UNITED NATIONS

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

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

Date: 27 January 2014

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Carmel Agius, Presiding**
Judge Patrick Robinson
Judge Mehmet Güney
Judge Khalida Rachid Khan
Judge Bakhtiyar Tuzmukhamedov

Registrar: **Mr. John Hocking**

Judgement of: **27 January 2014**

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

JUDGEMENT

The Office of the Prosecutor:

Ms. Daniela Kravetz
Mr. Kyle Wood
Ms. Priya Gopalan
Ms. Saeeda Verrall

Counsel for the Accused:

Mr. Dragoljub Đorđević
Mr. Veljko Đurđić
Mr. Russell Hopkins
Ms. Marie O'Leary

I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Appeals Chamber" and "Tribunal" or "ICTY", respectively) is seised of the appeals filed by Vlastimir Đorđević ("Đorđević")[1] and the Office of the Prosecutor ("Prosecution")[2] against the judgement rendered by Trial Chamber II on 23 February 2011 in the case of *Prosecutor v. Vlastimir Đorđević* ("Trial Judgement" and "Trial Chamber", respectively).[3]

A. Background

2. Đorđević was born on 17 November 1948 in Koznica, Vladičin Han municipality, in Serbia.[4] He commenced his career with the Ministry of the Interior of the Republic of Serbia ("MUP") in 1971.[5] On 11 September 1996, he was appointed Assistant Minister of the Interior.[6] On 30 May 1997, Đorđević was assigned to the position of Acting Chief of the Public Security Department of the MUP ("RJB"), and on 27 January 1998 he became Chief of the RJB.[7] He remained in this post until 30 January 2001, when he was appointed Counsellor to the Minister of the Interior and member of a coordination body for the south of Serbia.[8] Further, in July 1997, Đorđević was promoted to the rank of Colonel-General, making him the highest ranking MUP officer at the time.[9]

3. The events giving rise to these appeals took place in Kosovo between 1 January and 20 June 1999. The Prosecution charged Đorđević with the following crimes against humanity under Article 5 of the Statute of the Tribunal ("Statute"): deportation under Article 5(d) (Count 1); other inhumane acts (forcible transfer) under Article 5(i) (Count 2); murder under Article 5(a) (Count 3);

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1 Vlastimir Đorđević Notice of Appeal, 24 May 2011 ("Đorđević Notice of Appeal"); Vlastimir Đorđević Appeal Brief, 15 August 2011 (confidential, public redacted version filed on 23 January 2012) ("Đorđević Appeal Brief") (collectively, "Đorđević Appeal").

2 Prosecution Notice of Appeal, 24 May 2011 ("Prosecution Notice of Appeal"); Prosecution Appeal Brief, 15 August 2011 (confidential, public redacted version filed on 17 August 2011) ("Prosecution Appeal Brief") (collectively, "Prosecution Appeal").

3 *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Public Judgement with Confidential Annex, 23 February 2011.

4 Trial Judgement, para. 2209.

5 Trial Judgement, para. 2209.

6 Trial Judgement, paras 38, 2209.

7 Trial Judgement, paras 40, 2209.

8 Trial Judgement, paras 40, 2209.

9 Trial Judgement, paras 43, 2209.

and persecutions on political, racial, and religious grounds under Article 5(h) (Count 5).[10] The Prosecution also charged Đorđević with murder as a violation of the laws or customs of war under Article 3 of the Statute (Count 4).[11] The Indictment alleges Đorđević to be responsible for these crimes pursuant to both Article 7(1) (planning, instigating, ordering, aiding and abetting, and committing through participation in a joint criminal enterprise) and Article 7(3) (failing to prevent or punish the crimes committed by his subordinates).[12]

4. The Trial Chamber concluded that crimes occurred in well over 40 neighbourhoods, villages, and towns across 14 different municipalities in Kosovo and found that "some 724 Kosovo Albanian residents were murdered and hundreds of thousands were displaced within Kosovo or across the borders [to Albania, the Former Yugoslav Republic of Macedonia ("FYROM") or Montenegro]".[13] The Trial Chamber found that Đorđević participated in a joint criminal enterprise with the purpose of modifying the ethnic balance in Kosovo to ensure Serbian control over the province ("JCE").[14] This was achieved through the commission of murders, deportations, other inhumane acts (forcible transfer), and persecutions (through deportation, forcible transfer, murder, and destruction or damage to property of cultural and religious significance).[15] The Trial Chamber also found that Đorđević aided and abetted these crimes.[16] In addition, the Trial Chamber found Đorđević criminally responsible pursuant to Article 7(3) of the Statute for his failure to prevent and punish the crimes committed by the members of the MUP under his authority.[17] However, the Trial Chamber entered convictions on all counts solely on the basis of Article 7(1) of the Statute, while taking Đorđević's position of command as an aggravating factor in sentencing.[18] The Trial Chamber imposed a single sentence of 27 years of imprisonment.[19]

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10 *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, Fourth Amended Indictment, 9 July 2008 ("Indictment"), pp 8-20.
11 Indictment, pp 15-19.
12 Indictment, paras 16-22.
13 Trial Judgement, para. 2212.
14 Trial Judgement, paras 2003, 2130, 2134, 2149, 2152, 2193, 2210, 2213.
15 Trial Judgement, paras 2130, 2149, 2193, 2213.
16 Trial Judgement, para. 2194.
17 Trial Judgement, para. 2195.
18 Trial Judgement, para. 2195.
19 Trial Judgement, para. 2231.

B. Appeals

1. Đorđević Appeal

5. Đorđević challenges the Trial Judgement on 19 grounds.[20] First, he argues that the Trial Chamber erred in inferring that the JCE existed.[21] Second, Đorđević submits that while the Trial Chamber was bound to apply the jurisprudence of the Tribunal on all categories of joint criminal enterprise, cogent reasons exist for the Appeals Chamber to depart from its previous decisions establishing that joint criminal enterprise liability exists in customary international law.[22] Third, he contends that the Trial Chamber committed errors of law and fact in relation to the nature, timing, and members of the JCE.[23] Fourth, Đorđević submits that the Trial Chamber erroneously found the existence of a "plurality of persons" for the purposes of the JCE.[24] Fifth, he argues that the Trial Chamber erred in concluding that the JCE members shared the common purpose of the JCE.[25] Sixth, he claims that the Trial Chamber erroneously followed and, in any case, misapplied the law with respect to attributing to the JCE members crimes physically perpetrated by non-members.[26] Seventh, Đorđević asserts that the Trial Chamber erred in finding that the crimes of murder and persecutions fell within the first category of joint criminal enterprise.[27] Eighth, Đorđević submits that the Trial Chamber erred in law by allowing liability under the third category of joint criminal enterprise for specific intent crimes.[28] Under his ninth and tenth grounds of appeal, Đorđević advances a series of arguments challenging his participation in the JCE.[29] Under his eleventh ground of appeal, Đorđević challenges the Trial Chamber's conclusions on aiding and abetting.[30] Under his twelfth through fifteenth grounds of appeal, Đorđević raises arguments with respect to the definition of the term civilian,[31] the displacement across a *de facto* border with regard to the crime of deportation,[32] premeditation in relation to the crime of murder,[33] and the elements of the crime of persecutions through destruction of religious sites.[34] Đorđević's sixteenth ground of appeal

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20 Đorđević Notice of Appeal.
21 Đorđević Notice of Appeal, paras 5-11; Đorđević Appeal Brief, paras 6-19.
22 Đorđević Notice of Appeal, paras 12-17; Đorđević Appeal Brief, paras 20-77.
23 Đorđević Notice of Appeal, paras 18-27; Đorđević Appeal Brief, paras 78-88.
24 Đorđević Notice of Appeal, paras 28-32; Đorđević Appeal Brief, paras 89-99.
25 Đorđević Notice of Appeal, paras 33-36; Đorđević Appeal Brief, paras 100-107.
26 Đorđević Notice of Appeal, paras 37-41; Đorđević Appeal Brief, paras 108-129.
27 Đorđević Notice of Appeal, paras 42-49; Đorđević Appeal Brief, paras 130-146.
28 Đorđević Notice of Appeal, paras 50-52; Đorđević Appeal Brief, paras 147-155.
29 Đorđević Notice of Appeal, paras 53-85; Đorđević Appeal Brief, paras 156-295.
30 Đorđević Notice of Appeal, paras 86-88; Đorđević Appeal Brief, paras 296-303.
31 Đorđević Notice of Appeal, paras 89-94; Đorđević Appeal Brief, paras 304-319.
32 Đorđević Notice of Appeal, paras 95-97; Đorđević Appeal Brief, paras 320-328.
33 Đorđević Notice of Appeal, paras 98-100; Đorđević Appeal Brief, paras 329-343.
34 Đorđević Notice of Appeal, paras 101-105; Đorđević Appeal Brief, paras 344-351.

deals with specific incidents allegedly not charged in the Indictment.[35] His seventeenth ground of appeal relates to allegations of errors in relation to specific crime sites.[36] Đorđević's eighteenth ground of appeal concerns concurrent and cumulative convictions.[37] Under his nineteenth ground of appeal, Đorđević alleges a number of errors of law and fact relating to his sentence.[38]

6. In response, the Prosecution argues, *inter alia*, that Đorđević's appeal should be dismissed in its entirety because his arguments "lack merit".[39]

7. In reply, Đorđević submits that the Prosecution has failed to refute any of his arguments on appeal.[40]

2. Prosecution Appeal

8. The Prosecution raises two grounds of appeal against the Trial Judgement. First, the Prosecution argues that the Trial Chamber erred in fact and in law as it failed to conclude that there was sufficient evidence to establish that at least five Kosovo Albanian women had been persecuted by way of sexual assault.[41] It argues that Đorđević is responsible for persecutions through sexual assault, a crime against humanity under the third category of joint criminal enterprise.[42] Second, the Prosecution alleges that the Trial Chamber erred in imposing a manifestly inadequate sentence in light of the gravity of crimes and Đorđević's role in them.[43] The Prosecution requests that the Appeals Chamber increase Đorđević's sentence to life imprisonment.[44]

9. In response, Đorđević argues that the Prosecution has failed to show any errors in the impugned parts of the Trial Judgement and that, in any event, the Appeals Chamber does not possess the power to enter new convictions or increase a sentence when there is no right of a further appeal.[45]

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35 Đorđević Notice of Appeal, paras 106-112; Đorđević Appeal Brief, paras 352-361.
36 Đorđević Notice of Appeal, paras 113-119 (claiming that the Trial Chamber's factual findings do not support its ultimate conclusions with respect to certain crime sites); see also Đorđević Appeal Brief, paras 362-379.
37 Đorđević Notice of Appeal, paras 120-125; Đorđević Appeal Brief, paras 380-406.
38 Đorđević Notice of Appeal, paras 126-140; Đorđević Appeal Brief, paras 407-426.
39 Prosecution Response Brief, 26 September 2011 (confidential; public redacted version filed on 30 January 2012) ("Prosecution Response Brief"), para. 8.
40 Vlastimir Đorđević Reply Brief, 26 October 2011 (confidential; reclassified as public on 9 February 2012) ("Đorđević Reply Brief").
41 Prosecution Notice of Appeal, paras 2-3; Prosecution Appeal Brief, para. 1.
42 Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras 1, 4-56.
43 Prosecution Notice of Appeal, para. 4; Prosecution Appeal Brief, paras 2, 57-96.
44 Prosecution Notice of Appeal, para. 4; Prosecution Appeal Brief, paras 2, 57-96.
45 Vlastimir Đorđević Response Brief, 26 September 2011 (confidential; public redacted version filed on 30 January 2012) ("Đorđević Response Brief"), paras 3-6.

10. In reply, the Prosecution argues that according to the Statute and well-established jurisprudence, and contrary to Đorđević's submissions, the Appeals Chamber has jurisdiction to enter new convictions and increase a sentence, and has repeatedly exercised this jurisdiction.[46] The Prosecution further argues that Đorđević has failed to demonstrate why the Appeals Chamber should refrain from doing so in this case.[47]

3. Appeal Hearing

11. The Appeals Chamber heard oral submissions from the parties regarding these appeals on 13 May 2013.

12. Having considered the written and oral submissions of the Prosecution and Đorđević, the Appeals Chamber hereby renders its Judgement.

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[46] Prosecution Reply Brief, 26 October 2011 (confidential; public redacted version filed on 8 February 2012) ("Prosecution Reply Brief"), para. 1.

[47] Prosecution Reply Brief, para. 1.

II. STANDARD OF APPELLATE REVIEW

13. Article 25 of the Statute stipulates that the Appeals Chamber may affirm, reverse, or revise the decisions taken by a trial chamber. The Appeals Chamber recalls that an appeal is not a trial *de novo*.[48] The Appeals Chamber reviews only errors of law that have the potential to invalidate the decision of the trial chamber and errors of fact that have occasioned a miscarriage of justice.[49] These criteria are set forth in Article 25 of the Statute and are well-established in the jurisprudence of both the Tribunal and the International Criminal Tribunal for Rwanda ("ICTR").[50] In exceptional circumstances, the Appeals Chamber will also hear appeals in which a party has raised a legal issue that would not invalidate the trial judgement but is nevertheless of general significance to the Tribunal's jurisprudence.[51]

14. A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision.[52] An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.[53] However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may find for other reasons that there is an error of law.[54] It is necessary for any

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48 *Kordić and Čerkez* Appeal Judgement, para. 13.

49 *Šainović et al.* Appeal Judgement, para. 19; *Perišić* Appeal Judgement, para. 7; *Lukić and Lukić* Appeal Judgement, para. 10; *Gotovina and Markač* Appeal Judgement, para. 10.

50 *Šainović et al.* Appeal Judgement, para. 19; *Lukić and Lukić* Appeal Judgement, para. 10; *Boškoski and Tarčulovski* Appeal Judgement, para. 9; *D. Milošević* Appeal Judgement, para. 12; *Mrkšić and Šljivančanin* Appeal Judgement, para. 10; *Krajišnik* Appeal Judgement, para. 11; *Martić* Appeal Judgement, para. 8; *Hadžihasanović and Kubura* Appeal Judgement, para. 7; *Halilović* Appeal Judgement, para. 6; *Gatete* Appeal Judgement, para. 7; *Seromba* Appeal Judgement, para. 9; *Nahimana et al.* Appeal Judgement, para. 11. See *Perišić* Appeal Judgement, para. 7; *Gotovina and Markač* Appeal Judgement, para. 10; *Ndahimana* Appeal Judgement, para. 7; *Mugenzi and Mugiraneza* Appeal Judgement, para. 11.

51 *Šainović et al.* Appeal Judgement, para. 19; *Perišić* Appeal Judgement, para. 7; *Lukić and Lukić* Appeal Judgement, para. 10; *Gotovina and Markač* Appeal Judgement, para. 10; *D. Milošević* Appeal Judgement, para. 12; *Mrkšić and Šljivančanin* Appeal Judgement, para. 10; *Krajišnik* Appeal Judgement, para. 11; *Martić* Appeal Judgement, para. 8; *Orić* Appeal Judgement, para. 7; *Hadžihasanović and Kubura* Appeal Judgement, para. 7. *Cf. Ndahimana* Appeal Judgement, para. 8; *Mugenzi and Mugiraneza* Appeal Judgement, para. 12; *Gatete* Appeal Judgement, para. 8.

52 *Šainović et al.* Appeal Judgement, para. 20; *Perišić* Appeal Judgement, para. 8; *Lukić and Lukić* Appeal Judgement, para. 11; *Gotovina and Markač* Appeal Judgement, para. 11; *Boškoski and Tarčulovski* Appeal Judgement, para. 10; *D. Milošević* Appeal Judgement, para. 13; *Ndahimana* Appeal Judgement, para. 8; *Mugenzi and Mugiraneza* Appeal Judgement, para. 12; *Gatete* Appeal Judgement, para. 8.

53 *Šainović et al.* Appeal Judgement, para. 20; *Perišić* Appeal Judgement, para. 8; *Lukić and Lukić* Appeal Judgement, para. 11; *Gotovina and Markač* Appeal Judgement, para. 11; *Boškoski and Tarčulovski* Appeal Judgement, para. 10; *D. Milošević* Appeal Judgement, para. 13; *Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Strugar* Appeal Judgement, para. 11; *Orić* Appeal Judgement, para. 8; *Halilović* Appeal Judgement, para. 7. See *Ndahimana* Appeal Judgement, para. 8; *Mugenzi and Mugiraneza* Appeal Judgement, para. 12; *Gatete* Appeal Judgement, para. 8.

54 *Šainović et al.* Appeal Judgement, para. 20; *Perišić* Appeal Judgement, para. 8; *Lukić and Lukić* Appeal Judgement, para. 11; *Gotovina and Markač* Appeal Judgement, para. 11; *Boškoski and Tarčulovski* Appeal

appellant claiming an error of law on the basis of the lack of a reasoned opinion to identify the specific issues, factual findings, or arguments that the appellant submits the trial chamber omitted to address and to explain why this omission invalidates the decision.[55]

15. The Appeals Chamber reviews the trial chamber's findings of law to determine whether or not they are correct.[56] Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of the wrong legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[57] In so doing, the Appeals Chamber not only corrects the legal error, but when necessary applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt of the factual finding challenged by an appellant before the finding is confirmed on appeal.[58] 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 or in a related footnote, and evidence contained in the trial record and referred to by the parties.[59]

16. When considering alleged errors of fact, the Appeals Chamber will only substitute its own finding for that of the trial chamber when no reasonable trier of fact could have reached the original

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Judgement, para. 10; *D. Milošević* Appeal Judgement, para. 13; *Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9; *Strugar* Appeal Judgement, para. 11; *Hadžihasanović and Kubura* Appeal Judgement, para. 8; *Ndahimana* Appeal Judgement, para. 8; *Mugenzi and Mugiraneza* Appeal Judgement, para. 12; *Gatete* Appeal Judgement, para. 8.

55 *Šainović et al.* Appeal Judgement, para. 20; *Perišić* Appeal Judgement, para. 9; *Lukić and Lukić* Appeal Judgement, para. 11; *D. Milošević* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9; *Halilović* Appeal Judgement, para. 7; *Brđanin* Appeal Judgement, para. 9.

56 *Šainović et al.* Appeal Judgement, para. 21; *Lukić and Lukić* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 11; *D. Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10; *Strugar* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 8.

57 *Šainović et al.* Appeal Judgement, para. 21; *Perišić* Appeal Judgement, para. 9; *Lukić and Lukić* Appeal Judgement, para. 12; *D. Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10; *Orić* Appeal Judgement, para. 9; *Hadžihasanović and Kubura* Appeal Judgement, para. 9; *Ndahimana* Appeal Judgement, para. 9; *Mugenzi and Mugiraneza* Appeal Judgement, para. 13; *Gatete* Appeal Judgement, para. 9.

58 *Šainović et al.* Appeal Judgement, para. 21; *Perišić* Appeal Judgement, para. 9; *Lukić and Lukić* Appeal Judgement, para. 12; *D. Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10; *Strugar* Appeal Judgement, para. 12; *Orić* Appeal Judgement, para. 9; *Ndahimana* Appeal Judgement, para. 9; *Mugenzi and Mugiraneza* Appeal Judgement, para. 13; *Gatete* Appeal Judgement, para. 9.

59 *Šainović et al.* Appeal Judgement, para. 21; *Lukić and Lukić* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 11; *D. Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Hadžihasanović and Kubura* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 15; *Galić* Appeal Judgement, para. 8.

decision.[60] The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[61] It is not any error of fact that will cause the Appeals Chamber to overturn a decision by a trial chamber, but only one that has caused a miscarriage of justice.[62]

17. In determining whether or not a trial chamber's finding was reasonable, the Appeals Chamber will not lightly disturb findings of fact by the trial chamber.[63] The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in *Kupreškić et al.*, wherein it was stated that:

> [p]ursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[64]

18. The same standard of reasonableness and the same deference to factual findings apply when the Prosecution appeals against an acquittal.[65] Thus, when considering an appeal by the Prosecution, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[66] Considering

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60 *Šainović et al.* Appeal Judgement, para. 22; *Perišić* Appeal Judgement, para. 10; *Lukić and Lukić* Appeal Judgement, para. 13; *Gotovina and Markač* Appeal Judgement, para. 13; *Haradinaj et al.* Appeal Judgement, para. 12; *D. Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10; *Mugenzi and Mugiraneza Appeal Judgement*, para. 14; *Gatete* Appeal Judgement, para. 10.

61 *Šainović et al.* Appeal Judgement, para. 22; *Lukić and Lukić* Appeal Judgement, para. 13; *Boškoski and Tarčulovski* Appeal Judgement, para. 13; *Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11.

62 *Šainović et al.* Appeal Judgement, para. 22; *Perišić* Appeal Judgement, para. 10; *Lukić and Lukić* Appeal Judgement, para. 13; *Gotovina and Markač* Appeal Judgement, para. 13; *Boškoski and Tarčulovski* Appeal Judgement, para. 13; *D. Milošević* Appeal Judgement, para. 15; *Krajišnik* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11; *Simić* Appeal Judgement, para. 10; *Ndahimana* Appeal Judgement, para. 10; *Mugenzi and Mugiraneza* Appeal Judgement, para. 14; *Gatete* Appeal Judgement, para. 10.

63 *Šainović et al.* Appeal Judgement, para. 23; *Perišić* Appeal Judgement, para. 10; *Gotovina and Markač* Appeal Judgement, para. 13; *D. Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 14; *Strugar* Appeal Judgement, para. 13; *Hadžihasanović and Kubura* Appeal Judgement, para. 11; *Simić* Appeal Judgement, para. 11; *Krnojelac* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10; *Mugenzi and Mugiraneza* Appeal Judgement, para. 14.

64 *Kupreškić et al.* Appeal Judgement, para. 30. See also *Boškoski and Tarčulovski* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11; *Kupreškić et al.* Appeal Judgement, para. 30; *Ndahimana* Appeal Judgement, para. 10; *Mugenzi and Mugiraneza* Appeal Judgement, para. 14; *Gatete* Appeal Judgement, para. 10.

65 *Šainović et al.* Appeal Judgement, para. 24; *Boškoski and Tarčulovski* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14; *Ndahimana* Appeal Judgement, para. 10; *Gatete* Appeal Judgement, para. 10.

66 *Šainović et al.* Appeal Judgement, para. 24; *Boškoski and Tarčulovski* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement,

that it is the Prosecution that bears the burden at trial of proving the guilt of an accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a prosecution appeal against acquittal than for a defence appeal against a conviction.[67] An accused must show that the trial chamber's factual errors create reasonable doubt as to his or her guilt.[68] The Prosecution must show that, when account is taken of the errors of fact committed by the trial chamber, all reasonable doubt of the accused's guilt has been eliminated.[69]

19. The Appeals Chamber recalls that, as held in the *D. Milošević* case:

> it has inherent discretion to determine which of the parties' submissions merit a reasoned opinion in writing and that it may dismiss arguments which are evidently unfounded without providing detailed reasoning.[70] Indeed, the Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties. In order for the Appeals Chamber to assess a party's arguments on appeal, the party is expected to present its case clearly, logically, and exhaustively. The Appeals Chamber may dismiss submissions as unfounded without providing detailed reasoning if a party's submissions are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[71]

20. When applying these basic principles, the Appeals Chamber recalls that in previous cases it has identified the general types of deficient submissions on appeal which may be dismissed without detailed analysis.[72] In particular, the Appeals Chamber will generally dismiss: (i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings; (ii) mere assertions that the trial chamber must have

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para. 14; *Hadžihasanović and Kubura* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10.

67 *Šainović et al.* Appeal Judgement, para. 24; *Boškoski and Tarčulovski* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Ndahimana* Appeal Judgement, para. 10.

68 *Šainović et al.* Appeal Judgement, para. 24; *Boškoski and Tarčulovski* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Ndahimana* Appeal Judgement, para. 10.

69 *Šainović et al.* Appeal Judgement, para. 24; *Boškoski and Tarčulovski* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14; *Ndahimana* Appeal Judgement, para. 10; *Seromba* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 24.

70 *D. Milošević* Appeal Judgement, para. 16, referring to *Mrkšić and Šljivančanin* Appeal Judgement, para. 18, *Krajišnik* Appeal Judgement, para. 16, *Strugar* Appeal Judgement, para. 16, *Karera* Appeal Judgement, para. 12. See *Karadžić* 98*bis* Appeal Judgement, para. 16; *Perišić* Appeal Judgement, para. 12; *Gotovina and Markač* Appeal Judgement, para. 15; *Ndahimana* Appeal Judgement, para. 12; *Mugenzi and Mugiraneza* Appeal Judgement, para. 16; *Krajišnik* Appeal Judgement, para. 16; *Gatete* Appeal Judgement, para. 12; *Zigiranyirazo* Appeal Judgement, para. 13.

71 *D. Milošević* Appeal Judgement, para. 16, referring to *Mrkšić and Šljivančanin* Appeal Judgement, para. 17, *Krajišnik* Appeal Judgement, para. 16, *Martić* Appeal Judgement, para. 14, *Strugar* Appeal Judgement, para. 16; *Orić* Appeal Judgement, paras 13-14 and references cited therein, *Karera* Appeal Judgement, para. 12. See *Perišić* Appeal Judgement, para. 12; *Gotovina and Markač* Appeal Judgement, para. 15; *Ndahimana* Appeal Judgement, para. 12; *Mugenzi and Mugiraneza* Appeal Judgement, para. 16; *Gatete* Appeal Judgement, para. 12.

72 *Šainović et al.* Appeal Judgement, para. 27; *Lukić and Lukić* Appeal Judgement, para. 15; *Boškoski and Tarčulovski* Appeal Judgement, para. 18; *D. Milošević* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, para. 17; *Martić* Appeal Judgement, para. 15; *Strugar* Appeal Judgement, para. 17; *Stakić* Appeal Judgement, para. 13.

failed to consider relevant evidence without showing that no reasonable trier of fact, based on the evidence, could have reached the same conclusion as the trial chamber did; (iii) challenges to factual findings on which a conviction does not rely and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding; (iv) arguments that challenge a trial chamber's reliance or failure to rely on one piece of evidence without explaining why the conviction should not stand on the basis of the remaining evidence; (v) arguments contrary to common sense; (vi) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appealing party; (vii) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the trial chamber constituted an error warranting the intervention of the Appeals Chamber; (viii) allegations based on material not on the trial record; (ix) mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate errors; and (x) mere assertions that the trial chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.[73]

21. Finally, where the Appeals Chamber finds that a ground of appeal, presented as relating to an alleged error of law, formulates no clear legal challenge but challenges the trial chamber's factual findings in terms of its assessment of evidence, it will either analyse these allegations to determine the reasonableness of the impugned conclusions or refer to the relevant analysis under other grounds of appeal.[74]

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[73] *Šainović et al.* Appeal Judgement, para. 27; *Lukić and Lukić* Appeal Judgement, para. 15; *Boškoski and Tarčulovski* Appeal Judgement, para. 18; *D. Milošević* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, paras 17-27; *Martić* Appeal Judgement, paras 14-21; *Strugar* Appeal Judgement, paras 18-24; *Brđanin* Appeal Judgement, paras 17-31; *Galić* Appeal Judgement, paras 256-313.

[74] *D. Milošević* Appeal Judgement, para. 18. See also *Strugar* Appeal Judgement, paras 252, 269.

III. "COGENT REASONS" FOR THE APPEALS CHAMBER TO DEPART FROM ITS JURISPRUDENCE

A. Introduction

22. Throughout his Appeal, Đorđević frequently submits that there are cogent reasons for the Appeals Chamber to depart from a previous decision. Specifically, under his second, sixth, and eighth grounds of appeal, Đorđević advances a number of arguments suggesting that the Appeals Chamber should depart from its jurisprudence on various aspects of the first and third categories of joint criminal enterprise.[75] Considering the recurrence of such submissions, and noting the frequency with which submissions on cogent reasons have been brought before the Appeals Chamber,[76] the Appeals Chamber will deal with them in this preliminary section of the Judgement, after briefly setting out the relevant law.

B. Applicable law

23. It is well established in the jurisprudence of the Tribunal that the Appeals Chamber may exceptionally depart from its previous decisions if there are cogent reasons to do so.[77] In the *Aleksovski* case, the Appeals Chamber held that "in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice".[78] The Appeals Chamber in that case further stressed that "the normal rule is that previous decisions are to be followed, and departure from them is the exception".[79] The Appeals Chamber will therefore "only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts".[80]

24. The Appeal Chamber understands that the notion of "cogent reasons" encompasses considerations that are clear and compelling. As such, cogent reasons requiring a departure from previous decisions in the interests of justice include situations where a previous decision was made "on the basis of a wrong legal principle" or given *per incuriam*, that is, "wrongly decided, usually

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75 See Đorđević Appeal Brief, paras 20-22, 32, 68-71, 110, 117, 129, 155.
76 See *e.g. Orić* Appeal Judgement, paras 161-168; *Naletilić and Martinović* Appeal Judgement, paras 582-586; *Blaškić* Appeal Judgement, paras 167-182; *Kupreškić et al.* Appeal Judgement, paras 415-426.
77 *Aleksovski* Appeal Judgement, para. 107; *Krajišnik* Appeal Judgement, para. 655; *Galić* Appeal Judgement, para. 117.
78 *Aleksovski* Appeal Judgement, para. 107. See also *Galić* Appeal Judgement, para. 117.
79 *Aleksovski* Appeal Judgement, para. 109. See also *Galić* Appeal Judgement, para. 117.
80 *Aleksovski* Appeal Judgement, para. 109.

because the judge or judges were ill-informed about the applicable law".[81] It is for the party submitting that the Appeals Chamber should depart from a previous decision to demonstrate that there are cogent reasons in the interests of justice that justify such departure.[82]

C. Đorđević's second ground of appeal: existence of joint criminal enterprise liability in customary international law

1. Introduction

25. Under his second ground of appeal, Đorđević submits that although the Trial Chamber was bound to follow the current jurisprudence of the Appeals Chamber, there are cogent reasons why the Appeals Chamber should depart from its previous decisions holding that joint criminal enterprise exists in customary international law as a form of commission.[83] At the core of Đorđević's submission is that the reasoning set out in the *Tadić* Appeal Judgement is "shallow and uncertain" and, in any case, does not support "all of the levels of JCE identified in that case" nor "the subsequent extension of JCE to leadership cases when an accused is structurally and geographically remote from a crime and the physical perpetrator is not a member of the JCE".[84] For these reasons, Đorđević requests that the Appeals Chamber: (i) reverse all of his convictions to the extent that they rely on joint criminal enterprise; or in the alternative (ii) reverse any existing convictions "that are found to (pursuant to other grounds of appeal) rely upon JCE III"; or (iii) clarify that joint criminal enterprise is a form of accomplice liability rather than a form of commission liability and adjust his sentence accordingly.[85]

26. The Prosecution responds that Đorđević has failed to demonstrate the existence of exceptional circumstances that would justify a departure from the Appeals Chamber's jurisprudence

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81 *Aleksovski* Appeal Judgement, para. 108.

82 See *e.g. Krajišnik* Appeal Judgement, para. 655; *Galić* Appeal Judgement, para. 117; *Milutinović et al.* Appeal Decision on Joint Criminal Enterprise of 21 May 2003, para. 18.

83 Đorđević Appeal Brief, paras 20-23, referring to *Tadić* Appeal Judgement, *Krajišnik* Appeal Judgement, *Milutinović et al.* Appeal Decision on Joint Criminal Enterprise of 21 May 2003, *Aleksovski* Appeal Judgement, paras 107-108. Đorđević also refers to a number of other decisions in support of his contention that the Appeals Chamber may and should depart from its previous jurisprudence on the matter (Đorđević Appeal Brief, paras 24-27, referring to *Kordić and Čerkez* Appeal Judgement, para. 1040, *Laurent Semanza v. The Prosecutor*, Case No. ITCR-97-20-A, Decision, 31 May 2000, paras 92-97 and Separate Opinion of Judge Shahabuddeen, para. 38, *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-AR65.1, Decision on Mićo Stanišić's Appeal Against Decision on his Motion for Provisional Release, 11 May 2011, Separate Opinion of Judge Robinson, paras 16, 21, *Prosecutor v. Zoran Žigić*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006, para. 9).

84 Đorđević Appeal Brief, para. 21. See also Đorđević Appeal Brief, paras 29-31; Đorđević Reply Brief, para. 10.

85 Đorđević Appeal Brief, para. 77.

on joint criminal enterprise.[86] The Prosecution further argues that: (i) the Appeals Chamber correctly assessed the customary nature of joint criminal enterprise in the *Tadić* case; (ii) the third category of joint criminal enterprise is an established mode of liability in customary international law; and (iii) joint criminal enterprise is a form of commission regardless of whether the physical perpetrators engaged to commit the crimes were non-members of the joint criminal enterprise.[87]

2. Alleged erroneous application of the law and weight attached to post-World War II jurisprudence in the *Tadić* Appeal Judgement

(a) Arguments of the parties

27. Đorđević submits that the methodology used in the *Tadić* Appeal Judgement in order to deduce rules of customary international law "was fundamentally flaw[ed]".[88] He argues that the Appeals Chamber in *Tadić* relied on obscure and unpublished sources, and failed to explain how it established the existence of joint criminal enterprise in customary international law.[89] He submits three separate arguments.[90]

28. First, he claims that the Appeals Chamber in *Tadić* failed to consider the approach taken by the International Military Tribunal at Nuremberg ("IMT") and its Charter ("IMT Charter"), whereby "participation in a common plan" was criminalised only in relation to "crimes against the peace" and not "war crimes" or "crimes against humanity".[91] Đorđević further claims that the findings of the IMT in the IMT Judgement provide no basis for a conclusion that joint criminal enterprise is a form of commission of crimes.[92] He also argues that the Appeals Chamber erred in dismissing a similar argument advanced in the *Rwamakuba* case.[93]

29. Second, Đorđević claims that the *Tadić* Appeal Judgement misunderstood and misapplied the provisions of the Statute of the International Criminal Court ("ICC Statute" and "ICC",

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86 Prosecution Response Brief, para. 32, referring to *Aleksovski* Appeal Judgement, paras 108-109.
87 Prosecution Response Brief, para. 35.
88 Đorđević Appeal Brief, para. 29; Đorđević Reply Brief, paras 10-17.
89 Đorđević Appeal Brief, paras 29, 31.
90 Đorđević Appeal Brief, paras 32-67.
91 Đorđević Appeal Brief, paras 32-43, referring to the IMT Charter, Article 6, *The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics against Herman Wilhelm Göring et al.*, Judgement, 1 October 1946, Trial of Major War Criminals Before the International Military Tribunal Under Control Council Law No. 10, Vol. 1 (1947) ("IMT Judgement"). See also Đorđević Reply Brief, paras 10-11.
92 Đorđević Appeal Brief, para. 44.
93 Đorđević Appeal Brief, paras 38, 43, referring to *Rwamakuba* Appeal Decision on Joint Criminal Enterprise of 22 October 2004, para. 15; Đorđević Reply Brief, para. 11.

respectively).[94] Đorđević submits that Article 25 of the ICC Statute, as applied in ICC decisions, "decisively reject[s] JCE as a form of principal liability".[95] He further argues that unlike the approach taken by the Tribunal and the ICTR, Article 25(3)(d) of the ICC Statute provides for "a residual and broader form of accessorial liability than JCE"[96] and that Article 30 of the ICC Statute excludes the application of the third category of joint criminal enterprise.[97]

30. Third, Đorđević claims that the *Tadić* Appeal Judgement placed inappropriate weight on certain post-World War II cases in support of joint criminal enterprise.[98] He further relies on academic opinions suggesting that these cases dealing with mob violence or prison camps are actually examples of co-perpetration in the sense of Article 25(3)(a) of the ICC Statute, but do not support the "sprawling" concept of joint criminal enterprise adopted by the Tribunal and the ICTR.[99] With respect to the Appeals Chamber's reliance on the *Einsatzgruppen* case in the *Tadić* Appeal Judgement, Đorđević refers to the Joint Separate Opinion of Judges McDonald and Vohrah, attached to the *Erdemović* Appeal Judgement, which considered the *Einsatzgruppen* Judgement to be "of 'questionable' international character" because it applied American, rather than "purely international law".[100] He also points out that, in any event, the Appeals Chamber in *Tadić* referred to the Prosecution's opening and closing arguments in the *Einsatzgruppen* case rather than the actual judgement.[101] With regard to the *Justice* case, Đorđević argues that the Appeals Chamber in the *Kunarac et al.* case clearly rejected the approach suggested in the *Justice* case whereby a policy or a plan was a necessary element of a crime against humanity.[102] Additionally, he submits that in *Brđanin*, the Appeals Chamber erroneously relied on the *Justice* case to hold that physical perpetrators do not need to be members of the joint criminal enterprise because the *Justice* case did

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94 Đorđević Appeal Brief, paras 32, 46-55. See also Đorđević Reply Brief, para. 12.
95 Đorđević Appeal Brief, para. 53. See also Đorđević Appeal Brief, paras 47-52.
96 Đorđević Appeal Brief, para. 54.
97 Đorđević Appeal Brief, para. 54.
98 Đorđević Appeal Brief, paras 56-67, referring to *The United States of America v. Otto Ohlenforf et al.*, U.S. Military Tribunal, Judgement, 8 and 9 April 1948, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. IV ("*Einsatzgruppen* case"), *The United States of America v. Alstoetter et al.*, U.S. Military Tribunal, Judgement, 3 and 4 December 1947, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1951), Vol. III ("*Justice* case"), *The United States of America v. Greifelt et al.*, U.S. Military Tribunal, Judgement, 10 March 1948, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1951), Vol. V ("*RuSHA* case"). See also Đorđević Appeal Brief, para. 64 (arguing that these cases should be treated with caution as they do not reflect international customary law but rather rely on American law).
99 Đorđević Appeal Brief, para. 57, referring to J.S. Martinez/A.M. Danner, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law", 93 *California Law Review* 75 (2005), p. 110.
100 Đorđević Appeal Brief, para. 59, citing *Erdemović* Appeal Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras 53-54.
101 Đorđević Appeal Brief, para. 60, referring to *Tadić* Appeal Judgement, para. 200, fn. 245.
102 Đorđević Appeal Brief, para. 61, referring to *Kunarac et al.* Appeal Judgement, para. 98, fn. 114.

not clearly apply the theory of joint criminal enterprise.[103] Furthermore, the defendants in that case were not convicted in relation to specific crime sites, as is the practice of the Tribunal, but rather were convicted for taking part in a "system of cruelty and injustice".[104] Finally, with respect to the *RuSHA* case, Đorđević claims that even if this source is considered authoritative, it does not support the concept of joint criminal enterprise as applied by the Appeals Chamber.[105] In any event, and with all of the caveats regarding the reliability of these cases, Đorđević insists that none of these cases support joint criminal enterprise as a form of principal liability and that they cannot be transposed to leadership cases such as the present one.[106]

31. The Prosecution responds that the Appeals Chamber in the *Tadić* case already conducted a "thorough and balanced analysis" of the law on joint criminal enterprise and that Đorđević only repeats arguments that have been previously considered and rejected.[107] The Prosecution argues that the Appeals Chamber was correctly informed about the law with regard to joint criminal enterprise and properly considered the IMT Judgement and IMT Charter, the ICC Statute, and post-World War II jurisprudence.[108] It adds that the jurisprudence of the ICC, which is premised on the interpretation of the ICC Statute, is irrelevant to the assessment of the *Tadić* Appeal Judgement as well as the legality of joint criminal enterprise in customary international law.[109]

(b) Analysis

a. Alleged failure of the Appeals Chamber to consider the approach taken in the IMT Judgement and IMT Charter

32. Regarding Đorđević's contention that in *Tadić* the Appeals Chamber ignored the fact that the IMT "rejected" a form of liability similar to joint criminal enterprise in relation to war crimes or

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103 Đorđević Appeal Brief, para. 62.
104 Đorđević Appeal Brief, para. 62.
105 Đorđević Appeal Brief, para. 63. See also Đorđević Reply Brief, para. 15.
106 Đorđević Appeal Brief, paras 66-67. In his reply, Đorđević further asserts that the jurisprudence analysed in the *Tadić* Appeal Judgement and referred to by the Prosecution is unreliable as it does not explicitly support joint criminal enterprise liability and is derived from national, as opposed to international, law (Đorđević Reply Brief, paras 15-17).
107 Prosecution Response Brief, para. 36, referring to *Tadić* Appeal Judgement, paras 185-226. See also Prosecution Response Brief, paras 37-38, referring to *Milutinović et al.* Appeal Decision on Joint Criminal Enterprise of 21 May 2003, para. 29, *Krajišnik* Appeal Judgement, para. 659, *Martić* Appeal Judgement, paras 80-81.
108 Prosecution Response Brief, para. 39, referring to *Rwamakuba* Appeal Decision on Joint Criminal Enterprise of 22 October 2004, para. 15, *Tadić* Appeal Judgement, paras 195-223. See also Prosecution Response Brief, paras 40-51.
109 Prosecution Response Brief, paras 45-49.

crimes against humanity,[110] the Appeals Chamber considers that he conflates the notions of conspiracy and joint criminal enterprise liability. The Appeals Chamber has already clarified this difference in its *Milutinović et al.* Decision of 21 May 2003.[111] Đorđević's argument suggesting that conspiracy and participation in a common plan are forms of liability which were rejected by the IMT Judgement[112] is contradicted by the plain language of the IMT Judgement:

> Count One, however, charges not only the conspiracy to commit aggressive war, but also to commit War Crimes and Crimes against Humanity. But the Charter *does not define as a separate crime any conspiracy except the one to commit acts of aggressive war*. Article 6 of the Charter provides:
>
> 'Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.'
>
> In the opinion of the Tribunal these words *do not add a new and separate crime* to those already listed. *The words are designed to establish the responsibility of persons participating in a common plan*. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit War Crimes and Crimes against Humanity, and will consider only the common plan to prepare, initiate, and wage aggressive war.[113]

It is clear that the IMT restricted its jurisdiction in relation to the *crime* of conspiracy only to acts of aggressive war. However, the IMT did not exclude that *liability* through participation in a common plan can apply to any other crimes under its Charter.[114] In any event, the IMT's interpretation of its own Charter, does not detract from the consistent application of the joint criminal enterprise doctrine according to the Tribunal's own Statute and jurisprudence.

33. The Appeals Chamber further finds unpersuasive Đorđević's references to academic writings purportedly suggesting the contrary.[115] The authors referred to by Đorđević do not expressly state that the IMT Judgement or IMT Charter excluded liability according to a common plan or joint criminal enterprise. Indeed, they discuss the use of "conspiracy" and the absence of a specific provision for accessorial liability.[116] Further, the Appeals Chamber recalls that while writings of highly respected academics may be considered in determining the law, their subsidiary

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110 See Đorđević Appeal Brief, paras 37-38, citing IMT Judgement, p. 226. See also Đorđević Appeal Brief, paras 39-45.

111 *Milutinović et al.* Appeal Decision on Joint Criminal Enterprise of 21 May 2003, paras 22-23.

112 Đorđević Appeal Brief, paras 38-43.

113 IMT Judgement, p. 226 (emphasis added).

114 See also *The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics against Herman Wilhelm Göring et al.*, International Military Tribunal, Indictment dated 6 October 1945, Trial of Major War Criminals Before the International Military Tribunal, Vol. 1 (1947), Counts 3 and 4, pp 42-68.

115 See Đorđević Appeal Brief, paras 40, 42, 44.

116 R. Cryer / H. Friman / D. Robinson / E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2007), pp 304-305; H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Hart Publishing, 2009), p. 213.

nature is well-established and the Appeals Chamber is not bound by them.[117] Đorđević has failed to show how these academic writings provide a cogent reason to depart from the Tribunal's existing jurisprudence.

34. Additionally, Đorđević has failed to demonstrate that the Appeals Chamber erred when holding, in its *Rwamakuba* Decision of 22 October 2004, that the judgements of the IMT and the *RuSHA* case "found the defendants criminally liable [...] on a basis equivalent to that of joint criminal enterprise".[118] The Appeals Chamber reasoned that although the IMT Judgement did not specifically refer to joint criminal enterprise, "the factual discussion in that case ma[de] plain that several defendants were convicted for participation in a vast plan to commit atrocities which amounted to genocide".[119] Đorđević appears to disagree with this interpretation and claims that the Appeals Chamber was "ill-informed" when so concluding,[120] but fails to substantiate any error in this regard.

b. Alleged misinterpretation of the ICC Statute

35. Đorđević's argument that the ICC jurisprudence proves that the Appeals Chamber in the *Tadić* case was incorrect in its interpretation of customary international law in relation to joint criminal enterprise is unpersuasive. As discussed below,[121] the Appeals Chamber in *Tadić* based its analysis on various sources, including the IMT and other post-World War II jurisprudence, national legislation and case law, and international conventions, in order to ascertain that joint criminal enterprise was a valid form of liability in customary international law.[122] The ICC Statute was also analysed in this framework with the caveat that, at the time, it was still a non-binding treaty indicative of *opinio juris* of the signatory States.[123]

36. Đorđević's argument is essentially that the Appeals Chamber in *Tadić* incorrectly referred to Article 25(3) of the ICC Statute in support of its finding that joint criminal enterprise is a

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[117] Article 38(1) of the Statute of the International Court of Justice ("ICJ"), which is regarded as customary international law, enumerates, *inter alia*: "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". *See Kupreškić et al.* Trial Judgement, para. 540; *Čelibići* Trial Judgement, para. 414; *Furundžija* Trial Judgement, para. 227; *Aleksovski* Trial Judgement, Declaration of Judge Hunt, para. 2; *Erdemović* Appeal Judgement, Separate Opinion of Judge McDonald and Judge Vohrah, para. 43. See also *Krištić* Appeal Judgement, para. 11, fn. 20.

[118] *Rwamakuba* Appeal Decision on Joint Criminal Enterprise of 22 October 2004, para. 15.

[119] *Rwamakuba* Appeal Decision on Joint Criminal Enterprise of 22 October 2004, para. 23, referring to IMT Judgement, pp 226-228.

[120] Đorđević Appeal Brief, para. 43; Đorđević Reply Brief, para. 11.

[121] See *infra*, paras 40-45.

[122] See *Tadić* Appeal Judgement, paras 194-226.

[123] *Tadić* Appeal Judgement, para. 223.

principal, rather than accessorial, form of liability.[124] Article 25(3) of the ICC Statute states, in part, that:

> a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime;
>
> (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
>
> (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

37. The Appeals Chamber in *Tadić* expressly noted that the subjective and objective elements provided for by Article 25(3) of the ICC Statute were to a certain extent different from those required by the case law examined in the *Tadić* Appeal Judgement in relation to common criminal purpose, and were still to be tested by the ICC jurisprudence.[125] Moreover, it stated that the text adopted in the ICC Statute was "consistent with the view that the mode of accomplice liability under discussion is well-established in international law and is distinct from aiding and abetting".[126] Nowhere does the *Tadić* Appeal Judgement state that Article 25(3) of the ICC Statute provides for so-called principal liability, as this was not the point discussed. In fact, the relevant section of the *Tadić* Appeal Judgement referring to the ICC Statute deals with the notion of a common plan and

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[124] Đorđević Appeal Brief, paras 47-48, 52-53.
[125] *Tadić* Appeal Judgement, fn. 282.
[126] *Tadić* Appeal Judgement, para. 223. See also *Milutinović et al.* Appeal Decision on Joint Criminal Enterprise of 21 May 2003, para. 20; *Milutinović et al.* Appeal Decision on Joint Criminal Enterprise of 21 May 2003, Separate

participation therein as distinct from liability through aiding and abetting.[127] Consequently, Đorđević has failed to show any error in the *Tadić* Appeal Judgement in relation to the interpretation of this provision.

38. As regards the ICC jurisprudence referred to by Đorđević,[128] the Appeals Chamber finds that it is irrelevant to the discussion whether there are cogent reasons to depart from the analysis in the *Tadić* Appeal Judgement with respect to the state of customary international law. The ICC jurisprudence did not address the issue of the existence of joint criminal enterprise in customary international law, nor did it exclude it.[129] Rather, it elaborated on the "distinguishing criterion between principals and accessories to a crime where a criminal offence is committed by a plurality of persons",[130] based on the detailed provisions of the ICC Statute.[131] As discussed above, in the *Tadić* Appeal Judgement, the Appeals Chamber relied on the ICC Statute only as evidence revealing the existence of a mode of liability based on "a group of persons acting with a common purpose" distinct from aiding and abetting.[132] It then reached its conclusion on the existence of joint criminal enterprise in customary international law based on a number post-World War II cases.[133] Consequently, the interpretation in the ICC jurisprudence regarding the objective or subjective elements of the mode of liability based on a "common purpose" derived from the ICC Statute does

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Opinion of Judge Shahabuddeen, para. 7. The "accomplice liability" referred to in the *Tadić* Appeal Judgement is therefore not to be confused with the so-called accessorial liability.

127 In fact, the relevant section of the *Tadić* Appeal Judgement referring to the ICC Statute deals with the notion of a common plan and participation therein as distinct from liability through aiding and abetting (*Tadić* Appeal Judgement, para. 221).

128 See Đorđević Appeal Brief, paras 49-50, referring to *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007 ("*Lubanga* Decision on Confirmation of Charges").

129 See *Lubanga* Decision on Confirmation of Charges, paras 326, 335, 338.

130 *Lubanga* Decision on Confirmation of Charges, para. 327.

131 Article 25 (3) of the ICC Statute.

132 *Tadić* Appeal Judgement, para. 220.

133 *Tadić* Appeal Judgement, paras 194-225. Specifically, paras 197 (referring to *Trial of Otto Sandrock and Three Others*, British Military Court for the Trial of War Criminals, Almelo, Holland, 24-26 November 1945, Law Reports of Trials of War Criminals, UNWCC, vol. I, Case No. 3, *Hölzer et al.*, Canadian Military Court, Aurich, Germany, Royal Canadian Air Force Binder 181.009 (D2474), Record of Proceedings of the Canadian Military Court, 25 March-6 April 1946, vol. I, pp 341, 347, 349 (copy on file with the Library of the Tribunal)), 198 (referring to *Trial of Gustav Alfred Jepsen et al.*, Proceedings of a War Crimes Trial, Luneberg, Germany, 13-23 August 1946, Judgement of 24 August 1946, p. 241 (original transcripts in Public Record Office, Kew, Richmond; copy on file with the Library of the Tribunal), *Trial of Franz Schonfeld and Nine Others*, British Military Court, Essen, 11-26 June 1946, Law Reports of Trials of War Criminals, UNWCC, vol. XI, Case No. 66, p. 68 (summing up of the Judge Advocate)), 199 (referring to *Trial of Feurstein and others*, Proceedings of a War Crimes Trial, Hamburg, Germany, 4-24 August 1948, Judgement of 24 August 1948 (original transcripts in Public Record Office, Kew, Richmond; copy on file with the Library of the Tribunal)), 200 (referring to *Einsatzgruppen* case).

not undermine the Tribunal's analysis on the issue of the existence of the "notion of common purpose" in customary international law. Accordingly, Đorđević's submissions in that regard are dismissed.

39. In sum, the Appeals Chamber in the *Tadić* case was entitled to examine the ICC Statute as one of the sources indicative of the existence of elements of joint criminal enterprise liability in customary international law. Furthermore the *Tadić* Appeals Chamber's interpretation of Article 25(3) of the ICC Statute was correct, and the subsequent ICC case law based on this provision does not affect its conclusion. Đorđević has failed to show otherwise.

c. Post-World War II jurisprudence

40. The Appeals Chamber has previously underscored that the *Tadić* Appeal Judgement provided "detailed reasoning for inferring the grounds for conviction in the [post-World War II] cases it cited".[134] It has also established that those cases show that joint criminal enterprise applies to "large-scale cases, and that JCE is legally distinct from conspiracy and organisational liability".[135] The Appeals Chamber finds that the majority of Đorđević's submissions in relation to post-World War II do not reveal anything new in this regard and, therefore, will address only those arguments warranting consideration.

41. Having reviewed the *Tadić* Appeal Judgement and the sources it relied on, the Appeals Chamber is not persuaded that these sources are obscure and unpublished.[136] The Appeals Chamber notes that the *Tadić* Appeals Chamber examined a variety of cases in setting out its reasoning,[137]

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134 *Krajišnik* Appeal Judgement, para. 659, referring to *Tadić* Appeal Judgement, paras 195-219.

135 *Krajišnik* Appeal Judgement, para. 659 (citations omitted), referring to *Brđanin* Appeal Judgement, paras 422-423, *Rwamakuba* Appeal Decision on Joint Criminal Enterprise of 22 October 2004, para. 25, *Milutinović et al.* Appeal Decision on Joint Criminal Enterprise of 21 May 2003, paras 23, 25-26. In light of the discussion below rejecting Đorđević's arguments concerning the authority of the *Justice*, *RuSHA*, and *Einsatzgruppen* cases, the Appeals Chamber also rejects his contention that these cases are "an inadequate basis to sustain JCE liability in leadership cases" (Đorđević Appeal Brief, para. 75).

136 *Contra* Đorđević Appeal Brief, paras 21, 29, 31, 56-67.

137 *Tadić* Appeal Judgement, paras 194-225. Specifically, paras 197 (referring to *Trial of Otto Sandrock and Three Others*, British Military Court for the Trial of War Criminals, Almelo, Holland, 24-26 November 1945, Law Reports of Trials of War Criminals, UNWCC, vol. I, Case No. 3, *Hölzer et al.*, Canadian Military Court, Aurich, Germany, Royal Canadian Air Force Binder 181.009 (D2474), Record of Proceedings of the Canadian Military Court, 25 March-6 April 1946, vol. I, pp 341, 347, 349 (copy on file with the Library of the Tribunal)), 198 (referring to *Trial of Gustav Alfred Jepsen et al.*, Proceedings of a War Crimes Trial, Luneberg, Germany, 13-23 August 1946, Judgement of 24 August 1946, p. 241 (original transcripts in Public Record Office, Kew, Richmond; copy on file with the Library of the Tribunal), *Trial of Franz Schonfeld and Nine Others*, British Military Court, Essen, 11-26 June 1946, Law Reports of Trials of War Criminals, UNWCC, vol. XI, Case No. 66, p. 68 (summing up of the Judge Advocate)), 199 (referring to *Trial of Feurstein and others*, Proceedings of a War Crimes Trial, Hamburg, Germany, 4-24 August 1948, Judgement of 24 August 1948 (original transcripts in Public Record Office, Kew, Richmond; copy on file with the Library of the Tribunal)), 200 (referring to *Einsatzgruppen* case).

and finds these sources reliable. Upon review of these cases, the *Tadić* Appeals Chamber was satisfied that "the doctrine of acting in pursuance of a common purpose [was] rooted in the national law of many States".[138] In addition, the *Tadić* Appeals Chamber differentiated the "notion of common purpose" itself from "the approach to the notion" and found that, although the major legal systems of the world recognised the notion, they did not take the same approach to the notion.[139] The *Tadić* Appeals Chamber finally reached the conclusion that the doctrine of joint criminal enterprise existed in customary international law based on the "consistency and cogency of case law and the treaties referred to [...], as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation".[140] Thus, Đorđević is not correct in stating that the *Tadić* Appeals Chamber failed to explain how it established the existence of joint criminal enterprise in customary international law.[141]

42. With respect to Đorđević's contention that the *Brđanin* Appeal Judgement contradicted the *Kunarac et al.* Appeal Judgement and wrongly relied on the *Justice* case, which according to Đorđević did not apply joint criminal enterprise liability,[142] the Appeals Chamber considers that Đorđević conflates the issues involved in these cases. The *Kunarac et al.* Appeal Judgement dealt with the question of "whether a policy or plan constitutes an element of the definition of crimes against humanity".[143] It was in that context that the Appeals Chamber referred to the opinion expressed by a Judge in the *Polyukhovich* case in support of its finding that "nothing in the Statute or in customary international law at the time of the alleged acts [...] required proof of the existence of a plan or policy to commit these crimes".[144] In the *Brđanin* case, the Appeals Chamber referred to the *Justice* and *RuSHA* cases as it found them to "provide strong support for the Prosecution's contention" that post-World War II jurisprudence allowed holding an accused responsible for his participation in a common criminal purpose although the *actus reus* of the crime was perpetrated by persons who did not share such purpose.[145] The Appeals Chamber sees no contradiction between its

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138 *Tadić* Appeal Judgement, para. 224.
139 *Tadić* Appeal Judgement, para. 225.
140 *Tadić* Appeal Judgement, para. 226. For the *Tadić* Appeal Chambers' analysis, see *Tadić* Appeal Judgement, paras 194-225.
141 *Contra* Đorđević Appeal Brief, paras 29, 31.
142 Đorđević Appeal Brief, paras 61-62.
143 *Kunarac et al.* Appeal Judgement, para. 98, fn. 114.
144 *Kunarac et al.* Appeal Judgement, para. 98, referring to, *inter alia*, the *Justice* case and comment thereupon in *Ivan Timofeyevich Polyukhovich v The Commonwealth of Australia and Anor*, (1991) 172 CLR 501 ("*Polyukhovich* case"), pp 586-587.
145 *Brđanin* Appeal Judgement, para. 394. See also *Brđanin* Appeal Judgement, paras 395-404.

two judgements. Moreover, Đorđević has failed to show that cogent reasons exist to depart from the said finding in the *Brđanin* Appeal Judgement.[146]

43. Đorđević's additional claim that the *Tadić* Appeals Chamber could not have relied on domestic jurisprudence or the jurisprudence of the courts operating under Control Council Law No. 10[147] in order to assess the state of customary international law is unsustainable. Both international and national sources may be indicative of international custom.[148] Specifically with respect to post-World War II jurisprudence, the Appeals Chamber notes with approval the following observation made in the *Kupreškić et al.* Trial Judgement:

> [i]t cannot be gainsaid that great value ought to be attached to decisions of such international criminal courts as the international tribunals of Nuremberg or Tokyo, or to national courts operating by virtue, and on the strength, of Control Council Law no. 10, a legislative act jointly passed in 1945 by the four Occupying Powers and thus reflecting international agreement among the Great Powers on the law applicable to international crimes and the jurisdiction of the courts called upon to rule on those crimes. These courts operated under international instruments laying down provisions that were either declaratory of existing law or which had been gradually transformed into customary international law.[149]

44. Beyond disagreeing with this statement,[150] Đorđević has failed to undermine it. Clearly, there is no requirement to examine customary international law solely from the point of view of "international law".[151] To the contrary, the Appeals Chamber recalls that:

> [i]n appraising the formation of customary rules or general principles one should [...] be aware that [...] reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.[152]

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[146] The Appeals Chamber has never stated that neither the *Justice* nor the *RuSHA* cases applied the joint criminal enterprise liability in the exact way as it has been developed in the jurisprudence of the Tribunal. Rather, it relied on these cases, among multiple other sources, to establish that the essential elements of this mode of liability were recognised in customary international law (see *infra*, para. 58).

[147] The Appeals Chamber recalls that Control Council Law No. 10 is a legislative act that entered into force on 20 December 1945 and was passed by the four Occupying Powers reflecting international agreement between those countries on the law applicable to international crimes and the jurisdiction of the courts called upon to rule on those crimes. Control Council Law No. 10 provided definitions for specific offences, in order to ensure that Allied powers would be using the same legal standard (see *Kupreškić et al.* Trial Judgement, para. 541; see also *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (1946-1949) 15 volumes, Washington D.C., U.S. Government Printing Office).

[148] See *Kupreškić et al.* Trial Judgement, paras 537-542; *Furundžija* Trial Judgement, para. 227; North Sea Continental Shelf cases, ICJ, Judgement, 20 February 1969, ICJ Reports 1969, p. 43, para. 74. The *Tadić* Appeals Chamber, however, emphasised that "reference to national legislation and case law only serve[d] to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems". It added that "in the area under discussion, national legislation and case-law [could not] be relied upon as a source of international principles or rules, under the doctrine of the general principles of law, recognised by nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose" (*Tadić* Appeal Judgement, para. 225).

[149] *Kupreškić et al.* Trial Judgement, para. 541.

[150] Đorđević Appeal Brief, para. 58.

[151] *Contra* Đorđević Appeal Brief, para. 59, referring to *Erdemović* Appeal Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras 53-54.

Consequently, the Appeals Chamber in *Tadić* correctly examined the sources, including the post-World War II jurisprudence under the Control Council Law No. 10 and national case law, because "[t]he basis for the Appeals Chamber's finding that JCE liability was founded in international customary law was the 'consistency and cogency of the case law and the treaties' referred to earlier in its discussion."[153]

45. Finally, with respect to Đorđević's contention that the analysis of the *Einsatzgruppen* Judgement in the *Tadić* Appeal Judgement is flawed because it refers to the parties' arguments and not the court's reasoning,[154] the Appeals Chamber notes, with approval, the clarification provided by Judge Shahabuddeen, who presided over the *Tadić* Appeals Chamber, stating that:

> the Appeals Chamber was competent, particularly 'when a clear judicial statement was unavailable', to examine the statements of counsel engaged in those cases to ascertain how the court in fact proceeded; courts sometimes do that. The arguments of counsel are given in the better law reports of some jurisdictions before the judgement is laid out. That practice, where it applies, is not an ornamental flourish on the part of the reporter: counsels' arguments help appreciation of what the issues were. Thus, it cannot be wrong to refer to counsel's arguments. [...] [T]he material question is whether [these statements] correctly reflected customary international law.[155]

3. Existence of cogent reasons to depart from the third category of joint criminal enterprise jurisprudence

(a) Arguments of the parties

46. Đorđević submits that the Appeals Chamber should depart from the current jurisprudence, which finds that there is such a form of liability as the third category of joint criminal enterprise.[156] Đorđević claims that the authority of the case law relied upon by the Appeals Chamber in *Tadić* is questionable and certainly does not demonstrate the existence of the third category of joint criminal enterprise in customary international law.[157] Similarly, he argues that the concept of the third category of joint criminal enterprise is either unsupported or explicitly rejected by other sources,

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152 *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 99.

153 *Krajišnik* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 31, citing *Tadić* Appeal Judgement, para. 226.

154 Đorđević Appeal Brief, para. 60.

155 *Krajišnik* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 24 (citations omitted). This clarification was made in relation to the argument advanced by Krajišnik's counsel that "the *Tadić* Chamber took wide latitude in its interpretation, repeatedly – and unsoundly – inferring the bases for liability from isolated statements by the prosecutors, when a clear judicial statement was unavailable" (*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Brief on Joint Criminal Enterprise on Behalf of Momčilo Krajišnik, 4 April 2008, para. 12 (without any specific reference to a paragraph in the *Tadić* Appeal Judgement)).

156 Đorđević Appeal Brief, paras 68-71.

157 Đorđević Appeal Brief, para. 70. See also Đorđević Reply Brief, para. 14.

including IMT jurisprudence, post-World War II cases, and the ICC Statute.[158] Đorđević contends that these arguments apply both to the Trial Chamber's findings regarding the third category of joint criminal enterprise liability as an alternative to the first category of joint criminal enterprise and to the Prosecution's first ground of appeal.[159] In support of his arguments, Đorđević also refers to a decision of the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), which he argues rejects the existence of the third category of joint criminal enterprise.[160]

47. The Prosecution responds that the *Tadić* Appeals Chamber correctly analysed the *Borkum Island* and *Essen Lynching* cases as illustrations of the third category of joint criminal enterprise in light of the parties' arguments.[161] It also responds that the Appeals Chamber in *Tadić* referred to post-World War II rulings of Italian courts in support of the third category of joint criminal enterprise.[162] The Prosecution reiterates that the related jurisprudence of other tribunals, such as the ECCC or the ICC, is not binding on the Appeals Chamber.[163] It also points to other post-World War II cases that have not been discussed in the *Tadić* Appeal Judgement which support the customary nature of the third category of joint criminal enterprise.[164]

(b) Analysis

48. The Appeals Chamber recalls that, in *Karemera et al.*, the ICTR Appeals Chamber had declined to review the *Tadić* Appeal Judgement in relation to the third category of joint criminal enterprise, confirming that "under the third – or 'extended' – category of JCE liability, the accused can be held responsible for crimes physically committed by other participants in the JCE when

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158 Đorđević Appeal Brief, para. 71.
159 Đorđević Appeal Brief, para. 68.
160 Đorđević Appeal Brief, para. 69, referring to *Prosecutor v. Ieng Thirith et al.* (Case 002), Case File No.: 002/19-09-2007-ECCC/OCIJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010 ("ECCC Decision on Joint Criminal Enterprise of 20 May 2010"), para. 83.
161 Prosecution Response Brief, para. 54, referring to *Tadić* Appeal Judgement, paras 205-213; *Trial of Erich Heyer and Six Others, British Military Court for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd December, 1945, Law Reports of Trials of War Criminals, UNWCC, vol. I, Case No. 8 ("Essen Lynching case")*, *The United States of America v. Kurt Goebell et al.*, Records of United States Army War Crimes Trials, February 6 – March 21, 1946, National Archives Microfilm Publications M1103, (Washington: 1980) ("*Borkum Island* case").
162 Prosecution Response Brief, para. 54, referring to *Tadić* Appeal Judgement, paras 214-219.
163 Prosecution Response Brief, paras 55-56.
164 Prosecution Response Brief, paras 57-60, referring to *RuSHA* case, pp 117, 120, 160-162, Decision of the Supreme Court for the British Zone against *Sch. et al.*, 20 April 1949, *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen*, Walter de Gruyter & Co. (Berlin: 1950), vol. 2 ("*Sch. et al.* case"), pp 11-15, Review of Proceedings of General Military Court in the case of *United States vs. Martin Gottfried Weiss et al.* of the Recommendation of the Staff Judge Advocate ("*Weiss et al.* case"), pp 1, 141.

these crimes are foreseeable consequences of the JCE, even if the accused did not agree with other participants that these crimes would be committed".[165]

49. For the reasons set out below, the Appeals Chamber is not convinced by Đorđević's suggestion that cogent reasons exist to revisit the jurisprudence cited above and to abolish the third category of joint criminal enterprise.[166] In particular, the Appeals Chamber finds that Đorđević's assertion – that the authority of the *Borkum Island* and *Essen Lynching* cases is "questionable"[167] – is insufficient to undermine the Appeals Chamber's analysis in the *Tadić* case.[168] Apart from pointing to these two cases, Đorđević has failed to show a reason why the Appeals Chamber should revisit its well-established case law, based on numerous sources, that both civil and common law jurisdictions recognise liability for taking part in a common criminal plan in relation to crimes committed outside the common plan but that are nonetheless foreseeable.[169]

50. Finally, the ECCC Decision on Joint Criminal Enterprise of 20 May 2010 is not binding on the Appeals Chamber and, as such, does not constitute a cogent reason to depart from its well-established case law. In any event, the Appeals Chamber notes that the ECCC did not determine whether or not the third category of joint criminal enterprise liability was a part of customary international law.[170] The ECCC noted the cases relied on by the *Tadić* Appeals Chamber and considered them not to be "proper precedents for the purpose of determining the status of customary international law *in this area*".[171] It then concluded that these cases did not "constitute a sufficiently firm basis to conclude that JCE III formed part of customary international law *at the time relevant to Case 002*".[172] The ECCC Pre-Trial Chamber deemed it unnecessary to conduct an analysis as to whether or not the third category of joint criminal enterprise was a part of customary international law.[173] It concluded that no provision in Cambodian law provided notice of such an extended form of responsibility at the time of the alleged crimes, and stated as follows:

> [t]he Pre-Trial Chamber has not been able to identify in the *Cambodian law*, applicable at the relevant time, any provision that could have given notice to the Charged Persons that such

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165 *Edouard Karemera et al. v. The Prosecutor*, Case Nos. ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, para. 13, referring to *Vasiljević* Appeal Judgement, para. 99, *Tadić* Appeal Judgement, para. 220.

166 Đorđević Appeal Brief, paras 68-71.

167 See Đorđević Appeal Brief, para. 70.

168 Đorđević's challenges to these other sources relied upon by the Appeals Chamber in the *Tadić* case are unpersuasive and are therefore rejected (see Đorđević Appeal Brief, para. 70).

169 *Tadić* Appeal Judgement, paras 204-220, 224.

170 ECCC Decision on Joint Criminal Enterprise of 20 May 2010, para. 87.

171 ECCC Decision on Joint Criminal Enterprise of 20 May 2010, para. 82.

172 ECCC Decision on Joint Criminal Enterprise of 20 May 2010, para. 83 (emphasis added).

173 ECCC Decision on Joint Criminal Enterprise of 20 May 2010, para. 87.

> extended form of responsibility was punishable as well. In such circumstances, the principle of legality requires the ECCC to refrain from relying on the extended form of JCE in its proceedings.[174]

51. The ECCC thus identified flaws in the reasoning of the *Tadić* Appeals Chamber in determining the existence of the third category of joint criminal enterprise in customary international law,[175] but limited its finding "insofar as the applicability of the JCE III before the ECCC is concerned".[176]

52. Further, despite criticising the approach taken in *Tadić*, the ECCC did not perform any further analysis of relevant state practice and *opinio juris* to determine whether the third category of joint criminal enterprise was part of customary international law but limited its assessment to the sources analysed in the *Tadić* Appeal Judgement.[177] The Appeals Chamber is satisfied that the sources of law examined by the *Tadić* Appeals Chamber are reliable and that the principles in relation to the third category of joint criminal enterprise set out therein are well-established in both customary international law and the jurisprudence of this Tribunal.[178] Finally, while the Appeals Chamber does not doubt the persuasiveness of the ECCC Decision on Joint Criminal Enterprise of 20 May 2010 beyond the jurisdiction of the ECCC, it recalls that the Appeals Chamber is not bound by it.

53. In light of the foregoing, the Appeals Chamber finds that the ECCC Decision on Joint Criminal Enterprise of 20 May 2010 does not constitute a cogent reason for the Appeals Chamber to depart from its consistent jurisprudence.

4. Alleged errors concerning the nature of joint criminal enterprise liability

(a) Arguments of the parties

54. Đorđević submits that the Appeals Chamber in *Tadić* and subsequent cases mistakenly characterised joint criminal enterprise as a principal form of liability and applied it in so-called "leadership cases" where the physical perpetrators were not part of the joint criminal enterprise.[179] Đorđević submits that the liability of high-level accused who "use" physical perpetrators to commit

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174 ECCC Decision on Joint Criminal Enterprise of 20 May 2010, para. 87 (emphasis added).
175 ECCC Decision on Joint Criminal Enterprise of 20 May 2010, paras 79-85.
176 ECCC Decision on Joint Criminal Enterprise of 20 May 2010, para. 88.
177 See ECCC Decision on Joint Criminal Enterprise of 20 May 2010, paras 77, 79-85.
178 See also *supra*, para. 41.
179 Đorđević Appeal Brief, paras 48-53, 55, 66, 72-76, 77.

the crimes on the ground cannot be equated with commission (or principal liability).[180] Thus, he submits that the Trial Chamber erred in convicting him for committing and consequently imposed a higher sentence than would have been the case had his liability correctly been characterised as accessorial/accomplice, rather than principal.[181]

55. The Prosecution responds that Đorđević cannot claim that the principle of legality has been violated as he knew that he was accused of committing the crimes perpetrated by non-members of the JCE.[182] It submits that all categories of joint criminal enterprise liability properly fall under "commission" because the members of a joint criminal enterprise have a common criminal purpose, share the intent for crimes, and are aware of the risk associated with their actions in furtherance of such purpose.[183]

(b) Analysis

56. The Appeals Chamber has repeatedly held that participation in any category of joint criminal enterprise is a form of commission.[184] As explained in the *Krajišnik* Appeal Judgement, a conviction pursuant to joint criminal enterprise liability for crimes committed through physical perpetrators who were not part of the joint criminal enterprise also properly falls under Article 7(1) of the Statute.[185]

57. In any event, Đorđević is wrong to suggest that his responsibility and sentence should be adjusted to account for the fact that he did not personally commit any of the crimes for which he is held responsible pursuant to joint criminal enterprise. As repeatedly emphasised by the Appeals Chamber, the participation and contribution of a joint criminal enterprise member "is often vital in facilitating the commission of the offence in question" and, therefore, "the moral gravity of such

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[180] Đorđević Appeal Brief, paras 72-76, referring, *inter alia*, to *Krajišnik* Appeal Judgement, para. 664, *Brđanin* Appeal Judgement, para. 413, fn. 891, *Milutinović et al.* Appeal Decision on Joint Criminal Enterprise of 21 May 2003, paras 20, 31.

[181] Đorđević Appeal Brief, para.72.

[182] Prosecution Response Brief, para. 62.

[183] Prosecution Response Brief, paras 63-65, referring, *inter alia*, to *Milutinović et al.* Appeal Decision on Joint Criminal Enterprise of 21 May 2003, para. 20.

[184] See *e.g. Krajišnik* Appeal Judgement, paras 663-664; *Kvočka et al.* Appeal Judgement, para. 80; *Brđanin* Appeal Judgement, para. 413, fn. 891; *Tadić* Appeal Judgement, paras 188, 191-192. This conclusion is, in particular, supported by the *Justice* and *RuSHA* cases (see analysis in the *Brđanin* Appeal Judgement, paras 395-404). See also *supra*, paras 32-34.

[185] *Krajišnik* Appeal Judgement, para. 665.

participation is often no less – or indeed no different – from that of those actually carrying out the acts in question".[186]

5. Conclusion

58. The Appeals Chamber, in light of the analysis set out above, reaffirms that joint criminal enterprise, including the third category of joint criminal enterprise, is a form of commission under customary international law, and finds that Đorđević has not demonstrated the existence of cogent reasons to depart from well-established jurisprudence on this matter. The Appeals Chamber therefore dismisses Đorđević's second ground of appeal.

D. Đorđević's sixth ground of appeal, in part: alleged errors with respect to attributing perpetrators' crimes to joint criminal enterprise members

1. Introduction

59. Đorđević submits that: (i) joint criminal enterprise liability, if it exists at all in customary international law, does not apply to "leadership cases" and that the Appeals Chamber should depart from its jurisprudence in the *Brđanin*, *Martić*, and *Krajišnik* Appeal Judgements or clarify the approach in these cases;[187] and (ii) in any event, the Trial Chamber erred in applying the standard it relied upon and "simply imputed crimes to Đorđević on the basis of the affiliation of perpetrators (MUP, [Yugoslav Army ("VJ")], etc.)".[188]

60. The Prosecution responds that Đorđević fails to point to cogent reasons for the Appeals Chamber to depart from its well-established jurisprudence.[189] It further responds that Đorđević fails to show that the Trial Chamber erred in applying the law on joint criminal enterprise.[190]

2. Alleged contradiction between the *Brđanin* Appeal Judgement and the *Stakić* Appeal Judgement

(a) Arguments of the parties

61. Đorđević submits that the approach taken in the *Brđanin* Appeal Judgement contradicts that followed in the *Stakić* Appeal Judgement.[191] The Appeals Chamber understands Đorđević to argue

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[186] *Krajišnik* Appeal Judgement, para. 663, citing *Kvočka et al.* Appeal Judgement, para. 80, *Tadić* Appeal Judgement, para. 191.
[187] Đorđević Appeal Brief, para. 110. See also Đorđević Appeal Brief, para. 129.
[188] Đorđević Appeal Brief, para. 111. See also Đorđević Appeal Brief, para. 129.
[189] Prosecution Response Brief, paras 96-97.
[190] Prosecution Response Brief, paras 105-106.

that the theory of joint criminal enterprise liability retained in *Brđanin* – whereby the physical perpetrators of the crimes do not need to be members of the joint criminal enterprise as long as a member of the joint criminal enterprise, acting in accordance with the common plan, used them to carry out the crimes – is, in fact, based on the notion of control over the act of the physical perpetrator.[192] This notion of control, in Đorđević's view, was expressly rejected by the Appeals Chamber in *Stakić*.[193] He suggests that the form of joint criminal enterprise retained in *Brđanin*, when applied to leadership cases, is simply "indirect co-perpetration by another name".[194] In Đorđević's view, this inconsistency alone constitutes a cogent reason for the Appeals Chamber to depart from the approach taken in the *Brđanin* Appeal Judgement.[195] In further support of his submission, Đorđević refers to the opinions of Judges Cassese and Shahabuddeen, two "fathers of the JCE jurisprudence", both of whom disagree with the application of joint criminal enterprise liability in the *Brđanin* Appeal Judgement.[196]

62. The Prosecution responds that Đorđević fails to point to cogent reasons why the Appeals Chamber should depart from the Tribunal's well-established jurisprudence.[197] It argues that there is no inconsistency between the Appeals Chamber's rejection of co-perpetration in *Stakić* and the determination in *Brđanin* that members of a joint criminal enterprise can incur liability for acts of non-members of the joint criminal enterprise.[198] In fact, it submits, the Appeals Chamber in *Brđanin* relied on the principle approved in *Stakić* that members of a joint criminal enterprise are liable for crimes perpetrated by non-members of a joint criminal enterprise.[199]

(b) Analysis

63. The Appeals Chamber has consistently held that joint criminal enterprise liability applies to leadership cases, even where the crimes are committed by non-members of the joint criminal enterprise.[200] The Appeals Chamber finds Đorđević's argument that the approach taken in the

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191 Đorđević Appeal Brief, paras 116-117.
192 See Đorđević Appeal Brief, paras 116-117.
193 Đorđević Appeal Brief, para. 117.
194 Đorđević Appeal Brief, para. 117. See also Đorđević Appeal Brief, paras 112, 116; Đorđević Reply Brief, para. 32.
195 Đorđević Appeal Brief, para. 117.
196 Đorđević Appeal Brief, para. 118, referring to Antonio Cassese, "The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise", *Journal of International Criminal Justice*, vol. 5 (2007), pp 126, 133; *Brđanin* Appeal Judgement, Partially Dissenting Opinion of Judge Shahabuddeen, para. 18.
197 Prosecution Response Brief, paras 96-97.
198 Prosecution Response Brief, para. 100.
199 Prosecution Response Brief, para. 100.
200 *Brđanin* Appeal Judgement, paras 410-414, 420-424, 430-431. See also *Gotovina and Markač* Appeal Judgement, para. 89; *Krajišnik* Appeal Judgement, paras 664-665; *Martić* Appeal Judgement, paras 168-169; *Limaj et al.* Appeal Judgement, para. 120.

Brđanin Appeal Judgement contradicts that followed in the *Stakić* Appeal Judgement to be unpersuasive. In *Stakić*, the Appeals Chamber found that the *Stakić* Trial Chamber erred in relying on the framework of "co-perpetratorship" because this mode of liability "does not have support in customary international law or in the settled jurisprudence of this Tribunal" and was "not valid law within the jurisdiction of this Tribunal".[201] It did not, as contended by Đorđević, "explicitly reject" co-perpetratorship because of the concept of "control over the physical perpetrators".[202] The Appeals Chamber notes that, unlike the form of co-perpetration applied by the Trial Chamber in *Stakić*, joint criminal enterprise liability as articulated in *Brđanin*, when it applies to crimes committed by physical perpetrators who are not members of the joint criminal enterprise, does not require "coordinated co-operation and joint control over the criminal conduct".[203] Contrary to what Đorđević implies, it also does not require that the use of the physical perpetrator by the joint criminal enterprise member be equivalent to that of a "tool".[204] In order to impute liability to an accused – as a member of a joint criminal enterprise – for a crime physically carried out by a non-member of the joint criminal enterprise, the Appeals Chamber requires the existence of a link between the accused and the crime, which is to be assessed on a case-by-case basis.[205] It must also be shown that one of the joint criminal enterprise members acted in accordance with the common plan when "using" a principal perpetrator.[206]

64. Đorđević has failed to show any inconsistency between the *Brđanin* and *Stakić* Appeal Judgements or that there are any other cogent reasons for the Appeals Chamber to depart from its established jurisprudence.

65. Finally, the Appeals Chamber observes that it has never departed from the joint criminal enterprise theory it set out in the *Stakić* and *Brđanin* Appeal Judgements and has applied it

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201 *Stakić* Appeal Judgement, para. 62.

202 See *Stakić* Appeal Judgement, para. 62. *Contra* Đorđević Appeal Brief, para. 117. The issue of control discussed by the Trial Chamber in *Stakić* relates to the control of the co-perpetrators over the execution of the common acts. In that case the Trial Chamber considered that for the type of co-perpetratorship it was assessing, it was typical, but not mandatory, that one co-perpetrator possessed skills or authority which the other co-perpetrator did not. It then explained that these skills or authority "can be described as shared acts which when brought together achieve the shared goal based on the same degree of control over the execution of the common acts". The Trial Chamber in that case did not suggest there was a requirement of control over physical perpetrators of the crime, and, importantly, this was not "precisely what the Appeals Chamber rejected in *Stakić*" (see Đorđević Appeal Brief, para. 117).

203 *Stakić* Trial Judgement, para. 440; *Brđanin* Appeal Judgement, para. 412.

204 See *Brđanin* Appeal Judgement, paras 412-413. *Contra* Đorđević Appeal Brief, para. 116. It is not a finding of the Appeals Chamber, rather it is the Prosecution's position that the link is to be found in the fact that the members of the JCE use the principal perpetrators as "tools" to carry out the crime (*Brđanin* Appeal Judgement, para. 412).

205 *Brđanin* Appeal Judgement, para. 413.

206 *Brđanin* Appeal Judgement, para. 413.

consistently in the cases that followed over the years.[207] The Appeals Chamber respectfully acknowledges the valuable contribution made by Judges Cassese and Shahabuddeen to the legal discourse on this issue. However, the Appeals Chamber considers that in light of the consistent jurisprudence set out above, in simply pointing to their writings and opinions, Đorđević has failed to demonstrate how these constitute cogent reasons to depart from the established jurisprudence.[208]

3. Alleged error in relying on the *Martić* Appeal Judgement and the *Krajišnik* Appeal Judgement

(a) Arguments of the parties

66. In the alternative to his arguments above, Đorđević argues that, in any event, there is deep uncertainty in leadership cases as to the nature of the link to be established between the accused joint criminal enterprise member and the non-member physical perpetrator of the crime.[209] He further argues that the *Martić* Appeal Judgement should not have been relied upon either by the Trial Chamber in the present case or by the Appeals Chamber in *Krajišnik*, because it is inconsistent with both the *Stakić* and *Limaj et al.* Appeal Judgements.[210]

67. The Prosecution responds that there is no contradiction between the *Martić* and *Stakić* Appeal Judgements, since the former followed the latter's methodology to assess whether certain crimes could be imputed to a joint criminal enterprise member.[211] The Prosecution further argues that Đorđević misrepresents the *Limaj et al.* Appeal Judgement and that there is no contradiction between the *Martić* and *Limaj et al.* Appeal Judgements.[212] According to the Prosecution, in *Limaj et al.*, the Appeals Chamber declined to discuss the responsibility of one of the accused for crimes committed by non-members of the joint criminal enterprise, as the issue was not raised during trial or appeal.[213] Finally, the Prosecution submits that Đorđević fails to advance any argument as to why the Appeals Chamber should depart from the approach taken in *Krajišnik*.[214]

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[207] *Gotovina and Markač* Appeal Judgement, para. 89; *Krajišnik* Appeal Judgement, para. 225; *Martić* Appeal Judgement, para. 168; *Limaj et al.* Appeal Judgement, para. 120.
[208] See *supra*, paras 23-24.
[209] Đorđević Appeal Brief, paras 110, 119, pointing to the way the Appeals Chamber articulated the required link in the *Brđanin*, *Martić* and *Krajišnik* cases.
[210] Đorđević Appeal Brief, paras 120-122; Đorđević Reply Brief, para. 33.
[211] Prosecution Response Brief, para. 102.
[212] Prosecution Response Brief, para. 103.
[213] Prosecution Response Brief, para. 103.
[214] Prosecution Response Brief, para. 104.

68. Đorđević replies that the concept of "tools" has never been fully explained and that the Appeals Chamber should clarify the *Brđanin*, *Martić*, and *Krajišnik* Appeal Judgements.[215]

(b) Analysis

69. The Appeals Chamber notes that Đorđević misrepresents parts of the *Martić* Appeal Judgement. He submits that the Appeals Chamber in that case held that the *Martić* Trial Chamber "failed to make an explicit finding on how the JCE *used* physical perpetrators".[216] However, from the paragraph that Đorđević cites in support of his submission, it is clear that the Appeals Chamber was referring to the Trial Chamber's failure to make an explicit finding that the joint criminal enterprise members, when using certain identified forces under their control, "*were acting in accordance with the common purpose*".[217] It found that while the Trial Chamber should have made such a finding, the omission did not invalidate the *Martić* Trial Judgement.[218] The Appeals Chamber then noted in relation to certain armed structures and paramilitary units, that the Trial Chamber had not made *definite* findings on the link between these forces and Milan Martić.[219] With that in mind, the Appeals Chamber analysed the Trial Chamber's findings on the crimes for which Milan Martić was held criminally responsible,[220] and quashed several convictions when it found that such link was too tenuous.[221] However, the Appeals Chamber held that the link was sufficiently established when the crimes were committed by the Yugoslav People's Army ("JNA"), Territorial Defence ("TO"), and other forces, based on:

> the Trial Chamber's findings on Martić's position as Minister of the Interior and his absolute authority over the MUP, his control over the armed forces, the TO and *Milicija Krajine*, the cooperation between the TO, the JNA, the *Milicija Krajine* and the armed forces of the ["Serbian Autonomous District ("SAO")] Krajina, and the control over the JNA and the TO exercised by other members of the JCE.[222]

This approach is consistent with that followed in the *Stakić* Appeal Judgement, where the Appeals Chamber assessed whether the crimes could be imputed to Milomir Stakić under the first category of joint criminal enterprise, after it had rejected the *Stakić* Trial Chamber's reliance on the "co-perpetratorship" mode of liability.[223] Đorđević's argument in this regard is therefore dismissed.

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215 Đorđević Reply Brief, para. 31.
216 Đorđević Appeal Brief, para. 120 (emphasis in original).
217 *Martić* Appeal Judgement, para. 181 (emphasis added).
218 *Martić* Appeal Judgement, para. 181.
219 *Martić* Appeal Judgement, para. 181 (emphasis added).
220 *Martić* Appeal Judgement, paras 181-212.
221 *Martić* Appeal Judgement, paras 192, 200, 207.
222 *Martić* Appeal Judgement, para. 187. See also *Martić* Appeal Judgement, paras 189, 205, 210.
223 *Stakić* Appeal Judgement, paras 59, 62-63, 79-85. See *Martić* Appeal Judgement, para. 169.

70. As to the alleged inconsistency between the *Martić* and *Limaj et al.* Appeal Judgements, Đorđević misrepresents the Appeals Chamber's conclusions in those cases. In the *Limaj et al.* case, the Appeals Chamber did not reject the concept that non-members of the joint criminal enterprise could be "used" to commit the crimes. Rather it acknowledged that whether the accused "could incur systemic joint criminal enterprise liability for crimes committed by non-members of the enterprise" had not been argued at trial or on appeal and held that it would be unfair to enter new convictions at that stage.[224] Furthermore, in that case, the Trial Chamber did not enter a conviction on the crimes committed by "outsiders" because it was unable to identify the perpetrators or establish that these crimes had been committed in furtherance of a common plan, and not because the perpetrators were non-members of the joint criminal enterprise.[225] This reasoning is consistent with the Tribunal's jurisprudence that the essential requirement to impute responsibility to a joint criminal enterprise member for crimes committed by non-members is that "the crime in question *forms part of the common criminal purpose*".[226] The Appeals Chamber sees no contradiction between its two judgements. Đorđević's argument in this regard is therefore also dismissed.

71. Đorđević's arguments in relation to the *Krajišnik* Appeal Judgement demonstrate his misunderstanding of the findings in that case. The Appeals Chamber did not quash Momčilo Krajišnik's convictions as a result of the Trial Chamber having erred in setting out the law on joint criminal enterprise. To the contrary, the Appeals Chamber found that the Trial Chamber correctly set out the applicable law on the use of non-members of the joint criminal enterprise to commit the crimes, in line with the *Brđanin* Appeal Judgement.[227] It quashed several convictions because the Trial Chamber in that case erred in applying the law to the facts and failed to make relevant findings.[228] Moreover, Đorđević ignores that the Appeals Chamber upheld other convictions when it was satisfied that the Trial Chamber had made the necessary factual findings establishing a link between the physical perpetrators and a joint criminal enterprise member.[229]

4. Conclusion

72. In light of the foregoing, the Appeals Chamber finds that Đorđević has not shown that cogent reasons exist for the Appeals Chamber to depart from well-established jurisprudence

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[224] *Limaj et al.* Appeal Judgement, para. 120. The *Limaj et al.* Appeal Judgement refers to "outsiders" of the detention camp (*Limaj et al.* Appeal Judgement, para. 120).
[225] See *Limaj et al.* Appeal Judgement, paras 115, 117.
[226] *Brđanin* Appeal Judgement, para. 418 (emphasis in original).
[227] *Krajišnik* Appeal Judgement, paras 225-226, 235-236.
[228] *Krajišnik* Appeal Judgement, paras 237, 281, 284.
[229] See *Krajišnik* Appeal Judgement, paras 237, 256-257, 259-261, 264, 267, 270, 272, 275, 278, 282.

permitting the physical perpetrators' crimes to be attributed to members of a joint criminal enterprise.

E. Đorđević's eighth ground of appeal: liability for specific intent crimes pursuant to the third category of joint criminal enterprise

1. Arguments of the parties

73. Under his eighth ground of appeal, Đorđević submits that the Trial Chamber erred in concluding that if, contrary to its findings, some crimes had not been intended as part of the common plan (JCE), they were a natural and foreseeable consequence thereof (third category of joint criminal enterprise).[230] According to Đorđević, this alternative conclusion is erroneous because, as a matter of principle, no convictions for specific intent crimes can be entered on the basis of the third category of joint criminal enterprise.[231] He also requests the Appeals Chamber to decline entering any new convictions, in the context of the Prosecution Appeal, for rape as a form of persecutions solely on the basis of the third category of joint criminal enterprise.[232]

74. Đorđević acknowledges that the case law of the Tribunal allows for the applicability of the third category of joint criminal enterprise with respect to specific intent crimes.[233] However, he asserts that the Appeals Chamber should depart from this jurisprudence and clarify that "JCE III does not support convictions for specific intent crimes".[234] Referring to the *Brđanin* Appeal Decision of 19 March 2004, Đorđević claims that the Appeals Chamber should espouse Judge Shahabuddeen's approach suggesting that a person cannot be convicted of a specific intent crime as a principal perpetrator unless he possesses specific intent.[235] Furthermore, Đorđević refers to the *Krstić* Appeal Judgement in which, according to him, the Appeals Chamber "appears to have approved [...] Judge Shahabuddeen's approach by reversing convictions for genocide pursuant to JCE I and JCE III on the basis that General Krstić did not possess the necessary special intent for genocide."[236] He also claims that the Appeals Chamber has never established that customary international law allows for the application of the third category of joint criminal enterprise to

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230 Đorđević Appeal Brief, para. 147, referring to Trial Judgement, para. 2158.
231 Đorđević Appeal Brief, para. 155; Đorđević Reply Brief, para. 43. See also Đorđević Appeal Brief, paras 150-154.
232 Đorđević Appeal Brief, paras 147, 155. The Appeals Chamber observes that the specific crime appealed by the Prosecution is the crime of persecutions through sexual assault (see Prosecution Appeal Brief, para. 56).
233 Đorđević Appeal Brief, para. 148, referring to *Rwamakuba* Appeal Decision on Joint Criminal Enterprise of 22 October 2004, para. 9; *Brđanin* Appeal Decision of 19 March 2004, para. 7.
234 Đorđević Appeal Brief, para. 155.
235 Đorđević Appeal Brief, paras 149-150, citing *Brđanin* Appeal Decision of 19 March 2004, Dissenting [*sic*] [Separate] Opinion of Judge Shahabuddeen, para. 4. See also Đorđević Reply Brief, para. 43.
236 Đorđević Appeal Brief, para. 151, referring to *Krstić* Appeal Judgement, para. 134.

special intent crimes.[237] Finally, in support of his arguments, Đorđević cites the extrajudicial writings of Judge Cassese and a holding of the Appeals Chamber of the Special Tribunal for Lebanon ("STL"), which states that "the better approach under international law is not to allow convictions under JCE for special intent crimes".[238]

75. The Prosecution responds that Đorđević has failed to provide cogent reasons for the Appeals Chamber to depart from its jurisprudence allowing convictions for specific intent crimes pursuant to the third category of joint criminal enterprise liability.[239] The Prosecution further submits that the *Krstić* Appeal Judgement relied upon by Đorđević does not address whether the third category of joint criminal enterprise is applicable to specific intent crimes.[240] Moreover, the Prosecution contends that the relevant parts of the *Tadić* Appeal Judgement analysing customary international law on the matter do not suggest that the third category of joint criminal enterprise is incompatible with specific intent crimes.[241] Finally, the Prosecution submits that decisions from other jurisdictions referred to by Đorđević are not binding on the Appeals Chamber.[242]

76. Đorđević replies that the *Krstić* Appeal Judgement is relevant because, according to him, "the Appeals Chamber declined to enter or even consider a conviction under JCE III when it quashed the conviction under JCE I".[243] In his submission, this shows that the jurisprudence on the matter "is not 'well-settled'."[244] Đorđević also claims that the Prosecution failed to explain why the Appeals Chamber should not give "careful consideration" to the STL Decision of 16 February 2011.[245]

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[237] Đorđević Appeal Brief, para. 152, referring to *Rwamakuba* Appeal Decision on Joint Criminal Enterprise of 22 October 2004, para. 9; *Tadić* Appeal Judgement, paras 205, 207-209.

[238] Đorđević Appeal Brief, paras 153-154, citing Antonio Cassese, "The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise", *Journal of International Criminal Justice*, vol. 5 (2007), p. 121, and referring to *The Prosecutor v. Salim Jamil Ayyash et al.*, Case No. STL-11-01/I/AC/R176bis, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 ("STL Decision of 16 February 2011"), para. 249.

[239] Prosecution Response Brief, para. 124.

[240] Prosecution Response Brief, para. 125, referring to *Krstić* Trial Judgement, para. 633, *Krstić* Appeal Judgement, para. 134.

[241] Prosecution Response Brief, para. 126. Rather, according to the Prosecution, "the Appeals Chamber recalled that what matters is that the crime not envisaged by the plan must be a predictable development and not merely an incidental consequence of the intended crime" (Prosecution Response Brief, para. 126, referring to *Tadić* Appeal Judgement, paras 218-220).

[242] Prosecution Response Brief, para. 127.

[243] Đorđević Reply Brief, para. 42.

[244] Đorđević Reply Brief, para. 42.

[245] Đorđević Reply Brief, para. 43.

2. Analysis

77. The Appeals Chamber recalls that:

> [a]s a mode of liability, the third category of joint criminal enterprise is no different from other forms of criminal liability which do not require proof of intent to commit a crime on the part of an accused before criminal liability can attach.[246]
>
> Provided that the standard applicable to that head of liability, i.e. "reasonably foreseeable and natural consequences" is established, criminal liability can attach to an accused for any crime that falls outside of an agreed upon joint criminal enterprise.[247]

In particular, the Appeals Chamber has held that an accused can be found criminally liable under the third category of joint criminal enterprise for specific intent crimes, provided that the crimes were reasonably foreseeable to the accused.[248]

78. For the reasons set out below, the Appeals Chamber finds that Đorđević has failed to demonstrate the existence of any cogent reasons to depart from this jurisprudence.

79. In the *Brđanin* Appeal Decision of 19 March 2004, Judge Shahabuddeen did not dissent but expressed a separate opinion, stating that the third category of joint criminal enterprise "was not excluded in the case of crimes requiring proof of a specific intent".[249] In Judge Shahabuddeen's view, applying the third category of joint criminal enterprise "does not dispense with the need to prove intent; what it does is that it provides a mode of proving intent in particular circumstances, namely, by proof of foresight in those circumstances".[250]

80. Đorđević's argument is misleading with respect to the *Krstić* Appeal Judgement.[251] In *Krstić*, the conviction for genocide was entered on the basis of the first category of joint criminal enterprise, which requires that all members of the joint criminal enterprise share the intent to commit the concerted crime.[252] In that case, the Appeals Chamber found that the Trial Chamber erred in concluding that Radislav Krstić possessed the intent to commit genocide, and instead found

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246 *Brđanin* Appeal Decision of 19 March 2004, para. 7.
247 *Brđanin* Appeal Decision of 19 March 2004, para. 9.
248 *Cf. Brđanin* Appeal Decision of 19 March 2004, para. 6 (where the Trial Chamber found that an accused can be held liable for the crime of genocide under the third category of joint criminal enterprise). See also *Stakić* Appeal Judgement, para. 38.
249 *Brđanin* Appeal Decision of 19 March 2004, Separate Opinion of Judge Shahabuddeen, para. 8.
250 *Brđanin* Appeal Decision of 19 March 2004, Separate Opinion of Judge Shahabuddeen, para. 2. See also *Brđanin* Decision of 19 March 2004, Separate Opinion of Judge Shahabuddeen, paras 6-8. For a more detailed overview of his position on the matter, see *Krajišnik* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, paras 29-52.
251 Đorđević Appeal Brief, para. 151.
252 *Krstić* Trial Judgement, para. 644.

him responsible for aiding and abetting genocide.[253] As regards the third category of joint criminal enterprise, the Appeals Chamber upheld Radislav Krstić's convictions for inhumane acts and persecutions, committed as natural and foreseeable consequences of a joint criminal enterprise to forcibly remove the Bosnian Muslim civilians from Potočari.[254] In doing so, the Appeals Chamber clarified that "it was sufficient that [the occurrence of other crimes] was foreseeable to him and that those other crimes did in fact occur".[255] Contrary to Đorđević's claims, the *Krstić* Appeal Judgement actually confirmed that convictions for specific intent crimes can be entered under the third category of joint criminal enterprise liability.[256]

81. With regard to Đorđević's argument that the Appeals Chamber has never found that customary international law supports the third category of joint criminal enterprise liability for special intent crimes, the Appeals Chamber notes that it has established that the third category of joint criminal enterprise, as a mode of liability, existed in customary international law prior to the time period covered by the Indictment.[257] In addition, the Appeals Chamber has stated that joint criminal enterprise applies to **all crimes** within the jurisdiction of the Tribunal, thereby including specific intent crimes.[258] In light of this, in the Appeals Chamber's view it is not required to demonstrate that every possible *combination* between crime and mode of liability be explicitly allowed by, or have precedents in, customary international law.

82. As regards the *Essen Lynching* and *Borkum Island* cases, which Đorđević contends are not supportive of the applicability of the third category of joint criminal enterprise to special intent crimes,[259] the Appeals Chamber notes that they were relied upon in *Tadić* as being "illustrative" of the existence of the third category of joint criminal enterprise as such,[260] and were not – and need not have been – discussed in the context of specific intent crimes. Therefore, these cases are irrelevant to the present discussion. The Appeals Chamber is also not convinced by Đorđević's

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253 *Krstić* Appeal Judgement, paras 133-134, 143-144. Judge Shahabuddeen explained that he disagreed with the majority of the Appeals Chamber and believed that the Trial Chamber correctly found that Krstić possessed the requisite intent for a conviction of genocide under the first category of joint criminal enterprise (*Krstić* Appeal Judgement, Partial Dissenting Opinion of Judge Shahabuddeen, paras 2, 72, 95-96). Đorđević fails to substantiate why the Appeals Chamber in the *Krstić* case needed to consider a possible conviction for genocide under the third category of joint criminal enterprise (see *Krstić* Appeal Judgement, fn. 234, specifying that in the context of that appeal, the Appeals Chamber was only dealing with aiding and abetting).

254 *Krstić* Appeal Judgement, paras 149-151, p. 87; *Krstić* Trial Judgement, paras 617-618.

255 *Krstić* Appeal Judgement, para. 150.

256 *Krstić* Appeal Judgement, paras 150-151, p. 87; *Krstić* Trial Judgement, paras 617-618.

257 See *supra*, para. 58.

258 *Tadić* Appeal Judgement, paras 188-193; *Rwamakuba* Decision on Joint Criminal Enterprise of 22 October 2004, paras 10, 17, referring to *Tadić* Appeal Judgement, paras 188, 190.

259 Đorđević Appeal Brief, para. 152.

260 *Tadić* Appeal Judgement, para. 205.

claim that the *Essen Lynching* case "suggest[s] that [the third category of joint criminal enterprise] cannot be used to convict an accused of a crime that involves a greater *mens rea* than the original plan".[261] To the contrary, the Appeals Chamber observes that although the defendants' original plan in *Essen Lynching* involved the ill-treatment of detainees, they were ultimately convicted of murder because they foresaw and willingly took the risk that murder could occur.[262]

83. Finally, with respect to Đorđević's reliance on the STL Decision of 16 February 2011, the Appeals Chamber notes that this jurisprudence is not binding on the Tribunal.[263] The Appeals Chamber of the STL found it preferable not to allow convictions under the third category of joint criminal enterprise for specific intent crimes, such as terrorism.[264] While Đorđević asserts that the STL Appeals Chamber held that "customary international law does not allow for convictions as a principal perpetrator for specific intent crimes on the basis of a *mens rea* standard of foreseeability and risk-taking",[265] the STL Appeals Chamber does not refer to *customary* international law when discussing the issue.[266] The jurisprudence of this Tribunal not only allows for convictions under the third category of joint criminal enterprise for specific intent crimes as a matter of principle, but several accused have actually been convicted of specific intent crimes pursuant to the third category of joint criminal enterprise liability.[267] These are precedents not to be lightly dismissed by the Appeals Chamber simply because another tribunal has decided the matter differently. Similarly, while the Tribunal may take into consideration scholarly writings and decisions of other courts and tribunals in ascertaining the law, the Appeals Chamber observes that Đorđević fails to provide an explanation as to why the STL Decision of 16 February 2011 or independent writing of Judge Cassese justifies a departure from past practice.

3. Conclusion

84. Accordingly, the Appeals Chamber finds that Đorđević's submissions do not provide cogent reasons to disturb the well-established jurisprudence of the Tribunal with regard to liability for specific intent crimes pursuant to the third category of joint criminal enterprise.

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261 Đorđević Appeal Brief, para. 152.

262 *Essen Lynching* case, pp 89-90. See also transcript of the parties' oral arguments in *Trial of Erich Heyer and Six Others*, British Military Court for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd December, 1945, Law reports of trials of war criminals, UNWCC, vol. I, pp 65-66. See *supra*, para. 49.

263 *Cf. Čelebići* Appeal Judgement, para. 24.

264 STL Decision of 16 February 2011, para. 249.

265 Đorđević Appeal Brief, para. 154.

266 STL Decision of 16 February 2011, paras 248-249.

267 *E.g. Krstić* Appeal Judgement, para. 150; *Martić* Appeal Judgement, paras 194-195, 202-204, 205. See also *Popović et al.* Trial Judgement, vol. 2, paras 1195, 1332, 1427, 1733-1735 (pending appeal).

F. Conclusion

85. In light of the foregoing, the Appeals Chamber dismisses Đorđević's second, sixth (in part),[268] and eighth grounds of appeal.

[268] One of the submissions that Đorđević makes in the context of ground of appeal 6 (*i.e.* that the Trial Chamber misapplied existing standards with regard to the use of physical perpetrators by JCE members) has been analysed separately in Section VIII of the Judgement (see *infra*, paras 161-172).

IV. ĐORĐEVIĆ'S FIRST GROUND OF APPEAL: ALLEGED ERRORS WITH REGARD TO THE EXISTENCE OF THE JCE

A. Introduction

86. The Trial Chamber concluded that the JCE was formed by mid-January 1999, if not earlier.[269] The JCE existed with the purpose of changing the ethnic balance of Kosovo, in order to ensure Serbian control over the province, by waging a campaign of terror and violence against Kosovo Albanians.[270] The Trial Chamber found that this campaign started in 1998, before the JCE had come into existence by mid-January 1999, and was implemented by forces of the FRY, in particular forces of the VJ, or forces of the Republic of Serbia, in particular forces of the MUP, or a combination of these forces ("Serbian forces") against Kosovo Albanians, from 1998 and continuing throughout the war.[271] It also found that the scale, nature, and structure of the "coordinated forces which implemented it" demonstrated the existence of a "leadership reaching across the political, military and police arms of governments of the FRY and Serbia who were directing and coordinating the events on the ground".[272]

87. In reaching its conclusion on the existence of the JCE, the Trial Chamber identified and analysed the following seven factors as evidence of the common plan: (i) demographic indications; (ii) the build up and use of Serbian forces and the arming of the non-Kosovo Albanian civilian population in violation of the October Agreements and ongoing peace talks in early 1999; (iii) the pattern of crimes; (iv) the coordinated use of the MUP and VJ; (v) the disproportionate use of force

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269 Trial Judgement, para. 2134; *infra*, paras 121-123.

270 Trial Judgement, paras 2007, 2128, 2130-2131. The Indictment alleges that the purpose of the JCE "was, *inter alia*, the modification of the ethnic balance in Kosovo in order to ensure continued Serbian control over the province. This purpose was to be achieved by criminal means consisting of a widespread or systematic a campaign of terror and violence that included deportations, murders, forcible transfers and persecutions directed at the Kosovo Albanian population during the Indictment period" (Indictment, para. 19).

271 Trial Judgement, paras 2130, 2134. The Trial Chamber defined Serbian forces as forces of the Federal Republic of Yugoslavia ("FRY"), in particular forces of the Yugoslav Army ("VJ"), or forces of the Republic of Serbia, in particular forces of the MUP, or a combination of these forces (Trial Judgement, para. 6). The Appeals Chamber will operate the same definition in the current Judgement.

272 Trial Judgement, para. 2130. See also Trial Judgement, paras 2126-2128. The Trial Chamber identified the following members of the JCE:

> [i]n regard to the political component [...] Slobodan Milošević, President of the FRY, Nikola Šainović, Deputy Prime Minister of the FRY responsible for Kosovo [...]. In respect to the MUP membership [...] Vlajko Stojiljković, Minister of Interior, the Accused Vlastimir Đorđević, Chief of the RJB, Radomir Marković, Chief of the [State Security Department of the MUP ("RDB"), Sreten Lukić, head of the MUP Staff for Kosovo, Obrad Stevanović, chief of the RJB Police Administration and Dragan Ilić, chief of the RJB Crime Police Administration [...]. With regard to the VJ component [...] Dragoljub Ojdanić, Chief of the VJ General Staff/Supreme Command Staff, Nebojša Pavković, Commander of the VJ 3rd Army and Vladimir Lazarević, Commander of the Priština Corps [...]. (Trial Judgement, para. 2127).

in "anti-terrorist" actions; (vi) the systematic collection of Kosovo Albanian identification documents and vehicle licence plates; and (vii) efforts to conceal the crimes against Kosovo Albanian civilians.[273]

88. Đorđević submits that the Trial Chamber erred when "assessing the intentions of alleged JCE members" and hence the mere existence of the JCE, as well as "when concluding that there existed a widespread and systematic attack directed against the civilian population".[274] Specifically, Đorđević claims that the Trial Chamber failed to assess correctly the following factors, individually and cumulatively: (i) the breach of the October Agreements;[275] (ii) the nature of the Kosovo Liberation Army ("KLA") threat; and (iii) the nature of the NATO threat.[276] As a result, the Trial Chamber, according to Đorđević, failed to assess the situation in its proper context and arrived at the wrong ultimate conclusion that the entire Kosovo Albanian population was regarded by the JCE members as the enemy.[277]

89. The Appeals Chamber will consider whether the Trial Chamber erred in considering these factors separately and cumulatively.

B. Breach of the October Agreements

1. Arguments of the parties

90. Đorđević submits that the Trial Chamber erred in characterising the FRY's actions as breaches of the October Agreements and, therefore, indicative of the existence of the JCE.[278] Đorđević argues that the FRY should not have been considered bound by the October Agreements because the KLA did not respect them and the Kosovo Verification Mission ("KVM") failed to ensure that the KLA respected them.[279] According to him, these agreements provided that the FRY

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273 Trial Judgement, para. 2008.

274 Đorđević Appeal Brief, para. 6. See also Đorđević Appeal Brief, paras 8, 17.

275 Đorđević Appeal Brief, para. 6. The Trial Chamber defined the term "October Agreements" as including: (i) a document entitled "Understanding Between [Kosovo Diplomatic Observer Mission] and Ministry of Interior of the Republic of Serbia", signed by Shaun Byrnes, for the international delegation and by Đorđević, for the Serbian side; and (ii) a document entitled "Record of Meeting in Belgrade, 25 October 1998" signed for the FRY authorities by Nikola Šainović ("Šainović"), Deputy Prime Minister of the FRY, for the Republic of Serbia by Đorđević, Chief of the RJB of the MUP, and for the North Atlantic Treaty Organisation ("NATO") by General Klaus Naumann and General Wesley Clark (Trial Judgement, paras 360-363).

276 Đorđević Appeal Brief, para. 6; Appeal Hearing, 13 May 2013, AT. 171-172.

277 Đorđević Appeal Brief, para. 8, referring to Trial Judgement, para. 2018.

278 Đorđević Appeal Brief, para. 10, referring to, *inter alia*, Trial Judgement, Section XII.B.2(ii). See also Đorđević Reply Brief, para. 7.

279 Đorđević Appeal Brief, para. 9.

had the right to respond to KLA actions.[280] Moreover, Đorđević claims that the October Agreements were "dead in the water".[281] He adds that the Trial Chamber in the *Milutinović et al.* case was presented with more relevant evidence and recognised that the negotiations of the October Agreements had been biased against the FRY.[282]

91. The Prosecution responds that the Trial Chamber properly considered the violations of the October Agreements as evidence of the existence of a common criminal plan.[283] It further submits that contrary to Đorđević's arguments, the *Milutinović et al.* Trial Judgement contains similar reasoning and reaches the same conclusion in this regard.[284]

2. Analysis

92. The Appeals Chamber finds that Đorđević misunderstands the Trial Chamber's reliance on the FRY breach of the October Agreements. The Trial Chamber did not find that the violation of the October Agreements *per se* was an indicator that the JCE existed.[285] Rather, it considered the attitude of several JCE members towards the October Agreements in the context of the totality of the evidence,[286] and concluded that:

> evidence of the build-up and use of VJ and MUP and associated forces and the arming of the non-Albanian civilian population in Kosovo from early 1999 in violation of the October Agreements and contrary to stated intentions to pursue a political solution to the Kosovo problem, together with the series of meetings from the end of October 1998 involving senior political, military and MUP leaders at which plans to thwart the proper monitoring by the KVM of VJ and MUP activities in Kosovo were discussed, indicates that a common plan had formed among senior Serbian and FRY political, military and police leaders.[287]

93. The Appeals Chamber is therefore of the view that whether the international negotiations were not entirely even-handed is immaterial in light of the Trial Chamber's finding that a common plan amongst senior FRY political, military, and police leaders had formed, based on evidence of, *inter alia*, the build up of Serbian forces in Kosovo, the arming of the non-Albanian civilian population of Kosovo, and meetings at which plans to thwart the proper implementation of the

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280 Đorđević Appeal Brief, para. 9, referring to Exhibit P837, Article III.

281 Đorđević Appeal Brief, para. 10. See also Appeal Hearing, 13 May 2013, AT. 168-169, where Đorđević argues that "to hark back" to events surrounding the October Agreements of 1998 led the Trial Chamber to overreach and overstate his role in the JCE. The Trial Chamber's reliance on events from 1998 to assess his partipation in the JCE will be discussed under Đorđević's ground of appeal 9(C) (see *infra*, paras 292-299).

282 Đorđević Appeal Brief, para. 10, referring to *Milutinović et al.* Trial Judgement, vol. 1, para. 410.

283 Prosecution Response Brief, para. 15, referring to Trial Judgement, paras 2008, 2026.

284 Prosecution Response Brief, para. 18, citing *Milutinović et al.* Trial Judgement, vol. 1, para. 410, vol. 3, para. 76.

285 The Appeals Chamber recalls that the Trial Chamber based its conclusion on the existence of the JCE on seven indicators (see *supra*, para. 87. See also *infra*, para. 183).

286 Trial Judgement, paras 2012-2014.

287 Trial Judgement, para. 2026.

October Agreements were discussed.[288] Furthermore, whether or not the FRY was bound by the October Agreements or had the "right to respond to KLA action" does not undermine the Trial Chamber's conclusion that the attacks were carried out against the civilian population[289] or that the Serbian forces used disproportionate force during purported anti-terrorist operations.[290] The Appeals Chamber therefore finds that Đorđević has failed to show that the Trial Chamber committed an error.

C. Nature of the KLA threat

1. Arguments of the parties

94. Đorđević argues that the Trial Chamber erred in its assessment of the size and nature of the KLA.[291] First, he submits that the Trial Chamber erred in concluding that the VJ and the MUP outnumbered the KLA by more than seven to one.[292] In particular, he claims that the Trial Chamber erred in relying on the evidence of Witness Richard Ciaglinski ("Witness Ciaglinski"), who indicated that there were 10,000 KLA soldiers, rather than the evidence of Witness Bislim Zypari ("Witness Zypari"), who estimated that the KLA had 17,000-18,000 soldiers.[293] Đorđević argues that the Trial Chamber erred in: (i) failing to consider Witness Ciaglinski's evidence that it was "almost impossible" to estimate the numbers of KLA soldiers; (ii) concluding that Witness Zypari may have had an interest in presenting a higher number of soldiers; and (iii) ignoring the evidence of other international observers who stated that the KLA membership was potentially unlimited.[294]

95. Second, Đorđević argues that the Trial Chamber erred in failing to take into account the KLA's tactics when considering the FRY's actions.[295] In particular, he claims that when reaching its ultimate findings on the disproportionate use of force, the Trial Chamber erred in failing to consider: (i) the weaponry the KLA possessed;[296] (ii) that the KLA was "opportunistic – proclaiming to be farmers by day but actually being KLA by night", thus making it impossible for

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288 See Trial Judgement, paras 2013-2014.
289 See *Blaškić* Appeal Judgement, para. 109. The Appeals Chamber recalls that is settled in the jurisprudence of the Tribunal that "whether an attack was ordered as pre-emptive, defensive or offensive is from a legal point of view irrelevant [...]. The issue at hand is whether the way the military action was carried out was criminal or not." (*Martić* Appeal Judgement, para. 268 citing *Kordić and Čerkez* Appeal Judgement, para. 812). See Trial Judgement, para. 2016.
290 See Trial Judgement, paras 2052-2069. See *supra*, para. 87; *infra*, paras 102, 106-109, 184.
291 Đorđević Appeal Brief, para. 11.
292 Đorđević Appeal Brief, para. 12, referring to Trial Judgement, para. 2061.
293 Đorđević Appeal Brief, paras 11-12, referring to Trial Judgement, para. 1540, Exhibit P833, p. 3336.
294 Đorđević Appeal Brief, para. 12, referring to Trial Judgement, para. 1540. See also Đorđević Reply Brief, para. 8.
295 Đorđević Appeal Brief, para. 13.

the FRY forces to distinguish between civilians and combatants;[297] (iii) the evidence of Witness Karol John Drewienkiewicz that the KLA declared that 1999 would be the year of independence of Kosovo and became more opportunistic during and after the Rambouillet discussions in February 1999;[298] and (iv) the evidence of Witness Joseph Maisonneuve that by 23 January 1999, the KLA had completed plans for a more general resumption of hostilities and that in March 1999, it would return to full-scale violence.[299] Đorđević contends that the Trial Chamber repeatedly and erroneously drew the inference that the military action by FRY forces was disproportionate to the threat faced.[300]

96. The Prosecution argues that the Trial Chamber was reasonable in its assessment of the KLA's size and tactics.[301] In any event, the Prosecution contends that even if Đorđević's arguments regarding the KLA threat were accepted, they do not undermine the Trial Chamber's ultimate conclusion that the Serbian forces' operations were disproportionate and went beyond counter-terrorism.[302]

2. Analysis

97. In relation to the size of the KLA, the Trial Chamber expressly considered and rejected Witness Zyrapi's evidence that the KLA numbered 17,000-18,000 fighters, after having assessed the credibility of the witness.[303] The Appeals Chamber finds that Đorđević merely repeats arguments that were unsuccessful at trial,[304] and has failed to show that the Trial Chamber erred in preferring the evidence of Witness Ciaglinski to that of Witness Zyrapi.[305] The Appeals Chamber therefore finds that Đorđević has not shown that the Trial Chamber erred in its estimation of the number of KLA fighters. In any event, the Appeals Chamber notes that the Trial Chamber found that the Serbian forces in Kosovo numbered between 14,571 and 15,779 MUP personnel and 61,892 VJ personnel.[306] It therefore considers that even if the Appeals Chamber were to find that the Trial Chamber erred in rejecting evidence that the KLA numbered 17,000-18,000 fighters, this

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296 Đorđević Appeal Brief, para. 13, referring to Trial Judgement, para. 1567. Đorđević refers to anti-tank weapons, heavy machine guns, rocket propelled grenades, Zoljas, 82 and 120 millimetre mortars, and other heavy weapons.
297 Đorđević Appeal Brief, para. 13, referring to Karol John Drewienkiewicz, 22 Jun 2009, T. 6378, Exhibit P997, p. 7878.
298 Đorđević Appeal Brief, para. 14, referring to Exhibit P996, paras 114, 189.
299 Đorđević Appeal Brief, para. 15, referring to Exhibits P873, p. 3, P853, pp 11044, 11119-11121, 11126.
300 Appeal Hearing, 13 May 2013, AT. 171.
301 Prosecution Response Brief, paras 19-27.
302 Prosecution Response Brief, paras 23, 27, referring to Trial Judgement, paras 2052-2053, 2055, 2061, 2069.
303 Trial Judgement, para. 1539-1540, 2052.
304 Trial Judgement, paras 2052, 2055, 2065. See *supra*, para. 20. See also *infra*, para. 522.
305 Trial Judgement, paras 1539-1540, 2052, 2058.
306 Trial Judgement, para. 2060.

would have no impact on the Trial Chamber's conclusion that the Serbian forces heavily outnumbered the KLA and that these figures were a "further indication" that the purpose of the Serbian forces operations went beyond counter-terrorism.[307] It would also not invalidate the Trial Chamber's finding that the use of force by the Serbian forces was disproportionate.[308] The Appeals Chamber notes that in reaching this conclusion on the proportionality of the attacks, the Trial Chamber did not rely on its finding that the Serbian forces outnumbered the KLA. It considered this evidence together with extensive evidence on the pattern of excessive use of force against the Kosovo Albanian population by Serbian forces.[309]

98. Furthermore, contrary to Đorđević's contention, the Trial Chamber took into account the KLA's tactics on the ground in Kosovo and the weapons it had at its disposal.[310] Particularly, it expressly accepted that at times the Serbian forces may have been confronted with individuals whom they suspected were KLA members, even if they were wearing civilian clothing.[311] Moreover, the Trial Chamber was aware of the attitude of the KLA prior, during, and after the Rambouillet negotiations.[312] However, it was satisfied that the vast majority of the crimes committed in Kosovo in 1999, occurred in situations in which there was little or no KLA activity. It therefore concluded that the use of force by the Serbian forces was "patently disproportionate".[313] Đorđević repeats arguments that were unsuccessful at trial,[314] and has failed to show that no reasonable trier of fact could have reached the same conclusion.

99. Finally, the Appeals Chamber finds that the attitude of the KLA during international negotiations and its statements and declarations have no bearing on the Trial Chamber's assessment on the disproportionate use of force by Serbian forces.[315] While the Trial Chamber did not refer specifically to the evidence cited by Đorđević, it explicitly considered the attitude of the KLA prior, during and after the Rambouillet negotiations.[316] As described above, the Trial Chamber considered the KLA's tactics on the ground, as well as the fact that in 1999 the extent and degree of the KLA's

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307 Trial Judgement, para. 2061.
308 Trial Judgement, paras 2065-2069.
309 Trial Judgement, paras 2062-2069, 2083-2085.
310 Trial Judgement, paras 1564-1570, 2065.
311 Trial Judgement, para. 2065.
312 See Trial Judgement, paras 432-433.
313 Trial Judgement, para. 2065.
314 Trial Judgement, paras 2054-2055, 2064-2065. See *supra*, para. 20. See also *infra*, para. 522.
315 See *infra*, paras 106-110.
316 See Trial Judgement, paras 432-433.

territorial control in Kosovo was less significant than in 1998.[317] Đorđević's argument in this regard is therefore dismissed.

D. The Nature of the NATO threat

1. Arguments of the parties

100. Đorđević argues that, when considering the proportionality of the FRY's actions, the Trial Chamber erred in failing to take into account: (i) the NATO bombing, which resulted in the killing of at least 500 civilians;[318] and (ii) the evidence establishing that "NATO had decided to support the KLA and 'regime change' in Serbia and that the KLA was a tool to make this happen".[319]

101. The Prosecution asserts that the Trial Chamber properly assessed and considered the NATO intervention, and that its findings regarding the use of the MUP and VJ for the implementation of the common criminal plan remain unaffected by Đorđević's arguments.[320]

2. Analysis

102. The Appeals Chamber finds that Đorđević has failed to demonstrate that the Trial Chamber erred in finding that the use of force by Serbian forces was disproportionate in the context of an attack directed against the Kosovo Albanian population. Đorđević has failed to explain how shelling, looting, and/or burning of villages, constitute proportional use of force against the KLA/NATO when there was little to no KLA activity in those villages and when the killing of Kosovo Albanian individuals who were unarmed, in detention, or otherwise not taking part in hostilities.[321]

E. Combined effect of Đorđević's challenges

1. Arguments of the parties

103. Đorđević insists that had the Trial Chamber properly considered all of the factors addressed above, it would have found that the FRY plans and operations were proportionate and legitimate

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317 See *supra*, paras 97-98; Trial Judgement, para. 2059.

318 Đorđević Appeal Brief, para. 16, referring to the ICTY Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, para. 54. See also Đorđević Appeal Brief, para. 18.

319 Đorđević Appeal Brief, para. 16, referring to Exhibits P1335, pp 3-10, P1402 p. 9866, D170, D545, D549, D750, para. 21, D767. See also Đorđević Reply Brief, para. 9.

320 Prosecution Response Brief, paras 28-29, referring to Trial Judgement, paras 2017, 2020.

321 Trial Judgement, paras 2027-2035, 2055, 2065. See *supra*, para. 98; *infra*, para. 524.

responses to the KLA and NATO threats, rather than indications of the existence of both a joint criminal enterprise and a widespread and systematic attack against civilians.[322] Đorđević argues that in the absence of proper consideration of the context and the threats faced by the FRY, the conclusion that the civilian population was its primary target is unsustainable.[323] In addition, Đorđević submits that the Trial Chamber erred in concluding that the JCE existed on the basis of the mere fact that crimes had been committed.[324] He admits that the "[n]ecessary action" by the FRY forces was "accompanied by crimes against civilians" but claims that "it does not necessarily follow that the leadership's purpose was criminal".[325]

104. The Prosecution suggests that this ground of appeal be summarily dismissed and that, in any event, Đorđević fails to demonstrate that no reasonable trier of fact could conclude that the use of force by the Serbian forces was disproportionate.[326] According to the Prosecution, Đorđević disregards the relevant factors that the Trial Chamber considered as establishing the existence of a common criminal plan, such as: (i) the demographic indications; (ii) the pattern of crimes; (iii) the coordinated use of the MUP and VJ in the commission of the crimes; (iv) the widespread collection of identification documents; and (v) the concealment of the crimes against Kosovo Albanian civilians.[327]

105. Đorđević replies that the Trial Judgement merely mentions NATO and KLA actions when discussing the common plan but does not place those actions in their proper context as combined threats to the "sovereign integrity of the FRY".[328] Consequently, according to Đorđević, the Trial Chamber improperly "assess[ed] the intentions of JCE members in a vacuum".[329] In Đorđević's view, the FRY actions were proportionate to the threat, so the conclusion that they were directed against civilians cannot be sound.[330]

2. Analysis

106. The Appeals Chamber finds that the core of Đorđević's challenge under this ground of appeal relates to the Trial Chamber's findings on the disproportionate use of force by the FRY in

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322 Đorđević Appeal Brief, para. 17, referring to Trial Judgement, paras 2020-2026.
323 Đorđević Appeal Brief, para. 18, referring to Trial Judgement, paras 1599-1600.
324 Đorđević Reply Brief, para. 3.
325 Đorđević Reply Brief, para. 5(2). See also Đorđević Reply Brief, para. 5(3).
326 Prosecution Response Brief, paras 9-10, 12-13, 30-31.
327 Prosecution Response Brief, para. 11.
328 Đorđević Reply Brief, para. 1, referring to Trial Judgement, para. 2020.
329 Đorđević Reply Brief, para. 2 (emphasis omitted).
330 Đorđević Reply Brief, para. 6.

"anti-terrorist" actions.[331] The Appeals Chamber notes that this is only one of the seven factors relied upon by the Trial Chamber to conclude that the JCE existed.[332]

107. In reaching these findings, the Trial Chamber explicitly considered the issues that Đorđević reiterates on appeal, including his argument that the FRY's actions were a legitimate anti-terrorist campaign in defence of the country rather than a common criminal plan.[333] However, it concluded that while certain operations of the Serbian forces "may have been conducted under the guise of anti-terrorist operations, and that may have been among the objectives, it [was] starkly clear from the evidence that these operations were not limited to members of the KLA" but targeted the Kosovo Albanian civilians.[334] In this regard, the Trial Chamber found that:

> the operations [of the Serbian forces] were typically aimed at terrorising the Kosovo Albanian civilian population in cities, towns and villages. This was achieved by a variety of means. Populated areas were shelled by Serbian forces using heavy weapons. [...] The effect of the actions of Serbian forces to terrorise Kosovo Albanians was so grave that many fled from their homes, villages or towns to escape from Serbian forces without actually being ordered to do so. [...]
>
> The deportations, murders, forcible transfers and persecutions were typical features of the campaign of terror and violence. [... The] scale and nature and the structure of the coordinated forces which implemented it demonstrates, in the finding of the Chamber, the existence of a leadership reaching across the political, military and police arms of governments of the FRY and Serbia who were directing and coordinating the events on the ground. The existence of the common plan as alleged in the Indictment is therefore established.[335]

108. Beyond disagreeing with these findings, Đorđević advances no substantial argument as to how the Trial Chamber erred. His submissions are therefore dismissed.

109. In particular, Đorđević's arguments in relation to the context of the conflict and the threats faced by the FRY[336] have no bearing on the Trial Chamber's finding that it was the *nature*, or *pattern*, of the crimes committed by the Serbian forces that clearly demonstrated that the Kosovo Albanian population was the primary target thereof.[337] Contrary to Đorđević's suggestion, the Trial Chamber inferred the existence of the JCE from, *inter alia*, the way in which the crimes were committed rather than from the mere fact that such crimes occurred.[338] It found that Serbian forces "implemented a campaign of terror and extreme violence in Kosovo directed against Kosovo Albanian people" and that the scale, structure, and *nature* of their coordinated actions demonstrated

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331 Trial Judgement, paras 2052-2069.
332 See *supra*, para. 87.
333 Trial Judgement, para. 2002.
334 Trial Judgement, para. 2129.
335 Trial Judgement, paras 2129-2130.
336 See *supra*, paras 90, 94-95, 100.
337 Trial Judgement, paras 2128-2129.

the existence of a leadership in FRY and Serbia directing and coordinating the events on the ground.[339] Đorđević has failed to demonstrate that this inference was unreasonable. Consequently, even if the Appeals Chamber were to accept, *arguendo*, all of Đorđević's assertions with respect to the context of the conflict,[340] this cannot exonerate the members of the JCE from their responsibility for the crimes planned and committed against the Albanian population of Kosovo. Đorđević has not shown that his suggested alternative inference – that such a campaign involved the proportionate use of force in response to KLA/NATO action – was unreasonably excluded by the Trial Chamber. He has therefore failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber.

110. In light of the foregoing, the Appeals Chamber dismisses Đorđević's first ground of appeal.

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338 See Trial Judgement, paras 2027-2035, 2132-2135, 2137-2140.

339 Trial Judgement, para. 2130.

340 Namely, that the FRY should not have been considered bound by the October Agreements that the KLA may have used terrorist tactics, and that NATO actions may have resulted in civilian losses (see *supra*, paras 90, 95, 100).

V. ĐORĐEVIĆ'S THIRD GROUND OF APPEAL: ALLEGED ERRORS CONCERNING THE NATURE, COMMENCEMENT, DURATION, AND MEMBERS OF THE JCE

111. As recalled earlier, the Trial Chamber found that a joint criminal enterprise existed to change the ethnic balance of Kosovo to ensure Serb control over the province by waging a campaign of terror and violence against the Kosovo Albanian population, which included deportations, forcible transfers, murders, and destruction of culturally significant property.[341] It further found that the JCE members included Slobodan Milošević, President of the FRY, Nikola Šainović, Deputy Prime Minister of the FRY responsible for Kosovo, Vlajko Stojiljković, Minister of Interior, Vlastimir Đorđević, Head of the RJB, Radomir Marković ("Marković"), Head of the RDB, Sreten Lukić ("Lukić"), Head of the MUP Staff for Kosovo, Obrad Stevanović ("Stevanović"), Chief of the RJB Police Administration, Dragan Ilić, Chief of the RJB Crime Police Administration, Dragoljub Ojdanić ("Ojdanić"), Chief of the VJ General Staff/Supreme Command Staff, Nebojša Pavković ("Pavković"), Commander of the VJ 3rd Army, and Vladimir Lazarević ("Lazarević"), Commander of the Priština Corps.[342] The Trial Chamber also found that the JCE had been formed by mid-January 1999 and may have already existed in October 1998.[343]

A. Introduction

112. Under his third ground of appeal, Đorđević argues that the Trial Chamber's findings are impermissibly vague in relation to: (i) the nature of the common plan underlying the JCE; (ii) the points in time at which it existed; and (iii) its constituent members.[344] The Prosecution responds that Đorđević's arguments ignore and misrepresent the relevant findings of the Trial Chamber and should therefore be summarily dismissed.[345] The Appeals Chamber will address Đorđević's arguments in turn.

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341 Trial Judgement, para. 2007. See also *supra*, para. 86.
342 Trial Judgement, para. 2127.
343 Trial Judgement, para. 2134.
344 Đorđević Appeal Brief, paras 78, 83, 88.
345 Prosecution Response Brief, para. 67.

B. Nature of the common plan

1. Arguments of the parties

113. Đorđević claims that the Trial Chamber's findings characterising the common purpose of the JCE are inconsistent.[346] In particular, he takes issue with the following conclusions of the Trial Chamber: (i) the purpose of the JCE was to alter the ethnic balance of Kosovo so as to ensure *continued* Serbian control over the province; (ii) the purpose of the JCE was to *regain* control over the territory of Kosovo; and (iii) the objectives of the JCE *evolved* throughout the conflict from revenge to retaliation to destroying the KLA.[347] Đorđević submits that the latter finding is "too loose a peg on which to hang criminal responsibility", especially in light of the Appeals Chamber's finding in the *Krajišnik* case that evolution of a common purpose must be agreed upon by the members of the joint criminal enterprise.[348]

114. The Prosecution argues that the Trial Chamber adequately determined the common purpose and that all the crimes for which Đorđević was convicted fell within the object of the JCE to modify the ethnic balance in Kosovo.[349] It further contends that "*continuing* and *regaining* control [over Kosovo] were indistinguishable aspects of the same plan to ensure the long-term objective to assure Serbian rule in Kosovo".[350] Finally, the Prosecution submits that, contrary to Đorđević's argument, the Trial Chamber did not find that the common plan evolved to include additional crimes, but rather noted that "additional *reasons* to act – such as revenge and retaliation – evolved during the implementation of the plan".[351] This, according to the Prosecution, is immaterial to the nature of the common plan.[352]

115. Đorđević replies that the Prosecution's suggestion that the Trial Chamber found that mere "reasons to act", rather than the objectives of the JCE, have evolved, makes no sense as these "are

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[346] Đorđević Appeal Brief, para. 84. See also Appeal Hearing, 13 May 2013, T. 61 (submitting that the Trial Chamber's findings on Đorđević's role and intent undergo a "metamorphosis", whereby "earlier discussions on the evidence are summarised incorrectly and then used to support sweeping conclusions").
[347] Đorđević Appeal Brief, paras 84-85.
[348] Đorđević Appeal Brief, para. 85, referring to *Krajišnik* Appeal Judgement, para. 163. See Trial Judgement, para. 2007.
[349] Prosecution Response Brief, para. 68.
[350] Prosecution Response Brief, para. 69.
[351] Prosecution Response Brief, para. 70.
[352] Prosecution Response Brief, para. 70.

explicitly different purposes whereas the purpose must be common".[353] He insists that the relevant findings of the Trial Chamber are impermissibly vague.[354]

2. Analysis

116. In considering whether a joint criminal enterprise existed, the Trial Chamber noted that the overall purpose of the alleged JCE – namely, the demographic modification of Kosovo to ensure continued Serbian control over the province – was not in itself a crime provided for in the Statute.[355] It further articulated that "only if, and once, this purpose amounted to or involved the commission of a Statute crime [...] a JCE would exist".[356]

117. The Trial Chamber further found that the evidence:

> reveals a number of characteristics about the way that crimes were committed against Kosovo Albanians that, in the Chamber's view, are persuasive evidence of a common plan by the leadership of the FRY and Serbia, including politicians, military figures, and the police leadership (as identified in more detail below) to modify the ethnic balance in Kosovo by waging a campaign of terror against the Kosovo Albanian civilian population. This plan included deportations, forcible transfers, murders and the destruction of culturally significant property. The evidence related to the way the crimes were committed against the Kosovo Albanian civilian population also establishes that other objectives of the common plan evolved, especially throughout the armed conflict that commenced on 24 March 1999, including revenge for the killing of MUP and VJ members, retaliation for the NATO bombing campaign, and fighting and destroying the KLA once and for all, including through the use of executions and disproportionate force.[357]

118. The Appeals Chamber notes that the Trial Chamber first set out that while the *overall* purpose of the JCE was alleged to be the demographic modification of Kosovo to ensure continued Serbian control over the province, it had to establish that such common purpose involved or amounted to a *crime* under the Statute.[358] It was in the context of establishing this element that the Trial Chamber turned to the political context and noted that the Serbian leadership, as the result of escalated separatist tendencies and tensions, wanted to regain control over Kosovo by means of altering the demographic balance of the province, thus pressuring the Albanian population to move out of Kosovo.[359]

119. On this basis and having considered the evidence adduced in the case, the Trial Chamber concluded that the common *criminal* purpose of the JCE was "to modify the ethnic balance in

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353 Đorđević Reply Brief, para. 19.
354 Đorđević Reply Brief, para. 18.
355 Trial Judgement, para. 2003.
356 Trial Judgement, para. 2003.
357 Trial Judgement, para. 2007.
358 Trial Judgement, para. 2003.
359 Trial Judgement, para. 2005.

Kosovo by waging a campaign of terror against the Kosovo Albanian civilian population [including through] deportations, forcible transfers, murders and the destruction of culturally significant property".[360] There is consequently no contradiction in the Trial Chamber's reference to ensuring continued control over Kosovo or regaining such control because these terms were used in different contexts. Importantly, these rather descriptive terms are virtually irrelevant to the Trial Chamber's ultimate finding regarding the common criminal purpose of the JCE, which only refers to modifying the ethnic balance through criminal means and not controlling the province.[361]

120. Regarding the evolution of the common plan, the Trial Chamber held that "other *objectives* of the common plan evolved [and later also included] revenge for the killing of MUP and VJ members, retaliation for the NATO bombing campaign, and fighting and destroying the KLA once and for all, including through the use of executions and disproportionate force".[362] The Appeals Chamber considers the use of the expression "other objectives" by the Trial Chamber must be understood in its proper context, especially in light of the fact that revenge, retaliation for NATO bombing, and fighting to destroy the KLA as such may not constitute crimes under the Statute. As correctly noted by the Trial Chamber, the common purpose of the JCE must amount to or involve the commission of a statutory crime.[363] Therefore, in using the word "objective", the Appeals Chamber understands the Trial Chamber to state that with the development of circumstances on the ground, the perpetrators resorted to acts which could have been motivated, for example, by revenge or retaliation in furtherance of the common plan. What motivated the perpetrators to act, however, is not relevant to the determination of the common criminal purpose of the JCE[364] While the motivation to commit the crimes as part of the common plan evolved to include, *inter alia,* revenge killings and retaliation for NATO bombing,[365] the objective itself, *i.e.* modifying the ethnic balance in Kosovo remained unchanged. The Appeals Chamber therefore finds that the Trial Chamber did not commit an error in this respect. Further, and contrary to Đorđević's suggestion, the *Krajišnik* Appeal Judgement is irrelevant because it deals with expanded *crimes* under the common purpose of a joint criminal enterprise.[366]

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360 Trial Judgement, para. 2007.
361 Trial Judgement, para. 2007.
362 Trial Judgement, para. 2007 (emphasis added). The Trial Chamber also accepted that anti-terrorist operations may have been among the *objectives* of the Serbian operations (Trial Judgement, para. 2129).
363 Trial Judgement, para. 2003, referring to *Vasiljević* Appeal Judgement, para. 100.
364 See *e.g.* Trial Judgement, para. 2063, referring to the excessive use of force in murders committed out of retaliation, and para. 2069 concluding that "the purpose of the operations was to perpetuate the crimes established, rather than, or in addition to, fighting the KLA".
365 Trial Judgement, para. 2007.
366 See *Krajišnik* Appeal Judgement, paras 161-178.

C. Commencement and duration of the JCE

1. Arguments of the parties

121. Đorđević argues that the Trial Chamber contradicted itself when it found, on the one hand, that the JCE came into existence no later than January 1999, and on the other hand, it held that a joint criminal enterprise can arise extemporaneously.[367] As a result, Đorđević argues that the Trial Judgement is impermissibly vague as to whether the expulsion of hundreds of thousands of civilians was pre-planned or not.[368]

122. The Prosecution responds that the Trial Chamber's observation that a common plan can materialise extemporaneously is not inconsistent with its finding that the JCE came into existence by mid-January 1999.[369]

2. Analysis

123. The Appeals Chamber finds that Đorđević takes the Trial Chamber's findings out of context. When mentioning the aspect of extemporaneous materialisation of a common purpose or criminal means, the Trial Chamber did so in general terms while recalling the applicable law on commission through participation in a joint criminal enterprise.[370] It then established, in another part of the Trial Judgement, after a lengthy and detailed analysis of the evidence, that the JCE was formed by mid-January 1999, and possibly even earlier.[371] Contrary to Đorđević's contention, this finding is not impermissibly vague as it clearly identifies when the common plan to change the ethnic balance of Kosovo came into existence. The fact that the Trial Chamber also referred to aspects of the law concerning extemporaneous materialisation of a common purpose does not detract from that finding. There is no contradiction between the affirmation of the general principle of law and the factual finding in question.[372] Đorđevic's argument is therefore dismissed.[373]

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[367] Đorđević Appeal Brief, para. 86, referring to Trial Judgement, paras 1862, 2007, 2025-2026, 2134. See also Đorđević Reply Brief, para. 20.
[368] Đorđević Appeal Brief, para. 86. See also Đorđević Reply Brief, para. 20.
[369] Prosecution Response Brief, para. 71, referring to Trial Judgement, paras 2007, 2134.
[370] Trial Judgement, paras 1862, 2007, referring to *Tadić* Appeal Judgement, para. 227, *Krnojelac* Appeal Judgement, para. 97, *Vasiljević* Appeal Judgement, paras 100, 109, *Brđanin* Appeal Judgement, paras 415, 418. See also Trial Judgement, paras 1859-1868.
[371] Trial Judgement, para. 2134. See also Trial Judgement, paras 2003-2133; 2135-2153 (these paragraphs concern the crimes falling within the common purpose).
[372] *Contra* Đorđević Appeal Brief, para. 86.
[373] See *supra*, para. 20.

D. Members of the JCE

1. Arguments of the parties

124. Đorđević submits that the Trial Chamber was inconsistent in identifying the members of the JCE considering that it listed some members, including himself, by name while making vague references to "senior political military and police leadership".[374] He submits that such impermissibly vague references were rejected by the Appeals Chamber in *Krajišnik*.[375] He argues that the Trial Chamber "introduced yet further uncertainty by concluding that it was 'unable to make an exact determination as to who were participants and who were perpetrators'".[376]

125. The Prosecution responds that the Trial Chamber correctly identified the JCE members by name and found that they held most of the highest political, VJ, and MUP positions in the FRY in Serbia.[377] Furthermore, the Prosecution argues that no vagueness was introduced when the Trial Chamber found that some of the perpetrators may not have been members of the JCE, considering that it is not required to establish that the physical perpetrators used as tools by the JCE members shared the common plan.[378]

126. In reply, Đorđević agrees that the "[Trial] Chamber's findings should be limited to the specific individuals it identified by name as JCE members" but refers to his arguments presented under his fourth and sixth grounds of appeal for "the implications".[379]

2. Analysis

127. The Trial Chamber correctly identified the applicable law on this matter.[380] In making its factual findings with respect to the members of the JCE, the Trial Chamber concluded that the common criminal purpose was shared by "the senior political, military and police leadership", namely "political leaders of the FRY and Serbia, the leadership of the VJ, including the relevant Corps in Kosovo, and the MUP and the leadership of the relevant administrations of which it was comprised and its Staff in Kosovo".[381] The Trial Chamber further specified by name the "core

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374 Đorđević Appeal Brief, para. 87, referring to Trial Judgement, paras 2051, 2126, 2127.
375 Đorđević Appeal Brief, para. 87, referring to *Krajišnik* Appeal Judgement, para. 157.
376 Đorđević Appeal Brief, para. 87, citing Trial Judgement, para. 2128.
377 Prosecution Response Brief, paras 72-73, referring to Trial Judgement, paras 1861, fn. 6359, 2126-2127, 2211.
378 Prosecution Response Brief, para. 74.
379 Đorđević Reply Brief, para. 21.
380 Trial Judgement, para. 1861.
381 Trial Judgement, para. 2126.

members" of all three components, including, amongst others, Slobodan Milošević, Nikola Šainović, Vlajko Stojiljković, Dragoljub Ojdanić, and Vlastimir Đorđević.[382]

128. The Appeals Chamber therefore dismisses Đorđević's submission that the Trial Chamber's vague reference to a "plan existing among senior political, military and police leadership"[383] is no better than the "rank and file" joint criminal enterprise membership rejected in the *Krajišnik* Appeal Judgement.[384] In that case, the trial chamber referred to a "rank and file consist[ing] of local politicians, military and police commanders, paramilitary leaders, and others".[385] The Appeals Chamber found this reference to have been impermissibly vague because "[t]he Trial Chamber failed to specify whether all or only some of the local politicians, militaries, police commanders and paramilitary leaders were rank and file JCE members."[386] In the present case, however, the members are identified by name and are listed within the relevant components of the JCE.

129. Contrary to Đorđević's assertion, the Trial Chamber's noting that it was "unable to make an exact determination as to who were the participants and who were perpetrators" does not render its findings regarding the JCE membership vague.[387] In fact, this statement relates solely to members of special units of the MUP and VJ who "were drawn into the plan as participants and perpetrators", rather than the "core members" of the JCE identified by name who directed "the overall common plan".[388]

130. Consequently, the Appeals Chamber finds that the Trial Chamber's findings[389] are sufficiently specific in identifying the JCE members, considering that the "core members" are listed by name and the others are adequately referred to by unambiguous categories or groups of persons.

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382 Trial Judgement, para. 2127. See also Trial Judgement, para. 2211.
383 Đorđević Appeal Brief, para. 87, citing Trial Judgement, paras 2051, 2126.
384 Đorđević Appeal Brief, para. 87, referring to *Krajišnik* Appeal Judgement, para. 157.
385 *Krajišnik* Trial Judgement, para. 1087.
386 *Krajišnik* Appeal Judgement, para. 157. The Appeals Chamber also found that the Trial Judgement was too vague both with respect to the temporal and the geographical scope of the JCE, which, as noted above, is not an issue in the Trial Judgement in this case.
387 Trial Judgement, para. 2128.
388 Trial Judgement, para. 2128. The Trial Chamber clearly stated that while it was unable to make an exact determination as to who were the participants and who were the perpetrators, it was clear that:

> certain members of such units worked together in the implementation of the common purpose. The forces of the MUP and the VJ worked in a highly coordinated manner, and units and individual members were drawn into the plan as participants and perpetrators, while the overall common plan was directed by at least the core members of the JCE identified above (Trial Judgement, para. 2128).

389 Trial Judgement, paras 2126-2128.

E. Conclusion

131. In light of the foregoing, the Appeals Chamber dismisses Đorđević's third ground of appeal in its entirety.

VI. ĐORĐEVIĆ'S FOURTH GROUND OF APPEAL: ALLEGED ERRORS CONCERNING THE PLURALITY OF PERSONS

A. Arguments of the parties

132. Under his fourth ground of appeal, Đorđević submits that the Trial Chamber committed errors of law and fact in assessing: (i) whether the identified members of the JCE acted in unison; and (ii) if they did, whether their joint action was in furtherance of a shared criminal purpose.[390]

133. With respect to the first submission, Đorđević claims that the Trial Chamber failed to take into account its own finding that the MUP was not re-subordinated to the VJ when it assessed whether the VJ, MUP, and civilian leaders acted in unison.[391] In his submission, the Trial Chamber's finding that the MUP and VJ forces were coordinated by the Joint Command for Kosovo and Metohija (respectively, "Joint Command" and "KiM") is insufficient to establish the required unison of action.[392]

134. With respect to the second submission, Đorđević argues that the Trial Chamber erred in failing to assess the conduct of each member of the JCE in detail and compare it with the conduct of the other members in order to conclude that they acted in pursuit of the common purpose.[393]

135. In addition, the Appeals Chamber understands that there is a common underlying argument throughout this ground of appeal. Đorđević submits that the Trial Chamber erred in reaching a different conclusion than the one reached by the Trial Chamber in the *Milutinović et al.* case, although based on the same evidence; and that it did so by incorrectly applying a different and lower standard of proof to the evidence concerning the core JCE members in this case, compared to the one applied in the *Milutinović et al.* case.[394] Specifically, Đorđević contends that no reasonable trial chamber could have concluded that Ojdanić and Lazarević were members of the JCE and acted in unison with its other members, especially bearing in mind that the *Milutinović et al.* Trial Chamber found that they were not members of the JCE.[395] He argues that a different result could

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390 Đorđević Appeal Brief, para. 93.
391 Đorđević Appeal Brief, para. 94, referring to Trial Judgement, paras 261-263, 2126. See also Đorđević Reply Brief, para. 23.
392 Đorđević Appeal Brief, para. 95, referring to Trial Judgement, para. 264.
393 Đorđević Appeal Brief, para. 97, referring to *Krajišnik* Appeal Judgement, paras 250-282. See also Đorđević Reply Brief, paras 24-26.
394 Đorđević Appeal Brief, paras 96, 98.
395 Đorđević Appeal Brief, para. 96, referring to *Milutinović et al.* Trial Judgement, vol. 3, paras 618, 919. See Đorđević Reply Brief, para. 26.

not be reached in the present case, as "[t]here was no more evidence before the Trial Chamber in Đorđević's trial than was before the Trial Chamber in *Milutinović et al.* case".[396] In addition, Đorđević submits that another reasonable conclusion was open on the basis of the evidence, namely that the preparations for military action in early 1999 were a joint action in pursuit of legitimate targets, such as the KLA or NATO.[397] Similarly, Đorđević points out that the Trial Chamber in the *Milutinović et al.* case could not conclude that the actions of Lukić were part of the criminal purpose in relation to the concealment of crimes.[398] As a result, Đorđević contends that the "test of joint action in pursuit of a JCE" was not satisfied by the Trial Chamber's approach in this case and that a higher threshold was necessary to impose criminal liability.[399]

136. The Prosecution responds that Đorđević misstates the law in arguing that in order to satisfy the criteria for joint criminal enterprise liability, it is required to establish that a plurality of persons acted in unison.[400] The Prosecution further argues that the Trial Chamber's factual findings demonstrate that the required plurality of persons acting together was established on the evidence.[401] The Prosecution adds that Đorđević's reference to the *Milutinović et al.* Trial Judgement is inapposite because the findings in that judgement can have "no preclusive effect on the *Đorđević* Trial Chamber".[402] Regarding Đorđević's argument that the Serbian forces acted in pursuit of legitimate targets, the Prosecution responds that Đorđević ignores the Trial Chamber's finding that while anti-terrorist activities might have been among the objectives, the Serbian operations were directed against the Kosovo Albanian civilians.[403] Finally, the Prosecution argues that contrary to Đorđević's submissions, the Trial Judgement contains sufficient findings with respect to the acts of each of the 11 identified JCE members.[404]

137. Đorđević replies that, rather than suggesting an additional requirement to joint criminal enterprise liability, his argument is that where the "alleged JCE members do not act in unison", a

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396 Đorđević Appeal Brief, para. 96.
397 Đorđević Appeal Brief, para. 98. In this regard, Đorđević refers to the *Milutinović et al.* Trial Chamber's finding that it was unable to conclude that Ojdanić's and Lazarević's actions "reflected a shared criminal purpose". Đorđević Appeal Brief, para. 98, referring to *Milutinović et al.* Trial Judgement, paras 618, 919. See also Đorđević Reply Brief, para. 26.
398 Đorđević Appeal Brief, para. 98, referring to Trial Judgement, para. 2120, fn. 5174.
399 Đorđević Appeal Brief, para. 98.
400 Prosecution Response Brief, paras 75, 78-80.
401 Prosecution Response Brief, para. 81, referring to Trial Judgement, para. 2126.
402 Prosecution Response Brief, para. 82.
403 Prosecution Response Brief, para. 83, referring to Trial Judgement, paras 2129-2130.
404 Prosecution Response Brief, para. 84, referring, by way of example, to the Trial Chamber's findings with respect to Slobodan Milošević (Trial Judgement, paras 230, 233, 1979).

trier of fact is expected to scrutinise the evidence before concluding on the existence of a shared common purpose.[405]

B. Analysis

138. With regard to Đorđević's first submission, the Appeals Chamber emphasises that in order to conclude on the existence of a common purpose, it is *not required* to establish that a plurality of persons acted in unison.[406] What is required to be established is "that a plurality of persons shared the common criminal purpose".[407] The existence of such a common criminal purpose, particularly one that has not been previously arranged or formulated but materialised extemporaneously, *may be inferred* "from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise".[408] In other words, it is not necessary to establish that joint criminal enterprise members acted in unison in order to reach a conclusion on the existence of the common purpose.

139. In the present case, the Trial Chamber concluded that there existed "a plan, involving a plurality of persons, to modify the demographic balance of Kosovo by a campaign of terror and violence, and that these persons participated in the common purpose and shared the intent to commit such crimes".[409] It based this conclusion on, *inter alia*, the "scale of the operations across Kosovo, the pattern of crimes committed against Kosovo Albanian civilians, and the multitude of different units of the VJ and MUP involved in such actions".[410] In support of this conclusion the Trial Chamber referred to several factors, *inter alia*, evidence regarding the establishment and functioning of the Joint Command to plan and coordinate operations of the MUP and VJ in Kosovo, minutes of meetings of MUP and VJ organs where joint operations were planned and ordered, orders effectuating such plans and evidence that the plans were implemented on the ground, monitored, and reported on by the same persons, and the fact that at least some JCE members were directly involved in the concealment of crimes committed pursuant to the common plan.[411] In addition to the above factors, the Trial Chamber also noted that the evidence adduced in the case allowed it to conclude that the members of the JCE acted in unison to implement the JCE.[412] The

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405 Đorđević Reply Brief, para. 22.
406 *Brđanin* Appeal Judgement, para. 430, and references cited therein. *Contra* Đorđević Appeal Brief, para. 91.
407 *Brđanin* Appeal Judgement, para. 430, and references cited therein.
408 *Krajišnik* Appeal Judgement, fn. 418, and references cited therein.
409 Trial Judgement, para. 2128.
410 Trial Judgement, para. 2128.
411 Trial Judgement, para. 2126.
412 The Trial Chamber considered: (i) evidence on the establishment and "functioning" of the Joint Command to plan and coordinate the MUP and VJ; (ii) minutes of meetings of the VJ Collegium, the Supreme Defence Council, the VJ General Staff, the MUP Collegium, and the MUP Staff for Kosovo, where the joint operations were planned and ordered; (iii) orders effectuating the plans; (iv) evidence that such plans were implemented on the ground,

Appeals Chamber finds that even if the MUP was not re-subordinated to the VJ, Đorđević has failed to show how this would vitiate the Trial Chamber's conclusion on the existence of the JCE. Therefore, beyond merely disagreeing with the Trial Chamber's findings, Đorđević has failed to demonstrate that they are erroneous.

140. The Appeals Chamber notes that Đorđević's argument regarding the link of coordination, rather than subordination, between the MUP and the VJ was presented at trial.[413] The Trial Chamber concluded that the forces of the MUP and the VJ "worked in a highly coordinated manner" towards the achievement of the criminal goal.[414] In this context, the absence of subordination between the two bodies is irrelevant considering that cooperation between the participants of the JCE implies the existence of the common criminal purpose. Nor does cooperation, rather than subordination, undermine the Trial Chamber's finding that the JCE members acted in unison.[415] Indeed, the Trial Chamber's finding that the Joint Command coordinated the actions of the MUP and VJ does not undermine, and can only provide further support for, the finding that the JCE members acted together in implementing the common purpose.[416] Moreover, the Trial Chamber was clearly cognizant of the re-subordination issue when making these findings.[417] The Appeals Chamber finds that Đorđević has failed to show that the Trial Chamber erred.

141. As regards Đorđević's second submission, the Appeals Chamber recalls that in order to conclude that persons identified as joint criminal enterprise members acted in furtherance of the joint criminal enterprise, a trial chamber is required to identify the plurality of persons belonging to the joint criminal enterprise and establish that they shared a common criminal purpose.[418] The plurality of persons can be sufficiently identified by referring to "categories or groups of persons", and it is not necessary to name each of the individuals involved.[419] Furthermore, the common purpose can be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.[420] It is therefore not required, as a matter of law, that a trial chamber make a separate finding on the individual actions and the intent of each member of a joint criminal

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monitored and reported on by the same persons; and (v) that at least some JCE members were directly involved in the concealment of crimes (Trial Judgement, para. 2126).

413 See Trial Judgement, para. 2123, referring to Đorđević Closing Brief, para. 297.

414 Trial Judgement, para. 2128.

415 See *supra*, para. 139.

416 *Contra* Đorđević Appeal Brief, para. 95, referring to Trial Judgement, para. 264.

417 See Trial Judgement, para. 2123.

418 See *supra*, para. 138. See also *Brđanin* Appeal Judgement, para. 430.

419 See *Krajišnik* Appeal Judgement, para. 156, referring to *Limaj et al.* Appeal Judgement, para. 99, *Brđanin* Appeal Judgement, para. 430.

enterprise to establish that a plurality of persons acted together in implementing the common purpose. The Appeals Chamber therefore finds that the Trial Chamber was not required to examine the individual actions or scrutinise the intent of each member of the JCE.

142. Furthermore, in relation to Đorđević's general contention that the Trial Chamber erred in reaching a different conclusion by applying a different standard than the Trial Chamber in *Milutinović et al.* case,[421] the Appeals Chamber considers that "findings of criminal responsibility made in a case before the Tribunal are binding only for the individual accused in that specific case".[422] Therefore, in the *Milutinović et al.* case the Trial Chamber was required to scrutinise the *actus reus* and *mens rea* of each JCE member who was accused in that case in order to reach a conclusion beyond a reasonable doubt on their individual criminal responsibility. However, in the present case, findings concerning those individuals are only relevant to the analysis aimed at establishing that Đorđević acted in concert with a plurality of persons and shared the common purpose to further the JCE, in order to make a finding beyond a reasonable doubt regarding his individual criminal responsibility only.

143. In any event, the Appeals Chamber recalls that in making factual findings, judges rely solely and exclusively on the evidence adduced in the particular case.[423] Therefore, it is entirely acceptable that on the basis of two different case records, judges arrive at different conclusions, even if they concern the same events.[424] Merely referring to factual conclusions from another case falls short of showing that *no* reasonable trier of fact could reach the same conclusion as the Trial Chamber on the basis of the evidence adduced in this particular case.[425]

144. The Appeals Chamber therefore rejects Đorđević's submission that the Trial Chamber erred in failing to address individual actions and intentions of the identified participants of the JCE by applying a lower standard.

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420 See *Krajišnik* Appeal Judgement, fn. 418, and references cited therein; *Brđanin* Appeal Judgement, para. 430.

421 Đorđević Appeal Brief, paras 96, 98.

422 *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-A, Decision on Motion to Intervene and Statement of Interest by the Republic of Croatia, 8 February 2012, para. 12.

423 *Cf.*, in a different context, *Nahimana et al.* Appeal Judgement, paras 78, 84-85; *Akayesu* Appeal Judgement, para. 269.

424 *Lukić and Lukić* Appeal Judgement, para. 396, citing *Krnojelac* Appeal Judgement, paras 11-12. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions even on the basis of the same evidence (see *e.g. Kupreškić et al.* Appeal Judgement, para. 30; *Tadić* Appeal Judgement, para. 64; *Rutaganda* Appeal Judgement, para. 22).

425 See *supra*, para. 20.

145. The issue before the Appeals Chamber is instead whether a reasonable trier of fact could reach the same conclusion as the Trial Chamber, on the basis of the evidence on the record in this case. The Trial Chamber discussed ample evidence in this regard and made findings on contributions of JCE members to the common purpose.[426] It identified the core members of the JCE and, as discussed above, concluded that they acted in unison to further the JCE.[427] Further, the Trial Chamber made several findings on the shared intent of JCE members with respect to the implementation of the common purpose through the commission of deportation, forcible transfer, murder, and persecutions.[428] As discussed later in this Judgement, Đorđević does not show why, in his opinion, the Trial Chamber erred in relying on these findings to conclude that the JCE members participated in the common plan.

146. The Appeals Chamber has already discussed and rejected Đorđević's arguments suggesting that the Serbian forces acted in pursuit of a legitimate target rather than in furtherance of a common criminal purpose.[429] Đorđević's submissions under this ground of appeal do not add anything in this regard.

147. Considering the above, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact, based on the evidence, could have reached the same conclusion as the Trial Chamber did; and merely repeats the arguments that were unsuccessful at trial without demonstrating that their rejection by the Trial Chamber constituted an error warranting the intervention of the Appeals Chamber.[430]

148. In light of the foregoing, the Appeals Chamber dismisses Đorđević's fourth ground of appeal.

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[426] See Trial Judgement, paras 2012, 2013, 2018, 2020, 2021, 2023, 2025, 2035, 2037, 2051, 2068, 2112, 2118, 2127. See also Exhibits P387, p. 3; D343. These contributions comprised of ordering co-ordinated operations of the MUP and VJ and associated forces to commit crimes in furtherance of the common plan, and to conceal the evidence thereof (Trial Judgement, paras 2112, 2118, 2128). See also *infra*, paras 179-193, 198-208.

[427] See *supra*, para. 139; Trial Judgement, paras 2126-2128.

[428] Trial Judgement, paras 2014, 2018, 2020, 2021, 2023, 2025, 2118, 2126.

[429] See *supra*, paras 97-98, 107-109.

[430] See *supra*, para. 20.

VII. ĐORĐEVIĆ'S FIFTH GROUND OF APPEAL: ALLEGED ERRORS CONCERNING THE COMMON PURPOSE

A. Arguments of the parties

149. Đorđević submits that the Trial Chamber erred in finding that the purpose of the JCE was to modify the ethnic balance of Kosovo in order to ensure Serbian control over the province, without any proof that the JCE members, including Đorđević, intended to expel Kosovo Albanians on a *permanent* basis.[431] He argues that an intention to expel on a temporary basis would lead to a temporary shift in the ethnic balance; therefore, it would not achieve the purpose of ensuring Serbian control over the province, since such control would be lost the moment the Kosovo Albanians returned.[432] Moreover, Đorđević argues that there is a "gap" in the Trial Chamber's analysis as there is no finding as to "how the intentional displacement of Kosovo Albanians on an internal and/or temporary basis supported the conclusion that the purpose of the JCE was to permanently alter the ethnic balance of Kosovo".[433]

150. Further, Đorđević contends that the Trial Chamber erred in finding that the seizure and destruction of identity documents was widespread and systematic[434] since: (i) the identification documents of at least eight witnesses – in six municipalities – were not confiscated upon their departure from Kosovo;[435] and (ii) it failed to consider the possibility that the destruction of documents was not the result of a pre-planned general practice formulated at a higher level, but rather an occurrence caused by frequent hostility and ill-discipline amongst low ranking VJ and/or MUP members.[436] Furthermore, Đorđević argues that the Trial Chamber's findings are inconsistent and inadequately reasoned because the Trial Chamber made "imprecise references to 'senior leadership or [...] FRY and Serbian governments'", instead of scrutinising the intentions of the JCE members.[437]

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431 Đorđević Appeal Brief, paras 100-101, 105-107; Đorđević Reply Brief, para. 27. See also Appeal Hearing, 13 May 2013, AT. 173, where Đorđević reiterates, in relation to the JCE members, that although paragraph 2127 of the Trial Judgement identifies them, their respective roles are not clear (Appeal Hearing, 13 May 2013, AT. 173).

432 Đorđević Appeal Brief, paras 100-101, 105-107; Đorđević Reply Brief, para. 27.

433 Đorđević Appeal Brief, paras 105-107.

434 Đorđević Appeal Brief, paras 102-103, referring to Trial Judgement, paras 2007-2008, 2080.

435 Đorđević Appeal Brief, para. 103, referring to Trial Judgement, fn. 1857, paras 643, 724, 777, 822, 1075, 1095, 1099.

436 Đorđević Appeal Brief, para. 103.

437 Đorđević Appeal Brief, para. 104, referring to Trial Judgement, para. 2051.

151. The Prosecution responds that Đorđević's challenges should be summarily dismissed.[438] It contends that despite Đorđević's claims to the contrary, the Trial Chamber relied on a "wealth of evidence" in finding that the MUP's practice of confiscating and destroying Kosovo Albanians' identification documents was a common and widespread occurrence.[439] With regard to the witnesses whose identification documents were not confiscated, the Prosecution notes that the Trial Chamber considered that these individuals were subject to a series of acts that were intended to instil fear and persuade them to leave Kosovo.[440] The Prosecution also notes that in addition to the MUP's destruction of identification documents, the Trial Chamber considered six other factors in finding that JCE members shared a common purpose, namely: (i) demographic indications; (ii) the build up and use of Serbian and FRY forces along with the arming of the non-Albanian civilian population; (iii) the pattern of crimes; (iv) the coordinated use of MUP and VJ forces; (v) the disproportionate use of force in "anti-terrorist" actions; and (vi) efforts to conceal the crimes against Kosovo Albanian civilians.[441] Further, the Prosecution argues that Đorđević failed to reference any instance in which the Trial Chamber found that the displacement of Kosovo Albanians was meant to be temporary.[442] The Prosecution contends that Đorđević fails to identify the Trial Chamber's findings he alleges to be "inconsistent and inadequately reasoned" and this argument should therefore also be summarily dismissed.[443] It also argues that Đorđević fails to substantiate his claim that the Trial Chamber did not scrutinise the intentions of the alleged JCE members.[444]

152. Đorđević replies that the Prosecution ignores his contentions that the Trial Chamber was required to find that the JCE members shared a common goal of permanently expelling Kosovo Albanians, and that the Trial Chamber failed to make such a finding.[445]

B. Analysis

153. The Appeals Chamber finds that Đorđević's submissions misrepresent the Trial Chamber's findings. The purpose of the JCE, as found by the Trial Chamber, was not to *permanently* change the ethnic balance of Kosovo, but to demographically modify Kosovo "to ensure continued Serbian control over the province"[446] by waging a campaign of terror against the Kosovo Albanian civilian

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438 Prosecution Response Brief, para. 86.
439 Prosecution Response Brief, para. 87.
440 Prosecution Response Brief, paras 90-91.
441 Prosecution Response Brief, para. 89, referring to Trial Judgement, paras 2009-2069, 2081-2108.
442 Prosecution Response Brief, para. 93.
443 Prosecution Response Brief, para. 92, referring to Đorđević Appeal Brief, para. 104.
444 Prosecution Response Brief, para. 92.
445 Đorđević Reply Brief, para. 27.
446 Trial Judgement, para. 2003.

population, which included deportations, forcible transfers, murders, and the destruction of religious or culturally significant property.[447]

154. The Appeals Chamber considers that this goal does not require a finding that the ethnic balance be changed permanently, or that all members of the JCE shared the intent to permanently remove the Kosovo Albanians. As a matter of law, the objective or common purpose does not need to be achieved in order for a trial chamber to conclude that a plurality of persons shared a common purpose or that crimes were committed in furtherance of a joint criminal enterprise.[448] Therefore, the Trial Chamber's conclusion that the common purpose was to change the ethnic balance of Kosovo to ensure Serb control over the province would still be reasonable even if the shift in ethnic balance was temporary and the purpose in fact not achieved. Moreover, in relation to the crimes through which a common purpose is implemented, the Appeals Chamber stresses that the *mens rea* of deportation and forcible transfer do *not* require an intention to displace the persons across the border on a *permanent* basis.[449] The Trial Chamber was therefore not required to enter such findings.

155. Nevertheless, the Trial Chamber would not be prevented from relying on evidence of permanent displacement in support of its conclusions. In this case, the Trial Chamber was clearly cognisant that evidence of preventing the return of the Kosovo Albanian population indicated the common purpose of changing the ethnic balance of Kosovo and ensuring Serbian control. The Trial Chamber found that the only reasonable inference as to the intent behind the policy of seizing and destroying identification documents and vehicle licences and plates, for example, was "*to prevent the Kosovo Albanians from proving their identities as citizens with the right to return*".[450] The Trial Chamber was "satisfied that this constitute[d] strong evidence of a criminal plan to expel the Kosovo Albanian population from Kosovo".[451] The Appeals Chamber finds that there was no gap in the Trial Chamber's analysis.

156. The Appeals Chamber further finds that the Trial Chamber's conclusion that the seizure of identification documents and vehicle licences and plates amounted to a widespread and systematic

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[447] See Trial Judgement, paras 2003, 2007, 2128, 2130-2153.

[448] See *Vasiljević* Appeal Judgement, para. 100.

[449] *Krajišnik* Appeal Judgement, para. 304. See also *Stakić* Appeal Judgement, paras 278, 307; *Brđanin* Appeal Judgement, para. 206.

[450] Trial Judgement, para. 2080 (emphasis added). The Trial Chamber found unpersuasive Đorđević's argument that the documents were not actually lost since Kosovo Albanians could simply reapply for replacement documents, because that would entail reapplying to the same forces that had originally confiscated them and the Serbian government had ordered that personal identification numbers would not be re-issued "until further notice" (Trial Judgement, para. 2079).

policy is not undermined by the fact that the identification documents of at least eight persons were not seized.[452] In reaching its conclusion on the existence of such a practice, the Trial Chamber relied on ample evidence that in March and April 1999, MUP forces confiscated and destroyed the identification documents, and, at times, vehicle licences and plates, of individuals who were expelled from a number of towns and villages.[453] It further relied on the fact that the practice took place in almost all municipalities in Kosovo and that people travelling in convoys were asked for their identification documents multiple times at designated checkpoints, and again at the border crossing.[454] The Trial Chamber was presented with overwhelming evidence that people crossing the border in refugee convoys were instructed to give up their identification documents, vehicle registration, and licence plates at the crossing.[455] Based on the evidence of two witnesses, the Trial Chamber found that in June 1999, MUP officers purposefully burned a large number of identification documents, passports, and applications for passports in Priština/Prishtinë.[456] The Trial Chamber noted that although the trial record contained no written orders directing the MUP and the VJ to confiscate documents, Witness K54 gave evidence that it was "common knowledge" that there were orders for the police and the VJ to confiscate Kosovo Albanians' identification documents at the border and burn them, in order to prevent them from claiming that they were from Kosovo.[457] Witness K89 testified that he received an order to destroy identification documents of Kosovo Albanians and that he also witnessed identification documents being confiscated and destroyed by the VJ.[458] Furthermore, the Trial Chamber also considered and found unreliable the evidence of Defence witnesses who claimed not to be aware of any such practice or who claimed

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451 Trial Judgement, para. 2080.

452 See Đorđević Appeal Brief, para. 103.

453 Trial Judgement, paras 2072-2073.

454 Trial Judgement, paras 2072-2073, 2080. See also Trial Judgement, para. 2077, discussing the credibility of Defence witnesses who denied being aware of the practice to seize identification documents or that documents were seized by the VJ and MUP forces.

455 Trial Judgement, paras 530-531 (unclear how many persons, as witnesses gave inconsistent evidence: 8,000, 10,000, or 4,000-5,000 (Trial Judgement, fn. 1943)), 700 (several thousands), 739 (undefined how many persons, however the evidence is that the convoy was transported to the border by 20 busses and truck that made several rides (Trial Judgement, paras 736-738)), 905 (300 persons), 906 (7,000-8,000), 909 (10,000-15,000). See Exhibits P281, p. 3 (about 10.000-12.000 were in the convoy; there was a basket at the border where people had to throw the identification documents in); P499, pp 4458-4459, 4484 (there is no indication of numbers, however the convoy crossing over the border took so long and was so crowded that it took the witness three hours to advance approximately 50 meters. At the border there were baskets where the refugees had to throw in their identification documents before crossing the border); P628, pp 4156-4157 (a little less than 20,000); K81, 15 May 2009, T. 4545-4546 ("approximately a thousand").

456 Trial Judgement, paras 2075-2076, referring to Richard Ciaglinski, 25 May 2009, T. 5290-5291, Karol John Drewienkiewicz, 23 Jun 2009, T. 6399, Exhibits P832, p. 10, P833, pp 3210-3211, P834, pp 6848-6849, P997, pp 7816, 7822, 7994-7996.

457 Trial Judgement, para. 2078, referring to Exhibit P784, p. 2.

458 Trial Judgement, para. 2078, referring to Exhibit P1274 pp 9124-9126, 9154-9155, 9186, K89, 26 Aug 2009, T. 8476-8478.

that there was no such practice.[459] While the Trial Chamber recognised that the eight witnesses referred to by Đorđević did not have their identification documents seized, the Appeals Chamber is satisfied that based on its extensive analysis of the evidence, the Trial Chamber reasonably concluded that the practice of seizure of identification documents and vehicle licenses and plates existed and was widespread and systematic.[460]

157. In relation to Đorđević's argument that the Trial Chamber failed to consider and exclude the possibility that instances of destruction of identification documents were equally consistent with "hostility and ill-discipline" amongst low ranking members of the VJ and/or MUP rather than proof of a high level policy,[461] the Appeals Chamber recalls that a trial chamber does not have to discuss other inferences it may have considered, as long as it is satisfied that the inference it retained was the only reasonable one.[462] Besides disagreeing with the Trial Chamber's finding, Đorđević has failed to point to any evidence on the record supporting his theory and to demonstrate how the Trial Chamber erred. His argument is therefore dismissed.[463]

158. The Appeals Chamber further finds unpersuasive Đorđević's contention that the Trial Chamber's findings are "inconsistent and inadequately reasoned", because it made "imprecise references to 'senior leadership' or [...] 'FRY and Serbian governments'" instead of "scrutinising" the intention of the alleged JCE members.[464] First, the Appeals Chamber recalls that in order to establish that a plurality of persons shared the common purpose,[465] the Trial Chamber was not required as a matter of law to scrutinise the intention of each JCE member.[466] Further, it was entitled to infer, as it did, that the JCE members shared the common plan based on circumstantial evidence, including the fact that they acted in unison.[467] Furthermore, Đorđević ignores the Trial

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459 Trial Judgement, para. 2071, referring to Defence Closing Brief, paras 351-352, 355 and 358. See also Trial Judgement, paras 2007-2008, 2072-2080 (citations omitted). The Appeals Chamber notes that the Trial Chamber did not estimate the number of those whose identification documents were seized, however, it did estimate that at least 200,000 Kosovo Albanians were deported from the specific locations listed in the indictment from 24 March to 20 June 1999 (Trial Judgement, para. 1700).

460 Trial Judgement, para. 2080. The Trial Chamber found that this was *strong* evidence and not, as Đorđević argues, *the strongest* indication of a plan to prevent the Kosovo Albanians from returning (Trial Judgement, para. 2080.) *Contra* Đorđević Appeal Brief, paras 102-103.

461 Đorđević Appeal Brief, para. 103.

462 *Krajišnik* Appeal Judgement, para. 192. See Trial Judgement, paras 2080, 2130. See also Trial Judgement, para. 2077 (dealing with the credibility of Defence witnesses who claimed they did not know of any such policy).

463 See *supra*, para. 20.

464 Đorđević Appeal Brief, para. 104. See Trial Judgement, paras 2126-2128.

465 *Brđanin* Appeal Judgement, para. 430, and references cited therein. See *supra*, paras 138-139, 141; *infra*, para. 175.

466 See *Krajišnik* Appeal Judgement, fn. 418, and references cited therein; *Brđanin* Appeal Judgement, para. 430, and references cited therein. See also *supra*, para. 141.

467 Trial Judgement, paras 2025-2026, 2051, 2126-2128. See *Krajišnik* Appeal Judgement, fn. 418, and references cited therein. See also *supra*, para. 145.

Chamber's other relevant findings.[468] As discussed in other parts of this Judgement, the Trial Chamber clearly identified the core members of the JCE,[469] discussed extensively and in detail the command structure coordinating the actions of the Serbian forces in Kosovo, set out the role of the identified JCE members in this structure,[470] and found that the evidence supported a finding that they acted in unison to implement the JCE.[471] Đorđević's argument is therefore dismissed.[472]

159. In light of the above considerations, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could conclude that a shared common plan existed with the purpose to modify Kosovo's ethnic balance and ensure Serbian control over the territory by waging a campaign of terror and violence against the Kosovo Albanian population.

C. Conclusion

160. In light of the foregoing, the Appeals Chamber dismisses Đorđević's fifth ground of appeal in its entirety.

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[468] See Đorđević Appeal Brief, para. 104, referring to Trial Judgement, para. 2051. See Trial Judgement, paras 2126-2128.

[469] See *supra*, paras 111, 127, 145. See *infra*, para. 166.

[470] See *infra*, paras 166-169.

[471] See *supra*, paras 139, 145. The Appeals Chamber notes Đorđević suggestion in passing that the Trial Chamber also failed to establish the alleged JCE members' intent to commit murders and persecutions of Kosovo Albanians (Đorđević Appeal Brief, para. 106). This argument will be addressed later in this Judgement (see *infra*, paras 188-193, 199-207). Whether Đorđević possessed the requisite intent will be addressed later in this Judgement (see *infra*, paras 463-514).

[472] See *supra*, para. 20.

VIII. ĐORĐEVIĆ'S SIXTH GROUND OF APPEAL, IN PART: ALLEGED ERRORS WITH RESPECT TO ATTRIBUTING PERPETRATORS' CRIMES TO JCE MEMBERS

A. Introduction

161. The Trial Chamber found that the JCE members shared the common plan to change the ethnic balance of Kosovo in order to ensure Serbian control by waging a campaign of terror against the Kosovo Albanian population through murders, deportation, other inhumane acts (forcible transfers), and persecutions (through murder, deportation, forcible transfer, and wanton destruction of religious sites).[473] As recalled earlier, the Trial Chamber found that this campaign was implemented by the Serbian forces against Kosovo Albanians starting in 1998, before the JCE had come into existence by mid-January 1999, and continuing throughout the war.[474]

B. Arguments of the parties

162. As part of the submissions in his sixth ground of appeal, Đorđević contends that the Trial Chamber failed to establish and/or provide reasoning as to "how each physical perpetrator was *used* to commit the crimes that they committed",[475] thus extending his joint criminal enterprise liability far beyond the jurisprudence of the *Brđanin* and *Krajišnik* Appeal Judgements.[476] He adds that the Trial Chamber's approach in this regard is too vague and is phrased ambiguously as the Trial Chamber simply concluded that the vast majority of the crimes, but not all of them, were part of the common purpose.[477] Đorđević argues that in so doing, the Trial Chamber failed to demonstrate the required link for each crime site.[478]

163. The Prosecution responds that the Trial Chamber properly applied the law and found that JCE members controlled MUP and VJ structures and used them in coordination to implement the JCE.[479] The Prosecution argues that the Trial Chamber properly convicted Đorđević after having made the necessary findings in relation to: (i) the nature of the common plan; (ii) how the JCE members used the physical perpetrators to implement it; and (iii) which crimes fell within the

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[473] Trial Judgement, paras 2126-2128, 2130, 2136, 2138-2149, 2151-2152.
[474] See *supra*, para. 86.
[475] Đorđević Appeal Brief, para. 126.
[476] Đorđević Appeal Brief, para. 126; Appeal Hearing, 13 May 2013, AT. 173.
[477] Đorđević Appeal Brief, paras 127-128, referring to Trial Judgement, paras 2051, 2069, 2128, 2132, 2136.
[478] Đorđević Appeal Brief, paras 127-128, referring to Trial Judgement, paras 2051, 2069, 2128, 2132, 2136.
[479] Prosecution Response Brief, paras 105-106.

common plan.[480] The Prosecution argues that Đorđević fails to show that no reasonable trial chamber could have reached this conclusion.[481]

164. Đorđević replies that based on the case law, merely identifying a physical perpetrator's apparent affiliation (*e.g.* MUP or VJ) without showing who used that physical perpetrator is insufficient.[482] Finally, he submits that in any event the Trial Chamber applied the wrong standard, because it suggested that the crimes were committed as a result of "vague language in orders".[483]

C. Analysis

165. The Appeals Chamber recalls that all members of a joint criminal enterprise are responsible for a crime committed by a non-member of the joint criminal enterprise if it is shown that the crime can be imputed to at least one member who acted in furtherance of the common plan when using the non-member.[484] The establishment of the link between the crime in question and the joint criminal enterprise member is to be assessed on a case-by-case basis.[485] As a matter of law, there is no requirement that a trial chamber demonstrate "how each physical perpetrator was *used* to commit the crimes" in order to establish such link, provided that the trial chamber identifies how one or more members of the joint criminal enterprise used the forces to which these physical perpetrators belonged in furtherance of the common plan.[486]

166. The Trial Chamber identified the following individuals as members of the JCE: Slobodan Milošević, President of the FRY; Nikola Šainović, Deputy Prime Minister of the FRY responsible for Kosovo; Vlajko Stojiljković, Minister of the Interior; Vlastimir Đorđević, Head of the RJB; Radomir Marković, Head of the RDB; Sreten Lukić, Head of the MUP Staff for Kosovo; Stevanović, Chief of the RJB Police Administration; Dragan Ilić, Chief of the RJB Crime Police Administration; Dragoljub Ojdanić, Chief of the VJ General Staff/Supreme Command Staff; Nebojša Pavković, Commander of the VJ 3rd Army; and Vladimir Lazarević, Commander of the Priština Corps.[487]

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480 Prosecution Response Brief, paras 106-111.
481 Prosecution Response Brief, para. 111.
482 Đorđević Reply Brief, paras 29-30.
483 Đorđević Reply Brief, para. 35.
484 *Krajišnik* Appeal Judgement, paras 225, 235.
485 *Martić* Appeal Judgement, paras 168-169; *Brđanin* Appeal Judgement, paras 413, 418; *Krajišnik* Appeal Judgement, paras 225-226. See also *Krajišnik* Appeal Judgement, paras 235-237.
486 See *Krajišnik* Appeal Judgement, paras 235-237. *Contra* Đorđević Appeal Brief, para. 126 (emphasis in original).
487 Trial Judgement, para. 2127.

167. It further concluded that VJ, MUP, and associated forces that physically committed the crimes "were used by JCE members, in coordination, to implement the common plan".[488] In reaching this conclusion it found that the Joint Command coordinated the actions of the VJ, MUP, and associated forces in Kosovo before and during the Indictment period.[489] The Trial Chamber also held that the command bodies of the VJ (being the Supreme Defence Council, the VJ Collegium, as well as the leadership of the VJ 3rd Army and of the Priština Corps in particular) and of the MUP (being the MUP Staff in Priština/Prishtinë, the MUP Collegium, the chiefs of the RDB and RJB, and within the RJB the heads of the Police Administration and Crime Police Administration) "who continued to exercise their powers of authority and control over the forces under their command, including Special Police and Special Anti-Terrorist Units ("PJP" and "SAJ", respectively), were responsible for implementing the plan for the use of the forces in an operational sense".[490]

168. The Trial Chamber also set out in great detail the hierarchical structure and functioning of the VJ and MUP forces present and/or deployed in Kosovo, as well as paramilitary or volunteer forces.[491] These forces included for the MUP: the RJB, under the control of Đorđević,[492] the most important organisational units of which were the Crime Police Administration, headed by Dragan Ilić, and the Police Administration, headed by Stevanović;[493] the Secretariat for Internal Affairs ("SUP") (composed of the OUP), all subordinated to the RJB[494] and whose operations were planned and coordinated by the MUP Staff in Priština/Prishtinë headed by Lukić;[495] the PJP, under the control of Đorđević;[496] the SAJ, under the control of Đorđević;[497] and the RDB, directed and controlled by Slobodan Milošević through its Chief, Marković.[498] For the VJ, the primary unit in Kosovo was the Priština Corps, an element of the VJ 3rd Army, with a headquarter in

488 Trial Judgement, para. 2051. See also Trial Judgement, paras 2036, 2128.
489 Trial Judgement, paras 252, 241, 2051. The Appeals Chamber recalls the Trial Chamber's previous finding that members of the Joint Command included the following JCE members: Nikola Šainović, Vlastimir Đorđević, Nebojša Pavković, Sreten Lukić, Vladimir Lazarević (Trial Judgement, para. 239. See also Trial Judgement, para. 241).
490 Trial Judgement, para. 2051. The Trial Chamber further considered: the testimony of VJ witnesses who testified they were ordered to expel Kosovo Albanians or to burn villages (Trial Judgement, para. 2007); orders issued by the VJ General Staff, 3rd Army command on the use of the VJ in coordination with the MUP prior to NATO intervention (Trial Judgement, para. 2018); Đorđević's dispatch for the call and registration of volunteers to bolster the MUP for the forthcoming mopping up operations (Trial Judgement, paras 2020-2021); and its finding on a joint decision to use paramilitaries together with the MUP (Trial Judgement, para. 2021).
491 Trial Judgement, Chapter IV.
492 Trial Judgement, paras 40-45, 1892, 1898, 2154, 2171.
493 Trial Judgement, paras 41, 60.
494 Trial Judgement, paras 46, 48.
495 Trial Judgement, paras 49, 1897.
496 Trial Judgement, paras 61-63, 1892, 1898, 2154, 2171.
497 Trial Judgement, paras 71-72, 1892, 1898, 2154, 2171.
498 Trial Judgement, para. 79. The RDB included the JSO, headed by Franko Simatović (Trial Judgement, para. 80).

Priština/Prishtinë.[499] It was headed by Lazarević, who responded to the Commander of the 3rd Army, Pavković.[500] In addition, there were two special forces that dealt with anti-terrorist activities: the VJ 72nd Special Brigade and 63rd Parachute Brigade, directly subordinated to the VJ General Staff, under the control of Ojdanić.[501] The Trial Chamber also found that Đorđević, as Head of the RJB and as Assistant Minister, had *de jure* powers and exercised effective control over the police in Kosovo who perpetrated the majority of the crimes against Kosovo Albanians during the Indictment period, including reserve and regular police, the PJP, SUP, and the SAJ.[502]

169. In sum, the Trial Chamber identified which MUP and VJ units and/or departments were active in Kosovo during the relevant time, the leaders of these units in the operational sense, and how these persons were linked to the higher command bodies of the MUP and VJ in Belgrade. It found that the MUP forces active in Kosovo were ultimately responding to Đorđević, directly or through other JCE members present on the ground, such as Lukić, Stevanović, and Dragan Ilić. It further found that the VJ units ultimately responded to Ojdanić, either directly or through other JCE members on the ground, such as Pavković and Lazarević. The Trial Chamber identified to which units of the VJ or MUP the paramilitary/volunteer units were associated or re-subordinated.[503] The Trial Chamber thereby established that the physical perpetrators were under the responsibility or command of several individuals it explicitly identified as the core JCE members. The Appeals Chamber recalls that the link between the physical perpetrator and a joint criminal enterprise member need not be direct but may be indirect, *i.e.* established based on the hierarchical structure of the forces involved in the perpetration of the crimes.[504] The Appeals Chamber therefore finds that

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499 Trial Judgement, para. 158.

500 Trial Judgement, paras 158, 166.

501 Trial Judgement, paras 155, 157-158, 164, 166. As for the paramilitaries, see Trial Judgement, paras 205, 208-209, 214, 216; *infra*, Section X.F.

502 Trial Judgement, paras 1892, 1898, 2154, 2171.

503 Trial Judgement, paras 204-207, 1231-1261 (Scorpions), 208-211 (Arkan's Tigers), 212-215, 938-1012 (White Eagles), 216 (Pauk Spiders).

504 See *Martić* Appeal Judgement, paras 174-181, referring to *Martić* Trial Judgement, paras 135, 140-143, 155, 159-160, 445-446, 453-455, where the Trial Chamber found that a link between Martić and the physical perpetrators was established mainly on the basis of: (i) the hierarchical structure within the JNA, the police and other Serb forces active on the territory of the SAO Krajina and the Republic of Serbian Krajina; (ii) Martić's general role as the Minister of Interior, his absolute authority over the MUP and his control over the armed forces of the SAO Krajina; (iii) the cooperation between the TO, the JNA, the *Milicija Krajine* and the armed forces of the SAO; (iv) the control over the JNA and the TO by other members of the JCE; and (v) Martić's conduct and *mens rea*. See further *Martić* Appeal Judgement, paras 187-189, 195, 205-206, referring to *Martić* Trial Judgement, paras 174-181, 202-203, 244-247, 266, 274-275, 281-288, 294, 443-444, 446, 450-454, where the Trial Chamber referred to evidence establishing that some armed men identifying themselves as "Martić's men", "Martić's Militia", or "reserve forces, Martić's troops or Martić's army" wearing uniforms like those of the army were, in fact, JNA or TO soldiers, or members of the *Milicija Krajina*, or were at least acting in concert with the JNA to commit crimes that fell within the JCE. See also *Krajišnik* Appeal Judgement, para. 226; *Brđanin* Appeal Judgement, para. 413; *Martić* Appeal Judgement, para. 169, holding that the establishment of a link between a physical perpetrator – who is a non-member of the JCE – and a member of the JCE is a matter to be assessed on a case-by-case basis.

the Trial Chamber established the necessary link between the physical perpetrators and several JCE members.

170. The Appeals Chamber further notes that in the section of the Trial Judgement discussing the crimes alleged in the Indictment, the Trial Chamber detailed which Serbian forces were engaged in each municipality and described the orders by which these forces were deployed.[505]

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[505] For the municipality of Orahovac/Rahovec: Trial Judgement, paras 450-455, 478 (Bela Crkva/Bellacërkë), 501 (Mala Kruša/Krushë-e-Vogël), 515 (Velika Kruša/Krushë-e-Madhe and Nogavac/Nagavc), 533-534 (Celina/Celinë). For the municipality of Prizren: Trial Judgement, paras 563-564 (Prizren town), 572 (Dušanovo/Dushanovë), 581-582 (Pirane/Piranë), 590-592 (Landovica/Landovicë), 597 (Srbica/Sërbica). For the municipality of Srbica/Skenderaj: Trial Judgement, paras 610, 644, 649, 651. For the municipality of Suva Reka/Suharekë: Trial Judgement, paras 653, 658, 692 (Suva Reka/Suharekë town), 704 (Pecane/Peqan), 708 (Trnje/Tërrnje), 714, 716, 718 (Belanica/Bellanicë), 727 (Budakovo/Budakovë). For the municipality of Peć/Pejë: Trial Judgement, paras 742 (Peć/Pejë town). For the municipality of Kosovska Mitrovica/Mitrovicë: Trial Judgement, paras 766-767, 774 (Kosovska Mitrovica/Mitrovicë), 786, 789, 791 (Zabare/Zhabar). For Priština/Prishtinë: Trial Judgement, paras 797, 800, 816-817, 819, 823, 825, 829. For the municipality of Đakovica/Gjakovë: Trial Judgement, paras 923, 925 (Đakovica/Gjakovë), 949-950, 953, 955, 1002-1010 (Carragojs, Erenik and Trava Valleys – Operation Reka). For the municipality of Gnjilane/Gjilan: Trial Judgement, paras 1013, 1041, 1054, 1056. For the municipality of Uroševac/Ferizaj: Trial Judgement, paras 1062-1063. For the municipality of Kačanik/Kaçanik: Trial Judgement, paras 1105, 1127, 1134. For the municipality of Dečani/Deçan: Trial Judgement, paras 1144, 1157-1159. For the municipality of Vučitrn/Vushtrri: Trial Judgement, paras 1162, 1165, 1218 (Vučitrn/Vushtrri town), 1169 (Donji Svracak/Sfaraçak-i-Poshtëm), 1176, 1182 (Donja Sudimlja/Studime-e-Poshtme), 1213 (Smrekovnica/Smrekonicë), 1215 (Dobra Luka/Dobërllukë). For the municipality of Podujevo/Podujevë: Trial Judgement, paras 1223, 1225, 1230, 1239, 1261.
For example, when discussing the operation carried out by combined VJ and MUP forces in Orahovac/Rahovec, the Trial Chamber found that:

> [o]n 23 March 1999, the Joint Command for Kosovo issued an order assigning elements of a reinforced VJ Priština Corps, comprised of the 549th Motorised Brigade, the 243rd Mechanised Brigade and the 202nd logistics base, in cooperation with the "armed non-KLA population", to undertake an operation to provide support in "blocking, crushing and destroying" the KLA forces in the general areas of Orahovac/Rahovec and Velika Kruša/Krushë-e-Madhe (Trial Judgement, para. 450).
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> In line with this Joint Command order, on 23 March 1999, Božidar Delić, commander of the 549th Motorised Brigade, and the direct subordinate of Lieutenant-General Vladimir Lazarević who then commanded the Priština Corps, ordered the 37th Company of the Niš PJP of the MUP, the 4th Company of the Prizren PJP of the MUP and the 4th Company of the Đakovica/Gjakovë PJP of the MUP to act in coordination with the 549th Motorised Brigade (Trial Judgement, para. 451).
>
> Following the operational activity throughout the Orahovac/Rahovec municipality[…] reports to the Priština Corps Command were received that confirmed that VJ and MUP forces were present in the municipality between 25 March 1999 and 3 April 1999. […] It was recorded that during the operation that took place in the municipality from 25 March 1999 around 2000 members of the Serbian forces were deployed, some 1020 of which were members of the MUP. VJ units involved in the operation (in the municipality of Orahovac/Rahovec) included: the 101st Military Territorial Detachment, the 243rd Motorised Brigade, the 15th Armoured Brigade, the 120th Mortar Company, and the 2nd Motorised Battalion. The MUP forces deployed in the area of the operation as of 25 March 1999 included: the 37th Niš PJP detachment, the 23rd PJP detachment, the 5th Company of the Priština/Prishtinë PJP and the 4th Company of the Đakovica PJP detachment (Trial Judgement, para. 455. See also Trial Judgement, paras 450-454 (detailing the deployment orders)).

The Trial Chamber then detailed the evidence of the activities of these forces when it discussed the events alleged in the Indictment (Trial Judgement, paras 456-554).

D. Conclusion

171. In conclusion, the Appeals Chamber is not persuaded by Đorđević's suggestion that the Trial Chamber was required, and failed, to establish "how each physical perpetrator was used to commit the crimes"[506] when attributing criminal responsibility to him pursuant to the joint criminal enterprise doctrine for crimes committed by non-members of the joint criminal enterprise. The Trial Chamber was required to establish: (i) that the alleged crimes were committed; (ii) who were the physical perpetrators of the crimes (individual, group, or unit); (iii) that the crime fell within the common criminal purpose; and (iv) that at least one JCE member used the physical perpetrators in furtherance of the common plan.[507] As described above, after an extensive and detailed analysis of the evidence, the Trial Chamber established that the crimes were committed, identified the physical perpetrators (in this case units of the VJ, MUP, and associated forces), established who was responsible for or in command of these forces, established that the acts of the physical perpetrators were the direct consequence of the orders and directions of those it identified to be in command, and established that those in command were JCE members. In doing so, the Trial Chamber followed the jurisprudence of the *Brđanin* and *Krajišnik* Appeal Judgements. Đorđević has failed to show how the Trial Chamber went beyond or extended such jurisprudence. Further, Đorđević has not shown that the Trial Chamber failed to establish the required link, *i.e.* how a JCE member ordered the deployment of the forces to which the physical perpetrators of the crimes belonged, in order to implement the common plan.

172. The Appeals Chamber therefore dismisses Đorđević's sixth ground of appeal, in part.[508]

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[506] Đorđević Appeal Brief, para. 126.

[507] See *Krajišnik* Appeal Judgement, paras 225-226, 235-237; *Brđanin* Appeal Judgement, para. 410-414. See also *Martić* Appeal Judgement, paras 1269, 183-189.

[508] See also *supra*, paras 59-72, where the Appeals Chamber dismisses the remainder of Đorđević's sixth ground of appeal.

IX. ĐORĐEVIĆ'S SEVENTH GROUND OF APPEAL: ALLEGED ERRORS WITH RESPECT TO THE FINDING THAT MURDER AND PERSECUTIONS FELL WITHIN THE JCE

A. Introduction

173. The Trial Chamber found that the JCE members shared the common plan to modify the ethnic balance of Kosovo in order to ensure Serbian control, by waging a campaign of terror against the Kosovo Albanian population, which included murders, deportations, other inhumane acts (forcible transfers), and persecutions (through murder, deportation, forcible transfer, and destruction of religious or culturally significant property).[509]

174. The Trial Chamber based its conclusion on, *inter alia*, the evidence of: (i) the establishment of the Joint Command;[510] (ii) minutes of the meetings of the VJ Collegium, the Supreme Defence Council, the VJ General Staff, the MUP Collegium, and the MUP Staff for Kosovo, during which joint VJ and MUP operations were planned and ordered;[511] (iii) such orders being issued, implemented on the ground, monitored, and reported on;[512] (iv) the "build-up" and use of the VJ, MUP, and associated forces in violation of the October Agreements;[513] (v) the coordinated use of the VJ, the MUP, and the associated forces;[514] (vi) the pattern of crimes committed by these forces when taking over and entering villages;[515] (vii) the plan and concealment of bodies of Kosovo Albanian civilians killed during these operations;[516] (viii) the disproportionate use of force;[517] and (ix) the attitude of key political and military leaders.[518]

175. Particularly, the Trial Chamber found that although the orders and directives regarding these joint operations did not explicitly order the armed forces to commit crimes, their "calculated imprecision allowed, indeed encouraged, an interpretation that included the execution of KLA fighters, suspected KLA fighters and people perceived as KLA supporters and the 'clearing' of

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509 Trial Judgement, paras 2126, 2128, 2130. See also Trial Judgement, paras 2136-2149, 2151-2152.
510 Trial Judgement, paras 2126-2127. See also Trial Judgement, paras 226-237.
511 Trial Judgement, paras 2126-2127, 2134. See also Trial Judgement, paras 2023-2024.
512 Trial Judgement, paras 2126, 2132-2136.
513 Trial Judgement, paras 2010-2026.
514 Trial Judgement, paras 2036-2051.
515 Trial Judgement, paras 2027-2035, 2036-2051, 2129-2130, 2132-2135. The Trial Chamber found that the VJ would secure the perimeter of the village or area under attack and provide artillery support if needed, while the MUP forces would engage in infantry assault (Trial Judgement, para. 2037). See also Trial Judgement, Chapter VI.
516 Trial Judgement, paras 2111-2117.
517 Trial Judgement, paras 2052-2069.
518 Trial Judgement, paras 2023-2025, 2062.

entire swathes of territory of Kosovo Albanian residents, across the borders, by all means available".[519] The Trial Chamber therefore concluded that:

> [t]he scale of the operations across Kosovo, the pattern of crimes committed against Kosovo Albanian civilians, and the multitude of different units of the VJ and MUP involved in such actions persuade the Chamber that there was a plan, involving a plurality of persons, to modify the demographic balance of Kosovo by a campaign of terror and violence, and that these persons participated in the common purpose and shared the intent to commit such crimes.[520]

176. Đorđević submits that the Trial Chamber erred in concluding that the crimes of murder and persecutions (through deportation, forcible transfer, and destruction of religious sites) fell within the JCE, because the Trial Chamber failed to establish that each member of the JCE shared the requisite *mens rea*.[521] The Appeals Chamber will first consider his submissions in relation to murder and then his submissions in relation to persecutions.

B. Alleged error in concluding that the crime of murder was part of the JCE

1. Arguments of the parties

177. Đorđević takes issue with the fact that, while in the *Milutinović et al.* case it could not be established that Šainović, Ojdanić, Pavković, Lazarević, or Lukić had the intent to murder, the Trial Chamber in the present case "utilized the orders and commands of these men to manifest an inference of intention to murder that was then transferred to the JCE and Đorđević".[522] Đorđević refers to the conclusion in the *Milutinović et al.* Trial Judgement, purportedly based on the same facts, that there was no clear pattern of murder.[523] Đorđević argues that had murder been within the

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[519] Trial Judgement, para. 2132 (emphasis added). The Trial Chamber further found that:
> the VJ and MUP forces implemented [these orders and directives] in the majority of cases in a manner that encompassed the forced expulsion of Kosovo Albanian civilians from their homes, the burning of Albanian houses, villages and property, the killing of Kosovo Albanian civilians, particularly men and boys of fighting age, and the execution of captured KLA fighters (Trial Judgement, para. 2133).
> These joint operations involved eradicating the KLA by killing its members, clearing areas of KLA or NATO support systems in anticipation of a NATO ground invasion, and killing or removing the Kosovo Albanian civilian population from areas, in many cases moving them across the border so that they were no longer part of the population of Kosovo. In order to achieve these goals, forcible transfer, deportation, murder and the destruction of homes and villages, as well as religious or culturally significant property of the Kosovo Albanian civilian population were intended as a means to implement the plan (Trial Judgement, para. 2135).

[520] Trial Judgement, para. 2128.

[521] Đorđević Appeal Brief, paras 130, 132-133, referring to *Tadić* Appeal Judgement, paras 197, 220, *Brđanin* Appeal Judgement, paras 365, 418, *Milutinović et al.* Trial Judgement, vol. 1, para. 109, *Kvočka et al.* Appeal Judgement, para. 110. See also Đorđević Appeal Brief, para. 136.

[522] Đorđević Appeal Brief, para. 137.

[523] Đorđević Appeal Brief, para. 136, referring to *Milutinović et al.* Trial Judgement, vol. 3, para. 94, adding that the Trial Chamber in the present case recognised this conclusion but only in its consideration of sentencing (Đorđević Appeal Brief, fn. 191, referring to the Trial Judgement, para. 2227, fn. 7435).

intended JCE, a far larger number of individuals would have been killed throughout Kosovo and there would have been more instances of mass killings.[524] Instead, the Trial Chamber found that the "murder" of at least 724 individuals was established in ten locations in Kosovo,[525] involving only 7 out of 14 municipalities, and occurring mostly in villages rather than major cities.[526] Đorđević also argues that the Trial Chamber's alternative finding in relation to his *mens rea* pursuant to the third category of joint criminal enterprise is ambiguous and suggests that the inference remained that Đorđević and other members of the JCE did not intend to kill.[527]

178. The Prosecution responds that since the Trial Chamber was not bound by findings made in the *Milutinović et al.* case, Đorđević's argument should be dismissed.[528] The Prosecution further responds that the Appeals Chamber should summarily dismiss Đorđević's argument that a larger number of people needed to be killed throughout Kosovo in order for the Trial Chamber to find that murder fell within the scope of the JCE.[529] The Prosecution submits that Đorđević fails to explain how many persons should have been killed for the Trial Chamber to make such a finding, and argues that there is no minimum number required.[530] Moreover, Đorđević "ignores the Trial Chamber's findings that murder was 'a central element of the campaign of terror,' often employed 'to cause Kosovo Albanians to leave Kosovo'",[531] and substitutes his own evaluation of the evidence for that of the Trial Chamber.[532] Finally, the Prosecution argues that the Trial Chamber's findings on the third category of joint criminal enterprise were made in the alternative and are not ambiguous.[533]

2. Analysis

179. The Appeals Chamber understands that there are three underlying arguments at the core of Đorđević's submission that it was unreasonable for the Trial Chamber in this case to conclude that

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[524] Đorđević Appeal Brief, para. 134; Đorđević Reply Brief, para. 36. Đorđević also contends that mass killings in Kosovo were relatively rare compared to other conflicts (Đorđević Appeal Brief, para. 134).

[525] Đorđević Appeal Brief, para. 134, referring to Trial Judgement, para. 1780.

[526] Đorđević Appeal Brief, para. 135.

[527] Đorđević Appeal Brief, para. 138, fn. 196; Đorđević Reply Brief, para. 39. Đorđević also submits that the fact that the Trial Chamber made alternative third category of joint criminal enterprise findings, suggests that the Trial Chamber was "not sure that he intended to kill" (Đorđević Appeal Brief, para. 138, fn. 196). Therefore, he argues that the inference that he did not have the requisite intent for murder was equally open to the Trial Chamber on the basis of its own factual findings (Đorđević Appeal Brief, para. 138, referring to Trial Judgement, paras 2139, 2141, 2145, 2147, 2153, 2158, *Kvočka* Appeal Judgement, para. 237). Whether Đorđević had the requisite intent in relation to murder will be addressed later in this Judgement (see *infra*, Chapter XI).

[528] Prosecution Response Brief, para. 117.

[529] Prosecution Response Brief, para. 112.

[530] Prosecution Response Brief, paras 112, 116.

[531] Prosecution Response Brief, para. 115, referring to Trial Judgement, para. 2137.

[532] Prosecution Response Brief, paras 112, 115-116, referring to Trial Judgement, paras 674-675, 2007, 2032, 2137.

murder was within the scope of the JCE. First, he argues that the Trial Chamber erred because it based this conclusion on orders and directives issued by Šainović, Ojdanić, Pavković, Lazarević, or Lukić, while the *Milutinović et al.* Trial Chamber could not conclude, based on the same facts, that they possessed the requisite intent for murder.[534] Second, he argues that the fact that the murders were limited in numbers and locations shows that there was no wide ranging plan to kill Kosovo Albanians, and that the JCE members did not share the intent to murder.[535] Consequently, the inference remains open that murder "was not within the aim of the alleged JCE".[536] Third, he argues that the Trial Chamber failed to make a finding on the intent of murder of the other JCE members, thereby failing to outline the "essential requirement" that the JCE members shared the intent for the agreed crimes.[537] The Appeals Chamber will address these three issues in turn.

180. As for Đorđević's first argument, regarding the conclusions of the *Milutinović et al.* Trial Chamber on murder, the Appeals Chamber recalls that in making factual findings, judges rely solely and exclusively on the evidence adduced in the particular case before them.[538] It would be highly irregular for the Appeals Chamber to take into consideration anything which is not on the record of the case before it on appeal:[539] "*quod non est in actis, non est in mundo*". Even on the same facts, evidence and witness testimony may differ from case to case. It is therefore accepted that two reasonable triers of facts might reach different but equally reasonable conclusions, even if they concern the same events.[540] The question before the Appeals Chamber is whether no reasonable trier of fact could have reached the same conclusion as the Trial Chamber and not whether the conclusion reached by another trial chamber was a reasonable one.[541] The Appeals

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533 Prosecution Response Brief, para. 119.

534 See Đorđević Appeal Brief, paras 136-137. The Appeals Chamber notes that the *Milutinović et al.* Trial Chamber found that common plan did not include the crime of murder (*Milutinović et al.* Trial Judgement, paras 94-95). It however found that murder was the reasonably foreseeable to Šainović, Pavković, and Lukić (*Milutinović et al.* Trial Judgement, vol. 3, paras 470, 785, 1134) and convicted them for murder on the basis of the third category of joint criminal enterprise (*Milutinović et al.* Trial Judgement, vol. 3, paras 475, 788, 1138). The Appeals Chamber further notes that the Trial Chamber in the *Milutinović et al.* case found that while there was "considerable evidence" supporting the allegation that Ojdanić and Lazarević were supportive of the commission of crimes throughout Kosovo by the VJ and MUP forces, it had not been proven beyond reasonable doubt that they "shared the intent of the joint criminal enterprise members" (*Milutinović et al.* Trial Judgement, vol. 3, paras 616, 917).

535 Đorđević Appeal Brief, paras 134-135.

536 Đorđević Appeal Brief, paras 134-136.

537 Đorđević Appeal Brief, paras 136-137.

538 See, in a difference context, *Nahimana et al.* Appeal Judgement, paras 78, 84-85. See also *supra*, para. 143.

539 See *Galić* Appeal Judgement, paras 311, 312.

540 *Lukić and Lukić* Appeal Judgement, para. 396, citing *Krnojelac* Appeal Judgement, paras 11-12. The Appeals Chamber recalls that "two Judges, both acting reasonably, can come to different conclusions" even on the basis of the same evidence (*Kupreškić et al.* Appeal Judgement, para. 30; *Tadić* Appeal Judgement, para. 64; *Rutaganda* Appeal Judgement, para. 22).

541 See *supra*, para. 16.

Chamber will therefore determine whether it was reasonable for the Trial Chamber to rely on orders of Šainović, Ojdanić, Pavković, Lazarević, or Lukić to conclude that murder was within the JCE.

181. The Appeals Chamber notes that Đorđević does not explicitly identify any of the orders and directives of Šainović, Ojdanić, Pavković, Lazarević, or Lukić, which he argues the Trial Chamber used to erroneously infer that murder was within the common plan.[542] Rather, he cites several Trial Judgement paragraphs,[543] which refer to: (i) a VJ directive of 16 January 1999 signed by Ojdanić ("Operation Grom-3 Directive");[544] (ii) Pavković's order on the use of the VJ 3rd Army in Kosovo dated 27 January 1999;[545] (iii) examples of orders to "clear the terrain";[546] (iv) examples of orders to establish "combat control" over certain areas in Kosovo;[547] and (v) several Joint Command orders and one Priština Corps Command order to "destroy" the Kosovo Albanian "terrorist forces".[548]

182. The Appeals Chamber notes that only three of these orders can be attributed to Šainović, Ojdanić, Pavković, Lazarević, or Lukić: (i) the VJ directive of 16 January 1999 signed by Ojdanić;[549] (ii) the order on the use of the VJ 3rd Army in Kosovo dated 27 January 1999 issued by Pavković;[550] and (iii) the Priština Corps Command order to "destroy" the Kosovo Albanian "terrorist forces" issued by Lazarević.[551]

183. The Trial Chamber discussed the VJ directive of 16 January 1999 signed by Ojdanić[552] and Pavković's order on the use of the VJ 3rd Army in Kosovo of 27 January 1999,[553] as part of the evidence showing that there was a build-up and use of VJ and MUP forces in Kosovo "in violation

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542 Đorđević Appeal Brief, para. 137.

543 Đorđević Appeal Brief, para. 137, fn. 193, referring to Trial Judgement, paras 2018-2026, 2034-2035, 2051, 2056, 2062, 2066, 2069, 2126, 2129, 2130, 2132, 2134-2135, 2138-2152. Several Trial Judgement paragraphs cited by Đorđević do not support his submission. For example, paragraph 2056 refers to several verbal orders, but none of these were issued by Šainović, Ojdanić, Pavković, Lazarević, or Lukić (Trial Judgement, para. 2056; K89, 26 Aug 2009, T. 8476 (private session); Exhibit P1273, p. 9124 (confidential); Exhibit P1274, p. 9124 (public redacted version of Exhibit P1273); Exhibit P320, para. 41 (confidential); Exhibit P321, para. 41 (public redacted version of Exhibit P320)). Paragraph 2062 of the Trial Judgement discusses the reports prepared by international observers on the disproportionate use of force by the VJ and MUP forces in response to KLA actions. Paragraph 2066 also discusses the disproportionate use of force in light of the principles IHL protecting the civilian population and paragraph 2069 contains the Trial Chamber's conclusion on the disproportionate use of force by VJ and MUP.

544 Exhibit D179. See Trial Judgement, paras 2018, 2035, 2134.

545 Exhibit D343. See Trial Judgement, para. 2018.

546 Exhibits P957, p. 3; P493, paras 45-46; P782, p. 2; K54, 13 May 2009, T. 4367. See Trial Judgement, para. 2132.

547 Exhibit P896, pp 4, 6. See Trial Judgement, para. 2132.

548 Exhibits P350; P969; P970; P766; P767; P961; P1235; P1382. See Trial Judgement, para. 2132.

549 Exhibit D179. See Trial Judgement, paras 2018, 2035, 2134.

550 Exhibit D343. See Trial Judgement, para. 2018.

551 Exhibit P961. See Trial Judgement, para. 2132.

552 Exhibit D179. See Trial Judgement, paras 2018, 2035, 2134.

553 Exhibit D343. See Trial Judgement, para. 2018.

of the October Agreement and contrary to the stated intentions to pursue a political solution to the Kosovo problem".[554] The build-up and use of force is one of the seven "critical elements" identified and analysed by the Trial Chamber as evidence of the common plan.[555] The Operation Grom-3 Directive, was addressed to the commands of the VJ 1st, 2nd, and 3rd Army, the Air Force, anti-aircraft defence, and the Special Units Corps. It tasked these forces with, *inter alia*, preparing for the anticipated NATO intervention, preventing the forced introduction of a multinational NATO brigade in Kosovo, and carrying out mobilisation and coordinated actions with the MUP to crush the multinational NATO brigade and destroy the "*Šiptar* terrorist forces".[556] Similarly, Pavković's order on the use of the 3rd Army for operation Grom-3 followed on 27 January 1999 and, in accordance with the VJ directive, tasked the 3rd Army units, in cooperation with MUP forces, to break up and destroy the NATO brigade and "*Šiptar* terrorist forces", and make it impossible for the two to collaborate.[557]

184. Significantly, the Trial Chamber found that the "Kosovo Albanian population as a whole became viewed as the enemy" and that operations carried out under the guise of "anti-terrorist" operations in fact targeted the Kosovo Albanian civilian population.[558] The Trial Chamber noted that although these documents referred to attacks against the Albanian terrorist forces and that the publicly declared objective of the Serbian forces was to fight terrorism, there was an abundance of evidence, including the disproportionate use of force by these forces,[559] showing that the Serbian forces acted "consciously and determinedly against the whole Kosovo Albanian population of Kosovo".[560]

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554 Trial Judgement, para. 2026. See also Trial Judgement, paras 2010-2025.

555 Trial Judgement, para. 2008. The seven "critical elements" identified by the Trial Chambers as evidence of the common plan are: (i) demographic indications; (ii) the build up and use of Serbian forces and the arming of the non-Kosovo Albanian population in violation of the 1998 October Agreements and ongoing peace talks in early 1999; (iii) the pattern of crimes; (iv) the coordinated use of the MUP and VJ; (v) the disproportionate use of force in "anti-terrorist" actions; (vi) the systematic collection of Kosovo Albanian identification documents and vehicle licence plates; and (vii) the efforts to conceal the crimes against Kosovo Albanian civilians (Trial Judgement, para. 2008). See *supra*, paras 173, 174.

556 Exhibit D179, pp 1-2, 7. See also Trial Judgement, para. 2018.

557 Exhibit D343, pp 3, 6-8. See also Trial Judgement, para. 2018. The order also engaged the "armed non-*Šiptar* population" to secure Serbian forces, military features, and communication routes, and defend the non-*Šiptar* population (Exhibit D343, pp 5-6. See also Trial Judgement, para. 2018).

558 See Trial Judgement, paras 2018, 2035, 2055-2056, 2062, 2065, 2069, 2129. See also *infra*, paras 521-526.

559 Trial Judgement, paras 2018, 2027-2035, 2036-2051, 2052-2080. The Appeals Chamber has already dismissed elsewhere in this Judgement Đorđević's arguments that the Trial Chamber erred in its findings on the disproportionate use of force by Serbian forces (see *supra*, para. 108). See also Trial Judgement, paras 2035, 2055-2056, 2062, 2065, 2069, 2129. See also *infra*, paras 351-371.

560 Trial Judgement, paras 2018, 2035, 2134-2135.

185. The Trial Chamber further considered evidence of: (i) meetings involving the senior leadership of Serbia;[561] (ii) public statements of senior political figures;[562] (iii) the engagement of volunteers;[563] and (iv) the plan to conceal crimes committed against the civilian population.[564] In the Trial Chamber's reasoning, this evidence, together with the orders of Ojdanić and Pavković, indicated that the war with NATO and the KLA would allow a "justification as to the use of the VJ and MUP forces in combat operations and provide cover, in particular, for the killing of Kosovo Albanian men of fighting age".[565] It further found that "[n]ot only were crimes intended as a means to implement the common purpose, but the concealment of evidence of such crimes – the bodies of hundreds of Kosovo Albanian civilians – was also planned and carried out by JCE members and forces used by them".[566]

186. As for Lazarević's order identified above, the Trial Chamber considered it together with other orders[567] to conclude that the crimes committed by the Serbian forces in the course of pre-planned and coordinated operations were part of the JCE, rather than isolated incidents, as submitted by Đorđević at trial.[568] While orders relating to such operations did not explicitly mandate the commission of crimes, the Trial Chamber considered that the manner in which the VJ and MUP forces implemented them was significant in understanding their true meaning.[569] The Trial Chamber considered, *inter alia*, the extensive evidence on the patterns of the crimes and use of disproportionate force by the Serbian forces discussed in more detail in previous parts of this Judgement.[570] It therefore concluded that the "calculated imprecision of these orders" encouraged the commission of crimes by the VJ and MUP during the pre-planned and coordinated VJ and MUP operations.[571] Đorđević has failed to show that it was unreasonable for the Trial Chamber to rely on such evidence.

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561 Trial Judgement, paras 2020, 2025, referring to Exhibits P85, P387.
562 Trial Judgement, paras 2023-2024, referring to Knut Vollebaek, 10 Jul 2009, T. 7215-7218.
563 Trial Judgement, para. 2021. See also *infra*, Section X.F.
564 Trial Judgement, paras 2025, 2081-2082, 2086-2105, 2108-2120. See also *infra*, Section X.G.
565 Trial Judgement, para. 2026.
566 Trial Judgement, para. 2026.
567 See *supra*, paras 183-184. The orders include: (i) orders to "clear the terrain" (Trial Judgement, para. 2132, referring to Exhibits P957, p. 3, P493, paras 7, 45-46, P782, p. 2, K54, 13 May 2009, T. 4367); (ii) orders to establish "combat control" over certain areas in Kosovo (Trial Judgement, para. 2132, referring to Exhibit P896, p. 4); and (iii) several Joint Command orders and one Priština Corps Command order to "destroy" the Kosovo Albanian "terrorist forces" (Trial Judgement, para. 2132, referring to Exhibits P1235, P969, P970, P1382, P766, P767, P350, P961 (Priština Corps Command), D104).
568 Trial Judgement, paras 2132-2135.
569 See *supra*, para. 184. See also Trial Judgement, paras 2007, 2133.
570 See Trial Judgement, paras 2007, 2132-2133. See *supra*, paras 97-99, 102, 184.
571 See *supra*, para. 175. See also Trial Judgement, paras 2027-2035 (patterns of crimes), 2036-2051 (coordinated use of the MUP and VJ), 2132.

187. The Appeals Chamber further finds that orders referred to by Đorđević were part of a wider array of evidence analysed by the Trial Chamber.[572] The Appeals Chamber notes that Đorđević has failed to develop his argument, point to any error within the Trial Chamber's analysis, or show that it was unreasonable for the Trial Chamber to conclude as it did based on all the evidence discussed and considered.[573] Đorđević's argument relies on the fact that the *Milutinović et al.* Trial Chamber reached a different conclusion, but has failed to advance any other argument why in this case it was unreasonable for the Trial Chamber to conclude that murder was part of the JCE. The Appeals Chamber therefore finds that Đorđević has not shown that the Trial Chamber erred in relying on these orders to conclude that murder was one of the crimes through which the JCE was implemented.

188. As for Đorđević's second argument, regarding the number of individuals killed, the Appeals Chamber clarifies at the outset that there is no legal requirement that a minimum number of killings occur in order to support a finding that murder is part of a joint criminal enterprise.[574]

189. The Appeals Chamber considers that, at times, Đorđević conflates the objective of the JCE with the criminal means through which this was to be implemented.[575] The Trial Chamber found that there was a plan to *change the ethnic balance of Kosovo* and that this plan was *implemented* through a campaign of terror and violence against the Kosovo Albanian population, a typical feature of which *included* murders.[576] Murder was therefore but one of the means identified by the Trial Chamber through which the common plan was to be implemented, and not its ultimate purpose. In the Trial Chamber's reasoning, the killings, including of women, children, and entire families, were carried out to cause the Albanian population to leave, by showing what would occur if they did not leave or simply by creating an atmosphere of terror to induce the population to leave.[577] Đorđević fails to challenge this reasoning and these findings.

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572 See Đorđević Appeal Brief, para. 137.
573 See *supra*, para. 20.
574 *Cf. Krajišnik* Appeal Judgement, para. 309. The Appeals Chamber also recalls that, "except for extermination, it is not necessary that a crime be carried out against a multiplicity of victims to constitute a crime against humanity: an act directed against a limited number of victims or even against a single victim can constitute a crime against humanity, provided it forms part of a widespread or systematic attack directed against a civilian population" (*Krajišnik* Appeal Judgement, para. 309). See also *Krajišnik* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 25.
575 See Đorđević Appeal Brief, para. 135.
576 Trial Judgement, paras 2130-2131.
577 Trial Judgement, paras 2032, 2137-2140, 2143. The Trial Chamber discussed in more detail cases where entire families were killed (Trial Judgement, paras 2137-2140).

190. Particularly noteworthy is the Trial Chamber's conclusion that the public killing of prominent Kosovo Albanian families (the Berisha, Vejsa, and Caka families) had an impact on the rest of the Kosovo Albanian population of those villages, causing large numbers to leave.[578] The Appeals Chamber agrees with the Trial Chamber that the intended killing of a few prominent persons may be sufficient to cause people to leave and therefore further the common purpose of the JCE. Đorđević's suggestion that the number of murders "fall short of showing that murder was within a JCE plan"[579] is therefore without merit. Similarly, Đorđević's arguments that the facts are inconsistent with a finding that murder was part of the JCE, because the murders, most of which occurred in villages rather than major cities, were established in only seven municipalities, is also unpersuasive.[580] The Appeals Chamber considers that where the killings occurred is immaterial since the Trial Chamber found that the killings set "an example for the local Kosovo Albanian population by showing what would happen if they did not leave their villages, towns or cities, or simply to create an atmosphere of terror to induce the Kosovo Albanians to leave".[581]

191. With regard to Đorđević's third argument concerning the Trial Chamber's failure to make a finding on the requisite intent for murder of the other JCE members, the Appeals Chamber recalls its finding that the Trial Chamber was not required to analyse separately the intentions of each member of the JCE.[582] Rather, it was required to identify the plurality of persons belonging to the JCE and establish that they shared a common criminal purpose.[583] The Appeals Chamber notes that the Trial Chamber found that murder was a crime through which the common purpose was implemented.[584] The Trial Chamber held that "the JCE members intended to implement the common plan by way of the crimes of deportation, forcible transfer, murder, and persecution through such acts."[585] The Appeals Chamber therefore considers that the Trial Chamber did not fail to make the requisite findings. This argument is rejected accordingly.

192. Finally, the Appeals Chamber notes that the Trial Chamber clearly and unequivocally found that the crimes were committed pursuant to the first category of joint criminal enterprise.[586] Out of an abundance of caution, the Trial Chamber noted that even if these crimes had not been intended as part of the JCE, the evidence also supported a finding that they were the natural and foreseeable

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578 See Trial Judgement, para. 2032. See also Trial Judgement, paras 500, 668-676, 687-689, 904, 2045, 2143.
579 See Đorđević Appeal Brief, para. 134.
580 See Đorđević Appeal Brief, para. 135.
581 Trial Judgement, para. 2137.
582 See *supra*, para. 141.
583 See *supra*, para. 141; *Brđanin* Appeal Judgement, para. 430.
584 Trial Judgement, paras 2126, 2137-2149.
585 Trial Judgement, para. 2025. See also Trial Judgement, paras 2010-2026, 2035, 2051.

consequence of the common plan.[587] The Appeals Chamber finds no ambiguity and that it was within the Trial Chamber's discretion to reasonably make such findings.

193. In light of the above, the Appeals Chamber finds that Đorđević has failed to show that a reasonable trier of fact could not have reached the same conclusion as the Trial Chamber, and as such has failed to show that the Trial Chamber erred in concluding that murder was within the JCE.

C. Alleged error in concluding that the crime of persecutions was part of the JCE

1. Arguments of the parties

194. With respect to the findings on the discriminatory intent for persecutions, Đorđević submits that the Trial Chamber failed to establish, in relation to each crime site for which it entered a conviction, that individuals were targeted because of their ethnicity.[588] In relation to persecutions through murder, Đorđević contends that the Trial Chamber erred in failing to establish the necessary discriminatory intent of the perpetrators with regard to 4 out of 10 crime sites for which it entered convictions.[589] As for persecutions through deportation and forcible transfer, he submits that the Trial Chamber's general findings that those forcibly displaced were targeted on the basis of their ethnicity are inadequate.[590] With respect to persecutions through destruction of religious or culturally significant property, Đorđević argues that the Trial Chamber failed to establish that three of the eight mosques destroyed were specifically targeted.[591] In addition, he claims no reasonable trier of fact could conclude that the destruction of religious sites was within the intended scope of the JCE on the basis that "only eight mosques were damaged throughout the entirety of Kosovo during the conflict".[592]

195. Đorđević further argues that the weakness of the Trial Chamber's reasoning is revealed by its reliance on an order issued to a VJ unit deployed in Orahovac on 24 March 1999, that "'not a single Albanian ear' was to remain in Kosovo".[593] He contends that the evidence did not establish

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586 See Trial Judgement, paras 2135-2136, 2138, 2140.
587 See Trial Judgement, paras 2139, 2141, 2147, 2153.
588 Đorđević Appeal Brief, paras 139, 141. Đorđević does not challenge the Trial Chamber's finding that deportation and forcible transfer were part of the JCE, rather, he only challenges the Trial Chamber's finding that persecutions through these crimes were found to be intended by the JCE (Đorđević Appeal Brief, paras 130, 140-142).
589 Đorđević Appeal Brief, para. 139, referring to Trial Judgement, paras 1780-1790; Đorđević Reply Brief, paras 37-38. Đorđević also points out that the Prosecution did not respond to his submission that the Trial Chamber failed to establish the *mens rea* for murder of the JCE members (Đorđević Reply Brief, para. 38).
590 Đorđević Appeal Brief, para. 141, referring to Trial Judgement, para. 1777.
591 Đorđević Appeal Brief, para. 144; Đorđević Reply Brief, para. 41.
592 Đorđević Appeal Brief, para. 143; Đorđević Reply Brief, para. 41.
593 Đorđević Appeal Brief, para. 142, citing Trial Judgement, para. 2056.

that this order, or the intention behind it, was attributable to any specific member of the JCE.[594] Furthermore, he submits that the Trial Chamber also failed to mention that the evidence indicated that the actual order may well have been that "'not a single terrorist ear' was to remain in Kosovo".[595]

196. In relation to the requisite discriminatory intent for persecutions through murder, the Prosecution responds that the Trial Chamber found that "the 'requisite special intent' was established in relation to all the murders" and that Đorđević misrepresents the Trial Chamber's findings.[596] In relation to the six crime sites Đorđević mentions, the Trial Chamber identified "additional specific evidence" of discriminatory intent.[597] The Prosecution further responds that the Trial Chamber's findings that the JCE members intended to commit persecutions through forcible transfer and deportation are based on overwhelming evidence, and that Đorđević fails to show that the Trial Chamber erred.[598] It points to the Trial Chamber's finding that approximately 800,000 Kosovo Albanians were driven out of their homes between 24 March and 10 June 1999, and to the incident by incident analysis showing a pattern of forcible displacement and murder of Kosovo Albanian civilians by Serbian forces.[599]

197. Finally, with respect to persecutions through destruction of religious or culturally significant property, the Prosecution argues that Đorđević fails to explain how many culturally significant sites must be destroyed before the Trial Chamber can find that the crime of persecutions was established.[600]

2. Analysis

198. Although Đorđević initially states that the Prosecution must prove that an accused shared the required specific intent with the other JCE members,[601] apart from pointing to the Trial Chamber's failure to attribute the 24 March 1999 order (*or the intention behind it*) to any JCE

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[594] Đorđević Appeal Brief, para. 142.
[595] Đorđević Appeal Brief, para. 142, citing Exhibit P1274, p. 9179, K89, 26 Aug 2009, T. 8443 (closed session) (emphasis omitted).
[596] Prosecution Response Brief, para. 118.
[597] Prosecution Response Brief, para. 118, referring to Trial Judgement, para. 1783.
[598] Prosecution Response Brief, paras 113, 120, 123.
[599] Prosecution Response Brief, para. 120, referring to Trial Judgement, paras 1613-1704, 2009. The Prosecution submits that Đorđević also misstates the evidence (Prosecution Response Brief, para. 120, fn. 359, referring to Exhibit P1273, pp 9179-9180 (confidential).
[600] Prosecution Response Brief, paras 114, 121.
[601] See Đorđević Appeal Brief, paras 133, 140-142.

member, his arguments focus on the *mens rea* of the physical perpetrators.[602] The Appeals Chamber therefore understands Đorđević to argue that these alleged deficiencies in the Trial Chamber's analysis show that the Trial Chamber failed to properly assess whether the underlying acts could support a finding of persecutions.[603]

199. At the outset, the Appeals Chamber rejects Đorđević's suggestion that the Trial Chamber erred in concluding that the crime of persecutions was an intended part of the JCE due to its alleged failure to establish that individuals in each incident were targeted because they were Kosovo Albanians. Discriminatory intent may be inferred from circumstantial evidence, including the general discriminatory nature of an attack, as long as, in light of the facts of the case, the circumstances surrounding the commission of the alleged acts of persecutions substantiate the existence of such intent.[604]

200. The Appeals Chamber notes that this is the methodology that was used by the Trial Chamber in this case. After performing an incident by incident analysis of the events, it established that the victims of the underlying offences of persecutions were Kosovo Albanian and that they were targeted precisely because of their ethnicity.[605]

201. In relation to persecutions through murder, the Appeals Chamber considers that Đorđević misrepresents and takes the Trial Chamber's findings out of context. The Trial Chamber made

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602 See Đorđević Appeal Brief, paras 139, 140-142. Specifically, in relation to murder, he argues that "the Trial Chamber failed to establish that individuals were killed *because* they were Kosovo Albanian in relation to every crime site" and that the Trial Chamber performed the necessary *mens rea* analysis of the "perpetrators" in only 6 out of the 10 crime sites (Đorđević Appeal Brief, para. 139 (emphasis in original)). In relation to deportation and forcible transfer, he argues that the Trial Chamber erred because it failed to make a "specific finding that individuals in each specific crime site were targeted because of their ethnicity" before entering a conviction for persecutions (Đorđević Appeal Brief, para. 141). Similarly, his argument in relation to destruction of religious sites is focused on whether the perpetrators specifically targeted the mosques (Đorđević Appeal Brief, para. 144).

603 Whether Đorđević shared the requisite discriminatory intent with the other JCE members will be addressed later in this Judgement. See *infra*, paras 466-476.

604 *Blaškić* Appeal Judgement, para. 164; *Krnojelac* Appeal Judgement, para. 184. The Appeals Chamber recalls that however, the discriminatory intent may not be inferred directly from the general discriminatory nature of an attack against the civilian population alone (*Blaškić* Appeal Judgement, para. 164; *Krnojelac* Appeal Judgement, para. 184).

605 See Trial Judgement, paras 1626-1627, 1629, 1633, 1638, 1640-1642, 1646-1650, 1652, 1656-1657, 1659, 1663, 1665, 1667-1668, 1670-1671, 1673-1674, 1679 (for deportation), 1619-1620, 1622, 1627-1628, 1630-1631 (in connection with para. 606), 1635-1637, 1645, 1651, 1653-1655, 1658 (in connection with para. 1015), 1660 (in connection with paras 1036, 1048 – when the population returned, they found that "approximately 120 Albanian houses totally burned and some 420 houses partially burned. The Serb houses remained intact"), 1664, 1666, 1669, 1672, 1676-1677 (for forcible transfer), 1681, 1683, 1697, 1776-1778 (for both deportation and forcible transfer), 497, 1710-1712,1715-1718, 1721-1724, 1727-1728, 1731-1732, 1735-1736, 1738-1739, 1742, 1744, 1745 (for an example where the Trial Chamber found that the evidence was insufficient both to establish the intent of the perpetrators and to exclude that the victims were not taking an active part in the hostilities and therefore found that murder had not been established), 1747, 1750-1751, 1781-1790 (for murder); *infra*, paras 555-569 (for destruction of religious or culturally significant property).

explicit findings that the victims were targeted because of their ethnicity, in relation to all 10 crime sites where murder had been established.[606] Based on its analysis and findings on this issue, it concluded, in the part of the Trial Judgement dealing with the legal findings on persecutions through murder, that the Serbian forces acted with the requisite discriminatory intent when committing these murders.[607] In this context, it further noted that in relation to some of the killings there was even additional specific evidence of discriminatory remarks, conduct, and demands made by the Serbian forces, and gave examples of six such instances.[608]

202. As for persecutions through deportation and forcible transfer, the Trial Chamber performed an extensive analysis of the evidence on each incident of deportation and forcible transfer, which showed: (i) the organised manner in which the VJ, MUP, and associated forces attacked villages and forcibly displaced the population;[609] (ii) that the majority of the victims were Kosovo Albanians;[610] (iii) that the majority of villages attacked were almost completely Kosovo Albanian;[611] (iv) if part of the population of these villages was Serbian, they and their property were spared from the attack;[612] and (iv) the organised practice of seizing identification documents and vehicle plates from Kosovo Albanians who were deported, in order to prevent them from proving their identity and returning to Kosovo.[613] The Trial Chamber concluded that the Serbian forces acted with the requisite discriminatory intent.[614] Although the Trial Chamber accepted that people of other ethnicities may have left Kosovo during the Indictment period, it held that this did not alter its findings in relation to the underlying acts and that the vast majority of the victims were Kosovo Albanians.[615]

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606 Trial Judgement, Chapter VI, specifically paras 472, 473, 481-482, 485, 486, 495, 633, 672, 676, 678, 683, 873, 889, 892. See also Trial Judgement, para. 1718.

607 Trial Judgement, Chapter XI, specifically paras 1779-1782.

608 Trial Judgement, paras 1783-1789.

609 See Trial Judgement, paras 2036-2051.

610 Trial Judgement, para. 1697. For specific Trial Judgement findings see *supra*, fns 565, 568. See also *e.g.* Trial Judgement, paras 457 (Bela Crkva/Bellačërkë: "All of the inhabitants were Kosovo Albanian."), 482-483 (Mala Kruša/Krushë-e-Vogël: "The Serbian forces were being guided by local Serbian villagers, who would identify which houses were Albanian and then, with members of the Serbian forces, they would set Albanian houses on fire"; "Because the Serbian forces were shooting and setting fire to houses, out of fear, some 400 to 500 Kosovo Albanians fled from the village"; "Serb residents remained in their houses"), 494, 497, 500, 570 ("A policeman in black uniform told them that they should go to Albania, and that there was no place for them in Kosovo"), 576 (Serbian police told Roma and Goranies who were also traveling in the convoy of displaced Kosovo Albanians to go back to their homes), 1621-1622, 1627, 1629, 1777.

611 See *supra*, fn. 586.

612 See Trial Judgement, para. 1171.

613 Trial Judgement, paras 2077-2080. See also *supra*, paras 157-158.

614 Trial Judgement, para. 1777.

615 Trial Judgement, para. 1681.

203. The Appeals Chamber considers that the fact that people not belonging to the targeted group were affected by attacks of the Serbian forces against the Kosovo Albanian population does not deprive such conduct of its discriminatory character.[616] Đorđević's argument that the Trial Chamber made impermissibly generalised findings in relation to the perpetrator's discriminatory intent ignores the Trial Chamber's other relevant findings.

204. In relation to persecutions through destruction of religious or culturally significant property, Đorđević's argument that the mosques had to be specifically targeted is addressed and dismissed elsewhere in this Judgement.[617] As for Đorđević's argument that too few mosques were destroyed to support a finding that this crime was part of the JCE, the Appeals Chamber finds that again he confuses the objective of the JCE with the means through which it was to be achieved.[618] As noted above, the Trial Chamber found that the common plan was to change the ethnic balance of Kosovo by terrorising the Kosovo Albanian population into leaving[619] and the destruction of mosques was one of the means of implementing the common plan.[620] Đorđević has failed to show that it was unreasonable for the Trial Chamber to draw this conclusion. His argument that too few mosques were destroyed to support a finding that persecutions through destruction of religious or culturally significant property was within the JCE is therefore dismissed.

205. As for the order of 24 March 1999 that "'not a single Albanian ear' was to remain in Kosovo" the Appeals Chamber finds that Đorđević misstates the evidence and ignores the Trial Chamber's other relevant considerations in relation to this order. While it is true that in cross-examination Witness K89 stated that the order may have referred to "terrorist ear" rather than "Albanian ear",[621] in re-examination, the witness confirmed having heard "Albanian ear".[622] Furthermore, contrary to Đorđević's contention, the Trial Chamber explicitly discussed the witness's inconsistent evidence and explained why it decided to accept parts of Witness K89's testimony that this order referred to all Albanians, including civilians.[623]

206. In addition, the Appeals Chamber finds that Đorđević's reliance on the 24 March 1999 order in support of his challenge to the Trial Chamber's findings on persecutions, takes this order

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616 *Cf. Krnojelac* Appeal Judgement, para. 185.
617 See *infra*, paras 555-569.
618 See Đorđević Appeal Brief, paras 144-145; Đorđević Reply Brief, para. 41. See also Đorđević Appeal Brief, para. 134 where Đorđević argues that the number of murders committed "fall short of showing that murder was within a JCE plan".
619 Trial Judgement, paras 2126, 2128, 2130, 2136-2149, 2151-2152 See also *supra*, paras 111, 173, 189.
620 Trial Judgement, para. 2151. See also *supra*, paras 204.
621 K89, 26 Aug 2009, T. 8442-8443 (private session). See also Exhibit P1273, pp 9179-9180 (confidential).
622 K89, 26 Aug 2009, T. 8475-8476 (private session). See also Exhibit P1273, pp 9179-9180 (confidential).

out of its proper context. The Trial Chamber discussed this order in the context of its analysis on the disproportionate use of force by Serbian forces against Kosovo Albanians during the course of purported anti-terrorist operations.[624] Đorđević's argument is therefore dismissed.[625]

207. The Appeals Chamber finds that Đorđević has failed to show that no reasonable trial chamber could have concluded as the Trial Chamber did and as such has failed to show that the Trial Chamber erred in concluding that the crime of persecutions through murder, deportation, forcible transfer, and destruction of religious or culturally significant property was part of the JCE.

D. Conclusion

208. In light of the foregoing, the Appeals Chamber dismisses Đorđević's seventh ground of appeal in its entirety.

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[623] Trial Judgement, Confidential Annex, p. 970, fn. 1570 (confidential).
[624] Trial Judgement, para. 2056. See also Trial Judgement, paras 2052-2069.
[625] See *supra*, para. 20.

X. ĐORĐEVIĆ'S NINTH GROUND OF APPEAL: ALLEGED ERRORS CONCERNING ĐORĐEVIĆ'S PARTICIPATION IN THE JCE

209. The Trial Chamber found that Đorđević significantly contributed to the JCE[626] based on the following factors: (i) Đorđević, as Head of the RJB and Assistant Minister of the MUP, had "*de jure* powers and exercised effective control over the police in Kosovo", including the PJP and the SAJ, during the Indictment period;[627] (ii) he was one of the most senior MUP officials at the time;[628] (iii) he played a key role in the coordination of the MUP forces in Kosovo in 1998 and 1999;[629] (v) he was a member, and regularly attended the meetings, of the Joint Command and the MUP Collegium;[630] (vi) he was present on the ground, and attended the meetings of the MUP Staff in Priština/Prishtinë;[631] (vii) he was *de jure* responsible for the forces involved in the disarming of Kosovo Albanians, while the Serbian civilian population in Kosovo was being armed and organised in Reserve Police Squads ("RPOs");[632] (viii) he represented the Republic of Serbia during the international negotiations of October 1998 on the role of the police in Kosovo;[633] (ix) he played a leading role in the MUP efforts to conceal the killing of 45 civilians in Račak/Raçak in January 1999;[634] (x) he contributed to the deployment of paramilitary units in Kosovo;[635] (xi) he was personally and directly involved in the incorporation of the Scorpions into the MUP, their formal attachment to the SAJ, and their deployment to Kosovo in 1999;[636] (xii) he had a leading role in the MUP efforts to conceal the murder of Kosovo Albanian civilians and others taking no active part in hostilities;[637] and (xiii) at no time during his tenure as the Head of RJB, did Đorđević take any measures to ensure investigations into the crimes committed in Kosovo or to punish those involved in their commission.[638]

210. The Trial Chamber also found that Đordević acted with the requisite intent.[639]

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626 Trial Judgement, para. 2158.
627 Trial Judgement, para. 2154.
628 Trial Judgement, para. 2154.
629 Trial Judgement, para. 2154.
630 Trial Judgement, para. 2154.
631 Trial Judgement, para. 2154.
632 Trial Judgement, para. 2154.
633 Trial Judgement, para. 2154.
634 Trial Judgement, para. 2154.
635 Trial Judgement, para. 2155.
636 Trial Judgement, para. 2155.
637 Trial Judgement, para. 2156.
638 Trial Judgement, para. 2157.
639 Trial Judgement, para. 2158. The Appeals Chamber has upheld the Trial Chamber's conclusion that Đordević acted with the requisite intent (see *infra*, paras 463, 468, 470 477, 504, 513-514).

211. Under his ninth ground of appeal, Đorđević argues that the Trial Chamber committed a number of errors of law and fact which, individually and cumulatively, resulted in a mischaracterisation of his conduct and improperly linked him to the JCE.[640] Particularly, he argues that the Trial Chamber's reasoning is flawed as it is based on the erroneous premise that he exercised effective control over the perpetrators of the crimes.[641] Đorđević sets out his arguments in eight sub-grounds of appeal, which the Appeals Chamber will address in turn.

A. Sub-ground 9(A): alleged errors in relation to the Trial Chamber's assessment of the structure of the MUP and Đorđević's role

1. Introduction

212. The Trial Chamber found that Đorđević, as Head of the RJB and Assistant Minister of the MUP, had *de jure* power over the organisational units of the RJB operating in Kosovo at all relevant times.[642] Đorđević, who was also a member of the MUP Collegium and the Joint Command, held the highest attainable rank, Colonel-General, and was described as the "number two man" in the Ministry, was also found to have "exercised effective control, both *de jure* and *de facto*, over the MUP forces under the RJB in Kosovo throughout 1998 and 1999".[643] The Trial Chamber further found that his powers in relation to the RJB units participating in anti-terrorist activities were not diminished after the establishment of the Ministerial Staff for the Suppression of Terrorism in Kosovo ("Ministerial Staff") on 16 June 1998.[644]

213. Đorđević argues that the Trial Chamber "fundamentally misunderstood and overstated his role in Kosovo in 1999".[645] In particular, he submits that: (i) the creation of the Ministerial Staff had an impact on his role *vis-à-vis* the police in Kosovo;[646] (ii) the Trial Chamber erred in concluding that he actively participated or had effective control over events in Kosovo in 1998 and 1999;[647] (iii) there is no evidence that he exercised control over the PJP and/or SAJ units;[648] (iv) he was not privy to reports concerning MUP operations in Kosovo and was thus unaware of the events on the

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640 Đorđević Appeal Brief, para. 156; Appeal Hearing, 13 May 2013, AT. 61.
641 Đorđević Appeal Brief, para. 156.
642 Trial Judgement, paras 40, 1892, 1898.
643 Trial Judgement, para. 1898.
644 Trial Judgement, para. 1895. See also Trial Judgement, paras 108-124.
645 Đorđević Appeal Brief, paras 157, 194; Appeal Hearing, 13 May 2013, AT. 61, 71-72, 74, 80-81. See also Đorđević Appeal Brief, para. 160; Đorđević Reply Brief, paras 44-45.
646 Đorđević Appeal Brief, paras 161-172; Appeal Hearing, 13 May 2013, AT. 79-80. See Đorđević Reply Brief, paras 45-49.
647 Đorđević Appeal Brief, para. 173. See also Đorđević Reply Brief, paras 49-50. See also Appeal Hearing, 13 May 2013, AT. 168-169.

ground;[649] (v) the Trial Chamber erred in finding that the other Assistant Ministers were subordinate to him;[650] (vi) the evidence does not support the Trial Chamber's finding that Ministerial Collegium meetings were used to discuss and plan MUP engagements in Kosovo;[651] and (vii) the Trial Chamber erred in relation to its findings regarding Đorđević's role in the negotiations leading to the October Agreements.[652] According to Đorđević, these errors invalidate the finding on his control over the RJB and participation in the JCE.[653] Thus, Đorđević requests that all of his convictions be quashed or his sentence be reduced accordingly.[654]

214. The Prosecution responds that the Trial Chamber reasonably concluded that Đorđević participated in the JCE.[655] It contends that Đorđević merely repeats arguments expressly rejected by the Trial Chamber, without showing any error, and that these arguments should therefore be summarily dismissed.[656] In addition, the Prosecution argues that Đorđević's arguments fail on the merits.[657]

215. The Appeals Chamber will consider Đorđević's submissions in turn.

2. The Ministerial Staff and Đorđević's role

(a) Introduction

216. The Trial Chamber found that on 11 June 1997, Đorđević set up the MUP Staff for Kosovo, which created an intermediate level of command between the MUP headquarters in Belgrade and the SUPs in Kosovo.[658] The MUP Staff was tasked with the planning, organising, and undertaking of "'measures and activities to suppress armed rebellions; prevent and suppress civil disorder; [and] prevent terrorism'".[659] The Trial Chamber further found that on 15 January 1998, Đorđević issued a decision expanding the mandate of the MUP Staff to include cooperation with the "RDB, the VJ, other state organs and organs of local self government", and that one of the tasks of the MUP Staff

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[648] Đorđević Appeal Brief, paras 174-179. See also Đorđević Reply Brief, para. 51.
[649] Đorđević Appeal Brief, paras 180-185; Đorđević Reply Brief, paras 52-53. See also Appeal Hearing, 13 May 2013, AT. 170-171.
[650] Đorđević Appeal Brief, paras 186-190; Appeal Hearing, 13 May 2013, AT. 71, 74. See also Đorđević Reply Brief, paras 54-55.
[651] Đorđević Appeal Brief, para. 158. See Đorđević Appeal Brief, para. 194; Đorđević Reply Brief, paras 56-57.
[652] Đorđević Appeal Brief, para. 193.
[653] Đorđević Appeal Brief, para. 194.
[654] Đorđević Appeal Brief, para. 194.
[655] Prosecution Response Brief, paras 129, 156. See also Appeal Hearing, 13 May 2013, AT. 116-117.
[656] Prosecution Response Brief, paras 129, 131, 133, 139-142, 145-146, 149, 152-154, 156. See also Appeal Hearing, 13 May 2013, AT. 116-117.
[657] Prosecution Response Brief, para. 132.
[658] Trial Judgement, paras 104, 107.

was the "prevention and suppression of terrorism".[660] On 15 May 1998, Đorđević issued a decision by which he extended the mandate of the MUP Staff for one year.[661] He issued another decision on 11 June 1998 whereby Lukić was appointed Head of the MUP Staff and the membership of the MUP Staff was expanded to 14 members, all of whom were from the RJB.[662] The Trial Chamber further found that Đorđević did not have the authority, as Head of the RJB, to formally include the RDB in the MUP Staff, and that only the Minister had the legal power to formally ensure the representation of the RDB in the MUP Staff.[663] The Minister, as found by the Trial Chamber, did so on 16 June 1998 when he issued a decision establishing the Ministerial Staff, which expanded the membership of the MUP Staff to include the chiefs of the "secretariats for internal affairs, centres and branches of the RDB".[664] The Trial Chamber noted that:

> [w]hile in form this was a new staff which superseded the existing Staff, and while the Accused maintained he had not been consulted about this decision, its leader remained Sreten Lukić of the RJB, and most of its composition was unchanged from that put in place by Đorđević just five days earlier. The significant change was the formal inclusion of the state security representatives (the RDB).[665]

217. It further found that "[t]he MUP Staff for the Suppression of Terrorism was a coordinating body between the Ministry in Belgrade and the SUPs in Kosovo".[666] The Trial Chamber concluded

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659 Trial Judgement, para. 104, referring to Exhibit D402, item 2, Vlastimir Đorđević, 2 Dec 2009, T. 9469-9470.

660 Trial Judgement, para. 105.

661 Trial Judgement, para. 105.

662 Trial Judgement, para. 106, referring to Exhibit P760. The members of the MUP Staff were: Sreten Lukić, Assistant Chief of the Secretariat in Belgrade for police affairs, as Staff leader; Radoslav Djinović, Assistant Chief of the SUP in Smelderovo, as Staff deputy leader; Goran Radosavljević, Chief of the section for PJP in the SUP Belgrade, as Assistant Staff leader for interventions; Žarko Braković, Chief of the police department of SUP Priština/Prishtinë, as the Assistant Staff leader for police affairs; Milutin Vuković, Commander of the Mechanised Brigade in Priština/Prishtinë, as Assistant Staff leader for mechanised units; Miodrag Ršumović, Chief of the Department for the Suppression of Financial Crime, SUP Belgrade, as the coordinator for financial crime; Novica Zdravković, working in the suppression of financial crime in the Criminal Police Department in the SUP Vranje, as the general crime coordinator; Radovan Vušurević, Chief of the Department for Border Police, Aliens and Administrative Affairs of the SUP Novi Sad, as the Assistant Staff leader for border police, aliens and administrative affairs; Milan Čanković, providing communications equipment, vehicles and other equipment in the Police Administration of the Ministry, as the Assistant Staff leader for radio communications; Miloš Deretić, Chief of the Department of Communications in the SUP Priština/Prishtinë, as the Assistant Head of Staff for wire communications; Milorad Rajičić, Chief of the Department for Joint Affairs of the SUP Priština/Prishtinë, as the Assistant Staff leader for quartermaster security; Gojko Čelebić, working in the defence preparations in the Police Department of the SUP Priština/Prishtinë, as Assistant Staff leader for logistics; Dobrašin Krdžić, working in matters of preventive medicine as the Assistant Staff leader for medical security; and Raško Milenković, Chief of the analysis Department of the SUP Priština/Prishtinë, as the Assistant Staff leader for surveillance analysis (Trial Judgement, fn. 392).

663 Trial Judgement, paras 107-108.

664 Trial Judgement, para. 108, referring to Exhibit P57.

665 Trial Judgement, para. 108. See also Trial Judgement, paras 110, 1896-1897. The Trial Chamber also noted that "of the 14 original members of the Staff of 11 June 1998, just four (Braković, Ršumović, Deretić, and Čelebić) did not continue to be members in the Ministerial Staff" (Trial Judgement, fn. 394).

666 Trial Judgement, para. 1897.

that, contrary to the Defence case, the creation of the Ministerial Staff did not curtail Đorđević's powers and did not interrupt or affect his authority over the SUPs and the police in Kosovo.[667]

(b) Arguments of the parties

218. Đorđević argues that with the creation of the Ministerial Staff, the RJB and RDB chains of command were merged and brought under the direct supervision of the Minister, who delegated all command over these forces to the Head of MUP Staff, Lukić, as well as those chosen by the Minister and physically present in Kosovo.[668] The heads of RJB and RDB, therefore, were bypassed and excluded from the chain of command.[669] Consequently, although Đorđević remained Head of the RJB, he could no longer exercise command or control over the police in Kosovo.[670]

219. Đorđević contends that the Trial Chamber erred in its analysis of the Minister's decision of 16 June 1998 ("Minister's Decision") establishing the Ministerial Staff.[671] According to Đorđević, item 3 of the Minister's Decision contains two different provisions: "1. 'The Head of [MUP] Staff shall ***report*** to the Minister [...]' and 2. '[***inform***] the Minister about [...]'".[672] He argues that these provisions have distinct meaning and that the Trial Chamber failed to appreciate the original language used in the Serbian text of the Minister's Decision.[673] Đorđević submits that the use of the term *odgovora* in original Serbian version, which means "shall answer to", shows that the Head of Staff was responsible only to the Minister.[674] In his view this interpretation is supported by the Minister's decision of 31 May 1999 which extended the Minister's Decision, stating: "the Head of Staff **shall answer** for his own work, that of the Staff and the security situation to the Minister".[675] Đorđević submits that the additional use in both decisions of the term *izveštava* – meaning informing –in the latter half of the sentence would be redundant if the two terms had the same meaning.[676] He states that it is therefore clear that the Ministerial Staff fundamentally restructured the hierarchy and functioning of the MUP, thus eradicating Đorđević's former role and rerouting

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667 Trial Judgement, paras 111-124, 1895-1897.
668 Đorđević Appeal Brief, para. 162. See Đorđević Appeal Brief, para. 159, referring to Trial Judgement, para. 124. See also Đorđević Appeal Brief, para. 168; Đorđević Appeal Brief, para. 161, referring to Trial Judgement, para. 108; Exhibit P57; Appeal Hearing, 13 May 2013, AT. 75-76, 79.
669 Đorđević Appeal Brief, paras 162-163. See also Appeal Hearing, 13 May 2013, AT. 77-78.
670 Đorđević Appeal Brief, paras 163, 167. See also Đorđević Reply Brief, paras 45-46.
671 Đorđević Appeal Brief, para. 164, referring to Exhibit P57.
672 Đorđević Appeal Brief, para. 164 (emphasis in original).
673 Đorđević Appeal Brief, para. 164, referring to Exhibit P57.
674 Đorđević Appeal Brief, para. 165.
675 Đorđević Appeal Brief, para. 165; Exhibit P67, Item 3 (emphasis in original).
676 Đorđević Appeal Brief, para. 166, referring to Exhibits P57, Item 3, P67, Item 3.

responsibility directly from the Minister to the Head of the MUP Staff.[677] In Đorđević's view, the transfer of Stojanović should have been considered as a decisive sign of this change of hierarchy.[678]

220. Đorđević further submits that the Trial Chamber erroneously relied on the evidence of Witness Ljubinko Cvetić ("Witness Cvetić"), who was the Chief of one of the seven SUPs in Kosovo, to conclude that the creation of the Ministerial Staff had no impact on Đorđević's role.[679] Đorđević argues that the Trial Chamber erred in: (i) failing to acknowledge that Witness Cvetić changed his evidence when confronted with the Minister's Decision; and (ii) relying on Witness Cvetić's evidence because "he had no direct knowledge of the relationship between the Ministerial Staff and Belgrade".[680] He notes that Witness Cvetić acknowledged that "the relationship between Kosovo and Đorđević had changed with the creation of the Ministerial Staff".[681] Đorđević further submits that the Trial Chamber erred in relying on the hearsay evidence of Witness Shaun Byrnes ("Witness Byrnes") and on the inaccurately summarised statement of Đorđević's *chef de cabinet*, Slobodan Borišavljević ("Borišavljević").[682] In relation to Borišavljević's statement, Đorđević further notes that it was not admitted into evidence.[683]

221. In addition, Đorđević argues that the Trial Chamber erred in finding that he appointed and dismissed Chiefs of SUPs.[684] He insists that it was the prerogative of the Minister, whose authorisation was required when Đorđević appointed and dismissed RJB members to and from the Ministerial Staff.[685] Đorđević claims that his "limited role bore no relation to being 'actively engaged' in the actual functioning of the Staff until the end of the war".[686]

222. The Prosecution responds that the evidence supports the finding that Đorđević's role as Head of the RJB remained unchanged after the establishment of the Ministerial Staff.[687] It argues that "[t]he Trial Chamber reasonably found that the RJB chain of command flowed from MUP Minister Stojiljković and Đorđević" to the MUP Staff headed by Lukić, "who was in charge of coordinating and managing MUP units engaged in combat actions in Kosovo".[688] Furthermore, the

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677 Đorđević Appeal Brief, para. 166.
678 Appeal Hearing, 13 May 2013, AT. 78. See also Đorđević Appeal Brief, para. 170, referring to Exhibit D99.
679 Đorđević Appeal Brief, para. 168.
680 Đorđević Appeal Brief, para. 168. See also Đorđević Reply Brief, para. 47.
681 Đorđević Appeal Brief, para. 168, referring to Ljubinko Cvetić, 2 Jul 2009, T. 6789-6790.
682 Đorđević Appeal Brief, para. 169.
683 Đorđević Appeal Brief, para. 169.
684 Đorđević Appeal Brief, para. 171. See also Đorđević Reply Brief, para. 48.
685 Đorđević Appeal Brief, para. 172.
686 Đorđević Appeal Brief, para. 172, referring to Trial Judgement, paras 120-121.
687 Prosecution Response Brief, para. 130.
688 Prosecution Response Brief, para. 134.

Minister's Decision does not contradict the Trial Chamber's finding that Đorđević remained Head of the RJB and Lukić's superior.[689]

223. Regarding Witness Cvetić's testimony, the Prosecution argues that the Trial Chamber properly exercised its discretion in accepting it and that Đorđević incorrectly asserts that Witness Cvetić acknowledged he was mistaken.[690] It further argues that Đorđević fails to substantiate the claim that the Trial Chamber relied on weak evidence that Lukić continued to report to Đorđević after the Minister's Decision.[691] The Prosecution contends that, by focusing on only one paragraph of the Trial Judgement, Đorđević ignores other factual findings, "merely asserts that the [Trial] Chamber failed to interpret the evidence in a particular manner, and points to other evidence, without demonstrating that no reasonable trier of fact could have reached this conclusion".[692]

224. Similarly, regarding Đorđević's powers to appoint and dismiss SUP chiefs, the Prosecution states that Đorđević repeats arguments that the Trial Chamber considered and rejected, without showing an error.[693]

(c) Analysis

225. At the outset, the Appeals Chamber notes that Đorđević reiterates on appeal some of the same arguments made at trial that were explicitly considered and rejected by the Trial Chamber.[694] The Appeals Chamber therefore recalls that appeals proceedings are not a trial *de novo*; rather, the Appeals Chamber will hear appeals when an error of law or fact is alleged.[695] It is established in the jurisprudence of the Tribunal that mere repetitions of arguments that were unsuccessful at trial, without showing that their rejection constituted an error warranting the intervention of the Appeals Chamber, may be summarily dismissed.[696]

226. With respect to the Trial Chamber's consideration of the Minister's Decision, the Appeals Chamber observes that while the Trial Chamber found that pursuant to the Minister's Decision,

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689 Prosecution Response Brief, para. 134.
690 Prosecution Response Brief, para. 136.
691 Prosecution Response Brief, para. 137.
692 Prosecution Response Brief, para. 137, referring to Trial Judgement, para. 1897, Đorđević Appeal Brief, paras 169-170.
693 Prosecution Response Brief, paras 138-139.
694 See Trial Judgement, paras 111, 115, 1893; Closing Arguments (14 Jul 2010), T. 14451-14452, 14481, 14492-14493; Đorđević Closing Brief, paras 136-137, 146-148, 185-209, 285, 406. See *supra*, paras 211, 214, 218-224.
695 Article 25 of the Statute; *supra*, paras 13-19.

Lukić was to "report to the Minister about his actions", it did not solely rely on this wording or document to conclude that Đorđević's power had not been limited by the creation of the Ministerial Staff.[697] To the contrary, the Trial Chamber reasoned that the wording of the Minister's Decision did not suggest anything extraordinary from the standard functioning of the MUP, namely that the "Minister remains the person ultimately responsible and who can intervene and make demands or give instructions as he deems it necessary".[698] It further reasoned that the normal functioning of the MUP also entailed that senior chiefs of sections carry out their normal duties in assisting the Minister to fulfil his role.[699] The Trial Chamber then engaged in a detailed analysis of the evidence supporting the finding that Đorđević's role and involvement in the activities of the MUP in Kosovo were not diminished.[700] It considered evidence that: (i) Đorđević was often on the ground in 1998 and 1999 and played a direct role in the engagement of MUP forces in Kosovo;[701] (ii) he actively participated in the Collegium meetings at which anti-terrorist operations were discussed and planned;[702] (iii) he actively participated at the Joint Command meetings dealing with the coordination of the VJ and MUP forces in Kosovo;[703] (iv) the majority of the operations in Kosovo continued to be carried out by the RJB, including PJP and SAJ detachment, for which Đorđević remained responsible;[704] (v) Đorđević made decisions regulating the rights of the MUP members assigned to the Ministerial Staff, including Stevanović;[705] and (vi) Lukić recognised Đorđević as his superior.[706]

227. In light of the above, the Appeals Chamber finds unpersuasive Đorđević's claim that the use of both *odgovora* and *izveštava* in the Minister's Decision clearly show that "the Ministerial Staff fundamentally restructured the hierarchy and functioning of the MUP by requiring that the Head of Staff directly answer to [the Minister] and additionally inform him about security-related

696 See *supra*, para. 20.
697 See Trial Judgement, para. 110.
698 Trial Judgement, para. 112. See also Trial Judgement, para. 115.
699 Trial Judgement, paras 112-114.
700 See Trial Judgement, para. 118.
701 Trial Judgement, paras 118, 244, 359, 398, 1900-1907, 1920-1925, 2178. See *infra*, paras 231, 235-238, 242-243, 450-451.
702 Trial Judgement, paras 98, 118, 1897.
703 Trial Judgement, paras 118, 229, 237, 239-240, 244, 247, 249, 1902, 1904, 1906, 1988, 2178. See *infra*, paras 250, 283-287, 321. The Appeals Chamber further notes that, as will be discussed in detail below, Đorđević continued to issue dispatches deploying PJP units to Kosovo throughout the Indictment period (see *infra*, para. 242).
704 Trial Judgement, paras 118, 124.
705 Trial Judgement, para. 120. See *infra*, para. 230.
706 Trial Judgement, paras 119, 1897-1899. See *infra*, para. 229.

developments, measures taken and the effects of those measures".[707] These arguments are therefore dismissed.

228. The second error alleged by Đorđević relates to the Trial Chamber's reliance on the evidence of Witness Cvetić and Witness Byrnes, and on the summary of Borišavljević's statement.[708] The Appeals Chamber is not convinced by Đorđević's argument that the Trial Chamber erred in relying on Witness Cvetić's evidence to conclude that Đorđević's authority and powers remained unaffected by the creation of the Ministerial Staff. The Appeals Chamber observes that Witness Cvetić testified about the MUP Staff and stated that it was a "mid-command" between the MUP in Belgrade and the SUPs in Kosovo.[709] He did not testify in relation to the Ministerial Staff and, contrary to Đorđević's contention, did not change his evidence or acknowledge that he was mistaken.[710] Upon review of Witness Cvetić's testimony, it is clear that when discussing the relationship between the MUP Staff and Belgrade, he was referring to the MUP Staff established by Đorđević in 1997, which the Trial Chamber clearly distinguished from the Ministerial Staff established by the Minister's Decision.[711] Witness Cvetić testified that during the Indictment period he did not know of the existence of the Ministerial Staff and had never seen the Minister's Decision establishing it prior to his testimony.[712] In other words, he did not perceive a change in the relationship between the SUP and the headquarters in Belgrade, in relation to the MUP Staff originally established by Đorđević.[713] His testimony is consistent with the Trial Chamber's conclusion that the creation of the Ministerial Staff was a formality to include the RDB in the MUP Staff in Kosovo, but did not affect the relationship between the SUPs in Kosovo, the MUP Staff, and the headquarters Belgrade in that they remained subordinate to the RJB, and hence to Đorđević.[714] In reaching this conclusion, the Trial Chamber also considered the fact that Lukić continued to be the Head of the Staff and that, with the exception of the inclusion of the RDB representatives, the composition of the new Ministerial Staff remained for the most part

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707 See Đorđević Appeal Brief, para. 166.
708 See Đorđević Appeal Brief, paras 168-169.
709 Trial Judgement, para. 124.
710 See Ljubinko Cvetić, 2 Jul 2009, T. 6789-6790.
711 See Trial Judgement, paras 104-107, 123; Ljubinko Cvetić, 29 Jun 2009, T. 6590, 6597; Ljubinko Cvetić, 30 Jun 2009, T. 6645.
712 Ljubinko Cvetić, 30 Jun 2009, T. 6624-6626; Ljubinko Cvetić, 2 Jul 2009, T. 6784-6785.
713 See Ljubinko Cvetić, 2 Jul 2009, T. 6785-6786.
714 Trial Judgement, para. 124.

unchanged.[715] The Appeals Chamber is not convinced by Đorđević's assertions, which misrepresent the relevant witness testimony and evidence. His arguments are therefore dismissed.

229. As to the evidence of Witness Byrnes, the Appeals Chamber notes that he testified that Lukić told him that during his weekly trips to Belgrade he reported to both Đorđević and Stevanović.[716] The Appeals Chamber recalls that it is within the discretion of a trial chamber to admit hearsay evidence, although in assessing its probative value, the surrounding circumstances must be considered.[717] The Appeals Chamber observes that the Trial Chamber did not solely rely on Witness Byrne's testimony to conclude that Đorđević retained control over Lukić, but also relied on evidence of Đorđević's role in the negotiations leading to the October Agreements.[718] As for Borišavljević's statement given before the Belgrade War Crimes Chamber[719] that Đorđević received reports by phone from Lukić,[720] the Appeals Chamber notes that indeed this statement was not admitted into evidence in this trial. However, the Trial Chamber did not rely on Borišavljević's statement to reach the conclusion that Đorđević "remained in control of the Ministerial Staff and Sreten Lukić".[721] Borišavljević's statement was simply put to Đorđević during Đorđević's testimony. In assessing his credibility, the Trial Chamber observed that Đorđević failed to "consistently and convincingly" maintain his evidence denying that Lukić was reporting to him.[722] The Appeals Chamber therefore considers that the Trial Chamber relied on Borišavljević's statement to assess Đorđević's credibility on the issue, and not, as Đorđević suggests, for the truth of its content.[723] The Appeals Chamber finds that Đorđević takes the Trial Chamber's findings out of their context and ignores its detailed analysis of the testimonial and documentary evidence upon

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715 Trial Judgement, paras 108-109. The Appeals Chamber finds that contrary to the Đorđević's claim, the Trial Chamber considered and reasoned the changes in the composition of the Ministerial Staff from the MUP Staff (see Trial Judgement, paras 108-109, fn. 394. *Contra* Đorđević Appeal Brief, para. 162). Đorđević simply offers an alternative interpretation of the facts, ignoring all the relevant Trial Chamber findings.

716 Trial Judgement, fn. 6502.

717 See *Lukić and Lukić* Appeal Judgement, para. 303; *Blaškić* Appeal Judgement, para. 656, fn. 1374; *Haradinaj et al.* Appeal Judgement, paras 85-86.

718 Trial Judgement, para. 1897.

719 Chamber created in June 2003 within the Belgrade District Court, with jurisdiction over crimes against humanity and violations of international law as set out in the Serbian Penal Code, and over serious violations of international humanitarian law that occurred on the territories of the former Republic of Yugoslavia since 1 January 1991.

720 Trial Judgement, para. 1897, fn. 6502.

721 See Trial Judgement, para. 1897, fn. 6502. *Contra* Đorđević Appeal Brief, para. 169.

722 Trial Judgement, fn. 6502. See also Vlastimir Đorđević, 14 Dec 2009, T. 10061. Đorđević also suggests that the Trial Chamber inaccurately summarised the testimony of Borisavljević (Đorđević Appeal Brief, para. 169). Having reviewed the transcript, the Appeals Chamber notes that that is not the case. The Trial Judgement reported Borisavljević's statement that Đorđević received oral reports from Lukić, who contacted him by phone, which is consistent with Borisavljević statement as read into the record (*cf.* Trial Judgement, fn. 6502 with Vlastimir Đorđević, 14 Dec 2009, T. 10063).

723 See Trial Judgement, fn. 6502; Vlastimir Đorđević, 14 Dec 2009, T. 10061-10067.

which it concluded that the Ministerial Staff did not alter the superior-subordinate relationship between Đorđević and Lukić.[724] His arguments are therefore dismissed.

230. The Appeals Chamber further finds unconvincing Đorđević's argument that he lacked the power to appoint and dismiss the SUP chiefs. The Trial Chamber explicitly considered and rejected this argument.[725] Đorđević merely asks the Appeals Chamber to accept his interpretation of the evidence, without pointing to an error.[726] In addition, Đorđević's argument that his role in "appointing and dismissing RJB members to and from the Ministerial Staff" was limited to regulating individual employment rights reveals his misunderstanding of the Trial Chamber's finding.[727] Indeed, the Appeals Chamber understands the Trial Chamber to have found that notwithstanding Đorđević's lack of "power to appoint" members of the Ministerial Staff, by regulating the rights of those RJB members assigned to the Ministerial Staff, he "remained actively engaged in the membership and functioning of the Ministerial Staff in Kosovo throughout 1999."[728] Đorđević merely offers an alternative conclusion but has failed to show that the Trial Chamber erred. His argument is therefore dismissed.

3. Đorđević's role in the events in Kosovo in 1998 and 1999

(a) Introduction

231. The Trial Chamber found that, following the adoption of the Plan for the Suppression of Terrorism in Kosovo in July 1998, Đorđević was present in Kosovo for about three months, where he monitored the implementation of the plan and actively participated in the Ministerial Staff meetings.[729] The Trial Chamber also found that at a meeting of the Ministerial Staff in Kosovo on

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724 Trial Judgement, paras 104-124, 1897-1899.
725 Trial Judgement, paras 40, 48; Đorđević Closing Brief, para. 163.
726 See *supra*, para. 20.
727 Đorđević Appeal Brief, para. 172.
728 Trial Judgement, para. 120. The evidence analysed by the Trial Chamber includes two decisions signed by Đorđević relating to the entitlement of Stojanović and Bozović (Trial Judgement, para. 120, referring to Exhibits P1044, D405, respectively); Lukić's letter to Đorđević proposing the termination of appointments and addition of members to the Ministerial Staff as of 1 June 1999 (Trial Judgement, para. 120, referring to Exhibit D406); the Minister's subsequent decision reflecting Lukić's proposal to Đorđević (Trial Judgement, para. 120, referring to Exhibit P67); and Đorđević's decision of 30 May 1999 terminating the employment of Milan Čanković as member of the Ministerial Staff (Trial Judgement, para. 120, referring to Exhibit P144).
729 Trial Judgement, para. 1901. The Appeals Chamber notes that "in keeping with the general usage of witnesses and submissions during the trial" the Trial Chamber used "the description the 'MUP Staff', or the 'MUP Staff for Kosovo', whether the reference is to the MUP Staff for Kosovo before 16 June 1998, or the Ministerial Staff for the Suppression of Terrorism in Kosovo after 16 June 1998." The Trial Chamber stressed that this "usage is convenient for brevity and does not imply any failure to recognise the change in [the] formal structure" of the Staff (Trial Judgement, para. 123). The Appeals Chamber will instead differenciate between the two and refer to Ministerial Staff when discussing the Staff after 16 June 1998.

22 July 1998, Đorđević instructed those present on their future obligations in accordance with the Plan for the Suppression of Terrorism in Kosovo.[730] It further found that throughout 1999, Đorđević "continued to maintain his involvement in Kosovo and was active with the Minister in Kosovo on more than one occasion".[731] The Trial Chamber found this conduct to be inconsistent with Đorđević's position at trial that the Minister kept him "out of the loop" about the events in Kosovo.[732]

(b) Arguments of the parties

232. Đorđević argues that the effect of the creation of the Ministerial Staff on his "control over the events in Kosovo was instantaneous"[733] and that the Trial Chamber erred in concluding that he "actively participated in" in Ministerial Staff meetings, or had "effective control" over events in Kosovo in 1998 and 1999.[734] He contends that the Trial Chamber erred in concluding that he actively participated in Ministerial Staff meetings in 1998.[735] Đorđević submits that as 1998 proceeded, his involvement in Kosovo waned, and in 1999 he was in Kosovo on only a handful of occasions.[736] In support of his argument, Đorđević points to: (i) his alleged presence and involvement in Račak/Raçak in mid-January 1999; (ii) a staff meeting on 17 February 1999, headed by Lukić on the Minister's behalf, in which Đorđević barely spoke; (iii) a Ministerial Staff meeting on 8 March 1999, chaired by the Minister and Head of MUP Staff, in which Đorđević did not contribute; (iv) a visit to Kosovo on 16 and 18 April 1999 where he terminated the duties of two SUP chiefs, on the Minister's authorisation, and met with Lukić and Stevanović; (v) his alleged presence at the Joint Command meeting on 1 June 1999; and (vi) his presence at a meeting on 10 June 1999 pertaining to the withdrawal of MUP forces from Kosovo.[737]

233. In support of this argument, Đorđević also points to evidence of a number of Ministerial Staff meetings during which Stevanović was either chairing the meeting or giving detailed instructions, while Đorđević was not even present.[738]

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730 Trial Judgement, para. 1901.
731 Trial Judgement, para. 1925.
732 Trial Judgement, para. 1925.
733 Đorđević Appeal Brief, para. 173.
734 Đorđević Appeal Brief, para. 173.
735 Đorđević Appeal Brief, para. 173.
736 Đorđević Appeal Brief, para. 173.
737 Đorđević Appeal Brief, para. 173. Đorđević's involvement in Račak/Raçak in January 1999 and a Joint Command meeting on 1 June 1999, will be addressed under, respectively, sub-grounds 9(E) and 9(B) of his appeal.
738 Appeal Hearing, 13 May 2013, AT. 78-79. Specifically, Đorđević points to the following Ministerial Staff meetings: (i) 21 December 1998 (see Exhibit P1043); (ii) 4 April 1999 (see Exhibit P764); (iii) 7 May 1999 (see Exhibit P771); and (iv) 11 May 1999 (see Exhibit P345).

234. The Prosecution responds that the Trial Chamber rejected Đorđević's assertions that he seldom attended Ministerial Staff meetings in 1998 and was rarely on the ground in Kosovo in 1999.[739] It contends that the Trial Chamber reasonably reached this conclusion after weighing the evidence regarding Đorđević's presence on the ground following the establishment of the Ministerial Staff in June 1998, and was not convinced by his assertion that he was kept "out of the loop" about events in Kosovo.[740]

(c) Analysis

235. The Appeals Chamber observes that Đorđević submits that "[it] was wholly erroneous to conclude that [he] 'actively participated' in Ministerial Staff meetings in 1998".[741] The Appeals Chamber considers that this statement is taken out of context. The complete Trial Chamber's finding is as follows:

> [f]rom July 1998 onwards, for a period of at least three months, the Accused was present in Kosovo, monitoring the implementation of the Plan for the Suppression of Terrorism in Kosovo and actively participating in MUP Staff meetings.[742]

236. The Trial Chamber's findings in this regard are based on extensive evidence concerning Đorđević's involvement in Kosovo throughout 1998 and his active participation in the establishment and implementation of the Plan for the Suppression of Terrorism in Kosovo.[743] The Appeals Chamber recalls that the full title of the Ministerial Staff was "Ministerial Staff for the Suppression of Terrorism"[744] and that it was created to formally bring together the RJB and RDB for the purpose of "combating terrorism" in Kosovo.[745] Immediately after the creation of the Ministerial Staff, Đorđević was sent to Kosovo to monitor and implement the Plan for the Suppression of Terrorism.[746] Đorđević himself testified that he occasionally participated in the Ministerial Staff meetings, "took part in the work of the meetings, contribut[ed] to them with some proposal [...] or help[ed] them in any way [he] thought [he] could".[747] Similarly, when discussing his role in Kosovo at the time, he testified that he was not "merely an observer" but that his task was "to get involved and provide assistance in the activities being carried out down there and to

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739 Prosecution Response Brief, para. 141.
740 Prosecution Response Brief, para. 141.
741 Đorđević Appeal Brief, para. 173.
742 Trial Judgement, para. 1901.
743 Trial Judgement, para. 1901, fns 6522-6531. See also Trial Judgement, paras 228-293, 1900-1907.
744 Trial Judgement, para. 108. See also *supra*, paras 209-211.
745 Trial Judgement, para. 110.
746 Vlastimir Đorđević, 8 December 2009, T. 9791; Trial Judgement, paras 1900-1907.
747 Trial Judgement, fn. 6526, referring to Vlastimir Đorđević, 3 December 2009, T. 9589.

give [his] contribution to the success of the anti-terrorist activity."[748] In light of the above, the Appeals Chamber finds that the fact that Đorđević did not attend all the meetings of the Ministerial Staff as he pointed out, does not undermine the Trial Chamber's conclusion that he was actively participating in Ministerial Staff meetings.[749] Similarly, it also does not undermine the Trial Chamber's conclusion that the creation of the Ministerial Staff did not, as Đorđević suggests, have an impact on his involvement in the events in Kosovo. His arguments in this respect are dismissed.

237. Đorđević further contends that the Trial Chamber erroneously relied on evidence of his limited participation in meetings in Kosovo in 1999, to establish that he was an active participant in and had effective control over forces in Kosovo in 1999.[750] Đorđević, however, ignores the Trial Chamber's finding that his visits to Kosovo in 1999 were considered in the context of his active participation in the establishment of the Plan for the Suppression of Terrorism in Kosovo and his "commanding presence in Račak/Raçak".[751] Đorđević's relative silence during certain meetings or the fact that a meeting was chaired by someone other than Đorđević does not negate these findings.[752] To the contrary, given his role in the establishment of the Plan for the Suppression of Terrorism in Kosovo and his "commanding presence in Račak/Raçak", as well as his senior status, Đorđević's presence in Kosovo and at meetings aimed at "boost[ing] the morale of the police force" and evaluating the "handover of duties of the two SUP chiefs" is relevant to the Trial Chamber's determination of Đorđević's continued involvement in Kosovo during the Indictment period.[753] It was therefore reasonable for the Trial Chamber to consider his participation at meetings in Kosovo in 1999 to establish that he was still active in Kosovo and was not kept "out of the loop" as Đorđević argued at trial.[754]

238. In any event, Đorđević misunderstands the findings of the Trial Chamber insofar as he submits that it failed to establish that he had "effective control" over events in Kosovo.[755] The Trial Chamber did not consider whether or not he had effective control in these specific instances, but rather that Đorđević "played a key role in coordinating the work of the MUP forces in Kosovo in 1998 and 1999"[756] and, additionally, that he had *de jure* powers and effective control over the

[748] Trial Judgement, fn. 6526, referring to Vlastimir Đorđević, 8 December 2009, T. 9791.
[749] *Contra* Đorđević Appeal Brief, fn. 256.
[750] See Trial Judgement, para. 1925.
[751] Trial Judgement, para. 1925.
[752] See Đorđević Appeal Brief, para. 173, referring to Exhibit P85, p. 4, Trial Judgement, para. 1925.
[753] Trial Judgement, para. 1925.
[754] See Trial Judgement, para. 1925.
[755] See Đorđević Appeal Brief, para. 173(b).
[756] Trial Judgement, para. 2154.

police in Kosovo.[757] The Trial Chamber made its findings with respect to Đorđević's presence in Kosovo in 1999 to show that Đorđević "continued to maintain his involvement in Kosovo, and was active with the Minister in Kosovo on more than one occasion".[758] In light of his continual visits throughout 1998 and 1999, his "commanding presence" at times, and his key role in coordinating MUP forces in Kosovo, the Appeals Chamber is satisfied the Trial Chamber reasonably concluded that Đorđević maintained his involvement and was active in Kosovo in 1999.

239. In light of the above, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and as such has failed to show that the Trial Chamber erred in concluding that he remained involved and active in Kosovo throughout 1999.

4. Authority over the PJP and the SAJ

(a) Arguments of the parties

240. Đorđević submits that the Trial Chamber erred in concluding that he had authority and effective control over the PJP and the SAJ, because he engaged and deployed them.[759] Moreover, he argues that he merely implemented the Minister's decisions and his role ended there.[760] He further contests the Trial Chamber's finding that he admitted members of PJP and SAJ units into the reserve forces and deployed them to Kosovo.[761]

241. The Prosecution responds that the Trial Chamber reasonably found that Đorđević was responsible for PJP and SAJ units in Kosovo throughout 1998 and 1999 and rejected Đorđević's argument that he merely implemented the Minister's decisions.[762] The Prosecution maintains that the establishment of the Ministerial Staff in June 1998 did not diminish Đorđević's authority over the PJP and SAJ units.[763] The Prosecution also claims that Đorđević has failed to show that the Trial Chamber's finding regarding the deployment of volunteers and reservists to Kosovo was unreasonable.[764]

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[757] Trial Judgement, para. 2154.
[758] Trial Judgement, para. 1925.
[759] Đorđević Appeal Brief, paras 174, 176, 178-179.
[760] Đorđević Appeal Brief, paras 175, 177-179.
[761] Đorđević Appeal Brief, para. 177.
[762] Prosecution Response Brief, para. 143. See also Appeal Hearing, 13 May 2013, AT. 119.
[763] Prosecution Response Brief, para. 144.
[764] Prosecution Response Brief, para. 145.

(b) Analysis

242. The Appeals Chamber observes that the Trial Chamber found that "the mobilising and engaging of the PJPs could be done on orders of the Minister and, when approved by the Minister, also on orders of the Chief of the RJB", namely Đorđević.[765] The Trial Chamber explicitly considered Đorđević's evidence that he was never authorised by the Minister to "use" the PJP to be sent on mission, and found this to be "blatantly" incompatible with the evidence before it.[766] It concluded that the Minister had authorised him to make decisions on engaging the PJP forces at the relevant time, based on: (i) documentary evidence showing that Đorđević, as Head of the RJB, issued dispatches deploying the PJP units throughout the Indictment period;[767] and (ii) the testimony of Witness Cvetić, Chief of the Kosovska Mitrovica/Mitrovicë SUP, that it was normally the Head of RJB, *i.e.* Đorđević, who made the decision to engage PJP units.[768] The Appeals Chamber finds that Đorđević fails to support his contention that he merely implemented the Minister's decisions and that the Trial Chamber erred in relying on the testimonies and documentary evidence upon which it reached its conclusion. The Appeals Chamber therefore finds that Đorđević has failed to show that the Trial Chamber's reasoning and assessment of the evidence was erroneous.[769]

243. With regard to Đorđević's argument in relation to the SAJ, he suggests that the Trial Chamber's finding that he had authority over the SAJ because he could deploy them, falls short of effective control.[770] To the extent Đorđević argues that effective control necessarily implies control during combat operations,[771] the Appeals Chamber recalls that this is incorrect as a matter of law.[772] In any event, the Appeals Chamber finds that whether he had control over these units in Kosovo during their combat operations is irrelevant to the ultimate determination of whether by deploying

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765 Trial Judgement, para. 61, referring to Exhibits P58, para. 2, P1360, p. 5, Ljubinko Cvetić, 29 Jun 2009, T. 6604, 6607, Vlastimir Đorđević, 1 Dec 2009, T. 9453, Vlastimir Đorđević, 2 Dec 2009, T. 9459. The Appeals Chamber notes that in support of his argument, Đorđević points to evidence that only supports the Trial Chamber's general finding that it was within the Minister's power to engage the PJP (compare Đorđević Appeal Brief, paras 174-175, fn. 263 with Trial Judgement, para. 61).

766 See Trial Judgement, para. 61, referring to Vlastimir Đorđević, 2 Dec 2009, T. 9459.

767 Trial Judgement, para. 61, referring to Exhibits P131, P132, P137, P138, P139, P346, P1182, P1183.

768 Trial Judgement, para. 61.

769 See *supra*, para. 20.

770 Đorđević Appeal Brief, para. 176. In this context, Đorđević challenges the Trial Chamber's conclusion that he admitted members into the reserve forces and deployed them, based solely on challenges to the Trial Chamber's findings on the deployment of the Scorpions (see Đorđević Appeal Brief, paras 176-177). The Appeals Chamber will address this argument later in this Judgement (see *infra*, paras 355-362, 366-371).

771 Đorđević Appeal Brief, paras 176, 178-179.

772 The Appeals Chamber recalls that "[w]hether the effective control descends from the superior to the subordinate culpable of the crime through intermediary subordinates is immaterial as a matter of law; instead, what matters is

them he acted in furtherance of the JCE. The Appeals Chamber recalls that the Trial Chamber explicitly found that although the PJP and SAJ units received their assignments from the MUP Staff in Priština/Prishtinë following their deployment, Đorđević remained responsible for them.[773]

244. Đorđević has therefore failed to show that the Trial Chamber erred in finding that he had effective control over the deployed units.

5. The reporting system within the MUP

(a) Arguments of the parties

245. Đorđević's argument in relation to the reporting system within the MUP is twofold. First, he argues that the reporting patterns within the MUP were affected by the creation of the Ministerial Staff, which is further evidence that this event curtailed Đorđević's powers.[774] Đorđević particularly takes issue with the Trial Chamber's finding that SUP reports sent from the Ministerial Staff to the MUP headquarters in Belgrade, including the heads of RJB and RDB, contained information on anti-terrorist operations carried out by the police units.[775] In his view, the fact that there was a double-track reporting system, one from the SUPs to the Ministerial Staff in Priština/Prishtinë, and the other one directly to the MUP, shows that he was not informed of the MUP operations in Kosovo.[776] Second, Đorđević contends that the Trial Chamber erred in inferring that he had knowledge of the events in Kosovo, since reports to Belgrade did not include information on anti-terrorist operations, even if the MUP Staff had received all the relevant information on the MUP and anti-terrorist activities.[777]

246. The Prosecution responds that the Trial Chamber's finding that Đorđević was informed of MUP operations in Kosovo was reasonable and "based on a wealth of evidence".[778]

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whether the superior has the material ability to prevent or punish the criminally responsible subordinate" (*Orić* Appeal Judgement, para. 20).

773 Trial Judgement, paras 72, 110, 112, 118, 124, 1896-1897. See also *infra*, paras 406-408.

774 See Đorđević Appeal Brief, paras 180, 182, 184-185; Đorđević Reply Brief, paras 52-53.

775 Đorđević Appeal Brief, para. 182, referring to Trial Judgement, para. 132. See also Appeal Hearing, 13 May 2013, AT. 170-171.

776 Đorđević Appeal Brief, para. 184. See also Appeal Hearing, 13 May 2013, AT. 170-171.

777 See Đorđević Appeal Brief, paras 180, 182, 184-185; Đorđević Reply Brief, paras 52-53.

778 Prosecution Response Brief, para. 147. See also Appeal Hearing, 13 May 2013, AT. 125. The Prosecution further submits that the Trial Chamber found that Đorđević's knowledge came from various sources including the detailed and extensive reporting systems in place in the MUP, reports by telephone, personal contact, his participation in meetings of the MUP Staff, Joint Command, MUP Collegium, and personal tours on the ground (Prosecution Response Brief, paras 147-148).

(b) Analysis

247. The Appeals Chamber notes that the Trial Chamber discussed in detail the reporting system within the MUP.[779] In making its findings on the reporting system, it relied on the MUP instructions on information and reporting,[780] Đorđević's, Witness Cvetić's, and Witness Simović's testimonies, as well as other documentary evidence.[781] It found that: (i) in 1999, the SUPs in Kosovo[782] sent reports about the events occurring in the territory of Kosovo to both the MUP headquarters in Belgrade and the MUP Staff in Priština/Prishtinë;[783] (ii) the most important security-related information that occurred within the territory of all the SUPs was in turn sent by the analytics department of the RJB in Belgrade to all the SUPs and the head of the MUP Staff, informing them of the situation outside their territory;[784] (iii) the chiefs of the SUPs reported to Lukić every morning on any additional information that had not been included in the daily bulletins;[785] and (iv) reports were given during the meetings of the MUP Staff.[786] The Trial Chamber also found that the MUP Staff submitted reports to the headquarters in Belgrade and summary reports to the MUP in Belgrade of everything that happened in the field. These summary reports were described by Đorđević as a "double-track channel", in light of the fact that the same information was also sent by the SUPs to the operation centre of the MUP.[787]

248. When discussing these reports, the Trial Chamber rejected Đorđević's evidence that while such reports were to include information on the movement of the police and police operations, the information received by Belgrade covered only terrorist activities (and therefore not anti-terrorist responses by the VJ and MUP).[788] The Trial Chamber instead found that these reports covered: (i) terrorist actions and the police response to these actions; (ii) police operations, including the type of operation, its time and place, the number of police members participating, combat and non-combat equipment used, and the result and consequences; (iii) movement of police units to, from, and within Kosovo; and (iv) observations on the work of the KVM mission members.[789] These

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779 Trial Judgement, paras 125-135.
780 Exhibit D232.
781 See Trial Judgement, paras 125-135, 1258.
782 The 33 Secretariats for Internal Affairs (SUPs) were subordinate to the RJB and responsible for the security situation in a particular geographic area for which they were established in the territory of the Republic of Serbia (Trial Judgement, para. 46).
783 Trial Judgement, para. 129, referring to Ljubinko Cvetić, 1 Jul 2009, T. 6723, 6726, Exhibit P1060.
784 Trial Judgement, para. 129, referring to Vlastimir Đorđević, 2 Dec 2009, T. 9495, 9499-9504.
785 Trial Judgement, para. 129, referring to Ljubinko Cvetić, 2 Jul 2009, T. 6763.
786 Trial Judgement, para. 129, referring to Ljubinko Cvetić, 3 Jul 2009, T. 6860, Exhibit P764.
787 Trial Judgement, para. 131, referring to Vlastimir Đorđević, 2 Dec 2009, T. 9508 (discussing Exhibit D284).
788 Trial Judgement, para. 132, referring to Exhibit P1041.
789 Trial Judgement, para. 132.

topics were set out in a dispatch from Lukić to all the SUPs in Kosovo on 21 October 1998 in light of the obligations entered into by Serbia in the October Agreements.[790]

249. The Appeals Chamber considers that the Trial Chamber's finding is not clear on whether the content of the "reports" refers to the reports sent: (i) from the SUPs to the MUP Staff, (ii) from the SUPs to the Operations Centre of the MUP in Belgrade, or (iii) from the MUP Staff to Belgrade. The Appeals Chamber notes that the Trial Chamber referred to Exhibits D274 and D275.[791] Exhibit D274 is a report from a SUP to the MUP Staff dated 14 January 1999, which covers precisely the areas of reporting set out in the dispatch of 21 October 1998 issued by Lukić.[792] Exhibit D275, is a daily report from a SUP to the Operations Centre in Belgrade, which on the other hand, only covers criminal offences, events, and incidents, but makes no reference to police operations.[793] However, for the reasons set out below and elsewhere in this Judgement,[794] the Appeals Chamber finds that this distinction has no bearing on the Trial Chamber's conclusion that the creation of the Ministerial Staff did not limit Đorđević's powers and that he was aware of the events unfolding in Kosovo.

250. The Appeals Chamber observes that the Trial Chamber explicitly found that despite the detailed and extensive reporting system whereby both the SUP and the MUP Staff reported to Belgrade on the events that occurred on the ground in Kosovo, these reports did not mention serious crimes committed by MUP forces against the Kosovo Albanian population during the course of 1998 and 1999.[795] It therefore inferred Đorđević's knowledge of the events occurring in Kosovo based on: (i) evidence that reports from the SUPs were sometimes given to the MUP headquarters by phone;[796] (ii) evidence that on 28 March 1999, Simović, SAJ Commander, informed Đorđević by telephone of the crimes committed against Kosovo Albanian civilians by the Scorpions unit attached to the SAJ in Podujevo/Podujevë on that day;[797] (iii) Đorđević's personal and direct contact with, *inter alia*, a number of SUP chiefs in Kosovo and the Head of the MUP Staff, Lukić;[798] (iv) his attendance at and active participation in the Joint Command meetings;[799] (v) his

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790 Trial Judgement, para. 132; Exhibit P1041.
791 Trial Judgement, para. 132.
792 See Exhibits D274, P1041.
793 See Exhibit D275.
794 See *supra*, paras 226-227, 235-238; *infra*, paras 250-251.
795 Trial Judgement, paras 1985-1986.
796 Trial Judgement, para. 1986, referring to the testimony of Ljubinko Cvetić, 1 Jul 2009, T. 6723, 6726.
797 Trial Judgement, para. 1986, referring to the testimony of Vlastimir Đorđević, 7 Dec 2009, T. 9703, Zoran Simović, 19 Apr 2010, T. 13588-13589, Zoran Simović, 20 Apr 2010, T. 13654.
798 Trial Judgement, para. 1987. The Trial Chamber considered evidence in 1999 he was present in Kosovo on several occasions, attending MUP Staff meetings and visiting SUP chiefs (Trial Judgement, para. 1987). Particularly the Trial Chamber found that: (i) in 1999 Đorđević attended a MUP Staff meeting during which Lukić discussed the

participation at the MUP Collegium, where the Trial Chamber found that VJ/MUP anti-terrorist operations were discussed in detail;[800] (vi) his knowledge of crimes committed by the Serbian forces in Kosovo already in 1998;[801] (vii) his presence on the ground in Račak/Raçak in January 1999, where an operation directed against the KLA resulted in the death of many civilians;[802] (viii) his involvement in the concealment of crimes;[803] and (ix) the national media.[804] The Appeals Chamber therefore finds that Đorđević has failed to show that no reasonable trier of fact could have concluded as the Trial Chamber did, and as such has failed to show that the Trial Chamber erred in concluding that he had knowledge of the events occurring in Kosovo.[805]

251. Turning to Đorđević's argument that after 24 March 1999, the communication system was damaged and news from the field was severely hampered, the Appeals Chamber notes that the Trial Chamber explicitly found that the telephone system of reporting was interrupted during April 1999 as a result of the bombing of the Priština/Prishtinë post office.[806] While the Trial Chamber did not explicitly state how the reporting system continued, evidence cited in the footnotes supports its finding that the reporting system continued to function throughout the war.[807] The Appeals Chamber notes that the Trial Chamber referred to Đorđević's own testimony concerning a set of dispatches sent from the RJB to the SUPs and the MUP Staff in April and May 1999.[808] Particularly, when testifying on a dispatch dated 24 April 1999, Đorđević stated that he received all the daily reports[809] and that the dispatch was sent to "all the secretariats and the MUP in

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RJB "mopping-up" operation to be carried out in Podujevo/Podujevë, Dragobilje/Dragobil and Drenica (Trial Judgement, para. 1987, referring to Exhbit P85, p. 1); (ii) in March 1999, while "mopping-up" VJ/MUP operations were being carried out in Kačanik/Kaçanik and Vučitrn/Vushitrri, he took part in discussions with the MUP Staff on the overall security situation in Kosovo and the implementation of a defence plan (Trial Judgement, para. 1987, referring to Ljubinko Cvetić, 1 Jul 2009, T. 6682-6683. See also Trial Judgement, para. 1925); (iii) on 16 April 1999 he accompanied the Minister on a visit to Kosovo during which they met the chiefs of the SUPs and the MUP Staff (Trial Judgement, para. 1987, referring to Vlastimir Đorđević, 7 Dec 2009, T. 9735); (iv) on 18 April 1999 Đorđević returned to Kosovo to oversee the handover of duty concerning the chief of a number of SUP, during which he met with Lukić, Petrić, Pavković, Lazarević, and Đaković (Trial Judgement, para. 1987, referring to Vlastimir Đorđević, 7 Dec 2009, T. 9738-9739, Vlastimir Đorđević, 11 Dec 2009, T. 10020).

799 Trial Judgement, para. 1988. See *supra*, para. 226; *infra*, paras 283-287, 321.

800 Trial Judgement, para. 1989. The Appeals Chamber recalls that it has upheld the Trial Chamber's conclusion that anti-terrorist operations were discussed during the Ministerial Collegium meetings (see *infra*, paras 269-271).

801 Trial Judgement, paras 1990-1991.

802 Trial Judgement, paras 1920-1924,1992. The Appeals Chamber has upheld the Trial Chamber's findings in relation to the Račak/Raçak incident and Đorđević's role therein (see *infra*, paras 338-340, 345-349).

803 Trial Judgement, paras 1994, 2156. The Appeals Chamber has upheld the Trial Chamber's findings and conclusions in relation to Đorđević's involvement in the concealment of the crimes committed by Serbian forces in Kosovo (see *infra*, paras 378-384, 406-409, 413-415, 421-425, 428-433).

804 Trial Judgement, para. 1996. See *infra*, para. 501.

805 See also *infra*, paras 463, 468, 470, 477, 504, 513-514.

806 Trial Judgement, para. 130. See Đorđević Appeal Brief, para. 185.

807 Trial Judgement, fn. 442, referring to Vlastimir Đorđević, 2 Dec 2009, T. 9499-9504, Exhibits D407, D408, D410, D411, D412. See also Ljubinko Cvetić, 1 Jul 2009, T. 6723-6724.

808 Trial Judgement, fn. 442, referring to Exhibits D407, D408, D410, D411.

809 Trial Judgement, fn. 442, referring to Vlastimir Đorđević, 2 Dec 2009, T. 9500.

[Priština/Prishtinë]".[810] The Appeals Chamber also notes Witness Cvetić's testimony in the context of the discussion on the destruction of the post office that caused the telephone lines to be cut, that the SUPs had communication centres and used "teleprinters" to send dispatches and bulletins to the MUP Staff and the headquarters in Belgrade.[811] Đorđević's argument therefore fails.

252. The Appeals Chamber therefore finds that Đorđević has failed to show that the Trial Chamber erred in concluding that the creation of the Ministerial Staff did not limit his powers and that he was aware of the MUP operation and other relevant events unfolding in Kosovo.

6. Areas of responsibility of the Assistant Ministers

(a) Introduction

253. The Trial Chamber held that, at all times relevant to the Indictment, Đorđević exercised *de jure* control over the RJB,[812] which was the largest organisational element within the MUP.[813] It found that in July 1997, Đorđević was promoted to Colonel-General, the highest attainable rank within the MUP and thus became the highest ranking MUP officer.[814] On 27 January 1998, Đorđević was appointed Chief of the RJB.[815] The Trial Chamber further found that the other Assistant Ministers within the RJB were subordinate to Đorđević based on: (i) his rank of Colonel-General; (ii) his position as Head of the RJB; (iii) Witness Aleksander Vasiljević's ("Witness Vasiljević") testimony that Đorđević was "the number 2 man in MUP";[816] and (iv) the fact that he held the highest attainable rank in the MUP.[817]

(b) Arguments of the parties

254. Đorđević argues that the Trial Chamber erred in concluding that, as Assistant Minister and Chief of the RJB, he was superior to the other three Assistant Ministers from the RJB.[818] He insists that all Assistant Ministers were directly responsible to the Minister.[819] He points to several laws and two documents issued by the Minister and argues that instead of "deal[ing]" with these

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[810] Vlastimir Đorđević, 2 Dec 2009, T. 9500.
[811] Ljubinko Cvetić, 1 Jul 2009, T. 6723-6724.
[812] Trial Judgement, para. 40.
[813] Trial Judgement, para. 43.
[814] Trial Judgement, paras 43, 1898.
[815] Trial Judgement, para. 43.
[816] Trial Judgement, paras 43, 1898.
[817] Trial Judgement, paras 43, 1898.
[818] Đorđević Appeal Brief, para. 159(ii), referring to Trial Judgement, paras 42-43, 1976.
[819] Đorđević Appeal Brief, para. 186, referring to Exhibits P258, Article 18, P263, D208. See also Đorđević Appeal Brief, para. 188; Appeal Hearing, 13 May 2013, AT. 76, referring to Exhibits P208, P258, Article 18, P263.

documents, the Trial Chamber based its conclusions on the MUP hierarchy and on the testimony of Witness Vasiljević and Witness K87.[820] According to Đorđević, the Trial Chamber erred in focusing on his rank to determine his status *vis-à-vis* the other Assistant Ministers, as unlike in the military, the principle of hierarchy was not well respected in the MUP and a superior rank did not entail superior control in the MUP.[821] Đorđević states that the *Milutinović et al.* Trial Chamber correctly recognised this, and that the Trial Chamber in this case should have come to the same conclusion.[822] He submits that the evidence of Witness Vasiljević was irrelevant on this issue and that Witness K87 was at the "very bottom of the RJB".[823] Đorđević insists that limitations to Đorđević's power arose when there was an overlap between the responsibilities of other Assistant Ministers.[824] He maintains that the Trial Chamber correctly noted this, but then failed to properly assess the role of two Assistant Ministers, Petar Zeković ("Zeković") and Stevanović, whose roles overlapped with Đorđević's.[825]

255. Đorđević further contends that there was no evidence that Zeković was Head of the Administration of Joint Affairs and that Stevanović was Head of the Police Administration in the RJB, as found by the Trial Chamber.[826]

256. The Prosecution responds that the Trial Chamber did consider the laws, evidence and witnesses referred to by Đorđević in support of his argument and found that the areas of responsibility of Stevanović and Zeković did not overlap with, or limit, Đorđević's authority as Head of the RJB.[827] The Prosecution submits that the Trial Chamber correctly reasoned that, as the highest ranking MUP Officer in the RJB and the "number 2 man in the MUP" and because the "principle of hierarchy was well-respected throughout the MUP structure", the three other Assistant Ministers, Zeković, Stevanović, and Mišić were subordinate to Đorđević.[828] Furthermore, the Prosecution adds that the Trial Chamber correctly relied on mutually-corroborating evidence and found that Assistant Ministers Zeković and Stevanović held positions within the RJB and

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[820] Appeal Hearing, 13 May 2013, AT. 73, 75-76.
[821] Đorđević Appeal Brief, para. 187, referring to *Milutinović et al.* Trial Judgement, vol.3, paras 943-944. See also Appeal Hearing, 13 May 2013, AT. 74-75, 174.
[822] Đorđević Appeal Brief, para. 187.
[823] Đorđević Appeal Brief, para. 188; Appeal Hearing, 13 May 2013, AT. 73 76.
[824] Đorđević Appeal Brief, para. 189-190; Appeal Hearing, 13 May 2013, T. 75-77. See also Đorđević Reply Brief, para. 55.
[825] Đorđević Appeal Brief, para. 189-190; Appeal Hearing, 13 May 2013, AT. 78-81. See also Đorđević Reply Brief, para. 55.
[826] Đorđević Appeal Brief, paras 189-190; Appeal Hearing, 13 May 2013, AT. 79, 172. Đorđević also notes that Zeković arranged for the collection of bodies from Priština/Prishtinë and Kosovska Mitrovica/Mitrovicë and their direct transportation to the Petrovo Selo PJP centre (Appeal Hearing, 13 May 2013, AT. 79).
[827] Appeal Hearing, 13 May 2013, AT. 126.
[828] Prosecution Response Brief, para. 150; Appeal Hearing, 13 May 2013, AT. 126.

reasonably found that both men headed departments that were within the RJB.[829] On the other hand, the Prosecution argues that the Trial Chamber found there was no evidence to support the theory that the area of responsibility of these Assistant Ministers overlapped with that of Đorđević.[830]

(c) Analysis

257. The Appeals Chamber first recalls that a trial chamber must make findings based on all of the evidence presented before it, and that two reasonable triers of fact may reach different but equally reasonable conclusions on the basis of the same evidence.[831] Therefore, an error cannot be established by merely pointing to the fact that other trial chambers have exercised their discretion in a different way.[832] The question before the Appeals Chamber is whether no reasonable trier of fact could have reached the same conclusion as the Trial Chamber.[833] The Appeals Chamber will therefore determine whether it was reasonable for the Trial Chamber to conclude that Đorđević was superior to other Assistant Ministers.

258. The Appeals Chamber notes that the Trial Chamber considered, but found unconvincing, the testimony of Đorđević and Witness Stojan Mišić ("Witness Mišić"), MUP Assistant Minister, who testified that, unlike in the military, the system of hierarchy did not exist in the MUP and that each Assistant Minister was responsible directly to the Minister.[834] The Trial Chamber instead concluded that the other Assistant Ministers within the RJB were subordinate to Đorđević, based on his rank and position as Head of the RJB, as well as the supporting testimony of Witness Vasiljević.[835]

259. The Appeals Chamber notes that in reaching its conclusion that those Assistant Ministers who also had a position in one of the RJB sections were subordinate to Đorđević, the Trial Chamber relied mostly on Đorđević's role and position as Head of the RJB.[836] Contrary to Đorđević's claim, the Trial Chamber did consider the legal framework concerning the organisation of the MUP.[837] Specifically, the Trial Chamber noted that according to Article 54 of Exhibit P357 – the Rules of Internal Organisation of the MUP of 1997 – the "Departments shall be controlled by chiefs of

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829 Prosecution Response Brief, para. 151; Appeal Hearing, 13 May 2013, AT. 126-128, referring to Trial Judgement, paras 40-41, 60, 100, 1936, 2127, 2175, Exhibits P263, P357, Article 13, P537.
830 Appeal Hearing, 13 May 2013, AT. 127, referring to Trial Judgement, para. 43.
831 *Krnojelac* Appeal Judgement, paras 11-12. See also *supra*, para. 180.
832 See *Krnojelac* Appeal Judgement, para. 12.
833 See *supra*, paras 16-17.
834 Trial Judgement, para. 43.
835 Trial Judgement, para. 43, referring to Aleksander Vasiljević, 11 June 2009, T. 5933, K87, 17 May 2010, T. 14162.
836 Trial Judgement, para. 43.
837 See Trial Judgement, paras 37, 40-41; Appeal Hearing, 13 May 2013, AT. 75-76, 78.

departments",[838] and that Đorđević, as "Chief of the RJB", was in control of the RJB.[839] Based on the same rules, the Trial Chamber also noted that the RJB comprised several administrations, including the Crime Police Administration and the Police Administration.[840] The Appeals Chamber considers that these findings are not disturbed by the additional laws Đorđević points to in support of his submission that the Assistant Ministers reported directly to the Minister.[841] In this respect, the Appeals Chamber notes that Exhibit P69 is an extract of the decree on the "Law on State Administration" dated 8 April 1992, which was considered by the Trial Chamber in setting out the structure of the MUP.[842] Đorđević refers to Article 46 of this decree which establishes that:

> [a]ssistant ministers shall be appointed in the ministry to head certain departments and carry out tasks specified in the document on job organization and planning and other duties which the minister may entrust to them.
>
> At the minister's proposal, the government shall appoint assistant ministers to four-year terms and relieve them of their duties.[843]

The Appeals Chamber notes that this provision does not create a direct and exclusive line of reporting between Assistant Ministers and Ministers within the Republic of Serbia. Rather, it establishes how the Assistant Ministers are appointed and that the Minister *may* entrust them with duties. This is further confirmed by Exhibit P258 – a decree "establishing the principles that shall apply to grading and classification of posts within ministries and special organisations" dated 6 July 1994 – also referred to by Đorđević.[844] While the Trial Chamber did not explicitly refer to Exhibit P258, the Appeals Chamber considers it was within the Trial Chamber's discretion not to do so,[845] considering that the content of this decree mirrors the evidence already before the Trial Chamber.[846] In this respect, the Appeals Chamber notes that while Article 18(2) of Exhibit P258 sets out that the "Assistant Minister [...] is directly responsible to the Minister"[847], Article 18(3) of the same exhibit establishes that:

> [t]he head of an internal organisation unit shall be responsible for his work and for the work of the organisation unit he runs to the head of the sector to which his internal organisation unit belongs;

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838 Trial Judgement, para. 40, referring to Exhibit P357.
839 Trial Judgement, para. 40, referring to Vlastimir Đorđević, 1 Dec 2009, T. 9396-9397, Exhibits P357, D396, Vlastimir Đorđević, 8 December 2009, T. 9788, 9817.
840 Trial Judgement, para. 41.
841 Appeal Hearing, 13 May 2013, AT. 75-76.
842 See Trial Judgement, para. 37.
843 Exhibit P69, Article 46.
844 See Appeal Hearing, 13 May 2013, AT. 73, 75-76.
845 See *e.g. Kvočka et al.* Appeal Judgement, para. 23; *Čelebići* Appeal Judgement, para. 498; *Kupreškić et al.* Appeal Judgement, para. 39; *Kordić and Čerkez* Appeal Judgement, para. 382.
846 See Trial Judgement, paras 37, 40-41.
847 Exhibit P258, Article 18(2).

> i.e. he shall be responsible to the chief executive who is in charge of the administrative organ or of a special organisation within the Ministry.[848]

260. It follows that Assistant Ministers who were also heads of an internal unit within a department in any ministry were also responsible to the head of the sector to which their internal unit belonged.[849] In this case, and in line with what is set out in Article 54 of Exhibit P357 and as found by the Trial Chamber, the heads of administrations within the RJB were responsible to the Head of the RJB, Đorđević.[850]

261. The Appeals Chamber notes that the Trial Chamber's reliance on Vasiljević's testimony was not crucial to its conclusion that the other three Assistant Ministers in the RJB were subordinate officers to Đorđević.[851] The Appeals Chamber observes that Witness Vasiljević, who was the Deputy Head of the Security Service of the VJ, was present in Kosovo during the Indictment period, had contact with the military, MUP and political leadership.[852] He also attended at least one Joint Command meeting.[853] Vasiljević testified that he was not specifically familiar with the chain of command between Stevanović and Đorđević and whether there was a superior-subordinate relationship between the two.[854] Nevertheless, he testified that Đorđević was the "number 2 man in the MUP"[855] and that from the communications "[they] all knew that [Đorđević and Stevanović] were the public security sector of the MUP."[856] Based on Vasiljević's position, his involvement in Kosovo during the Indictment time, and his contact with the MUP and political leadership at the time, the Appeals Chamber finds that it was reasonable for the Trial Chamber to rely on his testimony that Đorđević was the second ranking man in the MUP. Đorđević has failed to show that the Trial Chamber erred in doing so.

262. With regard to the testimony of Witness K87, the Appeals Chamber notes that the Witness corroborates Witness Vasiljević's evidence that Đorđević was "the number two man" in the MUP, and that only the Minister was superior to him.[857] The Appeals Chamber further notes that Witness K87 was a member of the SAJ (a special unit within the RJB, under the control of Đorđević),[858] that he was involved in the reburial of bodies at the Batajnica SAJ Centre, and that he had personal and

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848 Exhibit P258, Article 18(3). See also Exhibit P258, Articles 16 and 17.
849 See Exhibits P258, Articles 16-18; P357, Article 54.
850 Exhibit P357, Article 54.
851 Trial Judgement, para. 43.
852 See Trial Judgement, paras 196, 237, 262, 1898,
853 Trial Judgement, para. 237.
854 Aleksander Vasiljević, 8 Jun 2009, T. 5683
855 Aleksander Vasiljević, 11 Jun 2009, T. 5933.
856 Aleksander Vasiljević, 8 Jun 2009, T. 5683.
857 See K87, 17 May 2010, T. 14162, 14164-14165, 14172-14173, 14176-14177.
858 Trial Judgement, paras 70-77; *supra*, paras 242-243.

direct contact with Đorđević throughout the reburial operations.[859] In light of Witness K87's position as a member of the SAJ and personal and direct contact with Đorđević at the relevant time, the Appeals Chamber finds that it was therefore reasonable for the Trial Chamber to consider Witness K87's testimony that Đorđević was the second ranking man in the MUP.

263. The Appeals Chamber is therefore satisfied that it was reasonable for the Trial Chamber to conclude that, based on his position within the MUP and as Head of the RJB, Đorđević was superior to the other RJB Assistant Ministers who were also head of administrations within the RJB. Đorđević has failed to show that the Trial Chamber erred in reaching this conclusion.

264. As to the position held by Assistant Ministers Stevanović and Zeković, the Appeals Chamber notes that contrary to Đorđević's contention, there is evidence that Zeković was the Head of Administration of Joint Affairs[860] and that Stevanović was the Head of the Police Administration until 1999.[861] The Appeals Chamber finds that whether Stevanović had any role within the MUP other than that of Assistant Minister, is irrelevant. The Trial Chamber only considered Zeković's position as subordinate to Đorđević in the RJB in 1999, together with other factors, to conclude that Đorđević knew of the concealment of bodies at the Petrovo Selo PJP Centre.[862] Apart from this consideration, the Appeals Chamber recalls that Đorđević was not found to have contributed to the JCE by virtue of his position *vis-à-vis* the Assistant Ministers, but rather by virtue of, *inter alia*, the fact that he had effective control over the MUP forces deployed in Kosovo, that he was personally and directly involved in the deployment of the Scorpions to Kosovo, and that he took active steps to prevent investigations into and conceal the crimes committed by the forces under his effective control.[863]

265. Finally, Đorđević insists that there was an overlap between his area of responsibility and those of Zeković and Stevanović, which resulted in a limitation of his "powers".[864] However, the Appeals Chamber notes that Đorđević fails to indicate how Zeković's area of responsibility overlapped with his and therefore limited his power.[865] As for Stevanović, the core of Đorđević's

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[859] See Trial Judgement, paras 1325-1347.
[860] See Vlastimir Đorđević, 1 Dec 2009, T. 9409-9410, 9751; Ljubinko Cvetić, 29 Jun 2009, T. 6594; Stojan Mišić, 28 April 2010, T. 14070; Exhibit P263.
[861] See Vlastimir Đorđević, 1 Dec 2009, T. 9409-9410; Ljubinko Cvetić, 29 Jun 2009, T. 6594; Exhibit P263.
[862] See *infra*, Section X. G. 4. (c) .
[863] See *supra*, paras 242-243; *infra*, paras 304-308, 315-324, 355-362, 366-371, 378-384, 406-409, 413-415, 421-425, 428-432.
[864] Đorđević Appeal Brief, para. 189.
[865] See Appeal Hearing, 13 May 2013, AT. 75, 79. The Appeal Chamber notes that Đorđević's claim that the Minister's decision of 4 June 1997 created "fiefdoms" for Zeković and Stevanović is unsupported by the evidence (see Appeal Hearing, 13 May 2013, AT. 76, referring to Exhibit P263). The Appeals Chamber notes that by this

argument is in fact that Stevanović came to "take the hands-on role on the ground in Kosovo for the [M]inister" with the creation of the Ministerial Staff and that therefore Đorđević's role and powers were reduced.[866] As extensively discussed above, the Appeals Chamber is satisfied that the Trial Chamber reasonably concluded that Đorđević remained involved and active in Kosovo throughout 1999, even if Stevanović did chair some of the meetings of the Ministerial Staff, and that Đorđević's powers were not limited by the creation of the Ministerial Staff.[867]

7. The Ministerial Collegium

(a) Introduction

266. The Trial Chamber found that Đorđević was a member of the Ministerial Collegium during the Indictment period[868] and that at the Ministerial Collegium meetings, its members discussed and planned MUP engagement in Kosovo.[869]

(b) Arguments of the parties

267. Đorđević argues that the Trial Chamber erred in holding that anti-terrorist activities must have been discussed at the Ministerial Collegium meetings.[870] Đorđević maintains that all evidence confirmed that the Ministerial Collegium meetings merely relayed the general security situation in Kosovo and related logistics support, but that no plans or reports regarding the anti-terrorist operations were discussed at those meetings.[871] Furthermore, he contends that the only documentary evidence the Trial Chamber relied on was a diary entry, which was not admitted into evidence and was rejected by Witness Mišić.[872]

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very decision, Zeković and Stevanović were appointed to the Administration for Joint Affairs and the Police Administration, respectively (see Exhibit P263). Counsel for Đorđević concede that the findings regarding Zeković are much more limited and only point to the fact that he was involved in the concealment of bodies, without further elaboration (see Appeal Hearing, 13 May 2013, AT. 79-80).

866 Appeal Hearing, 13 May 2013, AT. 78-79. Specifically, Đorđević points to the following Ministerial Staff meetings in Kosovo during which Stevanović was either chairing the meeting or giving detailed instructions, while Đorđević was not even present: (i) 21 December 1998 (Exhibit P1043); (ii) 4 April 1999 (Exhibit P764); (iii) 7 May 1999 (Exhibit P 771); and (iv) 11 May 1999 (Exhibit P345).

867 See *supra*, paras 225-230, 235-239.

868 Trial Judgement, para. 2154.

869 Trial Judgement, para. 103.

870 Đorđević Appeal Brief, para. 159, referring to Trial Judgement, para. 101.

871 Đorđević Appeal Brief, para. 191, referring to Stojan Mišić, 27 Apr 2010, T. 14032, 14040, 14053-14054, Stojan Mišić, 28 Apr 2010, T. 14087-14090, 14094-14096, Slobodan Spasić, 18 May 2010, T. 14196-14198, 14230-14231, 14241-14242. See also Đorđević Reply Brief, para. 56.

872 Đorđević Appeal Brief, para. 192, referring to Trial Judgement, para. 102, Stojan Mišić, 28 Apr 2010, T. 14099-14100.

268. The Prosecution responds that the Trial Chamber correctly and reasonably considered witness testimony and documentary evidence in finding that the Ministerial Collegium, of which Đorđević was a member, discussed and planned the engagement of the MUP in Kosovo.[873]

(c) Analysis

269. The Appeals Chamber notes that the Trial Chamber expressly considered, but found unconvincing, the testimony of Đorđević and Witness Mišić that no information regarding anti-terrorist and combat activities in Kosovo was discussed, and that no decisions in that respect were taken at the Ministerial Collegium meetings.[874] The Trial Chamber found that it would have been "incredible" if the Ministerial Collegium had not discussed or made decisions about the situation in Kosovo in 1998 and 1999, considering that it was the "single most pressing security issue facing the MUP and Serbia at the time".[875] The Trial Chamber considered the testimony of Witness Mišić, who in contradiction with his other assertions, stated that: (i) at several Ministerial Collegium meetings they analysed the "overall security situation and sought solutions"; (ii) the Minister declared at a Ministerial Collegium meeting that a Ministerial Staff was created "to deal more effectively with the problem of terrorism"; and (iii) one of the priorities of the Ministerial Collegium was the situation in Kosovo and Metohija and the requests for logistic support for the police forces there.[876]

270. The Trial Chamber reasoned that in order to address such requests for additional units, re-enforcements, and equipment, the members of the Ministerial Collegium had to have knowledge of the operations for which they were required in order to properly deal with such requests.[877] The Trial Chamber also found it incredible that the MUP would have large numbers of men, including key units, regularly engaged and active in Kosovo without the Ministerial Collegium being involved in, or aware of, these activities.[878] Finally the Trial Chamber also acknowledged that the

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873 Prosecution Response Brief, para. 152.

874 Trial Judgement, paras 100-101. In relation to Witness Slobodan Spasić ("Witness Spasić"), the Appeals Chamber notes that the Trial Chamber did not rely on his testimony in its Judgement, but rather relied on the testimony of Witness Mišić, who was Assistant Minister in the MUP and Witness Spasić's direct superior (See Slobodan Spasić, 18 May 2010, T. 14187). The Appeals Chamber notes the Trial Chamber's consideration that there was a "marked inconsistency" in the testimony of the Defence witnesses as to whether anti-terrorist operations were discussed (Trial Judgement, para. 100), and the fact that it transpired from Witnss Spasić's testimony that he may not have attended all the MUP meetings ("the [anti-terrorist operations] were not discussed at the [C]ollegium meetings that I attended", Slobodan Spasić, 18 May 2010, T. 12231). The Appeals Chamber therefore finds that it was within the discretion of the Trial Chamber not to rely on Witness Spasić's testimony.

875 Trial Judgement, para. 101.

876 Trial Judgement, para. 101.

877 Trial Judgement, para. 101.

878 Trial Judgement, para. 101.

Ministerial Collegium did not engage in detailed planning of specific operations, as this activity was carried out by the MUP Staff in Priština/Prishtinë.[879] In light of these considerations, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have concluded as the Trial Chamber did, and therefore has failed to show that the Trial Chamber erred in concluding that anti-terrorist operations were discussed at the Ministerial Collegium meetings.

271. Turning to Đorđević's claim that the Trial Chamber relied on documentation not admitted into evidence, the Appeals Chamber notes that the said documentation consists of notes from a Ministerial Collegium meeting held on 14 February 1999 attended by, *inter alia*, Đorđević, Marković, and Witness Mišić, during which the need to develop a response to an imminent NATO attack was discussed.[880] The notes were put to Witness Mišić during his testimony at trial, and he denied being present at any such meeting and questioned whether the meeting was ever held.[881] The Trial Chamber considered that while the notes were not admitted into evidence, "very similar sentiments" described in those notes were recorded at a meeting of the Ministerial Staff in Priština/Prishtinë on 17 February 1999 and at another meeting scheduled for 20 February 1999.[882] At both of these meetings the deployment and engagement of approximately 5,000 policemen were discussed.[883] The Trial Chamber considered that the evidence on these additional meetings, specifically the minutes of the Ministerial Staff meeting of 17 February 1999,[884] demonstrated the "full extent" to which the Ministerial Collegium members were involved in planning and discussing MUP operations in Kosovo.[885] It also relied on this evidence to decide on the credibility of Witness Mišić's testimony that he had no knowledge of an RJB plan to prevent entry of NATO troops into Kosovo.[886] The Appeals Chamber considers that the Trial Chamber relied on Witness Mišić's testimony on the notes of the Ministerial Collegium meeting of 14 February 1999 to assess his credibility, and did not rely on those notes for the truth of their content.[887] The Appeals Chamber therefore finds that Đorđević mischaracterises the Trial Chamber's findings when he claims that it

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879 Trial Judgement, para. 103.
880 Trial Judgement, para. 102.
881 Trial Judgement, para. 102.
882 Trial Judgement, para. 102.
883 Trial Judgement, para. 102, referring to Exhibit P85, Stojan Mišić, 28 Apr 2010, T. 14104-14105. Based on the content of the minutes of the 17 February 1999 meeting which also included a discussion on the future deployment of about 4000 policemen, 70 policemen of the operative group and some 900 reservists, the Trial Chamber further found Witness Mišić incredible when he stated that he was not aware of any RJB plan to prevent the entry of NATO troops in Kosovo (Trial Judgement, para. 102, referring to Stojan Mišić, 28 Apr 2010, T. 14099-14100).
884 Trial Judgement, para. 102, referring to Exhibit P85.
885 Trial Judgement, para. 102.
886 Trial Judgement, para. 102.
887 See Trial Judgement, paras 101-102.

relied on evidence not admitted into evidence to find that anti-terrorist operations were discussed and planned at the Ministerial Collegium meetings.

8. The October Agreements

(a) Introduction

272. The Trial Chamber found that Đorđević's role at the negotiations leading to the October Agreements was indicative of his effective control over the police forces in Kosovo and further evidence that he had not been excluded from authority over the MUP forces by the decision of 16 June 1998 establishing the Ministerial Staff.[888]

(b) Arguments of the parties

273. Đorđević argues that his participation in negotiations leading to the October Agreements in 1998 cannot amount to evidence of effective control, because at these meetings his decisions were not absolute and he was only one of several members authorised to sign on behalf of a delegation of the Republic of Serbia.[889] Furthermore, he argues that the Trial Chamber failed to analyse the intent of the FRY during the negotiations leading to the October Agreements, which was the peaceful resolution of the crisis in Kosovo.[890]

274. The Prosecution responds that the Trial Chamber reasonably found that Đorđević's leading role in the negotiations of the October Agreements showed that he was responsible for the units in Kosovo, that he had detailed knowledge of the situation on the ground, and that he was fully informed about the activities of the MUP forces.[891]

(c) Analysis

275. The Appeals Chamber rejects Đorđević's submissions regarding the Trial Chamber's findings in relation to the October Agreements. Contrary to Đorđević's suggestion, the Trial Chamber did not find that his participation in the negotiations of the October Agreements itself "amount[ed] to effective control at the time of the Indictment incidents", namely in 1999.[892] Rather, the Trial Chamber found that Đorđević's participation in the negotiation of the October Agreements

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888 Trial Judgement, para. 1917.
889 Đorđević Appeal Brief, para. 193. See also Đorđević Reply Brief, para. 58.
890 Đorđević Appeal Brief, para. 193.
891 Prosecution Response Brief, para. 155.
892 See Đorđević Appeal Brief, para. 193.

was indicative of his effective control over the police force in late 1998.[893] In reaching this conclusion, it noted that Đorđević was able to give undertakings on behalf of the Republic of Serbia about the withdrawal of police forces, as well as negotiate the establishment of a number of observation points and their specific location.[894] It also found that these facts further revealed that Đorđević had not been excluded from authority over the police forces in Kosovo and their operations by the establishment of the Ministerial Staff and that he had detailed knowledge "about the situation on the ground, of MUP forces in Kosovo in 1998, and the strategic needs and concerns of these forces".[895] The Trial Chamber found this to be indicative of Đorđević's effective control over the police forces in that he was able to decide on their "deployment, withdrawal, movement and operational functioning in Kosovo".[896] However, it did not base its conclusion on Đorđević's effective control over the MUP forces in 1999 on his role in the negotiations leading to the October Agreements alone. As discussed extensively elsewhere in the Judgement, the Trial Chamber also considered other indicators, such as: (i) his ability to dispatch PJP units throughout the Indictment period; (ii) his authorisation to incorporate paramilitary forces and volunteers in the SAJ during the Indictment period; and (iii) the fact that the SUP chiefs reported to him.[897] The Appeals Chamber therefore finds that Đorđević has failed to show that the Trial Chamber erred in assessing his role in the negotiations leading to the October Agreements in late 1998.

276. The Appeals Chamber finds that the Trial Chamber was cautious in making these findings with regard to Đorđević's role during the in the negotiations of the October Agreements.[898] Indeed, the Trial Chamber did not improperly draw the conclusion that his role *itself* amounted to effective control over the MUP forces in Kosovo in 1999. Rather, the Trial Chamber considered this role in the October Agreements in late 1998 together with other identified indicators to determine whether Đorđević acted in furtherance of the JCE with the required intent.[899]

277. The Appeals Chamber thus finds that the Trial Chamber acted within the scope of its discretion and reasonably relied on Đorđević's role and responsibilities during the negotiations of the October Agreements as indicative of his effective control over the police forces.

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893 Trial Judgement, paras 1916-1917.
894 See Trial Judgement, paras 1916-1917.
895 Trial Judgement, paras 1917-1918.
896 See Trial Judgement, para. 1917.
897 See *supra*, paras 242-243, 247-252; *infra*, paras 355-362, 366-371; Trial Judgement, para. 2173.
898 See Trial Judgement, paras 1916-1917.
899 Trial Judgement, paras 1916-1919, 2154-2158.

9. Conclusion

278. In light of the foregoing, the Appeals Chamber dismisses Đorđević's sub-ground of appeal 9(A) in its entirety.

B. Sub-ground 9(B): alleged errors in relation to the Trial Chamber's assessment of the Joint Command and Đorđević's participation therein

1. Introduction

279. The Trial Chamber found that the Joint Command was established pursuant to an order of then President Slobodan Milošević in June 1998.[900] It began operating on 22 July 1998[901] and "functioned for about a year, by decisions and actions at the very highest political, military and police levels, so as to coordinate and jointly command the operations of the Federal VJ and Provincial MUP, with some other Serbian forces, in anti-terrorist and defence measures in Kosovo".[902] The Trial Chamber found that "although the end of October 1998 signalled the end of the first phase of the work of the Joint Command, it was decided that the Joint Command should continue to function as the most effective means to coordinate the operations of the VJ and MUP"[903] and that the evidence confirmed that the Joint Command operated "at least until 1 June 1999".[904] The Trial Chamber found that Đorđević was a member of this body, representing the RJB.[905]

2. Arguments of the parties

280. Đorđević submits that the Trial Chamber erred in finding that he was a member of the Joint Command during the Indictment period and in relying on his membership as indicative of his participation in the JCE.[906]

281. Specifically, Đorđević claims that the Trial Chamber's conclusion that he was a member of the Joint Command is based exclusively on the "notes taken during the summer of 1998", whereas

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900 Trial Judgement, para. 230.
901 Trial Judgement, para. 230.
902 Trial Judgement, para. 231.
903 Trial Judgement, para. 233.
904 Trial Judgement, para. 236.
905 Trial Judgement, para. 239, referring to Exhibit P886, p. 2, Ljubinko Cvetić, 30 Jun 2009, T. 6627-6628, Milan Đaković, 17 Aug 2009, T. 7880.
906 Đorđević Appeal Brief, paras 195-201. See also Đorđević Reply Brief, para. 59.

the "evidence as to the future membership of the Joint Command was inconclusive".[907] Đorđević argues that his attendance at a single meeting of the Joint Command on 1 June 1999 cannot establish his membership and role in its operation during the Indictment period.[908] Đorđević also asserts that the Joint Command operated from the Priština/Prishtinë area, but that he was in Kosovo on only a few occasions.[909] Đorđević further suggests that the Trial Chamber failed to properly consider 16 orders bearing the heading "Joint Command for KiM" ("16 Orders") registered in the Priština Corps logbook and the amendment to a Joint Command order dated 22 March 1999 signed by the Commander of the Priština Corps.[910] In his view, this evidence shows that "[t]here was no evidentiary basis upon which to conclude that Đorđević played any role in the operation of the Joint Command during the Indictment period."[911] Finally, he submits that the Joint Command was "properly within the discretion of the President of the FRY".[912] Accordingly, "[n]o inference of impropriety arose", and, in any event, the Trial Chamber found that membership in "the Joint Command was not equivalent to membership of a JCE".[913]

282. The Prosecution responds that this sub-ground of appeal should be summarily dismissed as Đorđević merely repeats submissions which were unsuccessful at trial, without showing any error in the Trial Chamber's conclusion.[914] The Prosecution submits that the Trial Chamber carefully considered the 16 Orders and reasonably concluded that these orders revealed that the Joint Command played a central role in planning and commanding the joint VJ-MUP actions during the Indictment period.[915] The Prosecution also points to other contemporaneous military orders corroborating the Joint Command's role.[916] Finally, the Prosecution submits that Đorđević ignores relevant evidence supporting the finding that he was a member of the Joint Command and participated in the JCE.[917]

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907 Đorđević Appeal Brief, para. 197, referring to Trial Judgement, paras 233, 238-239, Exhibit P87, pp 12-15.
908 Đorđević Appeal Brief, para. 200, referring to Trial Judgement, para. 1925. See also Đorđević Reply Brief, para. 61.
909 Đorđević Appeal Brief, para. 199. See also Đorđević Reply Brief, para. 59.
910 Đorđević Appeal Brief, para. 198, referring to Trial Judgement, paras 236, 241, fn. 837, Milan Đaković, 17 Aug 2009, T. 7945-7946, Milan Đaković, 19 Aug 2009, T.8067-8068, Exhibits D104, D105.
911 Đorđević Appeal Brief, para. 198, referring to Trial Judgement, paras 236, 241, fn. 837, Milan Đaković, 17 Aug 2009, T. 7945-7946, Milan Đaković, 19 Aug 2009, T. 8067-8068, Exhibits D104, D105.
912 Đorđević Appeal Brief, para. 196, referring to Trial Judgement, paras 231, 252. See also Đorđević Reply Brief, para. 60. *Contra* Prosecution Response Brief, para. 158.
913 Đorđević Appeal Brief, para. 196. See also Đorđević Reply Brief, para. 60.
914 Prosecution Response Brief, paras 157, 159-160.
915 Prosecution Response Brief, para. 161, referring to Trial Judgement, para. 236.
916 Prosecution Response Brief, para. 161, referring to Trial Judgement, para. 236.
917 Prosecution Response Brief, para. 162.

3. Analysis

283. At the outset, the Appeals Chamber notes, and Đorđević does not contest, that he was an active member of the Joint Command in 1998,[918] nor does he challenge the Trial Chamber's conclusion that the Joint Command continued to function until at least 1 June 1999.[919] This latter finding is linked to the Trial Chamber's finding on Đorđević's continued membership in the Joint Command. In reaching its findings, the Trial Chamber relied on: (i) the minutes of Joint Command meetings in October 1998,[920] attended by Đorđević,[921] during which opinions were voiced regarding the continued existence of the Joint Command;[922] (ii) President Milošević's support for "the proposal for the continued status of the Joint Command";[923] (iii) a MUP Staff meeting on 5 November 1998, which Đorđević attended, during which President Milan Milutinović summarised the decisions that had been reached and stated that "[w]ith regard to the Yugoslav Army and police, everything will remain the same as it has been up to now, (a joint command, VJ units will not withdraw, and police forces have only been reduced by the number that has already been withdrawn)";[924] (iv) the minutes of the VJ Collegium of 21 January 1999 which record General Ojdanić's observation that the Račak/Raçak operation had been ordered by the Joint Command;[925] (v) 16 Orders, directing combat operations in Kosovo, issued during the Indictment period;[926] (vi) combat reports from the Indictment period indicating that tasks were taken pursuant to the Joint Command decisions;[927] and (vii) Witness Vasiljević's evidence about a meeting of the

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[918] The Trial Chamber, in particular, found that Đorđević was present for nearly all of the body's frequent meetings in 1998 and that during these meetings he regularly provided updates on operations and/or detailed instructions on actions to be taken (see Trial Judgement, paras 239, 244, 247, 249, 1901-1902, 1904. See also Exhibit P886).

[919] Trial Judgement, paras 231, 233-236. See also Trial Judgement, para. 237.

[920] Trial Judgement, para. 233, referring to Exhibits P87, P886.

[921] Exhibits P886, pp 137, 140 (Đorđević is not listed as absent); P87, p. 1. The Appeals Chamber observes that, like for other members, it was specifically noted when Đorđević was absent during a Joint Command meeting (see Exhibit P886).

[922] Trial Judgement, para. 233, referring to Exhibits P87, P886. On 26 October 1998, Šainović stated that "'[t]his section of combat operations should be closed" (Trial Judgement, para. 233, referring to Exhibit P886, p. 139). On 28 October 1998, Milomir Minić is recorded as saying that "this command should remain unchanged and work until the end of the year, meeting when necessary'" (Trial Judgement, para. 233, referring to Exhibit P886, p. 142). On 29 October 1998, Šainović is recorded to have suggested that the composition of the Joint Command should be re-evaluated (Trial Judgement, para. 233, referring to Exhibit P87, p. 13).

[923] Trial Judgement, para. 233, referring to Exhibit P87, p. 12.

[924] Trial Judgement, para. 234, referring to Exhibit P770, p. 4.

[925] Trial Judgement, para. 236, referring to Exhibit P902, p. 11.

[926] Trial Judgement, para. 236, referring to Exhibits P973, D104, P972, P350, P971, P970, P1235, P1382, P766, P1383, P1384, P1385, P969, P767, P1386, D105. See *infra*, para. 286.

[927] Trial Judgement, para. 236, referring to Exhibits P1393, p. 2, P1394, p. 2.

Joint Command in Priština/Prishtinë on 1 June 1999, during which he took detailed notes and at which Đorđević was also present.[928]

284. In addition, the Appeals Chamber notes that Đorđević had a leading role in the Račak/Raçak operation in January 1999, which was ordered by the Joint Command,[929] and that he attended a meeting of the Joint Command as late as June 1999.[930] The Appeals Chamber considers that Đorđević's attendance at this meeting is relevant to establish his continued membership in the Joint Command after 1998 (and throughout the Indictment period), especially when considered in conjunction with the evidence of his participation in earlier Joint Command meetings and operations. The Appeals Chamber is satisfied that the Trial Chamber reasonably concluded that Đorđević remained an active member of the Joint Command during the Indictment period. The Appeals Chamber is therefore satisfied that the evidence referred to by the Trial Chamber clearly shows that the Trial Chamber did not, as submitted by Đorđević, rely solely on "notes taken during the summer of 1998" to establish his continued participation in the Joint Command in 1999.[931]

285. The Appeals Chamber also finds unconvincing Đorđević's claim that he could not have been a member of the Joint Command in 1999 as its seat was in Priština/Prishtinë and he was in Kosovo in 1999 only on "a handful of occasions".[932] The Appeals Chamber cannot discern, even if his actual physical presence in Kosovo was limited, how this renders unreasonable the Trial Chamber's conclusion concerning his membership in the Joint Command considering the totality of the evidence relied upon by the Trial Chamber. Moreover, the Appeals Chamber recalls that it has already found that the Trial Chamber reasonably concluded that Đorđević maintained his involvement and was active in Kosovo in 1999.[933]

286. With regard to the 16 Orders, the Appeals Chamber observes that Đorđević repeats arguments already made at trial, namely that the orders were in fact not issued by the Joint

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928 Trial Judgement, para. 237, referring to Aleksandar Vasiljević, 8 Jun 2009, T. 5691-5696, Exhibit P885. See also Trial Judgement, para. 235.

929 Trial Judgement, para. 236, referring to Exhibit P902, p. 11. The Appeals Chamber notes in particular that with respect to the events in Račak/Raçak, it has confirmed later in this Judgement the Trial Chamber's finding that Đorđević took a leading role in this operation which was ordered by the Joint Command (see *infra*, para. 349).

930 Trial Judgement, para. 237. The Appeals Chamber notes that in submitting that his presence at the 1 June 1999 Joint Command meeting does not establish his membership to the Joint Command, Đorđević repeats arguments already made at trial (see Đorđević Closing Brief, para. 461). Đorđević has failed, however, to show that it was unreasonable for the Trial Chamber to consider this in its assessment of Đorđević's membership to the Joint Command.

931 Đorđević Appeal Brief, para. 197.

932 Đorđević Appeal Brief, para. 199.

933 See *supra*, paras 235-239.

Command, but rather by the Priština Corps.[934] The Appeals Chamber further notes that the Trial Chamber specifically addressed and rejected Đorđević's contention that the Joint Command could not issue orders, and instead found, after a detailed analysis of the evidence, that "the Joint Command was a body which issued commands and did so on a regular basis during the Indictment period".[935] Đorđević's contention that orders were at times registered in the logbook of the Priština Corps does not negate the Trial Chamber's finding that the Joint Command issued orders for the coordinated use of the VJ and MUP forces to conduct combat operations against specific villages,[936] nor does it address the Trial Chamber's additional consideration of operations ordered by the Joint Command such as that in Račak/Raçak.[937] The Appeals Chamber recalls that the Trial Chamber noted that the actual drafting of the Joint Command orders was usually undertaken by the VJ,[938] and that operational command was left to the units on the grounds.[939] The Trial Chamber did not explicitly address Witness Milan Đaković's ("Witness Đaković") evidence that the orders were registered in the Priština Corps logbook and that the amendment to a 22 March 1999 Joint Command order was signed by Lazarević, Commander of the Priština Corps. However, the Appeals Chamber considers that the Trial Chamber took into account the role of the Priština Corps in finding that the orders were issued by the Joint Command.[940] Additionally, the Trial Chamber neither accepted nor found credible Witness Đaković's testimony with respect to the issue of the Joint Command and its ability to issue orders.[941] The Trial Chamber expressed that it had "the distinct impression that he strained to play down the nature and role of the Joint Command".[942] In the Appeals Chamber's view, Đorđević has failed to demonstrate any error by the Trial Chamber in its analysis of the 16 Orders.[943]

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934 See Đorđević Closing Brief, para. 462. See also Đorđević Closing Brief, paras 322-327.
935 Trial Judgement, para. 243. See also Trial Judgement, paras 241, 242, 244-251.
936 Trial Judgement, para. 241. See also Trial Judgement, para. 236.
937 Trial Judgement, para. 236.
938 Trial Judgement, para. 254.
939 Trial Judgement, paras 250, 254, 948.
940 See Milan Đaković, 17 Aug 2009, T. 7945-7946; Exhibits D104 (22 March 1999 Joint Command Order); D105 (amendment to the 22 March 1999 Joint Command Order), p. 5. The Appeals Chamber also recalls in this respect that in addition to the Trial Chamber having broad discretion in weighing evidence, it is not required to articulate every step of its reasoning or to list every piece of evidence which it considers in making its finding (see *Krajišnik* Appeal Judgement, para. 27; *Martić* Appeal Judgement, para. 19; *Strugar* Appeal Judgement, para. 21. See also *Brđanin* Appeal Judgement, para. 24; *Čelebići* Appeal Judgement, para. 481; *Gacumbitsi* Appeal Judgement, para. 115).
941 Trial Judgement, para. 243. See also Trial Judgement, para. 242.
942 Trial Judgement, para. 243. See also Trial Judgement, para. 242.
943 See Trial Judgement, paras 236, 241-252, 254, and evidence cited therein.

287. Based on the foregoing, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have found that he was a member of the Joint Command during the Indictment period.

288. Turning to Đorđević's argument that the Trial Chamber erroneously considered his membership to the Joint Command as indicative of his participation in the JCE,[944] the Appeals Chamber notes that the Trial Chamber explicitly found that "[w]hile the Joint Command may have facilitated the implementation of the common plan, this does not entail that all members of the Joint Command were necessarily members of the JCE or intended the crimes committed pursuant to it."[945] The Trial Chamber thus did not equate Đorđević's membership to the Joint Command to his participation in the JCE. Rather, it took into consideration his membership, in combination with a significant number of other factors, when assessing his alleged participation in the JCE.[946] Having already concluded that the Trial Chamber did not err in finding that Đorđević was a member of the Joint Command, the Appeals Chamber finds that it was reasonable to consider this factor in assessing Đorđević's alleged participation in the JCE.

289. Finally, Đorđević argues that the Trial Chamber erroneously made an inference of impropriety based on the fact that the Joint Command was not provided for by the legal order of the FRY and the Republic of Serbia.[947] The Appeals Chamber understands him to argue that the Trial Chamber erroneously relied on this finding as evidence of existence of the JCE, while the creation of the Joint Command was a mere presidential action aimed at coordinating the MUP and VJ.[948] The Trial Chamber found that:

> [t]he Joint Command was not a body contemplated by the Constitutions of the FRY or of Serbia. The FRY legal structure pursuant to which the VJ functioned, and the Republic of Serbia legal structure pursuant to which the MUP functioned, were quite distinct. There was no legal authority for a Joint Command of the VJ and the MUP.[949]

290. The Appeals Chamber considers that the Trial Chamber's finding must be read in light of Đorđević's submission at trial that the Joint Command could not have existed as it was not provided for in FRY or Serbia's legal order.[950] The Trial Chamber was not convinced by Đorđević's submission in this regard and found instead that "despite the constraints of the existing

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944 See Đorđević Appeal Brief, para. 201.
945 Trial Judgement, para. 2124. See Đorđević Appeal Brief, paras 196, 201.
946 See Trial Judgement, paras 2154-2158. See also Trial Judgement, paras 2051, 2126-2128.
947 Đorđević Appeal Brief, para. 196.
948 See Đorđević Reply Brief, para. 60.
949 Trial Judgement, para. 231.
950 See Trial Judgement, para. 231. See also Đorđević Closing Brief, paras 38-41, 298-299.

constitutional and legal regimes, a Joint Command was created" and that "the constraints of the existing legal structures were ignored and overridden by those at the highest levels of power in an attempt to achieve desired political and social outcomes".[951] It further found that: "[c]learly, out of necessity, the Joint Command was an extraordinary measure established by the President in conjunction with the political, VJ and MUP leadership to provide, in a period of crisis, a more effective means to carry out the agenda of the Serb leadership for Kosovo."[952] The Appeals Chamber considers that it was within the discretion of the Trial Chamber to consider that the Joint Command was an extraordinary measure used to achieve the goals of the Serbian leadership, and to rely on its creation, amongst other factors, to infer that a plurality of persons acted in concert to achieve the common purpose of the JCE. The Appeals Chamber finds that Đorđević's argument ignores the relevant context of the Trial Chamber's findings.[953] His argument is therefore dismissed.

4. Conclusion

291. Based on the foregoing, the Appeals Chamber dismisses sub-ground of appeal 9(B) in its entirety.

C. Sub-ground 9(C): alleged errors in relation to Đorđević's actions in 1998 as a basis for joint criminal enterprise liability for crimes committed in 1999

1. Introduction

292. The Trial Chamber found that the JCE formed among senior Serbian and FRY political, military, and police leaders, including Đorđević, came into existence no later than January 1999.[954] In reaching its conclusion on the existence of the JCE and Đorđević's criminal responsibility for his participation in it, the Trial Chamber considered, *inter alia*, evidence of his conduct and events which occurred prior to the Indictment period.[955]

2. Arguments of the parties

293. Đorđević submits that the Trial Chamber erred in relying on the events that took place in 1998 and early 1999 in order to infer his *mens rea* in relation to the crimes charged in the

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951 Trial Judgement, para. 231. See also Trial Judgement, paras 242, 252, 2124.
952 Trial Judgement, para. 252.
953 See Trial Judgement, paras 2008, 2036-2051. See also *supra*, paras 90-109, 116-120, 127-130, 138-147, 153-159, 179-193, 198-208.
954 Trial Judgement, paras 2025-2026. See also Indictment, para. 72.
955 See Trial Judgement, paras 2026, 2083-2085.

Indictment.[956] He claims that such an approach is "inherently unfair and should be discouraged by the Appeals Chamber".[957] In particular, Đorđević contends that the Trial Chamber should have followed the approach taken by the *Milutinović et al.* Trial Chamber, namely that "in order for the Prosecution to rely on crimes in 1998, it had to prove that those crimes were committed".[958] Đorđević argues that those crimes should have been "alleged, litigated and proved beyond reasonable doubt".[959]

294. The Prosecution responds that Đorđević's arguments are underdeveloped and should be summarily dismissed.[960] It argues that the Trial Chamber reasonably relied on Đorđević's conduct and events in 1998 as a basis for his liability for crimes committed in 1999 through his participation in the JCE.[961] It further claims that Đorđević had sufficient notice of the allegations and that he specifically addressed them at trial.[962]

3. Analysis

295. At the outset, the Appeals Chamber finds unconvincing Đorđević's contention that the Trial Chamber's consideration of evidence outside the Indictment period was inherently unfair. The Appeals Chamber recalls that Rule 89(C) of the Rules of Procedure and Evidence of the Tribunal ("Rules") gives a trial chamber discretion to admit any "relevant evidence which it deems to have probative value".[963] It has been established that pre-indictment period materials may be used to define "the development of the Common Purpose which was in place during the relevant period of the Indictment as well as the role played by the Appellant during that period".[964] Accordingly, the Appeals Chamber is satisfied that it was within the Trial Chamber's discretion to consider evidence pre-dating the Indictment period for the above-mentioned purpose.

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[956] Đorđević Appeal Brief, paras 203-204, 207. See also Đorđević Reply Brief, paras 62-63; Appeal Hearing, 13 May 2013, AT. 113-114, 168.
[957] Đorđević Appeal Brief, para. 204.
[958] Đorđević Appeal Brief, para. 205, referring to *Milutinović et al.* Trial Judgement, vol. 1, para. 844. See also Đorđević Reply Brief, para. 63. Đorđević argues that no such caution was taken in this case (Đorđević Appeal Brief, para. 205).
[959] Đorđević Appeal Brief, para. 204. See also Đorđević Appeal Brief, para. 206.
[960] Prosecution Response Brief, para. 167.
[961] Prosecution Response Brief, para. 163; Appeal Hearing, 13 May 2013, AT. 157-158.
[962] Prosecution Response Brief, paras 164-165, referring to Đorđević Closing Brief, paras 36-37, 43-68, 74-93.
[963] *Stakić* Appeal Judgement, para. 122; *Kupreškić et al.* Appeal Judgement, para. 31, citing Rule 89(C) and (D) of the Rules.
[964] *Stakić* Appeal Judgement, para. 123.

296. Đorđević also argues that the Trial Chamber should have established all events referred to in its findings beyond a reasonable doubt.[965] Initially, the Appeals Chamber observes that Đorđević fails to point to instances in which the Trial Chamber erred in applying the correct standard of proof; instead, he refers to a single incident, which took place in Račak/Raçak in January 1999, without identifying any specific error.[966] In any event, the Appeals Chamber recalls that "not each and every fact in the Trial Judgement must be proved beyond reasonable doubt, but only those on which a conviction or the sentence depends".[967] Similarly, "each piece of circumstantial evidence" does not need to be proven beyond a reasonable doubt.[968] The Appeals Chamber recalls that the rights of an accused are protected by requiring that findings at trial based on circumstantial evidence must be the only reasonable conclusion to be drawn from that evidence.[969]

297. The Appeals Chamber notes that the Trial Chamber took into consideration a number events which occurred in 1998 and early 1999, including: (i) a series of meetings amongst senior political, military and MUP leaders;[970] (ii) the build up of Serbian forces in Kosovo from early 1999;[971] (iii) the excessive use of force by Serbian forces against the Kosovo Albanian population already in 1998;[972] (iv) Đorđević's involvement in anti-terrorist operations in Kosovo as of March 1998;[973] (v) Đorđević's role in disarming Kosovo Albanians;[974] and (vi) his participation at the international negotiations in October 1998.[975] The Appeals Chamber finds that it was within the discretion of the Trial Chamber to rely on such events to establish that the JCE existed, as well as in assessing Đorđević's role therein and his *mens rea*. In this context, the Appeals Chamber observes that Đorđević neither contests the value of the events of 1998 and early 1999 in demonstrating his knowledge and intent in relation to Indictment crimes, nor alleges a single error committed by the Trial Chamber beyond the mere act of relying on the events in Račak/Raçak.[976] Accordingly, the Appeals Chamber finds that Đorđević has failed to show that the Trial Chamber erred in relying on,

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965 Đorđević Appeal Brief, para. 204.
966 The Račak/Raçak incident is discussed in detail in sub-ground 9(E) and will therefore be addressed separately (see *infra*, paras 325-350).
967 *D. Milošević* Appeal Judgement, para. 20.
968 *Galić* Appeal Judgement para. 218, referring to *Stakić* Appeal Judgement, para. 219; *Čelebići* Appeal Judgement, para. 458.
969 *Galić* Appeal Judgement para. 218; *Stakić* Appeal Judgement, para. 219; *Čelebići* Appeal Judgement, para. 458; *Kupreškić et al.* Appeal Judgement, para. 303.
970 Trial Judgement, para. 2026.
971 Trial Judgement, paras 2010-2026.
972 Trial Judgement, paras 2062-2063, 2083-2084.
973 Trial Judgement, paras 1900-1907.
974 Trial Judgement, paras 1908-1912.
975 Trial Judgement, paras 1916-1919.
976 See Đorđević Appeal Brief, paras 202-206.

inter alia, the events from 1998 and early 1999 to establish Đorđević's awareness of a specific pattern of criminal activity by MUP forces and absence of investigative action.[977]

298. Finally, Đorđević appears to suggest that the pre-Indictment events were not sufficiently pleaded.[978] The Appeals Chamber recalls that where the specific state of mind of an accused is pleaded as a material fact, "the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded".[979] The Appeals Chamber notes that the Indictment specifically pleaded that Đorđević had the requisite *mens rea* for liability under Articles 7(1) and 7(3) of the Statute, and that this inference could be drawn, *inter alia*, from events that occurred in 1998 and his knowledge thereof.[980] The Appeals Chamber observes that the pre-Indictment events were used by the Trial Chamber only to demonstrate his knowledge and intent with respect to the commission of crimes for which he was convicted.[981] Accordingly, the Appeals Chamber finds that the pre-Indictment events considered by the Trial Chamber to establish the state of mind of Đorđević did not have to be "specifically alleged" in the Indictment.

4. Conclusion

299. For the foregoing reasons, the Appeals Chamber dismisses Đorđević's sub-ground of appeal 9(C) in its entirety.

D. Sub-ground 9(D): alleged errors in relation to arming local Serbians and disarming Kosovo Albanians

1. Introduction

300. The Trial Chamber found that in mid-1998, pursuant to the FRY plan to quash KLA activity in Kosovo, adopted in July 1998 ("Plan of the Suppression of Terrorism"), the Joint Command tasked the VJ and MUP to undertake the disarming of predominantly Albanian villages in Kosovo and the arming of Serbian civilians.[982] These actions were to be implemented by the SUPs.[983] The

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977 See Trial Judgement, paras 1906, 2083-2085.
978 Đorđević Appeal Brief, para. 204. See also Đorđević Appeal Brief, para. 206.
979 *Blaškić* Appeal Judgement, para. 219. See also *Nahimana et al.* Appeal Judgement, para. 347. See *e.g. D. Milošević* Appeal Judgement, where the Appeals Chamber upheld the Trial Chamber's use of facts from incidents not charged in the Indictment to make findings about the siege of Sarajevo, finding that "the Trial Chamber properly based its findings about the purpose of the siege on the evidence" by considering witness testimony as to the goals and strategy of the campaign (*D. Milošević* Appeal Judgement, para. 133).
980 Indictment, para. 64.
981 See Trial Judgement, paras 1900-1907, 2026, 2083-2084.
982 Trial Judgement, paras 92, 1910-1915.

arming of Serbian civilians in Kosovo also involved the organisation of the Serbian population into local defence units, known as RPOs, that were then armed and trained by the VJ and the MUP.[984] The Trial Chamber found that Đorđević was "*de jure* responsible for the disarming of Kosovo Albanian villages",[985] and that he was aware of the arming of the Serbian civilian population in 1998 and 1999.[986]

301. Đorđević submits that the Trial Chamber erred in: (i) finding that the disarming of Kosovo Albanian villagers and arming of the Serbian civilian population were related to the JCE; and (ii) relying on these matters as relevant to Đorđević's participation in the JCE.[987]

2. Analysis

(a) Alleged error in finding that the disarming of Kosovo Albanian villages and arming of the Serbian civilian population were related to the JCE

a. Arguments of the parties

302. Đorđević submits that the Trial Chamber erroneously linked the disarming of Kosovo Albanian villages and arming of the Serbian civilian population to the JCE.[988] In support of his submission, he argues that these actions carried out in 1998 were "reasonable steps to combat and defend against the KLA".[989] With respect to the disarming of Kosovo Albanian villages, Đorđević specifically argues that the Trial Chamber erred in failing to find that it was a defensive action unrelated to any criminal purpose.[990] By way of example, Đorđević refers to the situation in Istinić/Isniq in 1998, allegedly showing "the return of refugees and, separately, the surrender of KLA weapons".[991] He submits that such actions were legal and that the inference remained that the disarming was a legitimate and necessary measure against a "growing terrorist threat".[992] With regard to the arming of Serbian civilians, Đorđević claims that the RPOs were created "for the sole

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983 Trial Judgement, paras 92, 1910. In relation to the disarming of Kosovo Albanians, while the SUPs were responsible for the disarming of the villages in Kosovo, the Priština Corps was tasked to disarm villages located in the border belt (Trial Judgement, para. 1910).
984 Trial Judgement, paras 92, 1911, 1913. See also Trial Judgement, paras 93-97.
985 Trial Judgement, para. 1910.
986 Trial Judgement, paras 1910-1915.
987 Đorđević Appeal Brief, para. 208, referring to Trial Judgement, para. 2154.
988 Đorđević Appeal Brief, paras 208-209, 212.
989 Đorđević Appeal Brief, paras 208-209, 212. See Đorđević Reply Brief, para. 64.
990 Đorđević Appeal Brief, para. 209 (emphasis and citations omitted), referring to Exhibit P431, p. 5, Trial Judgement, para. 1566.
991 Đorđević Appeal Brief, para. 210 (citations omitted), referring to Trial Judgement, para. 1910, Exhibit D429.
992 Đorđević Appeal Brief, para. 210.

purpose of defending against terrorist forces" and contends that they were "civilians who operated as a volunteer territorial defence".[993]

303. The Prosecution responds that Đorđević fails to articulate an error in the Trial Chamber's findings.[994] It submits that the Trial Chamber rejected Đorđević's arguments that the disarming of Kosovo Albanians was necessary to remove illegal weapons from the reach of the KLA and that the arming of the non-Albanian population was lawful, and instead reasonably found that these actions were carried out on a discriminatory basis and were not limited to the self-defence of the civilian population.[995] In particular, with regard to the village of Istinić/Isniq, the Prosecution asserts that "[t]he Trial Chamber considered and rejected Đorđević's testimony that the disarming of the village was done with the sole intention of allowing the return of the refugees and the surrender of KLA weapons."[996]

b. Analysis

304. The Appeals Chamber notes that in submitting that the disarming of Kosovo Albanian villages and the arming of the Serbian population were "reasonable steps to combat and defend against the KLA",[997] Đorđević repeats arguments that have already been considered but were unsuccessful at trial.[998]

305. With regard to the disarming of Kosovo Albanian villages, the Appeals Chamber finds that the Trial Chamber reasonably rejected Đorđević's proposition that this was a legitimate operation unrelated to the JCE, in light of the other events which unfolded at the time and were considered by the Trial Chamber to be indicative of a common plan.[999] In particular, the Trial Chamber explicitly considered Đorđević's submission that the disarming of the village of Istinić/Isniq in Dečani/Deçan municipality was legitimate on the basis that the MUP had entered the village seeking to prevent the escalation of the situation by requesting "terrorists', who were intermingled with the civilian population to leave the area".[1000] While the Trial Chamber conceded that the disarming of the village of Istinić/Isniq might also have this objective, it rejected Đorđević's position at trial in light

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993 Đorđević Appeal Brief, para. 212.
994 Prosecution Response Brief, paras 171, 174.
995 Prosecution Response Brief, paras 171, 174, referring to Trial Judgement, paras 1910, 1915.
996 Prosecution Response Brief, para. 173, referring to Trial Judgement, para. 1910.
997 Đorđević Appeal Brief, para. 208. See Đorđević Appeal Brief, paras 210, 212, 217. See also *supra*, para. 302.
998 See Trial Judgement, para. 1910, referring to Vlastimir Đorđević, 4 Dec 2009, T. 9624-9625, Vlastimir Đorđević, 8 Dec 2009, T. 9804. See also Đorđević Closing Brief, paras 605-619.
999 See Trial Judgement, paras 1910-1915, 2003-2026.
1000 See Trial Judgement, para. 1910, referring to Vlastimir Đorđević, 4 Dec 2009, T. 9624-9625, Vlastimir Đorđević, 8 Dec 2009, T. 9804.

of the totality of the evidence concerning the disarmament of Kosovo Albanian villages by the SUPs, and of the contemporaneous arming of the Serbian civilians and their organisation into RPOs.[1001] The Trial Chamber clearly found that the arming of Serbian civilians, contrary to its official aim of "defending Serbian villages",[1002] was done in a discriminatory manner, and was not limited to the "aim of self-defence of the civilian population against the 'enemy'".[1003] It further found that the armed Serbian civilians were engaged in joint VJ and MUP operations during the Indictment period.[1004] This conclusion was based on extensive evidence, in particular documentary evidence concerning, *inter alia*, the close association between the MUP and the RPOs and the engagement of armed Serbian civilians in joint VJ and MUP operations.[1005]

306. The Trial Chamber considered further evidence showing that the engagement of armed Serbian civilians continued throughout the Indictment period in violation of the October Agreements.[1006] The Trial Chamber was satisfied that the evidence of the build up and use of the VJ and MUP, and the arming of the Serbian population was further evidence of the common plan aimed at changing the ethnic composition of Kosovo.[1007] The Appeals Chamber finds that by merely repeating his case that the RPOs were created with the sole purpose of self-defence against terrorist forces, Đorđević fails to show that the Trial Chamber erred.

[1001] Trial Judgement, paras 1910-1911.
[1002] Trial Judgement, para. 1911.
[1003] Trial Judgement para. 1915.
[1004] Trial Judgement, paras 95-96, 1915. The Trial Chamber found that:

> [a] large number of the VJ Priština Corps and Joint Command orders received in evidence, for example, tasked the "non-Šiptar [*i.e.* Kosovo Albanian] population in KiM", "armed non-Šiptars" or "armed non-Šiptar population" with supporting the MUP forces in "breaking up and destroying Siptar terrorist forces". Ljubinko Cvetić affirmed that this occurred in practice. Documentary evidence also confirms this. A report of the 3rd Army Forward Command Post (IKM) dated 2 October 1998 notes that "the distribution of weapons to citizens loyal to the FRY (of Serbian and Montenegrin ethnicity) has made it possible for large-scale resistance against the terrorists to be organised". At a meeting of the Collegium of the VJ General Staff of 21 January 1999, it was reported that "bearing in mind the number of people owning or having been distributed weapons, there is a realistic possibility on the Serbian and Montenegrin side of the Serbian population organising itself to offer resistance, and of an increasing emergence of radical forces". The Chamber accepts that RPOs had a role in combat operations in conjunction and coordination with the MUP and the VJ. This role was not always limited to the stated role of the RPOs as is apparent from some orders referred to in the course of the Judgement (Trial Judgement, para. 95).

[1005] See *e.g.* Exhibits P886 (minutes of meetings held by the Joint Command in July and August 1998, discussing, *inter alia*, the arming of Serb population and their recruitment into RPOs); P87 (minutes of a meeting held by the MUP and VJ in October 1998, discussing the implementation of the Plan for the Suppression of Terrorism); P690 (minutes of a meeting held by the MUP Staff in Kosovo, during which SUP chiefs and commanders of the PJP gave directions to the participants, not to mention to KVM representatives that Serb civilians were being armed). See also Trial Judgement, paras 92-97 (on the formation of RPOs).
[1006] Trial Judgement, paras 1915, 2010-2026.
[1007] Trial Judgement, para. 2026. See *supra*, paras 183-184, 187; Trial Judgement, paras 1910-1915, 2003-2026.

307. The Appeals Chamber recalls the Trial Chamber's finding that, although joint VJ and MUP operations had the declared objective of fighting terrorist forces, the manner in which they were carried out, including the disproportionate use of force and the commission of crimes against Kosovo Albanians throughout, showed that the Serbian forces in fact targeted the whole Kosovo Albanian population.[1008] The Appeals Chamber has already upheld this finding.[1009]

308. In light of these findings, the Appeals Chamber concludes that the actions taken to disarm Kosovo Albanian villages and arm local Serbian civilians were reasonably found by the Trial Chamber to be carried out by the VJ and MUP units, as part of the Plan for the Suppression of Terrorism and were indicative of the existence of a joint criminal enterprise.[1010]

309. Đorđević has failed to show an error in the Trial Chamber's finding. His arguments are therefore dismissed.

(b) Alleged error in relying on the disarming of Kosovo Albanian villages and the arming of the Serbian civilian population as relevant to Đorđević's participation in the JCE

a. Introduction

310. The Trial Chamber found that Đorđević was *de jure* responsible for the disarming of Kosovo Albanian villages in Kosovo.[1011] In reaching this conclusion, the Trial Chamber considered that the Joint Command tasked MUP units with disarming members of the Kosovo Albanian population, and the SUPs in Kosovo were responsible for such activity.[1012] It then assessed Đorđević's role with respect to the SUPs, as will be outlined below.[1013] The Trial Chamber further considered that Đorđević was personally involved in the disarming of the village of Istinić/Isniq in Dečani/Deçan municipality at the end of September 1998.[1014] In addition, the Trial Chamber found that Đorđević had knowledge of the arming of the Serb civilian population in Kosovo and the engagement of armed Serb civilians.[1015]

[1008] Trial Judgement, paras 2018, 2026-2035, 2036-2051, 2052-2080, 2132-2136, 2138, 2140. See *supra*, paras 183-184, 187.
[1009] See *supra*, para. 187.
[1010] See Trial Judgement, paras 1910-1915, 2003-2026, 2130.
[1011] Trial Judgement, para. 1910.
[1012] Trial Judgement, para. 1910.
[1013] See *infra*, paras 317-318.
[1014] Trial Judgement, para. 1910.
[1015] Trial Judgement, para. 1915.

b. Arguments of the parties

311. First, Đorđević submits that the Trial Chamber erred in concluding that he was *de jure* responsible for the disarming of Kosovo Albanians.[1016] He argues that the evidence: (i) shows that the MUP Staff in Priština/Prishtinë exercised control over the SUPs in the region without establishing any link to him; and (ii) "does not point to a solid conclusion that [he] was even informed of the disarming, much less that he held *de jure* control".[1017]

312. Second, Đorđević submits that the Trial Chamber "erroneously concluded that he had sweeping knowledge of 'the arming of the Serb civilian population in Kosovo' not only in 1998 but until the end of the Indictment period in 1999", because this was not demonstrated by the evidence.[1018] Đorđević argues that the Trial Chamber erred in finding that he: (i) played a role in the creation or the arming of the RPOs by relying on the uncorroborated testimony of Witness Cvetić;[1019] and (ii) had first-hand knowledge of the RPO offensive actions by relying on the events in Čičavica/Qiqavica in September 1998, as he was not physically present.[1020]

313. Đorđević contends that the cumulative error is that the Trial Chamber equates these findings with "some kind of effective control, which it finds, goes to a 'significant contribution' to the JCE".[1021]

314. The Prosecution responds that Đorđević's submission should be summarily dismissed because he fails to show that the Trial Chamber's findings were unreasonable and repeats arguments made at trial.[1022] The Prosecution further argues that the Trial Chamber correctly found, based on ample evidence, that Đorđević was engaged in the arming of the non-Albanian population,[1023] that he was *de jure* responsible for disarming Kosovo Albanian villages,[1024] and that he also had knowledge of the engagement of armed Serbian civilians in joint MUP-VJ actions in

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[1016] Đorđević Appeal Brief, para. 211, referring to Trial Judgement, paras 49, 1910, Exhibit D244.
[1017] Đorđević Appeal Brief, para. 211, referring to Trial Judgement, paras 49, 1910, Exhibit D244.
[1018] Đorđević Appeal Brief, para. 215, referring to Trial Judgement, para. 1915. See also Đorđević Reply Brief, para. 64.
[1019] Đorđević Appeal Brief, paras 212-213, referring to Trial Judgement, paras 92, 1911, 2000, 2026, Exhibits P85, P688, P901, P1052, P1054, P1055, P1355, D449-D451, Ljubinko Cvetić, 2 Jul 2009, T.6742, Ljubinko Cvetić, 1 Jul 2009, T. 6713.
[1020] Đorđević Appeal Brief, para. 214, referring to Trial Judgement, para. 1903, Exhibit P866, Vlastimir Đorđević, 9 Dec 2009, T. 9863.
[1021] Đorđević Appeal Brief, para. 216 (citations omitted).
[1022] Prosecution Response Brief, para. 170, referring to Đorđević Closing Brief, paras 605-619.
[1023] Prosecution Response Brief, paras 176-177, referring to Trial Judgement, paras 1913-1915, Exhibits P85, P1055, p. 8.
[1024] Prosecution Response Brief, para. 172, referring to Trial Judgement, paras 46, 48, 238-239, 1910, 1895. See also Trial Judgement, para. 1899.

1998 and during the Indictment period.[1025] Specifically with regard to the arming of Serbian civilians, the Prosecution further responds that the Trial Chamber considered Witness Cvetić to be credible on this issue and accepted his testimony, and that Đorđević made "no attempt to overcome the deference afforded" to a trial chamber to assess the credibility of a witness.[1026] Therefore, through his participation in the arming and disarming process, the Prosecution contends that Đorđević contributed to the implementation of the JCE.[1027]

c. Analysis

315. At the outset, the Appeals Chamber stresses that the Trial Chamber found that the disarming of Kosovo Albanian villages and arming of local Serbian civilians were carried out by the VJ and MUP units as part of the Plan for the Suppression of Terrorism, and that these operations were indicative of the existence of a joint criminal enterprise.[1028] The Trial Chamber did not rely on the disarming of Kosovo Albanian villages or the arming of the Serbian civilians as showing Đorđević's contribution to the JCE.[1029] Instead, the Trial Chamber found that Đorđević's role in the process of disarming and arming of Serbian civilians meant that he had knowledge of these actions.[1030] The Trial Chamber referred to this knowledge when discussing his responsibility and in concluding that he possessed the intent for the crimes within the JCE.[1031] The factual errors alleged by Đorđević therefore relate to the findings on his *mens rea* and not, as Đorđević suggests, to his contribution to the JCE.

316. As such Đorđević's argument that the Trial Chamber equated these findings with "some kind of effective control which, it finds, goes to a 'significant contribution' to the JCE"[1032] is misconstrued. The Trial Chamber did not rely on these findings to conclude on Đorđević's contribution to the JCE (*actus reus*).[1033] Notwithstanding, the Appeals Chamber will consider his submissions in the context of his *mens rea*.

[1025] Prosecution Response Brief, para. 169, referring to Trial Judgement, paras 1910-1915.
[1026] Prosecution Response Brief, paras 175, 179, referring to Ljubinko Cvetić, 1 Jul 2009, T. 6713, *Aleksovski* Appeal Judgement, para. 63, *Popović* Impeachment Judgement, para. 32; see also *Galić* Appeal Judgement, paras 10, 303.
[1027] Prosecution Response Brief, para. 169, referring to Trial Judgement, paras 1915, 2154.
[1028] See Trial Judgement, paras 1910-1915, 2003-2026, 2130.
[1029] See Trial Judgement, paras 2154-2158.
[1030] Trial Judgement, paras 1990, 1999. See also Trial Judgement, paras 1915, 1983-1989, 1991-1998. See *infra*, paras 320-321.
[1031] Trial Judgement, paras 1908-1915, 2154.
[1032] Đorđević Appeal Brief, para. 216 (references omitted).
[1033] See Trial Judgement, paras 2154-2158.

317. The Appeals Chamber notes that Đorđević does not point to any evidence supporting his submission that he was "not even informed" of the disarming of Kosovo Albanian villages.[1034] Quite to the contrary, the Appeals Chamber notes that he gave direct testimony about his own knowledge of the operation of disarming in the village of Istinić/Isniq in Dečani/Deçan municipality at the end of September 1998.[1035] Furthermore, the Appeals Chamber finds that Đorđević misstates the record when he submits that the evidence "does not point to a solid conclusion" that he held "*de jure* control" over the disarming of Kosovo Albanian villages.[1036] While correctly pointing to the Trial Chamber's finding that the SUPs in Kosovo were commanded at the operational level by the MUP Staff in Priština/Prishtinë which coordinated and planned their operations,[1037] Đorđević ignores the other evidence considered by the Trial Chamber establishing that he remained *de jure* responsible for the work of the SUPs. The Trial Chamber considered documentary evidence indicating that the SUP chiefs were directly subordinate to Đorđević, who was their "only immediate superior", as the Head of the RJB.[1038] The evidence also showed that the SUP chiefs "were directly responsible only to [Đorđević], who in turn was directly responsible for his work and work of the units and personnel that were part of the [RJB] only to the minister".[1039] The Trial Chamber also found that the SUPs were subordinated to the RJB.[1040]

318. In light of the above findings establishing Đorđević's *de jure* responsibility over the work of the SUPs, and recalling the key role of the SUPs in the disarming of Kosovo Albanian villages,[1041] the Appeals Chamber finds that Đorđević has failed to show that no reasonable trial chamber could have concluded that he was, therefore, *de jure* responsible for the disarming of Kosovo Albanian villages. His submission is dismissed accordingly.

319. With regard to his knowledge of the arming of the Serbian population, Đorđević challenges the Trial Chamber's reliance on Witness Cvetić's uncorroborated testimony in order to conclude that he played a role in the arming of Serbian civilians.[1042] The Appeals Chamber recalls that a trial

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[1034] Đorđević Appeal Brief, para. 211. See *supra*, para. 311.
[1035] See Trial Judgement, para. 1910, referring to Vlastimir Đorđević, 4 Dec 2009, T. 9622-9625.
[1036] See Đorđević Appeal Brief, para. 211, referring to Trial Judgement, paras 49, 1910, Exhibit D244.
[1037] Trial Judgement, para. 49.
[1038] Trial Judgement, para. 48, referring to Exhibit D933, p. 21.
[1039] Trial Judgement, para. 48, referring to Exhibit D933, p. 21.
[1040] Trial Judgement, para. 46, referring to Ljubinko Cvetić, 26 Jun 2009, T. 6591, 6598. The Appeals Chamber notes that the Trial Chamber erroneously referred to T. 5691 but considers this to be a typographical error, as Ljubinko Cvetić provided evidence in T. 6591 that the SUPs were subordinated to the RJB. See also *supra*, paras 216, 228, 247, 250-251.
[1041] See *supra*, para. 315.
[1042] See *supra*, para. 312; Đorđević Appeal Brief, para. 213. See Trial Judgement, paras 92, 1911, referring to Ljubinko Cvetić, 1 Jul 2009, T. 6713.

chamber enjoys discretion in weighing the evidence,[1043] including the discretion to accept the evidence of a single witness.[1044] The Appeals Chamber notes that the Trial Chamber extensively relied on the evidence of Witness Cvetić throughout the Trial Judgement, in particular with regard to the structure of the MUP,[1045] and that Đorđević did not attempt to challenge the credibility of this witness at trial or on appeal.[1046]

320. Furthermore, the Appeals Chamber notes that Đorđević misstates the Trial Chamber's findings. Contrary to his argument, the Trial Chamber did not reach a conclusion that he "played a role"[1047] in arming Serbian civilians, but found that he possessed knowledge of this operation.[1048] This finding was based on the totality of the evidence, as outlined below. Among this evidence was Witness Cvetić's assertion that the process of arming the Serbian civilians "proceeded from the MUP down to the staff of the MUP and then the Secretariat of Internal Affairs".[1049] In this regard, the Appeals Chamber considers that Witness Cvetić's testimony, although uncorroborated, was analysed by the Trial Chamber in the broader context of the formation of the RPOs,[1050] and in light of all the other evidence establishing that Đorđević knew of the arming, but not that he participated in the process.[1051] Đorđević has thus failed to demonstrate an error in the Trial Chamber's reliance on the evidence of Witness Cvetić.

321. The Appeals Chamber notes that in challenging the Trial Chamber's conclusion that he had knowledge of the arming of Serbian civilians, in 1998 and 1999, Đorđević repeats arguments already raised at trial without pointing to any error.[1052] In relation to Đorđević's submission concerning the joint VJ and MUP operation in the village of Čičavica/Qiqavica in September 1998,[1053] the Trial Chamber considered Đorđević's account that although he had knowledge of this operation, he was not aware that armed civilians were being used to reinforce the army and the

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[1043] *Lukić and Lukić* Appeal Judgement, para. 88; *Munyakazi* Appeal Judgement, para. 51; *Setako* Appeal Judgement, para. 31, *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103; *Nchamihigo* Appeal Judgement, para. 47; *Bikindi* Appeal Judgement, para. 116; *Nahimana et al.* Appeal Judgement, para. 194.

[1044] *Lukić and Lukić* Appeal Judgement, para. 375, referring to *Haradinaj et al.* Appeal Judgement, para. 219, *Kupreškić et al.* Appeal Judgement, para. 33, *Aleksovski* Appeal Judgement, para. 62, *Tadić* Appeal Judgement, para. 65.

[1045] See Trial Judgement, paras 41-143.

[1046] See Ljubinko Cvetić, 2 Jul 2009, T. 6735-6810; Ljubinko Cvetić, 3 Jul 2009, T. 6812-6871; Đorđević Appeal Brief, para. 213. See also *supra*, para. 228.

[1047] Đorđević Appeal Brief, paras 212-213.

[1048] Trial Judgement, paras 1911-1915.

[1049] See Đorđević Appeal Brief, para. 213, referring to Ljubinko Cvetić, 2 Jul 2009, T. 6713.

[1050] Trial Judgement, paras 92, 1911. See also *supra*, para. 300.

[1051] See *infra*, para. 321.

[1052] Đorđević Appeal Brief, para. 215, referring to Trial Judgement, para. 1915; Đorđević Reply Brief, para. 64. See also Đorđević Closing Brief, paras 605-619.

[1053] See *supra*, para. 312; Đorđević Appeal Brief, para. 214.

police because he was "on the other side of the mountain" while the operation took place.[1054] The Trial Chamber also took into consideration Đorđević's denial that he had knowledge of the arming of the Serbian population on a general level, and of the involvement of armed Serbian civilians in joint VJ and MUP operations.[1055] However, it concluded that Đorđević's account was not credible in light of the totality of the evidence to the contrary.[1056] Such evidence included: (i) Joint Command meetings that Đorđević attended in July and August 1998 at which the arming of the Serbian population and their recruitment in the RPO were discussed;[1057] (ii) minutes of a meeting held on 29 October 1998, attended by senior VJ and MUP leadership including Đorđević, where the implementation of the Plan for the Suppression of Terrorism in Kosovo was discussed, which included the arming of the non-Albanian population and the formation of the RPOs;[1058] (iii) Đorđević's unsuccessful attempt to downplay the comments regarding armed Serbians and RPOs made by Lukić during a meeting;[1059] (iv) Đorđević's presence at the meeting of 17 February 1999 where Lukić informed those present that the RPOs in nearly all villages with Serb inhabitants were active and have increased their activities;[1060] as well as (v) other meetings, along with minutes and reports of these meetings establishing the close ties between the MUP and the RPOs in 1999.[1061] In light of this evidence in its totality, the Trial Chamber concluded that Đorđević had knowledge of the arming of the Serbian civilian population in Kosovo, their formation into RPOs, the involvement of the MUP in relation to logistical support, and the engagement of armed Serbian civilians in joint VJ and MUP operations.[1062] It further found that this knowledge was not limited to the second half of 1998 but extended until the end of the Indictment period in 1999.[1063]

1054 Trial Judgement, para. 1913, referring to Vlastimir Đorđević, 9 Dec 2009, T. 9860-9863, Exhibits P866, p. 103, P1422. See Đorđević Appeal Brief, para. 214.

1055 Trial Judgement, para. 1912, referring to Vlastimir Đorđević, 9 Dec 2009, T. 9862-9863, Vlastimir Đorđević, 10 Dec 2009 9901-9903. Specifically, the Trial Chamber further considered: (i) Đorđević's testimony that the role of the MUP with respect to the RPOs was limited to providing support and preparing the RPOs for defensive actions against terrorist (Trial Judgement, para. 1914, referring to Vlastimir Đorđević, 10 Dec 2009, T. 9938-9940); and (ii) his denial of his knowledge that by February 1999, 64,080 weapons had been distributed to the existing RPOs, as he had never seen the report on this (Trial Judgement, para. 1914, referring to Vlastimir Đorđević, 10 Dec 2009, T. 9940-9941).

1056 Trial Judgement, para. 1915, referring to Trial Judgement, paras 92-96. See Trial Judgement, paras 1912-1914.

1057 Trial Judgement, para. 1913, referring to Exhibit P886; see also Vlastimir Đorđević, 10 Dec 2009, T. 9915, 9920-9922, Vlastimir Đorđević, 14 Dec 2009, T. 10143.

1058 Trial Judgement, para. 1913, referring to Exhibit P87; see also Vlastimir Đorđević, 9 Dec 2009, T. 9872-9873, 9875.

1059 Trial Judgement, para. 1913, referring to Exhibit P690.

1060 Trial Judgement, para. 1914, referring to Exhibit P85, Vlastimir Đorđević, 10 Dec 2009, T. 9936-9937.

1061 See Trial Judgement, para. 1914, referring to a report of meetings held between 13 and 16 February 1999 and the minutes of the MUP Staff meeting of 17 February 1999. See Exhibits P85; P1055, p. 3.

1062 Trial Judgement, para. 1915.

1063 Trial Judgement, para. 1915.

322. In light of the above, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trial chamber could have come to the conclusion that Đorđević was aware of the arming of the Serbian population in the latter half of 1998 and until the end of the Indictment period in 1999.

323. Accordingly, the Appeals Chamber dismisses Đorđević's arguments relating to the Trial Chamber's findings on his *de jure* responsibility for the disarming of Kosovo Albanians and his knowledge of the arming of the Serb civilian population in Kosovo.

3. Conclusion

324. In light of all the foregoing, the Appeals Chamber dismisses Đorđević's sub-ground of appeal 9(D) in its entirety.

E. Sub-ground 9(E): alleged errors in relation to the Račak/Raçak incident and Đorđević's role therein

1. Introduction

325. The Trial Chamber found that Đorđević: (i) was aware of and took an active role in the joint VJ and MUP operation in Račak/Raçak on 15 January 1999 that resulted in the deaths of not less than 45 Kosovo Albanians;[1064] and (ii) led the subsequent "MUP efforts to conceal evidence of grossly excessive force used by the police and to present the operation in Račak/Raçak as a legitimate anti-terrorist operation".[1065]

326. In particular, the Trial Chamber concluded that the Račak/Raçak operation, which was ordered by the Joint Command, was "an early example of a new intensified approach to 'anti-terrorist' operations by VJ and MUP forces acting in coordination".[1066] It further found that by the time the Račak/Raçak operation took place, the JCE had already been formed,[1067] and this type of coordinated use of VJ, MUP, and other Serbian forces was employed to achieve the goal of the JCE.[1068] In the view of the Trial Chamber, by mid-January 1999 it had become apparent to the Serbian political, VJ, and MUP leadership that in order to achieve its objectives for assured Serbian control of Kosovo it was necessary to intensify cooperation between VJ and MUP forces in joint

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[1064] See Trial Judgement paras 257, 397-416, 425, 1920-1924, 2134.
[1065] See Trial Judgement, paras 415, 425, 1924.
[1066] Trial Judgement, para. 2134, referring to Exhibit P902, pp 9, 11.
[1067] Trial Judgement, para. 2134, referring to Exhibit P902, pp 9, 11, 29.
[1068] Trial Judgement, para. 2037.

operations.[1069] Thus, the Trial Chamber determined that Đorđević's role and knowledge in the Račak/Raçak operation was indicative of his involvement in the JCE.[1070]

327. Đorđević submits that the Trial Chamber erred in law and fact in: (i) relying on the Račak/Raçak operation to establish his role in furthering the JCE;[1071] (ii) concluding that 45 Kosovo Albanian civilians were killed during this operation;[1072] (iii) finding that the investigative Judge Danica Marinković ("Judge Marinković") was presented a staged scene; and (iv) finding that Đorđević had any role in the concealment of the excessive use of force.[1073] On this basis, Đorđević argues that the Račak/Raçak incident should not be considered in any evaluation of his criminal responsibility for the crimes contained within the Indictment and requests the Appeals Chamber to quash his convictions or reduce his sentence accordingly.[1074]

328. The Prosecution responds that Đorđević fails to demonstrate that no reasonable trial chamber could have reached the Trial Chamber's conclusion on the Račak/Raçak operation, and therefore this sub-ground of appeal should be dismissed.[1075]

2. Alleged error in relying on the Račak/Raçak operation to establish Đorđević's role in furthering the JCE

(a) Arguments of the parties

329. Đorđević argues that the Trial Chamber erred in relying on the Račak/Raçak operation to establish "'coordinated action' between the MUP and the VJ pursuant to the JCE".[1076] He contends that such a finding goes to his *actus reus*, whereas the relevance of the Račak/Raçak operation should have been limited to his alleged *mens rea*, following the withdrawal of the Račak/Raçak incident from the Indictment.[1077] In support of his argument, he points to the Trial Chamber's Decision on Admission of Evidence of 30 March 2010, which in his view limits the use of the

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[1069] Trial Judgement, para. 2134.
[1070] Trial Judgement, paras 1920-1924, 2134, 2154.
[1071] Đorđević Appeal Brief, paras 218-220.
[1072] Đorđević Appeal Brief, paras 218-223.
[1073] Đorđević Appeal Brief, paras 223-224.
[1074] Đorđević Appeal Brief, para. 226; Đorđević Reply Brief, paras 65-66.
[1075] Prosecution Response Brief, paras 180, 184, 187.
[1076] Đorđević Appeal Brief, paras 218, 220, referring to Trial Judgement, paras 1923-1925, 1992, 2154.
[1077] Đorđević Appeal Brief, paras 218, 220, referring to *Prosecutor v. Vlastimir Đorđević*, Prosecution's Motion for Leave to Amend the Third Amended Joinder Indictment with Annexes A, B, and C, 2 June 2008, para. 23, granted by *Đorđević* Decision on Amendment of Indictment of 7 July 2008, paras 47, 51.

Račak/Raçak incident to the assessment of his *mens rea*.[1078] Therefore, he submits that findings relating to Račak/Raçak outside of those concerning his *mens rea* should be reversed for lack of sufficient notice and litigation.[1079]

330. The Prosecution responds that Đorđević had sufficient notice of the allegations regarding the Račak/Raçak operation, as they were set out in both the Indictment and the Prosecution Pre-Trial Brief,[1080] Đorđević testified about the events at Račak/Raçak, and referred to them in his Closing Brief.[1081]

(b) Analysis

331. At the outset, the Appeals Chamber stresses that the Prosecution only withdrew the charge of murder in relation to the Račak/Raçak incident and that the Trial Chamber did not convict Đorđević for the murders committed during the Račak/Raçak incident.[1082] The Appeals Chamber recalls that an indictment must, at a minimum, specify "on what legal basis of the Statute an individual is being charged",[1083] and that the Prosecution is required to "state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven".[1084] Whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case "with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence".[1085] "There is thus a clear distinction between the material facts upon which the Prosecution relies, which must be pleaded, and the evidence proffered to prove those material facts."[1086] Furthermore, the Appeals

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[1078] Đorđević Appeal Brief, paras 218, 220, referring to *Đorđević* Decision on Admission of Evidence of 30 March 2010, para. 9. See also Đorđević Reply Brief, para. 67.

[1079] Đorđević Appeal Brief, paras 218, 220, referring to Trial Judgement, paras 1923-1925, 1992, 2154.

[1080] Prosecution Response Brief, paras 181-182, referring to Indictment paras 61(c), 64(g), *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, Prosecution Pre-Trial Brief, 1 September 2008 ("Prosecution Pre-Trial Brief"), para. 289.

[1081] Prosecution Response Brief, para. 182, referring to Vlastimir Đorđević, 7 Dec 2009, T. 9666-9675, Vlastimir Đorđević, 9 Dec 2009, T. 9885-9893, Đorđević Closing Brief, paras 73-93.

[1082] See Indictment, para. 64(g); *Đorđević* Decision on Amendment of Indictment of 7 July 2008, paras 45-47. No charges of deportation or other inhumane acts (forcible transfer) were brought by the Prosecution in relation to Račak/Raçak (*Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, Prosecution's Motion for Leave to Amend the Third Amended Joinder Indictment with Annexes A, B, and C, 2 June 2008, para. 23; *Đorđević* Decision on Amendment of Indictment of 7 July 2008, para. 47); Trial Judgement, para. 2230, pp 886-950.

[1083] *Krnojelac* Appeal Judgement, para. 138.

[1084] *Kupreškić* Appeal Judgement, para. 88.

[1085] *Stakić* Appeal Judgement, para. 116, citing *Kupreškić et al.* Appeal Judgement, para. 88.

[1086] *Stakić* Appeal Judgement, para. 116.

Chamber recalls that the materiality of a particular fact cannot be established in the abstract, but is dependant on the Prosecution's case.[1087]

332. In this case, the Indictment explicitly references the Račak/Raçak operation as one of the factors upon which Đorđević's intent could be inferred.[1088] However, it also alleges that Đorđević participated in the JCE by, *inter alia*, (i) exercising effective control over forces of FRY and Serbia including all RJB units which were involved in the perpetration of the crimes charged in the Indictment; and (ii) participating in the planning, instigating and ordering of operations and activities of the forces of the FRY and Serbia in Kosovo, which were involved in the perpetration of the crimes charged in the Indictment, in particular the RJB and subordinate units.[1089] In its Pre-Trial Brief, the Prosecution argued that the Račak/Raçak operation was evidence of Đorđević's "hands-on" involvement in MUP activities in Kosovo in 1999, which is one of the factors it alleged in support of its submission that Đorđević participated and contributed to the JCE.[1090] Therefore, the Appeals Chamber finds that the material facts relating to the nature of Đorđević's participation in the JCE were sufficiently pleaded in the Indictment and that Đorđević was on notice that the Prosecution also intended to rely on the Račak/Raçak incident to prove such participation.

333. Furthermore, Đorđević misinterprets the Trial Chamber's Decision of 30 March 2010.[1091] In that decision, the Trial Chamber did not set out a limitation for the relevance of the Račak/Racak operation.[1092] Rather, it held that, although the events that occurred in Račak/Racak were not subject to specific murder charges, "[t]hese allegations [...] are relevant to *other issues* in the Indictment."[1093] After recognising the events at Račak/Racak "as a factor relevant to establishing his *mens rea* under Articles 7(1) and 7(3) of the Statute of the Tribunal", it considered that these events "[we]re of significance in the determination of *the charges against the Accused*", also noting that "both parties [...] adduced considerable evidence on the Račak/Raçak operation".[1094]

334. The Prosecution was therefore fully entitled to rely on the incident in support of its submission that Đorđević participated in the JCE, as clearly set out in its Pre-Trial Brief.[1095]

[1087] *Stakić* Appeal Judgement, para. 117; citing *Kupreškić et al.* Appeal Judgement, para. 89.
[1088] See Indictment, para. 64(g).
[1089] Indictment, para. 61(a)-(c).
[1090] Prosecution Pre-Trial Brief, para. 289; Indictment, para. 61(a)-(c).
[1091] *Đorđević* Decision on Admission of Evidence of 30 March 2010, para. 9. See Đorđević Appeal Brief, para. 218.
[1092] *Đorđević* Decision on Admission of Evidence of 30 March 2010, para. 9. See Đorđević Appeal Brief, para. 218.
[1093] *Đorđević* Decision on Admission of Evidence of 30 March 2010, para. 9 (emphasis added).
[1094] *Đorđević* Decision on Admission of Evidence of 30 March 2010, para. 9 (emphasis added). See Đorđević Appeal Brief, para. 218.
[1095] Prosecution Pre-Trial Brief, para. 289.

335. In light of the above, the Appeals Chamber finds that Đorđević has failed to show that the Trial Chamber erred in considering the Račak/Racak operation as evidence of a 'coordinated action' between the MUP and the VJ, in the context of Đorđević's contribution to the JCE.

3. Alleged error in concluding that 45 Kosovo Albanian civilians were killed in Račak/Raçak on 15 January 1999

(a) Arguments of the parties

336. Đorđević submits that the Trial Chamber erred in concluding that 45 Kosovo Albanian civilians were killed in Račak/Raçak on 15 January 1999.[1096] He argues that the Trial Chamber failed to consider: (i) forensic reports;[1097] (ii) evidence concerning the type of weapons recovered from the KLA in Račak/Raçak;[1098] (iii) "further evidence of KLA activity" which demonstrated that the KLA was present in the village on 15 January 1999;[1099] (iv) evidence that the wounded were treated at military hospitals;[1100] (v) evidence that those who perished were buried in accordance with KLA military rules; and (vi) evidence of the existence of a KLA headquarters.[1101]

337. The Prosecution responds that the Trial Chamber reasonably concluded that no less than 45 Kosovo Albanian civilians were killed in the Račak/Raçak operation.[1102] It also submits that Đorđević repeats arguments that were unsuccessful at trial,[1103] offers his own evaluation of the evidence,[1104] and fails to show any error in the Trial Chamber's exercise of its discretion.[1105]

[1096] Đorđević Appeal Brief, para. 219, referring to Trial Judgement, paras 416, 2134.
[1097] Đorđević Appeal Brief, paras 221-222, referring to, *inter alia*, Exhibits D895 (List of persons who died in the village of Račak/Raçak), D899 (General conclusion by the medical experts on the 40 bodies found in a mosque in Račak/Raçak).
[1098] Đorđević Appeal Brief, para. 222, referring to Exhibits D149 (Report from the investigative judge including a list of weapons belonging to KLA that were found in Račak/Raçak on 15 January 1999 during an on-site investigation), D148 (Record of on-site investigation performed in Račak/Raçak, signed by the investigative judge on 18 January 1999), D757, p. 4 (Report from the Priština Corps including a report on 26 dead bodies found by KVM in Račak/Raçak on 20 January 1999, wearing "civilian clothes but with weapons and 'KLA' insignia"), D896 (Report on forensic examination of Račak/Raçak incident including a list of weapons found on the scene on 15 January 1999), Momir Stojanović, 22 Feb 2010, T. 11739.
[1099] Đorđević Appeal Brief, para. 222, referring to Joseph Maisonneuve, 4 Jun 2009, T. 5539.
[1100] Đorđević Appeal Brief, para. 222, referring to Trial Judgement, paras 401, 402, Exhibit P872, Joseph Maisonneuve, 4 Jun 2009, T. 5544-5545, Branko Mladenović, 8 Mar 2010, T. 12500.
[1101] Đorđević Appeal Brief, para. 222, referring to Trial Judgement, paras 401, 402, Exhibit P872, Joseph Maisonneuve, 4 Jun 2009, T. 5544-5545, Branko Mladenović, 8 Mar 2010, T. 12500.
[1102] Prosecution Response Brief, para. 180, referring to Trial Judgement, paras 397-402, 421-425, 1920-1923.
[1103] Prosecution Response Brief, para. 184, referring to Đorđević Closing Brief, paras 73, 75-81. See also Prosecution Response Brief, paras 184-186, referring to Đorđević Appeal Brief, paras 221-223.
[1104] Prosecution Response Brief, paras 185-187.
[1105] Prosecution Response Brief, paras 185-187.

(b) Analysis

338. The Appeals Chamber finds that, for the reasons set out below, none of Đorđević's arguments show that the Trial Chamber erred in finding that 45 Kosovo Albanian civilians were killed. The Appeals Chamber observes that the Trial Chamber's conclusion that 45 Kosovo Albanian civilians were killed as a result of Račak/Raçak operation was based on an assessment of a considerable amount of evidence concerning the events which occurred in the area on 15 January 1999 and the following days.[1106] This included evidence on the series of investigation attempts by the investigative Judge Marinković,[1107] as well as evidence given by Đorđević himself and other Defence witnesses.[1108] Contrary to Đorđević's contention,[1109] the Trial Chamber did consider: (i) forensic reports referred to by Đorđević in his Appeal Brief;[1110] (ii) evidence concerning the type of weapons recovered in Račak/Raçak;[1111] (iii) evidence of the KLA's presence in Račak/Raçak during the relevant time period;[1112] (iv) and evidence of a KLA headquarters in Račak/Raçak.[1113] His arguments are therefore dismissed.

[1106] Trial Judgement, para. 416. See Trial Judgement, paras 396-416. In relation to the joint VJ-MUP operation, the Trial Chamber considered evidence that: sporadic shooting coming from the direction of Račak/Raçak could be heard from Štimlje/Shtime police station in the early morning hours of 15 January and continued until the afternoon (Trial Judgement, para. 397); unusual events were occurring at the Štimlje/Shtime police station, in that all active duty and reserve police had been called in, one PJP and 10 to12 SAJ members were there, as well as the Chief of the SUP and the Chief of the Uroševac/Ferizaj police department (Trial Judgement, para. 397); there were rumours that an action was under way in Račak/Raçak to arrest those responsible for the killing of four policemen (Trial Judgement, para. 397); a couple of hours after the shooting had started Đorđević arrived at Štimlje/Shtime police station and received two telephone calls from Šainović (Trial Judgement, para. 398); the KVM started receiving reports concerning a "major operation taking place in Račak/Raçak", which was a planned joint VJ and MUP operation (Trial Judgement, paras 400, 402); and KVM verifiers observed VJ Pragas and T-55 tanks on the hills overlooking Račak/Raçak firing into the village and surrounding hills preventing the civilians from leaving the village, while MUP armoured vehicles and infantry entered the village and searched the houses (Trial Judgement, para. 401). In relation to the civilians killed, the Trial Chamber found that: the Head of Regional Centre of the KVM was informed by verifiers that there were over 25 bodies of civilians in the village, who appeared to have been executed (Trial Judgement, para. 405); the KVM representatives inspecting the village found a decapitated body of an elderly man in a farmhouse and over 20 bodies laying in a line in a gully or a trail with appearance of having been shot at close range in the head (Trial Judgement, para. 407); and they observed four more bodies in the village, including an 18 year old woman and a 12 year old boy (Trial Judgement, para. 407).

[1107] See Trial Judgement, paras 410-413, 1924.

[1108] See Trial Judgement, paras 419-425.

[1109] See Đorđević Appeal Brief, paras 221-222.

[1110] See Trial Judgement, para. 413, fn. 1430 (referring to Exhibit D899), fn. 1431 (referring to Exhibit D895). See *supra*, para. 336, fn. 1097.

[1111] Trial Judgement, para. 411, referring to Exhibit D896. See also Trial Judgement, paras 410, fn. 1410 (referring to Exhibit D149), 411, fns 1417, 1418 (referring to Exhibit D148). See *supra*, para. 336, fn. 1098.

[1112] Trial Judgement, paras 401, 410. The Trial Chamber, however, found that despite this fact there was no outgoing fire from the village during the coordinated VJ MUP offensive against the village (Trial Judgement, paras 401, 1922). The Appeals Chamber observes the evidence of General Drewienkiewicz, in relation to the VJ-MUP joint operation in Račak/Raçak, that he expressed concern over the operation in that "firing of anti-aircraft weapons into a village in which there were women and children could not be accepted as a police operation" (Trial Judgement, para. 404, referring to John Drewienkiewicz, Exhibit P996, para. 221, Karol John Drewienkiewicz, 22 Jun 2009, T. 6367-6368; Exhibit P1007).

339. As to Đorđević's argument in relation to the burials and treatment of wounded in military hospitals, insofar as Đorđević is suggesting that the victims might have been KLA members, and hence legitimate targets, it is speculative.[1114] The Appeals Chamber notes that the Trial Chamber found that the 45 victims were wearing civilian clothing when killed, and that an elderly man, a woman and a child were among the deceased.[1115] In addition, the Trial Chamber found that at least one victim had been decapitated and that most of those killed were over the age of 50 and shot in the head, apparently at close range.[1116] Đorđević's mere suggestion that some of the victims may have received a military burial, as well as a vague reference to wounded being treated in military hospitals, falls short of showing that the Trial Chamber erred in concluding that 45 Kosovo Albanian civilians were killed.

340. The Appeals Chamber therefore finds that Đorđević has failed to show that the Trial Chamber erred in concluding that 45 Kosovo Albanians were killed in Račak/Raçak on 15 January 1999.

4. Alleged error in finding that there was a "staged scene" and that Đorđević had a role in the concealment of the excessive use of force during the Račak/Raçak operation

(a) Introduction

341. The Trial Chamber found that on 18 January 1999, investigative Judge Marinković conducted an on-site investigation into the events in Račak/Raçak on 15 January 1999.[1117] She was directed by the police to the mosque where she observed 40 bodies, of which all but one were male.[1118] The Trial Chamber found that the scene shown to investigative Judge Marinković did not accord with the observations and video-recording by the KVM international observers on

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[1113] Trial Judgement, paras 401, 410.

[1114] See Đorđević Appeal Brief, para. 222. In relation to the burials, the Appeals Chamber notes that the Trial Chamber relied on the evidence of Witness K86 in concluding that the bodies were buried on a hill facing the mosque (Trial Judgement, fn. 1433, referring to K86, 28 May 2009, T. 5189-5190) rather than on the evidence of Defence Witness Mladenović, who mentioned that the coffins were wrapped in an Albanian flag, which in the view of the witness was not the burial custom for civilians (see Branko Mladenović, 8 Mar 2010, T. 12500). The Trial Chamber expressly found the evidence presented by Defence witnesses in relation to the Račak/Raçak to be unreliable and "in many respects [...] not truthful" (Trial Judgement, para. 419). The Appeals Chamber finds that it was therefore within the discretion of the Trial Chamber to prefer Witness K86's testimony over that of Witness Mladenović (see *Kvočka et al.* Appeal Judgement, para. 23; *Limaj et al.* Appeal Judgement, para. 82; *Kordić and Čerkez* Appeal Judgement, para. 21, fn. 12). As to the treatment of the wounded in military hospitals, the Appeals Chamber finds inconclusive the evidence cited by Đorđević in his Appeal Brief (see Đorđević Appeal Brief, para. 222, fn. 368, referring to Exhibit P872, Joseph Maisonneuve, 4 Jun 2009, T. 5544-5545).

[1115] Trial Judgement, paras 416, 1920. See *supra*, fn.1106; Trial Judgement, para. 407. See also *infra*, paras 522-523.

[1116] Trial Judgement, paras 416, 1920. See *supra*, para. 338, fns 1106, 1734.

[1117] Trial Judgement, para. 412.

[1118] Trial Judgement, para. 412.

16 January 1999.[1119] It therefore concluded that investigative Judge Marinković was presented a staged scene and that Đorđević led the MUP efforts to conceal the evidence of excessive use of force and to present the Račak/Raçak operation as a legitimate anti-terrorist operation.[1120]

(b) Arguments of the parties

342. First, Đorđević contends that the Trial Chamber erred in finding that a "staged scene" was shown to investigative Judge Marinković.[1121] He argues that there was absolutely no evidence in support of this conclusion, noting, *inter alia*, that the Trial Chamber rejected the evidence of investigative Judge Marinković on this issue.[1122] Second, he submits that the Trial Chamber erred in concluding that he "led MUP efforts to conceal evidence of grossly excessive force and present it as a legitimate anti-terrorist operation".[1123] Đorđević argues that there was "no evidence to support" such conclusion, but also that "no accusation of a 'cover-up' was ever put to him during his testimony".[1124] He suggests that, instead, it was more likely that "the KLA set up the initial scene observed by the KVM on 15 January following a heavy firefight".[1125]

343. The Prosecution responds that the Trial Chamber reasonably concluded that the scene shown to the investigative judge was staged and that Đorđević led the MUP efforts to conceal the evidence of the excessive use of force during the purported "anti-terrorist" operations.[1126]

(c) Analysis

344. The Appeals Chamber notes that the Trial Chamber acknowledged the "extensive, and often conflicting, evidence" presented by the parties concerning the Račak/Raçak operation; however, the Trial Chamber also stated that it had carefully evaluated and weighed all the evidence in reaching its conclusion that the scene at Račak/Raçak was staged and that evidence was concealed.[1127]

345. The Appeals Chamber notes, contrary to Đorđević's contention, that the evidence of investigative Judge Marinković was not rejected by the Trial Chamber; rather, it was carefully

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[1119] Trial Judgement, paras 412, 1924.
[1120] Trial Judgement, paras 412, 1923-1924.
[1121] Đorđević Appeal Brief, para. 223; Đorđević Reply Brief, para. 65, referring to Trial Judgement, paras 415, 425, 1924.
[1122] Đorđević Appeal Brief, para. 223; Đorđević Reply Brief, para. 65, referring to Trial Judgement, paras 415, 425, 1924.
[1123] Đorđević Appeal Brief, para. 224, referring to Trial Judgement, para. 1924.
[1124] Đorđević Appeal Brief, para. 224, referring to Trial Judgement, para. 1924.
[1125] Đorđević Appeal Brief, para. 225.
[1126] Prosecution Response Brief, paras 184-186.
[1127] Trial Judgement, para. 396. See Trial Judgement, para. 415.

assessed and weighed against the evidence of KVM international observers who conducted and video-taped their investigation on 16 January 1999.[1128] The Appeals Chamber notes that the international observers carried out their investigation on 16 January 1999 in the afternoon.[1129] They testified that as they approached the village they saw police and press everywhere, as well as VJ heavy weapons, artillery, and tanks on the hillside.[1130] During the investigation, the international observers uncovered: (i) "over 25 civilian bodies in the village, including that of an elderly man, most of whom seemed to have been executed";[1131] (ii) another elderly man who had been decapitated in a farmhouse;[1132] and (iii) 20 bodies in a gully that appeared to have been shot in the head, at close range.[1133] These bodies did not have uniforms and were "covered in dew, which indicated that they were already there in the morning".[1134] The KVM representatives saw more bodies in Račak/Raçak, including the body of an 18 year old woman and a 12 year old boy.[1135] The Appeals Chamber observes that the Trial Chamber noted that the evidence given by investigative Judge Marinković indicated that the scene, she and her team were shown during their on-site investigation in Račak/Raçak on 18 January 1999, differed significantly from that shown to the KVM international observers.[1136] This was confirmed by investigative Judge Marinković, who testified, *inter alia*, that the bodies she observed did not correspond to the bodies that she was shown in a videotape recorded by the KVM on 16 January 1999.[1137] As an example, she testified that the bodies she observed had not been shot in the head and that among the 40 bodies she observed, none had been "decapitated, although one or two had damage to the head which appeared to have been caused by birds or other animals".[1138] The Trial Chamber was therefore satisfied that at least some of the bodies observed by investigative Judge Marinković were not the bodies

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[1128] Trial Judgement, paras 407, 412-413, 415-416. See the testimony of Witnesses Maisonneuve (Joseph Maisonneuve, 3 Jun 2009, T. 5463, 5466-5467; Exhibits P851, paras 33-34, 36, 45, 53; P852, pp 5778-5779, 5781-5782, 5786-5787, 5795-5796, 5805, 5844, 5856, 5863; P853, pp 11059, 11170-11172), Drewienkiewicz (Karol John Drewienkiewicz, 22 Jun 2009, T. 6366-6367, 6370-6373; Exhibits P996, paras 138, 141-148, 150-152, 154-156, 158-162, 221; P997, pp 7792-7795, 7968, 7971), Ciaglinski (Exhibits P832, p. 8; P833, pp 3205-3206; P834, pp 6844-6845), and Michael Phillips (Michael Phillips, 1 Sep 2009, T. 8712-8713; Exhibit P1303, p. 11854).

[1129] Trial Judgement, para. 407.

[1130] Trial Judgement, para. 407.

[1131] Trial Judgement, para. 405.

[1132] Trial Judgement, para. 407.

[1133] Trial Judgement, para. 407.

[1134] Trial Judgement, para. 407.

[1135] Trial Judgement, para. 407.

[1136] Trial Judgement, paras 412-416, 425, 1924. Đorđević put forward his theory of who was responsible for the staged scene at trial (See Đorđević Closing Brief, paras 73, 75).

[1137] Trial Judgement, para. 412.

[1138] Trial Judgement, paras 412-413, referring to Danica Marinković, 18 Mar 2010, T. 13083, 13090.

depicted in the video recorded by KVM international observers during their on-site investigation on 16 January 1999.[1139]

346. The Trial Chamber further considered that between 15 and 18 January 1999, investigative Judge Marinković attempted to reach Račak/Raçak to conduct the investigation on three occasions, but had to abandon these efforts because she had been shot at.[1140] It was only on 18 January 1999, when according to Đorđević's own testimony he was in Štimlje/Shtimë police station to secure the location for the on-site investigation, that she managed to reach the bodies.[1141] The Trial Chamber noted that investigative Judge Marinković was shown neither the bodies shot in the head nor the gully depicted in the video recording by the KVM, "yet she was shown apparent KLA headquarters, which the KVM failed to see".[1142] The Trial Chamber also found that on 16 January 1999, the KVM noticed a newly dug trench that did not appear to have been previously occupied or fought from.[1143] The Trial Chamber concluded that investigative Judge Marinković was shown a "staged scene", set up by the police, designed to give a false impression of the events.[1144]

347. In light of the above, the Appeals Chamber finds that Đorđević is mistaken in asserting that there was no evidence in support of the Trial Chamber's conclusion. The Appeals Chamber further finds that, considering the heavy presence of police and VJ heavy artillery on 16 January 1999, the fact that investigative Judge Marinković was prevented from arriving at the scene until 18 January, while the KVM managed to reach the scene on 16 January in the afternoon, it was reasonable for the Trial Chamber to conclude that the scene presented to investigative Judge Marinković was staged. The Appeals Chamber therefore finds that Đorđević has failed to show that the Trial Chamber erred.

348. With regard to Đorđević's role, the Appeals Chamber notes that the Trial Chamber concluded that he led the MUP efforts to conceal the evidence of the excessive use of force based

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[1139] Trial Judgement, para. 415.

[1140] Trial Judgement, para. 411. Investigative Judge Danica Marinković and her team attempted to carry out the investigation the first time on 15 January 1999 at 2 p.m., the second time on 16 January at about 10 or 10:30 a.m., and the third time in the morning of 17 January 1999 (Trial Judgement, paras 410-411).

[1141] Trial Judgement, paras 412, 424-425, 1924.

[1142] Trial Judgement, para. 415.

[1143] Trial Judgement, para. 407.

[1144] Trial Judgement, para. 415. See also Trial Judgement, paras 411-412. As for Đorđević's claim that it is more likely that "the KLA set up the initial scene observed by the KVM on 15 January following a heavy firefight", the Appeals Chamber finds he fails to point to any evidence in support of this argument (Đorđević Appeal Brief, para. 225). Furthermore, the Appeals Chamber finds it implausible that the KLA would be free to stage such a scene, considering the heavy presence of police, press and VJ in and around the village observed by the KVM (Trial Judgement, paras 400-405, 407). His argument in this regard is therefore dismissed.

on circumstantial evidence.[1145] The Appeals Chamber recalls that trial chambers may reach conclusions based on circumstantial evidence.[1146] The Appeals Chamber observes that the Trial Chamber considered and rejected Đorđević's own account that he did not know anything about this operation and did not visit Štimlje/Shtime or Račak/Raçak on 15 January 1999, finding it to be unacceptable in many respects.[1147] It instead preferred the testimony of Witness K86, that Đorđević was at the police station in Štimlje/Shtime at the time the VJ-MUP operation started and that he had two telephone conversations with Šainović.[1148] The Trial Chamber considered this in combination with the close coordination between the MUP and VJ in carrying out the operation, the fact that heavy VJ artillery was used, as well as the fact that PJP and SAJ units were on the ground, to conclude that Đorđević "took an organising role regarding the actions of the police on the ground".[1149] In light of Đorđević's position as the most senior MUP officer on the ground during the operation and his own evidence that on 18 January 1999 he was in Štimlje/Shtime to secure the location for an on-site investigation, the Trial Chamber concluded that he "lead the MUP efforts to conceal evidence of grossly excessive use of force used by the police and to present the operation in Račak/Raçak as a legitimate anti-terrorist operation".[1150]

349. In light of the above considerations, particularly that the scene presented to the investigative judge was staged, and recalling the Trial Chamber's findings on the general pattern of disproportionate use of force by the Serbian forces in joint MUP and VJ "anti-terrorist" operations, the pattern of lack of investigations and concealment of crimes in 1998 and 1999,[1151] the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that Đorđević has failed to show that no reasonable trier of fact could conclude, based on the totality of evidence, that following the Račak/Raçak operation he took a leading role in the efforts to conceal the excessive use of force by the Serbian forces during joint operations.

5. Conclusion

350. In light of the foregoing, the Appeals Chamber dismisses Đorđević's sub-ground of appeal 9(E) in its entirety.

[1145] Trial Judgement, paras 1923-1925.
[1146] *Galić* Appeal Judgement, para. 218; *Stakić* Appeal Judgement, para. 219; *Kupreškić et al.* Appeal Judgement, para. 303. See also *Blaškić* Appeal Judgement, para. 56; *Krstić* Appeal Judgement, para. 83.
[1147] Trial Judgement, paras 421-425, 1924. The Appeals Chamber notes that the Trial Chamber found that Đorđević was present at Štimlje/Shtime police station at least on 15 January 1999.
[1148] Trial Judgement, paras 398, 422-425, 1921, referring to K86, 27 May 2009, T. 5127-5129, 5131.
[1149] Trial Judgement, paras 401-406, 1923.
[1150] Trial Judgement, paras 1922-1924.
[1151] See Trial Judgement, paras 2052-2069, 2083-2108.

F. Sub-ground 9(F): alleged errors in relation to Đorđević's role in relation to the crimes committed by the paramilitaries in Kosovo

1. Introduction

351. The Trial Chamber concluded that Đorđević "contributed significantly to the campaign of terror and extreme violence by Serbian forces against Kosovo Albanians" through, *inter alia*, his deployment of paramilitaries to Kosovo.[1152] The Trial Chamber found that Đorđević was "personally and directly involved in the incorporation of a notorious paramilitary unit, the Scorpions, into the MUP reserve force, their formal attachment to the SAJ and their deployment to Kosovo in March 1999" who, upon their arrival, killed 14 Kosovo Albanian women and children in Podujevo/Podujevë.[1153] The Trial Chamber also found that Đorđević "implement[ed] a decision to engage volunteers and paramilitary units" throughout Kosovo.[1154] With respect to the deployment of the reserve forces, including the Scorpions, the Trial Chamber found that "the Scorpions unit, having been attached to the SAJ, were intentionally deployed to [Podujevo/Podujevë] as an additional force and tasked with 'clearing up' the part of the town not yet under Serbian control".[1155] It further found that the "vague generality of the order for clearing up a part of town not yet under Serbian control was applied by members of this paramilitary force to include the killing of Kosovo Albanians".[1156]

352. Đorđević submits that the Trial Chamber erred with respect to: (i) the nature and extent of his involvement in and knowledge of the "atrocity committed in Podujevo/Podujevë on 28 March 1999" when members of the Scorpions murdered a group of Kosovo Albanian civilians;[1157] and (ii) his responsibility for crimes committed by other paramilitaries in Kosovo.[1158] The Appeals Chamber will consider each submission in turn.

[1152] Trial Judgement, paras 2155, 2158.
[1153] Trial Judgement, para. 2155.
[1154] Trial Judgement, para. 2155.
[1155] Trial Judgement, para. 2142.
[1156] Trial Judgement, para. 2144.
[1157] Đorđević Appeal Brief, paras 227, 233.
[1158] Đorđević Appeal Brief, paras 227, 236.

2. Alleged errors relating to Đorđević's responsibility for the deployment of the Scorpions

(a) Arguments of the parties

353. Đorđević submits, generally, that the Trial Chamber erred in finding that the crimes in Podujevo/Podujevë were attributable to him.[1159] He raises five arguments challenging the Trial Chamber's conclusion that the deployment of the reservists contributed to the JCE.[1160] First, Đorđević submits that the Trial Chamber erred in concluding that the incorporation of reserve forces into the SAJ, including members of the Scorpions, and their deployment to Podujevo/Podujevë, were "criminal from [his] perspective when those decisions were taken".[1161] Second, Đorđević argues that "there was no evidence, and the Trial Chamber did not conclude, that [he] played any part in a criminal order for the 'Scorpions' to clear up the part of the town of [Podujevo/Podujevë] not yet under Serbian control".[1162] He submits that the most likely conclusion to be drawn is that "a fraction of the 128 SAJ reservists deployed to [Podujevo/Podujevë] went off on a horrific frolic of their own".[1163] Third, Đorđević submits that following the killings, all of the Scorpions were removed from Kosovo, criminal investigations were commenced, and the unit was disarmed and not, as would have been expected, "sent on to find further victims".[1164] Fourth, Đorđević contends that the Trial Chamber overlooked subsequent investigations and convictions related to the Scorpions and placed an unfair burden on him to investigate the crimes,[1165] since he "had no role once judicial investigations began".[1166] Fifth, Đorđević submits the Trial Chamber erred in considering the redeployment of the SAJ reservists, as a "clear inference existed" that the perpetrators of the murders in Podujevo/Podujevë were not among those redeployed to Kosovo in April 1999, given that only 108 out of 128 SAJ reservists were in fact redeployed.[1167] He argues

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[1159] Đorđević Appeal Brief, paras 227, 233.
[1160] Đorđević Appeal Brief, paras 227-233.
[1161] Đorđević Appeal Brief, para. 228; Đorđević Reply Brief, para. 69. He contends that: (i) the Trial Chamber's finding that he "could not but have known" of the crimes committed by the Scorpions in the early to mid-1990s was speculative; (ii) only a small proportion of SAJ reserve forces deployed to Podujevo/Podujevë were former members of the Scorpions; (iii) their lack of combat experience was consistent with evidence that new recruits were "needed in a support capacity"; and (iv) background checks were undertaken for new recruits (Đorđević Appeal Brief, para. 228; Appeal Hearing, 13 May 2013, AT. 63-64). Đorđević also submits that it is common knowledge that the video capturing the 1995 massacre of Trnovo committed by the Scorpions came to light for the first during the Slobodan Milošević trial before this Tribunal, and therefore after the year 2001 (Appeal Hearing, 13 May 2013, AT. 63).
[1162] Đorđević Appeal Brief, para. 229; Đorđević Reply Brief, para. 70.
[1163] Đorđević Appeal Brief, para. 229.
[1164] Đorđević Appeal Brief, para. 230; Đorđević Reply Brief, para. 71. See also Appeal Hearing, 13 May 2013, AT. 66-67.
[1165] Đorđević Appeal Brief, para. 231. See also Đorđević Reply Brief, para. 72. See also Appeal Hearing, 13 May 2013, AT. 67-68.
[1166] Đorđević Appeal Brief, para. 231. See also Appeal Hearing, 13 May 2013, AT. 67-68.
[1167] Đorđević Appeal Brief, para. 232. See also Appeal Hearing, 13 May 2013, AT. 68-69.

that any crimes which occurred during the redeployment "should have been alleged and proven"[1168] and contends that the failure to do so deprived him of the "opportunity to investigate" such conduct.[1169]

354. The Prosecution responds that "[t]he Trial Chamber reasonably concluded that Đorđević contributed significantly to the implementation of the JCE and acted with requisite intent when he deployed paramilitary units, including the Scorpions, to Kosovo in 1999."[1170] The Prosecution further responds that "it is immaterial that the Chamber did not find that Đorđević ordered the Scorpions to clear up part of the town" and that the actions of the Serbian forces "furthered the common plan, and the murders that ensued were clearly within the common plan".[1171] The Prosecution argues that the Trial Chamber reasonably relied on evidence of crimes committed by the Scorpions following their redeployment to Kosovo in April 1999 and concluded that Đorđević, in full awareness that a proper investigation had not been conducted into the events at Podujevo/Podujevë, authorised the redeployment of the Scorpions to Kosovo.[1172]

(b) Analysis

355. The Trial Chamber found that Đorđević's deployment of reservists and paramilitary units itself, including the Scorpions, served as a contribution to the common plan.[1173] The Appeals Chamber observes that Đorđević misunderstands the Trial Chamber's findings when he suggests that it inferred his contribution from the fact that the incorporation and deployment were criminal from his perspective. The Trial Chamber did not consider whether the incorporation of the Scorpions into the SAJ and their deployment to Podujevo/Podujevë were "criminal".[1174] Instead, the Trial Chamber assessed their deployment in light of its finding that Serbian forces (MUP, VJ, and associated forces) were used to create an atmosphere of violence and fear in order to force the

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[1168] Đorđević Appeal Brief, para. 232; Đorđević Reply Brief, para. 73. See also Appeal Hearing, 13 May 2013, AT. 69-70.
[1169] Đorđević Reply Brief, para. 73.
[1170] Prosecution Response Brief, para. 188. See also Prosecution Response Brief, paras 190-197; Appeal Hearing, 13 May 2013, AT. 119-120, 128.
[1171] Prosecution Response Brief, para. 193. See also Appeal Hearing, 13 May 2013, AT. 119.
[1172] Prosecution Response Brief, paras 196-197.
[1173] Trial Judgement, paras 2155, 2158. Đorđević takes issue with the fact that the Trial Chamber referred to the Scorpions as a paramilitary unit, because they were "incorporated into the SAJ reserve forces and brought into its chain of command, so they weren't para anything" (see Appeal Hearing, 13 May 2013, AT. 65). The Appeals Chamber however notes that the Trial Chamber also found that the Scorpions were incorporated in the MUP reserve forces at Đorđević's approval and formally attached to the SAJ and under the command of the SAJ (see Trial Judgement, para. 1943). Whether the Trial Chamber referred to the Scorpions as a paramilitary unit is therefore irrelevant.

Kosovo Albanian civilian population to leave, as a means to achieve the common plan of changing the ethnic balance of Kosovo.[1175] In this context, the Trial Chamber concluded that the actions of Serbian forces, including the Scorpions, in Podujevo/Podujevë advanced the common plan and that the killing of women and children was within the common plan and "aimed at terrorizing the Kosovo Albanian population [...] with the ultimate aim of ensuring that [...] this population would leave the town".[1176] In doing so, it considered not only that the Scorpions were a notorious paramilitary unit, but also that they were deployed without basic background checks and/or proper training in the context of an ethnically volatile conflict.[1177] The Appeals Chamber further recalls that Đorđević, in addition to deploying these units, participated in the JCE through his "key role in coordinating the work of the MUP forces".[1178] While responsible for this coordination, Đorđević "was aware that police used force disproportionately in 1998" and also of "the arming of [the] Serb civilian population in Kosovo [...] in 1998 and 1999"[1179] Đorđević fails to articulate how sending additional forces, including a notorious paramilitary unit, to assist in these operations does not constitute a contribution to the JCE.

356. Further, and contrary to what Đorđević maintains, the Trial Chamber did not find that he "could not but have known" of the Scorpions' criminal past.[1180] Rather, the Trial Chamber found that Đorđević "could not but have known of their existence, and in the least," of their *presence* amongst the reservists to be deployed to Kosovo.[1181] The Trial Chamber concluded that Đorđević's knowledge of the Scorpions' presence emphasised the "need to screen [the reservists'] backgrounds

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[1174] See Đorđević Appeal Brief, para. 228, where Đorđević states that "there was no basis (other than guesswork supported by hindsight) to hold that the incorporation of [the Scorpions] into the SAJ and its deployment to Podujevo was criminal from Đorđević's perspective when those decisions were taken".

[1175] Trial Judgement, paras 2142-2144.

[1176] Trial Judgement, para. 2144. The Appeals Chamber recalls that the common plan was to modify the ethnic balance of Kosovo, to ensure Serbian control over the region, by waging a campaign of terror against the Kosovo Albanian civilian population (see Trial Judgement, paras 2126, 2130), and that the campaign of terror was implemented by Serbian forces (VJ, MUP, and associated forces) (see also *supra*, paras 86, 161, 173).

[1177] Trial Judgement, para. 1955. With regard to Đorđević argument that only a fraction of the original Scorpions were part of the group that was deployed to Podujevo/Podujevë (see Đorđević Appeal Brief, para. 228; Appeal Hearing, 13 May 2013, AT. 64), the Appeals Chamber notes that this point was expressly considered by the Trial Chamber (see Trial Judgement, para. 1937). Again, Đorđević suggests that the Trial Chamber relied heavily on the criminal past of the Scorpions as a basis for concluding that he contributed to the JCE. The Appeals Chamber finds that this is not the case: the Trial Chamber expressly considered that only a portion of the former Scorpions was deployed to Podujevo/Podujevë, to highlight the fact that half of them had no previous training, received only a one day training on the use of automatic rifles, and no training on the treatment of civilians (see Trial Judgement, para. 1937). Yet they were given uniforms, Scorpions insignia, weapons, and sent to a volatile ethnic conflict (see Trial Judgement, paras 1937, 1955).

[1178] Trial Judgement, para. 2154.

[1179] Trial Judgement, para. 2154.

[1180] See Đorđević Appeal Brief, para. 228; Appeal Hearing, 13 May 2013, AT. 63.

[1181] Trial Judgement, para. 1953. *Contra* Đorđević Appeal Brief, para. 228(a).

as required by the law".[1182] The Trial Chamber further found that Đorđević: (i) did not ensure that these units possessed basic combat training; (ii) did not in fact conduct any background checks; and (iii) upon learning of the commission of crimes in Podujevo/Podujevë by the Scorpions, chose to immediately redeploy the unit.[1183] The Appeals Chamber recalls that the Trial Chamber concluded that Đorđević contributed to the JCE with the required intent based on numerous factors, including his role in the concealment of bodies, his senior position in the MUP, and the fact that he exercised effective control over the MUP forces that committed the crimes in Kosovo.[1184] It was in this context that the Trial Chamber also found that the deployment of the reservists constituted a contribution to the JCE.[1185] Based on the findings considered by the Trial Chamber and the context in which the deployments occurred, the Appeals Chamber is satisfied that Đorđević has failed to show that no reasonable trier of fact could have found that he contributed to the JCE through the deployment of the reservists.

357. In relation to Đorđević's assertion that the Trial Chamber "failed to consider evidence demonstrating that checks were indeed undertaken and came back negative",[1186] the Appeals Chamber observes that individuals within the Scorpions unit sent to Kosovo did in fact have criminal records at the time they were deployed.[1187] When an investigation into their backgrounds took place after they were recalled from Kosovo following the events in Podujevo/Podujevë in May 1999, it was determined that there were "criminal types in their ranks, problematic people".[1188] Given Đorđević's clear legal obligation to ensure reservists did not have a criminal record,[1189] and the fact that upon a proper background check the criminal record of the reservists was in fact revealed,[1190] the Appeals Chamber is satisfied that the Trial Chamber reasonably concluded that Đorđević failed to ensure that adequate background checks into the criminal past of the reservists, including members of the Scorpions unit, who were deployed to Kosovo were undertaken.

358. Turning to Đorđević's submission concerning the issuance of the order to "clear up" Podujevo/Podujevë,[1191] the Appeals Chamber finds, Judge Tuzmukhamedov dissenting, that whether Đorđević issued the order is irrelevant to the Trial Chamber's conclusion that the

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[1182] Trial Judgement, para. 1953. Đorđević's submission in relation to the 1995 massacre of Trnovo also fails (see Appeal Hearing, 13 May 2013, AT. 63).
[1183] Trial Judgement, paras 1955, 1966.
[1184] See *supra*, paras 166-169, 209-210. See also Trial Judgement, paras 2027-2035.
[1185] See Trial Judgement, paras 2154-2155.
[1186] See Đorđević Appeal Brief, para. 228(c); Appeal Hearing, 13 May 2013, AT. 64-65.
[1187] Trial Judgement, para. 1954.
[1188] Trial Judgement, fn. 6728, referring to Aleksander Vasiljević, 8 Jun 2009, T. 5666-5667.
[1189] Trial Judgement, para. 1955.
[1190] Trial Judgement, para. 1954.

deployment of the reserve forces to Kosovo constituted a contribution to the JCE. The Trial Chamber considered Đorđević's decision to deploy the Scorpions in the context of his senior role within the government, his order to engage paramilitaries and volunteers, and his additional contributions to the JCE.[1192] Considering that Đorđević's contribution to the JCE included, *inter alia*, the deployment of the Scorpions, the Appeals Chamber considers the fact that the direct order to the Scorpions was not issued by Đorđević to be irrelevant. The Appeals Chamber further recalls that the order to "clear up" the town was issued by the leader of the Scorpions and that it was Đorđević's decision to incorporate and deploy this unit to Kosovo.[1193] The Appeals Chamber is also not convinced by Đorđević's submission that "[t]he most likely explanation was that a fraction of the 128 SAJ reservists [...] went off on a horrific frolic",[1194] or that the withdrawal of the Scorpions, disarmament of reservists, or administration of first aid following the murder of civilians in Podujevo/Podujevë in any way negates the Trial Chamber's finding that Đorđević deployed the individuals that committed the crimes.[1195] These submissions are rendered moot, in any event, by Đorđević's decision to authorise "the re-deployment of members of the same unit to Kosovo a few days" after the atrocity.[1196]

359. In relation to Đorđević's contention that the Trial Chamber "placed an unfair burden on [him] in relation to the investigation of [the] atrocity",[1197] the Appeals Chamber recalls that the Trial Chamber found that despite being informed about the crimes at Podujevo/Podujevë on the day of their occurrence, Đorđević failed to take any action against police officers who failed to include the crimes in their report.[1198] The Trial Chamber also found that the bodies of the victims laid in the courtyard until 30 March 1999 when an initial investigation by an investigative judge took place.[1199] The investigation report, however, named only one of the victims, made no mention of ethnicity of any of the victims, did not reference the perpetrators, and resulted in no apparent follow up measures.[1200] The Trial Chamber further found that a subsequent report of 13 May 1999 concerning the engagement of the reserve forces with the SAJ, which was provided to Đorđević, failed to outline any measures that had been taken against members of the reserve unit and, rather than

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[1191] Đorđević Appeal Brief, para. 229.
[1192] Trial Judgement, paras 2154-2158.
[1193] See Trial Judgement, para. 1238; Exhibit P493, para. 46.
[1194] Đorđević Appeal Brief, para. 229.
[1195] See Đorđević Appeal Brief, para. 230. The Appeals Chamber is also not convinced that the medical assistance provided by a different unit, and not the Scorpions, has any impact on the Trial Chamber's conclusions concerning the actions of the Scorpions (see Trial Judgement, para. 1253; *contra* Đorđević Appeal Brief, fn. 389).
[1196] See Trial Judgement, para. 2155. See also Trial Judgement, paras 1947-1948.
[1197] Đorđević Appeal Brief, para. 231.
[1198] See Trial Judgement, paras 1258, 1958, 1963.
[1199] Trial Judgement, para. 1959. See also Trial Judgement, para. 1258.

punishing any of the alleged perpetrators, discussed their immediate redeployment.[1201] While the filing of a criminal report, dated 23 May 1999, did result in the temporary detention of two members of the Scorpions for a period of 10 days,[1202] the Trial Chamber found that these individuals were not in fact prosecuted or convicted and that "[d]uring the entire period of [Đorđević's] tenure as Chief of the RJB, no person was prosecuted for the crimes committed in Podujevo/Podujevë."[1203] In light of these findings, the Appeals Chamber is satisfied, Judge Tuzmukhamedov dissenting, that the Trial Chamber did not place an unfair burden on Đorđević and reasonably concluded that he "was fully aware of the lack of investigation and, armed with that knowledge, he nonetheless authorised the re-deployment of members of the same unit to Kosovo to participate in further operations".[1204]

360. Turning to Đorđević's fifth submission, the Appeals Chamber observes that the Trial Chamber explicitly acknowledged that some of the suspected perpetrators of crimes in Podujevo/Podujevë had been removed from the Scorpions prior to being redeployed.[1205] The Appeals Chamber finds, however, Judge Tuzmukhamedov dissenting, that a finding that some members of the unit had been purged has no bearing on the Trial Chamber's conclusion that the redeployment of the unit further displayed his contribution to the furtherance of the JCE.[1206] The Appeals Chamber recalls, moreover, that no meaningful investigations were, in fact, commenced immediately following the atrocity.[1207] The Appeals Chamber, Judge Tuzmukhamedov dissenting, is therefore satisfied that the redeployment of the majority of the unit, immediately following the commission of the atrocity and in the absence of any meaningful criminal investigations, supports the Trial Chamber's finding that the deployment of paramilitaries was done in furtherance of the JCE.[1208]

361. The Appeals Chamber also finds Đorđević's contention that the Trial Chamber failed to establish that any crimes were committed by the Scorpions following their redeployment to be

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[1200] Trial Judgement, para. 1960, referring to Exhibit D441.
[1201] Trial Judgement, para. 1961, referring to Exhibit D442.
[1202] Trial Judgement, para. 1962, referring to Exhibits P1592, P1593.
[1203] Trial Judgement, para. 1962. The Appeals Chamber notes that the Trial Chamber also found that a trial against Saša Cvetan eventually started in the Prokuplje District Court and was transferred to the Belgrade district court as it became clear that pressure was being put on those who were giving evidence (Trial Judgement, para. 1962, referring to Exhibit P493, paras 83-88, Goran Stoparić, 26 Mar 2009, T. 2845-2849, 2867-2868, Exhibits P40, P41).
[1204] Trial Judgement, para. 1966.
[1205] Trial Judgement, para. 1946.
[1206] See Trial Judgement, paras 1946-1948.
[1207] See Trial Judgement, para. 1966.
[1208] See Trial Judgement, paras 1948, 1966. See also Trial Judgement, paras 2154-2158.

without merit.[1209] The Trial Chamber considered their redeployment to further emphasise its finding that no meaningful criminal investigation into the events at Podujevo/Podujevë was conducted by Đorđević.[1210] In any event, and in contrast to Đorđević's contention that these events should have been "alleged and proven",[1211] the Trial Chamber considered the testimony of Witness Goran Stoparić ("Witness Stoparić") that the redeployed Scorpion members worked in cooperation with both VJ and MUP forces to drive out "Albanian terrorists, and to seize local villages and hamlets, a process he described as 'cleaning'".[1212]

362. Accordingly, the Appeals Chamber finds that Đorđević has failed to show any error with respect to Trial Chamber's finding that Đorđević contributed to the JCE by the deployment of the Scorpions and in finding him responsible for the crimes committed in Podujevo/Podujevë.

3. Alleged error in finding that Đorđević was responsible for other paramilitaries operating in Kosovo

(a) Introduction

363. The Trial Chamber found that "paramilitary groups present in the field in Kosovo [...] work[ed] in concert mainly with MUP units in order to supplement the forces".[1213] The Trial Chamber concluded that Đorđević "acted to implement a decision to engage volunteers and paramilitary units by sending a dispatch to all SUPs in Serbia requesting them to establish complete control over volunteer and paramilitary units and their members."[1214] In reaching this finding, the Trial Chamber considered: (i) the deployment of the Scorpions to Podujevo/Podujevë;[1215] (ii) Đorđević's knowledge of paramilitaries operating in Kosovo;[1216] and (iii) numerous dispatches, including an 18 February 1999 dispatch ("Dispatch") that demonstrated Đorđević's intent "to engage paramilitaries in anti-terrorist operations prior to the start of the war".[1217]

[1209] Đorđević Appeal Brief, para. 232.
[1210] See Trial Judgement, paras 1948, 1964-1966.
[1211] See Đorđević Appeal Brief, para. 232; Đorđević Reply Brief, para. 73. See *supra*, para. 293.
[1212] Trial Judgement, para. 1948.
[1213] Trial Judgement, para. 1927.
[1214] Trial Judgement, para. 2155.
[1215] Trial Judgement, para. 1928.
[1216] Trial Judgement, para. 1928.
[1217] Trial Judgement, para. 1929, fn. 6616.

(b) Arguments of the parties

364. Đorđević submits that the "Trial Chamber unjustifiably extended [his] involvement in the deployment of the 'Scorpions' to entail criminal responsibility for the acts of all paramilitaries operating in Kosovo" and that its findings concerning the role of various paramilitary groups in Kosovo do not show that these groups were ""used by' JCE members as required in order for criminal responsibility to attach to [him]".[1218] Đorđević contends that: (i) outside of his deployment of the Scorpions, there was no basis to conclude that paramilitaries were incorporated into the ranks of the RJB; (ii) even if the Dispatch were construed against him, there was no evidence to suggest that paramilitaries were incorporated into and used by the MUP and VJ; and (iii) the findings with respect to the paramilitary groups known as Arkan's Tigers, the White Eagles, and the Pauk Spiders are inadequate and do not show that these groups were used in the commission of crimes.[1219] Đorđević further argues that "the Trial Chamber was not entitled to construe [the Dispatch] against him" because it failed to consider the evidence of Witness Cvetić that the Dispatch "was understood by the SUP's to be an order to prevent the introduction of volunteers".[1220]

365. The Prosecution responds that the Trial Chamber "had a sound evidentiary basis upon which to conclude that paramilitaries were incorporated into the MUP and VJ and used by them".[1221] The Prosecution argues that: (i) the Trial Chamber relied on the evidence of several witnesses to establish that paramilitary groups were active in Kosovo;[1222] (ii) Đorđević's arguments are unsupported, vague, and undeveloped;[1223] (iii) the JCE members "used [paramilitary groups] to carry out the *actus reus* of crimes forming part of the common criminal purpose";[1224] (iv) the Dispatch and other documents show that it was a joint decision to "engage paramilitaries together with MUP forces in Kosovo";[1225] (v) the Trial Chamber properly considered Witness Cvetić's evidence;[1226] and (vi) the Trial Chamber reasonably concluded that Đorđević contributed to the JCE in the deployment of the paramilitaries based on the totality of the evidence.[1227]

[1218] Đorđević Appeal Brief, para. 234.
[1219] Đorđević Appeal Brief, para. 234.
[1220] Đorđević Appeal Brief, para. 235; Đorđević Reply Brief, para. 75.
[1221] Prosecution Response Brief, para. 198.
[1222] Prosecution Response Brief, para. 198.
[1223] Prosecution Response Brief, para. 199.
[1224] Prosecution Response Brief, para. 200.
[1225] Prosecution Response Brief, para. 202.
[1226] Prosecution Response Brief, para. 203.
[1227] Prosecution Response Brief, paras 203-204.

(c) Analysis

366. At the outset, the Appeals Chamber rejects Đorđević's argument that "there was no evidentiary basis"[1228] for the Trial Chamber to conclude that paramilitary groups worked "in concert mainly with MUP units in order to supplement the forces".[1229] In reaching this conclusion, the Trial Chamber considered witness testimony and relevant documentary evidence that various paramilitary groups, specifically Arkan's Tigers,[1230] the White Eagles,[1231] and the Pauk Spiders,[1232] played an active part in the joint operations of the MUP and VJ.[1233] This included evidence that these paramilitary units contributed men to the RDB and that they carried RDB identification badges.[1234] The Appeals Chamber further recalls that the Trial Chamber found that Đorđević deployed the Scorpions, a paramilitary group, as reservists to the Serbian forces in Kosovo.[1235] In light of the above, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and as such has failed to show that the Trial Chamber erred in concluding that paramilitary units worked in concert with, and at times were included in the plans of, MUP and VJ forces within Kosovo.

367. The Appeals Chamber further observes that Đorđević's contention that the Dispatch was intended "to preclude the widespread incorporation of paramilitaries into Kosovo, consistent with preventative steps Đorđević took in 1998"[1236] is a restatement of his position at trial.[1237] Đorđević has failed to show why the Dispatch was an instruction "to prevent the use of paramilitaries and volunteers operating in Kosovo", rather than "quite clearly an instruction" to engage volunteers as found by the Trial Chamber.[1238] In its analysis, the Trial Chamber considered the plain language of the Dispatch including the need to "establish complete control over volunteer and paramilitary units

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[1228] See Đorđević Appeal Brief, para. 234.
[1229] Trial Judgement, paras 194, 1927.
[1230] Trial Judgement, paras 209-210, referring to, *inter alia*, Nike Peraj, 18 Feb 2009, T. 1211, Nike Peraj, 20 Feb 2009, T. 1266, Adnan Merovci, 13 Mar 2009, T. 2210-2211, Sada Lama, 24 Apr 2009, T. 3698, Aleksander Vasiljević, 8 Jun 2009, T. 5668-5670, 5681, Baton Haxhiu, 18 Jun 2009, T. 6226, K89, 26 Aug 2009, T. 8547, 8567-8568, Exhibits P283, p. 4, P313, paras 38, 80, P416, para. 44, P661, pp 2-3, P793, p. 7086, P798, p. 2, P884, p. 1, P1274, pp 9127, 9224-9225, P1400, para. 15, P994, pp 6092, 6133.
[1231] Trial Judgement, paras 212, 214, referring to Nike Peraj, 20 Feb 2009, T. 1258, Hysni Kryeziu, 5 Jun 2009, T. 5607-5608, Bajran Bucaliu, 25 May 2009, T. 5054, Exhibits P313, paras 12, 95, P420, p. 4, P512, para. 35.
[1232] Trial Judgement, para. 216, referring to Aleksander Vasiljević, 8 Jun 2009, T. 5663, 5680, Aleksander Vasiljević, 11 Jun 2009, T. 5908, 5921, Exhibits D723, pp 19778-19780, P884, p. 1.
[1233] Trial Judgement, paras 208-216 (and references therein).
[1234] Trial Judgement, para. 209, referring to Aleksander Vasiljević, 8 Jun 2009, T. 5669-5670, Exhibit P884, p. 1.
[1235] See *supra*, para. 351.
[1236] Đorđević Appeal Brief, para. 235.
[1237] See Đorđević Closing Brief, para. 101.
[1238] Trial Judgement, para. 2021.

and their members"[1239] and a subsequent dispatch, issued by Minister Stojiljković, which referenced the Dispatch and concerned "the anticipated engagement of paramilitary units in Kosovo".[1240] The Trial Chamber also considered evidence of government meetings, at which Đorđević was present, in which the integration of volunteers into the MUP was discussed, as well as Đorđević's personal and direct involvement in deploying the Scorpions to Kosovo in March 1999.[1241]

368. Accordingly, the Appeals Chamber, Judge Tuzmukhamedov dissenting, is satisfied that the Trial Chamber did not err in relying on the content of the Dispatch or Đorđević's role in the deployment of the Scorpions to reach its conclusion that he intended to engage, and not limit the involvement of, paramilitaries in the operations of the MUP in Kosovo.

369. The Appeals Chamber also finds that the Trial Chamber reasonably interpreted Witness Cvetić's testimony.[1242] In contrast to Đorđević's contention, the Appeals Chamber observes that Witness Cvetić clearly stated that the paramilitaries and volunteers were to be placed "under control".[1243] Moreover, this statement was considered by the Trial Chamber in the context of additional evidence that a number of paramilitary groups were operating in Kosovo, in concert with MUP forces, throughout the Indictment period,[1244] that Đorđević was aware of these units,[1245] and that he and Minister Stojiljković issued dispatches requiring the MUP to establish "complete control over volunteer and paramilitary units" and to deploy them as necessary.[1246] In light of these findings, Đorđević has failed to provide any basis for his contention that the Trial Chamber's findings "fall short" of showing that JCE members used paramilitary forces in the commission of crimes.[1247]

[1239] Trial Judgement, fn. 6616, referring to Exhibit P356.
[1240] Trial Judgement, fn. 6616, referring to Exhibit P702.
[1241] Trial Judgement, para. 1928.
[1242] *Contra* Đorđević Appeal Brief, para. 235.
[1243] See Trial Judgement, fn. 6616; Ljubinko Cvetić, 1 Jul 2009, T. 6679.
[1244] Trial Judgement, para. 194.
[1245] Trial Judgement, paras 1927-1929.
[1246] Trial Judgement, fn. 6616. The Appeals Chamber observes that the Trial Chamber considered additional evidence indicating the MUP's control over the units. This included the Trial Chamber's review of the minutes from a meeting of the Priština/Prishtinë MUP staff on 17 February 1999 and found within the report a quote from Minister Stojiljković stating "[a]pproach and engage volunteers carefully, linking their engagement through the reserve police force when assessed as necessary" (Trial Judgement, para. 195). The following day, Đorđević sent a dispatch to the RDB and all the SUPs in Serbia with a similar underlying message (Trial Judgement, para. 195). Furthermore, on 24 March 1999, Stojiljković sent another dispatch to the chief of the RDB, the headquarters of the RDB organizational units, all the SUPs, MUP staff in Priština/Prishtinë and all the traffic police stations requesting them to "register all volunteers and paramilitary units and their members to keep them under control in case you might need to engage them" (Trial Judgement, para. 195).
[1247] See Đorđević Appeal Brief, para. 234.

370. In light of the foregoing analysis, the Appeals Chamber is satisfied that the Trial Chamber reasonably concluded that paramilitary groups were integrated into, and acted in concert with, MUP forces during the commission of crimes in Kosovo throughout the Indictment period.

4. Conclusion

371. Accordingly, the Appeals Chamber, Judge Tuzmukhamedov dissenting, is satisfied that the Trial Chamber reasonably concluded that Đorđević was involved in, and aware of, the deployment of paramilitary units to Kosovo, including the deployment of the Scorpions to Podujevo/Podujevë, in concert with MUP and RJB forces, and that this formed part of his significant contribution to the JCE.[1248] The Appeals Chamber therefore dismisses sub-ground 9(F) in its entirety.

G. Sub-ground 9(G): alleged errors in relation to Đorđević's role in the concealment of crimes

1. Introduction

372. The Trial Chamber found that, as of March 1999, a plan existed amongst senior members of the FRY government, including Đorđević, to conceal the crimes committed against Kosovo Albanian civilians by Serbian forces in Kosovo, through the concealment of bodies.[1249] The Trial Chamber concluded that Đorđević played a direct and leading role in the concealment operations.[1250] It further found that this plan was "strong evidence that killings were part of the common plan to terrorise a significant part of the Kosovo Albanian population into leaving Kosovo [...] [and] further evidence of the collusion and shared purpose held by Milošević, Stojiljković, [...] Đorđević and Marković to use, *inter alia*, the forces of the MUP to commit crimes and to conceal the evidence of such".[1251]

373. In concluding that a plan to conceal bodies existed, the Trial Chamber considered that the crimes committed by members of the VJ and MUP against Kosovo Albanian civilians were neither reported nor investigated.[1252] It found that "the lack of reporting and investigations into the commission of crimes by members of the MUP and VJ against Kosovo Albanian civilians alone is indicative of a plan to conceal these killings".[1253] The Trial Chamber further considered the official

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[1248] Trial Judgement, para. 2158.
[1249] Trial Judgement, paras 1980-1981, 2117. See also Trial Judgement, para. 1967.
[1250] Trial Judgement, paras 1972, 2211.
[1251] Trial Judgement, para. 2025.
[1252] Trial Judgement, para. 2111.
[1253] Trial Judgement, para. 2111.

notes of a working group ("Working Group Notes" and "Working Group", respectively) convened by the Serbian government in 2001.[1254] The Working Group Notes included evidence suggesting that Đorđević, during a meeting held in March 1999, "raised the issue of 'clearing up the terrain' in Kosovo"[1255] and that, during a subsequent MUP Collegium meeting in March 1999, an order was given to Đorđević to remove evidence of civilian victims.[1256] The Trial Chamber found that "clearing the terrain" referred to "the concealment of bodies of persons, killed by Serbian forces during anti-terrorist operations, including persons taking no active part in hostilities".[1257]

374. Under sub-ground 9(G), Đorđević raises three main arguments. He submits that the Trial Chamber erred in: (i) finding that the concealment of the bodies contributed to the JCE;[1258] (ii) its consideration of the Working Group Notes and its conclusion that a plan existed to conceal bodies;[1259] and (iii) applying an unfair standard with respect to inferences about his role in the concealment operations.[1260] The Appeals Chamber will address each argument in turn.

2. Alleged error in concluding that the concealment of bodies contributed to the JCE

(a) Arguments of the parties

375. Đorđević submits that the Trial Chamber erred in concluding that the concealment of the bodies constituted a contribution to the JCE.[1261] He also argues that the concealment of the bodies is an *ex post facto* action which cannot contribute to an earlier crime.[1262] He contends that the Trial Chamber's findings concerning the concealment of bodies could give rise to superior responsibility pursuant to Article 7(3) of the Statute, but do not support the conclusion that his actions constituted a contribution to the JCE pursuant to Article 7(1) of the Statute.[1263] Đorđević contends that such a finding "blurs" the distinction between the two modes of liability.[1264]

[1254] Trial Judgement, paras 1289, 2112.
[1255] Trial Judgement, para. 2112. See also Trial Judgement, para. 2025.
[1256] Trial Judgement, paras 2025, 2112.
[1257] Trial Judgement, paras 2025, 2116.
[1258] Đorđević Appeal Brief, paras 237-267.
[1259] Đorđević Appeal Brief, paras 244-251.
[1260] Đorđević Appeal Brief, paras 252-267; Đorđević Reply Brief, para. 80.
[1261] Đorđević Appeal Brief, para. 240; Đorđević Reply Brief, para. 77.
[1262] Đorđević Appeal Brief, para. 240.
[1263] Đorđević Appeal Brief, para. 240. Đorđević observes that actions may aid and abet an earlier crime if an accomplice "agreed in advance with the physical perpetrator that such assistance would be provided" (Đorđević Appeal Brief, para. 240, referring to *Aleksovski* Trial Judgement, para. 62, *Blagojević and Jokić* Trial Judgement, paras 731, 745).
[1264] Đorđević Appeal Brief, para. 240.

376. Đorđević further submits that there is a missing evidentiary link between the concealment actions and the JCE[1265] because: (i) contrary to any concealment plan, the Trial Chamber's findings demonstrate that investigations were undertaken regarding the discovery of the refrigerated truck in the Danube River;[1266] (ii) the Trial Chamber was "unable to make specific findings against 'other specific senior political, MUP and VJ officials'" concerning the concealment of bodies;[1267] and (iii) the Trial Chamber's finding that a "'conspiracy of silence' existed at all levels of the MUP and VJ" is negated by its other findings.[1268] In Đorđević's view, the only exception to his submissions is the "suggestion of a March 1999 meeting" based on the "highly unreliable evidence of the Working Group".[1269]

377. The Prosecution responds that the Trial Chamber reasonably concluded that the concealment of bodies furthered the JCE.[1270] It submits that Đorđević "erroneously characterises the concealment operation as assistance after the fact" while the evidence shows that the plan was already in place by the start of NATO attacks.[1271] The Prosecution also argues that in claiming that attempts were made to investigate the crimes, Đorđević ignores the Trial Chamber's findings and evidence that he frustrated any investigation into the concealment of bodies.[1272]

(b) Analysis

378. The Appeals Chamber is not persuaded by Đorđević's submission that the concealment of the crimes in this case is an *ex post facto* action that cannot, therefore, contribute to an earlier crime.[1273] As discussed in detail below, the Trial Chamber held that there was a plan to conceal the crimes as early as March 1999.[1274] The Trial Chamber found that:

> [t]he planning for the concealment of hundreds of bodies of Kosovo Albanian civilians killed during joint VJ-MUP actions is strong evidence that killings were part of the common plan to terrorise a significant part of the Kosovo Albanian population into leaving Kosovo.[1275]

[1265] Đorđević Appeal Brief, para. 243.
[1266] Đorđević Appeal Brief, para. 242, referring to Trial Judgement, paras 1293-1296.
[1267] Đorđević Appeal Brief, para. 243, referring to Trial Judgement, para. 2119.
[1268] Đorđević Appeal Brief, para. 241, referring to Trial Judgement, para. 2108.
[1269] Đorđević Appeal Brief, para. 243. Đorđević also argues that if the plan had been to "'terrorise a significant part of the Kosovo Albanian population into leaving Kosovo', the more reasonable inference was that the bodies would have been left where they fell" (Đorđević Reply Brief, para. 77, referring to Prosecution Response Brief, para. 209).
[1270] Prosecution Response Brief, para. 209.
[1271] Prosecution Response Brief, para. 210, referring to Đorđević Appeal Brief, para. 240.
[1272] Prosecution Response Brief, para. 211.
[1273] Đorđević Appeal Brief, para. 240.
[1274] Trial Judgement, para. 2118.
[1275] Trial Judgement, para. 2025.

The Trial Chamber also found that this planning was further evidence of the shared purpose of Đorđević and other members of the JCE "to commit crimes and to conceal the evidence of such".[1276] In reaching these conclusions, the Trial Chamber relied on a series of meetings in March 1999 between senior government officials and members of the JCE, during which: (i) Đorđević raised the issue of "clearing up the terrain";[1277] (ii) President Milošević ordered Minister Stojiljković to take measures to remove all traces of evidence that could indicate crimes were committed in Kosovo;[1278] and (iii) Minister Stojiljković assigned the responsibility for implementing the task of "clearing up the terrain" to Đorđević and Ilić, with the objective of "removing civilian victims who could potentially become the subject of investigation by the Hague Tribunal".[1279] The Trial Chamber ultimately concluded that these meetings concerned the removal of bodies of Kosovo Albanians killed by VJ and MUP forces.[1280] The Trial Chamber also found that the pattern of failure to investigate the crimes was indicative of a plan to conceal the killings[1281] and considered corroborative evidence concerning the concealment of the bodies.[1282] The Appeals Chamber is satisfied that the Trial Chamber reasonably relied on these findings, including its interpretation of the phrase "clearing up the terrain", to conclude that Đorđević's role in the concealment of bodies was part of the coordinated plan "to remove evidence of crimes by Serbian forces against Kosovo Albanians in Kosovo during the Indictment period".[1283]

379. Furthermore, the Appeals Chamber observes that Đorđević's involvement in the concealment of bodies and failure to investigate crimes occurred contemporaneously with or, in some instances, prior to the commission of additional crimes by Serbian forces in Kosovo, including mass killings.[1284] For example, the Trial Chamber found that after the discovery of the bodies in Tekija, in early April 1999, and their subsequent removal and burial,[1285] 296 Kosovo Albanians were killed by Serbian forces on 27 and 28 April 1999 during the joint VJ and MUP action code-named "Operation Reka".[1286] The Trial Chamber also found that rather than investigating these killings, coordinated efforts were taken by Serbian authorities to conceal the

[1276] Trial Judgement, para. 2025.
[1277] Trial Judgement, para. 1373, referring to Exhibit P387, p. 3
[1278] Trial Judgement, para. 1373, referring to Exhibit P387, p. 3.
[1279] Trial Judgement, para. 1373, referring to Exhibit P387, p. 3.
[1280] Trial Judgement, paras 2025, 2117.
[1281] Trial Judgement, para. 2111.
[1282] See Trial Judgement, paras 2113-2116.
[1283] Trial Judgement, paras 2126, 2156, 2158. See also *supra*, paras 373, 378.
[1284] See Trial Judgement, paras 1967-1982, 2099-2103, 2146.
[1285] Trial Judgement, para. 1287.
[1286] Trial Judgement, paras 2099, 2146.

crimes through the removal and clandestine burial of the bodies of the victims.[1287] The Appeals Chamber considers that the Trial Chamber's findings show that Đorđević's involvement in the concealment operation occurred at the same time as, or prior to, the commission of the crimes.[1288] The Appeals Chamber therefore finds that these actions directly refute Đorđević's assertion that the acts were merely *ex post facto*.

380. The Appeals Chamber is also not convinced by Đorđević's assertion that the fact that a municipal investigative judge, deputy municipal prosecutor, and coroner were called to the scene and the district prosecutor was informed following the discovery of bodies in the Danube River, is contrary to a plan to conceal the killings.[1289] Đorđević ignores the Trial Chamber's findings that the municipal judge and prosecutor declared themselves incompetent when a large number of corpses were found in the truck and had no further involvement in the investigation.[1290] He also ignores the fact that while the district investigative judge and district prosecutor were called, they did not attend the scene.[1291] Đorđević further disregards that his actions were in fact directed to obstructing any investigation.[1292] In particular, the Trial Chamber found that, pursuant to Đorđević's instructions, the bodies found in the refrigerated truck in the Danube River were transported to Belgrade and buried in mass graves at the Batajnica SAJ Centre in an effort to conceal the discovery of the bodies, as well as their ethnicity and origin, and to obstruct any further investigation into the deaths of these individuals.[1293] It further noted that Đorđević instructed SUP Chief Časlav Golubović ("Golubović") not to make the case public and to have the refrigerated truck destroyed once the bodies were removed.[1294] In light of the above, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and as such has failed to show that the Trial Chamber erred in concluding that a plan existed to conceal the bodies of Kosovo Albanian civilians.

381. In addition, the Appeals Chamber is not persuaded that the Trial Chamber's decision to not make specific findings regarding the involvement of other senior political, MUP and VJ officials in

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[1287] Trial Judgement, paras 2099, 2146. While the Trial Chamber noted that the evidence does not identify where the bodies were transferred to, the remains of 295 of the victims of "Operation Reka" were exhumed from mass graves at the Batajnica SAJ Centre in 2001 (Trial Judgement, para. 2099).

[1288] See *supra*, para. 378.

[1289] See Đorđević Appeal Brief, para. 242, referring to Trial Judgement, paras 1293-1296.

[1290] Trial Judgement, para. 1321.

[1291] Trial Judgement, para. 1321.

[1292] Trial Judgement, paras 1321, 1324.

[1293] Trial Judgement, paras 1324, 1329, 1333, 1970.

[1294] Trial Judgement, paras 1302, 1313, 1970. The Trial Chamber also noted that Đorđević acknowledged that the order to destroy the truck was unlawful (Trial Judgement, fn. 6790, referring to Vlastimir Đorđević, 11 Dec 2009, T. 10002).

the concealment of bodies demonstrates that there is "a missing evidentiary link as to how [the concealment plan] was an agreed part of the JCE".[1295] The Appeals Chamber notes that the Trial Chamber considered the concealment of crimes in its analysis on whether a joint criminal enterprise existed and on Đorđević's contribution to it.[1296]

382. As discussed above, the Trial Chamber reached its conclusion on the plan to conceal crimes in Kosovo based, *inter alia*, on its analysis of the conduct of several JCE members involved in the operation, *i.e.* President Milošević, Minister Stojiljković, and Ilić.[1297] The Trial Chamber explicitly found that the operation regarding the concealment of the bodies was conducted "under the direction of [Đorđević], with Dragan Ilić, on direction of Minister Stojiljković, and pursuant to an order of President Milošević".[1298] The Trial Chamber chose not to make more specific findings regarding the involvement of other senior political, MUP, and VJ officials in the concealment of bodies.[1299] It reasoned that based on the evidence, however, it was "likely that a number persons had direct involvement in, or at least had knowledge of, the concealment of bodies."[1300] Considering that the Trial Chamber was only concerned with Đorđević's contribution, the Appeals Chamber is satisfied that the Trial Chamber made the necessary findings in relation to "other specific senior political, MUP and VJ officials"[1301] to support its conclusion that a plan to conceal the crimes existed and that Đorđević's participation in this plan was part of his contribution in furtherance of the JCE. In light of the above, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber.

383. Finally, the Appeals Chamber is not persuaded by Đorđević's unsubstantiated assertion that the Trial Chamber negated its own findings concerning a "conspiracy of silence".[1302] Đorđević argues that the Trial Chamber contradicted itself because it found that written records of the activities and progress in Kosovo, including the concealment of crimes, were not kept or were destroyed, but in the same paragraph also found that there was reporting, oral and/or written, of the activities and progress in Kosovo.[1303] A reading of the full paragraph of the Trial Judgement, however, shows that there is no contradiction in the Trial Chamber's reasoning. The Trial Chamber found that there was an "*almost complete* absence of any reports, records or minutes of meetings"

[1295] Đorđević Appeal Brief, para. 243.
[1296] Trial Judgement, paras 1981, 2025-2026, 2154-2158.
[1297] See *supra*, para. 378; Trial Judgement, paras 2112-2116.
[1298] Trial Judgement, para. 1980. See also Trial Judgement, paras 2117-2118.
[1299] Trial Judgement, paras 2119-2120.
[1300] Trial Judgement, para. 2119.
[1301] Trial Judgement, para. 2119.
[1302] See Trial Judgement, para. 2108; Đorđević Appeal Brief, para. 241.

on the actions and progress of the MUP and the VJ in Kosovo.[1304] It further held that "it was not feasible to accept that these subjects, which were critical to the very survival of the Serbian government and nation [...] went unreported".[1305] The Trial Chamber therefore reasoned that there was oral and/or written reporting on these matters but that "either all written records [had] been destroyed, or there was a very determined effort at all levels to avoid written records so that there could be nothing on which international investigations could proceed, or both."[1306] It found that this inference was supported by the few written records that were found, as well as conduct that evidenced knowledge of these events at the most "senior Serbian levels".[1307] The Appeals Chamber does not find the Trial Chamber's reasoning to be contradictory. Đorđević's assertion is, therefore, dismissed.

384. In light of the foregoing, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that Đorđević has not demonstrated that the Trial Chamber erred in concluding that the concealment of bodies, and Đorđević's role therein, constituted a contribution to the JCE. Consequently, Đorđević's argument that his conduct should rather have been analysed in the context of Article 7(3) liability is dismissed.

3. Alleged errors with respect to the Working Group Notes

(a) Introduction

385. Based on the Working Group Notes, the Trial Chamber found that two meetings were held in March 1999, during which the issue of the concealment of bodies of Kosovo Albanian civilians was discussed.[1308] The first meeting was held in President Milošević's office and attended by, among others, the President himself, Đorđević, Minister Stojilković, and the then Chief of the RDB, Marković.[1309] The Trial Chamber found that, during this meeting, Đorđević "raised the issue of 'clearing up the terrain' in Kosovo" and that in this respect, "President Slobodan Milošević ordered Minister Stojiljković to take measures to remove all traces which could indicate the existence of evidence of 'the crimes committed' there".[1310] The Trial Chamber also relied, *inter alia*, on the

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[1303] See Trial Judgement, para. 2108; Đorđević Appeal Brief, para. 241.
[1304] Trial Judgement, para. 2108 (emphasis added).
[1305] Trial Judgement, para. 2108.
[1306] Trial Judgement, para. 2108.
[1307] Trial Judgement, para. 2108.
[1308] Trial Judgement, paras 2112, 2117. The Appeals Chamber will refer to these two meetings as the March 1999 meeting and the subsequent MUP Collegium meeting.
[1309] Trial Judgement, para. 2112, referring to Exhibit P387, p. 3.
[1310] Trial Judgement, para. 2112, referring to Exhibit P387, p. 3. See also Trial Judgement, paras 2113-2117.

Working Group Notes in finding that at a subsequent MUP Collegium meeting, Minister Stojiljković issued an order to Đorđević and Ilić to perform the task of "'clearing up the terrain' in Kosovo with the aim of removing evidence of civilian victims who could potentially become the subject of investigations by the Tribunal".[1311]

386. Đorđević submits that the Trial Chamber erred in finding that there was a plan to conceal the bodies of Kosovo Albanian civilians "when it placed substantial weight on the Working Group [Notes]" evidence regarding the March 1999 meetings.[1312] In particular, Đorđević: (i) challenges the reliability of the Working Group Notes;[1313] and (ii) argues that the Trial Chamber placed undue emphasis on the Working Group Notes in reaching the conclusion that a plan to conceal the bodies existed.[1314]

(b) Reliability of the Working Group Notes

a. Arguments of the parties

387. Đorđević contends that the Working Group Notes are unreliable and should not be given any weight considering the lack of: (i) reference numbers, dates, places of interview, and signatures; and (ii) any opportunity for the individual interviewed to review the information.[1315] Additionally, Đorđević submits that the Trial Chamber erred in identifying the date of both the establishment of the Working Group and the publication of its report.[1316] According to Đorđević these errors "undermine the deference which the Appeals Chamber might otherwise pay a Trial Chamber in its discretion to assess the evidence before it".[1317]

388. The Prosecution responds that the Trial Chamber provided a reasoned opinion regarding the reliability of the Working Group's evidence.[1318] It further submits that any alleged error concerning the date of the Working Group's establishment is immaterial.[1319]

[1311] Trial Judgement, para. 2112, referring to Exhibit P387, p. 3, Trial Judgement, paras 1289, 1387-1394. See also Trial Judgement, paras 2113-2117.
[1312] Đorđević Appeal Brief, para. 244; Appeal Hearing, 13 May 2013, AT. 86-87.
[1313] Đorđević Appeal Brief, para. 247; Appeal Hearing, 13 May 2013, AT. 86-87.
[1314] Đorđević Appeal Brief, para. 251.
[1315] Đorđević Appeal Brief, para. 247, referring to K84, 12 Mar 2009, T. 2123-2128, T. 2132 (closed session).
[1316] Đorđević Appeal Brief, para. 246.
[1317] Đorđević Appeal Brief, para. 246.
[1318] Prosecution Response Brief, para. 216, referring to Trial Judgement, paras 2113-2116 (regarding the Trial Chamber's reference to other evidence).
[1319] Prosecution Response Brief, para. 215, referring to Đorđević Appeal Brief, para. 246.

b. Analysis

389. The Appeals Chamber is not convinced that the Trial Chamber erred in its consideration of the relative indicia of reliability of the Working Group Notes. The Appeals Chamber observes that the Trial Chamber acknowledged Đorđević's arguments at trial and, in this context, noted that the Working Group Notes needed to be approached with caution.[1320] The distinct question of whether the contents of the Working Group Notes were contradicted by witness testimony, their probative value, and the Trial Chamber's consideration of the evidence in the context of the plan to conceal the bodies, will be considered later in this section.[1321]

390. With respect to identifying the dates on which the Working Group was established and issued its reports, the Appeals Chamber observes that the Trial Chamber, in two instances, incorrectly stated that the Working Group existed in 1999 when, in fact, the Working Group was not established until 2001.[1322] In particular, it erred in finding that an indictment by this Tribunal against Slobodan Milošević was issued "just days" prior to the press conference held by the Working Group;[1323] and that a member of the Working Group approached Đorđević in May 1999.[1324] Apart from these two errors, the Trial Chamber, in all other instances, correctly referred to the date of the Working Group's establishment and publication of its first report as May 2001.[1325] It would thus appear that at least on one occasion, the reference to May 1999 was a simple clerical error.[1326] Moreover, the Appeals Chamber observes that the two instances in which the date of the Working Group was wrongly reported have no bearing on any of the substantive findings of the Trial Chamber.[1327] Accordingly, the Appeals Chamber finds that these errors had no effect on the Trial Chamber's findings with respect to the Working Group's evidence.

[1320] Trial Judgement, para. 1289, fn. 4974.
[1321] See *infra*, paras 395-399.
[1322] Trial Judgement, paras 1371, 1982.
[1323] Trial Judgement, para. 1371, fn. 5292.
[1324] Trial Judgement, para. 1982.
[1325] See Trial Judgement, paras 1289, 1369, 1371-1372.
[1326] See Trial Judgement, para. 1982.
[1327] With regard to the date of the indictment against Slobodan Milošević, the Appeals Chamber observes that it was an additional observation relating to Đorđević's argument that the report was hastily written and released and that it was made in the context of other findings by the Trial Chamber (see Trial Judgement, paras 1370-1373).

(c) Alleged error in relying on the Working Group Notes

a. Arguments of the parties

391. Đorđević submits that the Trial Chamber erred in relying on the Working Group Notes to conclude that a plan existed to conceal bodies.[1328] He argues that the Working Group Notes' "suggestion that these two meetings [in March 1999] took place rested on the flimsiest of foundations" and that no reasonable trial chamber could have concluded that "these meetings either occurred or as to what happened at them".[1329] He contends that multiple witnesses challenged the contents of the Working Group Notes and testified that the Working Group "expressed pressure on them to falsely incriminate Đorđević".[1330]

392. Đorđević further submits that the prejudicial effect of the Working Group Notes, arising in part due to the lack of any primary sources used during their creation, far outweighs their probative value.[1331] Specifically, he argues that while the Working Group Notes primarily rely on a statement by the Chief of the RDB, Marković, to members of the RDB, the Working Group did not in fact have this statement while compiling its report and, additionally, that the secondary notes used by the Working Group, in lieu of this statement, were not admitted into evidence at trial.[1332] Đorđević contends that while hearsay evidence is admissible before the Tribunal, no reasonable trial chamber could have found that the Working Group Notes were reliable in light of the deficiencies, including the lack of an original statement made by Marković.[1333] He submits that the question of the probative value of the Working Group Notes is especially important because it is the only evidence of the alleged March 1999 meeting in President Milošević's office and the subsequent MUP Collegium meeting.[1334]

393. Finally, Đorđević argues that the Trial Chamber erred in relying on Witness K84's testimony because: (i) "neither [Witness K84] nor the Working Group found any evidence to indicate that the removal of bodies from Kosovo was discussed at any MUP Collegium or any such

[1328] Đorđević Appeal Brief, para. 244.
[1329] Đorđević Appeal Brief, para. 251.
[1330] Đorđević Appeal Brief, para. 248.
[1331] Đorđević Appeal Brief, para. 249.
[1332] Đorđević Appeal Brief, para. 249; Appeal Hearing, 13 May 2013, AT. 86-87.
[1333] Đorđević Appeal Brief, para. 251; Appeal Hearing, 13 May 2013, AT. 86-87.
[1334] Đorđević Appeal Brief, paras 244, 249; Appeal Hearing, 13 May 2013, AT. 86. The Appeals Chamber notes that Đorđević mistakenly refers to the date of this release as May 1999 in para. 249 (but see Trial Judgement, para. 245, stating May 2001 as the correct date).

meeting with Milošević";[1335] and (ii) Witness K84 testified that Đorđević's *chef de cabinet*, Slobodan Borišavljević, never said that the concealment of bodies was discussed at any MUP Collegiums.[1336]

394. The Prosecution responds that the Trial Chamber properly relied on the Working Group's evidence in drawing its conclusions regarding the two meetings in March 1999.[1337] The Prosecution asserts that Đorđević's arguments fail on the merits as he has not demonstrated how the Trial Chamber's evaluation of this evidence was unreasonable.[1338] The Prosecution further submits that the Trial Chamber did not rely solely on this evidence in finding that the meetings occurred.[1339]

b. Analysis

395. The Appeals Chamber recalls that "it is settled jurisprudence of the International Tribunal that it is the trier of fact who is best placed to assess the evidence in its entirety as well as the demeanour of a witness".[1340] The Appeals Chamber further recalls that it is within the discretion of a trial chamber to resolve inconsistencies in the evidence, "evaluate whether evidence taken as a whole is reliable and credible and to accept or reject fundamental features of the evidence".[1341] The Appeals Chamber will defer to a trial chamber's judgement on issues of credibility and "will only find an error of fact if it determines that no reasonable trier of fact could have made the impugned finding".[1342] In this context, the Appeals Chamber recalls that the Trial Chamber acknowledged Đorđević's challenge to the contents of the Working Group Notes, explaining that:

> [i]t is the Defence position that the Prosecution unjustifiably seeks to place considerable value on some of [the Working Group] Notes for the truth of their contents [...]. [O]ne of the witnesses, K87, challenged the content of almost the entirety of the [Working Group Notes] compiled of his interview, claiming that it was full of untruths and inaccuracies. Another witness, K93, claimed that when interviewing him, the Working Group applied pressure by suggesting to him that it must have been Đorđević who was involved. While conscious of the positions these two and other witnesses have taken with respect to the contents of the [Working Group] Notes of their respective interviews, the Chamber also observes that, as set out earlier, it has difficulty accepting in

[1335] Đorđević Appeal Brief, para. 250, referring to Exhibit P390, K84, 10 Mar 2009, T. 2019 (closed session), K84, 11 Mar 2009, T. 2049-2050 (closed session), K84, 12 Mar 2009, T. 2160-2173 (closed session), T. 2177-2178 (closed session), T. 2186 (closed session), T. 2193-2195 (closed session), Adnan Merovci, 13 Mar 2009, T. 2208.
[1336] Đorđević Appeal Brief, para. 250, referring to K84, 12 Mar 2009, T. 2168-2169 (closed session).
[1337] Prosecution Response Brief, para. 213.
[1338] Prosecution Response Brief, paras 214-215.
[1339] Prosecution Response Brief, para. 216, referring to Trial Judgement, paras 2113-2116 (regarding the Trial Chamber's reference to other evidence).
[1340] *Limaj et al.* Appeal Judgement, para. 88, citing *Kordić and Čerkez* Appeal Judgement, para. 21, fn. 12.
[1341] *Munyakazi* Appeal Judgement, para. 51, citing *Simba* Appeal Judgement, para. 103; *Setako* Appeal Judgement, para. 31. See also *Haradinaj et al.* Appeal Judgement, paras 129-130.
[1342] See *supra*, para. 16. See also *Setako* Appeal Judgement, para. 31, referring to *Renzaho* Appeal Judgement, para. 355, *Gacumbitsi* Appeal Judgement, para. 70; *Karera* Appeal Judgement, para. 173; *Nahimana* et al. Appeal Judgement, para. 428.

> particular the evidence of K87 and K93 in this trial with respect to critical aspects concerning the role of the Accused in the events. Where a witness has given specific evidence about the content and accuracy of the [Working Group Notes] of the witness's interview, the Chamber has weighed this evidence in the context of the entirety of the evidence of that witness, as well as other relevant evidence before the Chamber.[1343]

The Appeals Chamber observes that the Trial Chamber made its findings regarding the interviews provided in the Working Group Notes on the basis of the entirety of the evidence and expressly addressed the concerns raised by Đorđević with respect to the Working Group Notes.[1344] In this respect, the Trial Chamber prefaced its discussion of the Working Group Notes by stating that the lack of reporting and investigations into the crimes committed by Serbian forces was, in and of itself, already "indicative of a plan to conceal" the killings.[1345] It then went on to consider other evidence which corroborated the Working Group Notes, including: (i) an Official Note recording that an individual telephoned Đorđević and asked for instructions or information concerning the arrival of a truck containing bodies at the 13 Maj Batajnica Centre in April 1999, to which Đorđević responded that "the territory in Kosovo was being mopped up", the truck "was to be put away on our premises", it was a "number one secret", and that Đorđević was to inform President Milošević about this issue;[1346] (ii) a written statement by Đorđević's *chef de cabinet*, Slobodan Borisavljević, discussing a decision to clear up the battlefields in Kosovo;[1347] (iii) the testimony of Witness Živko Trajković ("Witness Trajković") regarding a conversation he had with Đorđević in June 1999 about the decision to bury bodies at the Batajnica SAJ Centre, which Witness Trajković understood to have been taken "with regard to the sanitation and clearing up of the terrain", and Witness Trajković's view that Ilić was in charge of this kind of operation;[1348] and (iv) the minutes of a Joint Command meeting held on 1 June 1999, recording that Đorđević informed those present at the meeting that Ilić was unable to attend the meeting as he was busy "attending [to] some tasks that had to do with sanitation and hygiene measures in the field".[1349] The Appeals Chamber also observes that the Trial Chamber explained why it preferred the evidence of one witness over

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[1343] Trial Judgement, para. 1289 (citations omitted).

[1344] See Trial Judgement, para. 1289. The Appeals Chamber further observes that the Trial Chamber "carefully weighed the differing observations by the persons interviewed about the procedures followed during the interview of each witness and [...] regarded the content of each Official Note with much care and caution before, in some cases, being prepared to accept what is contained therein" (Trial Judgement, fn. 4974).

[1345] Trial Judgement, para. 2111.

[1346] Trial Judgement, para. 2113, referring to Confidential Annex (Exhibit P413 (confidential), p. 1).

[1347] Trial Judgement, para. 2114, referring to Exhibit P390 (confidential), K84, 10 Mar 2009, T. 2024-2025 (closed session), K84, 12 Mar 2009, T. 2172 (closed session).

[1348] Trial Judgement, para. 2115, referring to Živko Trajković, 29 Sep 2009, T. 9126-9127, 9129-9130, 9138.

[1349] Trial Judgement, para. 2116, citing Aleksandar Vasiljević, 8 Jun 2009, T. 5694 (private session), 5702. See also Exhibit P885. The Trial Chamber noted that this is in contrast to Đorđević's testimony that "Ilić told him on 2 June 1999 that he had gone to Kosovo to provide SUPs with instructions on how to improve the work of on-site investigations during war time conditions" (Trial Judgement, para. 2116, referring to Vlastimir Đorđević, 7 Dec 2009, T. 9747, Vlastimir Đorđević, 11 Dec 2009, T. 9987).

another when it was presented with conflicting evidence.[1350] The Appeals Chamber is therefore satisfied that the Trial Chamber carefully considered the differing positions, weighed the evidence, including additional corroborating evidence that supported the existence of a plan to conceal the bodies, and approached the Working Group Notes with caution.[1351] The Appeals Chamber therefore finds that Đorđević has failed to demonstrate that the Trial Chamber erred in its consideration of the evidence when it decided to not rely on witness testimony that contradicted the Working Group Notes.

396. Turning to Đorđević's contention that the Trial Chamber's conclusions concerning the March 1999 meetings were not supported by the Working Group Notes, the Appeals Chamber observes that Đorđević is correct insofar as he asserts that the Working Group did not have access to a direct statement concerning the existence of the meetings.[1352] The Trial Chamber, however, recognised this issue and, while it placed considerable emphasis on the Working Group Notes, it did so cautiously and in the context of corroborating evidence:

> [w]hile it is well aware that the evidence of the meetings in March of 1999 is not first hand, the Chamber is also aware that there are a number of pieces of evidence which tend, in combination, to confirm their underlying truth. The Chamber considers, on the basis of the entirety of the evidence viewed together, that it is established that at one or more meetings in March 1999 and thereafter the "clearing of the terrain" in the context of concealing the bodies of victims killed by Serbian forces in Kosovo was discussed.[1353]

397. The Appeals Chamber recalls that a trial chamber has "the discretion to cautiously consider and rely on hearsay evidence".[1354] While Đorđević correctly asserts that the Working Group Notes provides the only evidence of the March 1999 meetings, the Appeals Chamber is satisfied that the Trial Chamber considered the probative value of the Working Group Notes with sufficient caution and reasonably concluded, based on the totality of the evidence, that a plan existed amongst senior government leaders to conceal the bodies of Kosovo Albanian civilians killed by Serbian forces.[1355] While the additional findings of the Trial Chamber refer to events subsequent to the March 1999 meetings,[1356] they display a clear and consistent intent on the part of Đorđević to put into effect a plan to conceal the bodies of Kosovo Albanian civilians and strongly corroborate the Working

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[1350] Trial Judgement, fns 7270, 7278, 7280.
[1351] Trial Judgement, para. 2112. The Appeals Chamber therefore considers that Đorđević, in contending that the unreliability of the Working Group Notes is of paramount importance because they are the only evidence of the March 1999 meetings, misstates the findings of the Trial Chamber (Đorđević Appeal Brief, paras 244, 249).
[1352] See Đorđević Appeal Brief, para. 249.
[1353] Trial Judgement, para. 2117. See Trial Judgement, para. 2113.
[1354] *Munyakazi* Appeal Judgement, para. 77, citing *Kalimanzira* Appeal Judgement, para. 96; *Karera* Appeal Judgement, para. 39; *Nahimana et al.* Appeal Judgement, para. 831. See also *Naletilić and Martinović* Appeal Judgement, para. 217.
[1355] Trial Judgement, para. 2117.

Group Notes. These conclusions were further reinforced by the Trial Chamber's finding that the complete lack of investigations into crimes constituted evidence of a plan to conceal bodies.[1357]

398. The Appeals Chamber is also not convinced by Đorđević's assertion that the Working Group did not find any evidence to indicate the removal of bodies.[1358] The Appeals Chamber observes that, contrary to Đorđević's submission, the Working Group did obtain evidence that the concealment of bodies was discussed at the meetings, namely the statement of Marković.[1359]

c. Conclusion

399. In light of the above, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber and, as such, has failed to show that the Trial Chamber erred in relying on the evidence of the Working Group in concluding that a plan to conceal bodies existed.

4. Đorđević's role in the concealment of bodies

(a) Introduction

400. The Trial Chamber found that Đorđević played a leading role in the MUP efforts to conceal the bodies of Kosovo Albanians by giving orders concerning the handling, transport, and reburial of bodies.[1360] It relied, *inter alia*, on his involvement in the burial operations of bodies transported from Kosovo to various locations in Serbia which "was undertaken as part of a coordinated operation to remove evidence of crimes".[1361]

401. Đorđević submits that the Trial Chamber erred by inflating the extent of his responsibility in concealment operations.[1362] In particular, he submits that the Trial Chamber erred in its findings concerning: (i) the concealment of approximately 80 bodies discovered on 4 April 1999 in the back of a refrigerated truck in the Danube River near the village of Tekija, the subsequent transfer to and burial of these bodies at the Batajnica SAJ Centre, and a number of subsequent reburials at

[1356] See Trial Judgement, paras 2112-2117.
[1357] See Trial Judgement, para. 2111.
[1358] See Đorđević Appeal Brief, para. 250.
[1359] See Đorđević Appeal Brief, paras 249-250. See also Trial Judgement, para. 2114.
[1360] Trial Judgement, paras 1969, 2156.
[1361] Trial Judgement, paras 1969, 2156.
[1362] Đorđević Appeal Brief, para. 253; Đorđević Reply Brief, paras 76, 80; Appeal Hearing, 13 May 2013, AT. 88-89..

Batajnica;[1363] (ii) the two deliveries of bodies at the Petrovo Selo PJP Centre in April 1999;[1364] and (iii) the burial of bodies next to Lake Perućac.[1365]

402. The Prosecution responds that the Trial Chamber reasonably concluded that Đorđević played a leading role in actively concealing evidence of widespread murders of Kosovo Albanians.[1366] The Prosecution argues, in general, that Đorđević misstates the Trial Chamber's findings, repeats submissions made during trial, and fails to show that any other reasonable inferences were available.[1367]

(b) Alleged error in finding that Đorđević participated in the reburial of bodies of Kosovo Albanians found in a refrigerated truck in the Danube River

a. Introduction

403. The Trial Chamber found that in early April 1999, Đorđević arranged for the transport of the bodies of Kosovo Albanians found in a refrigerated truck in the Danube River near Tekija to the Batajnica SAJ Centre[1368] and instructed that the bodies be buried there in mass graves.[1369] The Trial Chamber noted that "[w]hile none of the evidence demonstrates directly that he had knowledge that the specific location to where these bodies were to be brought was the Batajnica SAJ Centre [...] the only inference to make is that he had such knowledge."[1370] The Trial Chamber concluded that Đorđević "was the initial, and primary, point of contact" and that it was "clear that [Đorđević] gave orders with respect to the secret handling, transport and reburial of bodies".[1371]

b. Arguments of the parties

404. Đorđević submits that the Trial Chamber erred in concluding that he participated in the concealment operations concerning the 80 bodies discovered on 4 April 1999 in the back of a refrigerated truck in the Danube River near the village of Tekija.[1372] In particular, he argues that the Trial Chamber erred in concluding that he had knowledge "that the specific location to where these bodies were to be brought was the Batajnica SAJ Centre" given that it previously had found that

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[1363] Đorđević Appeal Brief, paras 252, 255-258.
[1364] Đorđević Appeal Brief, paras 252, 262-263.
[1365] Đorđević Appeal Brief, paras 252, 259-261, 263.
[1366] Prosecution Response Brief, para. 217.
[1367] See Prosecution Response Brief, paras 217-231.
[1368] Trial Judgement, paras 1301-1324, 1969.
[1369] Trial Judgement, paras 1325-1352, 1969.
[1370] Trial Judgement, para. 1347.
[1371] Trial Judgement, para. 1969.

"none of the evidence demonstrates directly" that he had such knowledge.[1373] He also contends that his "surprised and delayed reaction" when contacted about the bodies found near Tekija shows that he did not have prior knowledge of the bodies.[1374] Đorđević further claims that the Trial Chamber mischaracterised the evidence when it found that he contacted Witness K87 and told him in advance about the arrival at the Batajnica SAJ Centre of additional trucks driven by MUP employees carrying bodies in April and likely into May 1999.[1375] Đorđević also submits that the Trial Chamber failed to take into account his "repeated requests to the Minister Stojiljković to investigate the discovery of bodies at Tekija", and that, even if his requests did not result in judicial investigations, there was also no finding that he precluded such investigations or that he could have done so.[1376]

405. The Prosecution responds that the Trial Chamber did not err in finding that Đorđević "played a leading and crucial role in the clandestine re-burial operation of bodies at the Batajnica SAJ Centre".[1377] It submits that Đorđević ignores and misstates the evidence demonstrating that he arranged for the transport of bodies from Tekija to the Batajnica SAJ Centre in early April 1999.[1378] According to the Prosecution, although there was no direct evidence that Đorđević knew that the bodies found in Tekija had been taken to the Batajnica SAJ Centre, the only reasonable inference in the context of the events was that Đorđević had such knowledge.[1379] The Prosecution further contends that the Trial Chamber rejected Đorđević's claim at trial that he repeatedly made requests to Minister Stojiljković to investigate the discovery of bodies in Tekija and that Đorđević fails to show an error in this regard.[1380]

c. Analysis

406. The Appeals Chamber observes that Đorđević is correct in asserting that no direct evidence was considered by the Trial Chamber which established that he knew the bodies would be taken to the Batajnica SAJ Centre.[1381] The Trial Chamber, however, provided a detailed explanation of the circumstantial evidence demonstrating Đorđević's role in coordinating the delivery of trucks carrying bodies and mass burial operations at the Batajnica SAJ Centre,[1382] which included

[1372] Đorđević Appeal Brief, paras 252, 255-258.
[1373] Đorđević Appeal Brief, para. 256, referring to Trial Judgement, para. 1347.
[1374] Đorđević Appeal Brief, para. 255.
[1375] Đorđević Appeal Brief, para. 257, referring to Trial Judgement, para. 1337, fn. 5145.
[1376] Đorđević Appeal Brief, para. 258.
[1377] Prosecution Response Brief, para. 219.
[1378] Prosecution Response Brief, para. 220.
[1379] Prosecution Response Brief, para. 222
[1380] Prosecution Response Brief, para. 224.
[1381] See Đorđević Appeal Brief, para. 256.
[1382] See Trial Judgement, paras 1325-1347.

evidence that: (i) on 6 April 1999, SUP Chief Golubović contacted Đorđević and informed him of the bodies discovered in the refrigerated truck in the Danube;[1383] (ii) Golubović, as instructed by Đorđević, assisted in organising the loading and transfer of most of the bodies in a truck to Belgrade;[1384] (iii) Đorđević made plans for a second truck to transport the remainder of the bodies to Belgrade;[1385] (iv) Đorđević met with Witness K87 at some point around 6 April 1999, but before 9 April 1999, and informed Witness K87 that there were two trucks at the Batajnica SAJ Centre containing bodies and that these bodies should be buried at the Batajnica SAJ Centre;[1386] and (v) additional trucks containing bodies arrived shortly after the first bodies were buried and that Đorđević arranged for the burial of these bodies as well.[1387] The Appeals Chamber recalls that a trial chamber may draw inferences to establish a fact on which a conviction relies based on circumstantial evidence as long as it was satisfied that the inference was the only reasonable one available.[1388] In light of the evidence presented, demonstrating Đorđević's significant role in arranging the transport and burial of the bodies found in the Danube River, the Appeals Chamber finds that the Trial Chamber reasonably concluded that the only available inference was that Đorđević knew that these bodies were to be brought to the Batajnica SAJ Centre. Given the nature and extent of the evidence corroborating Đorđević's knowledge, the Appeals Chamber is also not convinced that Đorđević's surprise upon learning about the discovery of the bodies suggests that another reasonable inference remained.[1389]

407. With respect to Witness K87, the Appeals Chamber notes that regarding the timing of Đorđević informing him about the trucks he testified that:

> [t]he first time it was after it arrived. And the other times I think it was before it arrived. I don't know exactly. I really cannot say now. But I know that the first time it was once the truck had arrived.[1390]

[1383] Trial Judgement, paras 1301, referring to Exhibits P352, p. 3, P353, pp 7405-7406, 7408, Časlav Golubović, 3 Mar 2009, T. 1741. See also Trial Judgement, para. 1347.

[1384] Trial Judgement, paras 1307-1308, referring to, *inter alia*, Exhibits P352, p. 4, P353, p. 7449. See also Prosecution Response Brief, para. 220.

[1385] Trial Judgement, paras 1307 (referring to Exhibits P352, p. 4), 1312 (referring to, *inter alia*, Exhibit P359, pp 7452-7454, Boško Radojković, 4 Mar 2009, T. 1846, Confidential Annex). See also Prosecution Response Brief, para. 220.

[1386] Trial Judgement, para. 1329, referring to Exhibit P1414 (confidential), paras 12-13, 24, K87, 17 May 2010, T. 14158-14161, 14164. See also Prosecution Response Brief, para. 221.

[1387] Trial Judgement, para. 1337, referring to Confidential Annex, Exhibits P1415, para. 21, P370A, para. 31, K87, 17 May 2010, T. 14174-14175. See also Trial Judgement, paras 1338-1342; Prosecution Response Brief, para. 221.

[1388] *Galić* Appeal Judgement, para. 218; *Stakić* Appeal Judgement, para. 219; *Čelebići* Appeal Judgement, para. 458; *Kupreškić et al.* Appeal Judgement, para. 303.

[1389] *Contra* Đorđević Appeal Brief, para. 253.

[1390] K87, 17 May 2010, T. 14175.

In his witness statement, Witness K87 similarly stated that he was informed about the trucks after they had arrived at the Batajnica SAJ Centre.[1391] In light of this evidence, which the Trial Chamber relied on, the Appeals Chamber observes that the Trial Chamber incorrectly found that Witness K87 was told by Đorđević in advance about the arrival of additional trucks, because Witness K87's testimony suggests that at least on the first occasion Đorđević informed Witness K87 about the truck after it arrived.[1392] The Appeals Chamber, however, finds that whether Đorđević contacted Witness K87 before or after the trucks arrived at the Batajnica SAJ Centre neither has an impact on the Trial Chamber's conclusion that Đorđević was involved in the burial operations at this location nor calls into question the findings of the Trial Chamber.

408. With respect to Đorđević's submissions concerning his request for judicial investigations, the Appeals Chamber observes that the Trial Chamber explicitly considered and rejected Đorđević's claims that he: (i) made repeated requests to Minister Stojiljković to investigate the discovery of bodies in Tekija;[1393] (ii) did not preclude investigations and could not have done so;[1394] and (iii) did not expose what had happened because Minister Stojiljković threatened his life.[1395] The Trial Chamber instead found that Đorđević did in fact take steps to preclude investigation into the discovery of these bodies by coordinating the transport of the bodies and through his involvement in the clandestine burial of the bodies in mass graves at the Batajnica SAJ Centre.[1396] The Appeals Chamber finds that Đorđević has failed to show how the Trial Chamber erred in its assessment of this evidence. Considering that the Trial Chamber explicitly addressed these arguments, and in light of the substantial evidence considered by the Trial Chamber concerning Đorđević's knowledge of and involvement in the concealment operations, as well as the lack of any evidence provided by Đorđević in support of his statements, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber. Đorđević has therefore failed to show that the Trial Chamber erred in rejecting these arguments.

409. The Appeals Chamber therefore finds that Đorđević has failed to demonstrate that the Trial Chamber erred in its assessment of the evidence concerning his involvement in the concealment of the bodies found in Tekija and conclusion that his involvement furthered the JCE.

[1391] Exhibits P1415, para. 21; P1414 (confidential), para. 21.
[1392] See Trial Judgement, para. 1337.
[1393] Trial Judgement, para. 1970. See also Đorđević Closing Brief, paras 556-557; Vlastimir Đorđević, 7 Dec 2009, T. 9723; Vlastimir Đorđević, 11 Dec 2009, T. 10002-10003, 10009; Closing Arguments, 14 Jul 2010, T. 14500, 14506-14507.
[1394] Trial Judgement, para. 1970. See also Vlastimir Đorđević, 11 Dec 2009, T. 10002-10003, 10009.

(c) Petrovo Selo PJP Centre

a. Introduction

410. The Trial Chamber found that in addition to the delivery of bodies to the Batajnica SAJ Centre, "two further deliveries of bodies were made to the Petrovo Selo PJP Centre", where they were buried in mass graves.[1397] The Trial Chamber found that numerous similarities were present among the concealment operations at these two sites and concluded that these were all undertaken as part of a coordinated operation under Đorđević's direction, along with Ilić, "on the direction of Minister Stojiljković, and pursuant to an order of President Milošević".[1398] The Trial Chamber further found that Đorđević knew of the bodies transported from Kosovo to the Petrovo Selo PJP Centre in April 1999.[1399]

b. Arguments of the parties

411. Đorđević submits that the Trial Chamber erred in concluding that he knew of the reburials at the Petrovo Selo PJP Centre.[1400] He argues, in particular, that the Trial Chamber erroneously: (i) relied on the "connecting features" between the events at the Batajnica SAJ Centre and the Petrovo Selo PJP Centre but then ignored that the bodies discovered at Tekija were transported much farther away;[1401] (ii) discounted that different individuals planned the concealment;[1402] and (iii) relied on his involvement in the arrest and transfer of the Bytiqi brothers to the Petrovo Selo PJP Centre and his visit to that location "sometime before July 1999", after the Indictment period.[1403]

412. The Prosecution responds that the Trial Chamber "reasonably found that the mass grave sites at the Petrovo Selo PJP Centre were components of the same plan to conceal evidence of

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[1395] Trial Judgement, para. 1971. See also Vlastimir Đorđević, 11 Dec 2009, T. 9975-9977, 10012; Vlastimir Đorđević, 12 Dec 2009, T. 10096-10097.
[1396] Trial Judgement, para. 1970.
[1397] Trial Judgement, para. 1356. See also Trial Judgement, paras 1353-1355.
[1398] Trial Judgement, paras 1976-1980.
[1399] Trial Judgement, para. 1981.
[1400] Đorđević Appeal Brief, paras 252, 262-263.
[1401] Đorđević Appeal Brief, para. 262. Đorđević contends instead that the events in each location had different features, suggesting that there was no overarching plan (Đorđević Appeal Brief, para. 263).
[1402] Đorđević Appeal Brief, para. 262.
[1403] Đorđević Appeal Brief, para. 263; Đorđević Reply Brief, para. 79. In his reply, Đorđević submits that the Prosecution improperly relies on the case of the Bytiqi brothers in its response, as it "relates to Serbia proper" after the Indictment period and does not demonstrate control over Kosovo (Đorđević Reply Brief, para. 79). The Appeals Chamber notes that in this respect Đorđević appears to misconstrue the Prosecution's response on this issue given that it submits that the Bytiqi brothers case relates to Đorđević's command over the police personnel at the Petrovo Selo PJP Centre (see Prosecution Response Brief, para. 231).

large-scale crimes and that Đorđević played a leading role in this plan".[1404] It argues that the Trial Chamber correctly inferred Đorđević's knowledge of the concealment operations at the Petrovo Selo PJP Centre based on the obvious similarities and overlap between these operations and those co-ordinated by Đorđević at Batajnica and Lake Perućac.[1405] Finally, the Prosecution responds that Đorđević's arguments merely seek to substitute his evaluation of the evidence for that of the Trial Chamber, warranting summary dismissal.[1406]

c. Analysis

413. The Appeals Chamber is satisfied that in light of the striking similarities and connections between the different concealment operations and Đorđević's direct role in coordinating the concealment of bodies at the Batajnica SAJ Centre and Lake Perućac, the Trial Chamber reasonably concluded that the only reasonable inference available from the evidence was that Đorđević knew about the similar concealment operations at the Petrovo Selo PJP Centre. The Appeals Chamber refers to the Trial Chamber's findings, *inter alia*, that: (i) the bodies buried at the different locations came from Kosovo and the dead were persons of Kosovo Albanian ethnicity;[1407] (ii) there were similarities in the type of transportation used and manner in which mass graves were prepared;[1408] (iii) some of the same equipment and personnel were used in the concealment operations at the different sites;[1409] (iv) both the SAJ training ground in Batajnica and the PJP training ground in Petrovo Selo fell within Đorđević's responsibility as the Chief of the RJB; and (v) MUP personnel who were subordinates of Đorđević were involved in the concealment operations.[1410] The Trial Chamber further found that Đorđević's involvement in the arrest and transfer of the Bytiqi brothers "demonstrate[d] his effective command over the MUP personnel at the [Petrovo Selo PJP] Centre",[1411] and that he visited the Petrovo Selo PJP Centre sometime before July 1999.[1412] The

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[1404] Prosecution Response Brief, para. 229.
[1405] Prosecution Response Brief, para. 229.
[1406] Prosecution Response Brief, para. 231.
[1407] Trial Judgement, para. 1976.
[1408] Trial Judgement, para. 1976. For example, the Trial Chamber noted that an abandoned refrigerated truck and a truck compartment containing bodies were found floating in the Danube and Lake Perućac, respectively, and that a similar type of plastic lining was used in a grave at the Batajnica SAJ Centre and Petrovo Selo PJP Centre (Trial Judgement, para. 1977).
[1409] Trial Judgement, paras 1976-1978.
[1410] Trial Judgement, para. 1978. For example, the Trial Chamber noted that according to the evidence Peter Zeković, a subordinate of Đorđević in the MUP and Assistant Minister, gave instructions for the collection of the bodies in Kosovo and their subsequent transport to the Batajnica SAJ Centre and Petrovo Selo PJP Centre (Trial Judgement, para. 1979).
[1411] Trial Judgement, para. 1978. The Trial Chamber also found that Đorđević confirmed in his testimony before the War Crimes Chamber of the Belgrade District Court that the duty officer at the Centre, Sreten Popović, whom he spoke with in July 1999, "was 'most certainly' obliged to carry out the task which the Accused had entrusted to him" regarding the Bytiqi brothers. (Trial Judgement, para. 1978). The Trial Chamber further noted that Đorđević

Appeals Chamber is satisfied that, based on this evidence, especially in light of a clear pattern of conduct by Đorđević in concealment operations, it was open to the Trial Chamber to conclude that the only reasonable inference was that the concealment operations were "consistent in timing, execution and purpose" with President Milošević's direction in March 1999 to Minister Stojiljković to "clear the terrain" and remove evidence of crimes committed in Kosovo, as well as the Minister's subsequent delegation of the responsibility for implementing the necessary measures to Đorđević and Ilić.[1413]

414. Furthermore, the Appeals Chamber is not convinced that the fact that the bodies found in Tekija, which is very close to the Petrovo Selo PJP Centre, were taken to the much further Batajnica SAJ Centre "strongly suggests" that different individuals were involved in the events at the Petrovo Selo PJP Centre.[1414] In light of the strength of the circumstantial evidence on the record, as set out above, the Appeals Chamber is satisfied that the Trial Chamber's findings regarding the similarities between the operations, and the conclusion that Đorđević was involved in those operations was the only reasonable inference notwithstanding the fact that the bodies from Tekija were transported much farther away. Turning to the arrest and detention of the Bytiqi brothers, the Appeals Chamber observes that the Trial Chamber found that they were transferred to the Petrovo Selo PJP Centre upon Đorđević's instruction and concluded that this was relevant to Đorđević's "effective command over the MUP personnel at the [Petrovo Selo PJP] Centre".[1415] The Appeals Chamber recalls that, even though they occurred after the Indictment period, it was within the discretion of the Trial Chamber to consider these events[1416] as additional corroborating evidence that the Petrovo Selo PJP Centre "fell under the responsibility" of Đorđević".[1417] Đorđević, therefore, has failed to demonstrate any error by the Trial Chamber in its evaluation of the evidence regarding the Petrovo Selo PJP Centre. Rather, he seeks to substitute his evaluation of the evidence for that of the Trial Chamber.

415. In light of the above, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber and, as such,

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conceded that he heard that the bodies of the three brothers were later exhumed from a mass grave at the Petrovo Selo PJP Centre (Trial Judgement, para. 1978, referring to Vlastimir Đorđević, 11 Dec 2009, T. 9975, 10016-10017, Exhibits P1508, pp 3-7, 10-11, P815, pp 31-35).

[1412] Trial Judgement, para. 1978.

[1413] See Trial Judgement, para. 1979.

[1414] *Contra* Đorđević Appeal Brief, para. 262.

[1415] Trial Judgement, para. 1978.

[1416] See *Stakić* Appeal Judgement, para. 122. See also *supra*, para. 278. *Contra* Đorđević Appeal Brief, para. 263.

[1417] Trial Judgement, para. 1978.

has failed to show that the Trial Chamber erred in concluding that Đorđević knew about the concealment operations at the Petrovo Selo PJP Centre.

(d) Lake Perućac

a. Introduction

416. The Trial Chamber found that local police discovered the bodies of Kosovo Albanians in a refrigerated truck in Lake Perućac in mid-April 1999 and that, under Đorđević's supervision, these bodies were buried next to Lake Perućac.[1418] The Trial Chamber noted that Đorđević conceded that he was aware that the burial of these bodies was unlawful and that he took no investigative measures in relation to these bodies.[1419] The Trial Chamber concluded that Đorđević "knew that these were, yet again, bodies of ethnic Kosovo Albanians killed in Kosovo during the Indictment period" and that the "instinctive reaction was to ensure that the bodies would not be discovered or further investigated".[1420]

b. Arguments of the parties

417. Đorđević submits that the Trial Chamber erred in relying on the evidence of Witness Đorđe Kerić ("Witness Kerić"), Head of Užice SUP in Serbia, that Đorđević ordered the burial of bodies next to Lake Perućac because the witness' evidence was inconsistent.[1421] In particular, Đorđević argues that: (i) the first time Witness Kerić claimed that Đorđević gave such an order was during his testimony at trial and that Witness Kerić had not made any such suggestion in his previous evidence;[1422] and (ii) the "manner" in which the Trial Chamber accepted certain parts of Witness Kerić's evidence is unclear.[1423] Specifically, Đorđević points out that while the Trial

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[1418] Trial Judgement, paras 1359-1366.
[1419] Trial Judgement, para. 1366, referring to Vlastimir Đorđević, 11 Dec 2009, T. 10002.
[1420] Trial Judgement, para. 1366 (citations omitted).
[1421] Đorđević Appeal Brief, para. 259. The Appeals Chamber notes that Đorđević additionally submits that the uncertainty in the number of bodies exhumed at Lake Perućac should have been resolved in his favour (Đorđević Appeal Brief, fn. 431). The Appeals Chamber observes that the Trial Chamber addressed the discrepancy between the Serbian authorities and the Office for Missing Persons and Forensics ("OMPF") with respect to the number of bodies exhumed at Lake Perućac and it chose to rely on the OMPF figures. In doing so, the Trial Chamber explained that the following factors may explain the discrepancy: (i) the Serbian authorities' report omitted the remains from two of the grave sites at Batajnica; (ii) the reports on the Serbian work refer to 'complete bodies' notwithstanding that in many instances there were only partial remains of bodies; and (iii) inconsistencies between the labelled and actual contents of body bags that were repatriated to Kosovo which included commingled body parts (Trial Judgement, paras 1460-1461. See also Prosecution Response Brief, fn. 711). The Appeals Chamber finds that Đorđević has failed to demonstrate that no reasonable trier of fact could have relied on the OMPF number, rather than those of the Serbian authorities, under these circumstances.
[1422] Đorđević Appeal Brief, para. 259.
[1423] Đorđević Appeal Brief, para. 260.

Chamber noted that Witness Kerić's evidence may have been influenced by a concern not to implicate himself in criminal conduct, it failed to explain why he would instead implicate himself in criminal conduct before the War Crimes Chamber of the Belgrade District Court.[1424]

418. Đorđević also argues that the Trial Chamber erred in concluding that he knew that the bodies discovered at Lake Perućac were those of ethnic Kosovo Albanians killed in Kosovo during the Indictment period.[1425] He asserts that there was no evidence establishing that he knew, or was on notice of, the identity of the victims at the time[1426] and argues that Witness Kerić testified that he did not know or inform Đorđević of, the origin of the bodies and instead testified that he thought the bodies originated from Bosnia and Herzegovina.[1427]

419. The Prosecution responds that the Trial Chamber reasonably concluded that the bodies found in mid-April 1999 in a refrigerated truck in Lake Perućac were buried by the local police under Đorđević's supervision.[1428] It submits that Đorđević fails to demonstrate that no reasonable trier of fact could accept Witness Kerić's testimony that Đorđević ordered the burial of the bodies found at Lake Perućac.[1429] The Prosecution contends that the Trial Chamber carefully assessed Witness Kerić's evidence.[1430]

420. The Prosecution further argues that Đorđević erroneously alleges that absent direct evidence as to the identity of the victims, the Trial Chamber erred in concluding that the victims were from Kosovo and that Đorđević knew this.[1431] According to the Prosecution, the Trial Chamber's findings were "reasonable inferences drawn from the totality of the evidence".[1432] The Prosecution also responds that Đorđević seeks to substitute his evaluation of the evidence for that of the Trial Chamber.[1433]

[1424] Đorđević Appeal Brief, para. 260. With respect to Witness Kerić's account given to investigative Judge Dilparić of the War Crimes Chamber of the Belgrade District Court, the Trial Chamber explained that "[w]hat Kerić said then is strikingly void of references to the Accused being involved at all in the decisions concerning the recovery of bodies and their burial at the dam" (Trial Judgement, para. 1364). Witness Kerić further "suggested that the decision to remove the bodies from Lake Perucac and bury them in the vicinity of the lake's dam was made by himself and Zoran Mitricević" (Trial Judgement, para. 1364, referring to Exhibit D316).

[1425] Đorđević Appeal Brief, para. 261, referring to Trial Judgement, para. 1366.

[1426] Đorđević Appeal Brief, para. 261.

[1427] Đorđević Appeal Brief, para. 261, referring to Đorđe Kerić, 21 Jul 2009, T. 7763, Đorđe Kerić, 22 Jul 2009, T. 7822.

[1428] Prosecution Response Brief, para. 225.

[1429] Prosecution Response Brief, para. 226.

[1430] Prosecution Response Brief, para. 226.

[1431] Prosecution Response Brief, para. 227.

[1432] Prosecution Response Brief, para. 227.

[1433] Prosecution Response Brief, para. 228.

c. Analysis

421. The Appeals Chamber observes that Witness Kerić gave three accounts regarding the burial of bodies next to Lake Perućac: (i) in a written statement to the Working Group in 2001; (ii) in a statement given under oath to Judge Dilparić of the War Crimes Chamber in Belgrade in 2005; and (iii) during his testimony at trial.[1434] The Trial Chamber explicitly considered the discrepancies between Witness Kerić's testimony at trial and his previous account to the War Crimes Chamber in Belgrade in 2005.[1435] It noted that in his 2005 account before investigative Judge Dilparić, Witness Kerić made no reference to Đorđević's involvement in any decisions regarding the recovery and burial of the bodies at Lake Perućac.[1436] Rather, he claimed that the decision to recover and bury the bodies was made by himself and Zoran Mitricević.[1437] The Trial Chamber also considered that Witness Kerić's written statement given to the Working Group in 2001 appeared to have more similarities to his testimony at trial.[1438] In assessing Witness Kerić's evidence, the Trial Chamber considered that certain factors, such as the effect of the passage of time on his recollection, the fact that he was still serving as a MUP officer when he gave his first statement to the Working Group but had retired by the time he gave evidence in 2005, and a concern not to implicate himself in criminal conduct, may have influenced the various accounts provided by Witness Kerić.[1439]

422. Despite the various inconsistencies, the Trial Chamber ultimately found Witness Kerić's testimony at trial that Đorđević instructed him in relation to the burial of the bodies recovered at Lake Perućac, and that he spoke with Đorđević several times to obtain further instructions, to be convincing.[1440] The Appeals Chamber recalls that a trial chamber "has the discretion to accept a witness's evidence, notwithstanding inconsistencies between the said evidence and his or her previous statements"[1441] and, further, that a trial chamber has the main responsibility for resolving any inconsistencies which may arise within or among witnesses' testimony.[1442] In considering the testimony of Witness Kerić, the Trial Chamber considered that no investigation concerning the recovery and burial of the bodies was undertaken by Witness Kerić at the time and that it appeared

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[1434] Trial Judgement, paras 1357, 1364.
[1435] Trial Judgement, paras 1357-1358, 1364-1365.
[1436] Trial Judgement, para. 1364, referring to Exhibit D316.
[1437] Trial Judgement, para. 1364, fn. 5252, referring to Exhibit D316.
[1438] Trial Judgement, para. 1357.
[1439] Trial Judgement, para. 1358.
[1440] Trial Judgement, paras 1364-1365.
[1441] *Rukundo* Appeal Judgement, para. 86, referring to *Kajelijeli* Appeal Judgement, para. 96, *Rutaganda* Appeal Judgement, para. 443, *Musema* Appeal Judgement, para. 89.

that "such a grave disregard of his duty by Kerić would only have occurred if Kerić was acting under orders".[1443] The Trial Chamber additionally noted that, contrary to Đorđević's submission, Witness Kerić's account to the MUP Working Group in 2001 was similar to what he testified at trial.[1444] In that account, he stated that Đorđević ordered that measures be taken for the "clearing up of the terrain", which at trial Witness Kerić explained he understood to relate to the retrieval and burial of the bodies from Lake Perućac, and informed Witness Kerić that MUP representatives would be sent to the location for coordination purposes.[1445] The Appeals Chamber further observes that Witness Kerić's evidence conformed to a pattern of involvement by Đorđević in burial operations.[1446] In light of the careful consideration undertaken by the Trial Chamber of Witness Kerić's evidence, the Appeals Chamber finds that it was within the discretion of the Trial Chamber to accept Witness Kerić's testimony despite prior inconsistencies.

423. The Appeals Chamber is also not convinced that the Trial Chamber erred in concluding that Đorđević knew that the bodies found at Lake Perućac were Kosovo Albanians.[1447] The Trial Chamber noted the testimony of Kerić, who stated that at the time the bodies were discovered, there was a public speculation that the bodies might have been victims of the NATO airstrikes, or bodies exhumed from mass graves in Bosnia and Herzegovina, but that "nobody thought that the bodies were from Kosovo".[1448] The Trial Chamber further noted, and found unconvincing, Kerić's evidence that he "did not dwell" on the origin of the bodies as he had other priorities at the time.[1449] The Trial Chamber later found that it could be "reasonably inferred" that Đorđević knew that the bodies were of ethnic Kosovo Albanians killed in Kosovo during the Indictment period,[1450] based on evidence that: (i) Đorđević conceded that he was aware that the burial of the bodies found in Lake Perućac was unlawful; (ii) he did not take any investigative action regarding these bodies; and (iii) shortly before the discovery of the bodies in Lake Perućac, Đorđević was notified that what appeared to be the bodies of Kosovo Albanians were discovered floating in a refrigerated truck in

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[1442] *Muriyakazi* Appeal Judgement, para. 71, referring to *Renzaho* Appeal Judgement, para. 355, *Rukundo* Appeal Judgement, para. 207, *Simba* Appeal Judgement, para. 103.

[1443] Trial Judgement, para. 1366. The Trial Chamber further elaborated that: "[n]o reason for him to fail so gravely in his duty in this respect is apparent, other than superior orders, and no motive of self-interest or otherwise would lead Kerić to act in this way, other than superior orders" (Trial Judgement, para. 1366, citing Đorđe Kerić, 22 Jul 2009, T. 7850).

[1444] Trial Judgement, para. 1361. See also Đorđević Appeal Brief, para. 259, claiming that none of Kerić's evidence prior to his testimony at trial suggests that Đorđević ordered the burial of the bodies at Lake Perućac.

[1445] Trial Judgement, para. 1361, referring to Exhibit P1212, Đorđe Kerić, 22 Jul 2009, T. 7863.

[1446] See *supra*, paras 378-384, 406-408, 413-414, 421-425.

[1447] *Contra* Đorđević Appeal Brief, para. 261, referring to Trial Judgement, para. 1366.

[1448] Trial Judgement, para. 1363.

[1449] Trial Judgement, para. 1363.

[1450] Trial Judgement, para. 1366.

the Danube River; and (iv) equally no investigation was undertaken with respect to these bodies.[1451] The Appeals Chamber is satisfied that in light of the pattern of conduct and the clear acknowledgement by Đorđević that this behaviour was unlawful, the Appeals Chamber is satisfied that it was reasonable to infer that he knew that the bodies recovered from Lake Perućac were Kosovo Albanians. In this regard, the Appeals Chamber refers to the Trial Chamber's findings concerning Đorđević's involvement in the discovery of Kosovo Albanian bodies only a few weeks prior.[1452]

424. The Appeals Chamber therefore finds that Đorđević has failed to demonstrate that the Trial Chamber erred in concluding that he had knowledge of and played a significant role in the concealment of the bodies from Lake Perućac.

(e) Conclusion

425. In light of the above, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber and, as such, has failed to show that the Trial Chamber erred in overstating Đorđević's role in the concealment operations in relation to the Batajnica SAJ Centre, Lake Perućac, and the Petrovo Selo PJP Centre.

5. Alleged error in the assessment of Đorđević's role in the concealment of the bodies

(a) Arguments of the parties

426. Đorđević submits that the Trial Chamber applied an unfair standard in assessing his involvement in the concealment of bodies.[1453] In particular, he argues that while the Trial Chamber acknowledged the possibility that he acted pursuant to Minister Stojiljković's orders to conceal the bodies, it failed to give Đorđević the benefit of this finding, despite absolving "Kerić for not taking further actions because he was 'under superior orders'".[1454] He further argues that the Trial Chamber erred in failing to consider whether it was within Đorđević's power to take any further action.[1455] Đorđević contends that his call for investigations and expression of surprise upon hearing about the bodies discovered in Tekija would be illogical if a general "conspiracy of silence" existed.[1456] He also argues that his "involvement was strictly limited to a subsequent cover-up" and

[1451] Trial Judgement, para. 1366, fn. 5260.
[1452] See *supra*, para. 406.
[1453] Đorđević Appeal Brief, para. 264.
[1454] Đorđević Appeal Brief, para. 264.
[1455] Đorđević Appeal Brief, para. 265.
[1456] Đorđević Appeal Brief, para. 266.

that the Trial Chamber overstated his role in the concealment operations because he did not participate in the initial botched attempt to move bodies out of Kosovo.[1457]

427. The Prosecution responds that Đorđević merely repeats arguments that failed at trial without showing that the Trial Chamber erred.[1458] The Prosecution further submits that even if Đorđević acted pursuant to an illegal order of the Minister, he remains liable for such actions.[1459]

(b) Analysis

428. The Appeals Chamber is not convinced by Đorđević's submission that he acted pursuant to Minister Stojiljković's orders and made repeated requests to Minister Stojiljković to investigate the discovery of the bodies in Tekija. The Appeals Chamber finds that the Trial Chamber reasonably concluded that the evidence demonstrated that Đorđević himself gave orders with respect to the clandestine handling, transport, and reburial of bodies.[1460] In reaching this conclusion, the Trial Chamber relied on the evidence set forth in Chapter VII of the Trial Judgement, concerning the discovery of bodies near the village of Tekija and Lake Perućac.[1461] Đorđević essentially reasserts his argument rejected at trial that he was merely a conduit to convey information to the Minister,[1462] but has failed to identify any error on the part of the Trial Chamber. The Appeals Chamber is thus satisfied that the Trial Chamber did not apply an unfair standard and reasonably concluded that the evidence established that Đorđević "was the initial, and primary, point of contact for both the respective SUP chiefs Časlav Golubović and Đorđe Kerić".[1463] Accordingly, the Appeals Chamber,

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[1457] Đorđević Appeal Brief, para. 253.

[1458] Prosecution Response Brief, para. 232, referring to Trial Judgement, paras 1969-1971, 1980-1982, Đorđević Closing Brief, paras 556-561, 564, 572, 602, 604.

[1459] Prosecution Response Brief, para. 232, referring to Article 7(4) of the Statute.

[1460] See Trial Judgement, paras 1969-1970. The Appeals Chamber further notes that Đorđević's assertion that the Trial Chamber absolved Kerić for not taking further actions because he was acting pursuant to superior orders misconstrues the Trial Chamber's reasoning. As discussed above, the Trial Chamber noted that the only apparent reason for Witness Kerić's failure to undertake an investigation at Lake Perućac was that he was acting pursuant to superior orders in assessing whether his evidence was convincing (see *supra*, paras 416, 421-424. The Trial Chamber, therefore, did not make any findings absolving Witness Kerić of any responsibility (see *contra* Đorđević Appeal Brief, para. 264).

[1461] Trial Judgement, paras 1357-1366, 1969.

[1462] See Trial Judgement, para. 1969. See also Trial Judgement, paras 1301, 1316.

[1463] See Trial Judgement, para. 1969. With respect to Đorđević's assertion that he did not issue any orders to Golubović concerning the bodies before informing the Minister of what Golubović had told him, the Trial Chamber noted that this assertion is contradicted by Đorđević's own statement in a letter to the "Nedeljini Telegraph" in 2004. In this letter, he stated that he gave Golubović instructions on how to proceed regarding the bodies immediately upon learning of them and that he informed the Minister of it afterwards (Trial Judgement, para. 1315, referring to Exhibit P1474, p. 7, Vlastimir Đorđević, 10 Dec 2009, T. 9967-9968).

recalling its finding that Đorđević knew of and was involved in the concealment operations on numerous occasions,[1464] dismisses Đorđević's contention.

429. The Appeals Chamber is also not persuaded that the Trial Chamber erred in finding that Đorđević failed to take measures to ensure the investigation of crimes or punishment of those who committed them. Contrary to Đorđević's claim, the evidence clearly established that Đorđević took actions to obstruct investigations by giving orders to Golubović to bury the bodies discovered in Tekija, ensured that the media was not informed, and destroyed the refrigerated truck after the bodies were removed.[1465]

430. With regard to Đorđević's submission that his actions contradicted the existence of a "conspiracy of silence", the Appeals Chamber recalls its finding that Đorđević failed to demonstrate that the Trial Chamber erred in its assessment of his alleged investigative efforts.[1466] Đorđević's repeated assertion that he was surprised when hearing about the discovery of the bodies in Tekija does not establish that the Trial Chamber erred in its overall conclusion, based on the totality of the evidence, that a plan to conceal the bodies of Kosovo Albanian civilians killed in Kosovo during the Indictment period existed and that Đorđević took an active role in the concealment operations.[1467] The Appeals Chamber is satisfied that the Trial Chamber reasonably concluded that the evidence established that Đorđević was actively involved in the concealment operations.

431. Finally, the Appeals Chamber is not convinced by Đorđević's assertions that two separate cover-ups existed and that his role was limited to an additional, or separate, plan to conceal the bodies. The Appeals Chamber recalls that Đorđević played a central role in the concealment operations and further recalls its finding that a plan existed, amongst senior leadership, to implement these operations.[1468]

432. In light of the above, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber and, as such, has failed to show that the Trial Chamber erred in assessing his involvement in the concealment of the bodies.

[1464] See *supra*, paras 406-408, 413-414, 421-423.
[1465] See Trial Judgement, para. 1970. See also Trial Judgement, paras 1301-1302, 1307, 1313.
[1466] See *supra*, para. 408.
[1467] See Trial Judgement, paras 1967-1982.
[1468] See *supra*, paras 400-430.

6. Conclusion

433. For the foregoing reasons, the Appeals Chamber dismisses Đorđević's sub-ground 9(G) in its entirety.

H. Sub-ground 9(H): alleged errors in relation to Đorđević's failure to take measures to ensure the investigation of crimes

1. Introduction

434. The Trial Chamber found that there was a pattern involving a general lack of reporting and investigation of crimes committed by Serbian forces in Kosovo against Kosovo Albanian civilians between 1998 and at least the end of the NATO campaign in June 1999.[1469] The Trial Chamber found that, rather than conducting investigations, there was "a consistent pattern of conduct involving MUP personnel, and at times VJ, by which complex efforts were made to prevent the discovery of killings, and to frustrate their investigations".[1470] It held that as a result of the non-reporting, lack of investigations, and concealment operations, the killings and other grave crimes established in the Trial Judgement, for the most part, were not investigated and the perpetrators of such crimes were not prosecuted.[1471]

435. The Trial Chamber found that Đorđević "contributed significantly to the campaign of terror and extreme violence by Serbian forces against Kosovo Albanians which had the purpose of changing the demographic composition of Kosovo".[1472] It further found that he had knowledge of the crimes committed by Serbian forces in Kosovo and that he acted with the requisite intent when he, *inter alia*: (i) failed to ensure the investigation and sanction of MUP personnel for crimes committed in Kosovo; (ii) acted to conceal these crimes;[1473] and (iii) deployed paramilitary units in Kosovo.[1474]

[1469] Trial Judgement, para. 2102. See also Trial Judgement, paras 2081-2101.
[1470] Trial Judgement, para. 2103.
[1471] Trial Judgement, para. 2105.
[1472] Trial Judgement, para. 2158.
[1473] Trial Judgement, para. 2158. See *supra*, paras 372-373.
[1474] Trial Judgement, para. 2158. See *supra*, para. 351.

2. Arguments of the parties

436. Đorđević submits that the Trial Chamber erred in finding that he did not take any measures to ensure the investigation of crimes committed by MUP forces and that this failure formed part of his significant contribution to the JCE.[1475]

437. Đorđević challenges the Trial Chamber's finding that the lack of reporting and investigation of crimes between 1998 and at least June 1999 demonstrated a pattern in relation to the JCE.[1476] He submits that the pattern consisted primarily of incidents that occurred between 1998 and early 1999,[1477] which were not listed in MUP Staff reports,[1478] and which were investigated by local SUP or VJ organs.[1479] He also notes that the Trial Chamber, in assessing Exhibit D888 (a collection of "thousands of summaries" of offences committed in Kosovo from July 1998 to June 1999) failed to consider that this exhibit was part of a larger volume of documents which was not admitted into evidence in its entirety due to its "sheer volume".[1480] According to Đorđević, the "sheer volume" of this document undermines the Trial Chamber's finding of a general pattern of a lack of reporting and investigations.[1481]

438. Đorđević also argues that there is no evidence showing that he knew or had reason to know of incidents not listed in MUP or SUP reports and as such, he could not have had a duty to investigate.[1482] Đorđević further claims that the Trial Chamber made "vague findings of a duty to investigate all crimes"[1483] in light of its finding that he had 'effective control' and should have punished crimes".[1484] He asserts that the investigative measures required of him should have been those "within his material possibility".[1485] He argues in this regard that the Trial Chamber failed to consider the hierarchy of the MUP and which investigations and punishments were within his actual

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1475 Đorđević Appeal Brief, para. 268, referring to Trial Judgement, paras 2154-2158.
1476 Đorđević Appeal Brief, para. 269.
1477 Đorđević Appeal Brief, para. 272, referring to Trial Judgement, paras 2083-2085, 2178-2179, 2182.
1478 Đorđević Appeal Brief, para. 272, referring to Trial Judgement, paras 2093, 2097-2098, 2100.
1479 Đorđević Appeal Brief, para. 272. Đorđević refers to the following sites in support of this assertion: Podujevo/Podujevë, Trnje/Tërnje, Izbica/Izbicë, Pusto Selo/Pastasellë, and Kotlina/Kotlinë (Đorđević Appeal Brief, fn. 469, referring to Trial Judgement, paras 1959, 2091, 2092, 2094, 2096).
1480 Đorđević Appeal Brief, para. 269, referring to Hearing, 2 Mar 2010, T. 12180, 12182-12184, 12187 (closed session); Đorđević Reply Brief, para. 82.
1481 Đorđević Appeal Brief, para. 269.
1482 Đorđević Appeal Brief, para. 272.
1483 Đorđević Appeal Brief, para. 270, referring to Trial Judgement, paras 2191, 2194.
1484 Đorđević Appeal Brief, para. 270, referring to Trial Judgement, paras 2174-2185, 2191; Đorđević Reply Brief, para. 82. Đorđević notes that a full appeal regarding his liability pursuant to Article 7(3) is not available to him since no conviction under this Article was entered (Đorđević Appeal Brief, fn. 464).
1485 Đorđević Appeal Brief, para. 271, referring to *Boškoski and Tarčulovski* Appeal Judgement, para. 230, *Hadžihasanović and Kubura* Appeal Judgement, para. 154, *Strugar* Trial Judgement, para. 373, *Limaj et al.* Trial Judgement, paras 526-527.

authority.[1486] In particular, Đorđević submits that the Trial Chamber failed to consider that once the judicial organs were involved, the MUP had no further influence on investigations and prosecutions.[1487] Đorđević further claims that the Trial Chamber appeared to assess the quality of investigations rather than "any attempt at investigation" within his actual authority, and has failed to consider the effect of the plight of wartime conditions on the ability to carry out investigations.[1488]

439. Đorđević additionally submits that the only findings on his active obstruction of investigations were made in relation to his liability for aiding and abetting, and that these findings are "seemingly" based only on the incidents of concealment of crimes addressed in sub-ground 9(G) of his appeal.[1489]

440. The Prosecution responds that Đorđević's submissions should be dismissed as he merely repeats arguments made at trial without demonstrating that the Trial Chamber erred.[1490] It argues that the Trial Chamber reasonably found that there was a pattern of non-reporting and non-investigation with respect to crimes committed by Serbian forces against Kosovo Albanian civilians, as well as efforts to frustrate such investigations, based on a careful assessment of the evidence.[1491] The Prosecution further claims that the Trial Chamber reasonably found that Đorđević significantly contributed to the JCE by failing to ensure the investigation and punishment of MUP members for crimes committed in Kosovo, in spite of his knowledge of such crimes.[1492]

441. As to Đorđević's assertion regarding Exhibit D888, the Prosecution points out that Đorđević did not seek to admit the exhibit in its entirety.[1493] It further asserts that the Trial Chamber

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[1486] Đorđević Appeal Brief, para. 273.
[1487] Đorđević Appeal Brief, para. 273.
[1488] Đorđević Appeal Brief, para. 273 (emphasis in original).
[1489] Đorđević Appeal Brief, para. 274. See *supra*, paras 372-432.
[1490] Prosecution Response Brief, para. 234, noting the comparison between Đorđević Appeal Brief, paras 268, 270-273, and Đorđević Closing Brief, paras 413-429, 447.
[1491] Prosecution Response Brief, para. 235, referring to Trial Judgement, paras 2081-2107. The Prosecution also notes that the Trial Chamber found the systematic lack of reporting to be consistent with the pattern to conceal such crimes (Prosecution Response Brief, para. 238, referring to Trial Judgement, para. 1985).
[1492] Prosecution Response Brief, para. 234, referring to Trial Judgement, paras 2157-2158. The Prosecution asserts that while recognising that the MUP reports sent to Belgrade did not include serious crimes committed by MUP forces against Kosovo Albanian civilians, the Trial Chamber found that Đorđević was informed of crimes through other means (Prosecution Response Brief, para. 238, referring to Trial Judgement, paras 1985-1998).
[1493] Prosecution Response Brief, para. 236, referring to 6D2, 5 Mar 2010, T. 12440 (closed session). *Contra* Đorđević Appeal Brief, para. 269.

reasonably admitted and relied only on those portions of the document "which were shown to a witness".[1494]

442. The Prosecution asserts that while recognising that the MUP reports sent to Belgrade did not include serious crimes committed by MUP forces against Kosovo Albanian civilians, the Trial Chamber found that Đorđević was informed of crimes through other means.[1495] The Prosecution also notes that the Trial Chamber found this systematic lack of reporting to be consistent with the pattern to conceal such crimes.[1496] The Prosecution further responds that Đorđević fails to show that the Trial Chamber erred in its assessment of his role in the investigation and punishment of crimes.[1497] According to the Prosecution, Đorđević had the authority and obligation, as Head of the RJB, to prevent the commission of crimes by his subordinates, punish offenders, and set up investigative bodies or commissions.[1498]

3. Analysis

(a) Alleged errors regarding the pattern of lack of reporting and investigation of crimes committed by Serbian forces

443. As set out above, according to Đorđević, the Trial Chamber erred in concluding that there was a pattern of a general lack of reporting and investigation of crimes committed by Serbian forces[1499] because the evidence relied on consisted primarily of incidents: (i) which occurred between 1998 and early 1999 and therefore were not relevant to his *actus reus* in 1999;[1500] (ii) that were not included in MUP staff reports and as such, he did not know or have reason to know about them;[1501] and (iii) for which on-site investigations were conducted.[1502]

444. With respect to Đorđević's first submission, the Appeals Chamber recalls that it is within the discretion of a trial chamber to consider evidence of events that occurred prior to the indictment

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[1494] Prosecution Response Brief, para. 236, referring to 2 Mar 2010, T. 12179-12187 (closed session), 6D2, 4 Mar 2010, T. 12324 (closed session), 6D2, 5 Mar 2010, T. 12440 (closed session), 17 Mar 2010, T. 12954, Trial Judgement, paras 279, 301, 310, 314, 384, 431, 548.

[1495] Prosecution Response Brief, para. 238, referring to Trial Judgement, paras 1985-1998.

[1496] Prosecution Response Brief, para. 238, referring to Trial Judgement, para. 1985.

[1497] Prosecution Response Brief, para. 239. The Prosecution notes that despite Đorđević's awareness of widespread crimes committed by MUP forces in Kosovo, he failed to take any measures to ensure the investigation of crimes or punishment of those involved during the Indictment period or thereafter while he was still serving as the RJB Chief (Prosecution Response Brief, para. 237, referring to Trial Judgement, paras 2157, 2191).

[1498] Prosecution Response Brief, para. 239, referring to Trial Judgement, paras 1999, 2174-2175, 2187.

[1499] See Trial Judgement, para. 2102. See also Trial Judgement, paras 2083-2101.

[1500] Đorđević Appeal Brief, para. 272, referring to Trial Judgement, paras 2083-2085, 2178-2179, 2182.

[1501] Đorđević Appeal Brief, para. 272, referring to Trial Judgement, paras 2093, 2097-2098, 2100.

[1502] Đorđević Appeal Brief, para. 272, referring to Trial Judgement, paras 1959, 2091, 2092, 2094, 2096.

period as long as such evidence is found to be relevant and of probative value.[1503] The Appeals Chamber notes that the Trial Chamber found that the evidence of events in 1998 and the first half of 1999 demonstrated "a pattern of excessive use of force by the Serbian forces in Kosovo and an absence of action to investigate and sanction the perpetrators of crimes committed against Kosovo Albanians".[1504] It similarly found that "by the end of March 1999, a pattern of non-investigation of incidents involving the killings of Kosovo Albanian civilians had already been established" and that "this pattern continued through the end of the Indictment period and thereafter".[1505] The Appeals Chamber is therefore satisfied that the evidence of incidents pre-dating the Indictment period is relevant to, and probative of, the general pattern of the failure to report, investigate, and punish crimes committed by Serbian forces in Kosovo against Kosovo Albanians during the Indictment period. The Appeals Chamber, therefore, finds that it was within the discretion of the Trial Chamber to consider the evidence of events which occurred prior to the Indictment period.

445. As such, Đorđević has failed to show that the Trial Chamber erred in this respect.

446. As to Đorđević's second submission, the Appeals Chamber recalls that it has upheld the Trial Chamber's finding that Đorđević remained informed of MUP operations during the Indictment period.[1506] Specifically, the Trial Chamber found that while serious crimes committed by MUP forces against Kosovo Albanian civilians during 1998 and 1999 were not included in MUP reports, such crimes were reported to Đorđević "through other means".[1507] In particular, the Trial Chamber considered that: (i) Đorđević had personal contact with a number of SUP chiefs; (ii) the Head of MUP Staff, Lukić, was present on the ground on several occasions; and (iii) that reports were relayed orally to him by his subordinates over the telephone.[1508] In light of such other means by which Đorđević was informed of the crimes, the Appeals Chamber found that the Trial Chamber

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[1503] See *supra*, para. 295.
[1504] Trial Judgement, para. 2083.
[1505] Trial Judgement, para. 2086.
[1506] See *supra*, paras 247-252. See also *infra*, para. 492.
[1507] Trial Judgement, para. 1985. See also Trial Judgement, paras 1986-1998. The Trial Chamber further explained that rather than constituting evidence of a lack of knowledge of crimes on the part of Đorđević, the systematic lack of reporting by the MUP is consistent with the pattern of concealment within the MUP of crimes committed against Kosovo Albanian civilians (Trial Judgement, para. 1985). The Appeals Chamber further notes that the Trial Chamber considered and rejected Đorđević's argument that investigations were not conducted with respect to certain incidents relied on by the Trial Chamber because they were not reported. For example, with regard to the killing of Kosovo Albanian civilians on the night of 1-2 April 1999 by MUP forces the Trial Chamber explained: The notion that the killings of a large number of civilians and the burning of houses in the centre of Đakovica/Gjakovë, during an operation involving a large number of police, would go un-investigated if not formally reported by Kosovo Albanian eye witnesses to the event, cannot be taken seriously (Trial Judgement, para. 2093. See Đorđević Appeal Brief, para. 272, fn. 468, referring to Trial Judgement, para. 2093, in support of his assertion that there is no evidence that he knew of incidents not listed in MUP reports).

did not err in concluding that Đorđević had knowledge of crimes notwithstanding that they were not included in SUP and MUP reports.[1509] Therefore, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and as such has failed to show that the Trial Chamber erred by relying on incidents not included in the SUP and MUP reports to assess his contribution to the JCE.

447. With respect to Đorđević's third submission, the Appeals Chamber observes that the Trial Chamber considered and rejected his argument that on-site investigations into crimes committed against Kosovo Albanians were carried out by the MUP.[1510] The Trial Chamber found that the evidence presented by the Defence concerning on-site investigations conducted by the MUP on killings of Kosovo Albanians "reveal[ed] that for the most part, these investigations were manipulated to present the false view that the victims concerned were members of the KLA who were killed in combat".[1511] Moreover, contrary to Đorđević's submissions, the Trial Chamber found that the evidence demonstrated that neither proper investigations were conducted nor were reports completed concerning the crimes committed in Podujevo/Podujevë (30 March 1999), Trnje/Tërrnje (last week of March 1999), Izbica/Izbicë (28 March 1999), Pusto Selo/Pastasellë (31 March 1999), and Kotlina/Kotlinë (9 and 24 March 1999).[1512] The Appeals Chamber finds that Đorđević has failed to demonstrate any error by the Trial Chamber in this respect.

448. In relation to Đorđević's argument regarding the "sheer volume" of the compilation from which Exhibit D888 was taken,[1513] the Appeals Chamber notes that the Trial Chamber admitted only those portions of the document that were shown to Witness 6D2.[1514] Furthermore, when tendering this document, the Defence expressly stated that it did not intend "to tender into evidence the entire document, but just the parts that the witness can talk about based on his direct experience".[1515] The Appeals Chamber recalls that it will in principle take into consideration only evidence referred to by a trial chamber in the body of the trial judgement or in a related footnote, evidence within the trial record and referred to by the parties, and, where applicable, additional

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[1508] Trial Judgement, paras 1985-1987. The Appeals Chamber notes that Đorđević's submissions regarding these "other means" are addressed by the Appeals Chamber in relation to his tenth ground of appeal (see *infra*, paras 485-504).
[1509] See *supra*, para. 250. See also *infra*, para. 492.
[1510] Trial Judgement, para. 2102. See Trial Judgement, paras 2086-2100. See also Đorđević Appeal Brief, para. 272.
[1511] Trial Judgement, para. 2102.
[1512] See Trial Judgement, paras 1959-1966 (Podujevo/Podujevë), 2091 (Trnje/Tërrnje), 2092 (Izbica/Izbicë), 2094-2095 (Pusto Selo/Pastasellë), 2096 (Kotlina/Kotlinë). See also Đorđević Appeal Brief, para. 269, fn. 469.
[1513] Đorđević Appeal Brief, para. 269.
[1514] See 6D2, 5 Mar 2010, T. 12440 (closed session). See also Prosecution Response Brief, para. 236.
[1515] 6D2, 2 Mar 2010, T. 12186 (closed session). See also 6D2, 5 Mar 2010, T. 12440 (closed session).

evidence admitted on appeal.[1516] The Appeals Chamber, therefore, finds that the Trial Chamber reasonably considered only the portions of Exhibit D888 that were admitted into evidence. Accordingly, the Appeals Chamber will not consider the portions of this document that were not admitted into evidence and, thus, will not make any findings with respect to the "sheer volume" of the larger document from which Exhibit D888 was taken.

449. In light of the foregoing, the Appeals Chamber finds that Đorđević has failed to demonstrate that the Trial Chamber erred in concluding that there was a pattern of a general lack of reporting and investigation of crimes committed by Serbian forces against Kosovo Albanian civilians in Kosovo between 1998 and at least the end of the NATO campaign in June 1999.

(b) Alleged errors regarding the duty to investigate

450. The Appeals Chamber observes that the Trial Chamber did not, as asserted by Đorđević, "make [...] vague findings of a duty to investigate all crimes related to Đorđević in light of an Article 7(3) command responsibility liability".[1517] Rather, it carefully assessed whether Đorđević took the necessary and reasonable measures to prevent crimes and/or punish the perpetrators, referring to specific incidents where Đorđević failed to do so.[1518] Furthermore, in contrast to Đorđević's submission, the Trial Chamber made clear findings that Đorđević exercised *de jure* power and effective control over the police in Kosovo within the context of his participation in the common plan of the JCE, "had detailed knowledge of the events on the ground", and "played a key role in coordinating the work of the MUP forces in Kosovo in 1998 and 1999".[1519] Đorđević ignores the Trial Chamber's findings that he actively concealed crimes committed by Serbian forces and ensured that they would not be investigated.[1520] Đorđević's conduct, therefore, went beyond merely failing to take any measures to ensure that crimes were investigated. Accordingly, the Appeals Chamber finds that Đorđević fails to show that the Trial Chamber erred in making such findings.

451. With respect to Đorđević's argument that the Trial Chamber failed to consider the hierarchy of the MUP, as well as whether investigations and punishment were within his actual authority in relation to the incidents for which investigations were conducted, the Appeals Chamber notes that the only incident Đorđević relies on in support of this assertion is the discovery of the bodies near

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[1516] See *supra*, para. 15.
[1517] See Đorđević Appeal Brief, para. 270, citing Trial Judgement, paras 2174-2185, 2191, 2194 (citations omitted).
[1518] See Trial Judgement, paras 2185-2192.
[1519] Trial Judgement, para. 2154.
[1520] Trial Judgement, paras 1969-1982. See also Trial Judgement, paras 2154-2158. See also *supra*, paras 344-349, 400-431.

the village of Tekija.[1521] He argues that the Trial Chamber failed to consider that the MUP's responsibility ended once the investigative judge and prosecutor were contacted.[1522] The Appeals Chamber, however, observes that the Trial Chamber found that Đorđević in fact took steps to ensure that no proper investigation into the circumstances surrounding the discovery of these bodies could be conducted.[1523] The Appeals Chamber finds that even if a hierarchy had existed limiting Đorđević's ability to ensure that the crimes were investigated, his obstructionist conduct and, in particular, his role in transporting the bodies and their clandestine burial demonstrates that his conduct in relation to Tekija and other locations went beyond a breach of his duty to investigate.[1524] The Appeals Chamber further notes the Trial Chamber's finding that the investigations that were carried out were, for the most part, manipulated to present the false view that the victims concerned were members of the KLA who were killed in combat.[1525] Contrary to Đorđević's suggestion, the Trial Chamber did not therefore hold him responsible for "the standard of [...] work" carried out by the investigative judge and prosecutor with respect to investigations,[1526] but reasonably considered his conduct when finding that he failed to take any measures to ensure that crimes were investigated.[1527]

452. In light of these findings concerning Đorđević's active role in the concealment of crimes and obstruction of investigations, the Appeals Chamber finds his further submission – that the investigative measures required of him should have been those within his material ability and that the duty to punish may be fulfilled, in certain circumstances, by reporting the matter to the competent authorities – to be unpersuasive.[1528] For the same reasons, the Appeals Chamber also finds Đorđević's claim that the Trial Chamber ignored the effect of the plight of wartime conditions on the ability to effectively conduct investigations to be unsubstantiated.[1529]

453. In light of the above, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber and, as such, has failed to show that the Trial Chamber erred in concluding that Đorđević failed to ensure that investigations were carried out in relation to crimes committed in Kosovo by Serbian forces.

[1521] See Đorđević Appeal Brief, para. 273.
[1522] Đorđević Appeal Brief, para. 273.
[1523] Trial Judgement, para. 1970. See *supra*, para. 408.
[1524] Trial Judgement, para. 1970. See Trial Judgement, paras 2154-2158. See also *supra*, paras 406-408, 413-414, 421-423.
[1525] Trial Judgement, para. 2102.
[1526] See Đorđević Appeal Brief, para. 273.
[1527] See Trial Judgement, paras 2156-2157.

(c) Alleged errors regarding the contribution to the JCE

454. Finally, the Appeals Chamber finds unpersuasive Đorđević's suggestion that the Trial Chamber made no findings in relation to how any lack of investigations could be linked to the JCE and "much less construed as a 'significant contribution'" to the JCE.[1530] The Appeals Chamber observes that the Trial Chamber clearly and explicitly found that Đorđević's conduct in concealing the crimes of Serbian forces in Kosovo and failure to ensure the investigation and punishment of MUP personnel for crimes committed in Kosovo, contributed significantly to the JCE.[1531] The Trial Chamber also considered the non-reporting, lack of investigations, and concealment operations to be part of the overall effort to remove evidence of crimes committed by Serbian forces against Kosovo Albanian civilians during the Indictment period.[1532] It specifically found that Đorđević's role in the concealment of the bodies of the Kosovo Albanian civilians killed in Kosovo by Serbian forces ensured that the bodies were not the subject of investigations at the time, and that the perpetrators were not punished despite his duty under the law to properly investigate the discovery of the bodies.[1533]

455. The Appeals Chamber further observes that, in contrast to Đorđević's submission that "the only findings [on him] 'actively trying to obstruct' are referred to in relation to aiding and abetting liability", the Trial Chamber referred to its findings concerning Đorđević's "leading role" in the MUP concealment efforts and his orders to preclude investigations in its assessment of his participation in the JCE.[1534] Furthermore, in relation to Đorđević's contention that these findings were "seemingly" based only on the incidents of concealment addressed in his sub-ground of appeal 9(G), he ignores that the Trial Chamber found that his role in obstructing investigations was directly related to the overall plan to conceal the bodies of Kosovo Albanian civilians killed by Serbian forces in Kosovo.[1535] Đorđević fails to articulate any error by the Trial Chamber in this respect.

[1528] See Đorđević Appeal Brief, para. 271. See also Đorđević Appeal Brief, para. 268. The Appeals Chamber further finds this argument to be underdeveloped (see *supra*, para. 20)
[1529] See Đorđević Appeal Brief, para. 273.
[1530] See Đorđević Appeal Brief, paras 268, 275.
[1531] Trial Judgement, para. 2158.
[1532] Trial Judgement, paras 2111, 2156-2158. See also Trial Judgement, paras 2083-2105.
[1533] Trial Judgement, para. 2156-2157.
[1534] Trial Judgement, para. 2156. See also Đorđević Appeal Brief, para. 274.
[1535] See Trial Judgement, para. 2156; Đorđević Appeal Brief, para. 274.

456. In light of the above, the Appeals Chamber finds that Đorđević has failed to show that the Trial Chamber erred in concluding that his failure to ensure the investigation and punishment for crimes committed in Kosovo constituted part of his significant contribution to the JCE.

4. Conclusion

457. For the foregoing reasons, the Appeals Chamber finds that Đorđević has failed to demonstrate that the Trial Chamber erred in finding that he failed to take any measures to ensure the investigation of crimes and that this constituted part of his significant contribution to the JCE. The Appeals Chamber therefore dismisses Đorđević's sub-ground 9(H) in its entirety.

I. Conclusion

458. In sum, the Appeals Chamber has found that Đorđević has failed to show that the Trial Chamber erred in concluding that the creation of the Ministerial Staff by the Minister's Decision did not terminate Đorđević's involvement in Kosovo or alter his former role and power over the MUP Staff in Priština/Prishtinë.[1536] The Appeals Chamber has upheld the Trial Chamber's findings that Đorđević remained involved and active in Kosovo throughout 1999 and retained *de jure* authority and effective control over the MUP forces, including the PJP and SAJ units deployed to Kosovo, during the Indictment period.[1537] The Appeals Chamber is also satisfied that the Trial Chamber reasonably concluded that anti-terrorist operations were discussed at the Ministerial Collegium meetings, that Đorđević remained an active member of the Joint Command throughout 1999, and that he had knowledge of the events occurring in Kosovo throughout the Indictment period.[1538]

459. The Appeals Chamber also found that the Trial Chamber reasonably concluded that Đorđević was *de jure* responsible for the disarming of Kosovo Albanians and knew that Serbian civilians were being armed.[1539] Furthermore, the Appeals Chamber, Judge Tuzmukhamedov dissenting, found that the Trial Chamber did not err in relying on the Račak/Raçak incident as evidence of the coordinated action of MUP and VJ, in the context of Đorđević's contribution to the JCE.[1540]

[1536] See *supra*, paras 226-230.
[1537] See *supra*, paras 235-239, 242-243.
[1538] See *supra*, paras 247-252, 269-271, 283-290.
[1539] See *supra*, paras 304-309, 315-323.
[1540] See *supra*, paras 331-335. See also *supra*, 338-340, 344-349.

460. The Appeals Chamber, Judge Tuzmukhamedov partially dissenting, further found that the Trial Chamber did not err in concluding that: (i) Đorđević was involved in and aware of the deployment of paramilitary units to Kosovo including the Scorpions to Podujevo/Podujevë, and that this formed part of his significant contribution to the JCE; (ii) there was a plan to conceal the crimes committed by Serbian forces against Kosovo Albanian civilians; (iii) Đorđević was directly involved in the concealment of these crimes; and (iv) Đorđević failed to ensure and/or actively obstructed, investigations into the crimes committed by Serbian forces.[1541]

461. The Appeals Chamber, Judge Tuzmukhamedov partially dissenting, therefore finds that the Trial Chamber reasonably relied on these findings to conclude that Đorđević acted in furtherance of the JCE. The Appeals Chamber accordingly finds that Đorđević has failed to show that the Trial Chamber erred in concluding, based on the above factors, that he was a member of, acted in furtherance of, and substantially contributed to the JCE.

462. The Appeals Chamber therefore dismisses Đorđević's ground of appeal 9 in its entirety.

[1541] See *supra*, paras 355-362, 366-370, 378-384, 389-390, 395-399, 406-409, 413-415, 421-425, 428-432, 443-457.

XI. ĐORĐEVIĆ'S TENTH GROUND OF APPEAL: ERRORS OF LAW AND FACT WHEN FINDING THAT ĐORĐEVIĆ SHARED THE NECESSARY INTENT FOR LIABILITY UNDER JOINT CRIMINAL ENTERPRISE

A. Introduction

463. The Trial Chamber found that Đorđević participated in the JCE[1542] and that the crimes of murder, deportation, other inhumane acts (forcible transfer), and persecutions were the "means by which the purpose of this JCE was to be achieved".[1543] It also found that Đorđević shared the intent with the other members of the JCE.[1544] The Trial Chamber further found that, alternatively, had it not been satisfied that Đorđević acted with the requisite intent to establish liability pursuant to the first category of joint criminal enterprise, it would have been satisfied that he was aware that the crimes "might be committed by Serbian forces in Kosovo and willingly took this risk", which is the requisite standard for the third category of joint criminal enterprise.[1545] It further found that Đorđević aided and abetted these crimes.[1546]

464. Under his tenth ground of appeal, Đorđević submits that the Trial Chamber committed several errors of law and fact in assessing his *mens rea* and requests that his convictions be quashed.[1547] Đorđević contends that the Trial Chamber erred in failing to make the necessary findings and in making findings that were impermissibly vague.[1548] Đorđević further argues that the Trial Chamber's assessment of his *mens rea* was unreasonable as it "ignored the other reasonable inferences that would suggest that Đorđević did not possess the requisite intent" to establish his responsibility under the first category of joint criminal enterprise.[1549]

465. The Prosecution responds that the Trial Chamber reasonably assessed the totality of the evidence.[1550] It argues that Đorđević's submission is an attempt to substitute his evaluation of the

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[1542] Trial Judgement, paras 2127-2128, 2158, 2193. See also Trial Judgement, para. 2213; *supra*, para. 461.
[1543] Trial Judgement, paras 2193, 2213. See Trial Judgement, paras 2131-2152, 2158.
[1544] Trial Judgement, paras 1999, 2158.
[1545] Trial Judgement, para. 2158.
[1546] Trial Judgement, paras 2164, 2194.
[1547] Đorđević Appeal Brief, paras 276-295.
[1548] Đorđević Appeal Brief, paras 276-278, 281.
[1549] Đorđević Appeal Brief, paras 280, 282-295; Đorđević Reply Brief, para. 86. See also Appeal Hearing, 13 May 2013, AT. 61.
[1550] Prosecution Response Brief, para. 244.

evidence for that of the Trial Chamber, and should be summarily dismissed because it is based on arguments that he raised at trial or in other grounds of appeal.[1551]

B. Alleged error in failing to make the necessary findings or in making impermissibly vague findings

1. Arguments of the parties

466. Đorđević first argues that the Trial Chamber erred as it failed to make "explicit findings that [he] intended to expel Kosovo Albanians on a permanent basis" which, he submits, were required for a conviction on the basis of joint criminal enterprise liability.[1552] Second, Đorđević submits that the Trial Chamber's *mens rea* finding that "he acted with the requisite intent" was impermissibly vague as it was made without any consideration of whether he intended the crimes in the Indictment.[1553] Specifically, he argues that the Trial Chamber failed to find the necessary intent to sustain a conviction for persecutions under the first category of joint criminal enterprise.[1554] He asserts that in order to enter such a conviction, the Trial Chamber was required to make findings not only that he shared the general intent to commit the underlying offence, but also that he "shared in the discriminatory policy" and "had consciously intended to discriminate".[1555] Third, Đorđević submits that the Trial Chamber confused the matter further in finding that he aided and abetted the established crimes and in making an alternate finding on Đorđević's *mens rea* for the third category of joint criminal enterprise.[1556]

467. The Prosecution responds that the Trial Chamber applied the correct legal standards and made the necessary findings.[1557] In particular, the Prosecution responds that Đorđević's argument concerning persecutions should be summarily dismissed because he ignores relevant findings.[1558] It further argues that the Trial Chamber correctly stated and applied the law on persecutions, including the requirement of discriminatory intent, and made all the necessary findings underpinning

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[1551] Prosecution Response Brief, para. 245. See also Prosecution Response Brief, paras 247, 251, 254-255, 259-262.
[1552] Đorđević Appeal Brief, para. 276. See also Đorđević Reply Brief, para. 84.
[1553] Đorđević Appeal Brief, para. 277, referring to Trial Judgement, para. 2158. See also Đorđević Reply Brief, para. 85.
[1554] Đorđević Appeal Brief, paras 277-281.
[1555] Đorđević Appeal Brief, para. 281.
[1556] Đorđević Appeal Brief, paras 277-278; Đorđević Reply Brief, para. 85. Đorđević argues that three distinct levels of *mens rea* were found in the Trial Judgement – namely intention, recklessness and awareness – but these findings do not provide a reasonable opinion that establishes beyond a reasonable doubt the necessary mental elements for any of these modes of liability (Appeal Hearing, 13 May 2013, AT. 108-109, referring to Trial Judgement, paras 2158, 2163, 2194).
[1557] Prosecution Response Brief, para. 246, referring to Trial Judgement, paras 1859-1868.
[1558] Prosecution Response Brief, para. 250, referring to *Krajišnik* Appeal Judgement, para. 18.

Đorđević's conviction for persecutions.[1559] In addition, the Prosecution responds that the Trial Chamber's findings on Đorđević's *mens rea* are not vague.[1560] Finally, the Prosecution argues that the Trial Chamber reasonably concluded that Đorđević's conduct satisfied the legal elements of both committing and aiding and abetting, and made findings on his intent under both modes of liability.[1561]

2. Analysis

468. The Appeals Chamber recalls that the *mens rea* required for liability under the first category of joint criminal enterprise is that the accused shares the intent with the other participants to carry out the crimes forming part of the common purpose.[1562] The Appeals Chamber observes that the Trial Chamber correctly set out the law on joint criminal enterprise[1563] and discussed in detail the underlying facts in relation to the existence of the JCE and its objective.[1564] With regard to Đorđević's *mens rea*, the Trial Chamber was satisfied, based on Đorđević's conduct at the relevant time coupled with his knowledge of the crimes that were committed by Serbian forces in Kosovo, that he "acted with the requisite intent", which was shared by the other participants, to commit the crimes that fell within the JCE.[1565] The Trial Chamber specifically found that the crimes of deportation, other inhumane acts (forcible transfer), murder, and persecutions were the means through which the purpose of the JCE was achieved.[1566] Considering that the Trial Chamber clearly identified the crimes that were part of the JCE and then found that Đorđević shared the requisite intent for these crimes, the Appeals Chamber finds that Đorđević has failed to show that the Trial Chamber's finding on his *mens rea* was made without any consideration of whether he intended the crimes charged in the Indictment.[1567]

469. Further, to the extent Đorđević suggests that there is a legal requirement to find that he intended to *permanently* expel the Kosovo Albanian population when assessing his *mens rea* in respect of the JCE, the Appeals Chamber finds that he is mistaken. The Appeals Chamber recalls

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[1559] Prosecution Response Brief, para. 250, referring to Trial Judgement, paras 1755, 2149, 2158.
[1560] Prosecution Response Brief, para. 246.
[1561] Prosecution Response Brief, para. 247.
[1562] *Tadić* Appeal Judgement, paras 220, 228; *Krajišnik* Appeal Judgement, para. 707.
[1563] Trial Judgement, paras 1864-1865, referring to *Tadić* Appeal Judgement, paras 202-204, 220, 227-228.
[1564] See Trial Judgement, paras 2000-2157.
[1565] Trial Judgement, paras 2154-2158. See also Trial Judgement, paras 1999, 2128, 2193.
[1566] Trial Judgement, paras 2135-2152, 2193.
[1567] *Contra* Đorđević Appeal Brief, para. 277.

that the *mens rea* of the crimes of deportation and other inhumane acts (forcible transfer) does not require intent to displace on a permanent basis.[1568] Đorđević's submission is therefore dismissed.

470. With regard to Đorđević's submission that the Trial Chamber failed to find the necessary intent to sustain a conviction for persecutions under the first category of joint criminal enterprise, the Appeals Chamber recalls that the *mens rea* for the crime of persecutions requires an intent to discriminate on political, racial, or religious grounds.[1569] The Appeals Chamber notes that the Trial Chamber did not make separate findings on Đorđević's intent in relation to each of the crimes that were within the JCE. Although this would have been preferable, the Appeals Chamber nevertheless considers that the Trial Chamber's finding that Đorđević "acted with the requisite intent" for the crimes within the JCE, in this instance, must be understood to include the finding that he also possessed the discriminatory intent required for persecutions.[1570] The Appeals Chamber considers that the Trial Chamber clearly found that "the crimes of forcible transfer, deportation and murder amounted to the crime of persecutions (as a crime against humanity) against the Kosovo Albanian population" and were part of the JCE.[1571] The Trial Chamber also found that persecutions through destruction or damage to Kosovo Albanian religious sites was part of the common plan.[1572] In the view of the Appeals Chamber, the essence of the JCE – the common purpose of which was to modify the ethnic balance of Kosovo in order to establish Serbian control[1573] – was clearly discriminatory. Đorđević has therefore failed to show that the Trial Chamber failed to find the necessary intent to sustain a conviction for persecutions under the first category of joint criminal enterprise.[1574] His submission is therefore dismissed.

471. The Appeals Chamber now turns to Đorđević's submissions concerning the Trial Chamber's alternative finding on his *mens rea* pursuant to the third category of joint criminal enterprise, and its additional finding in relation to aiding and abetting.[1575]

472. After finding that Đorđević participated in the JCE,[1576] the Trial Chamber held that:

[1568] *Brđanin* Appeal Judgement, para. 206; *Stakić* Appeal Judgement, paras 278, 307; *Krajišnik* Appeal Judgement, para. 304. See also *supra*, para. 154.
[1569] *Kordić and Čerkez* Appeal Judgement, para. 111; *Blaškić* Appeal Judgement, para. 164; *Kvočka et al.* Appeal Judgement, para. 109.
[1570] Trial Judgement, paras 2149, 2152. See also Trial Judgement, para. 2193.
[1571] Trial Judgement, paras 2149, 2152. See also Trial Judgement, para. 2193.
[1572] Trial Judgement, para. 2151.
[1573] Trial Judgement, paras 2128, 2158, 2193. See also Trial Judgement, para. 2213.
[1574] *Contra* Đorđević Appeal Brief, paras 277-281.
[1575] See Đorđević Appeal Brief, paras 277-278; Đorđević Reply Brief, para. 85.
[1576] Trial Judgement, para. 2158. See *supra*, para. 461.

> [a]lternatively, had the Chamber been not able to be satisfied that the Accused acted with the requisite intent, it would have been satisfied that the Accused acted with the intent to further the campaign of terror and extreme violence by Serbian forces against Kosovo Albanians and that he was aware that the crimes established in [the Trial] Judgement might be committed by Serbian forces in Kosovo and willingly took this risk.[1577]

473. Đorđević argues that by entering these findings, the Trial Chamber "confused the matter further" in a manner which rendered the *mens rea* findings pursuant to the first category of joint criminal enterprise "impermissibly vague".[1578]

474. In the view of the Appeals Chamber, the Trial Chamber's wording could be read as ambiguous. A plain reading may suggest that the Trial Chamber made a finding on Đorđević's responsibility pursuant to the third category of joint criminal enterprise independent of a *mens rea* finding in relation to the first category of joint criminal enterprise. However, the Appeals Chamber recalls that the *mens rea* in relation to the third category of joint criminal enterprise is two-fold. A finding that an accused possessed the requisite *mens rea* to commit the crimes which were not part of the common plan must be accompanied by a finding of intent under the first category of joint criminal enterprise.[1579] The Trial Chamber's additional findings phrased in third category of joint criminal enterprise language does not detract from the Trial Chamber's clear finding that Đorđević participated in the first category of joint criminal enterprise with the necessary intent.[1580] The Appeals Chamber does not consider that the Trial Chamber's *mens rea* findings pursuant to the first category of joint criminal enterprise are impermissibly vague as it made the required findings.

475. As for the Trial Chamber's finding that Đorđević was also guilty of aiding and abetting the established crimes,[1581] the Appeals Chamber considers that the fact that the Trial Chamber was satisfied that Đorđević's *mens rea* met the required standard for more than one mode of liability does not detract from its finding that Đorđević shared the necessary intent for the JCE.

476. In light of the above, the Appeals Chamber considers that the Trial Chamber's alternative finding that Đorđević's *mens rea* also met the requirements for liability pursuant to the third category of joint criminal enterprise and its additional finding on aiding and abetting neither impacts on, nor raises any vagueness with respect to the Trial Chamber's *mens rea* finding pursuant to the first category of joint criminal enterprise.

[1577] Trial Judgement, para. 2158.
[1578] Đorđević Appeal Brief, para. 277, referring to Trial Judgement, para. 2158.
[1579] See *Tadić* Appeal Judgement, paras 204, 228; *Kvočka et al.* Appeal Judgement, para. 83, as referred to in Trial Judgement, para. 1865.
[1580] See Trial Judgement, para. 2193. See also Trial Judgement, paras 2158, 2213. See *supra*, paras 463, 468.

477. Đorđević has therefore failed to show that the Trial Chamber erred in failing to make the necessary *mens rea* findings pursuant to the first category of joint criminal enterprise, or that it made impermissibly vague findings. The Appeals Chamber will now consider Đorđević's arguments relating to the reasonableness of these findings.

C. Alleged errors in the assessment of Đorđević's *mens rea*

478. The Trial Chamber found that Đorđević "acted with the requisite intent" on the basis of his knowledge of the crimes combined with his conduct.[1582] The Trial Chamber found that Đorđević was aware of the crimes being committed by MUP forces against Kosovo Albanian civilians[1583] based on several factors,[1584] including: (i) reports of crimes that were made to Đorđević "through other means" than regular reports, such as by telephone or personal contact;[1585] (ii) orders that Đorđević issued in 1998 and 1999, deploying MUP forces to Kosovo;[1586] and (iii) the Serbian media and Human Rights Watch reports.[1587] With this knowledge, the Trial Chamber found that Đorđević: (i) was involved in the deployment of members of a paramilitary unit to assist SAJ forces during anti-terrorist operations;[1588] (ii) participated in operations to conceal the bodies of Kosovo Albanians killed throughout Kosovo;[1589] and (iii) failed to establish a commission or body to investigate allegations of crimes committed by MUP forces in Kosovo.[1590] The Trial Chamber concluded that Đorđević shared the intent with the other members of the JCE that "the crimes be perpetrated, and that they remained without investigation".[1591]

479. Đorđević submits that there was no direct evidence that he shared the intent to further the JCE.[1592] Specifically, he argues that the Trial Chamber erred in: (i) failing to consider parts of his

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1581 See Trial Judgement, para. 2194. Whether the Trial Chamber erred in entering concurrent convictions will be dealt with later in this Judgement (see *infra*, paras 825-834).
1582 Trial Judgement, paras 2154-2158. See also Trial Judgement, paras 1983-1999.
1583 Trial Judgement, paras 1983-1999.
1584 Trial Judgement, paras 1985-1998. In addition to the factors listed in the main text, the Trial Chamber also considered, for example, Đorđević's attendance at Joint Command meetings and his knowledge of Security Council Resolution 1160 of 31 March 1998 condemning, *inter alia*, the use of excessive force by Serbian police forces against civilians (Trial Judgement, paras 1988, 1990).
1585 Trial Judgement, paras 1985-1987. See *supra*, para. 250.
1586 Trial Judgement, para. 1989.
1587 Trial Judgement, paras 1996-1998.
1588 Trial Judgement, para. 1993.
1589 Trial Judgement, para. 1994.
1590 Trial Judgement, para. 1999.
1591 Trial Judgement, para. 1999.
1592 Đorđević Appeal Brief, para. 279.

testimony at trial;[1593] (ii) assessing his knowledge of the crimes;[1594] and (iii) inferring intent from his conduct.[1595]

480. The Prosecution responds that, in reaching the findings on Đorđević's intent, the Trial Chamber relied on both circumstantial and direct evidence and correctly assessed the weight to be given to each piece of evidence in light of the totality of the evidence.[1596]

1. Alleged failure to consider parts of Đorđević's own testimony at trial

(a) Arguments of the parties

481. Đorđević submits that the Trial Chamber failed to analyse parts of his testimony at trial, which constituted direct evidence that he had no knowledge of any plan to expel the Kosovo Albanian population from Kosovo.[1597] Đorđević points to two statements he made during his testimony at trial, namely that he: (i) "never heard either the minister or any top people issue any tasks that would call for crimes against the [Kosovo] Albanian civilian population, that would incite MUP personnel to commit crimes or to the effect that their crimes would be tolerated";[1598] and (ii) "did not hear from a single politician of any intention or of any plan or of any activity or of anyone who was supposed to carry out that plan if there was any such thing in relation to the expulsion of Albanians from Kosovo and Metohija".[1599] Đorđević argues that instead of considering this direct evidence, the Trial Chamber relied only on inferences.[1600] In this regard, he acknowledges that while the jurisprudence provides that a "state of mind can be found by inference, *it must be the only reasonable inference on the evidence*".[1601] However, he argues that the Trial Chamber instead ignored the "other reasonable inferences that would suggest that [he] did not possess the requisite intent of JCE I".[1602]

482. The Prosecution responds that it was within the Trial Chamber's discretion to disregard Đorđević's testimony at trial and further asserts that Đorđević fails to explain why the Trial

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[1593] Đorđević Appeal Brief, paras 279-280.
[1594] Đorđević Appeal Brief, paras 282-288.
[1595] See Đorđević Appeal Brief, paras 289-294.
[1596] Prosecution Response Brief, paras 248-249.
[1597] Đorđević Appeal Brief, para. 279, referring to Vlastimir Đorđević, 27 Jan 2009, T. 238, Vlastimir Đorđević, 14 Dec 2009, T. 10145.
[1598] Đorđević Appeal Brief, para. 279, referring to Vlastimir Đorđević, 27 Jan 2009, T. 238.
[1599] Đorđević Appeal Brief, para. 279, referring to Vlastimir Đorđević, 14 Dec 2009, T. 10145.
[1600] Đorđević Appeal Brief, para. 280.
[1601] Đorđević Appeal Brief, para. 280, referring to *Brđanin* Appeal Judgement, para. 429.
[1602] Đorđević Appeal Brief, paras 279-280 (emphasis omitted), referring to *Kvočka et al.* Appeal Judgement, para. 237. See also Đorđević Reply Brief, paras 83, 86.

Chamber should have preferred the evidence he cites in his appeal brief to the "detailed and consistent circumstantial evidence of his intent upon which it based its findings".[1603]

(b) Analysis

483. The Appeals Chamber notes that Đorđević correctly observes that the Trial Chamber, in assessing his *mens rea* for the JCE, did not specifically analyse the two statements he made at trial.[1604] However, the Appeals Chamber recalls that a trial chamber has discretion in weighing and assessing the evidence[1605] and is not obliged to cite to every piece of evidence on the record.[1606] The Appeals Chamber further notes that, in arguing that the Trial Chamber relied only on inferences, Đorđević misrepresents the Trial Chamber's reasoning and findings. In assessing Đorđević's *mens rea*, the Trial Chamber did, in fact, consider ample evidence, both direct and circumstantial, including relevant parts of Đorđević's own testimony.[1607] In particular, it considered his testimony that "[e]verything that was happening [in] the organs of the interior was for the most part brought to [his] attention through regular channels or in some other way".[1608] The Trial Chamber found this evidence as a whole to be indicative of Đorđević's knowledge of the situation on the ground, including crimes that were being committed by MUP forces against Kosovo Albanian civilians.[1609] In light of this evidence, together with all of the other evidence concerning Đorđević's participation in the JCE, the Trial Chamber concluded that he "acted with the requisite intent".[1610]

484. For these reasons, the Appeals Chamber finds that Đorđević has failed to show that the Trial Chamber erred in failing to consider parts of his own testimony at trial when assessing his *mens rea*.

[1603] Prosecution Response Brief, para. 249.
[1604] See Đorđević Appeal Brief, para. 279, referring to Vlastimir Đorđević, 27 Jan 2009, T. 238, Vlastimir Đorđević, 14 Dec 2009, T. 10145.
[1605] See *e.g. Boškoski and Tarčulovski* Appeal Judgement, para. 14; *Kupreškić et al.* Appeal Judgement, paras 30-32; *Nchamihigo* Appeal Judgement, para. 47.
[1606] See *e.g. Kvočka et al.* Appeal Judgement, para. 23; *Čelebići* Appeal Judgement, para. 498; *Kupreškić et al.* Appeal Judgement, para. 39; *Kordić and Čerkez* Appeal Judgement, para. 382.
[1607] Trial Judgement, paras 1984-1999. See *e.g.* Trial Judgement, paras 1986, (referring to Vlastimir Đorđević, 7 Dec 2009, T. 9703, Vlastimir Đorđević, 14 Dec 2009, T. 10087), 1987 (referring to Vlastimir Đorđević, 7 Dec 2009, T. 9735-9739, Vlastimir Đorđević, 11 Dec 2099, T. 10020).
[1608] Trial Judgement, para. 1986, referring to Exhibit P1508, p. 5 (Đorđević's testimony before the Belgrade Court). See Vlastimir Đorđević, 14 Dec 2009, T. 10086-10087.
[1609] Trial Judgement, paras 1983-1999, 2154-2158. See also *supra*, para. 478.
[1610] Trial Judgement, para. 2158. See also Trial Judgement, paras 1983-1999, 2154-2157.

2. Alleged errors in assessing Đorđević's knowledge

(a) Introduction

485. The Trial Chamber's conclusion that Đorđević had knowledge of the crimes committed by MUP forces against Kosovo Albanian civilians was based on several factors, including: (i) reports of crimes that were provided to him through various means;[1611] (ii) orders that he issued in 1998 and 1999 deploying MUP forces to Kosovo;[1612] and (iii) the information he received from the Serbian media and Human Rights Watch reports.[1613]

(b) Arguments of the parties

486. Đorđević submits that the Trial Chamber improperly emphasised his knowledge of events in 1998 to conclude that he had knowledge of the crimes committed in 1999.[1614] Specifically, with regard to "reporting structures", Đorđević argues that the Trial Chamber improperly relied on circumstances concerning 1998 "to assume what information would be available in 1999".[1615] He submits that the Trial Chamber thereby failed to adequately weigh: (i) the lack of reporting of crimes through regular channels and the inability to travel or use phone lines during the Indictment period;[1616] (ii) certain orders that he issued;[1617] and (iii) the media sources available to him.[1618]

487. The Prosecution responds that Đorđević's submissions warrant summary dismissal as he "repeats failed trial submissions and substitutes his evaluation of the evidence for that of the Chamber without showing an error".[1619] Further, the Prosecution argues that the Trial Chamber reasonably found, based on numerous sources, that Đorđević had knowledge of the full extent of the crimes against civilians by Serbian forces in Kosovo in 1998, and that he knew of the risk that these forces would commit further crimes if redeployed in 1999.[1620]

[1611] Trial Judgement, paras 1985-1987.
[1612] Trial Judgement, para. 1989.
[1613] Trial Judgement, paras 1996-1998.
[1614] Đorđević Appeal Brief, para. 282.
[1615] Trial Judgement, para. 283. See *supra*, para. 293. See also Appeal Hearing, 13 May 2013, AT. 80-81.
[1616] Đorđević Appeal Brief, paras 283-286.
[1617] Đorđević Appeal Brief, para. 287. See also Appeal Hearing, 13 May 2013, AT. 173.
[1618] Đorđević Appeal Brief, paras 283, 288.
[1619] Prosecution Response Brief, para. 251 (citations omitted).
[1620] Prosecution Response Brief, paras 252-253. Đorđević replies that the Prosecution's argument that he was aware of "the risk" of further crimes in 1999 based on crimes committed in 1998 is more akin to liability under the third category of joint criminal enterprise, "but contradicts the Prosecution's argument that a JCE I plan was deliberately implemented to perpetrate crimes against Kosovo Albanians" (Đorđević Reply Brief, para. 87).

488. The Appeals Chamber will now address Đorđević's individual arguments relating to his overall submission that the Trial Chamber erred in finding that he possessed knowledge of the crimes.

(c) Analysis

a. Lack of reporting

489. The Trial Chamber found that Đorđević was informed of the situation on the ground in Kosovo 1998 and 1999 through, amongst other means, telephone calls from his subordinates and personal contact with a number of SUP chiefs in Kosovo and Head of the MUP Staff, Lukić.[1621]

490. Đorđević submits that the Trial Chamber's finding implies that he was not aware of the full extent of criminal acts in Kosovo, because communication systems were severely hampered after 24 March 1999, the date when the NATO bombing started.[1622] He also submits that, even in relation to the period before the bombardment, the Trial Chamber made "complete assumptions of how and what information was delivered to [him]".[1623]

491. The Prosecution responds that, in finding that crimes were reported to Đorđević "through other means", the Trial Chamber relied on, *inter alia*, Đorđević's own testimony, which was "carefully considered" alongside the testimony of a number of other witnesses.[1624]

492. The Appeals Chamber has previously found, in the context of the analysis on the reporting system within the MUP during the Indictment period, that the Trial Chamber made a reasonable finding based on the totality of the evidence that Đorđević remained informed of the MUP operations during that time.[1625] The Appeals Chamber therefore rejects Đorđević's argument that he was not aware of the full extent of criminal acts in Kosovo due to all communication systems being severely hampered after 24 March 1999.

[1621] Trial Judgement, para. 1987.
[1622] Đorđević Appeal Brief, paras 284-285, referring to Trial Judgement, paras 1985-1987. See also *supra*, para. 251.
[1623] Đorđević Appeal Brief, para. 286. As an example, he argues that there are no findings as to what knowledge he obtained "through other means" and as to how Lukić, the head of the MUP Staff, "consistently reported" to him (Đorđević Reply Brief, para. 88).
[1624] Prosecution Response Brief, paras 253-254, referring to Trial Judgement, paras 1897, 1986, fn. 6502, Vlastimir Đorđević, 14 Dec 2009, T. 10086.
[1625] See *supra*, para. 252.

b. Orders issued by Đorđević

493. In assessing Đorđević's knowledge of the situation on the ground in Kosovo, the Trial Chamber also considered certain "orders" that Đorđević issued throughout 1998 and 1999, deploying MUP forces to Kosovo.[1626]

494. Đorđević submits that the "orders" the Trial Chamber considered relevant to his *mens rea* were only "dispatches" and neither indicate specific planning or acts on the ground in Kosovo, contain any specific tasks, nor suggest a criminal purpose.[1627]

495. The Prosecution responds that Đorđević's submission is inapposite, as the evidence supports the Trial Chamber's finding that his knowledge regarding the situation on the ground is reflected in these orders.[1628]

496. The documents referred to as "orders" by the Trial Chamber include information about deployment of MUP forces to Kosovo during the Indictment period and were signed by Đorđević.[1629] The Appeals Chamber considers it reasonable for the Trial Chamber to have found on this basis that Đorđević was aware of the content of these "orders". Đorđević is correct in noting that these documents are "dispatches" and not "orders" and that they do not explicitly contain instructions that crimes be committed.[1630] However, the Appeals Chamber finds that Đorđević otherwise misinterprets the evidence in this regard. It notes that these "orders" were considered by the Trial Chamber, along with other relevant evidence, in order to determine Đorđević's *knowledge* of the situation on the ground in 1999, including the crimes.[1631] The Trial Chamber's conclusion on Đorđević's *mens rea* was based on such knowledge combined with evidence of his acts.[1632] Therefore, Đorđević has failed to show that the Trial Chamber committed an error in assessing these documents.

[1626] Trial Judgement, para. 1989, referring to Exhibits P136, P711, P1182, P1185, P1189. See also Exhibits P1193, P1195, P1196, P1487, P1488.
[1627] Đorđević Appeal Brief, para. 287. See also Appeal Hearing, 13 May 2013, AT. 173.
[1628] Prosecution Response Brief, para. 256. See also Appeal Hearing, 13 May 2013, AT. 119-120.
[1629] Exhibits P136; P711; P1182; P1185; P1189.
[1630] Exhibits P136, P711, P1182, P1185, P1189 are all MUP "dispatches" regarding the deployment of PJP units.
[1631] Trial Judgement, paras 1983-1999.
[1632] Trial Judgement, paras 1983-1999, 2154-2158.

c. Serbian media and international reports

497. The Trial Chamber found that the Serbian media was a source of knowledge for Đorđević of the crimes committed by Serbian Forces.[1633] It further found that the Serbian media had denied claims of crimes committed by Serbian forces in Kosovo.[1634] Based on these findings, the Trial Chamber concluded that, even if Đorđević had merely confined his reading to Serbian sources in 1999, as he testified at trial, he would at least have been aware of the accusations reported in the media.[1635] The Trial Chamber further found that in 1998 and 1999, Human Rights Watch issued reports and statements concerning crimes committed by MUP forces, which were disseminated by email to, *inter alia*, the MUP.[1636] In light of this, and considering Đorđević's position within the MUP, the Trial Chamber was unable to accept his testimony that he knew nothing of the accusations against the MUP by Human Rights Watch in 1998 and 1999.[1637]

498. Đorđević submits that the Trial Chamber "bizarrely" relied on international media and human rights groups in order to establish his *mens rea*.[1638] Specifically, he argues that: (i) the Internet was not widely available at that time; (ii) he does not understand any English; (iii) Witness Frederick Abrahams ("Witness Abrahams") of Human Rights Watch admitted that there was no confirmation of delivery or receipt of Human Rights Watch reports sent to the MUP, which did not even have an email address at the time, and that none of them were addressed to Đorđević; and (iv) he read local newspapers on a daily basis during the war, which did not suggest that crimes were committed in Kosovo.[1639]

499. The Prosecution responds that in establishing Đorđević's *mens rea*, the Trial Chamber relied on extensive evidence obtained from a variety of sources, including the media and Human Rights Watch reports.[1640] Further, it responds that the Trial Chamber's reliance on Human Rights Watch reports as a source of Đorđević's notice of crimes was reasonable.[1641] It argues that regardless of whether Đorđević was the addressee, in light of the evidence that Human Rights Watch sent these reports to the MUP offices where Đorđević was based, the Trial Chamber

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[1633] Trial Judgement, para. 1996.
[1634] Trial Judgement, para. 1996.
[1635] Trial Judgement, para. 1996, referring to Vlastimir Đorđević, 11 Dec 2009, T. 9981, Vlastimir Đorđević, 14 Dec 2009, T. 10078. See also Vlastimir Đorđević, 14 Dec 2009, T. 10079-10082, 10087-10089.
[1636] Trial Judgement, para. 1997.
[1637] Trial Judgement, para. 1997. See Vlastimir Đorđević, 11 Dec 2009, T. 9981-9982.
[1638] Đorđević Appeal Brief, para. 288; Đorđević Reply Brief, para. 88.
[1639] Đorđević Appeal Brief, para. 288.
[1640] Prosecution Response Brief, para. 257.
[1641] Prosecution Response Brief, para. 258, referring to Trial Judgement, para. 1997.

reasonably rejected his assertion that he knew nothing of the accusations against the MUP by Human Rights Watch.[1642]

500. The Appeals Chamber notes that, as Đorđević correctly argues, there is no confirmation of delivery of Human Rights Watch reports to the MUP and there is no evidence, or Trial Chamber findings, that he personally received or read such reports.[1643] The Appeals Chamber considers that no reasonable trier of fact could have inferred from the simple fact that reports were sent by Human Rights Watch to the MUP that Đorđević had personal knowledge of them, since reports from international human rights groups were not part of the established internal reporting system within the MUP.[1644] In addition, the Appeals Chamber takes into account Đorđević's arguments that the Internet was not widely available in 1999 and that he does not understand any English.[1645] The Appeals Chamber therefore finds that the Trial Chamber committed an error in inferring Đorđević's knowledge of the crimes from reports issued by Human Rights Watch.[1646]

501. The Appeals Chamber finds, however, that despite this error of fact it was reasonable for the Trial Chamber to conclude that Đorđević had knowledge of the crimes. As outlined above, the Trial Chamber's conclusion was based on several factors, including Đorđević's: position within the MUP; role in negotiations with international bodies; participation at Joint Command and MUP Collegium meetings; presence on the ground while certain operations were carried out; personal contact with Lukić; involvement in the deployment of paramilitary units and in operations to conceal crimes; and the reporting system within the MUP.[1647]

502. Further, the Trial Chamber considered the media as an additional source of Đorđević's knowledge of the crimes.[1648] In light of the Trial Chamber's findings on Đorđević's role in the events in Kosovo, the fact that he was reading about accusations of crimes in Kosovo, in the local Serb media was relevant for the Trial Chamber to consider as an indicator of his knowledge of the crimes. The Appeals Chamber finds that the Trial Chamber reasonably relied on this evidence.

503. Đorđević's submissions in relation to the media and international reports are therefore dismissed.

[1642] Prosecution Response Brief, para. 258.
[1643] See Trial Judgement, para. 1997; *cf.* Đorđević Appeal Brief, para. 288.
[1644] See *supra*, paras 247, 249.
[1645] See *supra*, para. 498; Đorđević Appeal Brief, para. 288.
[1646] See Trial Judgement, para. 1997.
[1647] See Trial Judgement, paras 1983-1999.
[1648] See Trial Judgement, para. 1996.

(d) Conclusion

504. The Appeals Chamber has found above that the Trial Chamber did not err in assessing the evidence on: (i) the reporting system in 1999; (ii) the "orders" Đorđević issued in 1998 and 1999; and (iii) the information on the crimes provided by the Serbian media.[1649] The Appeals Chamber notes that this evidence was considered by the Trial Chamber, along with other evidence, in establishing that Đorđević had full knowledge of the events in Kosovo in 1999, thereby including the crimes that were committed by Serbian forces.[1650] The Appeals Chamber considers that the Trial Chamber's finding on Đorđević's knowledge of the crimes was based on several cumulative factors and on the totality of the evidence. The Appeals Chamber therefore finds that Đorđević has not shown that no reasonable trier of fact could not have reached the conclusion the Trial Chamber did.

3. Alleged errors in finding that Đorđević's actions showed that he possessed the requisite intent

(a) Introduction

505. The Trial Chamber reached the conclusion on Đorđević's *mens rea* on the basis of his knowledge of the crimes, combined with his conduct.[1651] Specifically, it considered: (i) his involvement in operations to conceal the bodies of Kosovo Albanians killed throughout Kosovo during the relevant time; (ii) his failure to investigate crimes committed by MUP forces in Kosovo; and (iii) his involvement in deploying members of paramilitary units to Kosovo.[1652]

(b) Arguments of the parties

506. Đorđević submits that the Trial Chamber erred in inferring his intent to further the JCE from: (i) the commission of *ex post facto* acts, including the concealment of the crimes of Serbian forces and the failure to ensure the investigation and sanction of MUP personnel for crimes in Kosovo; and (ii) the deployment of paramilitary units to Kosovo.[1653] Đorđević argues that the evidence of his "participation in the concealment of bodies was of impromptu reactions on the basis of lack of prior knowledge" and, as such, "did not reveal a cohesive common purpose shared by him".[1654] Further, he argues that the Trial Chamber failed to take into account evidence that he was

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[1649] See *supra*, paras 492, 496, 501.
[1650] Trial Judgement, paras 1985-1998.
[1651] Trial Judgement, paras 2154-2158. See also Trial Judgement, paras 1983-1999.
[1652] Trial Judgement, paras 2154-2158.
[1653] Đorđević Appeal Brief, paras 289-294. See also Appeal Hearing, 13 May 2013, AT. 85-90, 172.
[1654] Đorđević Appeal Brief, para. 291.

"surprised" when he was contacted about the finding of the bodies in Serbia,[1655] as well as that he had requested an investigation, but that these efforts were blocked by the Minister of Interior.[1656] With respect to the involvement of paramilitary units, Đorđević argues that the Trial Chamber erred in inferring his intention on the basis that he deployed "members of a known paramilitary unit to [Podujevo/Podujevë] to assist the SAJ forces" and claims that the evidence was limited and did not establish the conclusion that he intended the Indictment crimes.[1657]

507. The Prosecution responds that the Trial Chamber did not err in finding that Đorđević intended to participate in the JCE,[1658] and contends that Đorđević repeats previous arguments outlined elsewhere in his Appeal Brief and Closing Brief.[1659] The Prosecution submits that the Trial Chamber carefully assessed Đorđević's involvement in the operation to conceal bodies, which showed that he took an active and direct role in it.[1660] It further argues that this evidence, combined with the Trial Chamber's previous finding that Đorđević had knowledge of the crimes committed by Serbian forces, led the Trial Chamber to reasonably conclude that he also shared the intent to further the common purpose.[1661] With respect to investigations, the Prosecution contends that Đorđević's request for investigations was not blocked[1662] and that the Trial Chamber's findings on Đorđević's failure to investigate were reasonable and based on a thorough review of the evidence.[1663] In light of this, the Prosecution argues that the Trial Chamber properly concluded that Đorđević's failure to investigate crimes committed by MUP forces in Kosovo was "compelling evidence that he shared the intent with the other JCE members".[1664] Furthermore, the Prosecution argues that it was within the Trial Chamber's discretion to assess the veracity of Đorđević's denial of his knowledge of the crimes and that, in light of other clear evidence contradicting his testimony, the Trial Chamber's rejection of his testimony was reasonable.[1665] With respect to the deployment of paramilitary units, the Prosecution reiterates the Trial Chamber's findings that: (i) Đorđević deployed paramilitary units, including the Scorpions, to Kosovo, without ensuring basic screening despite the fact that their members were widely-known to have a criminal background; (ii) the

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[1655] Đorđević Appeal Brief, para. 291, referring to Trial Judgement, para. 1301, Časlav Golubović, 2 Mar 2009, T. 1706-1707, Časlav Golubović, 3 Mar 2009, T. 1748-1749.
[1656] Đorđević Appeal Brief, para. 291, referring to, *inter alia*, Trial Judgement, para. 1970, Vlastimir Đorđević, 7 Dec 2009, T. 9723-9724, 9729-9730, Vlastimir Đorđević, 11 Dec 2009, T. 9977, 10002-10003, 10009-10010.
[1657] Đorđević Appeal Brief, para. 293, referring to Trial Judgement, para. 1993. See *supra*, para. 353.
[1658] Prosecution Response Brief, paras 259-262.
[1659] Prosecution Response Brief, paras 259-262.
[1660] Prosecution Response Brief, para. 259, referring to Trial Judgement, Section VII, paras 1967-1982.
[1661] Prosecution Response Brief, para. 259, referring to Trial Judgement, para. 2158.
[1662] Prosecution Response Brief, para. 260. See also Prosecution Response Brief, para. 232.
[1663] Prosecution Response Brief, para. 261. See also Prosecution Response Brief, paras 234-242.
[1664] Prosecution Response Brief, para. 261, referring to Trial Judgement, para. 1999.
[1665] Prosecution Response Brief, para. 261, referring to Trial Judgement, paras 1985-1999.

members of this unit killed 14 women and children in Podujevo/Podujevë on 28 March 1999; and (iii) Đorđević not only failed to ensure any proper investigations into these murders, but also authorised the redeployment of the Scorpions.[1666]

(c) Analysis

508. The Appeals Chamber observes that Đorđević's submissions largely reiterate previous arguments outlined in his ninth ground of appeal.[1667] The Appeals Chamber recalls its findings upholding the Trial Chamber's conclusions that Đorđević: (i) concealed crimes of Serbian forces against Kosovo Albanian civilians; (ii) failed to investigate and sanction MUP personnel for crimes in Kosovo; and (iii) was involved in and aware of the deployment and engagement of paramilitary units to Kosovo.[1668]

509. To the extent that Đorđević argues that the concealment of crimes, the deployment of paramilitary units to Kosovo, and the failure to investigate crimes constitute *ex post facto* actions, the Appeals Chamber finds that he is mistaken. The Trial Chamber found that: (i) as of March 1999, a plan existed among senior members of the FRY government, including Đorđević, to conceal the crimes committed against Kosovo Albanian civilians by Serbian forces in Kosovo, through the concealment of bodies;[1669] (ii) in the context of a general pattern of the failure to report, investigate and punish crimes committed by Serbian forces in Kosovo throughout the Indictment period, Đorđević failed to ensure investigation and obstructed those investigations that were initiated;[1670] and (iii) Đorđević was involved in the deployment of paramilitary units to Kosovo from February 1999.[1671] The Appeals Chamber has already upheld these findings[1672] and observes that Đorđević's conduct as described above occurred prior to and/or during the commission of the crimes.[1673] In this regard, it further notes that the first crimes for which the Trial Chamber convicted Đorđević were

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[1666] Prosecution Response Brief, para. 262, referring to Trial Judgement, paras 1956, 1966, 1993, 2188. See also Appeal Hearing, 13 May 2013, AT. 118-122.
[1667] See *supra*, paras 353, 364, 404, 436-439, 454.
[1668] See *supra*, paras 355-362, 366-371, 378-384, 390, 395-399, 406-409, 413-415, 422-425, 428-433, 443-457.
[1669] See *supra*, paras 372-433. See Trial Judgement, paras 1980-1981, 2116-2117.
[1670] See *supra*, paras 325-350, 434-457. See also *supra*, paras 380-429.
[1671] See *supra*, para. 363. See also *supra*, paras 351-371.
[1672] See *supra*, paras 372-433 (concealment), 325-350, 434-457 (failure to investigate), 351-371 (deployment of paramilitaries).
[1673] See *supra*, para. 379. See Trial Judgement, paras 2099, 2146. The Trial Chamber found that after the discovery of the bodies in Tekija and subsequent removal and burial of these bodies, 296 Kosovo Albanians were killed by Serbian forces on 27-28 April 1999 during the joint VJ and MUP action code-named "Operation Reka" (Trial Judgement, para. 2099). The Trial Chamber further found that rather than investigating these killings, coordinated efforts were taken by Serbian authorities to conceal the crimes through the removal and clandestine burial of the bodies of the victims (Trial Judgement, paras 2146, 2163).

committed on 20 and 21 March 1999,[1674] which is after or simultaneous to Đorđević's conduct relied on by the Trial Chamber to infer his intent. Therefore, Đorđević's actions concerning the concealment of crimes, the deployment of paramilitary units to Kosovo, and the failure to investigate crimes were not *ex post facto*, as Đorđević argues. His argument in this regard is dismissed.

510. Moreover, Đorđević's submissions concerning the Trial Chamber's failure to consider some evidence relating to the burial of bodies and investigations of crimes constitute a mere repetition of arguments he has already raised at trial, and are unsubstantiated. The Appeals Chamber first observes that the Trial Chamber considered and dismissed the evidence that Đorđević was "surprised" when he was contacted about the discovery of the bodies in Serbia.[1675] The Appeals Chamber also observes that the Trial Chamber found that Đorđević was "the initial, and primary, point of contact", that he made decisions and gave orders on his own initiative with respect to the "secret handling, transport and reburial of bodies", and that he was "not a mere conduit pipe for orders from the Minister".[1676] Second, with regard to Đorđević's testimony that his efforts to investigate were blocked by the Minister, the Appeals Chamber notes that, while the Trial Chamber left open this possibility,[1677] it nevertheless found that Đorđević gave orders to the SUP chief to bury the bodies at the scene, keep the media out, and destroy the refrigerated truck used for moving the bodies, thus acting in breach of his duty to conduct investigations.[1678] The Trial Chamber concluded that this conduct constituted "the first steps in ensuring that no investigation into these bodies could take place".[1679] The Appeals Chamber finds this conclusion to be reasonable.

511. Finally, with regard to the deployment of paramilitary units, including the Scorpions, to Kosovo, the Trial Chamber considered Đorđević's direct role in the deployments, along with other evidence indicating that although he had knowledge of crimes committed by members of these

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[1674] Trial Judgement, para. 1702. See also Trial Judgement, para. 1639. See *infra*, para. 619.
[1675] See Trial Judgement, para. 1301, referring to Časlav Golubović, 2 Mar 2009, T. 1706-1707, Časlav Golubović, 3 Mar 2009, T. 1748-1749.
[1676] Trial Judgement, para. 1969. See also *supra*, para. 428.
[1677] Trial Judgement, para. 1970, referring to Vlastimir Đorđević, 7 Dec 2009. T. 9723-9724, 9827. The Trial Chamber stated that "[w]hile it must be left open that, as suggested by the Accused, the Minister instructed him to conceal the bodies in order to prevent NATO from using the discovery for 'propaganda purposes' and told him that no further measures should be taken to establish the origin of the bodies and how they were killed, [...] this does not absolve the Accused of his duty to investigate this incident" (Trial Judgement, para. 1970). *Contra* Đorđević Appeal Brief, para. 291.
[1678] Trial Judgement, para. 1970.
[1679] Trial Judgement, para. 1970.

units, he took no steps to investigate these crimes and, instead, authorised the redeployment of these units to Kosovo.[1680]

512. The Appeals Chamber recalls that the *mens rea* for participation in a joint criminal enterprise may be inferred from knowledge combined with continuing participation.[1681] The Appeals Chamber observes that, in reaching its conclusion on Đorđević's contribution to the JCE, the Trial Chamber relied on its combined findings, that: (i) Đorđević was fully aware of the situation on the ground in Kosovo in 1998 and 1999, including the crimes that were being committed by Serbian forces;[1682] and (ii) Đorđević's conduct, considered in its totality as detailed in the Trial Judgement – including his actions of concealing crimes, failing to ensure investigations, and deploying paramilitary units to Kosovo – contributed to the JCE.[1683] Based on these findings, the Trial Chamber concluded that Đorđević "acted with the requisite intent" when he concealed the crimes by Serbian forces, failed to ensure investigation and sanction of MUP personnel, and deployed paramilitary units to Kosovo.[1684]

513. The Appeals Chamber finds that Đorđević has failed to show that no reasonable trial chamber could have come to the conclusion that he possessed the *mens rea* for the JCE based on these findings.

D. Conclusion

514. In light of all the foregoing, the Appeals Chamber dismisses Đorđević's tenth ground of appeal in its entirety.

[1680] Trial Judgement, paras 1966, 1993, 2155. See *supra*, paras 353, 358-360.
[1681] See *Krajišnik* Appeal Judgement, para. 697, upholding the *Krajišnik* Trial Chamber's finding on Krajišnik's *mens rea* (see *Krajišnik* Trial Judgement, para. 890).
[1682] Trial Judgement, para. 2154. See also Trial Judgement, paras 1983-1999. See *supra*, paras 483, 489, 493, 495-496.
[1683] Trial Judgement, paras 2154-2157. See *supra*, paras 209, 351, 356, 362, 366-433, 440, 454.
[1684] See Trial Judgement, para. 2158.

XII. ĐORĐEVIĆ'S TWELFTH GROUND OF APPEAL: DEFINITION OF CIVILIAN

A. Introduction

515. The Trial Chamber found that Serbian forces carried out attacks against Kosovo Albanian civilians, which resulted in the commission of the crimes of murder as a violation of the laws or customs of war and crimes against humanity, as well as deportation and other inhumane acts (forcible transfer) as crimes against humanity.[1685] With respect to the crime of murder, the Trial Chamber found that nearly all killed were unarmed and in the custody of Serbian forces.[1686] It concluded that there was "an outright intent [by] the Serbian forces to kill male Kosovo Albanians".[1687] With respect to the crimes of deportation and forcible transfer, the Trial Chamber found that "what caused the civilian population (if not murdered) to leave their homes and join masses of other similarly displaced, were the specific attacks by Serbian forces against Kosovo Albanians" and that this "campaign conducted against Kosovo Albanian civilians by Serbian forces" was the "dominant and compelling" cause of the displacement of Kosovo Albanians.[1688]

B. Arguments of the parties

516. Đorđević submits that the Trial Judgement is unclear as to whether the armed conflict was characterised as internal or international.[1689] He argues that the Trial Chamber's reliance on Additional Protocol II suggests that it considered the standards applicable to the conflict between the FRY and the KLA to be those relevant to internal armed conflicts.[1690] In his view, this raises two questions of principle.[1691]

517. First, Đorđević submits that the Trial Chamber incorrectly concluded that the presumption of civilian status applies equally to internal and international armed conflicts.[1692] He argues that based on this error, the Trial Chamber applied an "over-expansive definition of civilian whereby individuals were presumed to be civilians when they should not have been".[1693] He argues that as a

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[1685] Trial Judgement, paras 1697, 1701-1704 (deportation and other inhumane acts (forcible transfer)), 1753 (murder).
[1686] Trial Judgement, para. 1707.
[1687] Trial Judgement, para. 1707.
[1688] Trial Judgement, para. 1697.
[1689] Đorđević Appeal Brief, para. 305.
[1690] Đorđević Appeal Brief, para. 305.
[1691] Đorđević Appeal Brief, para. 306.
[1692] Đorđević Appeal Brief, paras 307-309.
[1693] Đorđević Appeal Brief, para. 308. See also Đorđević Appeal Brief, paras 315, 319; Đorđević Reply Brief, paras 91-92, 95.

result the Trial Chamber incorrectly found that attacks by Serbian forces were directed against the civilian population causing the population to flee.[1694] He argues that the Trial Chamber thereby reversed the burden of proof and erroneously convicted him for the crimes of deportation, other inhumane acts (forcible transfer), and murder.[1695]

518. Second, Đorđević contends that the Trial Chamber erred in concluding that individuals were actively participating in hostilities only if they had a "continuous combat function"[1696] and that the Trial Chamber's reasoning "was polluted by its suggestion that an individual is protected in an internal armed conflict unless their continuous function is to take a direct part in hostilities".[1697] He submits that the Trial Chamber placed "great emphasis" on the clothing of the victims but argues that such evidence does not establish that the victims were necessarily civilians rather than KLA casualties.[1698] He also asserts that, in determining whether the attack was proportionate, the Trial Chamber should have considered the presence of large numbers of individuals assisting the KLA, who did not have a "continuous combat function".[1699] He contends that expecting "a clear distinction between civilians and combatants in a conflict characterised by terrorists, insurgents and irregular forces is unrealistic".[1700]

519. Đorđević submits that these errors jeopardise "the conclusions that a JCE existed and that the FRY's attack was indeed directed against civilians rather than legitimate military targets".[1701]

520. The Prosecution responds that Đorđević misrepresents the Trial Chamber's findings and that his submissions warrant summary dismissal.[1702] It argues that Đorđević's submissions pertain to "observations on the law" that were not decisive to the Trial Chamber's conclusions.[1703] Further, the Prosecution responds that the Trial Chamber did not presume individuals to be civilians.[1704] Rather, it found that Serbian forces did not even attempt to distinguish civilians from KLA

[1694] Đorđević Appeal Brief, paras 308, 316. He further submits that this approach led to the application of too strict a standard of military targeting (Đorđević Appeal Brief, para. 316; Đorđević Reply Brief, paras 93, 95).
[1695] Đorđević Appeal Brief, paras 305-307, 316-318; Đorđević Reply, paras 92-93.
[1696] Đorđević Appeal Brief, para. 310.
[1697] Đorđević Appeal Brief, para. 311.
[1698] Đorđević Appeal Brief, paras 312-313.
[1699] Đorđević Appeal Brief, para. 314; Đorđević Reply, paras 93-94.
[1700] Đorđević Appeal Brief, para. 312.
[1701] Đorđević Appeal Brief, para. 315.
[1702] Prosecution Response Brief, paras 275, 291.
[1703] Prosecution Response Brief, paras 276-277, 284. The Prosecution further alleges that the presumption of civilian status should also apply in non-international armed conflicts (Prosecution Response Brief, paras 281-282).
[1704] Prosecution Response Brief, para. 280.

members[1705] and it was entitled to rely upon evidence of the clothing of the victims to establish their civilian status.[1706]

C. Analysis

521. The Appeals Chamber notes that while the Trial Chamber concluded that an armed conflict existed between the KLA and Serbian forces in Kosovo, it did not explicitly establish the nature of the armed conflict.[1707] By contrast, it explicitly defined the conflict between the FRY and NATO as international in nature.[1708] The Trial Chamber, however, applied the law relevant to internal armed conflicts[1709] and separately found that "the KLA possessed sufficient characteristics of an organised armed force to be able to engage in an internal armed conflict".[1710] The Appeals Chamber recalls in this respect that an internal armed conflict may exist alongside an international armed conflict,[1711] and is satisfied that the Trial Chamber therefore considered the conflict between the KLA and Serbian forces to be an internal armed conflict.[1712]

522. The Appeals Chamber turns to Đorđević's contention that the Trial Chamber erred in its definition and application of an individual's civilian status in an internal armed conflict. Đorđević argues that the Trial Chamber reversed the burden of proof when it considered that the presumption of civilian status, as set out in Article 50(1) of Additional Protocol I, applied to internal armed conflict despite its absence from the text of Article 13 of Additional Protocol II.[1713] The Appeals Chamber recalls that the principle contained in Article 50(1) of Additional Protocol I, that in cases of doubt a person shall be considered a civilian, is limited to the expected *conduct* of a member of the military.[1714] In contrast, where the *criminal responsibility* of an accused is at issue, the Prosecution bears the burden of proof concerning the civilian status of victims.[1715] Đorđević's submissions fail to acknowledge these two different standards. As a result, he misrepresents two distinct sets of findings made by the Trial Chamber: (i) the findings made in relation to the

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[1705] Prosecution Response Brief, paras 279-280.
[1706] Prosecution Response Brief, para. 290.
[1707] Trial Judgement, paras 1578-1579.
[1708] See Trial Judgement, para. 1580.
[1709] See Trial Judgement, paras 1530, 2066.
[1710] Trial Judgement, para. 1578.
[1711] *Tadić* Appeal Judgement, para. 84.
[1712] *Cf. D. Milošević* Appeal Judgement, para. 23.
[1713] Trial Judgement, para. 2066, fn. 7110.
[1714] *Kordić and Čerkez*, Appeal Judgement, para. 48, referring to *Blaškić* Appeal Judgement, para. 111. See also *D. Milošević* Appeal Judgement, para. 60.
[1715] *D. Milošević* Appeal Judgement, para. 60; *Kordić and Čerkez*, Appeal Judgement, para. 48, referring to *Blaškić* Appeal Judgement, para. 111.

disproportionate use of force by Serbian forces as an indicator of the existence of the JCE[1716] and (ii) the findings made in relation to the commission of crimes by these forces.[1717] In discussing the first set of findings and determining whether the disproportionate use of force by the VJ and the MUP was "a further indication that the purpose of the operations was to perpetuate the crimes established",[1718] the Trial Chamber stated that, in an internal armed conflict, in case of doubt an individual should be presumed to be a civilian.[1719] It considered that this principle entailed, at a minimum, that attacking forces assess and determine whether there is any doubt as to the status of the target.[1720] It then concluded that the Serbian forces' excessive use of force showed that no such assessments were made.[1721] Accordingly, the Appeals Chamber is satisfied that the Trial Chamber did not relieve the Prosecution of its burden to prove that the victims were civilians or otherwise protected persons under IHL, nor did it apply an "over-expansive definition" of civilian.[1722] The Appeals Chamber will now consider whether the Trial Chamber properly applied the burden of proof in finding that Serbian forces committed the crimes of murder, deportation, and other inhumane acts (forcible transfer).

523. With respect to the crime of murder, the Trial Chamber correctly recalled that Common Article 3 of the Geneva Conventions is applicable to internal armed conflicts and protects persons not taking active part in hostilities.[1723] The Appeals Chamber recalls that persons taking no active part in hostilities include persons in detention[1724] and that the "well-established jurisprudence of the Tribunal has repeatedly affirmed that the body proper of the Geneva Conventions cannot be interpreted in such a way as to afford lesser protection to individuals than that which is afforded by common Article 3".[1725] The Appeals Chamber observes that the Trial Chamber performed an extensive analysis of the circumstances surrounding the killings and took into account numerous factors in reaching its findings that the great majority of the victims were detained, unarmed, or otherwise taking no active part in hostilities at the time of their death.[1726] Accordingly, the Appeals

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[1716] Trial Judgement, paras 2064-2069.
[1717] Trial Judgement, para. 1707.
[1718] Trial Judgement, para. 2069.
[1719] Trial Judgement, para. 2066, fn. 7110.
[1720] Trial Judgement, para. 2066.
[1721] Trial Judgement, para. 2066.
[1722] See *infra*, paras 523-526.
[1723] Trial Judgement, para. 1530.
[1724] Common Article 3(1) of the Geneva Conventions.
[1725] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009, para. 23.
[1726] The Appeals Chamber finds that Đorđević's claim that the Trial Chamber erred in relation to specific crimes sites is not supported by the evidence (Đorđević Appeal Brief, para. 318). The Trial Chamber reasonably concluded that the individuals were detained or otherwise not actively taking part in hostilities at the time of their death: In Bela Crkva/Bellacërkë, the Trial Chamber found that on 25 March 1999, MUP forces killed 13 Kosovo Albanians,

Chamber, Judge Tuzmukhamedov partially dissenting, finds that the Trial Chamber reasonably concluded that the victims were entitled to protection under Common Article 3(1) and Article 13(2) of Additional Protocol II. Đorđević has therefore failed to show that the Trial Chamber erred in reaching this conclusion.

524. The Appeals Chamber is further satisfied that the Trial Chamber reasonably concluded that Serbian forces committed the crimes of deportation and other inhumane acts (forcible transfer). The Appeals Chamber finds that the Trial Chamber reasonably found that no evidence suggested that the shelling, shooting, and burning of houses by the Serbian forces were directed at military targets. By contrast, it found that the Serbian forces intentionally targeted protected persons.[1727] In

among them three women and seven children, who had attempted to flee from the MUP. A two year old boy was the only survivor of the shooting (Trial Judgement, paras 464-466, 1393-1394, 1710). After assessing the totality of the evidence, the Trial Chamber concluded that these persons were not taking active part in hostilities (Trial Judgement, para. 465). Also in late March 1999, the bodies of six Kosovo Albanian men were found in a channel close to Belaja Bridge. The Trial Chamber found that no evidence suggested that these six men were armed at the time of the shootings; actively participating in the hostilities; or members of the KLA. It found that they were shot by the Serbian police who had, shortly earlier, killed captured Kosovo Albanian men at the Belaja Bridge and stream (Trial Judgement, paras 468, 473, 1712). In relation to Mala Kruša/Krusë-e-Vogël, see the Appeals Chamber finding later in this Judgement (*infra*, paras 662-667). In Meja/Mejë, contrary to Đorđević's allegation, the Trial Chamber did determine the civilian status and the individual circumstances of the 281 murder victims during Operation Reka on 27 and 28 April 1999, finding that groups of Kosovo Albanian men were taken out of a convoy by Serbian forces and then shot, and that there was no evidence that any of these men were armed at the time or taking an active part in hostilities, or that there was fighting between the Serbian forces and the KLA in the area at that time (Trial Judgement, paras 962-963, 1739). Similarly, the Trial Chamber found that there was no evidence that Kolë Duzhmani was a member of the KLA when he was shot during the Operation Reka. Rather, it found that he was detained at the time of his killing (Trial Judgement, para. 1737). In Vučitrn/Vushtrri municipality, the Trial Chamber found that during the night of 2 and 3 May 1999, Serbian forces killed four detained Kosovo Albanian men (Trial Judgement, paras 1187, 1742). In Kotlina/Kotlinë, the Trial Chamber held that on 24 March 1999, at least 22 unarmed and imprisoned Kosovo Albanian men were killed by Serbian forces. The Trial Chamber based this finding on the account of eye-witness Hazbi Loku, after having attentively considered his credibility and his evidence that the men "were forced to go to the wells to be beaten there and eventually thrown in before explosive devises in the wells were set off" (Trial Judgement, paras 1125, 1431, 1744). In Slatina/Slatinë and Vata/Vataj, contrary to Đorđević's submission, the Trial Chamber based its finding that four Kosovo Albanian villagers were detained by VJ soldiers on 13 April 1999, and later killed, not only on the hearsay evidence of Sada Lama. Rather, it found that his hearsay evidence was confirmed by: the location where their bodies were found; the mutilation of two of them; the civilian clothes they were found in; and the fact that they were unarmed (Trial Judgement, paras 1138, 1747).

[1727] For example, in Bela Crkva/Bellacërkë the Trial Chamber found that MUP and VJ forces caused Kosovo Albanian villagers to flee, that men were separated from women and children, and that about 65 of these men were shot (Trial Judgement, paras 1617-1618). In Mala Kruša/Krushë-e-Vogël, the Trial Chamber found that 400-500 Kosovo Albanian residents were forcibly transferred on 25 March 1999 after the village had been shelled, houses looted and set on fire, and male residents killed (Trial Judgement, paras 482-483, 1619-1620). In Velika Kruša/Krushë-e Madhe, a village very close to Mala Kruša/Krushë-e-Vogël, the Trial Chamber found that about 3,000-4,000 residents fled because of the increased menacing presence of the Serbian forces surrounding the village, later the Serbian forces burnt houses and destroyed the mosque (Trial Judgement, paras 503-506, 1622). The Appeals Chamber notes that paragraph 1622 of the Trial Judgement refers to "Velika Kruša/*Krushë-e-Vogël*" rather than "Velika Kruša/*Krushë-e Madhe*". However, based on the facts described in the paragraph, the Appeals Chamber is satisfied that the Trial Chamber was discussing the events that occurred in Velika Kruša/Krushë-e Madhe). In Celina/Celinë, the Trial Chamber held that Serbian forces shelled the village, killed residents, burned houses and forcibly transferred Kosovo Albanian residents on 25 March 1999 (Trial Judgement, paras 517-522, 1623). The Trial Chamber made explicit findings that the shelling was not directed at military targets (Trial Judgement, paras 533, 1623) and that the victims were unarmed and not taking part in hostilities (Trial Judgement,

particular, the Trial Chamber found that no KLA troops were seen in the area where some of the crimes occurred.[1728] Further, where the evidence established KLA presence and activities, the Trial Chamber carefully considered whether the Serbian forces were legally combating the KLA.[1729]

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para. 522). In Landovica/Landovicë, the Trial Chamber found that the VJ shelled and burned the village on 26 March 1999 which caused the residents to flee. Eleven of the 13 villagers who were killed were women and children (Trial Judgement, paras 588-594, 1628). In Leocina/Leçine, Brocna/Burojë and Izbica/Izbicë, the Trial Chamber found that Kosovo Albanian villagers were forcibly transferred in late March 1999 after Serbian forces had taken positions in Brocna/Burojë and shelled Leocina/Leçine and Izbica/Izbicë, with no evidence that the shelling was directed against military targets. Also, Serbian forces were burning houses on their way, and women and children were ordered to leave their home villages and go to Albania (Trial Judgement, paras 607, 1630-1631). In Kladernica/Klladërnicë, the Trial Chamber found that 10,000 to 12,000 Kosovo Albanians, mainly women and children, fled the shelling of the village on 12 April 1999. Serbian forces separated 300-400 men and ordered the rest of the people to go to Albania (Trial Judgement, paras 647, 1634). In Turicevac/Turiqec and Tušilje/Tushilë, the Trial Chamber held that Kosovo Albanian residents left the villages in late March/early April 1999 due to the acts of Serbian forces; that they were escorted by the police and that men were separated for questioning (Trial Judgement, paras 635-639, 1632-1633), some were released and some were killed (Trial Judgement, para. 639). In Pecane/Peqan, the Trial Chamber expressly considered that while virtually every household had a family member in the KLA and that the KLA was active in the area, the displacement was caused by the Serb forces shelling and that this shelling was not directed at any military target (Trial Judgement, paras 704-706, 1639). In Belanica/Bellanicë, the Trial Chamber held that Serbian forces killed three men in the village on 1 April 1999; set houses on fire; threatened the people; and killed livestock (Trial Judgement, paras 715, 1641); the Trial Chamber further found that the KLA had withdrawn from the area (Trial Judgement, para. 712) that the population tried to surrender to the Serb forces and that it was the Serb forces that directed the convoy to the Albanian border (Trial Judgement, paras 714, 716, 718, 1641). In Zabare/Zhabar, the Trial Chamber held that thousands of Kosovo Albanian residents were deported on 17 April 1999 after the shooting of Serbian forces with machine guns, and that specific orders to leave were given by the MUP to the population (Trial Judgement, paras 1647-1648). In Vladovo/Lladovë, the Trial Chamber found that Kosovo Albanian residents were forcibly transferred after they had left the village because of Serbian military presence nearby; that villagers who attempted to return – including one woman - were killed by Serbian forces; and that villagers who had not fled were ordered by VJ soldiers to leave the village which they did (Trial Judgement, para. 1661). In Nosalje/Nosaljë, the Trial Chamber held that Kosovo Albanian residents were attacked by Serbian forces and forcibly transferred in April 1999 (Trial Judgement, para. 1662). In Mirosavlje/Mirosalë, the Trial Chamber found that 4,000 Kosovo Albanians were deported by Serbian forces in early April 1999, by fear caused by acts of Serbian forces in the village and in neighbouring villages (Trial Judgement, para. 1667). In Kotlina/Kotlinë, the Trial Chamber found that on 24 March 1999, shelling by Serbian forces caused the male population to flee, and women, children and elderly men were put on military trucks and driven to the town of Kačanik/Kaçanik. The Trial Chamber found that Serbian forces had blown up 22 men captured in wells that had been mined. Out of fear, the remaining 48 villagers left the village. In addition, Serbian forces specifically ordered women and children to leave (Trial Judgement, para. 1669). In Kačanik/Kaçanik, the Trial Chamber held that Kosovo Albanian residents were forced to leave the town on 27 and 28 March 1999 due to shelling and shooting carried out by Serbian forces, and ultimately deported. There was no evidence of return fire. A pregnant woman died after being shot while walking through the courtyard of her house (Trial Judgement, paras 1127-1130, 1670). In Donja Sudimlja/Studime-e-Poshtme, the Trial Chamber found that Kosovo Albanian villagers left the village in late March 1999 because of shelling by Serbian forces, that Serbian police told the remaining residents to leave the village within 15 minutes and that shooting was directed at civilian houses (Trial Judgement, para. 1676).

[1728] In Velika Kruša/Krushë-e-Vogël, the Trial Chamber found that 3,000-4,000 Kosovo Albanians were forcibly transferred on 25 March 1999 (Trial Judgement, para. 1622). In Pirane/Piranë, the Trial Chamber held that 2,700 Kosovo Albanians were forcibly transferred on 25 March 1999 (Trial Judgement, paras 582-586, 1628). In Pecane/Peqan, the Trial Chamber found that the Kosovo Albanian population of this village was displaced in March 1999 (Trial Judgement, paras 704-707, 1639). In Vata/Vataj, the Trial Chamber held that the Kosovo Albanian residents of the village were deported in April 1999 (Trial Judgement, para. 1671).

[1729] The Trial Chamber found in relation to the Serbian forces' presence in Vesekovce/Vesekoc and their shelling of Slakovce/Sllakovc on 1 May 1999, that on the following day, no less than 30,000 Kosovo Albanians headed towards Vučitrn/Vushtrri in a convoy which came under Serbian shelling. Shortly thereafter, Serbian forces specifically directed the convoy to the Agricultural Cooperative in Vučitrn/Vushtrri town. The Trial Chamber considered that the KLA, who were present in the area, had told the villagers that they could no longer protect

Additionally, Đorđević merely notes instances of shelling of towns and villages, but fails to provide any examples of when an "over-expansive" definition of civilian was applied.[1730] In light of the overwhelming evidence that entire towns and villages were displaced, the pattern of the attacks, and the coordinated action of the Serbian forces involved, the Appeals Chamber finds that Đorđević has failed to show that the Trial Chamber erred in concluding that Serbian forces targeted Kosovo Albanian civilians and that these attacks were the "dominant and compelling" reason causing the civilians to flee, resulting in the crimes of deportation and other inhumane acts (forcible transfer).[1731]

525. The Appeals Chamber is also not convinced by Đorđević's assertion that the Trial Chamber's assessment of "targeting" was "polluted" by the notion of a continuous combat function.[1732] Đorđević alleges that, based on this notion, the Trial Chamber erroneously considered the presence of civilian clothing in determining the status of an individual.[1733] The Appeals Chamber, however, finds that the Trial Chamber reasonably took into account numerous factors, including but not limited to the presence of civilian clothes, in concluding that those killed had no combat function at the time of their death.[1734] Đorđević also has not shown that the Trial Chamber

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them, but that it was the Serbian forces who had ordered them to go to Vučitrn/Vushtrri town, shelling the convoy and killing some men (Trial Judgement, para. 1677).

1730 See Đorđević Appeal Brief, para. 316.

1731 See *supra*, paras 173-176, 194-207.

1732 See Đorđević Appeal Brief, paras 310-311.

1733 Đorđević Appeal Brief, paras 312-313.

1734 See *supra*, paras 522-523. The Appeals Chamber has previously accepted a Trial Chamber's reliance on the clothes of a victim when determining that he was not actively participating in hostilities at the time of his death (see *Boškoski and Tarčulovski* Appeal Judgement, para. 81) ("The Appeals Chamber considers that the Trial Chamber's conclusion that Rami Jusufi had been an 'unarmed civilian' not taking part in the hostilities at the time of his death was based on its careful evaluation and analysis of the evidence. The Trial Chamber explained [...] its reasons for its reliance on certain pieces of evidence [...], finding *inter alia* that Rami Jusufi was in civilian clothes at the time of his death" (citations omitted).) Đorđević also does not show that the Trial Chamber erred in considering the relevant evidence in the following municipalities. Slatina/Slatinë: the Trial Chamber found that Mahmut Caka, Hebib Lami, Brahim Lami and Rraman Lami were captured by VJ soldiers and killed on 13 April 1999; that two of the bodies had been mutilated; and that they were unarmed (Trial Judgement, paras 1138, 1747). Izbica/Izbicë: the Trial Chamber held that forensic evidence proved that the victims who were killed on 28 March 1999 and later exhumed at Petrovo Selo PJP Centre, were detained by Serbian forces at the time of their death (Trial Judgement, paras 627, 633-634, 1727). Meja/Mejë and Korenicë/Korenica: the Trial Chamber found that no evidence suggested that the victims who were murdered on 27-28 April 1999 were armed at that time, or taking an active part in the hostilities, or that there was fighting between Serbian forces and the KLA (Trial Judgement, paras 990-991, 1738-1739). The four civilians who were murdered during the Operation Reka in a village next to Ramoc were found to be hostages in the captivity of Serbian forces (Trial Judgement, paras 976, 992, 1738-1739). Trnje/Tërrnje: the Trial Chamber found that the victims were not armed or taking an active part in the hostilities when they were killed in March 1999 (Trial Judgement, paras 708-709). Bela Crkva/Bellacërkë: the Trial Chamber held that about 40 unarmed victims were murdered at the Belaja Bridge in late March 1999 (Trial Judgement, paras 472, 527, 1711). Račak/Raçak: the Trial Chamber found that 20 to 24 of the about 45 victims appeared to have been shot from a close range on 15 January 1999; that one victim had been decapitated; and that there were women and a child among the victims (Trial Judgement, paras 416, 1920). Danube River: The Trial Chamber considered that many of the bodies that were found in a truck that was floating in the Danube showed the signs of blunt objects and large blades; that the hands of one individual were tied; and that there were 10 women and two

erred by not considering the "large numbers of individuals who fought for or assisted the KLA, but who did not have a continuous combat function".[1735] Contrary to Đorđević's assertion, the Trial Chamber did in fact acknowledge that the KLA was composed of both permanent members and other supporters,[1736] but found that the vast majority of crimes occurred in situations in which there was little or no KLA activity.[1737] The Appeals Chamber considers that the Trial Chamber reasonably concluded that any difficulties in distinguishing between suspected KLA members and civilians could not explain the deportation and forcible transfer of entire villages of Kosovo Albanians.[1738] Accordingly, the Appeals Chamber is satisfied that the Trial Chamber did not err in its determination of the protected status of individuals or in its assessment of the proportionality of the attack.[1739]

526. Finally, the Appeals Chamber is also not convinced by Đorđević's assertion that the Trial Chamber's findings with respect to the definition of civilian "jeopardises the conclusions that a JCE existed".[1740] As described above, the Appeals Chamber considers that the Trial Chamber did not apply an overly broad definition of civilian. It therefore did not err in its determination of the protected status of victims and assessment of the proportionality of the attacks.[1741] In this context, the Appeals Chamber notes that Đorđević did not identify any specific error with respect to the JCE. His argument is therefore dismissed.

D. Conclusion

527. For the foregoing reasons, the Appeals Chamber dismisses Đorđević's twelfth ground of appeal in its entirety.

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children among them (Trial Judgement, paras 1300, 1305, 1311). Suva Reka/Suharekë: The Trial Chamber considered that Jashar Berisha was murdered when he was unarmed and detained by members of the Serbian forces (Trial Judgement, paras 678, 683, 1720, 1723). Furthermore, contrary to Đorđević's submission (Đorđević Appeal Brief, para. 313, fn. 532), the Trial Chamber did not hold him responsible for the murder of the following victims who were found to have been killed in civilian clothes: Milaim Loku and Emrlah Kuci (Trial Judgement, paras 1111, 2096; Trial Judgement, Annex H). Furthermore, contrary to Đorđević's submission, the Trial Chamber did not find Đorđević guilty of having murdered: (i) victims in Prizren municipality (Trial Judgement, paras 1268, 1270, 1705); (ii) individuals who had their bodies disinterred by Witness K72 in Đakovica/Gjakovë municipality (Trial Judgement, paras 1277-1278, 1281-1282, 1285); (iii) individuals who were buried in two mass grave sites at the Petrovo Selo PJP Centre in April 1999 (Trial Judgement, paras 1353, 1355, 1507, 1730-1741, 1753); (iv) individuals who were murdered in Celina/Celinë (Trial Judgement, paras 532, 1705); and (v) individuals who were found dead in a truck in the Orahovac/Rahovec area (Trial Judgement, paras 553, 1705, 1714-1719, 1753).

[1735] Đorđević Appeal Brief, para. 314.

[1736] Trial Judgement, para. 2058, referring to Trial Judgement, paras 1539-1540. See also Trial Judgement, paras 2059-2061.

[1737] Trial Judgement, para. 2065.

[1738] Trial Judgement, para. 2067.

[1739] See also *supra*, paras 93, 97-99, 102, 107-109.

[1740] Đorđević Appeal Brief, para. 315.

[1741] See *supra*, paras 522-525.

XIII. ĐORĐEVIĆ'S THIRTEENTH GROUND OF APPEAL: ALLEGED ERROR WITH REGARD TO THE CRIME OF DEPORTATION

A. Introduction

528. The Trial Chamber convicted Đorđević for the crimes of deportation (Count 1) and persecutions through the acts of deportation (Count 5) as crimes against humanity.[1742] The Trial Chamber concluded that from 24 March to 20 June 1999, at least 200,000 Kosovo Albanians were deported from a number of towns and villages in Kosovo to locations in Albania, FYROM, and Montenegro.[1743] In reaching its conclusion, the Trial Chamber found, *inter alia*, that the displacement of Kosovo Albanians from Peć/Pejë on 27 and 28 March 1999[1744] and from Kosovska Mitrovica/Mitrovicë on 4 April 1999[1745] to Montenegro constituted displacement across a *de facto* border and thus met the requirement for deportation.[1746] The Trial Chamber also found that numerous other individuals, who did not cross the *de facto* border, were victims of other inhumane acts (forcible transfer) and that these acts were of a similar gravity to the acts of deportation.[1747]

B. Arguments of the parties

529. Đorđević submits that the Trial Chamber erred in concluding that individuals who were displaced from Kosovo to Montenegro crossed a *de facto* border as required for the crime of deportation.[1748] He argues that the crime of deportation only applies to instances where persons are forcibly displaced to another country or occupied territory[1749] and challenges the Trial Chamber's assertion that "the Tribunal's jurisprudence has firmly established that the offence of deportation may be established if there is a displacement across a *de facto* border".[1750] Đorđević contends that the essence of deportation is that individuals be forcibly displaced to the territory of another country and, in the present case, the FRY merely moved citizens within its own borders.[1751] He further asserts that the Trial Chamber: (i) erroneously considered a number of factors in determining that a

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1742 Trial Judgement, paras 1700-1701, 1704, 2193-2194, 2230.
1743 Trial Judgement, para. 1700.
1744 Trial Judgement, paras 1642, 1701.
1745 Trial Judgement, paras 1646, 1701.
1746 Trial Judgement, para. 1683.
1747 Trial Judgement, paras 1702-1703.
1748 Đorđević Appeal Brief, paras 320-328.
1749 Đorđević Appeal Brief, para. 321; Appeal Hearing, 13 May 2013, AT. 95-97, referring to *Stakić* Appeal Judgement, para. 300.
1750 Đorđević Appeal Brief, para. 322, citing Trial Judgement, para. 1683.
1751 Đorđević Reply Brief, paras 97, 99. See also Đorđević Appeal Brief, para. 328; Đorđević Reply Brief, paras 97, 99; Appeal Hearing, 13 May 2013, AT. 95, referring to *Stakić* Appeal Judgement, para. 300.

de facto border existed including serious hardship and ease of control over Kosovo;[1752] (ii) failed to take into account that the FRY, which consisted of the Republics of Serbia and Montenegro, was a sovereign nation;[1753] and (iii) erred in law when determining that the crime of deportation can be satisfied by the displacement of individuals across a *de facto* border.[1754] Đorđević submits that the Trial Chamber's error should result in the reversal of his convictions of the crime of deportation (Count 1) and the crime of persecutions (Count 5) to the extent that they relate to displacements from Kosovo to Montenegro.[1755]

530. The Prosecution responds that the forced displacement of individuals from Kosovo to Montenegro constitutes deportation.[1756] It contends that the Trial Chamber's factual findings support its conclusion that the boundary between Kosovo and Montenegro constituted a *de facto* border and thereby satisfied the requirement for a finding of deportation.[1757] The Prosecution maintains that, although the Assembly of Serbia officially revoked Kosovo's autonomous status in 1990 and Kosovo failed to obtain international recognition as a sovereign entity, it remained a *de facto* autonomous region throughout the 1990s.[1758] The Prosecution further contends that the same underlying acts also constitute the crimes of other inhumane acts (forcible transfer) and persecutions.[1759] It therefore argues, in the alternative, that if Đorđević's ground of appeal is granted, the Appeals Chamber should enter a conviction for the crimes of other inhumane acts (forcible transfer) and persecutions.[1760] Moreover, the Prosecution points out that it is immaterial for the purposes of the crime of persecutions whether the underlying act amounts to deportation or forcible transfer as long as the act was carried out with the requisite discriminatory intent, which was established in this case.[1761]

531. Đorđević replies that the Indictment neither charges the crime of other inhumane acts (forcible transfer), nor the crime of persecutions in relation to the displacement of the population

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[1752] Đorđević Appeal Brief, para. 326.
[1753] Đorđević Appeal Brief, paras 324-326; Đorđević Reply Brief, para. 97; Appeal Hearing, 13 May 2013, AT. 97-98.
[1754] Đorđević Appeal Brief, para. 322. See Đorđević Appeal Brief, paras 320-321, 327.
[1755] Đorđević Appeal Brief, para. 328.
[1756] Prosecution Appeal Brief, paras 292, 294.
[1757] Prosecution Response Brief, para. 295, referring to Trial Judgement, paras 21-30. See also Prosecution Appeal Brief, paras 293-294.
[1758] Prosecution Response Brief, para. 295.
[1759] Appeal Hearing, 13 May 2013, AT. 134.
[1760] Appeal Hearing, 13 May 2013, AT. 133-134, referring to *Stakić* Appeal Judgement, para. 321.
[1761] Appeal Hearing, 13 May 2013, AT. 134, referring to *Naletilić and Martinović* Appeal Judgement, para. 154.

from Kosovo to Montenegro.[1762] He therefore submits that he should not be convicted for these crimes.[1763]

C. Analysis

532. The Trial Chamber correctly observed that the crime of deportation can be established, in certain circumstances, by the displacement of individuals across a *de facto* state border.[1764] The Appeals Chamber in *Stakić* determined that "whether a particular *de facto* border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law".[1765]

533. The Appeals Chamber observes that the Trial Chamber recognised the territorial sovereignty of the FRY and the lack of a *de jure* border between Montenegro and Kosovo.[1766] In reaching its conclusion that a *de facto* border existed between Montenegro and Kosovo, the Trial Chamber considered: (i) the degree of autonomy enjoyed by Kosovo; (ii) Montenegro's status as a republic within the FRY; and (iii) the existence of "an armed conflict between forces of the FRY and Serbia on one hand and the KLA on the other".[1767] The Trial Chamber also considered that the displacement of Kosovo Albanians from Kosovo to Montenegro would have the same effect of "serious hardship" as the displacement across a state border, and that the displacement of Kosovo Albanians out of Kosovo would have made it easier for FRY and Serbian authorities to control Kosovo.[1768]

534. However, in finding that a *de facto* border existed between Montenegro and Kosovo, the Trial Chamber failed to articulate the basis in customary international law upon which it found that a *de facto* border could be established in these circumstances.[1769] The Appeals Chamber considers this to constitute an error of law. Consequently, the Appeals Chamber will assess whether, in light of customary international law, the circumstances of this case support the finding that a *de facto* border existed within the territory of the FRY, between Kosovo and Montenegro.

[1762] Appeal Hearing, 13 May 2013, AT. 169-170.
[1763] Appeal Hearing, 13 May 2013, AT. 169-170.
[1764] Trial Judgement, para. 1604, citing *Stakić* Appeal Judgement, paras 278, 288-303, *Krajišnik* Appeal Judgement, para. 304.
[1765] *Stakić* Appeal Judgement, para. 300. See Trial Judgement, para. 1604.
[1766] See Trial Judgement, para. 1683.
[1767] Trial Judgement, para. 1683.
[1768] Trial Judgement, para. 1683.
[1769] Trial Judgement, para. 1683. See *Stakić* Appeal Judgement, para. 300.

535. The Appeals Chamber in *Stakić* previously undertook a survey of customary international law pertaining to the crime of deportation. The various sources considered in *Stakić*, however, do not provide any examples of an instance in which a displacement of persons from an autonomous region within a federal state to another republic within the same federal state constituted deportation.[1770] Additional studies of customary international law regarding the crime of deportation were also undertaken in Judge Schomburg's Partly Dissenting Opinion in the *Naletilić and Martinović* Appeal Judgement and Judge Shahabuddeen's Partly Dissenting Opinion in the *Stakić* Appeal Judgement.[1771] The authorities cited in these opinions, however, also do not address the issue of forcible displacement of individuals within the confines of a sovereign state by the government of that state but, instead, involve the presence of an occupying power or a contested border between two states.[1772] The Appeals Chamber observes that the presence of an occupying power or of a contested border between states is not at issue in the present case.[1773] The Appeals Chamber has found no support in customary international law for the proposition that a *de facto* border can be found within the confines of a sovereign state even where a certain degree of autonomy is exercised by portions of that state. Accordingly, the Trial Chamber's finding that a *de facto* border existed based on the degree of autonomy enjoyed by Kosovo's or Montenegro's status as a republic within the state of the FRY finds no support in customary international law.[1774]

536. In addition, the other factors considered by the Trial Chamber do not support a finding on the existence of a *de facto* border in customary international law. The Appeals Chamber does not intend to diminish the importance of the "serious hardship"[1775] placed upon Kosovo Albanians forcibly displaced from Kosovo to Montenegro, as considered by the Trial Chamber, nor does it deny the presence of an armed conflict or the conclusion by the Trial Chamber that the displacement of Kosovo Albanians from Kosovo would have made it easier for FRY and Serbian

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[1770] See *Stakić* Appeal Judgement, paras 290-302. The Appeals Chamber instead defined a *de facto* border in the negative, concluding that "constantly changing frontlines [...] are neither *de jure* state borders nor the *de facto* borders of occupied territory, either of which would automatically be sufficient to amount to deportation under customary international law" (*Stakić* Appeal Judgement, para. 301) (citations omitted).

[1771] See *Naletilić and Martinović* Appeal Judgement, Separate and Partly Dissenting Opinion of Judge Schomburg, paras 3-33; *Stakić* Appeal Judgement, Partly Dissenting Opinion of Judge Shahabuddeen, paras 19-76.

[1772] See *Naletilić and Martinović* Appeal Judgement, Separate and Partly Dissenting Opinion of Judge Schomburg, para. 12, citing the *RuSHA* case, pp 126-127, 139. The Appeals Chamber further observes that Judge Shahabuddeen, in his Partly Dissenting Opinion, refers to the *Cyprus v. Turkey* case to suggest that the crossing of a front line could constitute deportation within customary international law (*Stakić* Appeal Judgement, Partly Dissenting Opinion of Judge Shahabuddeen, para. 23, citing *Cyprus v. Turkey*, European Commission of Human Rights, European Human Rights Reports, Vol. 4 (1982), pp 482-528 ("*Cyprus v. Turkey* case"), p. 520). The *Cyprus v. Turkey* case, however, also involves occupying forces which distinguishes it from the present case (see *Stakić* Appeal Judgement, Partly Dissenting Opinion of Judge Shahabuddeen, para. 23).

[1773] See Trial Judgement, para. 1683.

[1774] See Trial Judgement, para. 1683.

authorities to control Kosovo.[1776] However, the Appeals Chamber finds no basis in customary international law, including in any of the materials considered by the *Stakić* Appeal Judgement or in the Partly Dissenting Opinions of Judge Schomburg and Judge Shahabuddeen, to infer the presence of a *de facto* border in these circumstances.[1777]

537. The Appeals Chamber is therefore not satisfied that Kosovo Albanians crossed a *de facto* border during their forced displacement from Kosovo to Montenegro and finds that the Trial Chamber erred in concluding that the crime of deportation was committed. The Appeals Chamber therefore overturns the Trial Chamber's findings on Đorđević's responsibility for the crimes of deportation (Count 1) and persecutions through deportation (Count 5) with respect to the displacements of individuals to Montenegro from Peć/Pejë on 27 and 28 March 1999[1778] and from Kosovska Mitrovica/Mitrovicë on 4 April 1999.[1779]

538. The Appeals Chamber now turns to the Prosecution's submission that, in the event the Appeals Chamber grants Đorđević's thirteenth ground of appeal, it should find that the displacement of individuals from Kosovo to Montenegro amounts to the crime of other inhumane acts (forcible transfer) and the crime of persecutions.[1780] The Appeals Chamber recalls that forcible transfer, like deportation, "entail[s] the forcible displacement of persons from the area in which they are lawfully present, without grounds permitted under international law"[1781] but that it does so in the context of the displacement of individuals within national boundaries.[1782]

539. The Appeals Chamber, however, observes that the Indictment with regard to incidents of other inhumane acts (forcible transfer) in paragraph 73 refers exclusively and explicitly to displacement *within the territory of Kosovo*.[1783] Accordingly, the Appeals Chamber finds that the forcible displacement of individuals from Kosovo to Montenegro was not pleaded in the Indictment as other inhumane acts (forcible transfer) (Count 2). The Appeals Chamber therefore cannot enter a conviction for the crime of other inhumane acts (forcible transfer) (Count 2).

[1775] Trial Judgement, para. 1683.
[1776] See Trial Judgement, para. 1683.
[1777] See *supra*, para. 535.
[1778] See Trial Judgement, paras 1642, 1701.
[1779] Trial Judgement, paras 1649, 1701.
[1780] Appeal Hearing, 13 May 2013, AT. 133-134. See *supra*, para. 530.
[1781] *Krajišnik* Appeal Judgement, para. 308.
[1782] *Stakić* Appeal Judgement, para. 317.
[1783] "With respect to those Kosovo Albanians who were internally displaced *within the territory of Kosovo*, the Prosecutor re-alleges and incorporates by reference paragraphs 16-33, 60-64, and 71-72 [of the Indictment]" (Indictment, para. 73) (emphasis added).

540. With regard to the crime of persecutions, the Appeals Chamber considers that the underlying act of forcible displacement committed with a discriminatory intent may constitute the crime of persecutions.[1784] The Indictment alleges the crime of persecutions through forcible transfer and deportation as underlying acts in relation to all of the locations set out in paragraph 72 of the Indictment.[1785] The Indictment does not in this regard contain an explicit limitation of forcible transfer to displacements *"within the territory of Kosovo"* as it does in relation to the crime of other inhumane acts (forcible transfer) (Count 2).[1786]

541. While the Indictment makes a general reference to displacements to Albania, FYROM, and Montenegro in paragraph 29,[1787] it contains no explicit reference to Montenegro in relation to any of the listed locations.[1788] Furthermore, this general allegation was not elaborated in relation to Montenegro in the Prosecution Pre-Trial Brief.[1789] The portions of the Indictment relevant to Peć/Pejë and Kosovska Mitrovica/Mitrovicë, for which the Trial Chamber found displacements to Montenegro are paragraphs 72(e) and (f) of the Indictment.[1790] These paragraphs describe displacements to the Albanian border, but do not refer to any displacements to Montenegro, nor do they contain a general reference to displacements outside of Kosovo.[1791] The Appeals Chamber therefore considers that the Indictment does not set out the material facts with regard to any displacement to Montenegro. The Appeals Chamber therefore considers that displacement to Montenegro was not charged. The Appeals Chamber notes that the jurisprudence provides that the "final trial brief or closing arguments may assist in some instances in determining to what extent the

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[1784] See *Deronjić* Judgement on Sentencing Appeal, para. 109; *Kvočka et al.* Appeal Judgement, paras 320, 454; *Blaškić* Appeal Judgement, para. 131; *Krnojelac* Appeal Judgement, para. 185; *Vasiljević* Appeal Judgement, para. 113.

[1785] Indictment, paras 76-77. See *infra*, paras 692-694.

[1786] Indictment, paras 76-77. *Cf.* Indictment, para. 73.

[1787] Indictment, para. 29. Relevant part of paragraph 29 of the Indictment provides:

> Some of these internally displaced persons remained inside the province of Kosovo throughout the time period relevant to this indictment and many persons died as a consequence of the harsh weather conditions, insufficient food, inadequate medical attention and exhaustion. Others eventually crossed over one of the Kosovo borders into Albania, Macedonia, Montenegro, or crossed the provincial boundary between Kosovo and Serbia. Forces of the FRY and Serbia controlled and coordinated the movements of many internally displaced Kosovo Albanians until they were finally expelled from Kosovo.

[1788] Indictment, para. 29. Relevant parts of paragraph 29 of the Indictment provides:

> Some of these internally displaced persons remained inside the province of Kosovo throughout the time period relevant to this indictment and many persons died as a consequence of the harsh weather conditions, insufficient food, inadequate medical attention and exhaustion. Others eventually crossed over one of the Kosovo borders into Albania, Macedonia, Montenegro, or crossed the provincial boundary between Kosovo and Serbia. Forces of the FRY and Serbia controlled and coordinated the movements of many internally displaced Kosovo Albanians until they were finally expelled from Kosovo.

[1789] See Prosecution Pre-Trial Brief, paras 230-231.

[1790] See Trial Judgement, paras 1642, 1646, 1701.

[1791] Indictment, paras 72(e) and (f).

accused was put on notice of the Prosecution's case".[1792] Although Đorđević mentioned the displacement of the Kosovo civilian population to, *inter alia*, Montenegro, in his Final Trial Brief[1793], he did so in order to challenge the existence of any common plan to "modify the ethnic balance" in Kosovo, and his involvement therein.[1794] In these circumstances, the Appeals Chamber finds that there is no indication that Đorđević was on notice that he was charged with the crime of deportation to Montenegro.

D. Conclusion

542. In light of the foregoing, the Appeals Chamber grants Đorđević's thirteenth ground of Appeal and overturns the Trial Chamber's findings regarding Đorđević's responsibility for the crime of deportation (Count 1) and persecutions through deportation (Count 5) with respect to the displacements of individuals to Montenegro from Peć/Pejë on 27 and 28 March 1999,[1795] and from Kosovska Mitrovica/Mitrovicë on 4 April 1999.[1796] The impact of these findings on sentencing, if any, will be considered later in this Judgement.[1797]

[1792] *Simba* Appeal Judgement, para. 64.
[1793] Đorđević Closing Brief, paras 690-694.
[1794] Đorđević Closing Brief, para. 692.
[1795] See Trial Judgement, paras 1642, 1701.
[1796] See Trial Judgement, para. 1646, 1701.
[1797] See *infra*, paras 976-980.

XIV. ĐORĐEVIĆ'S FOURTEENTH GROUND OF APPEAL: ALLEGED ERRORS CONCERNING THE *MENS REA* FOR MURDER

543. The Trial Chamber found that the crime of murder both as a crime against humanity (Count 3) and as a violation of the laws or customs of war (Count 4) was established.[1798] The Trial Chamber articulated and applied the following elements for the crime of murder pursuant to both Articles 3 and 5 of the Statute:

> a) the death of a victim (*actus reus*), although it is not necessary to establish that the body of the deceased person has been recovered;
>
> b) that the death was the result of an act or an omission of the perpetrator; it is sufficient that the "perpetrator's conduct contributed substantially to the death of the person"; and
>
> c) that the perpetrator, at the time of the act or omission, intended to kill the victim or, in the absence of such a specific intent, in the knowledge that death was a probable consequence of the act or omission (*mens rea*). It has been found that negligence and gross negligence do not form part of indirect intent.[1799]

A. Arguments of the parties

544. Đorđević submits that as a matter of law the element of premeditation is required to establish the *mens rea* for murder under Articles 3 and 5 of the Statute.[1800] He submits that there is a discrepancy between the use of the term "murder" in the English version of Article 5 of the Statute and "*assassinat*" in the French text.[1801] According to Đorđević, this discrepancy should be resolved by adopting the approach of certain ICTR trial chambers which required premeditation in order to establish murder as a crime against humanity.[1802] Đorđević contends that the same standard should apply by analogy to murder as a "war crime".[1803] He concedes that premeditation was found by the Trial Chamber in relation to a number of crimes sites, but submits that it has not been established in relation to certain other crime sites.[1804] Accordingly, he requests that the Appeals Chamber quash

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[1798] Trial Judgement, para. 1753. See Trial Judgement, paras 1709-1752.
[1799] Trial Judgement, para. 1708 (citations omitted).
[1800] Đorđević Appeal Brief, paras 330-331. See Đorđević Appeal Brief, paras 332-342; Đorđević Reply Brief, para. 101.
[1801] Đorđević Appeal Brief, paras 330-331.
[1802] Đorđević Appeal Brief, paras 335-337, 341, referring to *Kayishema and Ruzindana* Trial Judgement, paras 137-140; *Muhimana* Trial Judgement, para. 569; *Semanza* Trial Judgement, paras 334-339; *Bagilishema* Trial Judgement, para. 84.
[1803] Đorđević Appeal Brief, para. 331.
[1804] Đorđević Appeal Brief, paras 342-343.

his convictions in relation to those sites where premeditation was not established and reduce his sentence.[1805]

545. The Prosecution responds that the jurisprudence of the Tribunal does not require premeditation in order to satisfy the *mens rea* for murder under Articles 3 and 5 of the Statute.[1806] It contends that the Appeals Chamber has not disturbed a "significant number" of trial judgements which have not required premeditation to establish the crime of murder under Article 5(a) of the Statute.[1807] Although some ICTR trial chambers have included premeditation as a requirement of the *mens rea* for murder as a crime against humanity, the Prosecution submits that Đorđević neither demonstrates an error in law nor provides convincing reasons for the Appeals Chamber to depart from the jurisprudence of the Tribunal.[1808]

B. Analysis

546. At the outset, the Appeals Chamber notes that both the ICTY and ICTR Statutes include the crime of murder as a crime against humanity.[1809] Articles 5 and 3 of the French versions of the ICTY and ICTR Statutes, respectively, list "*assassinat*" as one of the underlying acts constituting a crime against humanity, while the English versions specify "murder".[1810] The Appeals Chamber recalls that the term "*assassinat*" has "a very precise meaning in French national law" requiring premeditation,[1811] whereas the term murder is "clearly understood and well defined in the national law of every State" and requires no further explanation.[1812] Turning to murder as a violation of the laws and customs of war, the Appeals Chamber notes that Article 4 of the ICTR Statute prohibits

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[1805] Đorđević Appeal Brief, paras 342-343. Đorđević argues that there was no evidence of premeditation in relation to the following crimes sites: (i) Bela Crkva/Bellacërkë on 25 March 1999; (ii) Mala Kruša/Krusë-e-Vogël on 25 March 1999; (iii) Suva Reka/Suharekë town on 26 March 1999; (iv) Đakovica/Gjakovë on 1-2 April 1999; and (v) Korenica/Koreničë and Meja/Mejë on 27-28 April 1999 (Đorđević Appeal Brief, para. 342).

[1806] Prosecution Response Brief, paras 296, 298, 302.

[1807] Prosecution Response Brief, paras 299-300.

[1808] Prosecution Response Brief, para. 302.

[1809] Aricle 5 of the ICTY Statute; Article 3 of the ICTR Statute.

[1810] Aricle 5 of the ICTY Statute; Article 3 of the ICTR Statute.

[1811] *Blaškić* Trial Judgement, para. 216; fn. 414, citing Article 221-3 of the French Criminal Code which refers to "*assassinat*" as "*meurtre commis avec préméditation*".

[1812] 1996 ILC Report, p. 48. See *Kupreškić et al.* Trial Judgement, fn. 821, para. 560; *Blaškić* Trial Judgement, para. 217; *Kordić and Čerkez* Trial Judgement, fn. 316. The Appeals Chamber notes that the drafting history of the IMT Charter reveals that the French delegation did not suggest the inclusion of the term "*assassinat*" when negotiating the jurisdiction of the IMT (see "Observations of the French Delegation on American Draft, June 28, 1945", in Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to International Conference on Military Trials* (U.S. Department of State, 1949) ("Jackson Report"), pp 89-91; "Draft Article on Definition of "Crimes", Submitted by the French Delegation, July 19, 1945" in Jackson Report, p. 293; "Revised Definition of "Crimes", Prepared by British Delegation and Accepted by French Delegation, July 28, 1945" in Jackson Report, pp 390-391).

"violence to life [...], in particular murder", and the French version uses the term "*meurtre*".[1813] Article 3 of the ICTY Statute, on the other hand, does not explicitly list murder as one of the violations of the laws or customs of war.[1814] It is however firmly established in the jurisprudence of the Tribunal that Article 3 of the ICTY Statute encompasses murder.[1815]

547. The Appeals Chamber notes that the terms "*meurtre*" and "*assassinat*" have been expressly considered by a number of early trial judgements.[1816] For instance, the *Jelisić* Trial Chamber concluded that it was appropriate to adopt the term "murder" in the English text "as the accepted term in international custom".[1817] It reached this conclusion after considering the *Akayesu* case, Article 7(1)(a) of the ICC Statute, and Article 18 of the International Law Commission Code of Crimes Against the Peace and Security of Mankind; all of which refer to the term murder ("*meurtre*").[1818] After considering the same sources, the *Blaškić* Trial Chamber similarly concluded that it is murder, and not premeditated murder, that constitutes the underlying offence of a crime against humanity under the ICTY Statute.[1819] In *Kordić and Čerkez*, the Trial Chamber, referring to the *Blaškić* case, stated that:

> [a]lthough there has been some controversy in the International Tribunal's jurisprudence as to the meaning to be attached to the discrepancy between the use of the word "murder" in the English text of the Statute and the use of the word "*assassinat*" in the French text, it is now settled that premeditation is not required.[1820]

548. While the Appeals Chamber has not expressly considered the terms *"meurtre"* and "*assassinat*", the case law of the ICTY has been consistent in not requiring premeditation as one of the elements of the crime of murder either as a violation of the laws or customs of war or as a crime against humanity.[1821] The elements of the crime of murder as a war crime pursuant to Article 3 of the Statute have been established by the ICTY Appeals Chamber as follows: (i) the death of a victim taking no active part in hostilities; (ii) the death was the result of an act or omission of the

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[1813] Article 4 of the ICTR Statute.
[1814] Article 3 of the ICTY Statute.
[1815] See *Čelebići* Appeal Judgement, para. 136; *Tadić* October 1995 Appeal Jurisdiction Decision, paras 87, 89. The Appeals Chamber observes that Article 2 of the ICTY Statute lists "wilful killing" as one of the grave breaches of the Geneva Conventions of 1949 prohibited under the Statute, which is translated in the French version as "*homicide intentionel*".
[1816] *Kordić and Čerkez* Trial Judgement, para. 235; *Blaškić* Trial Judgement, para. 216; *Jelisić* Trial Judgement, para. 51; *Krstić* Trial Judgement, paras 484-485, fn. 1119; *Brđanin* Trial Judgement, para. 386, fns 911-912.
[1817] *Jelisić* Trial Judgement, para. 51.
[1818] *Jelisić* Trial Judgement, para. 51, referring to *Akayesu* Trial Judgement, para. 588, ICC Statute, Article 7(1)(a), Draft Code of Crimes against the Peace and Security of Mankind, in *1996 ILC Report*, Article 18.
[1819] *Blaškić* Trial Judgement, para. 216. See also *Kordić and Čerkez* Trial Judgement, paras 235-236.
[1820] *Kordić and Čerkez* Trial Judgement, para. 235, referring to *Blaškić* Trial Judgement, para. 216. See also *Kordić and Čerkez* Trial Judgement, para. 236.
[1821] *D. Milošević* Appeal Judgement, paras 108-109; *Kvočka et al.* Appeal Judgement, para. 261; *Kordić and Čerkez* Appeal Judgement, paras 37, 113; *Čelebići* Appeal Judgement, para. 423.

perpetrator(s) or of one or more persons for whom the accused is criminally responsible; and (iii) the perpetrator intended to kill the victim or wilfully harm or inflict serious injury with reasonable knowledge that the attack was likely to result in death.[1822] These elements have been established to be identical to those required for murder as a crime against humanity under Article 5 of the Statute, with the exception that the general *chapeau* requirements for each be met.[1823]

549. The Appeals Chamber further notes that it has consistently upheld convictions for murder where the relevant trial chambers have not required premeditation in order to satisfy the elements of murder both under Articles 3 and 5 of the Statute.[1824] Contrary to Đorđević's assertion, the Appeals Chamber in *Kupreškić et al.* also affirmed convictions of murder as a crime against humanity on the basis of *mens rea* not requiring premeditation.[1825] The Trial Chamber in *Kupreškić et al.* articulated that the "constituent elements of murder under Article 5(a) of the Statute are well known"[1826] and further stated that "the requisite *mens rea* for murder under Article 5(a) is the intent to kill or the intent to inflict serious injury in reckless disregard of human life".[1827] While setting out the legal elements, the Trial Chamber in *Kupreškić et al.* noted that intentional and premeditated killing had been articulated by the Trial Chamber in *Kayishema*.[1828] However, it did not require premeditation when it applied the legal standard of murder under Article 5 of the Statute.[1829]

550. The ICTR Appeals Chamber has established the same elements as those articulated by the ICTY Appeals Chamber in relation to the crime of murder as a violation of the laws or customs of war.[1830] Premeditation is, therefore, *not* an element of murder as a war crime under Article 4 of the ICTR Statute.[1831] The ICTR Appeals Chamber has, in some cases, affirmed convictions for murder as a crime against humanity under Article 3 of the ICTR Statute without requiring

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[1822] *Kvočka et al.* Appeal Judgement, para. 261; *Kordić and Čerkez* Appeal Judgement, para. 37; *Čelebići* Appeal Judgement, para. 423.
[1823] See *Kordić and Čerkez* Appeal Judgement, para. 113, citing *Kordić and Čerkez* Trial Judgement, para. 236.
[1824] See *e.g. D. Milošević* Appeal Judgement, p. 128; *D. Milošević* Trial Judgement, para. 931; *Kordić and Čerkez* Appeal Judgement, pp 295-297; *Kordić and Čerkez* Trial Judgement, para. 236; *Stakić* Appeal Judgement, p. 142; *Stakić* Trial Judgement, para. 587; *Mrkšić and Šljivančanin* Appeal Judgement, p. 169; *Mrkšić et al.* Trial Judgement, para. 486; *Kvočka et al.* Appeal Judgement, p. 242; *Kvočka et al.* Trial Judgement, para. 132; *Kupreškić et al.* Appeal Judgement, pp 170-171; *Kupreškić et al.* Trial Judgement, paras 560-561; *Krstić* Appeal Judgement, p. 87; *Krstić* Trial Judgement, para. 485; *Limaj et al.* Appeal Judgement, p. 116; *Limaj et al* Trial Judgement, para. 241.
[1825] *Kupreškić et al.* Appeal Judgement, pp 170-171.
[1826] *Kupreškić et al.* Trial Judgement, para. 560.
[1827] *Kupreškić et al.* Trial Judgement, para. 561, citing *Kayishema and Ruzindana* Trial Judgement, para. 139.
[1828] *Kupreškić et al.* Trial Judgement, para. 561, citing *Kayishema and Ruzindana* Trial Judgement, para. 139.
[1829] *Kupreškić et al.* Trial Judgement, paras 818, 820, 822. See also *Kordić and Čerkez* Trial Judgement, para. 235 (including references).
[1830] *Setako* Appeal Judgement, para. 257.
[1831] See *Setako* Appeal Judgement, para. 257.

premeditation.[1832] In other cases, however, it has upheld convictions based on a standard requiring premeditation.[1833] While there is indeed a difference in the approach of *some* early trial judgements of the ICTR, the Appeals Chamber recalls that it is not bound by decisions of trial chambers.[1834] Although Đorđević suggests that a *mens rea* standard requiring premeditation be adopted, the Appeals Chamber considers that Đorđević has failed to show any cogent reasons to depart from the existing case law of the Tribunal which has consistently upheld convictions for murder without the requirement of premeditation under both Articles 3 and 5 of the Statute.

551. In light of the foregoing, the Appeals Chamber finds that the case law of the Tribunal does not require premeditation to satisfy the *mens rea* element for murder as a violation of the laws or customs of war under Article 3 or as a crime against humanity under Article 5(a) of the Statute.

C. Conclusion

552. In the absence of any cogent reasons put forward by Đorđević to depart from the jurisprudence of the Tribunal, the Appeals Chamber confirms its previous jurisprudence that premeditation is not a required element for the crime of murder. Considering there is no legal requirement of premeditation, Đorđević's submissions challenging the Trial Chamber's assessment of premeditation in relation to specific crime sites are therefore dismissed. Đorđević's fourteenth ground of appeal is dismissed.

[1832] For instance, the Appeals Chamber in the *Akayesu* case did not disturb Akayesu's conviction for murder as a crime against humanity (*Akayesu* Appeal Judgement, p. 143) which was based on a standard not requiring premeditation (see *Akayesu* Trial Judgement, para. 588, where the Trial Chamber states that: "Customary International Law dictates that it is the act of 'Murder' that constitutes a crime against humanity and not 'Assassinat'"). The Appeals Chamber in *Rutaganda* quashed Rutaganda's conviction for murder as a crime against humanity on the basis of that same standard (*Rutaganda* Appeal Judgement, p. 168. See also *Rutaganda* Trial Judgement, paras 79-81, 426, 433). In *Musema*, the Appeals Chamber did not disturb the Trial Chamber's finding that Musema was not guilty of murder as a crime against humanity on the basis of this same standard (*Musema* Appeal Judgement, para. 958, p. 130. See *Musema* Trial Judgement, para. 955. See also *Musema* Trial Judgement, paras 214-215 where the Trial Chamber, referring to the *Akayesu* and *Semanza* Trial Judgements, articulated that customary international law dictates that the offence of "murder", and not "*assassinat*", constitutes a crime against humanity).

[1833] The Appeals Chamber in *Muhimana* and *Semanza* affirmed convictions for murder as a crime against humanity on the basis of a standard requiring premeditation (*Muhimana* Appeal Judgement, para. 228, p. 81; *Semanza* Appeal Judgement, p. 126). The Trial Chamber in *Muhimana* concurred with the Trial Chamber in *Semanza* that premeditated murder (*i.e. assasinat*) constitutes a crime against humanity, *Muhimana* Trial Judgement, para. 569, citing *Semanza* Trial Judgement, para. 339. See also *Semanza* Trial Judgement, paras 334-338. The Appeals Chamber notes that in *Bagilishema*, the Appeals Chamber affirmed Bagilishema's acquittal based on the Trial Chamber's standard requiring premeditation (*Bagilishema* Appeal Judgement, p. 57. See *Bagilishema* Trial Judgement, paras 84-85, p. 340). The *Kayishema and Ruzindana* Trial Chamber determined that the concepts of murder and *assassinat* should be considered together and that the standard of *mens rea* required for murder as a crime against humanity is intentional and premeditated killing (*Kayishema and Ruzindana* Trial Judgement, para. 138. See *Kayishema and Ruzindana* Trial Judgement, para. 137, 139-140). In *Kayishema and Ruzindana*, the Trial Chamber found however that murder as a crime against humanity was fully subsumed by the counts brought

XV. ĐORĐEVIĆ'S FIFTEENTH GROUND OF APPEAL IN PART: ALLEGED ERRORS CONCERNING DESTRUCTION OF RELIGIOUS OR CULTURALLY SIGNIFICANT PROPERTY

A. Introduction

553. The Trial Chamber found that the crime of persecutions through destruction of religious or culturally significant property was established in relation to the mosques in Celina/Celinë, Bela Crkva/Bellacërkë, Landovica/Landovicë, Suva Reka/Suharekë (White Mosque), Đakovica/Gjakovë (Hadum Mosque), Rogovo/Rogovë, Vlaštika/Llashticë, and Vučitrn/Vushtrri (Charshi Mosque) ("Eight Mosques").[1835]

554. Đorđević submits that the Trial Chamber erred in law with regard to the *mens rea* requirement for the crime of persecutions through destruction of religious sites and erred in fact in relation to its *mens rea* findings relevant to the Hadum Mosque, the Charshi Mosque, and the mosques in Vlaštica/Llashticë and Landovica/Landovicë ("Four Mosques").[1836] He further submits that the Trial Chamber erred in its application of the requirement that acts of persecutions must be of an equal gravity or severity as the other crimes enumerated under Article 5 of the Statute.[1837]

B. *Mens rea* for persecutions through wanton destruction

1. Arguments of the parties

555. Đorđević submits that the Trial Chamber erred in law by holding that an act of destruction or damage carried out with recklessness is "sufficient for persecutory wanton destruction".[1838] He

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under Article 2 of the ICTR Statute (Genocide) and did not therefore enter convictions for murder (*Kayishema and Ruzindana* Trial Judgement, paras 576-578).

1834 *Aleksovski* Appeal Judgement, para. 114.

1835 Trial Judgement, para. 1854. See also Trial Judgement, paras 1811, 1819, 1825, 1832, 1837, 1841, 1850. The mosque in Suva Reka/Suharekë is also known as Xhamia-e-Bardhe Mosque (Trial Judgement, paras 690, 1820). The mosque in Đakovica/Gjakovë is also known as Xhamia et Hadumit or Mosque of Hadum Suleiman Aga (Trial Judgement, para. 863). The market mosque complex in Vučitrn/Vushtrri is also known as Charshi Mosque, Xhamia e Carshisë or Tash Xhamia (Trial Judgement, para. 1849).

1836 Đorđević Appeal Brief, paras 344-347. Đorđević's additional submission that the Trial Chamber failed to link any destroyed mosques to a widespread and systematic attack directed against the civilian population or to the JCE (see Đorđević Appeal Brief, paras 344, 350), is addressed in connection with ground of appeal 7 (see *supra*, paras 198-200, 204, 207). His challenges concerning the evidence underlying the Trial Chamber's findings on the destruction of the mosques in Landovica/Landovicë, Đakovica/Gjakovë (Hadum Mosque), in Vlastica/Llashticë (see Đorđević Appeal Brief, para. 347) are addressed in relation to ground of appeal 17 (see *infra*, paras 803-815, 816-822).

1837 Đorđević Appeal Brief, paras 344, 348-349.

1838 Đorđević Appeal Brief, para. 345, referring to Trial Judgement, para. 1773.

submits that there appears to be confusion in the jurisprudence between destruction of property as a war crime and persecutions through destruction of property as a crime against humanity under Articles 3 and 5 of the Statute, respectively.[1839] While the *Brđanin* Trial Chamber found that the *mens rea* requirement for Article 3 crimes is satisfied by "reckless disregard", Đorđević asserts that this does not apply to Article 5(h).[1840] He argues that the crime of persecutions requires "specific intent" and, therefore, must be committed with the intention to discriminate.[1841] He asserts that the Trial Chamber failed to apply this "requirement".[1842] Đorđević further submits that the Trial Chamber's application of the recklessness standard in relation to the Four Mosques implies that "it was unable to establish whether the perpetrators specifically targeted the mosque[s]".[1843]

556. The Prosecution responds that: (i) the Trial Chamber did not apply a recklessness standard; (ii) Đorđević ignores relevant findings; and (iii) his submissions warrant summary dismissal.[1844] Further, it submits that even if the evidence concerning the Four Mosques satisfied only a "recklessness" standard, the Trial Chamber correctly found that the *mens rea* requirement was met for the crime of persecutions through the destruction of these mosques.[1845] It argues that acts undertaken in "awareness of the probability of the substantial likelihood of damage or destruction of cultural property" can satisfy the *mens rea* element of the crime of destruction or wilful damage under Article 3(d) of the Statute.[1846] Đorđević, according to the Prosecution, fails to show why a different standard should apply to the same crime under Article 5(h) of the Statute.[1847]

[1839] Đorđević Appeal Brief, para. 346. See also Đorđević Reply Brief, para. 102.

[1840] Đorđević Appeal Brief, para. 346, referring to *Brđanin* Trial Judgement, paras 599, 1021-1024. Đorđević notes that the Trial Chamber referenced the *Krajišnik* Trial Judgement to support that reckless disregard met the *mens rea* requirement for destruction of religious sites as an underlying act of the crime of persecutions (Đorđević Appeal Brief, para. 346, referring to *Krajišnik* Trial Judgement, para. 782). However, he argues that none of the authorities cited by *Krajišnik* suggest that recklessness is a suitable standard for persecutions through destruction under Article 5(h) but instead "highlight the need to find 'the requisite discriminatory intent'" (Đorđević Appeal Brief, para. 346, referring to *Kordić and Čerkez* Trial Judgement, paras 206-207, 362, *Stakić* Trial Judgement, paras 765-767, *Brđanin* Trial Judgement, paras 599, 1021, 1023, *Strugar* Trial Judgement, paras 308-311).

[1841] Đorđević Appeal Brief, para. 345; Đorđević Reply Brief, para. 102. Đorđević further submits that while the Prosecution relies on the *Strugar* Trial Judgement, "a comparison with that case is instructive. Had one of the shells hit a church in the Old Town of Dubrovnik, or started a fire which spread and engulfed a church, a conviction for religious persecution would not necessarily follow" (Đorđević Reply Brief, para. 103). He further submits that "the Prosecutor would need to also show that the church was struck with the intention to discriminate on one of the prescribed grounds" (Đorđević Reply Brief, para. 103).

[1842] Đorđević Reply Brief, para. 105.

[1843] Đorđević Appeal Brief, para. 347; Đorđević Reply Brief, paras 104, 106.

[1844] Prosecution Response Brief, para. 303, referring to Trial Judgement, paras 1817-1819, 1830-1832, 1838-1841, 1848-1850, 2025, 2151.

[1845] Prosecution Response Brief, para. 304.

[1846] Prosecution Response Brief, para. 304, referring to *Strugar* Appeal Judgement, para. 277.

[1847] Prosecution Response Brief, para. 304, referring to *Kordić and Čerkez* Appeal Judgement, para. 108, *Blaškić* Appeal Judgement, paras 144-149, *Kordić and Čerkez* Trial Judgement, para. 206.

2. Analysis

557. The Trial Chamber set out that the crime of persecutions consists of an act or omission that: (i) discriminates in fact and denies or infringes upon a fundamental right laid down in international customary or treaty law (*actus reus*); and (ii) is carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion, or politics (*mens rea*).[1848] It further held that the *mens rea* for the underlying act of destruction of religious sites is met when the perpetrator "acted with the intent to destroy or damage that property or in the reckless disregard of the substantial likelihood of the destruction or damage".[1849]

558. By arguing that the *mens rea* standard for persecutions through destruction of religious or culturally significant property is specific (discriminatory) intent, Đorđević appears to overlook that the *mens rea* for the crime of persecutions is twofold: it requires both the requisite *mens rea* for the underlying act and the specific intent to discriminate on political, racial, or religious grounds.[1850] In order to establish the crime of persecutions through destruction of religious or culturally significant property, a trial chamber thus must be satisfied that: (i) the *mens rea* for destruction of religious or culturally significant property is met; and (ii) the destruction is carried out with discriminatory intent.

559. The Appeals Chamber considers destruction of religious or culturally significant property as an underlying act of the crime of persecutions to be the same as "destruction or wilful damage done to institutions dedicated to religion, [or other cultural property]"; a violation of the laws or customs of war enumerated under Article 3(d) of the Statute.[1851] Contrary to Đorđević's assertion, the *mens rea* element for both acts is the same.[1852] The Appeals Chamber recalls that the *mens rea* element for destruction of institutions dedicated to religion or other cultural property under Article 3(d) "is [...] met if the acts of destruction or damage were wilfully, *i.e.* either deliberately or through recklessness, directed against" the property.[1853] Đorđević has therefore failed to show that the Trial Chamber erred in law in holding that recklessness is sufficient to satisfy the *mens rea* element for destruction of religious or culturally significant property as an underlying act of persecutions.

[1848] Trial Judgement, para. 1755.
[1849] Trial Judgement, para. 1773.
[1850] *Stakić* Appeal Judgement, para. 328.
[1851] *Cf.* Trial Judgement, paras 1770-1771, referring to *Kordić and Čerkez* Trial Judgement, para. 206. Article 3(d) of the Statute refers to the "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".
[1852] *Krajišnik* Trial Judgement, para. 782; *Stakić* Trial Judgement, paras 765-767; *Brđanin* Trial Judgement, paras 596-599, 1021, 1023. See also Trial Judgement, para. 1773.
[1853] *Strugar* Appeal Judgement, para. 277, with further references.

Consequently, his argument that the perpetrators must have "specifically targeted" the mosques cannot hold. Đorđević's argument that the Trial Chamber erred in applying the recklessness standard in relation to the Four Mosques is therefore dismissed.

560. The Appeals Chamber will now address Đorđević's argument that the Trial Chamber failed to apply the element of specific intent required for persecutions.[1854] The Trial Chamber correctly set out that the crime of persecutions requires specific intent, *i.e.* the intent to discriminate on political, racial or religious grounds.[1855] It subsequently made a general finding that the "widespread destruction [of Kosovo Albanian religious sites] was committed with persecutory intent as symbols of Kosovo Albanian heritage and identity".[1856] The Trial Chamber also specifically addressed the element of discriminatory intent with regard to the mosques in Celina/Celinë, Bela Crkva/Bellacërkë, and Rogovo/Rogovë.[1857] It subsequently found for each of these mosques that the crime of persecutions through wanton destruction was established.[1858] With regard to the Four Mosques and the White Mosque in Suva Reke/Suharekë, while it did not specifically discuss the element of discriminatory intent in relation to each mosque,[1859] the Trial Chamber equally concluded that the crime of persecutions was established through their destruction or the damage they sustained.[1860]

561. As noted above, the Trial Chamber made a general finding on whether the wanton destruction or damage of religious sites was committed with discriminatory intent.[1861] As this finding relates to all of the damaged mosques, the Appeals Chamber considers that the Trial Chamber was not required to discuss separately, in relation to each mosque, whether it was destroyed with discriminatory intent. However, it would have been preferable if the Trial Chamber had taken a consistent approach rather than providing a discussion in relation to some of individual mosques and not in relation to others. The Appeals Chamber considers that the placement of a legal finding in a trial judgement is immaterial and a matter within a trial chamber's discretion provided it is clear that the finding is overarching.

[1854] Đorđević Appeal Brief, para. 345; Đorđević Reply Brief, para. 105.
[1855] Trial Judgement, para. 1755.
[1856] Trial Judgement, para. 2151. This finding is located in the section of the Trial Judgement discussing whether the crimes established in the Trial Judgement were part of the common plan (Trial Judgement, Section XII.B.2(b)).
[1857] Trial Judgement, paras 1810, 1836. This discussion can be found in the section of the Trial Judgement concerning persecutions through wanton destruction or damage to religious property (Trial Judgement, Section XI.C.2(d)).
[1858] Trial Judgement, paras 1811, 1837.
[1859] See Trial Judgement, Section XI.C.2(d).
[1860] Trial Judgement, paras 1819, 1825, 1832, 1841, 1850. See also Trial Judgement, para. 1854.
[1861] Trial Judgement, para. 2151.

562. In these circumstances, the Appeals Chamber is satisfied that the Trial Chamber made the required finding that the destruction or damage to the mosques was carried out with discriminatory intent. Đorđević has therefore failed to show that the Trial Chamber erred, and his argument is dismissed.

C. Equal gravity

1. Arguments of the parties

563. Đorđević submits that the Trial Chamber erred in finding that the destruction of the Eight Mosques amounted to persecutions as it misapplied the equal gravity test.[1862] Đorđević agrees with the Trial Chamber that the nature and the extent of an act of destruction determine whether such an act satisfies the equal gravity requirement.[1863] He argues that since the Trial Chamber "recognised that the destruction of a religious site 'may' (not must) amount to an act of persecutions".[1864] it should have determined whether the equal gravity requirement was met in relation to each individual mosque.[1865] In his view, the Trial Chamber should have assessed "the importance of the place of worship to a particular community", and its failure to do so constitutes an error.[1866]

564. The Prosecution responds that it is clear from the Trial Chamber's reasoning that the equal gravity requirement is satisfied when a building is dedicated to religion, without the need to further demonstrate the value of the building to the community.[1867]

2. Analysis

565. In setting out the law on the crime of persecutions through destruction of religious or culturally significant property, the Trial Chamber held that:

> [w]hether the destruction of property meets the equal gravity requirement depends on the nature and extent of destruction. A number of Trial Chambers have noted that the destruction of religious property amounts to 'an attack on the very religious identity of a people' and as such manifests 'a nearly pure expression' of the notion of crimes against humanity. [...] The International Military Tribunal, the 1991 ILC Report, and national courts, *inter alia*, have singled out the destruction of religious buildings as a clear case of persecution as a crime against humanity. In the view of the

[1862] Đorđević Appeal Brief, paras 348-349.
[1863] Đorđević Appeal Brief, para. 348, referring to Trial Judgement, para. 1771.
[1864] Đorđević Appeal Brief, para. 348.
[1865] Đorđević Appeal Brief, paras 348-349.
[1866] Đorđević Appeal Brief, para. 349.
[1867] Prosecution Response Brief, para. 310.

> Chamber, therefore, the destruction and wilful damage to Kosovo Albanian religious sites, coupled with the requisite discriminatory intent, *may* amount to an act of persecution.[1868]

566. The Trial Chamber found that, in general the nature and extent of the destruction of property determine whether it meets the equal gravity requirement.[1869] It then analysed the destruction of *religious property* and found that the destruction and wilful damage to Kosovo Albanian religious sites "may" amount to an act of persecutions.[1870] By use of the modal verb "may", the Trial Chamber recognised that, while the destruction of religious sites satisfies the requirement of equal gravity to the crimes listed in Article 5 of the Statute, it does not automatically amount to the crime of persecutions as a crime against humanity. Additional requirements must be met, which the Trial Chamber set out in the subsequent paragraphs.[1871]

567. The Appeals Chamber has not previously addressed the issue of equal gravity specifically in relation to persecutions through destruction of religious or culturally significant property. The Appeals Chamber finds that the destruction of religious property meets the equal gravity requirement as it amounts to "an attack on the very religious identity of a people" and as such manifests "a nearly pure expression" of the notion of crimes against humanity, as also found by several trial chambers.[1872] Proof that a building is dedicated to religion satisfies the equal gravity requirement without requiring an assessment of the value of the specific religious property to a particular community.[1873] It is different in that respect to the destruction of private property which may not necessarily have a sufficiently severe impact to constitute a crime against humanity.[1874]

568. In light of the foregoing, the Appeals Chamber finds that it was not necessary for the Trial Chamber to assess for each mosque individually whether its destruction satisfied the equal gravity requirement. In these circumstances, Đorđević has failed to show that the Trial Chamber erred and his argument therefore must fail.

[1868] Trial Judgement, para. 1771 (emphasis added; citations omitted).
[1869] Trial Judgement, para. 1771.
[1870] Trial Judgement, para. 1771. See *Milutinović et al.* Trial Judgement, vol. 1, paras 204-205; *Kordić and Čerkez* Trial Judgement, paras 202, 206-207; *Stakić* Trial Judgement, paras 766-768; *Krajišnik* Trial Judgement, paras 780-783.
[1871] Trial Judgement, paras 1772 (property destroyed must not have been used for military purposes), 1773 (general elements of crimes against humanity; specific *mens rea* for persecution; *actus reus* and *mens rea* for destruction of religious sites). See also Trial Judgement, para. 1770.
[1872] See Trial Judgement, para. 1771; *Milutinović et al.* Trial Judgement, vol. 1, para. 205; *Kordić and Čerkez* Trial Judgement, paras 202, 206-207; *Stakić* Trial Judgement, paras 766-768; *Krajišnik* Trial Judgement, paras 780-783. The 1991 ILC Report lists the destruction of religious buildings as an example of persecutions as a crime against humanity (1991 ILC Report, vol. II, part. 2, p. 104). Similarly, post-WWII judgements have considered the destruction of religious buildings as persecutions as a crime against humanity (IMT Judgement, pp 248, 302; *Israel v. Adolph Eichmann*, District Court of Jerusalem, Judgement of 12 December 1961, 36 *International Law Reports* 5, para. 57).

D. Conclusion

569. In light of the foregoing, the Appeals Chamber dismisses Đorđević's fifteenth ground of appeal, in part.[1875]

[1873] See *Kordić and Čerkez* Trial Judgement, paras 202, 206-207; *Stakić* Trial Judgement, paras 766-768; *Krajišnik* Trial Judgement, paras 780-783.

[1874] See *Blaškić* Appeal Judgement, para. 146, citing and agreeing with *Kupreškić et al.* Trial Judgement, para. 631.

[1875] The Appeals Chamber will address the remainder of this ground of appeal in the part dealing with ground of appeal 17. See *infra*, Chapters IX and XIX.

XVI. ĐORĐEVIĆ'S SIXTEENTH GROUND OF APPEAL: ALLEGED CONVICTIONS BASED ON CRIMES NOT PLEADED IN THE INDICTMENT

A. Arguments of the parties

570. Đorđević submits that the Trial Chamber erred in convicting him of crimes not alleged in the Indictment.[1876] He argues that several of his convictions in relation to the crimes of deportation, other inhumane acts (forcible transfer), persecutions as crimes against humanity, and murder as a violation of the laws or customs of war as well as a crime against humanity, should be quashed since certain locations or events in relation to these crimes were not alleged in the Indictment.[1877] He requests that his sentence be reduced accordingly.[1878]

571. The Prosecution responds that: (i) this ground of appeal should be summarily dismissed as Đorđević raises it for the first time on appeal, and by not objecting to the evidence when it was introduced during the trial he has waived the right to raise the issue on appeal;[1879] (ii) Đorđević received fair notice of the material facts,[1880] arguing that the Indictment includes all the locations and crimes which Đorđević challenges;[1881] and (iii) the Appeals Chamber should not automatically quash the relevant convictions in the event that it finds that certain incidences were not alleged in the Indictment,[1882] but should also consider whether the defects were cured by the provision of clear, consistent, and timely information by the Prosecution in its Pre-Trial Brief and Rule 65*ter* witness summaries,[1883] the disclosed evidence,[1884] and Đorđević's own submissions at trial.[1885]

[1876] Đorđević Appeal Brief, para. 352; Appeal Hearing, 13 May 2013, AT. 99-102.
[1877] Đorđević Appeal Brief, paras 352-360, referring to *Kordić and Čerkez* Appeal Judgement, *Renzaho* Appeal Judgement. See Đorđević Reply Brief, paras 110-111.
[1878] Đorđević Appeal Brief, para. 361.
[1879] Prosecution Response Brief, para. 313. See also Prosecution Response Brief, paras 320, 322, 325, 327-328, 333, 335-336, 340-344, 346-347; Appeal Hearing, 13 May 2013, AT. 150-151.
[1880] Prosecution Response Brief, para. 314; Appeal Hearing, 13 May 2013, AT. 149-151.
[1881] Prosecution Response Brief, paras 314-315, 319, 321, 323-324, 326, 328-332, 334, 336-339, 341, 343-344, 347-348; Appeal Hearing, 13 May 2013, AT. 149-157.
[1882] Prosecution Response Brief, para. 316, referring to *Blaškić* Appeal Judgement, para. 238, *Niyitegeka* Appeal Judgement, para. 195.
[1883] Prosecution Response Brief, para. 316, referring to *Simić* Appeal Judgement, paras 23-24, *Naletilić and Martinović* Appeal Judgement, paras 26, 33, 61-65, *Kvočka et al.* Appeal Judgement, paras 34, 44, *Kordić and Čerkez* Appeal Judgement, paras 142, 165. See also Appeal Hearing, 13 May 2013, AT. 149-150.
[1884] Prosecution Response Brief, para. 316, referring to *Kupreškić et al.* Appeal Judgement, paras 117-120, *Niyitegeka* Appeal Judgement, para. 197, *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 48, *Gacumbitsi* Appeal Judgement, paras 57-58.
[1885] Prosecution Response Brief, para. 316, referring to *Simić* Appeal Judgement, para. 24, *Kvočka et al.* Appeal Judgement, paras 52-53. See also Prosecution Response Brief, para. 318, where the Prosecution argues that

572. Đorđević replies that the question of waiver does not arise since he only became aware of the additional crimes when the Trial Chamber issued the Trial Judgement.[1886] He explicitly states that he does not argue that the Indictment was vague.[1887] Furthermore, Đorđević invites the Appeals Chamber not to rely on Rule 65*ter* witness summaries or witness statements, claiming that the Prosecution seeks to expand the charges against him and hold him responsible for additional attacks that were not identified in the Indictment.[1888]

B. Analysis

1. Introduction

573. At the outset, the Appeals Chamber considers that challenges pertaining to defects in an indictment are normally dealt with at the pre-trial stage by the trial chamber, or, if leave to pursue an interlocutory appeal has been granted, under Rule 72(B)(ii) of the Rules, by the Appeals Chamber.[1889] In the instant case, however, the Appeals Chamber is faced with a different scenario, in that Đorđević's submission is made at the appellate stage and concerns crimes that he claims were not alleged in the Indictment and of which he only became aware of when the Trial Judgement was issued.[1890] Therefore, this submission can only be considered in relation to the criminal conduct for which Đorđević was ultimately convicted.[1891] Consequently, in the present circumstances it is irrelevant whether Đorđević raised any objections before the Trial Chamber, since the issue of waiver is not applicable in this context.[1892] However, as Đorđević raises defects in the Indictment for the first time on appeal, he bears the burden of proving that his ability to prepare his defence was materially impaired.[1893]

Đorđević "cross-examined witnesses about the incidents he challenges and has not demonstrated any material impairment in his defence".

[1886] Đorđević Reply Brief, para. 107.

[1887] Đorđević Reply Brief, para. 108.

[1888] Đorđević Reply Brief, para. 109, referring to *Muvunyi II* Appeal Judgement, para. 28. The Appeals Chamber notes that the reference to the *Muvunyi II* Appeal Judgement appears to be erroneous and understands it instead to be a reference to the *Muvunyi I* Appeal Judgement.

[1889] See *Kupreškić et al.* Appeal Judgement, para. 79.

[1890] See Đorđević Appeal Brief, paras 352, 354; Đorđević Reply Brief, para. 107.

[1891] See *Kupreškić et al.* Appeal Judgement, para. 79.

[1892] *Contra* Prosecution Response Brief, para. 313. See Đorđević Reply Brief, para. 107.

[1893] See *Mrkšić and Šljivančanin* Appeal Judgement, para. 142; *Simić* Appeal Judgement, para. 25; *Kvočka et al.* Appeal Judgement, para. 35; *Ntagerura et al.* Appeal Judgement, para. 31; *Niyitegeka* Appeal Judgement, para. 200. See also *Gacumbitsi* Appeal Judgement, para. 51.

574. The Appeals Chamber recalls that a trial chamber can only convict an accused for crimes which are charged in an indictment.[1894] It is well established in the jurisprudence of the Appeals Chamber, in accordance with the Statute of the Tribunal, that the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment.[1895] The ICTR jurisprudence has, however, clarified that whether a crime is charged in an indictment and whether an indictment is vague in the manner it sets out the alleged material facts of a crime are two separate issues.[1896] Indeed, a distinction is to be drawn between "counts or charges", and "material facts".[1897] Defects arising from an omission of a "count or a charge" from an indictment can only be remedied through formal amendment under Rule 50 of the Rules.[1898] However, defects concerning vagueness in an indictment, such as the omission of a material fact underpinning a charge can be cured in certain circumstances and through the provision of timely, clear and consistent information in post-indictment documents such as the pre-trial briefs, Rule 65*ter* witness summaries and witness statements.[1899] When challenges to an indictment are raised on appeal, the Appeals Chamber must determine whether the error of trying the accused on a defective indictment "invalidat[ed] the decision" to convict, as the indictment can no longer be amended.[1900]

[1894] *Naletilić and Martinović* Appeal Judgement, para. 26; *Kvočka et al.* Appeal Judgement, para. 33; *Munyakazi* Appeal Judgement, para. 36; *Kalimanzira* Appeal Judgement, para. 46; *Muvunyi I* Appeal Judgement, para. 18; *Ntagerura et al.* Appeal Judgement, para. 28.

[1895] *Martić* Appeal Judgement, para. 162; *Simić* Appeal Judgement, para. 20; *Naletilić and Martinović* Appeal Judgement, para. 23; *Kvočka et al.* Appeal Judgement, para. 27; *Kupreškić et al.* Appeal Judgement, para. 88; *Ntabakuze* Appeal Judgement, para. 30; *Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntakirutimana* Appeal Judgement, para. 58; *Niyitegeka* Appeal Judgement, para. 200; Article 21 of the Statute.

[1896] *Ntabakuze* Appeal Judgement, para. 30, referring to *Bagosora and Nsengiyumva* Appeal Judgement, para. 96, *Ntawukulilyayo* Appeal Judgement, para. 189, *Ntagerura et al.* Appeal Judgement, para. 32.

[1897] *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006 ("*Bagosora* Decision of 18 September 2006"), para. 19, referring to *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005", 12 May 2005 ("*Muvunyi* Decision"). "The count or charge is the legal characterisation of the material facts which support that count or charge. In pleading an indictment, the Prosecution is required to specify the alleged legal prohibition infringed (the count or charge) and the acts or omissions of the Accused that give rise to that allegation of infringement of a legal prohibition (material facts)" (*Muvunyi* Decision, para. 19).

[1898] *Ntabakuze* Appeal Judgement, para. 30; *Bagosora and Nsengiyumva* Appeal Judgement, para. 96; Bagosora Decision of 18 September 2006, para. 29; *Karera* Appeal Judgement, paras 295-296. See *Renzaho* Appeal Judgement, para. 128; *Kordić and Čerkez* Appeal Judgement, paras 1027-1028; *Ntagerura et* al. Appeal Judgement, para. 32; Rule 50 of the Rules.

[1899] See *e.g. Martić* Appeal Judgement, para. 163; *Simić* Appeal Judgement, para. 23; *Naletilić and Martinović* Appeal Judgement, para. 26; *Kvočka et al.* Appeal Judgement, para. 33; *Kupreškić et al.* Appeal Judgement, para. 114.

[1900] Article 25(1)(a) of the Statute; *Kvočka et al.* Appeal Judgment, para. 34.

575. The Appeals Chamber recalls that whether or not a fact is considered material depends on the nature of the Prosecution's case.[1901] The Prosecution's characterization of the alleged criminal conduct and the proximity of the accused to the underlying crimes are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice.[1902] Where the scale of the alleged crimes prevents the Prosecution from providing all the necessary material facts, less information may be acceptable.[1903] However, even where it is impracticable or impossible to provide full details of a material fact, the Prosecution must indicate its best understanding of the case against the accused and the trial should only proceed where the right of the accused to know the case against him and to prepare his defence has been assured.[1904] The Prosecution is expected to know its case before proceeding to trial and may not rely on the weaknesses of its own investigation in order to mould the case against the accused as the trial progresses.[1905]

576. An indictment which fails to set forth the specific material facts underpinning the charges against the accused is defective.[1906] The Appeals Chamber has held: "[a]n indictment may also be defective when the material facts are pleaded without sufficient specificity, such as, unless there are special circumstances, when the times refer to broad date ranges, the places are only generally indicated, and the victims are only generally identified."[1907] As stated above, the prejudicial effect of a defective indictment may only be "remedied" if the Prosecution provided the accused with timely, clear and consistent information that resolves the ambiguity or clarifies the vagueness,

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[1901] *Naletilić and Martinović* Appeal Judgement, para. 24; *Kvočka et al.* Appeal Judgement, para. 24; *Kupreškić et al.* Appeal Judgement, para. 89; *Karera* Appeal Judgement, para. 292; *Nahimana et al.* Appeal Judgement, para. 322; *Ndindabahizi* Appeal Judgement, para. 16; *Ntagerura et al.* Appeal Judgement, para. 23; *Kamuhanda* Appeal Judgement, para. 17.

[1902] *Naletilić and Martinović* Appeal Judgement, para. 24; *Kvočka et al.* Appeal Judgement, para. 28; *Kupreškić et al.* Appeal Judgement, para. 89. Where it is alleged that the accused planned, instigated, ordered, or aided and abetted the alleged crimes, the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question (*Naletilić and Martinović* Appeal Judgement, para. 24); *Kupreškić et al.* Appeal Judgement, para. 89; *Blaškić* Appeal Judgement, para. 213; *Renzaho* Appeal Judgement, para. 53; *Karera* Appeal Judgement, para. 292; *Seromba* Appeal Judgement, para. 27, citing *Ntagerura et al.* Appeal Judgement, para. 25.

[1903] The Appeals Chamber has held that "in certain circumstances, 'the sheer scale of alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates of the commission of the crimes'" (*Kupreškić* Appeal Judgement, para. 89; *Muhimana* Appeal Judgement, para. 79, citing *Gacumbitsi* Appeal Judgement, para. 50 (citations omitted)).

[1904] *Kvočka et al.* Appeal Judgement, para. 30.

[1905] *Kvočka et al.* Appeal Judgement, para. 30; *Kupreškić et al.* Appeal Judgement, para. 92.

[1906] *Kvočka et al.* Appeal Judgement, para. 28; *Kupreškić et al.* Appeal Judgement, para. 114; *Renzaho* Appeal Judgement, para. 55; *Karera* Appeal Judgement, para. 293; *Ntagerura et al.* Appeal Judgement, para. 22; *Niyitegeka* Appeal Judgement, para. 195; *Munyakazi* Appeal Judgement, para. 36; *Kalimanzira* Appeal Judgement, para. 46; *Rukundo* Appeal Judgement, para. 29.

[1907] *Kvočka et al.* Appeal Judgement, para. 31.

thereby compensating for the failure of an indictment to give proper notice of the charges.[1908] However, in some circumstances, the provision of material facts only through post-indictment information may impact upon the ability of the accused to know the case against him or her and to prepare his or her defence.[1909] As such, the possibility of curing the omission of material facts is not unlimited. For example, an expansion of charges through the introduction of new material facts should not lead to a "radical transformation" of the Prosecution's case which may result in unfairness and prejudice to an accused.[1910] In such circumstances, "if the new material facts are such that they could on their own, support separate charges",[1911] a formal amendment pursuant to Rule 50 of the Rules is required.[1912] In this regard, the Appeals Chamber considers that when an indictment is very specific in pleading certain crimes – for example, by giving an exhaustive list of locations and indicating a precise time period of incidents occurred within those locations – the addition of new material facts by the Prosecution, such as an incident occurred in a location and/or in a time period that was not specifically alleged in an indictment, constitutes an expansion of charge which may lead to prejudice to the accused.[1913]

577. In order to determine whether the Trial Chamber erred in entering convictions, the Appeals Chamber will consider whether the incidents challenged by Đorđević formed part of the Prosecution's case. Accordingly, the Appeal Chamber will assess whether: (i) the Indictment was defective; (ii) the defect was curable and, if so, whether it was cured; and (iii) Đorđević suffered prejudice. Contrary to Đorđević's claims,[1914] the Appeals Chamber may rely on, *inter alia*, the information contained in the Prosecution Pre-Trial Brief and Rule 65*ter* witness summaries and statements for this purpose.[1915]

578. The Appeals Chamber will consider Đorđević's submissions with respect to each crime in the following order: (i) deportation and other inhumane acts (forcible transfer); (ii) murder; and (iii) persecutions.

[1908] See *e.g. Martić* Appeal Judgement, para. 163; *Simić* Appeal Judgement, para. 23; *Naletilić and Martinović* Appeal Judgement, para. 26; *Kvočka et al.* Appeal Judgement, para. 33; *Kupreškić et al.* Appeal Judgement, para. 114.
[1909] *Renzaho* Appeal Judgement, para. 128.
[1910] See *Bagosora* Decision of 18 September 2006, para. 30, referring to *Kupreškić et al.* Appeal Judgement, para. 121, *Ntakirutimana* Appeal Judgement, para. 28.
[1911] *Bagosora* Decision of 18 September 2006, para. 30, referring to *Muvunyi* Decision, paras 33, 35.
[1912] *Bagosora* Decision of 18 September 2006, para. 30; *Muvunyi I* Appeal Judgement, para. 20. See also *Karera* Appeal Judgement, para. 296; *Muvunyi I* Appeal Judgement, para. 161.
[1913] See *e.g. Muvunyi I* Appeal Judgement, paras 89-100.
[1914] Đorđević's Reply Brief, para. 109.
[1915] *Supra*, para. 574.

2. Deportation and other inhumane acts (forcible transfer) as crimes against humanity

579. The Trial Chamber found Đorđević responsible for deportation (Count 1) and other inhumane acts (forcible transfer) (Count 2) as crimes against humanity, carried out by Serbian forces against Kosovo Albanian civilians in relation to incidents in thirteen municipalities in Kosovo.[1916]

580. Đorđević challenges his convictions for deportation and/or other inhumane acts (forcible transfer), with respect to incidents in specific sites located in nine of the municipalities,[1917] on the basis that these locations were not pleaded in the Indictment.[1918] The Appeals Chamber will address his submissions with regard to the respective municipalities.

(a) Prizren municipality

581. With regard to Prizren municipality, Đorđević challenges his convictions for deportation in relation to incidents in Dušanovo/Dushanovë[1919] and Srbica/Sërbica;[1920] and for other inhumane acts (forcible transfer) in Landovica/Landovicë.[1921]

a. Dušanovo/Dushanovë

582. The Trial Chamber found that "on 28 March 1999, Serbian forces entered the neighbourhood of Dušanovo/Dushanovë of Prizren" and forcibly displaced some 4,000 to 5,000 residents across the border to Albania.[1922] It further found that Dušanovo/Dushanovë is a suburb of Prizren town, located to the north of the town centre.[1923]

583. The Indictment alleges that from 28 March 1999, Kosovo Albanians were ordered to leave "the city of Prizren" and were forced to the Albanian border.[1924]

[1916] Trial Judgement, paras 1703-1704. The Trial Chamber found Đorđević responsible for crimes committed in the municipalities of: Orahovac/Rahovec; Prizren; Srbica/Skenderaj; Suva Reka/Suharekë; Peć/Pejë; Kosovska Mitrovica/Mitrovicë; Priština/Prishtinë; Đakovica/Gjakovë; Gnjilane/Gjilan; Uroševac/Ferizaj; Kačanik/Kaçanik; Dečani/Deçan; and Vučitrn/Vushtrri (Trial Judgement, paras 1615-1702).

[1917] Đorđević Appeal Brief, paras 357-358. Đorđević's submissions relate to the municipalities of: Prizren; Srbica/Skenderaj; Đakovica/Gjakovë; Suva Reka/Suharekë; Gnjilane/Gjilan; Uroševac/Ferizaj; Orahovac/Rahovec; Peć/Pejë; and Dečani/Deçan.

[1918] Đorđević Appeal Brief, paras 352, 356.

[1919] Đorđević Appeal Brief, paras 356, 357(a)(i), referring to Trial Judgement, paras 1626-1627, 1701, 1704.

[1920] Đorđević Appeal Brief, paras 356, 357(a)(ii), referring to Trial Judgement, paras 1629, 1701, 1704.

[1921] Đorđević Appeal Brief, paras 356, 358(b), referring to Trial Judgement, paras 1628, 1702-1704.

[1922] Trial Judgement, para. 1626.

[1923] Trial Judgement, para. 565.

[1924] Indictment, para. 72(b).

584. The Appeals Chamber notes that the term "suburb" generally refers to an "outlying part of a city", a "community adjacent to or within commuting distance of a city", or "the area belonging to a town or city that lies immediately outside its walls or boundaries".[1925] The Appeals Chamber notes that the Trial Chamber clearly considered Dušanovo/Dushanovë to be part of the city of Prizren "located to the north of the town centre" and that Đorđević does not challenge this finding on appeal.[1926] Specifically, the Appeals Chamber also notes the evidence of Witness Rexhep Krasniqi, who testified that Dušanovo/Dushanovë and Prizren were "merged together".[1927]

585. In light of the above, the Appeals Chamber is satisfied that Dušanovo/Dushanovë is part of the town of Prizren. Considering that the Indictment alleges the material facts underlying the charge of deportation from the "city of Prizren", the Appeals Chamber therefore finds that deportation from Dušanovo/Dushanovë is alleged in the Indictment. Đorđević has failed to show that the Trial Chamber erred in entering a conviction for the crime of deportation in relation to Dušanovo/Dushanovë on 28 March 1999.

b. Srbica/Sërbica

586. The Trial Chamber found that some villages in Prizren municipality were attacked between 25 and 30 March 1999, causing the villagers to flee to Srbica/Sërbica, from where they were later deported, between 9 and 16 April 1999, to the Albanian border.[1928] It found that the crime of deportation from Srbica/Sërbica was established between 9 and 16 April 1999.[1929]

587. The Indictment alleges that on 25 March 1999, some villages in the Prizren municipality were attacked and, as a result, some of the villagers fled towards Srbica/Sërbica.[1930] It continues: "[f]orces of the FRY and Serbia then launched an offensive in the area of Srbica/Sërbica and

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[1925] See *Merriam-Webster Dictionary* Online, Unabridged (Merriam-Webster, Incorporated, 2013); *Oxford English Dictionary* Online (Oxford University Press, 2013).

[1926] Trial Judgement, para. 565. The Appeals Chamber notes that in support of this statement, the Trial Chamber cites the statement of Witness Hysni Kryeziu, who refers to the "village" of Dušanovo/Dushanovë in the commune of Prizren (Exhibit P876, p. 2). The Appeals Chamber further notes that in describing the events, Witness Krasniqi clearly considers Dušanovo/Dushanovë as part of Prizren: "[a]bout 4 or 5 thousand people were forced out of our town. There was a convoy of people, like a chain, for 16 km., from Prizrem [*sic*] to the border." (Exhibit P848, p. 2).

[1927] See Trial Judgement, para. 565, fn. 2088, referring to Exhibit P850, p. 4922.

[1928] Trial Judgement, paras 599, 1628-1629.

[1929] Trial Judgement, para. 1629.

[1930] Indictment, para. 72(b).

shelled the villages of Donji Retimlje/Reti e Ulët, Retimle/Reti and Randubrava/Randobravë. Kosovo Albanian villagers were forced from their homes and sent to the Albanian border."[1931]

588. The Appeals Chamber recalls that the Indictment should be read as a whole.[1932] Accordingly, the Appeals Chamber considers that the Indictment alleges the material facts relating to the deportation of Kosovo Albanians from the area of Srbica/Sërbica following the attack on that village which was subsequent to the attacks on some villages in the Prizren municipality a few days earlier, from which the Kosovo Albanians had fled. The findings in the Trial Judgement are consistent with this allegation.

589. The Appeals Chamber finds that Đorđević has failed to show that the Trial Chamber erred in entering a conviction for the crime of deportation in relation to incidents in Srbica/Sërbica between 9 and 16 April 1999.

c. Landovica/Landovicë

590. The Trial Chamber found that the crime of other inhumane acts (forcible transfer) was established on the basis of events that occured on 26 March 1999, when the residents of Landovica/Landovicë fled north-west and south-west as a result of an attack by Serbian forces on the village.[1933]

591. The Indictment alleges that on 25 March 1999, the villages of Pirane and Landovica/Landovicë in the Prizen municipality were shelled and burned.[1934] More specifically, it alleges that "[i]n the town of Landovica/Landovicë, an old mosque was burned and heavily damaged by forces of the FRY and Serbia."[1935] The following passages read: "[s]ome of the Kosovo Albanians fleeing toward Srbica/Sërbica were killed or wounded by snipers";[1936] "[f]orces of the FRY and Serbia then launched an offensive in the area of Srbica/Sërbica";[1937] and "Kosovo Albanian villagers were forced from their homes and sent to the Albanian border".[1938] Further, paragraph 72 alleges that an atmosphere of fear and oppression was created to facilitate expulsions and displacements through "the use of force, threats of force and acts of violence" described in

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[1931] Indictment, para. 72(b).
[1932] *Mrkšić and Šljivančanin* Appeal Judgement, para. 138, referring to *Gacumbitsi* Appeal Judgement, para. 123.
[1933] Trial Judgement, para. 1628.
[1934] Indictment, para. 72(b).
[1935] Indictment, para. 72(b).
[1936] Indictment, para. 72(b).
[1937] Indictment, para. 72(b).
[1938] Indictment, para. 72(b).

detail in paragraphs 25-32 of the Indictment as, *inter alia*, "the burning and destruction of property, including [...] cultural monuments and religious sites".[1939]

592. The Appeals Chamber considers that the material facts relating to the crime of other inhumane acts (forcible transfer) at Landovica/Landovicë are alleged in the Indictment. The allegation concerning Landovica/Landovicë should be viewed in context of the Indictment as a whole, which describes a chain of events starting with attacks on villages throughout the Prizren municipality on 25 March 1999, leading to the forcible transfer of the Kosovo Albanian villagers towards Srbica/Sërbica.[1940] The Trial Chamber's finding that the forcible transfer occurred on 26 March 1999 is, therefore, consistent with the Indictment. The Appeals Chamber further notes that Landovica/Landovicë is located in the Prizren municipality,[1941] which is specifically mentioned in the Indictment as one of the villages attacked and shelled on 25 March.[1942] Further, the destruction of the mosque in Landovica/Landovicë was described in the Indictment as one of the "acts of violence" that were used to "facilitate expulsions" from the municipality.[1943]

593. The Appeals Chamber therefore finds that Đorđević has failed to show that the Trial Chamber erred in entering a conviction for the crime of other inhumane acts (forcible transfer) in relation to Landovica/Landovicë on 26 March 1999.

(b) Srbica/Skenderaj municipality

594. With regard to the Srbica/Skenderaj municipality, Đorđević challenges his conviction for deportation on the basis of incidents in Kladernica/Klladërnicë, between 12 and 15 April 1999;[1944] and his convictions for other inhumane acts (forcible transfer) on the basis of incidents in Brocna/Burojë, between 25 and 26 March 1999[1945] and Tušilje/Tushilë, on 29 March 1999.[1946]

[1939] Indictment, para. 72. See Indictment, paras 25-32.
[1940] Indictment, para. 72(b).
[1941] Trial Judgement, para. 588. See Exhibit P349.
[1942] Indictment, para. 72(b).
[1943] Indictment, para. 72.
[1944] Đorđević Appeal Brief, para. 357(b), referring to Trial Judgement, paras 1634, 1701, 1704; Appeal Hearing, 13 May 2013, AT. 99. See also Appeal Hearing, 13 May 2013, AT. 101-102.
[1945] Đorđević Appeal Brief, para. 358(c)(i), referring to Trial Judgement, paras 1631, 1702-1704; Appeal Hearing, 13 May 2013, AT. 99. See also Appeal Hearing, 13 May 2013, AT. 101-102.
[1946] Đorđević Appeal Brief, para. 358(c)(ii), referring to Trial Judgement, paras 1632, 1702-1704; Appeal Hearing, 13 May 2013, AT. 99. See also Appeal Hearing, 13 May 2013, AT. 101-102.

a. Kladernica/Klladërnicë

595. The Trial Chamber found that as a result of attacks launched between 25 and 26 March 1999 on villages in the Srbica/Skenderaj municipality, including the village of Kladernica/Klladërnicë, a group of 5,000 Kosovo Albanians sought refuge in Izbica/Izbicë, from where the women and children were sent away in the direction of Albania.[1947] The Trial Chamber held that the crime of other inhumane acts (forcible transfer) from Izbica/Izbicë was established on 28 March 1999, but it was not satisfied that the crime of deportation was established, as the evidence did not demonstrate that the women and children reached the border with Albania.[1948] The Trial Chamber further found that on 12 April 1999, Kladernica/Klladërnicë was again shelled, causing 10,000 to 12,000 villagers to take refuge in the village school.[1949] The villagers were then ordered by Serbian forces to go to Albania.[1950] The Trial Chamber held that the crime of deportation in relation to Kladernica/Klladërnicë was established on 12 April 1999.[1951]

596. Đorđević only challenges his conviction for deportation from Kladernica/Klladërnicë on 12 April 1999.[1952]

597. The Indictment alleges that a number of villages in the Srbica/Skenderaj municipality, including Kladernica/Klladërnicë, were attacked and destroyed "beginning on or about 25 March 1999".[1953] It further alleges that following the attacks, "[o]n or about 28 March 1999, at least 4,500 Kosovo Albanians from these villages gathered in the village of Izbica/Izbicë."[1954] The women and children were forcibly moved by Serbian forces towards Klina/Klinë, Đakovica/Gjakovë and eventually to the Albanian border.[1955]

598. The Appeals Chamber finds that the Indictment contains the material facts relating to other inhumane acts (forcible transfer) and deportation of Kosovo Albanians from villages in the Srbica/Skënderaj municipality resulting from attacks beginning on or about 25 March 1999. The Appeals Chamber however notes that the findings in the Trial Judgement on Kladernica/Klladërnicë relate to two specific scenarios resulting from two separate incidents: (i) the forcible transfer from

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[1947] Trial Judgement, paras 1630-1631.
[1948] Trial Judgement, para. 1631.
[1949] Trial Judgement, para. 1634.
[1950] Trial Judgement, para. 1634.
[1951] Trial Judgement, para. 1634.
[1952] Đorđević Appeal Brief, para. 357(b), referring to Trial Judgement, paras 1634, 1701, 1704; Appeal Hearing, 13 May 2013, AT. 99. See also Appeal Hearing, 13 May 2013, AT. 101-102.
[1953] Indictment, para. 72(c).
[1954] Indictment, para. 72(c).
[1955] Indictment, para. 72(c).

Izbica/Izbicë on 28 March 1999, which was caused by attacks launched between 25 and 26 March 1999 on several villages, including Kladernica/Klladërnicë; and (ii) the deportation from Kladernica/Klladërnicë on 12 April 1999, which resulted from a further attack launched on Kladernica/Klladërnicë about three weeks later.[1956] In the view of the Appeals Chamber the allegation in the Indictment only covers the Trial Chamber's finding on other inhumane acts (forcible transfer) of approximately 5,000 Kosovo Albanians from Izbica/Izbicë on 28 March 1999, but not the finding on the deportation of 10,000 to 12,000 Kosovo Albanians from Kladernica/Klladërnicë on 12 April, which occurred in different circumstances and was caused by a subsequent attack by Serbian forces on the village.

599. Furthermore, contrary to the Prosecution's suggestion, the Appeals Chamber finds that merely pleading a general pattern of events throughout Kosovo is insufficient to support the charge of deportation at Kladernica/Klladërnicë.[1957] The Appeals Chamber therefore considers that while the material facts in relation to the first scenario were properly pleaded, the material facts of the second scenario were not pleaded with sufficient specificity. The Indictment is therefore defective with regard to the deportation of 10,000 to 12,000 Kosovo Albanians from Kladernica/Klladërnicë on 12 April.

600. The Appeals Chambers notes that the Rule 65*ter* witness summaries and statements provide certain information relating to one witness's account of an attack on the village of Kladernica/Klladernicë, after 28 March 1999, following which displaced people who had found refuge in a school were forced to leave, all the way to the Albanian border, around 15 April 1999.[1958] However, the Appeals Chamber considers that the content of the witness summaries and statements relating to this witness alone was not sufficient to have informed Đorđević in a timely, clear and consistent manner of the new material facts that the Prosecution intended to prove at trial.[1959] The defects in the Indictment were therefore not cured by the provision of post-indictment

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[1956] Compare Trial Judgement, paras 1630-1631 (referring to 5,000 Kosovo Albanians seeking refuge in Izbica/Izbicë after attacks on various villages between 25 and 26 March 1999) with Trial Judgement, para. 1634 (referring to 10,000 to 12,000 villagers seeking refuge in the school of Kladernica/Klladërnicë following an attack launched on Kladernica/Klladërnicë on that same day).

[1957] See Prosecution Response Brief, para. 321, fn. 1069. In support of its argument that the deportation from Kladernica/Klladërnicë is covered by paragraph 72(c) of the Indictment, the Prosecution argued that paragraphs 25-30 of the Indictment "set out a pattern of events in Kosovo: following an attack on a Kosovo Albanian village by Serb forces, villagers and displaced persons were expelled in convoys that moved towards Kosovo's borders. [...] These paragraphs were incorporated into both the deportation and forcible transfer counts (Counts 1 and 2)" (Prosecution Response Brief, para. 321, fn. 1069). See also Appeal Hearing, 13 May 2013, AT. 151.

[1958] 65*ter* Witness List No. 45; Exhibit P. 281 (Sadik Januzi), p. 2; Exhibit P. 282 (Sadik Januzi), p. 7-8.

[1959] See *supra*, para. 576.

documents. Accordingly, the Appeals Chamber finds that Đorđević has shown that his ability to prepare his defence was materially impaired and that he suffered prejudice as a result.

601. For these reasons, the Appeals Chamber finds that the Trial Chamber erred in convicting Đorđević for the crime of deportation on the basis of the incidents in Kladernica/Klladërnicë between 12 and 15 April 1999.

b. Brocna/Burojë and Tušilje/Tushilë

602. The Trial Chamber found that the crime of other inhumane acts (forcible transfer) was carried out by Serbian forces in Brocna/Burojë and Tušilje/Tushilë between 25 and 26 March and on 29 March 1999, respectively.[1960] Brocna/Burojë and Tušilje/Tushilë are part of the Srbica/Skënderaj municipality.[1961]

603. The Indictment alleges with regard to Srbica/Skënderaj municipality, that "[b]eginning on or about 25 March 1999, forces of the FRY and Serbia attacked and destroyed the villages of Vojnike/Vocnjak, Leocina/Lecine, Kladernica/Klladërnicë, Turicevac/Turiçec and Izbica/Izbicë, by shelling and burning" and that "[o]n or about 28 March 1999, at least 4,500 Kosovo Albanians from these villages gathered in the village of Izbica/Izbicë [from where] [t]he women and children were forcibly moved."[1962]

604. The Appeals Chamber notes that the Indictment is specific in identifying the villages in Srbica/Skënderaj municipality that were attacked and from where the villagers fled to Izbica/Izbicë. The Indictment gives an exhaustive list which does not mention the villages of Brocna/Burojë or Tušilje/Tushilë.[1963] It also does not include a general allegation of attacks and expulsions "throughout the municipality", or indicate that the locations identified were only examples of villages in Srbica/Skënderaj municipality that were attacked.[1964] Thus, the Indictment is defective.

605. The Appeals Chamber notes that the allegation of forcible transfer at Brocna/Burojë is nowhere to be found either in the Prosecution Pre-Trial Brief or in the 65*ter* Witness List. With regard to Tušilje/Tushilë, Rule 65*ter* witness summaries contain some information about a witness who escaped to Tušilje/Tushilë after the Serb forces shelled her village, on 26 March 1999, and she

[1960] Trial Judgement, paras 1630-1632.
[1961] See Trial Judgement, paras 604-644, 1630-1634.
[1962] Indictment, para. 72(c).
[1963] See Indictment, para. 72(c).
[1964] See Indictment, para. 72(c).

was subsequently forced, along with the other villagers who had gathered in Tušilje/Tushilë, to leave in the direction of Klina, and then to Đakovica.[1965] Notwithstanding this information, the Appeals Chamber is of the view that it is not possible to cure the defect in the Indictment with respect to Brocna/Burojë and Tušilje/Tushilë. In this case, the Rule 65*ter* witness summaries expand the charges pleaded in the Indictment. The introduction of a new material fact in relation to a village other than those specifically mentioned in the Indictment, leads to a "radical transformation" of the Prosecution's case. Accordingly, the Appeals Chamber finds that Đorđević has shown that his ability to prepare his defence was materially impaired and that he suffered prejudice as a result.

606. For these reasons, the Appeals Chamber finds that the Trial Chamber erred in convicting Đorđević for the crime of other inhumane acts (forcible transfer) in relation to incidents in Brocna/Burojë between 25 and 26 March 1999, and Tušilje/Tushilë on 29 March 1999.

(c) Đakovica/Gjakovë municipality

607. With regard to Đakovica/Gjakovicë municipality, Đorđević challenges his convictions for deportation and other inhumane acts (forcible transfer) on the basis of incidents in Žub/Zhub, in early April 1999 and from 27 to 28 April 1999.[1966]

608. The Trial Chamber found that the crime of other inhumane acts (forcible transfer) was established with respect to several villages in Đakovica/Gjakovicë municipality, including Žub/Zhub, in early April 1999, when Serbian forces went door to door in several Kosovo Albanian villages "telling the people to leave within two hours".[1967] The Trial Chamber also found that the crime of deportation was established on 27 and 28 April 1999 with respect to, among other villages in the municipality, the village of Žub/Zhub.[1968]

609. The Indictment alleges deportation and other inhumane acts (forcible transfer) for the period of 2 to 4 April 1999 with regard to "thousands of Kosovo Albanians living in the town of Đakovica/Gjakovicë and neighbouring villages".[1969] In addition, it sets out that "during late March

[1965] 65*ter* Witness List No. 32.
[1966] Đorđević Appeal Brief, paras 365, 357(c); 358(d), referring to Trial Judgement, paras 1655, 1701-1704.
[1967] Trial Judgement, para. 1655.
[1968] Trial Judgement, paras 984, 1656-1657, where the Trial Chamber found that the crime of deportation was established in: Junik, Dobroš/Dobrosh, Ramroc, Meja/Mejë, Orize, Korenica/Korenicë, Guska/Guskë, "and other villages in this area"; Trial Judgement, para. 1701, also listing Žub/Zhub among the locations in Đakovica/Gjakovicë municipality where the crime of deportation was established.
[1969] Indictment, para. 72(h)(i).

and April 1999 forces of the FRY and Serbia forcibly expelled the Kosovo Albanian residents of many villages in the Đakovica/Gjakovicë municipality, including the villages of Dobroš/Dobrosh, Korenica/Korenicë and Meja/Mejë".[1970] It further describes that many of these residents were ordered or permitted to return to their homes only to be expelled again on or about 27 April 1999.[1971]

610. The Appeals Chamber notes that Žub/Zhub is located south of Đakovica/Gjakovë town, in Đakovica/Gjakovicë municipality.[1972] The Appeals Chamber considers that deportation and other inhumane acts (forcible transfer) of the residents from Žub/Zhub, in early April 1999 and on 27 and 28 April 1999, is alleged in the Indictment by the reference to forcible expulsions of "Kosovo Albanian residents of many villages in the Đakovica/Gjakovicë municipality".[1973] The Indictment did not provide an exhaustive list of locations, since the villages listed are only examples of locations where the crimes were allegedly committed within the municipality.

611. For these reasons, the Appeals Chamber finds that Đorđević has failed to show that the Trial Chamber erred in entering a conviction for the crimes of deportation from 27 to 28 April 1999, and other inhumane acts (forcible transfer) in early April 1999, in relation to Žub/Zhub.

(d) Suva Reka/Suharekë municipality

612. With regard to Suva Reka/Suharekë municipality, Đorđević challenges his convictions for other inhumane acts (forcible transfer) on 3 April 1999[1974] and deportation between 7 and 21 May 1999,[1975] in relation to Suva Reka/Suharekë town; and his conviction for other inhumane acts (forcible transfer) in relation to incidents in Pecane/Peqan, between 21 and 22 March 1999.[1976]

a. Suva Reka/Suharekë town

613. The Trial Chamber found that the crime of other inhumane acts (forcible transfer) occurred as a result of killings and destruction of buildings in Suva Reka/Suharekë town on two occasions:

[1970] Indictment, para. 72(h)(ii).
[1971] Indictment, para. 72(h)(ii). The Indictment alleges that: [a]round the morning hours of 27 April 1999, a massive attack was then launched in the area, including against "the remaining residents of the aforementioned villages. [...] Throughout the entire day, villagers under direct threat from the forces of the FRY and Serbia left their homes and joined several convoys of refugees [...] and eventually crossed into Albania" (Indictment, para. 72(h)(ii)).
[1972] Trial Judgement, para. 935.
[1973] Indictment, para. 72(h)(ii).
[1974] ĐorđevićAppeal Brief, para. 358(e)(i), referring to Trial Judgement, paras 1637, 1702-1704.
[1975] Đorđević Appeal Brief, para. 357(d), referring to Trial Judgement, paras 1638, 1701, 1704; Appeal Hearing, 13 May 2013, AT. 99. See also Appeal Hearing, 13 May 2013, AT. 101-102.
[1976] Đorđević Appeal Brief, para. 358(e)(ii), referring to Trial Judgement, paras 1639, 1702-1704.

first, from 27 to 28 March 1999, following the killing of at least 41 members of the Berisha family and the destruction of the mosque in the town; and second, on 3 April 1999, following shooting and burning of houses in the Gashi neighbourhood of Suva Reka/Suharekë town.[1977] The Trial Chamber further found that on 7 May 1999, Serb forces returned to Suva Reka/Suharekë town and looted and burnt houses.[1978] On 21 May 1999, the residents were ordered by Serbian forces to leave in a convoy crossing into Albania; which the Trial Chamber found constituted deportation.[1979]

614. The Indictment alleges that on the morning of 25 March 1999, the town of Suva Reka/Suharekë was surrounded by Serbian forces, and "during the following days" police officers threatened, assaulted and killed Kosovo Albanian residents and forcibly removed many of them from their homes[1980] and that Kosovo Albanians from Suva Reka/Suharekë town were "forced to flee, making their way in trucks, tractors and trailers towards the border with Albania".[1981]

615. The Appeals Chamber considers that the material facts underpinning other inhumane acts (forcible transfer) and deportation from Suva Reka/Suharekë town are alleged in the Indictment as part of the overall campaign aimed at the expulsion of the Kosovo Albanian villagers from the Suva Reka/Suharekë municipality.[1982] The Appeals Chamber however notes that, while the Indictment refers to these events as having been carried out during the days following 25 March 1999, when Serbian forces surrounded the town, the findings in the Trial Judgement clearly distinguish between two specific scenarios, resulting from separate incidents which occurred with an interval of over one month. First, the Trial Chamber found that forcible transfer from Suva Reka/Suharekë town took place from 27 to 28 March[1983] and on 3 April 1999,[1984] following attacks by Serbian forces on the town. Second, it found that deportation was carried out between 7 and 21 May 1999, when the Serbian forces returned to Suva Reka/Suharekë town with the purpose of telling the remaining residents to leave in the direction of Albania.[1985] Therefore, considering the broad lapse of time between these two events, the Appeals Chamber finds that the allegation in the Indictment referring

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[1977] Trial Judgement, paras 1635-1637. See also Trial Judgement, paras 687-695.
[1978] Trial Judgement, para. 1638.
[1979] Trial Judgement, paras 1638, 1701. See also Trial Judgement, paras 700-702. The Trial Chamber further found that the displacement constituting deportation of Kosovo Albanians from Suva Reka/Suharekë town on 21 May 1999 "was caused by specific orders of the Serbian forces to the population to leave and by fear caused by acts of the Serbian forces in the previous days" (Trial Judgement, para. 1638). The Trial Chamber ultimately concluded that the crime of deportation in relation to Suva Reka/Suharekë town occurred "between 7 and 21 May 1999" (Trial Judgement, para. 1701).
[1980] Indictment, para. 72(d).
[1981] Indictment, para. 72(d).
[1982] See Indictment, para. 72(d).
[1983] Trial Judgement, paras 1635-1636.
[1984] Trial Judgement, para. 1637.
[1985] Trial Judgement, para. 1638.

to attacks and expulsions on 25 March 1999 and days thereafter covers the Trial Chamber's first finding of forcible transfer from 27 to 28 March 1999 and on 3 April 1999. However, it does not reasonably encompass the second finding of deportation between 7 and 21 May 1999.

616. Therefore, the Appeals Chamber finds that the Indictment is defective with regard to the deportation from Suva Reka/Suharekë between 7 and 21 May 1999.

617. The Pre-Trial Brief and Rule 65*ter* witness summaries contain information from a male Muslim witness, residing in Suva Reka/Suharekë at the relevant time, and who was told by Serbian police to leave his home in the direction of Albania, on 21 May 1999.[1986] However, the Appeals Chamber considers that this information provided was not sufficient to inform Đorđević in a timely, clear and consistent manner of the new material facts that the Prosecution intended to prove at trial.[1987] The defects in the Indictment were not cured. Accordingly, the Appeals Chamber also finds that Đorđević has shown that his ability to prepare his defence was materially impaired and that he suffered prejudice as a result.

618. For these reasons, the Appeals Chamber finds that the Trial Chamber erred in convicting Đorđević for the crime of deportation between 7 and 21 May 1999 from Suva Reka/Suharekë town.

b. Pecane/Peqan

619. The Trial Chamber found that as a result of attacks by Serbian forces on many villages in the Suva Reka/Suharekë municipality between 20 and 21 March 1999, most of the civilians who had left their homes gathered in Belanica/Bellanicë.[1988] Specifically, it found that the village of Pecane/Peqan was shelled by Serbian forces between 20 and 21 March 1999, with the purpose of displacing the population of the village; and as a result, the civilian population was displaced.[1989]

620. The Indictment alleges that "[b]y 31 March 1999, approximately 80,000 Kosovo Albanians displaced from villages in the Suva Reka/Suharekë municipality gathered near Belanica/Bellanicë."[1990]

621. The Appeals Chamber considers that the Indictment alleges displacement from villages in the Suva Reka/Suharekë municipality.[1991] It further notes that the village of Pecane/Peqan is located

[1986] 65*ter* Witness List No. 10.
[1987] See *supra*, para. 576.
[1988] Trial Judgement, para. 1640.
[1989] Trial Judgement, para. 1639.
[1990] Indictment, para. 72(d)(i).

in Suva Reka/Suharekë municipality, approximately two kilometres from Suva Reka/Suharekë town.[1992]

622. Therefore, Đorđević has failed to show that the Trial Chamber erred in entering convictions for other inhumane acts (forcible transfer) from Pecane/Peqan, between 20 and 21 March 1999.

(e) Gnjilane/Gjilan municipality

623. With regard to Gnjlane/Gjilan municipality, Đorđević challenges his conviction for deportation at Vlaštica/Llashticë, on 6 April 1999.[1993]

624. The Trial Chamber found that on 6 April 1999, members of the Serbian forces entered the village of Vlaštica/Llashticë, forced the inhabitants out of their homes, looted, and set the houses on fire.[1994] The mosque was also heavily damaged, and its library destroyed.[1995] Between 6 and 11 April 1999, the inhabitants were forcibly displaced across the border with Serbia and eventually to FYROM.[1996] The Trial Chamber found that this constituted deportation.[1997]

625. The Indictment alleges several attacks and forcible expulsions of Kosovo Albanians carried out by Serbian forces in different locations throughout the municipality of Gnjilane/Gjilan, starting on or about 6 April 1999.[1998] In particular, it is alleged that "[t]hroughout the entire municipality of Gnjlane/Gjilan, forces of the FRY and Serbia systematically burned and destroyed houses, shops, cultural monuments and religious sites belonging to Kosovo Albanians, including a mosque in Vlaštica/Vlastica".[1999] The Indictment further alleges that many of the displaced persons from Gnjilane/Gjilan crossed Kosovo's boundary with Serbia before eventually entering FYROM.[2000] Additionally, it alleges at paragraph 72, referring to paragraphs 25-32 of the Indictment, that "[t]o facilitate the expulsions and displacements, forces of the FRY and Serbia deliberately created an atmosphere of fear and oppression through the use of force, threats of force and acts of violence",

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[1991] See Indictment, para. 72(d)(i).
[1992] Trial Judgement, para. 704.
[1993] Đorđević Appeal Brief, para. 357(e), referring to Trial Judgement, paras 1663, 1701, 1704.
[1994] Trial Judgement, para. 1663.
[1995] Trial Judgement, para. 1663.
[1996] Trial Judgement, paras 1054-1061, 1663.
[1997] Trial Judgement, para. 1663.
[1998] Indictment, para. 72(i).
[1999] Indictment, para. 72(i).
[2000] Indictment, para. 72(i).

such as "the burning and destruction of property, including [...] cultural monuments and religious sites".[2001]

626. The Appeals Chamber considers that deportation from the municipality of Gnjlane/Gjilan is pleaded in the Indictment, which refers to displaced Kosovo Albanians crossing the border to Serbia as a result of various attacks carried out by Serbian forces throughout the municipality. Further, with regard to the attack on the mosque in Vlaštica/Vlastica, the Appeals Chamber considers this as an example of the "acts of violence" directed to "[t]o facilitate the expulsions and displacements", as alleged in the Indictment.[2002]

627. For these reasons, the Appeals Chamber finds that Đorđević has failed to show that the Trial Chamber erred in entering a conviction for the crime of deportation from Vlaštica/Llashticë on 6 April 1999.

(f) Uroševac/Ferizaj municipality

628. With regard to Uroševac/Ferizaj municipality, Đorđević challenges his conviction for deportation in relation to Uroševac/Ferizaj town on 27 April 1999.[2003]

629. The Trial Chamber found that the crime of deportation was established on 27 April 1999, when the Kosovo Albanians present in Uroševac/Ferizaj left the town in the direction of FYROM, "because it was too dangerous to remain in Uroševac/Ferizaj" and therefore they "had no genuine choice" but to go towards the safest location, which was FYROM, across the border.[2004]

630. The Indictment alleges that, as a result of attacks carried out between 24 March and 14 April 1999 on villages in the municipality of Uroševac/Ferizaj, "[t]he displaced persons went to the town of Uroševac/Ferizaj, where most boarded trains which carried them to the Macedonian [FYROM] border crossing."[2005]

631. The Appeals Chamber notes that the deportation from Uroševac/Ferizaj town is alleged in the Indictment as a consequence of the attacks carried out throughout the municipality between

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[2001] Indictment, paras 26, 72. See also Indictment, paras 25-32.
[2002] Indictment, para. 72(i), referring to Indictment, paras 25-32.
[2003] Đorđević Appeal Brief, para. 357(f), referring to Trial Judgement, paras 1665, 1701, 1704.
[2004] Trial Judgement, paras 1665, 1668.
[2005] Indictment, para. 72(j).

24 March and 14 April 1999, and considers that this allegation is consistent with the Trial Chamber's finding that the deportation from Uroševac/Ferizaj occurred on 27 April 1999.[2006]

632. For these reasons, the Appeals Chamber finds that Đorđević has failed to show that the Trial Chamber erred in convicting him for deportation on the basis of the events in Uroševac/Ferizaj town on 27 April 1999.

(g) Orahovac/Rahovec municipality

633. With regard to Orahovac/Rahovec municipality, Đorđević challenges his convictions for other inhumane acts (forcible transfer) from Bela Crckva/Bellacërkvë,[2007] Mala Kruša/Krusë-e-Vogël,[2008] and Velika Kruša/Krushë[2009] on 25 March 1999.

634. The Trial Chamber found that, as a result of attacks carried out by Serbian forces in the villages of Bela Crckva/Bellacërkvë, Mala Kruša/Krusë-e-Vogël and Velika Kruša/Krushë, on 25 March 1999, the Kosovo Albanian residents were forced to leave these villages and that this constituted other inhumane acts (forcible transfer).[2010]

635. The Indictment alleges that on 25 March 1999, attacks were carried out on villages in Orahovac/Rahovec municipality, which resulted in the forcible expulsions of the villagers over the following days "throughout the entire municipality".[2011] In addition, and specifically with regard to Bela Crckva/Bellacërkvë and Velika Kruša/Krushë, the Indictment further alleges that "[i]n the course of the expulsions, throughout the entire municipality of Orahovac/Rahovec, forces of the FRY and Serbia systematically burned houses, shops, cultural monuments and religious sites belonging to Kosovo Albanians."[2012] Among these acts of violence was the destruction of the mosque in Bela Crckva/Bellacërkvë and in Velika Kruša/Krushë, on or about 25 March 1999.[2013]

636. The Appeals Chamber notes that Bela Crckva/Bellacërkvë, Mala Kruša/Krusë-e-Vogël, and Velika Kruša/Krushë are located in the municipality of Orahovac/Rahovec. The Indictment alleges forcible expulsions "throughout the entire municipality" which, therefore, includes these villages.

[2006] See Trial Judgement, paras 1665, 1668.
[2007] Đorđević Appeal Brief, para. 358(a)(i), referring to Trial Judgement, paras 1618, 1702-1704.
[2008] Đorđević Appeal Brief, para. 358(a)(ii), referring to Trial Judgement, paras 1619-1621, 1702-1704.
[2009] Đorđević Appeal Brief, para. 358(a)(iii), referring to Trial Judgement, paras 1622, 1702-1704.
[2010] Trial Judgement, paras 1618-1620, 1622.
[2011] Indictment, para. 72(a)(i).
[2012] Indictment, para. 72(a)(i).
[2013] Indictment, para. 72(a)(i).

637. The Appeals Chamber finds that Đorđević has failed to show that Trial Chamber erred in convicting him for the crime of other inhumane acts (forcible transfer) from these locations.

(h) Peć/Pejë municipality

638. With regard to Peć/Pejë municipality, Đorđević challenges his conviction for other inhumane acts (forcible transfer) from Čuska/Qyushk on 14 May 1999.[2014]

639. The Trial Chamber found that on 14 May 1999, Serbian forces forced the Kosovo Albanian women and children to board tractors and sent them to Peć/Pejë from the village of Čuska/Qyushk, and that it constituted the crime of other inhumane acts (forcible transfer).[2015]

640. The Indictment reads:

> Peć/Pejë: On or about 27 and 28 March 1999, *in the city of Peć/Pejë*, forces of the FRY and Serbia went from house to house forcing Kosovo Albanians to leave. Some houses were set on fire. Soldiers and police were stationed along every street directing the Kosovo Albanians toward the town centre. Once the people reached the centre of town, those without cars or vehicles were forced to get on buses or trucks and were driven to the town of Prizren and then on towards the Albania border. Outside Prizren, the Kosovo Albanians were forced to get off the buses and trucks and walk approximately 15 kilometres to the Albanian border where, prior to crossing the border, they were ordered to turn their identification papers over to forces of the FRY and Serbia.[2016]

641. The Appeals Chamber notes that the allegation in the Indictment concerning the municipality of Peć/Pejë does not refer to the village of Čuska/Qyushk, but only to the city of Peć/Pejë.[2017] However, the Prosecution asserts that the crime of other inhumane acts (forcible transfer), based on the events in Čuska/Qyushk, is charged in paragraphs 25 to 32 and 72(e) of the Indictment, as Count 2 (other inhumane acts (forcible transfer)) and Count 5 (persecutions) incorporate these paragraphs.[2018] Further, it argues that Đorđević received timely, clear, and consistent notice from the Rule 65*ter* witness summaries and the witness' prior testimony that evidence of events in Čuska/Qyushk would be offered in support of paragraphs 25 to 32 of the Indictment.[2019]

[2014] Đorđević Appeal Brief, para. 358(f), referring to Trial Judgement, paras 1643-1644, 1702-1704; Appeal Hearing, 13 May 2013, AT. 99-100. See also Appeal Hearing, 13 May 2013, AT. 101-102.
[2015] Trial Judgement, paras 1643-1644.
[2016] Indictment, para. 72(e) (emphasis added).
[2017] See Indictment, para. 72(e).
[2018] Prosecution Response Brief, para. 334, referring to Indictment paras 73-76. The Prosecution further claims that "notice of forcible transfer as an underlying act of persecutions would thus suffice for notice of the charge of unlawful transfer, and *vice versa*" (Prosecution Response Brief, para. 334, citing *Naletilić and Martinović* Appeal Judgement, para. 54). See also Appeal Hearing, 13 May 2013, AT. 153.
[2019] Prosecution Response Brief, para. 334.

642. The Appeals Chamber notes that Count 2 incorporates, by reference, paragraphs 25 to 32 of the Indictment.[2020] However, these paragraphs do not allege crimes at Čuska/Qyushk, nor throughout the municipality of Peć/Pejë. The Indictment also generally alleges widespread and systematic expulsions and displacements "across the entire province of Kosovo".[2021] The Appeals Chamber, however, considers this allegation to be too broad and general to provide Đorđević with notice. The Appeals Chamber also notes that there is over one month's difference between the date provided in the Indictment in relation to Peć/Pejë municipality and the Trial Chamber's findings concerning Čuska/Qyushk.[2022] Therefore, the Appeals Chamber finds that the Indictment is defective with regard to other inhumane acts (forcible transfer) from Čuska/Qyushk.

643. The Appeals Chamber notes that Rule 65*ter* witness summaries provide information concerning events at Čuska/Qyushk around mid-May 1999 which is indicative, *inter alia*, of the forcible transfer carried out by Serbian forces.[2023] The summaries refer to Serbian forces attacking the village on or about 14 May 1999, by firing weapons and burning houses, and separating men from women.[2024] By introducing new material facts regarding the events in Čuska/Qyushk in May 1999, the Prosecution expanded the charge. Notwithstanding this information, the Appeals Chamber is of the view that it is not possible to cure the defect in the Indictment with respect to Čuska/Qyushk. The introduction of a new material fact in relation to a village other than those specifically mentioned in the Indictment, leads to a "radical transformation" of the Prosecution's case. Accordingly, the Appeals Chamber finds that Đorđević has shown that his ability to prepare his defence was materially impaired and that he suffered prejudice as a result.

644. In these circumstances, the Appeals Chamber finds that the Trial Chamber erred in convicting Đorđević for the crime of other inhumane acts (forcible transfer) in relation to the events occurred at Čuska/Qyushk, on 14 May 1999.

[2020] See Indictment, para. 73, alleging that: "[w]ith respect to those Kosovo Albanians who were internally displaced within the territory of Kosovo, the Prosecutor re-alleges and incorporates by reference paragraphs 16-33, 60-64, and 71-72"; Indictment, para. 76, alleging that: "[t]he Prosecutor re-alleges and incorporates by reference paragraphs 16-33, 60-64, 72 and 75."

[2021] Indictment, para. 25.

[2022] Trial Judgement, paras 1643-1644.

[2023] Rule 65*ter* List Nos. 11, 73.

[2024] Rule 65*ter* List Nos. 11, 73.

(i) Dečani/Deçan municipality

645. With regard to Dečani/Deçan municipality, Đorđević challenges his conviction for other inhumane acts (forcible transfer) from Drenovac/Drenoc, on 26 March 1999.[2025]

646. The Trial Chamber found that Serbian forces attacked Drenovac/Drenoc on 26 March 1999, resulting in the villagers of Drenovac/Drenoc fleeing to the neighbouring village of Beleg.[2026] This constituted other inhumane acts (forcible transfer).[2027] It further considered that the village of Drenovac/Drenoc is located in the central part of Dečani/Deçan municipality, in the proximity of Beleg.[2028]

647. The relevant passage in the Indictment alleges various attacks by Serbian forces on the village of Beleg and "other surrounding villages in the Dečani/Deçan municipality".[2029] It further alleges that following these attacks, villagers were told to leave their houses, which were then looted and burned.[2030] Several men, women, and children gathered in a nearby field in the village of Beleg.[2031]

648. Considering that Drenovac/Drenoc is located in the central part of Dečani/Deçan municipality,[2032] the Appeals Chamber concludes that the offence of other inhumane acts (forcible transfer) of villagers from Drenovac/Drenoc, as found by the Trial Chamber, is covered by the allegation in the Indictment that attacks on "other surrounding villages" in Dečani/Deçan municipality caused the villagers "to leave their houses".[2033]

649. For these reasons, the Appeals Chamber finds that Đorđević has failed to show that the Trial Chamber erred in entering a conviction for the crime of other inhumane acts (forcible transfer) in relation to the events at Drenovac/Drenoc on 26 March 1999.

3. Murder as a violation of the laws or customs of war and as a crime against humanity

650. The Trial Chamber found Đorđević responsible for murder, both as a violation of the laws or customs of war and as a crime against humanity (Counts 3 and 4), for killings of Kosovo

[2025] Đorđević Appeal Brief, para. 358(g), referring to Trial Judgement, paras 1672, 1702-1704.
[2026] Trial Judgement, paras 1144, 1672.
[2027] Trial Judgement, para. 1672.
[2028] Trial Judgement, para. 1142.
[2029] Indictment, para. 72(l).
[2030] Indictment, para. 72(l).
[2031] Indictment, para. 72(l).
[2032] See Trial Judgement, paras 1142, 1144.

Albanian civilians carried out by Serbian forces in various locations covering seven municipalities in Kosovo.[2034]

651. Đorđević submits that the Trial Chamber erred in entering convictions for murder in relation to four specific crime sites: (i) Đakovica/Gjakovë town, on 1 April 1999; (ii) Podujevo/Podujevë town, on 28 March 1999; (iii) Mala Kruša/Krusë-e-Vogël, on 25 March 1999; and (iv) Suva Reka/Suharekë town, on 26 March 1999.[2035]

(a) Đakovica/Gjakovë town in Đakovica/Gjakovë municipality

652. The Trial Chamber found Đorđević responsible for the murder of 20 Kosovo Albanian civilians at 157 Miloš Gilić/Millosh Giliq Street and four members of the Cana family at 80 Miloš Gilić/Millosh Giliq Street in Đakovica/Gjakovë town, carried out by MUP forces on the night of 1 April 1999.[2036]

653. Đorđević challenges his conviction for the murder of the four members of the Cana family at 80 Miloš Gilić/Millosh Giliq Street.[2037]

654. The Indictment alleges that an operation was launched on the evening of 1 April 1999 against the Querim district of Đakovica/Gjakovë, during which Serbian forces "forcibly entered the houses of Kosovo Albanians in the Querim district, killed the occupants and set fire to the buildings".[2038] It further states that "over 50 persons were killed" and as an example referred to the murder of 20 Kosovo Albanians, listed in Schedule G of the Indictment, in a house located at 157 Miloš Gilić/Millosh Giliq Street.[2039]

655. The Appeals Chamber notes that the Indictment alleges that over 50 persons were killed in various "houses of Kosovo Albanians in the Querim district" on 1 April 1999. Thus, it considers that although Schedule G only lists 20 persons killed at 157 Miloš Gilić/Millosh Giliq Street, the

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2033 Indictment, para. 72(l).
2034 Trial Judgement, paras 1753, 2193-2195. These locations are: Bela Ckva/Bellacërkë and Mala Kruša/Krusë-e-Vogël (Orahovac/Rahovec municipality); Suva Reka/Suharekë municipality; Izbica/Izbicë (Sbrica/Skenderaj municipality); Đakovica/Gjakovë and Meja/Mejë (Đakovica/Gjakovë municipality); Vučitrn/Vushtrri municipality; Kotlina/Kotlinë, Slatina/Slatinë, Vata/Vataj, and Dubrava/Lisnaje (Kačanik/Kaçanik municipality); Podujevo/Podujevë municipality (see Trial Judgement, paras 1709-1752).
2035 Đorđević Appeal Brief, para. 359, referring to Trial Judgement, paras 1715, 1719, 1721, 1732, 1734, 1751-1753, 1956, 2143. In relation to the murders at Podujevo and Mala Kruša/Krusë-e-Vogël, see Appeal Hearing, 13 May 2013, AT. 100. See also Appeal Hearing, 13 May 2013, AT. 101-102.
2036 Trial Judgement, paras 1732, 1734, 1753, 2193-2195. See also Trial Judgement, paras 886-889, 891-892.
2037 Đorđević Appeal Brief, para. 359(a).
2038 Indictment, para. 75(g).
2039 Indictment, para. 75(g).

reference to the "over 50 persons" killed in the Querim district includes the murder of members of the Cana family at 80 Miloš Gilić/Millosh Giliq Street, which is also located in the Querim district.

656. The Appeals Chamber finds that Đorđević has failed to show that the Trial Chamber erred in entering a conviction for the murder in relation to the four members of the Cana family, at 80 Miloš Gilić/Millosh Giliq Street, on 1 April 1999.

(b) Podujevo/Podujevë town in Podujevo/Podujevë municipality

657. The Trial Chamber found Đorđević responsible for the murder of two elderly Kosovo Albanian men, Hamdi Duriqi and Selmon Gashi, in Podujevo/Podujevë town, on 28 March 1999.[2040] It found that the two elderly men were shot by Serbian forces at a coffee shop outside the courtyard where, a little later, 14 women and children were shot dead.[2041] The Trial Chamber acknowledged that the names of the two elderly men were "not specifically listed by name in the Indictment",[2042] but nevertheless found that these killings fell within the same set of events alleged to have occurred at the courtyard on 28 March 1999.[2043]

658. The Indictment alleges the killing of "at least 14 members belonging to the Bogujevci, Duriqi and Llugaliu families, all women and children, in the courtyard of a house in the town of Podujevo/Podujevë" on 28 March 1999.[2044] The Indictment further states that "[t]hose persons killed who are known by name are set forth in Schedule L."[2045] Schedule L lists the names of 14 victims, all of which were women and children.[2046]

659. The Appeals Chamber notes that the Trial Chamber found that the killing of the two elderly men, whose names it acknowledged were not listed in the Indictment, was part of the events alleged to have occurred at the courtyard in Podujevo/Podujevë on 28 March 1999, since the evidence established that this incident occurred outside the courtyard where women and children were later killed by Serbian forces, on the same day.[2047] The Appeals Chamber however notes that the Indictment is specific in alleging that the killing in the courtyard of a house in Podujevo/Podujevë

[2040] Trial Judgement, paras 1751-1753, 1956, 2143.
[2041] Trial Judgement, paras 1751-1753.
[2042] Trial Judgement, para. 1751.
[2043] Trial Judgement, para. 1751.
[2044] See Indictment, para. 75(l).
[2045] Indictment, para. 75(l).
[2046] Indictment, Schedule L, Persons Known by Name Killed at Podujevo/Podujevë – 28 March 1999.
[2047] See Trial Judgement, para. 1751 (The Trial Chamber found that the two men "were shot and killed by Serbian forces at a coffee shop outside the courtyard where, a little later, the 14 women and children were shot and killed").

on 28 March 1999 involved "all women and children" and that no killing of men is mentioned.[2048] Considering that the Indictment is specific about the gender and age of the victims, in the view of the Appeals Chamber, the killing of two elderly men is not alleged. The Indictment is therefore defective.

660. The Prosecution Pre-Trial Brief and Rule 65*ter* witness summaries contain information about the alleged events at Podujevo/Podujevë on 28 March 1999, based on the testimony of three witnesses.[2049] However, in the view of the Appeals Chamber, this information is not specific enough to give notice about the murder the two elderly men. For example, Witness Saranda Bogujevci referred to her "brother" and "other relatives" being shot,[2050] but since neither the age nor the sex of the "other relatives" were specified in her testimony, the possibility remains that these were women or children, which would be consistent with the allegation in the Indictment. Similarly, Witness Stoparić referred to killings taking place at Podujevo/Podujevë, the victims of which were "almost all" women and children, but did not give an indication as to the time period of these events.[2051] Considering that the Indictment is very specific with regard to this allegation – in referring to the killing occurred in the courtyard of a house in Podujevo/Podujevë on 28 March 1999 involving "all women and children"[2052] – the Appeals Chamber cannot conclude that the information provided by the Prosecution in the Pre-Trial Brief was sufficient to inform Đorđević in a timely, clear and consistent manner of the new material facts that the Prosecution intended to prove at trial, regarding the murder of two elderly men.[2053] Therefore, the defects in the Indictment were not cured. Accordingly, the Appeals Chamber finds that Đorđević has shown that his ability to prepare his defence was materially impaired and that he suffered prejudice as a result.

661. The Appeals Chamber therefore finds that the Trial Chamber erred in convicting Đorđević for the murder of two elderly Kosovo Albanian men, Hamdi Duriqi and Selmon Gashi, at Podujevo/Podujevë, on 28 March 1999.

(c) Mala Kruša/Krusë-e-Vogël in Orahovac/Rahovec municipality

662. The Trial Chamber found that during the day of 25 March 1999, nine Kosovo Albanians who refused to leave their homes following an attack by Serbian forces were burnt to death in their

[2048] Indictment, para. 75(l).
[2049] Pre-Trial Brief, para. 240, referring to witnesses Fatos Bogujevci, Saranda Bogujevci and Goran Stoparić.
[2050] Rule 65*ter* List No.15; Prosecution Pre-Trial Brief, para. 240.
[2051] Rule 65*ter* List No. 115; Prosecution Pre-Trial Brief, para. 240.
[2052] Indictment, para. 75(l).
[2053] See *supra*, para. 576.

houses in Mala Kruša/Krusë-e-Vogël.[2054] It also found that Serbian forces then assembled a large group of Kosovo Albanian men in the Batusha barn, located at the outskirts of Mala Kruša/Krusë-e-Vogël, where they were either shot dead or burned to death when the barn was set on fire.[2055] This operation resulted in 104 deaths.[2056]

663. The Indictment alleges that on or about 25 March 1999, Serbian forces attacked the villages of Mala Kruša/Krusë-e-Vogël and Velika Kruša/Krushë-e-Madhe, systematically looting and burning houses.[2057] Subsequently, the villagers took refuge in the house of Sedje Batusha, located on the outskirts of Mala Kruša/Krusë-e-Vogël.[2058] On the morning of 26 March 1999, Serbian forces located the villagers, separated the men from the women and children and assembled the men and boys into the house.[2059] As a result of shooting and fire, the Indictment alleges that approximately 105 Kosovo Albanian men and boys were killed.[2060]

664. The Appeals Chamber notes that in making its finding on the killing of the nine men, the Trial Chamber acknowledged that this killing did not occur at the Batusha barn, as alleged in the Indictment. Nevertheless, it found that the killing was carried out in the course of the attack by Serbian forces on the village of Mala Kruša/Krusë-e-Vogël on 25 March 1999.[2061] However, the Appeals Chamber considers that, while the Indictment clearly charges the killings of approximately 105 persons on 26 March 1999, there is no mention of any killings occurring on 25 March during the attack by Serbian forces on the villages of Mala Kruša/Krusë-e-Vogël and Velika Kruša/Krushë-e-Madhe.[2062] Only looting and burning of houses are alleged to have occurred on 25 March 1999.[2063]

665. The Appeals Chamber further considers that three of the nine men who were found to have been killed on 25 March 1999 were listed in Schedule C of the Indictment as victims of the incident occurring on 26 March 1999,[2064] but not on 25 March 1999. Thus, in the view of the Appeals Chamber, these three men are alleged to have been part of the approximately 105 victims of the

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[2054] Trial Judgement, paras 485, 1715.
[2055] Trial Judgement, para. 1717.
[2056] Trial Judgement, para. 1717.
[2057] Indictment, para. 75(c).
[2058] Indictment, para. 75(c).
[2059] Indictment, para. 75(c).
[2060] Indictment, para. 75(c).
[2061] Trial Judgement, para. 1715. See also Trial Judgement, para. 485.
[2062] See Indictment, para. 75(c).
[2063] Indictment, para. 75(c).
[2064] See Trial Judgement, para. 485 (referring to Sali Shehu, Demir Rashkaj and Nexhat Shehu), fn. 6121 (referring to Trial Judgement, Schedule: Victims Chart); Indictment, Schedule C, Persons Known by Name Killed at Mala-Kruša-e-Vogël – Velika Kruša-e-Mahde – 26 March 1999.

killings which occurred at the Batusha barn on 26 March 1999, but there is no indication in the Indictment that they were alleged to have been killed on 25 March 1999 during the attack by Serbian forces on the villages of Mala Kruša/Krusë-e-Vogël and Velika Kruša/Krushë-e-Madhe. As such, the Indictment is defective with regard to the killing of the nine men in Mala Kruša/Krusë-e-Vogël on 25 March 1999.

666. While the Prosecution Pre-Trial Brief and the Rule 65*ter* Witness List refer to the killing of over a hundred Kosovo Albanian men and boys in the Batusha barn, no information is to be found in relation to the killing of 9 Kosovo Albanian men in their house in Mala Kruša/Krusë-e-Vogël on 25 March 1999.[2065] Therefore, the defects in the Indictment were not cured. Accordingly, the Appeals Chamber finds that Đorđević has shown that his ability to prepare his defence was materially impaired and that he suffered prejudice as a result.

667. Accordingly, the Appeals Chamber finds that the Trial Chamber committed an error in convicting Đorđević for the murder of the nine men in Mala Kruša/Krusë-e-Vogël on 25 March 1999.[2066]

(d) Suva Reka/Suharekë town in Suva Reka/Suharekë municipality

668. The Trial Chamber found that on 26 March 1999, six members of the Berisha family were killed by MUP forces in the vicinity of the Berisha family compound in Suva Reka/Suharekë town.[2067] It also found that two elderly members of the Berisha family were shot by MUP forces while running away from these killings.[2068]

669. Đorđević challenges his conviction for the murder of the two elderly members of the Berisha family.[2069]

670. The Indictment refers to the killing of at least 47 civilians during an action carried out on 26 March 1999 by Serbian forces, whereby these forces surrounded the "vicinity of the Berisha family compound in the town of Suva Reka/Suharekë".[2070] Specifically, it alleges that: six members of the Berisha family were killed outside their house; the remaining family members along with

[2065] Prosecution Pre-Trial Brief, para. 224.
[2066] See Trial Judgement, paras 1715, 1717.
[2067] Trial Judgement, para. 1721.
[2068] Trial Judgement, para. 1721.
[2069] Đorđević Appeal Brief, para. 359(d).
[2070] Indictment, para. 75(d).

"three extended Berisha family groups" were killed inside the coffee shop; and "[a]n additional family member was later also brought to the coffee shop and shot dead."[2071]

671. The Appeals Chamber notes that the killing of the two elderly members of the Berisha family, as found by the Trial Chamber occurred at the same time and location described in the Indictment, which alleges that "[a]t least 47 civilians" were killed during the action carried out by Serbian forces in the vicinity of the Berisha family compound.[2072] Therefore, it is immaterial that the Indictment did not specify the circumstances of these particular killings as found in the Trial Judgement; namely, that the two elderly men were killed while running away from the site of the killings.[2073]

672. The Appeals Chamber finds that Đorđević has failed to show that the Trial Chamber erred in entering a conviction for the murder of two elderly members of the Berisha family in the vicinity of the Berisha compound on 26 March 1999.

4. Persecutions

673. The Trial Chamber found Đorđević responsible under Count 5 for persecutions as a crime against humanity, committed by Serbian forces against Kosovo Albanian civilians in Kosovo during the Indictment period, through the underlying acts of: forcible transfer; deportation; murder; and destruction of religious or culturally significant property.[2074]

674. Đorđević submits that the errors of the Trial Chamber in the context of the crimes of deportation, other inhumane acts (forcible transfer), and murder also apply to convictions entered for the crime of persecutions committed through these underlying acts.[2075] He also makes three additional claims arguing that the Trial Chamber erred in: (i) convicting him for persecutions by way of the murder in Pusto Selo/Pastasellë;[2076] (ii) adding to Count 5 murders not alleged in

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[2071] Indictment, para. 75(d).
[2072] Indictment, para. 75(d).
[2073] Trial Judgement, para. 1721.
[2074] Trial Judgement, para. 1856. See also Trial Judgement, paras 1774-1855, 2193-2195.
[2075] Đorđević Appeal Brief, para. 360(a), referring to Trial Judgement, paras 1774-1783, 1789-1790, 1856.
[2076] Đorđević Appeal Brief, para. 360(b), referring to Trial Judgement, paras 541, 1779-1784, 1790, 1856; Đorđević Reply Brief, para. 111.

Counts 3 and 4;[2077] and (iii) convicting him of persecutions by way of forcible transfer as it was not alleged in the Indictment.[2078]

675. The Prosecution requests the Appeals Chamber to summarily dismiss Đorđević's additional claims as undeveloped and without merit.[2079]

(a) Alleged errors in entering convictions for persecutions in relation to locations that were not charged in the Indictment

676. The Appeals Chamber notes that the material facts pleaded in support of the allegation of persecutions committed through the underlying acts of deportation, forcible transfer, and murder (Count 5) are the same as the material facts pleaded in support of the allegation of the crimes of deportation (Count 1), other inhumane acts (forcible transfer) (Count 2), and murder (Counts 3 and 4).[2080] Accordingly, the convictions entered for the crime of persecutions committed through the said underlying acts are based on the same material facts as the convictions entered for the crimes of deportation, other inhumane acts (forcible transfer), and murder.[2081] In this regard, the Appeals Chamber recalls its findings that the Trial Chamber erred in entering convictions for the crimes of: (i) deportation in relation to Kladernica/Kladërnicë[2082] and Suva Reka/Suharekë;[2083] (ii) other inhumane acts (forcible transfer) in relation to Brocna/Burojë and Tušilje/Tushilë,[2084] and Čuska/Qyushk;[2085] and (iii) murder in relation to incidents in Podujevo/Podujevë[2086] and Mala Kruša/Krusë-e-Vogël.[2087] The Appeals Chamber considers these errors automatically have an impact on the conviction for the crime of persecutions, since it was based on the same material facts in the Indictment.

677. On the basis of the same reasoning, the Appeals Chamber therefore reaffirms and applies these findings to the convictions entered by the Trial Chamber for persecutions through the same

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2077 Đorđević Appeal Brief, para. 360(c), referring to Trial Judgement, paras 1264, 2232, fn. 4872.
2078 Đorđević Appeal Brief, para. 360(d), referring to Trial Judgement, paras 1763, 1775-1778, 1856; Đorđević Reply Brief, para. 112.
2079 Prosecution Response Brief, para. 345. See Prosecution Response Brief, paras 346-348.
2080 See Indictment, paras 77(a) and (b) (In support of the charge of persecutions through deportation, forcible transfer and murder, in Count 5, the Indictment refers to the same paragraphs pleaded in support of Count 1 (deportation), Count 2 (other inhumane acts (forcible transfer)), Counts 3-4 (murder)).
2081 See Trial Judgement, paras 1774-1790, 1856.
2082 See *supra*, paras 595-601.
2083 See *supra*, paras 613-618.
2084 See *supra*, paras 602-606.
2085 See *supra*, paras 638-644.
2086 See *supra*, paras 657-661.
2087 See *supra*, paras 662-667.

underlying acts. The Appeals Chamber therefore finds that the Trial Chamber committed an error in convicting Đorđevic for persecutions with respect to the abovementioned incidents.

(b) Alleged error in convicting for persecutions by way of the murder in Pusto Selo/Pastasellë, in Orahovac/Rahovec municipality

678. Đorđević submits that the Trial Chamber erred in including incidents in Pusto Selo/Pastasellë in its finding with regard to the crime of persecutions through the underlying act of murder.[2088]

679. The Prosecution asserts that the murders in Pusto Selo/Pastasellë were relevant to the charge of persecutions in Count 5.[2089] It further submits that, in any event, Đorđević received proper notice of these murders through the Rule 65*ter* witness summaries and statements, and he did not object to this evidence at trial.[2090]

680. The Trial Chamber found that on 31 March 1999, 106 men were killed by Serbian forces in the village of Pusto Selo/Pastasellë in Orahovac/Rahovec municipality.[2091] While acknowledging that these murders were not alleged in the Indictment, the Trial Chamber nonetheless considered them as "relevant to other issues and to the charge of persecutions contained in Count 5".[2092] Accordingly, it included the events at Pusto Selo/Pastasellë on 31 March 1999 in its findings on persecutions through murder, based on evidence of discriminatory conduct by Serbian forces in connection with the killings.[2093]

681. The Appeals Chamber considers that the killings at Pusto Selo/Pastasellë on 31 March 1999 were not alleged in the Indictment either under murder (Counts 3 and 4),[2094] or under persecutions (Count 5)[2095], as the Trial Chamber acknowledged. The Indictment is therefore defective.

682. However, the Appeals Chamber observes that with regard to murder (Counts 3-4) and persecutions (Count 5), the Indictment clearly provides a non-exhaustive list of incidents of mass

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[2088] Đorđević Appeal Brief, para. 360(b), referring to Trial Judgement, paras 541, 1779-1784, 1790, 1856; Appeal Hearing, 13 May 2013, AT. 100. See also Appeal Hearing, 13 May 2013, AT. 101-102.
[2089] Prosecution Response Brief, para. 346; Appeal Hearing, 13 May 2013, AT. 154.
[2090] Prosecution Response Brief, para. 346; Appeal Hearing, 13 May 2013, AT. 154-155.
[2091] Trial Judgement, paras 541, 546.
[2092] Trial Judgement, para. 541, referring to Trial Judgement, para. 1784. The Trial Chamber used the phrase "not charged", however, in order to be consistent with its terminology, the Appeals Chamber prefers "not alleged".
[2093] Trial Judgement, paras 541, 1779-1784, 1790.
[2094] Trial Judgement, para. 541. See Indictment, paras 74-75.
[2095] See Indictment, paras 76-77.

killings which allegedly occurred throughout the Indictment period.[2096] It further notes that the Rule 65*ter* Witness List and some witness statements provide detailed and consistent information concerning killings of 106 Kosovo Albanian men in Pusto Selo/Pastasellë on 31 March 1999.[2097] The Appeals Chamber considers that this information was sufficient to inform Đorđević in a timely, clear and consistent manner of the new material facts that the Prosecution intended to prove at trial. Any prejudice caused to Đorđević was remedied by the post-indictment documents and therefore the defects were cured.

683. For these reasons, the Appeals Chamber concludes that the Trial Chamber did not err in finding Đorđević responsible for persecutions through murder based on the killings at Pusto Selo/Pastasellë on 31 March 1999.

(c) Alleged error in adding murders to Count 5

684. Đorđević submits that the Trial Chamber "erroneously and unjustifiably" added to the persecutions allegation in Count 5 "other murders beyond those in Counts 3 and 4", claiming that these additional murders were not alleged in the Indictment.[2098] Đorđević refers to the Trial Chamber's finding that "killings [were] committed by Serbian forces in at least 14 municipalities throughout Kosovo during the Indictment period".[2099]

685. The Prosecution responds that Đorđević overlooks that Count 5 expressly incorporates specific allegations concerning the JCE in paragraphs 16-33 of the Indictment and the general allegations of widespread and systematic acts of violence, including killings, against Kosovo Albanians throughout Kosovo.[2100]

686. Đorđević replies that the Prosecution "appears to want a blank cheque whereby any murder, or for that matter any other crime, could be said to fall within Count 5".[2101]

687. The Appeals Chamber notes that the Trial Chamber's finding challenged by Đorđević, that killings were committed in at least 14 municipalities throughout Kosovo, was made in the context of the "Concealment of Bodies".[2102] This finding was not used as a basis for the legal findings on

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[2096] Indictment, para. 75. See also Indictment, paras 76-77, which incorporate by reference, *inter alia*, para. 75.
[2097] Rule 65*ter* List Nos. 76, 89; Exhibits P908; P987; P988; D226. See also Rule 65*ter* List No. 35.
[2098] Đorđević Appeal Brief, para. 360(c), referring to Trial Judgement, paras 1264, 2232, fn. 4872.
[2099] Trial Judgement, para. 1264.
[2100] Prosecution Response Brief, para. 347.
[2101] Đorđević Reply Brief, para. 111.
[2102] Trial Judgement, para. 1264.

murder[2103] or persecutions through murder.[2104] Đorđević was ultimately convicted for persecutions through murder in Count 5 only for killings specifically alleged as murder in Counts 3 and 4. The only exception is the incident at Pusto Selo/Pastasellë on 31 March 1999, which has already been discussed above.[2105]

688. Furthermore, the Appeals Chamber understands Đorđević to argue that the Trial Chamber also committed errors in adding victims to the "Victim Charts".[2106] The Appeals Chamber finds this reference inapposite. If Đorđević intended to use this finding in support of his claim that the Trial Chamber "erroneously and unjustifiably" added murders to Count 5 beyond those set out in Counts 3 and 4, he should have identified particular incidents or victims, which he claims were not listed in the Indictment, as he has done in relation to other submissions in this ground of appeal.[2107] Instead, by solely referring to this general statement in the Trial Judgement, he fails to challenge any specific factual finding and does not articulate the Trial Chambers' alleged error.[2108] The Appeals Chamber therefore dismisses this claim.

689. In light of the foregoing, the Appeals Chamber finds that the Đorđević has failed to show that the Trial Chamber committed an error in entering convictions for persecutions through murder in Count 5 of the Statute.

(d) Alleged error in entering convictions for persecutions through forcible transfer

690. Đorđević submits that the Trial Chamber erred in entering a conviction for the crime of persecutions through forcible transfer.[2109] In support of his submission, Đorđević argues that paragraph 77(a) of the Indictment includes paragraph 72 (deportation)[2110] by reference but does not

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2103 See Trial Judgement, paras 1709-1753.
2104 See Trial Judgement, paras 1779-1790.
2105 See *supra*, paras 678-683.
2106 Đorđević Appeal Brief, para. 360(c), referring to Trial Judgement, para. 2232. "The Trial Chamber added two further categories of victims to the Victims Charts, other than victims whose names are alleged in the Indictment. These categories are: 'Victims known by name and not listed in the schedule of the Indictment', and 'Victims not known by name and not listed in the Schedule of the Indictment'" (Trial Judgement, para. 2232).
2107 See Đorđević Appeal Brief, paras 357-359, 360(a-b).
2108 See *supra*, para. 20.
2109 Đorđević Appeal Brief, para. 360(d).
2110 See Prosecution Response Brief, fn. 1148. The Prosecution notes that paragraph 360(d) of Đorđević Appeal Brief contains a scrivener's error, in that instead of "paragraph 7" it should have referred to "paragraph 72". The Appeals Chamber notes that Đorđević's Reply Brief is silent on this issue.

include paragraph 73 (other inhumane acts (forcible transfer)).[2111] He claims that the Trial Chamber "ignored this limitation".[2112]

691. The Prosecution responds that Đorđević's argument is incorrect, because paragraph 77 alleges persecutions by means of both forcible transfer and deportation, and includes the paragraphs setting forth the material facts, namely paragraphs 25-32 and 72. Accordingly, it argues that "[n]othing requires the Indictment to have incorporated by reference the legal characterization of the facts supplied by Count 2 (forcible transfer) and paragraph 73, which itself incorporates by reference, among others, paragraphs 25-32, and 72."[2113]

692. The Appeals Chamber notes that paragraph 77(a) of the Indictment alleges the crime of persecutions through forcible transfer and deportation.[2114] With regard to the material facts pleaded in support of this charge, paragraph 77(a) refers to, among others, paragraph 72 (deportation) but not paragraph 73 (other inhumane acts (forcible transfer)). Nevertheless, the Appeals Chamber observes that the material facts pleaded in paragraph 72 in support of Count 1 (deportation)[2115] are the same as those pleaded in paragraph 73 in support of Count 2 (other inhumane acts (forcible transfer)) since paragraph 73 itself incorporates by reference paragraph 72.[2116]

693. The Appeals Chamber notes that, paragraph 77(a) of the Indictment alleges the crime of persecutions through "the forcible transfer and deportation by forces of the FRY and Serbia of approximately 800,000 Kosovo Albanian civilians".[2117] In any event, the Appeals Chamber recalls that the crime of persecutions requires that an "act or omission" – not a "crime"[2118] – which infringes upon a fundamental right laid down in customary international law, be committed with discriminatory intent.[2119] The Appeals Chamber also notes the finding in *Krnojelac* Appeal Judgement that "acts of forcible displacement underlying the crime of persecution punishable under

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[2111] Đorđević Appeal Brief, para. 360(d).
[2112] Đorđević Appeal Brief, para. 360(d).
[2113] Prosecution Response Brief, para. 348.
[2114] Indictment, para. 77(a), alleging "[t]he forcible transfer and deportation by forces of the FRY and Serbia of approximately 800,000 Kosovo Albanian civilians as described in paragraphs 25-32, and 72."
[2115] Indictment, paras 71-72. "The Prosecutor re-alleges and incorporates by reference paragraphs 16-33 and 60-64." (Indictment, para. 71).
[2116] Indictment, para. 73, stating that "[w]ith respect to those Kosovo Albanians who were internally displaced within the territory of Kosovo, the Prosecutor re-alleges and incorporates by reference paragraphs 16-33, 60-64, and 71-72."
[2117] Indictment, para. 77(a).
[2118] *Kvočka et al.* Appeal Judgement, paras 322-323; *Brđanin* Appeal Judgement, para. 296.
[2119] *Deronjić* Judgement, para. 109; *Kvočka et al.* Appeal Judgement, paras 320, 454; *Blaškić* Appeal Judgement, para. 131; *Krnojelac* Appeal Judgement, para. 185; *Vasiljević* Appeal Judgement, para. 113.

Article 5(h) of the Statute are not limited to displacements across a national border".[2120] The Appeals considers that paragraph 77(a) of Indictment therefore refers to "forcible transfer" and "deportation" as general terms in order to cover the acts of "forcible displacement".[2121] The lack of reference in paragraph 77 to paragraph 73 of the Indictment does not affect the allegations. Accordingly, the Appeals Chamber considers that the material facts pleaded in relation to the crime of persecutions are set out in detail in paragraph 72 of the Indictment.

694. Therefore, the Appeals Chamber finds that Đorđević has failed to demonstrate that the Trial Chamber erred in entering a conviction for persecutions in relation to those acts of displacement that were charged in the Indictment.[2122]

C. Conclusion

695. In light of all of the foregoing, the Appeals Chamber grants, in part, Đorđević's sixteenth ground of appeal, with respect to:

- Deportation (Count 1) at:
  - Kladernica/Klladërnicë, in Srbica/Skënderaj municipality, between 12 and 15 April 1999;[2123] and
  - Suva Reka/Suharekë town, between 7 and 21 May 1999;[2124]
- Other inhumane acts (forcible transfer) (Count 2) at:
  - Brocna/Burojë and Tušilje/Tushilë, in Srbica/Skënderaj municipality between 25 and 26 March and on 29 March 1999, respectively;[2125] and
  - Čuska/Qyushk, in Peć/Pejë municipality, on 14 May 1999;[2126]
- Murder as a violation of the laws or customs of war and as a crime against humanity (Counts 3 and 4) in relation to:

[2120] *Krnojelac* Appeal Judgement, para. 218.
[2121] See *Krnojelac* Appeal Judgement, paras 213-216.
[2122] The Appeals Chamber recalls that all the Trial Chamber's findings in relation to persecutions through acts of displacement are based on acts charged in the Indictment, with the exception of a few locations that were discussed in detail above, see *supra*, paras 595-601, 602-606, 613-618, 638-644, 657-661, 662-667.
[2123] See *supra*, paras 595-601.
[2124] See *supra*, paras 613-618.

- the two elderly Kosovo Albanian men at Podujevo/Podujevë town, in Podujevo/Podujevë municipality, on 28 March 1999;[2127]
- the nine men at Mala Kruša/Krusë-e-Vogël, in Orahovac/Rahovec municipality, on 25 March 1999;[2128]
- Persecutions (Count 5) committed through:
  - *deportation* at Kladernica/Klladërnicë, in Srbica/Skënderaj municipality, between 12 and 15 April 1999;[2129] and Suva Reka/Suharekë town, between 7 and 21 May 1999;[2130]
  - *forcible transfer* at Brocna/Burojë and Tušilje/Tushilë, in Srbica/Skënderaj municipality between 25 and 26 March and on 29 March 1999, respectively;[2131] and Čuska/Qyushk, in Peć/Pejë municipality, on 14 May 1999;[2132]
  - *murder* in relation to the two elderly Kosovo Albanian men at Podujevo/Podujevë town, in Podujevo/Podujevë municipality, on 28 March 1999;[2133] the nine men at Mala Kruša/Krusë-e-Vogël, in Orahovac/Rahovec municipality, on 25 March 1999.[2134]

696. The Appeals Chamber overturns the Trial Chamber's findings on Đorđević's responsibility in relation to the incidents listed above but upholds his convictions for the crimes of deportation, other inhumane acts (forcible transfer), murder, and persecutions. The impact on sentencing is discussed in the sentencing part of this Judgement.[2135] The Appeals Chamber dismisses the remainder of Đorđević's sixteenth ground of appeal.

[2125] See *supra*, paras 602-606.
[2126] See *supra*, paras 638-644.
[2127] See *supra*, paras 657-661.
[2128] See *supra*, paras 662-667.
[2129] See *supra*, paras 595-601, 676-677.
[2130] See *supra*, paras 613-618, 676-677.
[2131] See *supra*, paras 602-606, 676-677.
[2132] See *supra*, paras 662-667, 676-677.
[2133] See *supra*, paras 662-667, 676-677.
[2134] See *supra*, paras 678-683, 676-677.
[2135] See *infra*, Chapter XX.

XVII. ĐORĐEVIĆ'S SEVENTEENTH AND PART OF FIFTEENTH GROUNDS OF APPEAL: CRIMES OF DEPORTATION, OTHER INHUMANE ACTS (FORCIBLE TRANSFER), MURDER, AND PERSECUTIONS IN RELATION TO A NUMBER OF CRIME SITES

A. Introduction

697. The Trial Chamber found that the crimes of deportation (Count 1), persecutions (through deportation, forcible transfer, murder, and destruction of religious or culturally significant property) (Count 5), other inhumane acts (forcible transfer) as crimes against humanity (Count 2), and murder both as a violation of the laws or customs of war and a crime against humanity (Counts 3 and 4) were established.[2136]

698. Đorđević submits that the Trial Chamber erred in concluding that the crimes of deportation, persecutions, other inhumane acts (forcible transfer), and murder were established in a number of locations.[2137] His underlying argument is that the Trial Chamber erred in failing to consider other possible inferences and that the Trial Chamber's conclusions were therefore not the only reasonable ones.[2138]

699. The Prosecution responds that none of Đorđević's challenges meet the standard of review, and that "some arguments warrant summary dismissal because they are unsupported, undeveloped,

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[2136] Trial Judgement, paras 1704, 1753, 1856.
[2137] Đorđević Appeal Brief, paras 364-379.
[2138] Đorđević Appeal Brief, paras 347(g), 362-379. Deportation: Belanica/Bellanicë in Suva Reka/Suharekë municipality on 1 April 1999 and Vata/Vataj in Kačanik/Kaçanik municipality on 14 April 1999. Other inhumane acts (forcible transfer): Leocina/Leçine in Srbica/Skenderaj municipality on 25 and 26 March 1999; Guska/Guskë in Đakovica/Gjakovë municipality on 27 March 1999; Prilepnica/Prëlepnice in Gnjilane/Gjilan municipality on 6 April 1999; Nosalje/Nosaljë in Gnjilane/Gjilan municipality on 6 April 1999. Murder: Mala Kruša/Krusë-e-Vogël in Orahovac/Rahovec municipality on 25 and 26 March 1999; Suva Reka/Suharekë town in Suva Reka/Suharekë municipality on 26 March 1999; Meja/Mejë in Đakovica/Gjakovë municipality on 27-28 April 1999; Vučitrn/Vushtrri municipality on 2/3 May 1999; Kotlina/Kotlinë in Kačanik/Kaçanik municipality on 24 March 1999; Vata/Vataj and Slatina/Slatinë in Kačanik/Kaçanik municipality on 13 April 1999. Persecutions: Celina/Celinë and Bela Crkva/Bellacërkë in Orahovac/Rahovec municipality and Rogovo/Rogovë in Đakovica/Gjakovë municipality on 28 March 1999; Landovica/Landovicë on 26 and 27 March; Hadum Mosque in Đakovica/Gjakovë municipality on 24/25 March 1999; and Vlaštica/Lashticë Mosque in Gnjilane/Gjilan municipality on 6 March 1999.

and vague".[2139] It further responds that Đorđević ignores a number of factual findings, and "proffers his interpretation of the evidence over that of the [Trial] Chamber".[2140]

B. Analysis

700. The Appeals Chamber recalls that the applicable burden on appeal is to show that *no* reasonable trier of fact could have reached the original decision based on the evidence before the trial chamber.[2141] The Appeals Chamber recalls that "there is nothing intrinsically erroneous about a criminal case being established through proof by circumstantial evidence".[2142] However, where the challenge on appeal is to an inference drawn to establish a fact on which a conviction relies, the standard is only satisfied if the inference was the *only* reasonable one that could be drawn from the evidence presented.[2143] In such instances, the Appeals Chamber will determine whether it was reasonable for the trial chamber to exclude or ignore other inferences that lead to the conclusion that an element of the crime was not proven.[2144]

701. In support of his argument, Đorđević frequently refers to findings in the *Milutinović et al.* case to show that other reasonable inferences remained open to the Trial Chamber.[2145] The Appeals Chamber recalls that two reasonable triers of fact may reach different but equally reasonable conclusions on the basis of the same evidence.[2146] An error cannot be established by merely pointing to the fact that other trial chambers have exercised their discretion in a different way.[2147] The Appeals Chamber will however consider Đorđević's specific submissions and determine whether the Trial Chamber's findings were reasonable on the basis of the trial record in this case.

[2139] Prosecution Response Brief, para. 351, referring to Đorđević Appeal Brief, paras 365-366, 368-370, 372-375, 376(iii), 377.

[2140] Prosecution Response Brief, para. 351, referring to Đorđević Appeal Brief, paras 365-366, 368-370, 372-375, 376(iii), 377.

[2141] See *Haradinaj et al.* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 13; *D. Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14; *Hadžihasanović and Kubura* Appeal Judgement, para. 10; *Halilović* Appeal Judgement, para. 9; *Limaj et al.* Appeal Judgement, para. 12; *Brđanin* Appeal Judgement, para. 14; *Galić* Appeal Judgement, para. 9.

[2142] *Galić* Appeal Judgement, para. 218. See *Krstić* Appeal Judgement, para. 83; *Kupreškić et al.* Appeal Judgement, para. 303.

[2143] *Stakić* Appeal Judgement, para. 219. See also *Stakić* Appeal Judgement, para. 220; *Čelebići* Appeal Judgement, para. 458.

[2144] *Stakić* Appeal Judgement, para. 219. See also *Čelebići* Appeal Judgement, para. 458; *Kvočka et al.* Appeal Judgement, para. 18.

[2145] Đorđević Appeal Brief, paras 363, 365, 366, 369, 370(ii), 372, 376; Đorđević Reply Brief, para. 113.

[2146] See *Krnojelac* Appeal Judgement, para. 12.

[2147] See *Krnojelac* Appeal Judgement, para. 12.

1. Alleged errors in relation to the crimes of deportation and other inhumane acts (forcible transfer) as crimes against humanity

702. The Appeals Chamber will now turn to Đorđević's specific arguments in relation to the crime of deportation established in the following locations: (i) Belanica/Bellanicë in Suva Reka/Suharekë municipality; and (ii) Vata/Vataj in Kačanik/Kaçanik municipality.[2148] The Appeals Chamber will also address Đorđević's specific arguments in relation to the crime of other inhumane acts (forcible transfer) in: (i) Leocina/Leçinë in Srbica/Skenderaj municipality; (ii) Guska/Guskë in Đakovica/Gjakovë municipality; (iii) Prilepnica/Prëlepnice in Gnjilane/Gjilan municipality; and (iv) Nosalje/Nosaljë in Gnjilane/Gjilan municipality.[2149]

703. Before addressing Đorđević's particular challenges in relation to the crimes of deportation and other inhumane acts (forcible transfer), the Appeals Chamber will consider a number of Đorđević's overarching arguments touching upon the legal definition of these crimes.[2150] In support of his submissions that the Trial Chamber erred in ignoring other inferences, Đorđević argues that the Prosecution failed to establish that the KLA were not in the vicinity[2151] and that the attack was not legitimately directed at the KLA.[2152] According to Đorđević, the inference remained, therefore, that the population fled for legitimate reasons.[2153]

704. The Appeals Chamber observes that Đorđević's submissions will be considered below in light of the finding, upheld by the Appeals Chamber, that a common plan to alter the ethnic balance of Kosovo in order to gain Serbian control over the territory existed.[2154] This goal was to be achieved by terrorising the Kosovo Albanian population into leaving, through waging against them a campaign of terror which the Trial Chamber found to have been implemented by Serbian forces, including members of the MUP and associated forces.[2155] The attacks of the Serbian forces were the very means used to commit the crimes of deportation and other inhumane acts (forcible transfer) in accordance with the common plan.[2156] The nature of these attacks by the Serbian forces cannot

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[2148] Đorđević Appeal Brief, paras 364-366.
[2149] Đorđević Appeal Brief, paras 367-370.
[2150] Đorđević raises this argument in relation to the crime of deportation in: Belanica/Bellanicë in Suva Reka/Suharekë municipality (Đorđević Appeal Brief, para. 365); Vata/Vataj in Kačanik/Kaçanik municipality (Đorđević Appeal Brief, para. 366). He further raises this argument in relation to the crime of other inhumane acts (forcible transfer) in: Leocina/Leçinë in Srbica/Skenderaj municipality (Đorđević Appeal Brief, para. 368); Prilepnica/Prëlepnice in Gnjilane/Gjilan municipality (Đorđević Appeal Brief, para. 370(i)).
[2151] See *e.g.* Đorđević Reply Brief, para. 115.
[2152] See Đorđević Appeal Brief, para. 366.
[2153] See Đorđević Appeal Brief, paras 365-366, 368, 370(i); Đorđević Reply Brief, para. 116.
[2154] Trial Judgement, paras 1683, 2005, 2025. See Trial Judgement, paras 1631, 1641, 1653, 1658, 1662, 1671.
[2155] Trial Judgement, para. 2025.
[2156] See Trial Judgement, paras 1697, 2007, 2026, 2131-2152, 2193, 2213, 2131-2152. See *supra*, Chapters X-XI.

therefore be viewed in isolation, but must be seen in the context of the pattern of excessive use of force by the Serbian forces when attacking villages, as discussed in detail by the Trial Chamber and upheld by the Appeals Chamber.[2157] Whether legitimate or not, the attacks were the means by which the common plan to change the ethnic composition of Kosovo was implemented.[2158]

705. The Appeals Chamber further recalls that the common elements of both deportation and other inhumane acts (forcible transfer) are: (i) the forced displacement of individuals; (ii) who are lawfully present in the area from which they are subsequently displaced; (iii) without grounds under IHL permitting the displacement; and (iv) carried out intentionally.[2159] The Appeals Chamber notes that the Prosecution is required to prove the elements of the crime beyond reasonable doubt, which includes proving that the displacement was carried out on grounds not permitted under IHL. However, it is not a legal requirement to prove that the attack causing the displacement was unlawful or that the KLA was not present in the area. Although involuntary displacements may be justified under IHL, such circumstances are limited.[2160] The Appeals Chamber will consider these findings when addressing Đorđević's submissions in relation to each location and apply at all times the legal principle set out above.

(a) Belanica/Bellanicë in Suva Reka/Suharekë municipality

706. The Trial Chamber was satisfied that the crime of deportation was established in relation to Belanica/Bellanicë in Suva Reka/Suharekë municipality on 1 April 1999 by the acts of Serbian forces that killed three men in the village, threatened people, set houses on fire and killed livestock.[2161]

707. Đorđević submits that, in light of an evacuation order issued by the KLA to the civilian population to withdraw with it to the mountains, no reasonable trial chamber could have attributed

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[2157] See *supra*, paras 97-98, 173-208, 515-527.

[2158] See *supra*, paras 97-98, 138-139, Chapter X.

[2159] *Krajišnik* Appeal Judgement, para. 304; *Stakić* Appeal Judgement, paras 278, 307. See Trial Judgement, paras 1604, 1613. See also *supra*, paras 532-538. The Appeals Chamber notes that the Trial Chamber incorrectly stated that the elements of the crime of forcible transfer require that the forcible displacement of persons "takes place within national boundaries" (Trial Judgement, para. 1613, referring to *Stakić* Appeal Judgement, para. 317, referring to *Krstić* Trial Judgement, para. 521, *Krnojelac* Trial Judgement, paras 474, 476). Rather, the case law has established that the displacement *may* take place within national boundaries but is not so restricted (see *Stakić* Appeal Judgement, para. 317).

[2160] See *Stakić* Appeal Judgement, paras 284-285, 287. IHL recognises that displacements may be justified: (i) "for reasons related to the conflict" where *inter alia* "the security of the civilians involved or imperative military reasons so demand" (Article 17 of Additional Protocol II); (ii) where an occupying power undertakes total or partial evacuation of a given area if the security of the population or imperative military reasons so demand (Article 49 of Geneva Convention IV); and (iii) when it concerns the removal of prisoners of war out of the combat zone and into internment facilities, and subject to numerous conditions (Article 19 of Geneva Convention III).

the movement of individuals to the actions of Serbian forces.[2162] He further avers that the KLA "was in and/or near Belanica".[2163]

708. The Prosecution responds that the evidence supports the Trial Chamber's conclusion that the population left Belanica/Bellanicë as a result of the acts of Serbian forces.[2164] It further responds that Đorđević's arguments should be summarily dismissed as he simply repeats failed trial submissions and ignores relevant factual findings.[2165]

709. In reaching its conclusion, the Trial Chamber explicitly considered evidence suggesting that the KLA issued an evacuation order to the civilian population "for security reasons" so that civilians "would not get caught up in the fighting".[2166] However, the Trial Chamber found that the evacuation order was not obeyed and that instead the civilian population surrendered to the Serbian forces, who ordered them to join a convoy directed by Serbian forces to the border with Albania or be killed.[2167] Đorđević ignores these findings and has failed to demonstrate that the Trial Chamber's evaluation of the evacuation order was erroneous. The Appeals Chamber finds, for the reasons discussed above, that by merely stating that the KLA was in and/or near Belanica/Bellanicë, Đorđević has failed to demonstrate that the Trial Chamber erred.[2168]

710. In light of the foregoing, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and therefore has failed to show that the Trial Chamber erred in concluding that the crime of deportation was established in relation to Belanica/Bellanicë.

(b) Vata/Vataj in Kačanik/Kaçanik municipality

711. The Trial Chamber found that the crime of deportation was established with respect to Vata/Vataj in Kačanik/Kaçanik municipality on 14 April 1999.[2169] The Trial Chamber found that Serbian forces arrived in Vata/Vataj on 13 April 1999 and opened fire at the village, thereby frightening residents who first fled out of fear into the Ljuboten Mountains and then to FYROM.[2170]

2161 Trial Judgement paras 716, 1641, 1701, 1704. See Trial Judgement, paras 710-726.
2162 Đorđević Appeal Brief, para. 365.
2163 Đorđević Appeal Brief, para. 365.
2164 Prosecution Response Brief, para. 352.
2165 Prosecution Response Brief, para. 352.
2166 Trial Judgement, para. 716. See Trial Judgement, para. 1641.
2167 Trial Judgement, paras 716, 1641.
2168 See *supra*, paras 700, 704.
2169 Trial Judgement, paras 1138-1139, 1671, 1701, 1704. See Trial Judgement, para. 1747.
2170 Trial Judgement, paras 1138, 1671, 2048.

It further found that residents also left out of fear as a result of sighting the dead bodies of Mahmut Caka, Hebib Lami, Brahim Lami, and Rraman Lami, two of which were badly mutilated.[2171] All four victims were found to have been captured in Vata/Vataj, detained, paraded through the village earlier that day, and later shot and killed by Serbian forces in Slatina/Slatinë.[2172]

712. Đorđević submits that there was no evidence that the attack on Vata/Vataj was not legitimately directed at the KLA, or that the bodies which the Trial Chamber found to have caused the villagers to flee were the bodies of civilians killed by Serbian forces.[2173]

713. The Prosecution responds that Đorđević's submissions warrant summary dismissal as he ignores relevant factual findings, such as the Trial Chamber's finding that KLA soldiers left Vata/Vataj one day prior to the attack on the village by Serbian forces.[2174]

714. Đorđević replies that the inference remained that the KLA was present, notwithstanding "[t]hat the KLA may have left Vata shortly before Serb forces attacked".[2175]

715. The Appeals Chamber considers that by merely stating that there was no evidence that the attack on Vata/Vataj was not legitimately directed at the KLA, Đorđević does not demonstrate that the Trial Chamber erred. Further, the Appeals Chamber emphasises that the attack on Vata/Vataj was one of many which formed part of the common plan to change the ethnic composition of Kosovo through, *inter alia*, the displacement of Kosovo Albanians.[2176]

716. Đorđević also suggests that the four men who were killed were combatants and therefore legitimately targeted.[2177] He further argues that the inference that the population left out of fear cannot be sustained.[2178] The Appeals Chamber considers the question of whether the four individuals were civilians or combatants to be irrelevant. The mutilated state of the bodies of the

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[2171] Trial Judgement, paras 1138, 1671, 1747.
[2172] Trial Judgement, paras 1671, 1747. The Appeals Chamber notes that Đorđević challenges the Trial Chamber's finding that these four men were detained when murdered (Đorđević Appeal Brief, para. 376(iv), referring to Trial Judgement, paras 1747, 1138-1139. The Appeals Chamber will address this challenge below (see *infra*, paras 783-790).
[2173] Đorđević Appeal Brief, para. 366.
[2174] Prosecution Response Brief, para. 353.
[2175] Đorđević Reply Brief, para. 115.
[2176] See *supra*, paras 173 (with references therein), 202-203.
[2177] See Đorđević Appeal Brief para. 366; Đorđevic Reply Brief, para. 115. In concluding that the four Kosovo Albanian men were not taking any active part in hostilities when killed, the Trial Chamber considered evidence that they were Kosovo Albanians "dressed in civilian clothes and had no weapons" (Trial Judgement, paras 1138-1139). The Appeals Chamber recalls that the clothing of victims may be accepted when determining whether a particular victim was actively participating in hostilities at the time of death (see *Boškoski and Tarčulovski* Appeal Judgement, para. 81; see *supra*, para. 525).
[2178] See Đorđevic Reply Brief, para. 115.

men in civilian clothing who had previously been seen alive and paraded through the village, was reasonably considered by the Trial Chamber to have contributed to instilling fear in the population, causing it to flee.[2179] The Appeals Chamber also notes that the sight of the mutilated dead bodies was only one of the factors taken into account by the Trial Chamber. In particular, the Trial Chamber found that the civilian population also fled out of fear into the mountains as a result of shots being fired by Serbian forces upon their arrival in Vata/Vataj.[2180] It was therefore reasonable for the Trial Chamber to conclude that the civilian population left out of fear as a result of Serbian forces opening fire upon entering Vata/Vataj, combined with the sighting of the mutilated dead bodies.

717. In light of the above, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and as such has failed to show that the Trial Chamber erred in concluding that the crime of deportation was established in Vata/Vataj.

(c) Leocina/Leçine in Srbica/Skenderaj municipality

718. The Trial Chamber found that the crime of other inhumane acts (forcible transfer) was established on 25 and 26 March 1999 in the village of Leocina/Leçine, in Srbica/Skenderaj municipality, as a result of shooting, shelling, and the burning of houses by Serbian forces.[2181]

719. Đorđević submits that the Trial Chamber failed to consider or eliminate the inference that the KLA was present and legitimately targeted by Serbian forces.[2182]

720. The Prosecution responds that Đorđević disregards the evidence concerning the Serbian forces' attack on Leocina/Leçine.[2183]

721. Đorđević replies that since the Prosecution did not prove that the KLA was not in Leocina/Leçine or not believed to be there, a reasonable inference consistent with his acquittal remained.[2184]

[2179] Trial Judgement, paras 1138, 1671, 1747. The Appeals Chamber notes that Đorđević's challenges to the Trial Chamber's reliance on the evidence of Sada Lama for this incident will be addressed below (see *infra*, paras 783-790).
[2180] Trial Judgement, paras 1137-1138.
[2181] Trial Judgement, paras 607, 1630-1631, 1702, 1704.
[2182] Đorđević Appeal Brief, para. 368.
[2183] Prosecution Response Brief, para. 355.
[2184] Đorđević Reply Brief, para. 116.

722. As discussed above, Đorđević's mere suggestion that the KLA was present and legitimately targeted does not demonstrate that the Trial Chamber erred in excluding the inference that the population in Leocina/Leçine fled for legitimate reasons.[2185]

723. In light of the foregoing, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and as such has failed to show that the Trial Chamber erred in concluding that the crime of other inhumane acts (forcible transfer) was established in Leocina/Leçine.

(d) Guska/Guskë in Đakovica/Gjakovë municipality

724. The Trial Chamber found that the crime of other inhumane acts (forcible transfer) was established on 27 March 1999 in Guska/Guskë in Đakovica/Gjakovë municipality.[2186] It found that VJ forces "expelled the residents of the village of Guska/Guskë and made them join a convoy of some 1,000 other Kosovo Albanian people who had been expelled from neighbouring villages".[2187]

725. Đorđević submits that since there was no evidence of use of violence or force against the civilian population in Guska/Guskë, the inference remained that these individuals were "evacuated" from a combat zone rather than "expelled".[2188]

726. The Prosecution responds that there is no need to demonstrate that violence or force was used and that the Trial Chamber reasonably concluded that Serbian forces expelled the inhabitants of Guska/Guskë.[2189]

727. The Appeals Chamber recalls that forced displacement requires, *inter alia*, that the victims had no genuine choice,[2190] which is not "limited to physical force but includes the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment".[2191] While fear of violence or use of force and other such circumstances may create an environment where there is no choice but to leave, thus leading to forced displacement,

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2185 See *supra*, paras 700, 704.
2186 Trial Judgement, paras 1653, 1702, 1704.
2187 Trial Judgement, para. 1653. See Trial Judgement, para. 930.
2188 Đorđević Appeal Brief, para. 369; Đorđević Reply Brief, para. 117.
2189 Prosecution Response Brief, para. 356.
2190 *Stakić* Appeal Judgement, paras 279, 282; *Krnojelac* Appeal Judgement, para. 229.
2191 *Stakić* Appeal Judgement, para. 281, referring to *Krnojelac* Trial Judgement, para. 475.

the determination as to whether a transferred person had a genuine choice is one to be made within the context of the particular case being considered.[2192]

728. In reaching its conclusion, the Trial Chamber considered that Serbian forces initially ordered the residents to go to Albania, but later sent them to Korenica/Korenicë, where they stayed for one week before they were ordered to leave and join a convoy of approximately 1,000 Kosovo Albanians expelled from neighbouring villages.[2193] This followed the murder of several civilians in the neighbouring villages on 25 March by the same forces, which then entered Guska/Guskë on 27 March and expelled the villagers.[2194] Đorđević does not point to any evidence or Trial Chamber findings supporting his position, and simply speculates that an alternative inference remained that the inhabitants were "evacuated" as opposed to "expelled". Speculation of an alternative inference falls short of meeting the applicable standard of review.[2195]

729. For these reasons, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and as such has failed to show that the Trial Chamber erred in concluding that the crime of other inhumane acts (forcible transfer) was established in Guska/Guskë.

(e) Prilepnica/Prëlepnicë in Gnjilane/Gjilan municipality

730. The Trial Chamber found that the crime of other inhumane acts (forcible transfer) was established in the village of Prilepnica/Prëlepnicë in Gnjilane/Gjilan municipality on 6 April 1999.[2196] It found that all 3,000 Kosovo Albanian and Roma villagers fled as a result of Serbian forces threatening to mine the village and ordering them to leave, while approximately five or six Serb families remained in Prilepnica/Prëlepnicë.[2197]

731. Đorđević submits that the inference remained that villagers from Prilepnica/Prëlepnicë were "evacuated" rather than "expelled".[2198] He further notes the Trial Chamber's finding that the KLA was in the area.[2199]

[2192] *Stakić* Appeal Judgement, paras 281-282.
[2193] Trial Judgement, paras 930, 1653.
[2194] Trial Judgement, paras 927-928, 930.
[2195] See *supra*, paras 700, 704.
[2196] Trial Judgement, paras 1658, 1702, 1704.
[2197] Trial Judgement, paras 1015, 1022, 1024, 1658, 1702, 1704. See Trial Judgement, paras 1016-1023.
[2198] Đorđević Appeal Brief, para. 370(i).
[2199] Đorđević Appeal Brief, para. 370(i).

732. The Prosecution responds that the Trial Chamber's finding was reasonable.[2200] It contends that by repeating submissions which were unsuccessful at trial, Đorđević has failed to demonstrate that the Trial Chamber erred.[2201] The Prosecution notes that the Trial Chamber considered that only the Kosovo Albanian and Roma villagers were ordered to leave the village, while the Serb villagers stayed in Prilepnica/Përlepnicë.[2202]

733. Đorđević replies that the Trial Chamber's finding that Kosovo Albanian and Roma villagers were ordered to leave the village while Serb families remained is not decisive.[2203] He contends that the inference remained that Kosovo Albanian and Roma villagers "offered resources and support to KLA in the area".[2204]

734. The Trial Chamber considered Đorđević's argument at trial that villagers were moved out of Prilepnica/Prëlepnicë for their own safety, but concluded that there was no evidence to support the conclusion that the displacement of Kosovo Albanians or "the mining of the village was to be carried out on a ground permitted under international law".[2205] It considered that Serbian forces threatened to mine the village and that only the Kosovo Albanian and Roma population left the village while "Serb resident families stayed in Prilepnica/Prëlepnicë".[2206] While displacements may be justified to ensure the security of the civilian population,[2207] had genuine safety concerns existed, the five or six Serb families living in Prilepnica/Prëlepnicë would similarly have been evacuated.[2208] The Appeals Chamber therefore finds that the Trial Chamber reasonably excluded the inference that genuine safety concerns existed for the civilian population.

735. Further, the Appeals Chamber understands Đorđević's contention that the KLA was in the vicinity and that those in the village may have offered resources and support to suggest that the placement of the mines was legitimate, thereby permitting the displacement of 3,000 inhabitants under IHL and showing that the Trial Chamber's finding was not reasonable.[2209] Đorđević provides no support for his contention. The Appeals Chamber notes that even if there were evidence of civilians offering resources or support to the KLA, this would not automatically change the

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[2200] Prosecution Response Brief, para. 357.
[2201] Prosecution Response Brief, para. 357, referring to Đorđević Closing Brief, paras 847-848.
[2202] Prosecution Response Brief, para. 357.
[2203] Đorđević Reply Brief, para. 118.
[2204] Đorđević Reply Brief, para. 118.
[2205] Trial Judgement, para. 1658.
[2206] Trial Judgement, paras 1022, 1024.
[2207] *Stakić* Appeal Judgement, paras 284-285, citing Additional Protocol II, Article 17.
[2208] See Trial Judgement, paras 1015, 1017.
[2209] See Đorđević Appeal Brief, para. 370(i).

protection afforded to them. Further, even if some of the villagers were KLA members, in light of the reasons discussed above, this would not have justified the displacement of 3,000 Kosovo Albanian and Roma villagers from Prilepnica/Përlepnicë.[2210]

736. In light of the above, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and therefore has failed to show that the Trial Chamber erred in concluding that the crime of other inhumane acts (forcible transfer) was established in Prilepnica/Prëlepnicë.

(f) Nosalje/Nosaljë in Gnjilane/Gjilan municipality

737. The Trial Chamber found that the crime of other inhumane acts (forcible transfer) was established on or about 6 April 1999 in the village of Nosalje/Nosaljë in Gnjilane/Gjilan municipality.[2211] It found that Serbian forces attacked Nosalje/Nosaljë causing inhabitants to flee.[2212]

738. Đorđević submits that "[t]here was no evidence as to what, if anything, took place" in Nosalje/Nosaljë.[2213]

739. The Prosecution responds that Đorđević misrepresents the trial record in submitting that there is no evidence and asserts that his submissions should be summarily dismissed on the basis that he has failed to articulate any error.[2214]

740. Đorđević replies that the Trial Chamber failed to find that the displacement of Kosovo Albanians resulted from the attack on Nosalje/Nosaljë and failed to consider "what transpired in that village".[2215]

741. Contrary to Đorđević's contention, the Trial Chamber took into account ample evidence of the circumstances in Nosalje/Nosaljë when concluding that the crime of other inhumane acts (forcible transfer) was established. The Trial Chamber found that VJ, MUP, and paramilitary forces "took part in operations that displaced Kosovo Albanian residents" from a number of villages in Gnjilane/Gjilan municipality, including Nosalje/Nosaljë between March and early May 1999 and

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[2210] See *supra*, paras 704-705.
[2211] Trial Judgement, paras 1662, 1702, 1704. See Trial Judgement, para. 1042.
[2212] Trial Judgement, para. 1662.
[2213] Đorđević Appeal Brief, para. 370(ii); Đorđević Reply Brief, para. 119.
[2214] Prosecution Response Brief, para. 358, referring to Trial Judgement, paras 1042, 1662.
[2215] Đorđević Reply Brief, para. 119.

that many persons were killed by Serbian forces.[2216] In particular, it considered that on or about 6 April 1999, Serbian forces attacked Nosalje/Nosaljë and the surrounding villages[2217] in Vitina/Viti municipality and Vladovo/Lladovë in Gnjilane/Gjilan municipality, causing approximately 20,000 inhabitants to flee to Donja Stubla/Stubëll-e-Poshtme.[2218] It further considered that 1,500 of those displaced to Donja Stubla/Stubëll-e-Poshtm returned to the villages in Vitina/Viti municipality, while groups of approximately 500 to 1,000 of the remaining Kosovo Albanians fled to FYROM each day out of fear of being further attacked by Serbian forces.[2219] It was on this basis that the Trial Chamber expressly found "that the inhabitants of these villages were forcibly displaced from their homes by the attacks of the Serbian forces".[2220]

742. The Appeals Chamber therefore finds that Đorđević misunderstands the Trial Chamber's findings insofar as he contends that there was no evidence as to what took place in Nosalje/Nosaljë and that the Trial Chamber failed to find that the displacement was a result of the attack on Nosalje/Nosaljë by Serbian forces.

743. In light of the above, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and therefore has failed to show that the Trial Chamber erred in concluding that the crime of other inhumane acts (forcible transfer) was established in Nosalje/Nosaljë.

2. Murder as a violation of the laws or customs of war and as a crime against humanity

744. Đorđević submits that the Trial Chamber erred in concluding that the crime of murder was established as a violation of the laws or customs of war and as a crime against humanity in the following locations: (i) Mala Kruša/Krusë-e-Vogël in Orahovac/Rahovec municipality; (ii) Suva Reka/Suharekë town in Suva Reka/Suharekë municipality; (iii) Meja/Mejë in Đakovica/Gjakovë municipality; (iv) Vučitrn/Vushtrri municipality; (v) Kotlina/Kotlinë in Kačanik/Kaçanik municipality; and (vi) Vata/Vataj and Slatina/Slatinë in Kačanik/Kaçanik municipality.[2221]

745. Before addressing Đorđević's particular challenges to the crime of murder, the Appeals Chamber will address Đorđević's underlying argument. Đorđević suggests that the inference

[2216] Trial Judgement, para. 2046.
[2217] The villages of Rimnik/Ribnik, Gornja Budrika/Burrke-e-Eperme and Mogila/Mogillë (Trial Judgement, paras 1042, 1662).
[2218] Trial Judgement, paras 1042, 1662.
[2219] Trial Judgement, para. 1662.
[2220] Trial Judgement, para. 1662. See Trial Judgement, para. 1042.
[2221] Đorđević Appeal Brief, paras 371-376.

remained that the victims were legitimately targeted combatants, by suggesting that the victims were KLA members and therefore taking active part in the hostilities.[2222]

746. The Appeals Chamber recalls the elements of the crime of murder, namely: (i) the death of a victim taking no active part in hostilities; (ii) the death was the result of an act or omission of the perpetrator(s) or of one or more persons for whom the accused is criminally responsible; and (iii) the perpetrator intended to kill the victim or wilfully harm or inflict serious injury with reasonable knowledge that it would likely to result in death.[2223] Since murder can only be established where the victim was taking no active part in hostilities, the status of a victim at the time of death is relevant to establishing the crime of murder.[2224]

747. The Appeals Chamber recalls in this regard that in addition to civilians taking no active part in hostilities, victims of murder as a war crime under Article 3 of the Statute include *any* individual not taking active part in hostilities, "including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause".[2225] For murder as a crime against humanity under Article 5 of the Statute, while the *chapeau* requirements necessitate proof that the act of the perpetrator was part of a widespread or systematic attack "directed against any civilian population",[2226] this does not mean that the individual victims of crimes against humanity must be civilians.[2227] Persons *hors de combat* may also be victims of murder as a crime against humanity, provided that they were victims of a widespread and systematic attack against the civilian population, and that all the elements of the crime were met.[2228] Therefore, even if some of the victims were members of the KLA, as Đorđević suggests, if they had laid down their arms at the relevant time, they were no longer legitimate targets.

748. The Appeals Chamber will now address Đorđević's specific arguments in relation to the crime of murder established at specific locations.

[2222] Đorđević Appeal Brief, para. 372(i).
[2223] The Appeals Chamber notes that the elements of murder as a war crime under Article 3 and as a crime against humanity under Article 5 of the Statute are identical, with the exception that the general *chapeau* requirements for each be met (see *supra*, para. 548).
[2224] See *supra*, para. 548.
[2225] Common Article 3. See also *Čelebići* Appeal Judgement, para. 420.
[2226] See *Kordić and Čerkez* Appeal Judgement, paras 93, 95-97; *Blaškić* Appeal Judgement, para. 98; *Kunarac et al.* Appeal Judgement, para. 85. Likewise, the presence of soldiers does not necessarily deprive a civilian population of its civilian character (*Galić* Appeal Judgement, para. 144; *Blaškić* Appeal Judgement, para. 115. See *Kordić and Čerkez* Appeal Judgement, para. 50).
[2227] *Martić* Appeal Judgement, para. 308.
[2228] See *Martić* Appeal Judgement, paras 307, 311, 313; *Mrkšić and Šljivančanin* Appeal Judgement, paras 29, 33. See also *Martić* Appeal Judgement, paras 303-306, 308, 318-319, 346, 355.

(a) Mala Kruša/Krusë-e-Vogël Orahovac/Rahovec municipality

a. 25 March 1999

749. The Trial Chamber found that the crime of murder was established with respect to Mala Kruša/Krusë-e-Vogël in Orahovac/Rahovec municipality.[2229] It found that during the course of an attack on the village, nine civilian Kosovo Albanians taking no active part in hostilities were burnt to death inside their own houses by Serbian police, assisted by local Serb villagers.[2230]

750. Đorđević submits that the Trial Chamber erred in concluding that the deaths of the nine Kosovo Albanians constituted murder because no evidence was presented as to the circumstances of their deaths, whether their deaths were intended, or whether the deceased were members of the KLA.[2231]

751. The Prosecution responds that "Đorđević fails to articulate an error and merely requests the Appeals Chamber to prefer his own interpretation of the evidence".[2232]

752. The Appeals Chamber considers this argument to be moot in light of its finding above that the Trial Chamber erred in convicting Đorđević for the murder of the nine men in Mala Kruša/Krusë-e-Vogël on 25 March 1999 [2233].

b. 26 March 1999

753. The Trial Chamber found that during the course of the Serbian forces' attack on the village of Mala Kruša/Krusë-e-Vogël on 26 March 1999, Hysni Hajdari was shot and killed by MUP forces either while in the Batusha Barn or after escaping from the Batusha Barn to the mountains.[2234]

754. Đorđević submits that the Trial Chamber erred in inferring that Hysni Hajdari was killed by MUP forces since there was no evidence as to the circumstances of his death.[2235]

755. The Prosecution responds that Đorđević incorrectly asserts that there was no evidence.[2236]

[2229] Trial Judgement, para. 1715.
[2230] Trial Judgement, paras 485, 1715.
[2231] Đorđević Appeal Brief, para. 372(i). See Đorđević Reply Brief, para. 120.
[2232] Prosecution Response Brief, para. 359.
[2233] See *supra*, para. 667.
[2234] Trial Judgement, paras 493, 1402, 1718.
[2235] Đorđević Appeal Brief, para. 372(ii). The Appeals Chamber notes that Đorđević withdrew his appeal in relation to the Trial Chamber's finding that Hysen Ramadani and one additional person were killed (Đorđević Appeal Brief, para. 372(ii), referring to Trial Judgement, paras 1716, 1718).

756. The Appeals Chamber, Judge Tuzmukhamedov dissenting, considers that Đorđević misstates the Trial Chamber's findings. The Trial Chamber found that approximately 114 Kosovo Albanian men and young boys, including Hysni Hajdari, were forced by MUP forces into the Batusha Barn.[2237] MUP forces opened fire on these men and boys and then set the barn on fire.[2238] Ten of the Kosovo Albanian men escaped[2239] and the remaining 104 died either as a result of being shot or burnt in the Batusha Barn.[2240] The Trial Chamber further found that two of the men who managed to escape the barn as it burned were subsequently shot and killed by MUP forces.[2241] It further considered that Mehmet Krasniqi, one of the ten individuals who escaped the barn, saw the body of Hysni Hajdari, who was unarmed and had sustained a gunshot wound.[2242]

757. On the basis of these findings, the Trial Chamber concluded that the only reasonable inference was that Hysni Hajdari died as a result of gunshot wounds inflicted by MUP forces while he was in the Batusha Barn, or as he attempted to escape.[2243] The Appeals Chamber, Judge Tuzmukhamedov dissenting, therefore considers that the Trial Chamber reasonably considered ample evidence as to the circumstances surrounding Hysni Hajdari's death. In this context, Đorđević simply suggests that the inference remained that after escaping the Batusha Barn, Hysni Hajdari proceeded to join the KLA on the same day and may have been killed in combat, but fails to point to any evidence supporting such theory or otherwise articulate an error.[2244] Đorđević has therefore not demonstrated an error.

758. In light of the above, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and therefore has failed to show that the Trial Chamber erred in concluding that Hysni Hajdari was shot and killed by MUP forces.

(b) Suva Reka/Suharekë town in Suva Reka/Suharekë municipality

759. The Trial Chamber found that the crime of murder was established in relation to Afrim, Arta, Hamdi and Zana Berisha, who were killed by Serbian forces on 26 March 1999 in Suva

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[2236] Prosecution Response Brief, para. 360, referring to Trial Judgement, paras 490, 493, 1718, Mehmet Krasniqi, 12 Feb 2009, T. 991, Mehmet Krasniqi, 13 Feb 2009, T. 1009, Exhibits P305, p. 14, P312.
[2237] Trial Judgement, paras 490, 493, 1395.
[2238] Trial Judgement, paras 490, 493, 1395, 1717.
[2239] Trial Judgement, para. 1717.
[2240] Trial Judgement, paras 490, 1717.
[2241] Trial Judgement, paras 491, 1718.
[2242] Trial Judgement, para. 493.
[2243] Trial Judgement, paras 493, 1718.
[2244] See *supra*, para. 700.

Reka/Suharekë town in Suva Reka/Suharekë municipality.[2245] The Trial Chamber concluded "notwithstanding the absence of forensic evidence of their causes of death",[2246] that Afrim, Arta, Hamdi, and Zana Berisha were killed by Serbian forces "[b]ased on the totality of the evidence and the pattern of attack by Serbian forces in Suva Reka/Suharekë".[2247] In particular, it considered that on 26 March 1999, police shot and killed: (i) Bujar, Nexhat, Faton, Fatine, Sedat, and Nexhmedin Berisha in the vicinity of their family compound; (ii) an elderly man and woman fleeing the Berisha family compound; (iii) 32 members of the Berisha family who fled the Berisha family compound to a pizzeria in the nearby shopping centre; and (iv) Jashar Berisha near the pizzeria.[2248]

760. Đorđević submits that the Trial Chamber erred in inferring that Afrim, Arta, Hamdi and Zana Berisha were killed by Serbian forces in the absence of evidence as to the cause of their deaths.[2249]

761. The Prosecution responds that Đorđević incorrectly submits that no evidence was tendered as to the cause of death of the four members of the Berisha family and has failed to demonstrate an error.[2250]

762. Đorđević replies that the victims' membership in the Berisha family "does not necessarily establish that they were murdered along with the other Berisha family members".[2251]

763. The Appeals Chamber recalls that proof beyond a reasonable doubt that a person was murdered may be inferred circumstantially from the evidence presented to a trial chamber.[2252] In concluding that Afrim, Arta, Hamdi, and Zana Berisha were killed, the Trial Chamber considered that at least 41 other members of the Berisha family, including women, children and the elderly, were murdered by Serbian forces on that same day in Suva Reka/Suharekë.[2253]

764. In particular, the Trial Chamber found, on the basis of eyewitness evidence of a survivor, that MUP forces approached Vesel Berisha's house on 26 March 1999, called for Bujar Berisha to come out of the house, and shot him and five other members of the Berisha family who were fleeing

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[2245] Trial Judgement, paras 1491, 1720, 1724.
[2246] Trial Judgement, paras 683, 1724.
[2247] Trial Judgement, paras 683, 1724.
[2248] See Trial Judgement, paras 672, 674, 676, 678, 683, 1721-1723.
[2249] Đorđević Appeal Brief, para. 373. See also Đorđević Reply Brief, para. 121.
[2250] Prosecution Response Brief, para. 361.
[2251] Đorđević Reply Brief, para. 121.
[2252] See *Kvočka et al.* Appeal Judgement, para. 260.
[2253] Trial Judgement, paras 672, 674, 676, 678, 683, 1721-1723.

from the house.[2254] The Trial Chamber further found, on the basis of another eyewitness, that an elderly woman and an elderly man were also shot while fleeing the Berisha family compound.[2255] The shooting intensified and 35 members of the Berisha family fled from the house to a shopping centre across the road and entered a pizzeria.[2256] Members of the local police then approached the pizzeria, broke the window, threw two grenades inside and shot at the 35 members of the Berisha family inside the pizzeria, killing all but three individuals.[2257] The Trial Chamber also found that Jashar Berisha was detained by local members of the police, brought to the pizzeria, and then shot in the back.[2258]

765. Based on forensic evidence, the Trial Chamber further found that the remains and personal items of some of the 41 members of the Berisha family discussed above, as well as those belonging to other members of the Berisha family, were later discovered at three locations: (i) the Suva Reka/Suharekë cemetery; (ii) the VJ firing site near Prizren referred to as "Kroj-I-Popit"; and (iii) in a mass grave at the Batajnica SAJ Centre in Serbia.[2259] The Appeals Chamber notes in this regard that the remains of Afrim, Arta, Hamdi, and Zana Berisha were among the remains of 24 members of the Berisha family exhumed from a mass grave in Batajnica SAJ Centre.[2260] Additionally, some of the personal items belonging to Afrim Berisha were also identified in Kroji-I-Popit, where the remains and personal items of other members of the Berisha family killed that day were found.[2261] The Appeals Chamber therefore considers that the Trial Chamber did not base its conclusion that Afrim, Arta, Hamdi, and Zana Berisha were murdered by Serbian forces solely on their membership in the Berisha family, but reached its conclusion based on forensic evidence, as well as the pattern

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[2254] Trial Judgement, paras 669-671.

[2255] Trial Judgement, para. 672. The elderly woman and elderly man were left unnamed by the evidence and therefore not listed in the Schedule to the Indictment (Trial Judgement, para. 672).

[2256] Trial Judgement, paras 670, 674. The location of this incident, as noted by the Trial Chamber, is interchangeably referred to as the café or the pizzeria. While the Trial Chamber heard evidence that members of the Berisha entered the pizzeria and locked themselves inside as well as that they were told by police to enter the café and sit down, it noted this discrepancy to be insignificant in light of the "events that followed and the charges in the Indictment" (Trial Judgement, para. 674).

[2257] Trial Judgement, paras 675-676.

[2258] Trial Judgement, para. 678.

[2259] Trial Judgement, paras 1403-1406, 1720, 1724. See also Trial Judgement, paras 683-684, 1377, 1484-1491. The bodies of members of the Berisha family were collected and transported by truck to Kroj-I-Popit, where they were buried for a short period of time before being disinterred, leaving behind personal items identified by two members of the Berisha family that accompanied a British forensic team to the site as well. The bodies were then reburied in a mass grave at the Batajnica SAJ Centre (Trial Judgement, paras 679-681).

[2260] Trial Judgement, paras 1491, 1724.

[2261] Trial Judgement, para. 683. All of the personal items were presented to family for identification, many were identified as belonging to various members of the Berisha family, and some of the items were identified as belonging to members of the Berisha family identified by an eyewitness as being killed at the pizzeria (Trial Judgement, paras 683, 1406).

of attack on the Berisha family by Serbian forces in Suva Reka/Suharekë town on the very same day.[2262]

766. In light of the above, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and as such has failed to show that the Trial Chamber erred in concluding that Afrim, Arta, Hamdi, and Zana Berisha were killed by Serbian forces on 26 March 1999 in Suva Reka/Suharekë.

(c) Meja/Mejë in Đakovica/Gjakovë municipality

767. The Trial Chamber found that 281 Kosovo Albanians were shot and killed by Serbian forces in Meja/Mejë in Đakovica/Gjakovë municipality as part of a large coordinated joint MUP and VJ operation known as "Operation Reka" on 27-28 April 1999.[2263]

768. Đorđević submits that the Trial Chamber erred in finding that 281 persons were murdered during "Operation Reka",[2264] arguing that in light of the Trial Chamber's finding that the KLA was in the vicinity, the inference remained that those killed were killed in combat.[2265]

769. The Prosecution responds that Đorđević ignores the Trial Chamber's findings and fails to demonstrate an error.[2266]

770. In reaching its conclusion, the Trial Chamber considered that large numbers of Serbian forces entered Meja/Mejë on 27 April 1999, started shooting outside houses and ordered inhabitants to join a convoy towards Albania.[2267] Serbian forces then removed numerous groups of Kosovo Albanian men who were travelling in the convoy and shot them at different locations.[2268] The Trial Chamber also considered a list of 344 persons, all of whom were reported as missing and having been last seen alive in Meja/Mejë on 27 and 28 April 1999, and were listed as victims in Schedule H of the Indictment.[2269] Of those listed, 15 persons were named by eyewitnesses as having been killed by Serbian forces after being removed from their homes and shot.[2270] The bodies of 281 individuals were exhumed from a mass grave in Batajnica and identified as those listed in

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[2262] See Trial Judgement, paras 669-683, 1403-1406.
[2263] Trial Judgement, paras 1738-1739.
[2264] Đorđević Appeal Brief, para. 374.
[2265] Đorđević Appeal Brief, para. 374; Đorđević Reply Brief, para. 122.
[2266] Prosecution Response Brief, para. 362.
[2267] See Trial Judgement, paras 958, 961.
[2268] Trial Judgement, para. 1738. See Trial Judgement, paras 967-979, 985-995.
[2269] Trial Judgement, para. 990.
[2270] Trial Judgement, paras 955-962, 1735-1737. See also Trial Judgement, para. 990.

Schedule H of the Indictment.[2271] Although forensic evidence determined that only 172 of 281 victims died as a result of gunshot wounds, no cause of death could be established for the remaining 109 victims.[2272] The Trial Chamber nevertheless concluded that the only reasonable inference was that those 109 victims were also killed by Serbian forces during "Operation Reka" in circumstances similar to those established with respect to the 172 victims found to have been shot when removed from the convoy.[2273]

771. Although Đorđević contends that the inference remained that the 281 men were killed during combat, the Appeals Chamber notes that the Trial Chamber found that there was no evidence of fighting between Serbian forces and the KLA in the area at the time of these events in Meja/Mejë, "save for a short unplanned fire fight in the village of Ramoc on 27 April 1999 between four KLA fighters and members of a VJ unit".[2274] Instead, there was evidence that a large number of men in Meja/Mejë were forced to join a convoy and many of them were subsequently shot.[2275] The Trial Chamber explicitly found that there was no evidence that the individuals killed in Meja/Mejë were armed or taking part in hostilities at the relevant time.[2276] The Trial Chamber also dismissed Đorđević's argument that the Serbian forces directed their actions against terrorist activities.[2277] In making this finding, the Trial Chamber considered, *inter alia*, that the exhumed victims "where it could be determined – were wearing civilian clothing";[2278] a factor which the Appeals Chamber recalls may be considered in determining whether a particular victim was actively participating in hostilities at the time of death.[2279]

772. In these circumstances, the Appeals Chamber, Judge Güney and Judge Tuzmukhamedov dissenting, finds that Đorđević has not shown that his suggested alternative inference – *i.e.* that those found to have been murdered were killed in combat – was unreasonably excluded by the Trial

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[2271] Trial Judgement, para. 990. The Trial Chamber considered evidence that the bodies of the victims killed during Operation Reka were exhumed from their initial burial sites, transported and re-buried in mass graves at the Batajnica SAJ Center (Trial Judgement, paras 985-989).

[2272] Trial Judgement, para. 1738. See Trial Judgement, para. 990.

[2273] Trial Judgement, para. 1738. The Appeals Chamber observes that the Trial Chamber considered that there was no evidence concerning the fate of 48 additional individuals listed as missing from Meja/Mejë on the OMPF Consolidated List of Missing Persons, and in Schedule H of the Indictment. As a result, the Trial Chamber was unable to make a finding that they were murdered although it was of the view that "it is likely that these persons were also killed in the course of Operation Reka" (Trial Judgement, para. 993).

[2274] Trial Judgement, paras 980, 1739. The Trial Chamber also considered Đorđević's contention that the actions of the Serbian forces were directed against Kosovo Albanian terrorists but found that there was no evidence to suggest that those killed had participated or were participating in terrorist activities (Trial Judgement, para. 1739).

[2275] Trial Judgement, paras 958, 961, 967-979, 985-995, 1738.

[2276] Trial Judgement, para. 1739.

[2277] Trial Judgement, para. 1739.

[2278] Trial Judgement, para. 990. The Trial Chamber noted that two of the bodies found in the Batanica mass grave were female and that the victims were of varying ages.

Chamber.[2280] Đorđević consequently has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and therefore has failed to show that it erred in concluding that 281 Kosovo Albanians were shot and killed by Serbian forces on 27-28 April 1999 in Meja/Mejë during "Operation Reka".

(d) Vučitrn/Vushtrri municipality

773. The Trial Chamber was satisfied that Hysni Bunjaku, Haki Gerxhaliu, Miran Xhafa, and Veli Xhafa were detained and murdered by Serbian forces on 2/3 May 1999 while travelling in a convoy in Vučitrn/Vushtrri municipality.[2281]

774. Đorđević submits that the evidence did not establish that Hysni Bunjaku, Haki Gerxhaliu, Miran Xhafa, and Veli Xhafa were detained and notes that "the Trial Chamber found that KLA were in the convoy".[2282] He argues that if these four men were not detained, the inference remained that they were legitimately targeted, and that therefore a finding of murder should not follow.[2283]

775. The Prosecution responds that Đorđević has failed to demonstrate that the findings of the Trial Chamber were unreasonable.[2284] It asserts that Đorđević's submission that the evidence did not establish that the four individuals were detained is undeveloped and should be dismissed.[2285]

776. The Appeals Chamber is of the view that the question of whether Hysni Bunjaku, Haki Gerxhaliu, Miran Xhafa, and Veli Xhafa were detained, or whether KLA members were in the convoy of displaced persons travelling to Vučitrn/Vushtrri, is not relevant in this instance. The Appeals Chamber observes that the circumstances in which these men met their deaths, as considered by the Trial Chamber, show that all four men were *hors de combat*, taking no active part in hostilities at the relevant time and therefore were not legitimate targets.[2286] For example, the Trial Chamber expressly considered that Hysni Bunjaku was unarmed and driving a tractor in the convoy of displaced persons when Serbian forces approached him, repeatedly asked him for money, and

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[2279] See *supra*, para. 525.
[2280] See *supra*, para. 700.
[2281] Trial Judgement, paras 1184-1185, 1191-1192, 1197, 1742-1743.
[2282] Đorđević Appeal Brief, para. 375, referring to Trial Judgement, paras 1197-1199, 1742-1743.
[2283] Đorđević Reply Brief, para. 123.
[2284] Prosecution Response Brief, para. 363.
[2285] Prosecution Response Brief, para. 363.
[2286] The Appeals Chamber notes that the relevant portion of the Trial Judgement to which Đorđević refers provides that there was ongoing fighting between the KLA and Serbian forces in Vučitrn/Vushtrri municipality and not that the KLA was present in the convoy (Trial Judgement, para. 1199. See Trial Judgement, paras 1197-1199, 1742-1743, as referred to in Đorđević Appeal Brief, para. 375).

then pulled him off his tractor.[2287] Although his father begged the police not to kill him, Hysni Bunjaku was shot and killed by Serbian forces.[2288] The situation was similar in relation to Haki Gerxhaliu and his family.[2289] Haki Gerxhaliu was travelling with his family and was shot by Serbian forces as he got off his tractor.[2290] Further, the Trial Chamber found that Miran Xhafa, who at the time was 71 years old and unarmed, was dragged away from the tractor on which his family was travelling in the convoy, as a policeman pointed a machine gun at his wife.[2291] The police fired three shots, after which Miran Xhafa fell to the ground, and soon after fired a fourth shot.[2292] The Trial Chamber found that Miran Xhafa died during this incident.[2293] Finally, the Trial Chamber found that the body of Veli Xhafa was seen lying dead on his tractor.[2294]

777. In light of the above, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and as such has failed to show that the Trial Chamber erred in concluding that Hysni Bunjaku, Haki Gerxhaliu, Miran Xhafa, and Veli Xhafa were murdered.

(e) Kotlina/Kotlinë in Kačanik/Kaçanik municipality

778. The Trial Chamber found that on 24 March 1999, Serbian forces detained and subsequently killed at least 22 men at the Kotlina/Kotlinë wells in Kačanik/Kaçanik municipality.[2295] In reaching this conclusion the Trial Chamber relied on the evidence of Witness Hazbi Loku ("Witness Loku"), who observed the events from a hillside less than 600 meters away through hunting binoculars.[2296] In particular, it considered his evidence that Serbian forces captured a group of approximately 20 men and forced them with their hands above their head to two dry wells.[2297] It further accepted his account that "he [then] saw all of the men 'executed and massacred'".[2298]

[2287] Trial Judgement, para. 1184.
[2288] Trial Judgement, para. 1184.
[2289] Trial Judgement, para. 1185.
[2290] Trial Judgement, para. 1185.
[2291] Trial Judgement, para. 1191.
[2292] Trial Judgement, para. 1191.
[2293] Trial Judgement, para. 1191.
[2294] Trial Judgement, para. 1192.
[2295] Trial Judgement, paras 1126, 1744. See Trial Judgement, paras 1116, 1120, 1428, 1431, 1433-1436.
[2296] Trial Judgement, paras 1115-1116, 1125-1126, 1428, fn. 4336.
[2297] Trial Judgement, paras 1115-1116, 1125-1126, 1428, fn. 4336.
[2298] Trial Judgement, para. 1125.

779. Đorđević submits that the Trial Chamber erred in relying on the evidence of Witness Loku to conclude that the 22 men were detained when killed, considering the distance from which he observed the events.[2299]

780. The Prosecution responds that Đorđević fails to demonstrate that the Trial Chamber's findings were unreasonable.[2300] It further asserts that Đorđević's submission should be dismissed on the basis that he repeats arguments which failed at trial and seeks to substitute his own evaluation of the evidence for that of the Trial Chamber.[2301]

781. The Appeals Chamber recalls that a trial chamber has broad discretion in assessing the appropriate weight and credibility to be accorded to the testimony of a witness,[2302] and may rely on the uncorroborated evidence of a single witness.[2303] The Appeals Chamber notes that the Trial Chamber explicitly considered and addressed Đorđević's argument at trial that, due to Witness Loku's distance from the wells in Kotlina/Kotlinë, he could not have seen all that he described in relation to the circumstances surrounding the deaths.[2304] However, the Trial Chamber found that Witness Loku had an unobstructed view of the wells from a higher position on top of a hillside, and that although he could see the events with his naked eye, he also used hunting binoculars.[2305] The Appeals Chamber finds no error in the Trial Chamber relying on Witness Loku's evidence that the 22 men had their hands over their heads when killed, especially in light of the evidence that Witness Loku used hunting binoculars and that the events were visible by the naked eye.[2306] Further, the Appeals Chamber is of the view that it was reasonable for the Trial Chamber to rely on this evidence to establish that the 22 men were unarmed, taking no active part in the hostilities at that time of the killings and, "[i]f any of them had been members of the KLA, they were *hors de combat*."[2307] It is therefore not relevant whether the individuals concerned were members of the KLA at the time of the killings.

782. Based on the foregoing, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and as such

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[2299] Đorđević Appeal Brief, para. 376(iii); Đorđević Reply Brief, para. 124.
[2300] Prosecution Final Brief, para. 364.
[2301] Prosecution Final Brief, para. 364, referring to Đorđević Closing Brief, para. 871.
[2302] *Haradinaj et al.* Appeal Judgement, para. 129. See also *Bikindi* Appeal Judgement, para. 114; *Nchamihigo* Appeal Judgement, para. 47; *Nahimana et al.* Appeal Judgement, para. 194.
[2303] *Haradinaj et al.* Appeal Judgement, para. 219; *Kupreškić et al.* Appeal Judgement, para. 33; *Aleksovski* Appeal Judgement, para. 62; *Tadić* Appeal Judgement, para. 65.
[2304] Trial Judgement, para. 1125, fns 4327, 4336, 4342. See Đorđević Closing Brief, para. 871.
[2305] Trial Judgement, paras 1115-1116, 1125-1126, 1428, fns 4327, 4336, 4342.
[2306] Trial Judgement, paras 1112, 1115-1116, fn. 4237.
[2307] See Trial Judgement, para. 1744.

has failed to show that the Trial Chamber erred in concluding that Serbian forces killed at least 22 men at the Kotlina/Kotlinë wells in Kačanik/Kaçanik municipality.

(f) Vata/Vataj in Kačanik/Kaçanik municipality

783. The Trial Chamber found that Mahmut Caka, Hebib Lami, Brahim Lami, and Rraman Lami from the village of Vata/Vataj were detained, paraded through the village, and later shot and killed by Serbian forces in Vata/Vataj in Kačanik/Kaçanik municipality on 13 April 1999.[2308] In reaching its conclusion the Trial Chamber relied on the evidence of Witness Sada Lama ("Witness Lama"), as well as forensic evidence that all four men died as a result of gunshot wounds.[2309]

784. Đorđević submits that the Trial Chamber erroneously placed decisive weight on hearsay evidence of Witness Lama to support the assertion that the four deceased Kosovo Albanians had been detained.[2310]

785. The Prosecution responds that Đorđević fails to demonstrate that no reasonable trial chamber could have relied on hearsay evidence, corroborated by other evidence, to support its factual finding.[2311]

786. Đorđević replies that the deaths of these individuals do not corroborate Witness Lama's evidence that they were detained.[2312]

787. The Appeals Chamber understands Đorđević's argument to be that the Trial Chamber's finding that the four men were detained is vital to the crime of murder, since if the men were not detained the inference remained that they were legitimately killed and therefore the killings did not constitute murder.

788. Witness Lama's evidence is comprised of both direct evidence, in which he describes the incident as he saw it himself, and hearsay evidence in respect of what he was told by his wife, who had observed the events from a hiding spot 300 meters away.[2313] The Appeals Chamber notes that Witness Lama's hearsay evidence that the four men were detained was the only evidence presented to the Trial Chamber that they were detained. The Appeals Chamber notes that the Trial Chamber

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[2308] Trial Judgement, para. 1747. See Trial Judgement, paras 1138-1139, 1447.
[2309] Trial Judgement, paras 1138-1139, 1447-1449, 1747.
[2310] Đorđević Appeal Brief, para. 376(iv).
[2311] Prosecution Response Brief, para. 365.
[2312] Đorđević Reply Brief, para. 125.
[2313] Trial Judgement, para. 1138, fn. 4410.

found that the four men were *hors de combat* and taking no active part in the hostilities at the relevant time.[2314]

789. For this finding, the Trial Chamber did not only rely on hearsay evidence but rather based its conclusion on the *direct* evidence of Witness Lama, who recounted that he saw the bodies of Mahmut Caka, Hebib Lami, Brahim Lami, and Rraman Lami on a path above the gorge after they had been paraded through the village earlier that day.[2315] In particular, Witness Lama further recounted that all of the victims were wearing civilian clothing and had no weapons.[2316] The Appeals Chamber recalls that the clothing of victims may be considered when determining whether a particular victim was actively participating in hostilities at the time of death.[2317] Therefore, it was reasonable for the Trial Chamber to rely on Witness Lama's evidence to conclude that the victims were *hors de combat* and not taking part in hostilities at their time of death.[2318] It follows that, whether Mahmut Caka, Hebib Lami, Brahim Lami, and Rraman Lami were detained is of no relevance in this instance, since the Trial Chamber's finding that they were *hors de combat* and not taking active part in the hostilities, was in any event reasonable.

790. In light of the above, Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and as such has failed to show that the Trial Chamber erred in concluding that Serbian forces killed Mahmut Caka, Hebib Lami, Brahim Lami, and Rraman Lami in Vata/Vataj.

3. Persecutions as a crime against humanity

791. The Trial Chamber found that the crime of persecutions through destruction of religious or culturally significant property was established in relation to the mosques in Celina/Celinë, Bela Crkva/Bellacërkë, Landovica/ Landovicë, Suva Reka/Suharekë (White Mosque), Đakovica/Gjakovë (Hadum Mosque), Rogovo/Rogovë, Vlaštika/Llashticë, and Vučitrn/Vushtrri (Charshi Mosque).[2319]

792. Đorđević submits that the Trial Chamber erred in concluding that the crime of persecutions was established by means of destruction of religious sites in relation to: (i) the Celina/ Celinë, Bela

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[2314] Trial Judgement, para. 1747.
[2315] Trial Judgement, para. 1138, fn. 4410. See Sada Lama, 24 Apr 2009, T. 3722-3724.
[2316] Trial Judgement, para. 1138, fn. 4410. See Sada Lama, 24 Apr 2009, T. 3722-3724.
[2317] See *Boškoski and Tarčulovski* Appeal Judgement, para. 81. See *supra*, para. 525.
[2318] Trial Judgement, paras 1139, 1747.
[2319] Trial Judgement, paras 1811, 1819, 1825, 1832, 1837, 1841, 1850, 1854, 1856, 2033.

Crkva/Bellacërkë, and Rogovo/Rogovë mosques; (ii) the mosque in Landovica/ Landovicë; (iii) Hadum Mosque; and (iv) the mosque in Vlaštica/Lashticë.[2320]

793. The Prosecution responds that Đorđević has failed to demonstrate an error.[2321]

(a) Celina/Celinë and Bela Crkva/Bellacërkë mosques in Orahovac/Rahovec municipality and the mosque in Rogovo/Rogovë in Đakovica/Gjakovë municipality

794. The Trial Chamber concluded that the Celina/Celinë and Bela Crkva/Bellacërkë mosques in Orahovac/Rahovec municipality, as well as the mosque in Rogovo/Rogovë in Đakovica/Gjakovë municipality, were destroyed by explosive devices detonated by Serbian forces on 28 March 1999.[2322] On the basis of the direct eyewitness evidence of Witness Sabri Popaj ("Witness Popaj"), corroborated by the indirect account of Witness Agim Jemini ("Witness Jemini"), the Trial Chamber concluded that Serbian forces entered the mosque in Celina/Celinë and detonated an explosive device causing its destruction,[2323] It further relied on, *inter alia*, the evidence of Witness Popaj in relation to the mosque in Celina/Celinë to infer that the mosques in Bela Crkva/Bellacërkë and Rogovo/Rogovë were similarly destroyed consecutively, in a matter of minutes, by explosive devices laid and detonated by Serbian forces.[2324]

795. Đorđević challenges the Trial Chamber's reliance on Witness Popaj's evidence on the basis that the witness was "uncertain when testifying", "biased as a KLA supporter", and that his evidence conflicted with that of Witness Jemini.[2325] He further submits that the Trial Chamber erroneously relied on the evidence of Witness Popaj in relation to the destruction of the mosque in Celina/Celinë to infer that the Bela Crkva/Bellacërkë and Rogovo/Rogovë mosques were also destroyed by Serbian forces.[2326] Đorđević finally submits that there was no eyewitness evidence to

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[2320] Đorđević Appeal Brief, paras 347(f), 347(g), 377. The finding that destruction of Kosovo Albanian religious sites was part of the common plan and alleged errors of law in regard to the finding of persecutions in relation to the mosque in Landovica/Landovicë, the Hadum Mosque, and the Vlaštica/Lashticë Mosque, respectively, have been addressed under his seventh and fifteenth grounds of appeal. Đorđević, under his seventeenth ground of appeal, challenges only the factual basis upon which the *actus reus* was satisfied (see *supra*, paras 198-200, 204, 557-562, 565-569).

[2321] Prosecution Response Brief, paras 366-368.

[2322] Trial Judgement, paras 477, 528, 931, 933, 1804, 1806, 1808, 1811, 1836-1837.

[2323] Trial Judgement, para. 1804, referring to Agim Jemini, 21 Apr 2009, T. 3542, 3544, Exhibit P638.

[2324] Trial Judgement, paras 478, 528, 931, 933.

[2325] Đorđević Appeal Brief, para. 377(a).

[2326] Đorđević Appeal Brief, para. 377(a).

support the findings that the Bela Crkva/Bellacërkë and the Rogovo/Rogovë mosques were destroyed by Serbian forces.[2327]

796. The Prosecution responds that Đorđević's challenges to the credibility of Witness Popaj were addressed at trial and that the Trial Chamber reasonably relied on his evidence.[2328] It further responds that Đorđević has failed to demonstrate that no reasonable trial chamber could have concluded that Serbian forces destroyed the Bela Crkva/Bellacërkë and Rogovo/Rogovë mosques.[2329]

797. The Appeals Chamber notes that the Trial Chamber addressed in detail the submissions made by Đorđević at trial as to the credibility of Witness Popaj, including, *inter alia*, the discrepancy between his evidence and that of Witness Jemini, but was satisfied that his evidence concerning events in and around the village of Bela Crkva/Bellacërkë was reliable.[2330] The Appeals Chamber recalls in this regard that a trial chamber has broad discretion in determining the weight to attach to the evidence of any given witness.[2331] It further recalls that minor inconsistencies may commonly occur in witness testimony without rendering such testimony unreliable.[2332] It is within the discretion of a trial chamber to evaluate discrepancies and to consider the credibility of the evidence as a whole, without explaining its decision in every detail.[2333]

798. The Trial Chamber considered the evidence of Witness Popaj, who testified that from his vantage point on the side of the mountain, he could see the villages of Celina/Celinë, Bela Crkva/Bellacërkë, and Rogovo/Rogovë, all of "which were close by".[2334] In particular, it considered that Witness Popaj saw police enter the mosque in Celina/Celinë where they remained for one hour, following which he heard a loud explosion and saw that the mosque was destroyed.[2335] While

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[2327] Đorđević Appeal Brief, para. 377(a).
[2328] Prosecution Response Brief, para. 366.
[2329] Prosecution Response Brief, para. 366.
[2330] Trial Judgement, paras 456, 528, fn. 1934. See Đorđević Closing Brief, paras 744, 980. The Appeals Chamber notes that Đorđević challenged at trial Witness Popaj's evidence that the destruction of the Celina/Celinë mosque occurred on 28 March 1999 in light of the conflicting evidence of Witness Jemini as to the date. Although the Trial Chamber heard from Witness Jemini that the mosque was blown up on 30 or 31 March 1999, Witness Popaj explained the inaccuracy of this recount as Witness Jemini had not seen the explosion (Trial Judgement, fn. 1934). It was on the basis that Witness Popaj viewed the destruction of the mosque and the forces involved in the village of Celina/Celinë that the Trial Chamber accepted the date as 28 March 1999 (Trial Judgement, fn. 1934).
[2331] *Haradinaj et al.* Appeal Judgement, para. 129. See also *Bikindi* Appeal Judgement, para. 114; *Nchamihigo* Appeal Judgement, para. 47; *Nahimana et al.* Appeal Judgement, para. 194.
[2332] *Kvočka et al.* Appeal Judgement, para. 23, referring to *Čelebići* Appeal Judgement, paras 481, 498, *Kupreškić et al.* Appeal Judgement, para. 31.
[2333] *Kvočka et al.* Appeal Judgement, para. 23, referring to *Čelebići* Appeal Judgement, paras 481, 498, *Kupreškić et al.* Appeal Judgement, para. 31.
[2334] Trial Judgement, para. 1833.
[2335] Trial Judgement, paras 528, 1804, 1833.

Witness Popaj's evidence was the only direct eyewitness account that police entered the mosque, placed and detonated an explosive device, the Trial Chamber also considered the evidence of Witness Jemini, "who, that evening, saw that the mosque had been completely destroyed".[2336] It was on the basis of this evidence that the Trial Chamber concluded that the mosque was destroyed by an explosive device placed and detonated by members of the MUP.

799. In concluding that the mosque in Bela Crkva/Bellacërkë was similarly destroyed, the Trial Chamber considered that shortly after the destruction of the mosque in Celina/Celinë, Witness Popaj heard another explosion from Bela Crkva/Bellacërkë, after which he saw that the mosque in that village was no longer standing.[2337] Witness Popaj then heard and saw the mosque in Rogovo/Rogovë explode.[2338]

800. The Trial Chamber also considered the evidence of Witness András Riedlmayer ("Witness Riedlmayer") that the minaret of the mosque in Rogovo/Rogovë "had been blown up with charges placed under the stairs causing its complete destruction" and found it to be consistent with the evidence that police laid and detonated explosives inside all three mosques, causing their destruction.[2339] In the Trial Chamber's finding, it was significant that the three mosques, all of which were located in close geographical proximity, were successively destroyed on the same day, and by the same method.[2340]

801. In the context of the pattern of destruction of all three mosques, their close geographical proximity, that the destruction occurred successively within minutes, and the evidence of Witness Jemini and Witness Riedlmayer, the Appeals Chamber finds that the Trial Chamber reasonably inferred that the mosques in Bela Crkva/Bellacërkë and Rogovo/Rogovë were also destroyed by Serbian forces in a manner similar to the mosque in Celina/Celinë.

802. In light of the above, the Appeals Chamber finds that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and therefore has failed to show that the Trial Chamber erred in concluding that the crime of persecutions was established in relation to the destruction of the mosques in Celina/Celinë, Bela Crkva/Bellacërkë, and Rogovo/Rogovë.

[2336] Trial Judgement, para. 1804.
[2337] Trial Judgement, paras 477, 1806, 1833.
[2338] Trial Judgement, paras 931, 1833.
[2339] Trial Judgement, para. 932.
[2340] Trial Judgement, para. 1836.

(b) Mosque in Landovica/Landovicë in Prizren municipality

803. The Chamber was satisfied that Serbian forces set fire to the interior of the mosque in Landovica/Landovicë in Prizren municipality on 26 March 1999, and caused substantial destruction to its structure and minaret by use of an explosive device on 27 March 1999.[2341]

804. Đorđević submits that no reasonable Trial Chamber could have relied solely upon the evidence of Halil Morina ("Morina") admitted pursuant to Rule 92*quater* to conclude that the mosque in Landovica/Landovicë was set on fire by Serbian forces.[2342]

805. The Prosecution responds that the Trial Chamber's finding was not based solely on Rule 92*quater* evidence but was corroborated by the testimony of Witness Riedlmayer, who saw the site after it was damaged.[2343] It further responds that Đorđević repeats arguments which did not succeed at trial without demonstrating that the Trial Chamber erred.[2344]

806. Đorđević replies that the Prosecution fails to explain how Witness Riedlmayer's evidence was corroborative of Morina's evidence that Serbian forces caused the damage.[2345]

807. Morina's evidence, which consists of a witness statement and testimony adduced in another case, was admitted in this case pursuant to Rule 92*quater* of the Rules.[2346] The Appeals Chamber recalls in this regard that a conviction may not be based solely or in a decisive manner on the evidence of an individual whom the accused has had no opportunity to cross-examine.[2347] In *Galić*, the Appeals Chamber determined that where the evidence is pivotal to the Prosecution's case and "goes to proof of the acts and conduct of the accused's immediately proximate subordinates", it must be corroborated.[2348] The Appeals Chamber considers Morina's evidence – that Serbian forces set fire to the interior of the mosque in Landovica/Landovicë causing substantial destruction to its structure and minaret by use of an explosive device – to be a critical element of the Prosecution case and a vital link in demonstrating Đorđević's responsibility for the destruction of the mosque

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[2341] Trial Judgement, para. 1819.
[2342] Đorđević Appeal Brief, para. 377(b). See Đorđević Appeal Brief, para. 347(i).
[2343] Prosecution Response Brief, para. 367.
[2344] Prosecution Response Brief, para. 367.
[2345] Đorđević Reply Brief, para. 127, referring to Prosecution Response Brief, para. 367.
[2346] Trial Judgement, para. 1817, referring to Exhibits P283, pp 3-4, P284, pp 896-897.
[2347] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 Nov 2007, paras 53, 58.
[2348] *Galić* Appeal Decision on Rule 92*bis*(C) of 7 June 2002, paras 13, 18-19. The Appeals Chamber found the statement of the witness demonstrating that a shell was fired from a gun manned by a subordinate of the accused, which caused many casualties, was a vital link to the Prosecution's case and therefore needed to be corroborated

committed by Serbian forces. The Appeals Chamber must therefore determine whether the conviction for persecutions through the destruction of the mosque in Landovica/Landovicë was based solely or in a decisive manner on the evidence of Morina.

808. In reaching its conclusion, the Trial Chamber also considered the evidence of Witness Riedlmayer, who reported on the damage sustained to the mosque, and concluded that his evidence on the nature of the damage to the mosque and its mechanism "is consistent in material respects with the observations of [Morina] and provides independent confirmation of his account".[2349] The Appeals Chamber observes that Witness Riedlmayer's evidence does not directly corroborate that of Morina with respect to Serbian forces having caused the destruction of the mosque in Landovica/Landovicë. The Appeals Chamber notes, however, that the Trial Chamber found a consistent pattern of attack by the Serbian forces entering towns and villages on foot, beginning on 24 March 1999, and setting houses on fire and looting valuables.[2350] Particularly, it found that "[t]he same pattern continued in the following days, on 26 March 1999 in Landovica/Landovicë."[2351] The Appeals Chamber, Judge Tuzmukhamedov dissenting, finds this pattern of attack by the Serbian forces to be corroborative of Morina's account in the admitted statement and transcript that the Serbian forces set fire to the interior of the mosque in Landovica/Landovicë. The Appeals Chamber therefore considers, Judge Tuzmukhamedov dissenting, that the Trial Chamber's conclusion is not based solely or in a decisive manner on Morina's 92*quater* evidence, as other evidence supports Đorđević's conviction for the crime of persecutions through the destruction of the mosque in Landovica/Landovicë.[2352]

809. In light of the above, the Appeals Chamber finds, Judge Tuzmukhamedov dissenting, that Đorđević has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber, and therefore has failed to show that the Trial Chamber erred in concluding that the crime of persecutions was established in relation to the mosque in Landovica/Landovicë.

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before admitted under Rule 92*bis* of the Rules (*Galić* Appeal Decision on Rule 92*bis*(C) of 7 June 2002, paras 18-19).

2349 Trial Judgement, paras 1818-1819. The Appeals Chamber recalls that hearsay evidence is in principle admissible, although in assessing its probative value, the surrounding circumstances must be considered (*Blaškić* Appeal Judgement, para. 656, fn. 1374. See *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15. See also *Haradinaj et al.* Appeal Judgement, paras 85-86).

2350 Trial Judgement, para. 2027.

2351 Trial Judgement, para. 2027.

2352 See *Popović et al.* Trial Judgement, para. 63.

(c) Hadum Mosque and adjoining library in Đakovica/Gjakovë town

810. The Trial Chamber found that the crime of persecutions was established in relation to the destruction of the Hadum Mosque and adjoining library during the night of 24 to 25 March 1999.[2353] In particular, it found that the Hadum Mosque was destroyed by a fire set by Serbian police "possibly acting together with paramilitary forces".[2354] While the Trial Chamber considered Đorđević's argument at trial that the Hadum Mosque was destroyed by a NATO aerial bombing, it concluded "that the damage sustained by the mosque and nearby buildings is inconsistent with damage caused by [NATO] aerial bombing".[2355]

811. Đorđević submits that the Trial Chamber erroneously excluded NATO as the cause of the destruction of the mosque on the basis that VJ barracks were not in the historic old town.[2356] He further submits that it was unreasonable for the Trial Chamber to rely on the evidence of Witness Abrahams that the buildings were set on fire from the inside.[2357]

812. The Prosecution responds that Đorđević's challenge should be dismissed as he repeats arguments which failed at trial and ignores the Trial Chamber's reasoning.[2358]

813. In reaching its conclusion that the historic centre of Đakovica/Gjakovë was deliberately set on fire by Serbian police, the Trial Chamber carefully considered but nonetheless rejected Đorđević's submission that damage to the Hadum Mosque was a result of the NATO bombing.[2359] Contrary to Đorđević's submission, the Trial Chamber did not exclude NATO as the cause of the destruction solely on the basis that VJ barracks were not in the historic old town.[2360] The Appeals Chamber notes that the Trial Chamber considered an MUP staff report indicating that NATO aircraft fired missiles hitting the historical centre of the city during the night of 24 March and in the morning of 25 March 1999, but was "unable to accept this report as reliable" when weighed against the following evidence:[2361] (i) war diaries of VJ units present in the city which do not record any such bombing of the old town;[2362] (ii) the fact that none of the relevant witnesses on the ground at

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[2353] Trial Judgement, para. 1831. See Trial Judgement, paras 870, 872.
[2354] Trial Judgement, para. 1831. See Trial Judgement, paras 870, 872.
[2355] Trial Judgement, para. 1831. See Trial Judgement, paras 870, 872.
[2356] Đorđević Appeal Brief, para. 377(c).
[2357] Đorđević Appeal Brief, para. 377(c).
[2358] Prosecution Response Brief, para. 368, referring to Trial Judgement, paras 866-870, 1830-1832.
[2359] Trial Chamber Judgement, paras 865-870, 1830-1832. See Đorđević Closing Brief, paras 1005-1008.
[2360] See Đorđević Appeal Brief, para. 377(c).
[2361] Trial Judgement, para. 866.
[2362] Trial Judgement, para. 867.

the time testified that NATO bombed the historic centre or other civilian areas;[2363] (iii) the evidence of Witness Abrahams, a Human Rights Watch researcher, who observed that the mosque had been set on fire from the inside as the walls remained standing while the roofs of the mosque were burned;[2364] (iv) the evidence of Witness Riedlmayer that "the building interiors were burned out to rooflines" and that there were "no signs of the blast damage" consistent with an aerial bombing;[2365] and (v) an aerial photograph from the US Department of Defense depicting the Hadum Mosque intact but the adjacent bazaar burning.[2366] The Trial Chamber found that the damage sustained by the mosque and adjacent buildings were "inconsistent with damage caused by aerial bombing".[2367] The Appeals Chamber finds that it was reasonable on the basis of these factors for the Trial Chamber to exclude NATO as the cause of the destruction of the Hadum Mosque and adjacent library.

814. In relation to Đorđević's challenge to the Trial Chamber's reliance on the evidence of Witness Abrahams,[2368] the Appeals Chamber notes that his evidence that the buildings appeared to have been set on fire from the inside was consistent with that of Witness Riedlmayer, who reported that buildings "were burned out to rooflines" and that "there were no signs of blast damage that would have been expected if the bazaar had really been hit by air strikes".[2369] While corroboration is not necessary before accepting the evidence of a particular witness, the Appeals Chamber notes that Witness Riedlmayer's evidence not only corroborates Witness Abrahams evidence but is consistent with the exclusion of NATO as the cause of the destruction.[2370]

815. Based on the foregoing, the Appeals Chamber finds that Đorđević has failed to demonstrate that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber and therefore Đorđević has failed to show that the Trial Chamber erred in finding that crime of persecutions was established in relation to the Hadum Mosque and its adjacent library.

(d) Mosque in Vlaštica/Lashticë in Gnjilane/Gjilan municipality

816. The Trial Chamber was satisfied that the mosque in Vlaštica/Llashticë in Gnjilane/Gjilan municipality was heavily damaged and its library destroyed by Serbian forces who set it on fire on

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[2363] Trial Judgement, para. 868.
[2364] Trial Judgement, para. 869.
[2365] Trial Judgement, para. 869.
[2366] Trial Judgement, para. 869.
[2367] Trial Judgement, para. 1831.
[2368] See Đorđević Appeal Brief, para. 377(c).
[2369] Trial Judgement, para. 869, referring to Exhibits P1098, pp 6, 50, P1137, p. 173, P1105, p. 1, P1106, András Riedlmayer, 16 Jul 2009, T. 7509-7511.

or about 6 April 1999.[2371] The Trial Chamber considered that Serbian forces entered the village and burned houses in the village, with the mosque in Vlaštica/Llashticë being the first building that was set on fire.[2372]

817. Đorđević submits that the Trial Chamber erred in finding that the mosque in Vlaštica/Lashticë was the first building to be set on fire by Serbian forces, based on the uncorroborated evidence of Witness K81, who watched events from a distance in the mountains.[2373]

818. The Prosecution responds that Đorđević's argument warrants summary dismissal.[2374]

819. The Appeals Chamber notes that the only direct evidence that the mosque was the first building set on fire by Serbian forces was provided by Witness K81.[2375] The Appeals Chamber recalls that a trial chamber may rely on the testimony of a single witness on a material fact without the need for corroboration[2376] and has discretion to assess the appropriate weight and credibility to be accorded to the testimony of a witness.[2377] The Appeals Chamber notes that Witness K81's evidence discloses that he was on top of a mountain when he saw the mosque being set on fire by Serbian forces and that this was not explicitly considered by the Trial Chamber. Witness K81's evidence, however, also discloses that he observed the events from a distance which he described as "close enough [that] I could see the activity",[2378] and in addition that he had a pair of binoculars.[2379]

820. The Appeals Chamber also notes that Witness K81's evidence that the mosque was destroyed by a fire is consistent with the evidence of Witness Riedlmayer who, on the basis of the examination of a photograph provided by the Islamic community, observed that the mosque in Vlaštica/Llashticë was "heavily damaged" by an intense fire.[2380] The Appeals Chamber therefore finds, based on the vantage point of Witness K81, as well as the consistency of Witness K81's

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[2370] See Trial Judgement, para. 869.
[2371] Trial Judgement, paras 1055, 1841.
[2372] Trial Judgement, paras 1055, 1838.
[2373] Đorđević Appeal Brief, para. 347(g); Đorđević Reply Brief, para. 106(b).
[2374] Prosecution Response Brief, para. 307.
[2375] K81, 15 May 2009, T. 4535. See Trial Judgement, paras 1055, 1838.
[2376] *Lukić and Lukić* Appeal Judgement, para. 375; *Haradinaj et al.* Appeal Judgement, para. 219; *Strugar* Appeal Judgement, para. 78; *Limaj et al.* Appeal Judgement, para. 203; *Kordić and Čerkez* Appeal Judgement, para. 274; *Kupreškić et al.* Appeal Judgement, para. 33; *Čelebići* Appeal Judgement, para. 506; *Aleksovski* Appeal Judgement, para. 62; *Tadić* Appeal Judgement, para. 65.
[2377] *Lukić and Lukić* Appeal Judgement, paras 86, 235, referring to *Nchamihigo* Appeal Judgement, para. 47, *Bikindi* Appeal Judgement, para. 116, *Nahimana et al.* Appeal Judgement, para. 194.
[2378] Exhibit P791, statement of 30 May 1999, p. 3.
[2379] See K81, 15 May 2009, T. 4535.
[2380] Trial Judgement, para. 1838, citing Exhibit P1125.

evidence with that of Witness Riedlmayer, that it was reasonable for the Trial Chamber in its discretion to rely on the evidence of Witness K81.

821. Witness Riedlmayer's evidence does not however corroborate Witness K81's assertion that the mosque was the first building set on fire by Serbian forces. The Appeals Chamber not only finds corroboration unnecessary in these circumstances, but also finds that whether the mosque in Vlaštica/Llashticë was the first to be destroyed has no bearing on the Trial Chamber's reasonable conclusion that the mosque was damaged by a fire set by Serbian forces.

822. Based on the forgoing, the Appeals Chamber finds that Đorđević has failed to demonstrate that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber and therefore has failed to demonstrate that the Trial Chamber erred in finding that the crime of persecutions was established in relation to the destruction of the mosque in Vlaštica/Llashticë on or about 6 April 1999.

C. Conclusion

823. For the foregoing reasons, the Appeals Chamber finds that Đorđević has failed to demonstrate that the Trial Chamber erred in concluding that the crimes of deportation, persecutions, other inhumane acts (forcible transfer) as crimes against humanity, and murder both as a violation of the laws or customs of war and a crime against humanity, were established.

824. The Appeals Chamber dismisses Đorđević's seventeenth ground of appeal in its entirety and in part his fifteenth ground of appeal.[2381]

[2381] The remainder of Đorđević's fifteenth ground of appeal has been dismissed (*supra*, Chapter XV).

XVIII. ĐORĐEVIĆ'S EIGHTEENTH GROUND OF APPEAL: ALLEGED ERRORS OF LAW WHEN ENTERING MULTIPLE CONVICTIONS

A. Alleged errors of law when entering convictions under joint criminal enterprise and aiding and abetting

825. The Trial Chamber found Đorđević guilty of the crimes of murder, deportation, other inhumane acts (forcible transfer), and persecutions (through deportation, forcible transfer, murder, and destruction of religious or culturally significant property), pursuant to Article 7(1) of the Statute, for participating in the JCE[2382] and for aiding and abetting the same crimes.[2383] The Trial Chamber further stated that "[t]he modes of responsibility under Article 7(1) of the Statute are not mutually exclusive, and it is possible to convict on more than one mode in relation to a crime if this better reflects the totality of the accused's conduct."[2384] It further stated that the facts of the case were "sufficiently compelling" to maintain the conviction for aiding and abetting the established crimes, in addition to the conviction for participation in the JCE, "in order to fully encapsulate the Accused's criminal conduct".[2385]

1. Arguments of the parties

826. Đorđević submits that the Trial Chamber erred in law by convicting him twice for the same crimes: once for committing the crimes through participation in a joint criminal enterprise; and again for aiding and abetting them.[2386] According to Đorđević, such duplicate convictions under Article 7(1) of the Statute are "impermissible and logically incompatible",[2387] and blur the carefully drawn distinction between the two forms of liability.[2388] Đorđević further submits that the Trial Chamber erroneously relied on jurisprudence which neither addresses concurrent convictions for "commission via JCE participation" and aiding and abetting nor results in concurrent convictions.[2389] Đorđević argues that once a finding of commission by participation in a joint

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[2382] Trial Judgement, paras 2193, 2230. See also Trial Judgement, para. 2213.
[2383] Trial Judgement, paras 2164, 2194, 2230. See also Trial Judgement, para. 2214.
[2384] Trial Judgement, para. 2194.
[2385] Trial Judgement, para. 2194.
[2386] Đorđević Appeal Brief, paras 380-381; Appeal Hearing, 13 May 2013, AT. 103-104, 110.
[2387] Đorđević Appeal Brief, para. 380. See also Appeal Hearing, 13 May 2013, AT. 104.
[2388] Đorđević Appeal Brief, para. 392. See also Đorđević Appeal Brief, paras 387-391.
[2389] Đorđević Appeal Brief, para. 382; Appeal Hearing, 13 May 2013, AT. 105. Đorđević argues that the cases referred to by the Trial Chamber, namely *Nahimana*, *Ndindabahizi*, and *Kamuhanda*, are not instructive as they do not deal with joint criminal enterprise (Appeal Hearing, 13 May 2013, AT. 105). Đorđević also contends that this jurisprudence "traces back to" the *Akayesu* Trial Judgement in which the Trial Chamber found that it was not justifiable to convict an accused where "one offence charges accomplice liability and the other offence charges

criminal enterprise is made, all of the other charged modes of liability "fall away".[2390] He asserts that it is common sense that "the principal cannot be the accomplice of the same crimes, just as the accomplice cannot be the principal".[2391] Đorđević further argues that the Trial Chamber failed to give a reasoned opinion as to why his conviction under two modes of liability would better reflect the totality of his criminal conduct.[2392] In his view, the lack of clear reasoning on the part of the Trial Chamber invalidates the entire Trial Judgement and warrants a full acquittal or, at the very least, his conviction pursuant to one of the two modes of liability should be quashed, and his sentence reduced accordingly.[2393] Finally, Đorđević submits that he has been prejudiced by, *inter alia*, the Trial Chamber's failure to "unequivocally express his criminal liability",[2394] and the fact that his sentence was increased as a result of this double conviction.[2395]

827. The Prosecution responds that a person may perpetrate a single crime in more than one way, in which case a trial chamber has the discretion to enter concurrent convictions.[2396] It argues that the Trial Chamber properly exercised its discretion in using concurrent convictions to fully characterise

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liability as a principal" in relation to the same set of facts (Đorđević Appeal Brief, para. 383; Appeal Hearing, 13 May 2013, AT. 105, citing *Akayesu* Trial Judgement, para. 468). Đorđević further argues that the Trial Chamber's language that his "conduct was such as to also render him liable to conviction and punishment for aiding and abetting the offences established" distinguishes his case from the recent *Gatete* case, where the ICTR Appeals Chamber found that "a mere reference to other modes of liability were not additional convictions" (Appeal Hearing, 13 May 2013, AT. 103-104, referring to Trial Judgement, para. 2214, *Gatete* Appeal Judgement, para. 235).

2390 Appeal Hearing, 13 May 2013, AT. 106. Đorđević points to recent trial judgements where trial chambers have adopted the practice of declining to convict on other modes of liability after reaching a finding on joint criminal enterprise (see Appeal Hearing, 13 May 2013, AT. 106, referring to *Stanišić and Župljanin* Trial Judgement, vol. 2, paras 529, 780, *Gotovina et al.* Trial Judgement, vol. 2, paras 2375, 2587, *Tolimir* Trial Judgement, para. 1174, fn. 4509).

2391 Appeal Hearing, 13 May 2013, AT. 106. See also Appeal Hearing, 13 May 2013, AT. 105, referring to *Akayesu* Trial Judgement, para. 468.

2392 Appeal Hearing, 13 May 2013, AT. 107-111. In arguing that the Trial Chamber did not give a reasoned opinion, Đorđević refers to the *Gotovina and Markač* Appeal Judgement, where the Appeals Chamber clearly stated that "a finding of a significant contribution is not equivalent to a substantial contribution required to enter a conviction for aiding and abetting" (Appeal Hearing, 13 May 2013, AT. 107-108, citing *Gotovina and Markač* Appeal Judgement, para. 149). Đorđević contends that the Trial Chamber did not give any explanation as to how the finding that he participated in the JCE "somehow transforms into one of substantial effect [...] or how he substantially assisted" (Appeal Hearing, 13 May 2013, AT. 108, referring to Trial Judgement, paras 2158, 2163, 2194).

2393 Đorđević Appeal Brief, paras 380, 398. See also Đorđević Appeal Brief, para. 393.

2394 Đorđević Appeal Brief, paras 393-395; Appeal Hearing, 13 May 2013, AT. 110, referring to *Krstić* Appeal Judgement, para. 217, *Kunarac et al.* Appeal Judgement, para. 169.

2395 Đorđević Appeal Brief, paras 396-397; Appeal Hearing, 13 May 2013, AT. 103-104; 110-111. Đorđević argues that he was clearly convicted twice for the same conduct (Appeal Hearing, 13 May 2013, AT. 103-104, referring to Trial Judgement, para. 2214).

2396 Prosecution Response Brief, paras 369, 373. See also Prosecution Response Brief, para. 371; Appeal Hearing, 13 May 2013, AT. 137-139, referring to *Ndindabahizi* Appeal Judgement, *Kamuhanda* Appeal Judgement, *Nahimana et al.* Appeal Judgement. The Prosecution refers in particular to *Ndindabahizi* Appeal Judgement and argues that, contrary to Đorđević's submission, it is relevant to the present case as it deals with convictions "through the concurrent modes of commission, aiding and abetting, and instigation" in relation to overlapping conduct (Appeal Hearing, 13 May 2013, AT. 138; *contra* Appeal Hearing, 13 May 2013, AT. 105).

Đorđević's *actus reus* and *mens rea*.[2397] The Prosecution also responds that the conduct upon which the Trial Chamber found Đorđević responsible is not exactly the same under both modes of liability.[2398] Specifically, the Prosecution submits that the Trial Chamber relied on four types of contributions to the JCE: (i) Đorđević's role in planning and coordinating MUP operations; (ii) his role in the deployment of the Scorpions and other volunteer units; (iii) his role in the concealment of bodies; (iv) and his failure to prevent and punish the crimes.[2399] However, according to the Prosecution, the Trial Chamber only relied on the final three types of contributions in concluding that Đorđević also aided and abetted the crimes.[2400] In the Prosecution's view, this shows that the Trial Chamber focused on this particular aspect of his conduct.[2401] Further, it submits that, contrary to Đorđević's assertion, the Trial Chamber in fact entered only one conviction for each count[2402] and that the sentence was based on the totality of his conduct.[2403] Accordingly, the concurrent convictions had no impact on Đorđević's sentence.[2404] The Prosecution requests that the Appeals Chamber summarily dismiss Đorđević's argument "as a theoretical challenge to the law of concurrent convictions".[2405]

828. Đorđević replies that an accused person cannot perpetrate a single crime in more than one way, if this entails possessing a different *mens rea* and/or *actus reus* at the same time.[2406] He emphasises that his challenge is indeed substantive, rather than theoretical, since the Trial Chamber entered convictions for both modes of liability, which impacted his sentence.[2407]

[2397] Prosecution Response Brief, paras 373-376, 385-386. See also Prosecution Response Brief, paras 370-371; Appeal Hearing, 13 May 2013, AT. 136-137, 141. Further, in referring to Đorđević's argument concerning the *Akayesu* Trial Judgement, the Prosecution clarifies that in that case, the Trial Chamber was dealing with cumulative convictions and held that it was inappropriate to convict both for genocide and complicity to commit genocide, whereas the present case concerns convictions through concurrent modes of liability (Appeal Hearing, 13 May 2013, AT. 141; *contra* Đorđević Appeal Brief, para. 383; Appeal Hearing, 13 May 2013, AT. 105-106, citing *Akayesu* Trial Judgement, para. 468).

[2398] Appeal Hearing, 13 May 2013, AT. 136.

[2399] Appeal Hearing, 13 May 2013, AT. 136.

[2400] Appeal Hearing, 13 May 2013, AT. 136.

[2401] Appeal Hearing, 13 May 2013, AT. 136.

[2402] Prosecution Response Brief, paras 371, 381; Appeal Hearing, 13 May 2013, AT. 139-141. According to the Prosecution, a conviction entered through more than one mode of liability does not result in a double conviction for the same crime (Appeal Hearing, 13 May 2013, AT. 139, referring to *Kamuhanda* Appeal Judgement, Separate Opinion of Judge Schomburg, para. 389).

[2403] Prosecution Response Brief, paras 371-372, 382-386; Appeal Hearing, 13 May 2013, AT. 140-141, referring to Trial Judgement, para. 2214.

[2404] Prosecution Response Brief, paras 372, 382, 386.

[2405] Prosecution Response Brief, para. 372. See Prosecution Response Brief, paras 380-386.

[2406] Đorđević Reply Brief, para. 129, citing Prosecution Response Brief, para. 369.

[2407] Đorđević Reply Brief, para. 131.

2. Analysis

829. The Appeals Chamber observes that the Trial Chamber entered convictions against Đorđević for each of the crimes of deportation, other inhumane acts (forcible transfer), murder, and persecutions on the basis of both his participation in the JCE[2408] and in aiding and abetting them.[2409] This is apparent from the language used by the Trial Chamber in making its legal findings[2410] and from the Disposition in the Trial Judgement.[2411]

830. In determining whether Đorđević could also be held liable for aiding and abetting the crimes, the Trial Chamber relied on the same underlying conduct which formed the basis of his participation in the JCE.[2412] It was satisfied that Đorđević's conduct "had a substantial effect on the perpetration by MUP forces of the crimes of murder, deportation and persecutions in Kosovo in 1999" and that he was "aware that his acts were assisting the commission of these crimes".[2413] The Trial Chamber further found:

> [i]n this case, the Accused's leading role in the MUP efforts to conceal the killings of Kosovo Albanian civilians and other persons taking no active part in the hostilities by organising for the clandestine transportation of the bodies of person killed by Serbian forces in Kosovo to secret mass grave sites on MUP property in Serbia, together with his active steps to prevent any investigation into the circumstances of these killing, and his failure to ensure that all offences by MUP forces were reported and investigated, taking into account his position as Chief of the RJB, substantially assisted the commission of these crimes. These facts are sufficiently compelling to also maintain the conviction for aiding and abetting, as well as the conviction for participating as a member of the JCE, in order to fully encapsulate the Accused's criminal conduct.[2414]

831. The Appeals Chamber recalls that trial chambers are not inherently precluded from entering a conviction for a crime on the basis of more than one mode of liability, if this is necessary to reflect the totality of an accused's criminal conduct.[2415] The Appeals Chamber considers that the

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[2408] Trial Judgement, paras 2159, 2193, 2230.
[2409] Trial Judgement, paras 2194, 2214, 2230. See also Trial Judgement, para. 2164.
[2410] In relation to Đorđević's participation in a JCE, the Trial Chamber explicitly stated that it "will enter a conviction on this basis" (Trial Judgement, para. 2159). While it made no such statement in relation to aiding and abetting, the language used elsewhere in the Trial Judgement clearly indicates that the Trial Chamber intended to also enter a conviction for each crime on the basis of this mode of liability: "[t]he Chamber is satisfied beyond reasonable doubt and finds that Vlastimir Đorđević is guilty of aiding and abetting the crimes of deportation, forcible transfer, murder, and persecutions established in this Judgement" (Trial Judgement, para. 2164); "[t]hese facts are sufficiently compelling to also maintain the conviction for aiding and abetting, as well as the conviction for participating as a member of the JCE, in order to fully encapsulate the Accused's criminal conduct" (Trial Judgement, para. 2194); "[h]owever, as detailed in this Judgement, the Accused's conduct was such as to also render him liable to conviction and punishment for aiding and abetting the offences established" (Trial Judgement, para. 2214).
[2411] Trial Judgement, para. 2230.
[2412] Trial Judgement, paras 2154-2158, 2162-2163. See also Trial Judgement, para. 2194.
[2413] Trial Judgement, para. 2163.
[2414] Trial Judgement, para. 2194.
[2415] See *Nahimana et al.* Appeal Judgement, para. 483; *Ndindabahizi* Appeal Judgement, para. 122; *Kamuhanda* Appeal Judgement, para. 77. See also *D. Milošević* Appeal Judgement, para. 274.

Trial Chamber correctly set out the applicable law in relation to the entering of convictions on the basis of multiple modes of liability.[2416] The Appeals Chamber further recalls that the scope of a convicted person's criminal responsibility must be unequivocally established[2417] and that a trial chamber must "identify unambiguously the mode(s) of liability for which an accused is convicted and the relation between them".[2418] The Appeals Chamber emphasises that whether single or multiple forms of responsibility are found to be appropriate, it is the crime itself, rather than the mode of liability, for which an accused person is convicted.[2419] It follows that any sentence imposed by a trial chamber must correspond to the totality of the criminal conduct of a convicted person, and that the convicted person must not be punished more than once for the same conduct.[2420] In this regard, the Appeals Chamber is satisfied that the Trial Chamber convicted Đorđević for the crimes once, on the basis of two modes of liability, and not, as he contends, twice for the same crimes.[2421] Accordingly the Appeals Chamber finds that, as a matter of law, it was within the Trial Chamber's discretion to enter convictions on the basis of more than one mode of liability.

832. The Appeals Chamber observes, however, that, contrary to the Prosecution's submission,[2422] the conduct relied upon to establish Đorđević's liability pursuant to aiding and abetting is entirely encapsulated within the conduct the Trial Chamber relied on to establish his participation in the JCE, and that the Trial Chamber made no distinction between the acts committed by Đorđević with respect to either form of liability.[2423] In these circumstances, the Trial Chamber's conclusion that "[t]hese facts are sufficiently compelling to also maintain the conviction for aiding and abetting [...] in order to fully encapsulate [Đorđević's] criminal conduct" does not provide any explanation of the relationship between the two modes of liability.[2424] As a result, the Trial Chamber fails to

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[2416] Trial Judgement, para. 2194, citing *Nahimana et al.* Appeal Judgement, para. 483; *Ndindabahizi* Appeal Judgement, paras 122-123; *Kamuhanda* Appeal Judgement, para. 77.

[2417] *Ndindabahizi* Appeal Judgement, para. 122.

[2418] *Ndindabahizi* Appeal Judgement, para. 123. See also *Ndindabahizi* Appeal Judgement, para. 122.

[2419] See *Ndindabahizi* Appeal Judgement, para. 122. See also *Kamuhanda* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Shahabuddeen, para. 405.

[2420] See *Ndindabahizi* Appeal Judgement, para. 122. See also *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 10. See also *Kamuhanda* Appeal Judgement, Separate Opinion of Judge Wolfgang Schomburg, para. 389.

[2421] See Trial Judgement, paras 2194, 2230. *Contra* Đorđević Appeal Brief, paras 380-381.

[2422] See *supra*, para. 827; Appeal Hearing, 13 May 2013, AT. 136]. The Appeals Chamber notes that the Prosecution's suggestion that the Trial Chamber relied on a partially different conduct in finding aiding and abetting is unconvincing. The Prosecution refers to one concluding paragraph on Đorđević's criminal liability, and ignores the Trial Chamber's other findings on aiding and abetting (compare Trial Judgement, para. 2194 with Trial Judgement, paras 2160-2164).

[2423] Compare Trial Judgement, paras 2154-2158 with Trial Judgement, paras 2160-2164. The Appeals Chamber notes in particular the Trial Chamber's discussion of Đorđevic's failure to take steps to prevent any investigation into crimes, his active role in engaging volunteers and paramilitary units, and his leading role in MUP efforts to conceal killings (see Trial Judgement, paras 2154-2156, 2163).

[2424] See Trial Judgement, para. 2194.

articulate why both modes of liability were necessary to reflect the totality of his conduct,[2425] particularly in light of its explicit finding that Đorđević's "*primary criminal liability* in this case is by virtue of his participation [...] in a joint criminal enterprise".[2426] In the Appeals Chamber's view this constitutes a failure to provide a reasoned opinion, and amounts to an error of law.[2427]

833. The Appeals Chamber will therefore consider whether convictions on the basis of both aiding and abetting and commission through the JCE are necessary to reflect the totality of Đorđević's conduct. In light of the fact that the two modes of liability were established based on exactly the same conduct,[2428] the Appeals Chamber finds that entering a conviction under both modes is not necessary to reflect the totality of Đorđević's conduct. In this regard, the Appeals Chamber agrees with the Trial Chamber that Đorđević's "primary criminal liability" follows from his participation in the JCE.[2429] Accordingly, the Appeals Chamber finds that the totality of Đorđević's criminal conduct is fully reflected in a conviction based solely on his participation in the JCE.

834. The Appeals Chamber therefore grants Đorđević's sub-ground of appeal 18(A) in part and reverses the Trial Chamber's findings concerning Counts 1-5 with respect to aiding and abetting, and dismisses the remainder of Đorđević's sub-ground of appeal 18(A). In light of this reversal, Đorđević's ground of appeal 11, alleging errors in relation to aiding and abetting, is moot.[2430] The impact, if any, of this reversal, and the question of whether his sentence was increased due to a "double conviction",[2431] will be discussed in the Sentencing section of this Judgement.[2432]

B. Alleged errors of law when entering multiple convictions under Article 5 of the Statute

835. The Trial Chamber entered convictions against Đorđević under Article 5 of the Statute for deportation (Count 1), other inhumane acts (forcible transfer) (Count 2), and murder (Count 3), as well as persecutions (Count 5) through those same underlying crimes.[2433] It found that these crimes contained materially distinct elements and were thus permissibly cumulative.[2434]

[2425] See Trial Judgement, para. 2194.
[2426] Trial Judgement, para. 2213 (emphasis added).
[2427] See *supra*, paras 14-15.
[2428] Trial Judgement, paras 2154-2158, 2162-2163.
[2429] Trial Judgement, para. 2213.
[2430] See Đorđević Appeal Brief, paras 296-303.
[2431] Đorđević Appeal Brief, para. 396.
[2432] See *infra*, paras 976-980.
[2433] Trial Judgement, paras 2202, 2230. See also Trial Judgement paras 2196-2201.
[2434] Trial Judgement, paras 2198-2201.

1. Arguments of the parties

836. Đorđević submits that the cumulative convictions entered against him for the crimes of deportation, forcible transfer, and murder as well as for persecutions through the same conduct under Article 5 of the Statute are unfair and prejudicial.[2435] According to him, "the Trial Chamber did not provide adequate reasoning to show how these crimes are materially distinct or how the original counts are not subsumed by the more specific crimes as persecutions".[2436] Đorđević further submits that there are "cogent reasons to review this issue and return to the original jurisprudence which would prohibit cumulative Article 5 convictions" in light of a number of dissenting opinions on this matter in Appeals Chamber judgements and a recent judgement of the ECCC ("*Duch* Trial Judgement").[2437] Đorđević accordingly requests the Appeals Chamber quash his convictions pursuant to Article 5 of the Statute to the extent they are cumulative and reflect the same conduct.[2438]

837. The Prosecution responds that it was within the discretion of the Trial Chamber to enter convictions against Đorđević for the crimes of deportation, murder, and forcible transfer and the crime of persecutions through those same acts.[2439] It further responds that the Trial Chamber followed the well-established jurisprudence that cumulative convictions are permissible where Article 5 crimes contain materially distinct elements and emphasises that such precedent should not lightly be disturbed.[2440] Finally, the Prosecution responds that Đorđević fails to explain how the Trial Chamber's analysis was insufficiently reasoned, or how the case law may be characterised as developing.[2441]

[2435] Đorđević Appeal Brief, paras 399, 405; Appeal Hearing, 13 May 2013, AT. 110, referring to *Stanišić and Župljanin* Trial Judgement, vol. 2, para. 912.

[2436] Đorđević Appeal Brief, para. 405.

[2437] Đorđević Appeal Brief, paras 402-403, referring to *Kordić and Čerkez* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, *Stakić* Appeal Judgement, Opinion Dissidente du Juge Güney sur le cumul de déclarations de culpabilité, *Naletilić and Martinović* Appeal Judgement, Opinion dissidente conjointe des Juges Güney et Schomburg sur le cumul de déclarations de culpabilité, *Nahimana et al.* Appeal Judgement, Partly Dissenting Opinion of Judge Güney. *Prosecutor v. Guek Eav Kaing alias "Duch"*, Case No. 001/18-07-2007/ECCC/TC, Trial Judgement, 26 July 2010, paras 563-565. Đorđević contends that the underlying crimes of murder, deportation and forcible transfer are "already encapsulated by a conviction for persecution by those same crimes" (Đorđević Reply Brief, para. 136).

[2438] Đorđević Appeal Brief, para. 406.

[2439] Prosecution Response Brief, para. 387.

[2440] Prosecution Response Brief, paras 387-389.

[2441] Prosecution Response Brief, para. 390, citing Đorđević Appeal Brief, paras 399, 405.

838. Đorđević replies that the practice of entering cumulative convictions "began in late 2004 in a narrow 3:2 decision which reversed years of established practice".[2442]

2. Analysis

839. The jurisprudence of the Tribunal on the issue of cumulative convictions is well-established. The Appeals Chamber in *Čelebići* held that it is only permissible to enter multiple criminal convictions under separate statutory provisions to punish the same conduct if "each statutory provision involved has a materially distinct element not contained in the other".[2443] The test, which has been applied by the Tribunal since that case, therefore "focuses on the legal elements of each crime that may be the subject of a cumulative conviction rather than on the underlying conduct of the accused."[2444] In order for an element to be considered materially distinct, it "requires proof of a fact that is not required by the other" element.[2445] The Appeals Chamber in *Kordić and Čerkez* opined that "[t]he cumulative convictions test serves twin aims: ensuring that the accused is convicted only for distinct offences, and at the same time, ensuring that the convictions entered fully reflect his criminality."[2446] Where, in relation to two crimes, this test is not met, the trial chamber should enter a conviction under the more specific provision.[2447]

840. The Appeals Chamber recalls that cumulative convictions on the basis of the same conduct under Article 5 of the Statute have been held to be permissible in relation to the crimes of deportation, forcible transfer, murder, and persecutions as a crime against humanity.[2448] The Appeals Chamber in *Kordić and Čerkez* concluded that persecutions as a crime against humanity has a materially distinct element from deportation, other inhumane acts (forcible transfer), and murder as crimes against humanity, in that persecutions requires proof that an act or omission discriminates in fact and proof that the act or omission was committed with specific intent to

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[2442] Đorđević Reply Brief, para. 135.
[2443] *Čelebići* Appeal Judgement, para. 412. See *Krajišnik* Appeal Judgement, para. 386; *Stakić* Appeal Judgement, para. 355; *Kordić and Čerkez* Appeal Judgement, paras 1032-1033; *Krstić* Appeal Judgement, para. 218; *Kunarac et al.* Appeal Judgement, para. 173; *Jelisić* Appeal Judgement, para. 82. See *Gatete* Appeal Judgement, para. 259.
[2444] *Krajišnik* Appeal Judgement, para. 387, citing *Stakić* Appeal Judgement, para. 356. See *Kordić and Čerkez* Appeal Judgement, paras 1039-1043.
[2445] *Čelebići* Appeal Judgement, paras 412-413. See *Krajišnik* Appeal Judgement, para. 386; *Stakić* Appeal Judgement, para. 355; *Kordić and Čerkez* Appeal Judgement, paras 1032-1033; *Krstić* Appeal Judgement, para. 218; *Kunarac et al.* Appeal Judgement, para. 173; *Jelisić* Appeal Judgement, para. 82.
[2446] *Kordić and Čerkez* Appeal Judgement, para. 1033.
[2447] *Stakić* Appeal Judgement, paras 355-356; *Kordić and Čerkez* Appeal Judgement, paras 1032-1033; *Krstić* Appeal Judgement, para. 218; *Čelebići* Appeal Judgement, paras 412-413; *Jelisić* Appeal Judgement, paras 78-79.
[2448] *Krajišnik* Appeal Judgement, para. 391; *Stakić* Appeal Judgement, para. 367.

discriminate.[2449] The Appeals Chamber is not convinced by Đorđević's assertion that the *Kordić and Čerkez* Appeal Judgement improperly applies the *Čelebići* test and recalls that the *Kordić and Čerkez* Appeals Chamber "clearly explained the reasons that warranted the departure from previous cases".[2450] Subsequent Appeal Judgements in the *Stakić*, *Naletilić and Martinović*, and *Nahimana et al.* cases confirmed the approach adopted in *Kordić and Čerkez*.[2451]

841. The Appeals Chamber finds unpersuasive Đorđević's suggestion that the "continuing dissents on this matter" and the *Duch* Trial Judgement constitute "compelling" reasons to revisit the jurisprudence of the Tribunal.[2452] In a number of dissenting opinions, including to the *Kordić and Čerkez* Appeal Judgement, Judges Schomburg and Güney have argued that *intra*-Article 5 convictions for persecutions with other crimes against humanity are impermissibly cumulative.[2453] The *Duch* Trial Judgement supports their view.[2454] The Appeals Chamber notes, however, that neither the dissenting opinions nor the *Duch* Trial Judgement are binding upon it. Further, as stated above, the Appeals Chamber in *Kordić and Čerkez* clearly explained the reasons for its interpretation of the standard set out in *Čelebići*,[2455] and subsequent Appeal Judgements have confirmed the *Kordić and Čerkez* approach.[2456] The Appeals Chamber therefore sees no cogent reason to depart from its well-established jurisprudence.

842. The Appeals Chamber is further satisfied that convictions based on the same acts may be entered for the crimes of deportation, other inhumane acts (forcible transfer), murder, and persecutions under Article 5 of the Statute. The Appeals Chamber accordingly finds that the Trial Chamber did not err in law in entering cumulative convictions for these crimes.

843. In light of the foregoing, the Appeals Chamber dismisses Đorđević's sub-ground of appeal 18(B) in its entirety.

[2449] *Krajišnik* Appeal Judgement, paras 389, 391; *Stakić* Appeal Judgement, paras 359-362; *Kordić and Čerkez* Appeal Judgement, paras 1041-1042.

[2450] *Krajišnik* Appeal Judgement, para. 389, referring to *Kordić and Čerkez* Appeal Judgement, para. 1040.

[2451] See *Nahimana et al.* Appeal Judgement, paras 1026-1027; *Naletilić and Martinović* Appeal Judgement, paras 587-591; *Stakić* Appeal Judgement, paras 355-367.

[2452] See Đorđević Appeal Brief, paras 399, 403.

[2453] See *Kordić and Čerkez* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, *Stakić* Appeal Judgement, Opinion dissidente du Juge Güney sur le cumul de déclarations de culpabilité, *Naletilić and Martinović* Appeal Judgement, Opinion dissidente conjointe des Juges Güney et Schomburg sur le cumul de déclarations de culpabilité, *Nahimana et al.* Appeal Judgement, Partly Dissenting Opinion of Judge Güney.

[2454] *Duch* Trial Judgement, para. 565.

[2455] *Krajišnik* Appeal Judgement, para. 389, referring to *Kordić and Čerkez* Appeal Judgement, para. 1040. See *Krstić* Appeal Judgement, paras 230-233; *Vasiljević* Appeal Judgement, paras 144-146; *Krnojelac* Appeal Judgement, para. 188.

XIX. PROSECUTION'S FIRST GROUND OF APPEAL: RESPONSIBILITY FOR PERSECUTIONS THROUGH SEXUAL ASSAULT

A. Introduction

844. The Trial Chamber found that two young women, Witness K14 (in Priština/Prishtinë town) and Witness K20 (in Beleg village, Dečani/Deçan municipality), were raped and that sexual assault had been established with regard to both women.[2457] The Trial Chamber was not satisfied that any other alleged sexual assaults had been proven.[2458] Further, the Trial Chamber was not satisfied that the crime of persecutions was established with regard to the established sexual assaults as it did not find that they were carried out with the requisite discriminatory intent.[2459] As the Indictment does not charge sexual assault other than as an underlying act of persecutions, the Trial Chamber could not enter convictions against Đorđević for sexual assault.[2460]

845. Under its first ground of appeal, the Prosecution submits that the Trial Chamber erred in failing to find: (i) sexual assault in relation to a Kosovo Albanian girl[2461] in a convoy in Priština/Prishtinë municipality and two young Kosovo Albanian women in Beleg, Dečani/Deçan municipality; (ii) the crime of persecutions through the sexual assaults of these three young women and that of Witness K14 and Witness K20; and (iii) that Đorđević was liable for these crimes under the third category of joint criminal enterprise.[2462] The Prosecution requests that the Appeals Chamber enter a conviction for persecutions through sexual assault as a crime against humanity and

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[2456] See *Nahimana et al.* Appeal Judgement, paras 1026-1027; *Naletilić and Martinović* Appeal Judgement, paras 587-591; *Stakić* Appeal Judgement, paras 355-367.

[2457] Trial Judgement, paras 838, 1151, 1791, 1793. The Appeals Chamber notes that in these findings, the Trial Chamber identified the two women who had been raped as, respectively, "a young Kosovo Albanian woman [who] was taken from her home in the municipality of Priština/Prishtinë by policemen to a hotel" and "a young Kosovo Albanian who was subjected to multiple rapes by VJ soldiers [...] in the night of 29/30 March 1999 in the village of Beleg" (Trial Judgement, paras 1791, 1793). However, it is clear from the context that the Trial Chamber was referring to Witness K14 and Witness K20, respectively (see Trial Judgement, paras 833, 838, 1151, 1791, 1793, and references cited therein). The Appeals Chamber will therefore in this Judgement refer to these two young women by their pseudonyms.

[2458] Trial Judgement, paras 832, 1792, 1794-1795.

[2459] Trial Judgement, paras 1796-1797.

[2460] See Indictment, paras 72-73, 75, 77. The Indictment alleges, under Count 5, that Đorđević is responsible for persecutions through sexual assaults committed by the forces of FRY and Serbia (Indictment, para. 77(c)).

[2461] The Trial Chamber mainly refers to the female in a convoy as a girl. However, there is no evidence indicating her precise age and whether she should be described as a girl or a young woman. The Appeals Chamber notes that Witness K14's evidence refers to her both as a girl and as a woman (see K14, 24 Sep 2009, T. 8997-8998, 9024-9025 (closed session); Exhibits P1325 (confidential), pp 3-4; P1326 (confidential), p. 1426). The Appeals Chamber will maintain the usage of the word "girl" in this Judgement, rather than substituting it with "young woman" but stresses that this must in no way be understood to imply that her treatment during the alleged events is more serious.

[2462] Prosecution Appeal Brief, paras 1, 4-56; Appeal Hearing, 13 May 2013, AT. 176-191, 199-206.

increase Đorđević's sentence.[2463] Đorđević argues that the Prosecution has failed to show any errors in the impugned parts of the Trial Judgement and that, in any event, the Appeals Chamber does not possess the power to enter new convictions or increase a sentence when there is no right of a further appeal.[2464] The Appeals Chamber will address these submissions in turn.

B. Alleged errors in findings on sexual assault

1. Introduction

846. The Trial Chamber found that the alleged sexual assaults of the Kosovo Albanian girl in a convoy in Priština/Prishtinë and two young Kosovo Albanian women in Beleg were not established due to a lack of direct evidence.[2465]

847. The Prosecution submits that by requiring direct evidence, the Trial Chamber erroneously considered the evidence before it to be insufficient to prove these sexual assaults.[2466] The Prosecution contends that the only reasonable conclusion to be drawn from the evidence is that the Kosovo Albanian girl in a convoy and the two young women in Beleg village were sexually assaulted and that the Trial Chamber therefore erred when it found otherwise.[2467]

848. Đorđević responds that the Prosecution "simply restates the evidence" without showing how the Trial Chamber failed to take it into consideration.[2468] He contends that the Trial Chamber acted within its discretion when it declined to rely solely on circumstantial or indirect evidence.[2469]

849. In this sub-section, the Appeals Chamber will first set out the elements of sexual assault. It will subsequently address the submissions with regard to the alleged sexual assaults of the girl in a convoy in Priština/Prishtinë municipality and the two young women in Beleg.

2. Definition and elements of sexual assault

850. The Appeals Chamber notes that the definition and elements of sexual assault have been discussed, in various degrees of detail, by several trial chambers.[2470] Trial chambers have held that

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[2463] Prosecution Appeal Brief, para. 56; Appeal Hearing, 13 May 2013, AT. 178, 206.
[2464] Đorđević Response Brief, paras 3-6, 54.
[2465] Trial Judgement, paras 1792, 1794. The Trial Chamber also found that the alleged sexual assaults in the municipalities of Srbica/Skenderaj and Prizren had not been proven (Trial Judgement, para. 1795). The Prosecution has not appealed this finding.
[2466] Prosecution Appeal Brief, paras 5, 18.
[2467] Prosecution Appeal Brief, paras 5, 18, 22, 24, 34, 39.
[2468] Đorđević Response Brief, paras 33, 35.
[2469] See Đorđević Response Brief, paras 33-34.

sexual assault is broader than rape and encompasses "all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is humiliating and degrading for the victim's dignity".[2471] The Appeals Chamber notes that the *Milutinović et al.* Trial Chamber, after a thorough analysis, identified the elements of sexual assault as follows:

> (a) The physical perpetrator commits an act of a sexual nature on another; this includes requiring that other person to perform such an act.
>
> (b) That act infringes the victim's physical integrity or amounts to an outrage to the victim's personal dignity.
>
> (c) The victim does not consent to the act.
>
> (d) The physical perpetrator intentionally commits the act.
>
> (e) The physical perpetrator is aware that the act occurred without the consent of the victim.[2472]

851. This definition was adopted by the Trial Chamber in the present case.[2473] While the Appeals Chamber is satisfied that this definition correctly reflects the elements of sexual assault (other than rape), it finds that some further elaboration is useful.

852. It is evident that sexual assault requires that an act of a sexual nature take place. The Appeals Chamber notes that the act must also constitute an infringement of the victim's physical or moral integrity.[2474] Often the parts of the body commonly associated with sexuality are targeted or involved. Physical contact is, however, not required for an act to be qualified as sexual in nature.[2475] Forcing a person to perform or witness certain acts may be sufficient, so long as the acts humiliate and/or degrade the victim in a sexual manner.[2476] Furthermore, the Appeals Chamber agrees with the *Milutinović et al.* Trial Chamber that "it would be inappropriate to place emphasis on the sexual gratification of the perpetrator [...]. In the context of an armed conflict, the sexual humiliation and

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[2470] See *Milutinović et al.* Trial Judgement, vol. 1, paras 195-201; *Brđanin* Trial Judgement, para. 1012; *Stakić* Trial Judgement, para. 757; *Furundžija* Trial Judgement, para. 186.

[2471] *Brđanin* Trial Judgement, para. 1012; *Stakić* Trial Judgement, para. 757; *Furundžija* Trial Judgement, para. 186 (in these cases, the definition of sexual assault was not challenged on appeal). See *Kvočka et al.* Trial Judgement, para. 180, referring to Akayesu Trial Judgement, para. 688 (the definition of sexual assault was again not challenged on appeal). See *Akayesu* Trial Judgement, in which the Trial Chamber held that "sexual violence, which includes rape, [is] any act of a sexual nature which is committed on a person under circumstances which are coercive. [It] is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact" (*Akayesu* Trial Judgement, para. 688. This definition was also not challenged on appeal).

[2472] *Milutinović et al.* Trial Judgement, vol. 1, para. 201.

[2473] Trial Judgement, para. 1768.

[2474] See *Stakić* Trial Judgement, para. 757; *Furundžija* Trial Judgement, para. 186.

[2475] See *Milutinović et al.* Trial Judgement, vol. 1, para. 199; *Akayesu* Trial Judgement, para. 688.

degradation of the victim is a more pertinent factor than the gratification of the perpetrator" as it is precisely the sexual humiliation and degradation which "provides specificity to the offence".[2477] With regard to the issue of consent, the Appeals Chamber considers that any form of coercion, including acts or threats of (physical or psychological) violence, abuse of power, any other forms of duress and generally oppressive surrounding circumstances, may constitute proof of lack of consent and usually is an indication thereof.[2478] In addition, a status of detention, particularly during armed conflict, will normally vitiate consent.[2479]

3. Kosovo Albanian girl in a convoy in Priština/Prishtinë municipality

853. The Trial Chamber considered Witness K14's evidence that, sometime in April 1999, a Kosovo Albanian girl, who was travelling with other displaced persons in a convoy from Graštica/Grashticë in the Priština/Prishtinë municipality to the town of Priština/Prishtinë, was taken off a tractor in Lukare/Llukar by two men, one being a policeman and the other carrying knives and dressed in camouflage trousers.[2480] The man dressed in camouflage trousers took the girl into the woods, while the policeman stood guard.[2481] When the man came out of the woods, the policeman then went into the woods with the girl.[2482] The Trial Chamber considered Witness K14's evidence that the girl was heard from the convoy to be screaming and crying while in the woods, and that when she was returned to the convoy about half an hour later, she was flushed from crying.[2483] It also noted that, while she had been clothed when taken into the woods, "[s]he was barefoot, wrapped in a blanket and appeared to be naked" upon return to the convoy.[2484] The Trial Chamber concluded that the evidence on the alleged sexual assault of the girl in the convoy was insufficient to satisfy a finding of sexual assault, noting in particular the lack of direct evidence regarding the events in the woods.[2485]

[2476] See *Milutinović et al.* Trial Judgement, vol. 1, para. 199; *Brđanin* Trial Judgement, para. 1012; *Stakić* Trial Judgement, para. 757; *Furundžija* Trial Judgement, para. 186.
[2477] *Milutinović et al.* Trial Judgement, vol. 1, para. 199.
[2478] See *Milutinović et al.* Trial Judgement, vol. 1, para. 200.
[2479] See *Kvočka et al.* Appeal Judgement, para. 396; *Kunarac et al.* Appeal Judgement, paras 132-133; *Milutinović et al.* Trial Judgement, vol. 1, para. 200.
[2480] Trial Judgement, paras 832, 1792.
[2481] Trial Judgement, paras 832, 1792.
[2482] Trial Judgement, para. 832.
[2483] Trial Judgement, paras 832, 1792.
[2484] Trial Judgement, paras 832, 1792, with further references.
[2485] Trial Judgement, paras 832, 1792.

(a) Arguments of the parties

854. The Prosecution submits that the Trial Chamber erred in finding that the girl taken from the convoy was not sexually assaulted.[2486] According to the Prosecution, Witness K14 witnessed that the girl was sexually assaulted by two men: a policeman and a man carrying knives and dressed in camouflage trousers.[2487] It argues that the intent of the men was clear when they told the girl she was beautiful and dragged her from the convoy into the woods.[2488] According to the Prosecution, the specific circumstances of the incident further confirm that the girl was subjected to sexual assault. These circumstances include that the men took turns going into the woods with the girl and standing guard, the girl returned wrapped in a blanket and appeared to be naked after the incident while she had been dressed before, and "[s]he showed no signs of bruising or bleeding that could have accounted for her screams."[2489]

855. Đorđević responds that no one saw what happened to the girl in the woods and she did not tell anyone what occurred.[2490] He contends that the only available evidence is Witness K14's assumption regarding "what may have happened to the girl" taken from a convoy, and that the Trial Chamber acted within its discretion in declining to rely solely on her circumstantial evidence to make a finding that sexual assault was not established.[2491]

(b) Analysis

856. The Appeals Chamber recalls that trial chambers are vested with broad discretion in their assessment of the evidence.[2492] Therefore, the Appeals Chamber will not lightly disturb a trial chamber's finding of fact.[2493] It will only do so when it considers that no reasonable trier of fact could have reached the impugned decision.[2494] The Appeals Chamber will assess whether no

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[2486] Prosecution Appeal Brief, paras 18-24; Appeal Hearing, 13 May 2013, AT. 179.
[2487] Prosecution Appeal Brief, paras 18, 20.
[2488] Prosecution Appeal Brief, paras 20-22, referring to Trial Judgement, para. 832, Exhibit P1325 (confidential), pp 3-4.
[2489] Prosecution Appeal Brief, paras 20-22. The Prosecution further refers specifically to the fact that the girl's screams could be heard in the convoy and that she was red in the face and flushed from crying when she returned to the convoy (Prosecution Appeal Brief, paras 20-22, referring to Trial Judgement, para. 832, Exhibit P1325 (confidential), K14, 24 Sep 2009, T. 8997-8998 (closed session).
[2490] Đorđević Response Brief, para. 34.
[2491] Đorđević Response Brief, paras 33-34.
[2492] See *e.g. Boškoski and Tarčulovski* Appeal Judgement, para. 14; *Kupreškić et al.* Appeal Judgement, paras 30-32; *Nchamihigo* Appeal Judgement, para. 47.
[2493] *D. Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 14; *Simić* Appeal Judgement, para. 11; *Krnojelac* Appeal Judgement, para. 11. See also *supra*, para. 17.
[2494] *Haradinaj et al.* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 13; *D. Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 13. See also *supra*, para. 16.

reasonable trial chamber could have found that the evidence was insufficient to satisfy a finding of sexual assault in relation to the girl in a convoy.

857. With regard to the lack of direct evidence, to which the Trial Chamber referred, the Appeals Chamber recalls that a trial chamber may infer the existence of a particular fact upon which the guilt of the accused depends from circumstantial evidence, as long as it is the only reasonable inference that could be drawn from the evidence presented.[2495] This also means that there is no requirement that an alleged victim personally testify in a case for a trial chamber to make a finding that a crime was committed. As regards the alleged sexual assault of the girl in the convoy, the Appeals Chamber considers that the facts that she was heard from the convoy to be screaming and crying, and that when she returned to the convoy she was flushed from crying,[2496] are clear indications that she was subjected to mistreatment at the hands of the two men while in the woods. Further, as the Trial Chamber noted, the girl was dressed when she was taken into the woods but wrapped in a blanket and appeared to be naked when she returned.[2497] The Appeals Chamber considers that the only reasonable conclusion in a situation where a young girl is taken by men to a location out of sight, is heard screaming and crying, and is returned in a seemingly naked state, is that she was subjected to mistreatment that was sexual in nature.[2498] This is further corroborated by: (i) the suggestive comment made by one of the men when taking the girl from the convoy,[2499] (ii) the fact that the men took turns standing guard and going into the woods to be alone with the girl,[2500] (iii) the girl's apparent emotional trauma when she returned to the convoy while she did not show any visible sign of external violence, such as bruising or bleeding, that could have otherwise

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[2495] *Galić* Appeal Judgement, para. 218; *Stakić* Appeal Judgement, para. 219; *Čelebići* Appeal Judgement, para. 458; *Kupreškić et al.* Appeal Judgement, para. 303; *Muhimana* Appeal Judgement, para. 49.

[2496] See Trial Judgement, paras 832, 1792.

[2497] Trial Judgement, paras 832, 1792.

[2498] *Cf. Muhimana* Trial Judgement, para. 32, in which the Trial Chamber found that: "[a]lthough Witness AP was not an eye witness to the rape of Goretti and Languida, the Chamber infers that the Accused raped them on the basis of the following factors: the witness saw the Accused take the girls into his house; she heard the victims scream, mentioning the Accused's name and stating that they 'did not expect him to do that' to them; finally the witnesses saw the Accused lead the victims out of his house, stark naked, and she noticed that they were walking 'with their legs apart'" (*Muhimana* Trial Judgement, para. 32). The Appeals Chamber confirmed that, on this basis of this evidence, it was reasonable for the trial chamber to have found that the girls were raped (*Muhimana* Appeal Judgement, para. 50). The Appeals Chamber did not, however, uphold the finding that the accused personally committed the rapes (*Muhimana* Appeal Judgement, paras 51-52).

[2499] See Exhibits P1325 (confidential), pp 3-4; P1326 (confidential), p. 1426; K14, 24 Sep 2009, T. 8997, 9024 (closed session). According to Witness K14, one of the men told the girl "Come here with me. You're very beautiful" (Exhibits P1325 (confidential), p. 3; P1326 (confidential), p. 1426; K14, 24 Sep 2009, T. 8997, 9024 (closed session)). *Cf.* Prosecution Appeal Brief, para. 22.

[2500] See Trial Judgement, para. 832, referring to Exhibit P1325 (confidential), p. 4, K14, 24 Sep 2009, T. 9024-9026 (closed session).

accounted for her screaming and crying,[2501] and (iv) Witness K14's evidence that the man who carried knives and was dressed in green camouflage trousers was known to do "these kinds of things".[2502] The Appeals Chamber finds that no reasonable trier of fact presented with this evidence could have failed to conclude that the only reasonable inference was that the girl was subjected to an act sexual in nature that infringed upon her right to physical integrity and/or amounted to an outrage on her personal dignity. Moreover, the circumstances, including that the girl was "dragged" into the woods by the men and that she was heard to be screaming, shouting, and crying, confirm that the girl did not consent and that the two men knew this.[2503]

858. The Appeals Chamber considers that this conclusion is not undermined by Đorđević's argument that the only evidence on this assault comes from Witness K14 without corroboration.[2504] In this regard, the Appeals Chamber recalls that the testimony of a single witness may be accepted without the need for corroboration, even if it relates to a material fact.[2505] Additionally, although Witness K14 did not directly witness what the men did to the young girl in the woods, the Appeals Chamber considers that Witness K14's evidence is not simply based on an "assumption" as suggested by Đorđević.[2506] Rather, it consists of what Witness K14 personally observed and heard immediately prior to, during, and after the taking of the girl into the woods.[2507] Moreover, the Appeals Chamber observes that the Trial Chamber found Witness K14's evidence to be reliable.[2508] Also, Đorđević does not raise specific challenges to Witness K14's credibility.

859. In view of these considerations, the Appeals Chamber considers that no reasonable trier of fact could have concluded that the evidence was insufficient to prove the sexual assault of the Kosovo Albanian girl in a convoy by two men, one being a policeman. The Appeals Chamber therefore finds that the Prosecution has shown that the Trial Chamber erred in its assessment of the

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[2501] See Trial Judgement, para. 832 (referring to Exhibit P1325 (confidential), p. 4, K14, 24 Sep 2009, T. 8997 (closed session)), 1792. According to Witness K14, the girl showed no signs of bruises or bleeding but looked "quite different" when she was returned back to the convoy, being completely red in the face and flushed with crying (Exhibit P1325 (confidential), p. 4; K14, 24 Sep 2009, T. 8997 (closed session)).

[2502] Exhibit P1325 (confidential), p. 4.

[2503] Exhibit P1325 (confidential), pp 3-4; K14, 24 Sep 2009, T. 8997 (closed session).

[2504] See Đorđević Response Brief, para. 34.

[2505] *Haradinaj et al.* Appeal Judgement, para. 219; *Tadić* Appeal Judgement, para. 65; *Aleksovski* Appeal Judgement, para. 62; *Čelebići* Appeal Judgement, paras 492, 506; *Kayishema and Ruzindana* Appeal Judgement, para. 154. See also *D. Milošević* Appeal Judgement, para. 215 (expressing that "nothing prohibits a Trial Chamber from relying on uncorroborated evidence; it has the discretion to decide in the circumstances of each case whether corroboration is necessary or whether to rely on uncorroborated, but otherwise credible, witness testimony").

[2506] See Đorđević Response Brief, para. 34.

[2507] Exhibits P1325 (confidential), P1326 (confidential); K14, 24 Sep 2009, T. 8997-8998, 9024, 9026 (closed session).

[2508] The Trial Chamber stated it had taken into account variations in the evidence of the witness on certain issues but found that such variations did not affect the reliability of her evidence (Trial Judgement, para. 833, fn. 3209).

evidence. The Appeals Chamber will address the Prosecution's submission that this sexual assault constitutes the crime of persecutions in the following section.[2509]

4. Two young Kosovo Albanian women in Beleg

860. The two young Kosovo Albanian women in Beleg were detained on the night of 29 to 30 March 1999 together with a group of other women and children, including Witness K20 and Witness K58.[2510] The Trial Chamber found that Witness K20 was raped that night by members of the Serbian forces.[2511] In addressing the alleged sexual assaults of the other two young women, the Trial Chamber recalled Witness K58's evidence that:

> other young Kosovo Albanian women were selected and taken away by soldiers, for lengthy periods of time throughout the night of 29/30 March 1999 in Beleg. When the young women were brought back, they were crying and had dishevelled hair. One of them was heard telling her mother that she had been raped.[2512]

The Trial Chamber concluded that: "[i]n the absence of further evidence [it was] unable to make a finding that these two women were subjected to sexual assault."[2513]

(a) Arguments of the parties

861. The Prosecution submits that the Trial Chamber erred in finding that the two young Kosovo Albanian women were not sexually assaulted on the night of 29 to 30 March 1999 by failing to consider the relevant evidence of Witness K20.[2514] It argues that had the Trial Chamber considered all of the relevant evidence, including that of Witness K20, it would have found that the two young women were sexually assaulted.[2515] According to the Prosecution, the evidence shows that the two young women were taken to a burnt-out house together with Witness K20,[2516] who saw one of the women being taken to a room by Serbian forces and heard both women screaming.[2517] The Prosecution contends that the conclusion that the two young women were sexually assaulted is

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[2509] See *infra*, Section XIX.C.3.
[2510] See Trial Judgement, paras 1149-1152, with further references.
[2511] Trial Judgement, para. 1151, 1793. See also *infra*, Section XIX.C.
[2512] Trial Judgement, para. 1794 (citations omitted). See also Trial Judgement, para. 1152, referring to Exhibits P1080, p. 6, P1081, p. 7468, K58, 13 Jul 2009, T. 7299.
[2513] Trial Judgement, para. 1794.
[2514] Prosecution Appeal Brief, paras 5, 34, referring to Trial Judgement, para. 1794, Exhibits P1279 (confidential), pp 5-6, P1281 (confidential), p. 2532; Prosecution Reply Brief, para. 10. See Appeal Hearing, 13 May 2013, AT. 179, 182.
[2515] Prosecution Appeal Brief, para. 34; Prosecution Reply Brief, para. 10.
[2516] Prosecution Appeal Brief, paras 34-35.
[2517] Prosecution Appeal Brief, para. 36; Appeal Hearing, 13 May 2013, AT. 182.

further supported by the fact that during that same night, other young Kosovo Albanian women were sexually assaulted.[2518]

862. Đorđević responds that the evidence presented on the alleged sexual assaults of the two young women in Beleg is based on hearsay and uncorroborated.[2519] He contends that Witness K58's evidence on the incident is hearsay as she overheard one girl telling her mother that she had been raped.[2520] He adds that Witness K58 did not know the girl who told her mother that she had been raped.[2521] Therefore, it could have been that Witness K58 overheard Witness K20, for whom sexual assault has been established, telling her mother that she had been raped.[2522] Đorđević further argues that the two young women both told Witness K20 that they had not been raped and that Witness K20's assumption is therefore the only basis for establishing that they were subjected to sexual assault.[2523] Đorđević submits that the Trial Chamber acted within its discretion in declining to rely solely on this circumstantial evidence to make a finding of sexual assault in relation to this incident.[2524]

(b) Analysis

863. In finding that the sexual assaults of the two young women in Beleg were not established, the Trial Chamber relied only on the evidence of Witness K58.[2525] The Trial Chamber thereby failed to consider the evidence of Witness K20 on this incident, even though it had previously discussed Witness K20's evidence in the context of the description of events in Beleg, found her credible, and relied on her evidence to find that she was raped.[2526]

864. The Appeals Chamber recalls that, while a trial chamber is not obliged to refer to every piece of evidence on the record, failure to address evidence that is clearly relevant to a finding

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[2518] Prosecution Appeal Brief, para. 37. The Prosecution refers to evidence that during that night, other women were taken away in small groups for lengthy periods by Serbian soldiers, returned crying and with dishevelled hair, and one of them was overheard saying that she had been raped (Prosecution Appeal Brief, para. 37, referring to Trial Judgement, paras 1151-1152, 1794). See Appeal Hearing, 13 May 2013, AT. 182.

[2519] Đorđević Response Brief, para. 34.

[2520] Đorđević Response Brief, para. 34, referring to Trial Judgement, para. 1794.

[2521] Đorđević Response Brief, para. 34, referring to Exhibit P1080, p. 9.

[2522] Đorđević Response Brief, para. 34.

[2523] Đorđević Response Brief, para. 34, referring to Exhibit P1279 (confidential), p. 6.

[2524] Đorđević Response Brief, para. 33.

[2525] Trial Judgement, para. 1794. The Trial Chamber recalled Witness K58's evidence that several women were selected and removed from the room by soldiers during the course of the night and that when they returned they were crying and had dishevelled hair, and one of them was heard telling her mother that she had been raped. The Trial Chamber stated that no further evidence had been presented (Trial Judgement, para. 1794, referring to Trial Judgement, para. 1152).

[2526] Trial Judgement, paras 1148-1151, 1793, and references cited therein.

amounts to an error of law.[2527] Witness K20 knew the other two young women.[2528] The three young women were taken together from the room in which they were being held by members of the Serbian forces to a nearby house, where Witness K20 was raped and the other two young women were allegedly subjected to sexual assault at the same time.[2529] Considering the clear relevance of Witness K20's evidence to the Trial Chamber's finding on the alleged sexual assaults of the other two young women, the Trial Chamber's failure to take this evidence into account constitutes an error of law.

865. In light of this error, the Appeals Chamber will now examine Witness K20's evidence regarding the alleged sexual assaults of the two young women, who were taken to the house along with her by members of the Serbian forces. The Appeals Chamber will determine whether it is convinced beyond a reasonable doubt on the basis of all the available evidence that the only reasonable inference is that the two young women were subjected to sexual assault.[2530]

866. On the night of 29 to 30 March 1999, members of the Serbian forces entered the room where they had detained the two young women together with a group of other Kosovo Albanian women and children.[2531] The men indicated that they needed people to help clean and some older women volunteered to go with the soldiers.[2532] The soldiers, however, told them to stay in the room.[2533] They then "checked the faces of the people in the room using a flashlight" and selected Witness K20 and the two other young women to come with them.[2534] The three women were taken together to a nearby house, where they were each taken to different rooms.[2535] Witness K20 started

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[2527] *Kvočka et al.* Appeal Judgement, para. 23; *Čelebići* Appeal Judgement, para. 498; *Kupreškić et al.* Appeal Judgement, para. 39; *Kordić and Čerkez* Appeal Judgement, para. 382. The Appeals Chamber also recalls that it is to be presumed that the trial chamber evaluated all the evidence presented to it, as long as there is no indication that the trial chamber completely disregarded any particular piece of evidence (*Kvočka et al.* Appeal Judgement, para. 23).

[2528] Exhibits P1279 (confidential), p. 4; P1280, p. 4; P1281 (confidential), pp 2513, 2527.

[2529] Exhibits P1279 (confidential), pp 4-6; P1280, pp 4-6; P1281 (confidential), pp 2526-2527, 2558; P1282 (confidential), pp 10063-10064; K20, 27 Aug 2009, T. 8494, 8502-8503 (closed session). See also Trial Judgement, paras 1150-1151; Exhibits P1080, p. 6; P1081, pp 7467-7468, 7476-7477; K58, 13 Jul 2009, T. 7299, 7329-7330, 7343.

[2530] See *supra*, para. 15. *Cf.* Prosecution Appeal Brief, paras 34-39.

[2531] Trial Judgement, paras 1149-1150; Exhibits P1279 (confidential), p. 4; P1280, p. 4; P1281 (confidential), pp 2526-2527, 2558; P1282 (confidential), pp 10063-10064; K20, 27 Aug 2009, T. 8494 (closed session). See also Exhibits P1080, p. 6; P1081, pp 7467-7468, 7477-7478; K58, 13 Jul 2009, T. 7299, 7329-7330, 7343.

[2532] Trial Judgement, para. 1150; Exhibits P1079 (confidential), p. 6; P1279 (confidential), p. 4; P1280, p. 4; P1281 (confidential), p. 2558; K58, 13 Jul 2009, T. 7299, 7343.

[2533] Trial Judgement, para. 1150; Exhibits P1279 (confidential), p. 4; P1280, p. 4.

[2534] Trial Judgement, paras 1149-1150; Exhibits P1279 (confidential), p. 4; P1280, p. 4; P1281 (confidential), pp 2526-2527, 2558; P1282 (confidential), pp 10063-10064; K20, 27 Aug 2009, T. 8494 (closed session). See also Exhibits P1080, p. 6; P1081, pp 7467-7468, 7477-7478; K58, 13 Jul 2009, T. 7299, 7329-7330, 7343.

[2535] Trial Judgement, para. 1151; Exhibits P1279 (confidential), p. 5; P1280, p. 5; K20, 27 Aug 2009, T. 8503 (closed session).

screaming as a soldier started to undress her.[2536] However, an Albanian speaking policeman standing guard commented: "[w]hy are you screaming? [A]ren't the other ones girls as well?"[2537] The soldier then took Witness K20 to a bathroom where she was raped by several soldiers.[2538] According to Witness K20, while she was in the house, she could hear the screams of the other two women, with the screams of one being particularly clear because she was held in the room next to the bathroom where Witness K20 was raped.[2539] Witness K20 stated that: "[t]he same what happened to me, must have happened with them. Their screams were the same as my screams while they raped me."[2540] Upon their return to the room where the group of women and children were held, one of the two young women told Witness K20 that she had been cleaning and both told Witness K20 that the soldiers had not done anything to them.[2541] The Appeals Chamber notes that this is exactly the same explanation that the soldiers had instructed Witness K20 to give to her family after she was raped.[2542] The Appeals Chamber further notes that according to Witness K20, one of the girls seemed "a little bit lost" after she returned, and that she heard each of the two women screaming while they were in the house with the soldiers.[2543] It finds that this evidence stands in stark contrast to the two women's claim that nothing had been done to them.[2544] The comment by the Albanian speaking policeman prior to her rape further supports the inference that the two women were subjected to the same fate as Witness K20. In addition, the Appeals Chamber considers that it is not uncommon for women to refrain from disclosing that they were sexually assaulted depending on, *inter alia*, personal feelings of shame or fear, religious views, sociocultural background, and the intensity and severity of the attack.[2545]

867. The Appeals Chamber further notes that Witness K58 was held in the same room as Witness K20, the two young women, and the group of women and children on the night that these

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[2536] Exhibits P1279 (confidential), p. 5; P1280, p. 5; P1281 (confidential), p. 2529. See Trial Judgement, para. 1151.
[2537] Exhibit P1281 (confidential), pp 2529-2530. See Trial Judgement, para. 1151.
[2538] Trial Judgement, paras 1151, 1793; Exhibits P1279 (confidential), p. 5; P1280, p. 5; P1281 (confidential), pp 2529-2532.
[2539] Exhibits P1279 (confidential), p. 6; P1280, p. 6.
[2540] Exhibits P1279 (confidential), p. 6; P1280, p. 6.
[2541] Exhibits P1279 (confidential), p. 6; P1280, p. 6.
[2542] See Exhibits P1279 (confidential), p. 5; P1280, p. 5; K20, 27 Aug 2009, T. 8504 (closed session).
[2543] Exhibits P1279 (confidential), p. 6; P1280, p. 6.
[2544] See Exhibits P1279 (confidential), p. 6; P1280, p. 6.
[2545] See K.G. Weiss, "Too ashamed to report: Deconstructing the shame of sexual victimization", *Feminist Criminology*, Vol. 5(3) (July 2010), pp 286-310; S.G. Smith, "The Process and Meaning of Sexual Assault Disclosure", *Psychology Dissertation*, paper 7 (2005), pp 19, 23, 31. See also P.L. Fanflik, *Victim Responses to Sexual Assault: Counter-Intuitive or Simply Adaptive* (National District Attorneys Association American Prosecutors Research Institute, Special Topic Series, Aug 2007), pp 4-5. The Appeals Chamber also notes that the Trial Chamber in *Kvočka et al.* found that "the fact that Witness K did not mention [her] rape incident in 1993 to a journalist [was] irrelevant, *particularly in light of the sexual and intensely personal nature of the crime*" (*Kvočka et al.* Trial Judgement, para. 552 (emphasis added)).

events occurred.[2546] The Appeals Chamber observes that Witness K58's evidence is corroborative of that of Witness K20. In particular, according to Witness K58, during the course of that night, on several occasions "young girls" were selected and about 20 of them were taken away in small groups by the soldiers for lengthy periods of time, supposedly to clean.[2547] When the young women returned they were crying and had dishevelled hair.[2548] The Appeals Chamber notes that Witness K58 overheard one of the women telling her mother that she had been raped.[2549] The Appeals Chamber notes Đorđević's argument that, as Witness K58 did not know the woman whom she overheard talking to her mother, it may have been Witness K20.[2550] However, the Appeals Chamber recalls that Witness K58 stated that she heard one mother ask her daughter: "'[w]hat did they do to you?' And she answered, 'Mom, they raped us'".[2551] This is inconsistent with Witness K20's evidence of what she told her mother. Witness K20 stated that: "[m]y mother must have understood what had happened. She asked me: 'How many'. I answered her: 'Four'. This is all I told my mother."[2552] Therefore, Đorđević's argument does not hold.

868. In the view of the Appeals Chamber, this evidence supports the inference that, in addition to Witness K20, the other two young women were sexually assaulted after being taken to the nearby house by the soldiers that night. Considering the evidence as a whole, the Appeals Chamber finds that the only reasonable inference is that the two young women were subjected to an act sexual in nature that infringed upon their right to physical integrity and/or amounted to an outrage to their personal dignity. Furthermore, the circumstances, including the fact that the two young women, along with Witness K20, were removed by the soldiers from the room where they were detained and taken to another house, where they were heard to be screaming, confirm that they did not consent and that the perpetrators of their sexual assaults knew that they did not consent.

869. The Appeals Chamber is therefore convinced beyond reasonable doubt that the only reasonable inference is that the two young Kosovo Albanian women in Beleg, taken away with Witness K20, were sexually assaulted by members of the Serbian forces. The Appeals Chamber finds that the Prosecution has shown that the Trial Chamber erred in its assessment of the evidence.

[2546] Trial Judgement, paras 1149-1150; Exhibits P1080, p. 6; P1081, pp 7467-7468; P1279 (confidential), p. 4; P1280, p. 4; P1281 (confidential), pp 2526, 2558; P1282 (confidential), p. 10064; K58, 13 Jul 2009, T. 7299, 7329-7330, 7343; K20, 27 Aug 2009, T. 8494 (closed session).
[2547] Trial Judgement, para. 1152. See also Exhibits P1080, p. 6; P1081, pp 7467-7468; K58, 13 Jul 2009, T. 7298-7299.
[2548] Trial Judgement, paras 1152, 1794; Exhibits P1080, p. 6; P1081, pp 7468.
[2549] Trial Judgement, paras 1152, 1794. See also Exhibits P1079 (confidential), p. 6; P1080, p. 6; P1081, p. 7468.
[2550] Đorđević Appeal Brief, para. 34.
[2551] Exhibit P1081, pp 7468.
[2552] Exhibits P1279 (confidential), p. 6; P1280, p. 6.

Whether these acts amounted to persecutions, as alleged by the Prosecution, will be addressed in the following section.[2553]

C. Alleged errors regarding findings on persecutions through sexual assault

1. Introduction

870. The Appeals Chamber recalls that the Trial Chamber found that Witness K20[2554] and Witness K14 were raped,[2555] and that sexual assault had been established in respect of these two young women.[2556] However, the Trial Chamber found that these acts were not committed with discriminatory intent, and thus did not constitute persecutions.[2557] The Prosecution appeals this finding, arguing that Trial Chamber erred in law and in fact.[2558] The Appeals Chamber further recalls that it has found that the Trial Chamber erred in failing to find that the Kosovo Albanian girl in a convoy in Priština/Prishtinë municipality and the two young Kosovo Albanian woman in Beleg who were detained together with Witness K20 were sexually assaulted.[2559] The Prosecution submits that these sexual assaults were also carried out with the intent to discriminate and amounted to acts of persecutions.[2560]

871. The Appeals Chamber will first address the alleged error of law.

2. Alleged error of law in the evaluation of relevant evidence in assessing the discriminatory intent regarding the rapes of Witness K20 and Witness K14

(a) Introduction

872. The Trial Chamber stated that:

> [n]o specific evidence has been presented with respect to either of the incidents that the perpetrators [of the sexual assaults of K14 and K20] acted with intent to discriminate. While the victims in each of these incidents were Kosovo Albanians and the perpetrators were members of the Serbian forces, considering the limited number of incidents relied on to support this underlying act of persecutions, the Chamber finds that the ethnicity of the two victims alone is not a sufficient basis to establish that the perpetrators acted with discriminatory intent.[2561]

[2553] See *infra*, Section XIX.C.3.
[2554] Trial Judgement, para. 1793. See also Trial Judgement, paras 1150-1152.
[2555] Trial Judgement, para. 1791. See also Trial Judgement, paras 833-838.
[2556] Trial Judgement, paras 1791, 1793.
[2557] Trial Judgement, paras 1796-1797.
[2558] Prosecution Appeal Brief, paras 1, 4-6, 8-17, 25-33, 40-41, 56.
[2559] See *supra*, paras 859, 869.
[2560] Prosecution Appeal Brief, paras 1, 18-24, 34-39.
[2561] Trial Judgement, para. 1796.

(b) Arguments of the parties

873. The Prosecution submits that the Trial Chamber erred in law in evaluating the sexual assaults of Witness K20 and Witness K14 in isolation and thus only considering a subset of the relevant evidence.[2562] It argues that, contrary to the Trial Chamber's conclusion, "the ethnicity of the victims was not the only evidence presented to establish that the perpetrators acted with discriminatory intent".[2563] The Prosecution submits that, by concluding that "[n]o specific evidence" had been presented that the perpetrators of the sexual assaults acted with specific intent, the Trial Chamber "unduly limited the scope of evidence it deemed relevant".[2564] The Prosecution asserts that it is settled case law that evidence of discriminatory intent goes beyond the specific facts of the crime in isolation, and that relevant evidence includes the context and circumstances in which the crime occurred.[2565] It contends that by failing to view the sexual assaults within the broader context in which they occurred, namely a campaign of persecutory violence against Kosovo Albanians, the Trial Chamber thus committed an error of law.[2566]

874. The Prosecution further submits that the Trial Chamber failed to consider the context and circumstances of the sexual assaults, while it did take such contextual factors into account as evidence of discriminatory intent with regard to other underlying acts of persecutions.[2567] According to the Prosecution, the Trial Chamber also erred in law when it relied on the limited number of incidents in finding that the crime of persecutions was not established.[2568]

875. Đorđević responds that the Trial Chamber reasonably found that the evidence was insufficient to find that Witness K20 and Witness K14 were sexually assaulted with discriminatory intent.[2569] He submits that the error alleged by the Prosecution "appears to lie only in its repeated claim" that the Trial Chamber artificially separated the incidents and considered them in

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[2562] Prosecution Appeal Brief, paras 40-41.
[2563] Prosecution Appeal Brief, para. 40.
[2564] Prosecution Appeal Brief, para. 40; Appeal Hearing, 13 May 2013, AT. 179.
[2565] Prosecution Appeal Brief, para. 41; Appeal Hearing, 13 May 2013, AT. 179, 191, referring to *Krnojelac* Appeal Judgement, paras 184, 188. According to the Prosecution, if the circumstances surrounding the specific crimes are consistent with the broader discriminatory attack, discriminatory intent may be inferred from contextual factors (Appeal Hearing, 13 May 2013, AT. 191).
[2566] Prosecution Appeal Brief, paras 40-41; Appeal Hearing, 13 May 2013, AT. 179. See also Prosecution Appeal Brief, paras 1, 4, 6, 8, 17, 25, 33; Prosecution Reply Brief, para. 2.
[2567] Prosecution Appeal Brief, para. 41; Appeal Hearing, 13 May 2013, AT. 179-183, 189-190, 200-201, 204, 206, referring to Trial Judgement, paras 618, 720, 824, 1192, 1701, 1751, 1774, 1777, 1781, 1783-1789, 1855.
[2568] Appeal Hearing, 13 May 2013, AT. 177, 183-184, 205. The Prosecution submits that there is no legal requirement that a certain numerical threshold be proven in order for acts to amounts to persecutions and that a single act may qualify as persecutions (Appeal Hearing, 13 May 2013, AT. 177, 183-184, referring to *Kordić and Čerkez* Appeal Judgement, para. 102, *Blaškić* Appeal Judgement, para. 135, *Kunarac et al.* Appeal Judgement, paras 153, 155).
[2569] Đorđević Response Brief, paras 10-11, 24; Appeal Hearing, 13 May 2013, AT. 192-196.

isolation.[2570] According to Đorđević, discriminatory intent can only be inferred from the context of an attack characterised as a crime against humanity if it is substantiated by the surrounding circumstances of the crime.[2571] He argues that an assessment of a perpetrator's subjective intention depends on more than the surrounding context of an attack and it is clear from the Trial Chamber's findings that it examined all the relevant facts.[2572] Đorđević contends that the Prosecution has not shown that the Trial Chamber failed to consider the overall context of each situation when finding that it was not proven that the perpetrators sexually assaulted the women "***because*** they were Kosovo Albanian".[2573] Đorđević further responds that overall, the evidence presented fails to support the conclusion that the alleged five sexual assaults were committed with discriminatory intent.[2574] He argues that the Prosecution merely seeks to "infer intent derived from the entirety of the conflict instead of the specific intentions behind the actual sexual assaults".[2575] Đorđević further contends that "a coincidence of ethnicity and a crime did not, on the facts of these incidents, establish that the individuals were raped *because* of their ethnicity".[2576]

(c) Analysis

876. The Appeals Chamber recalls that the crime of persecutions "requires evidence of a specific intent to discriminate on political, racial, or religious grounds and that it falls to the Prosecution to prove that the relevant acts were committed with the requisite discriminatory intent".[2577] The Trial Chamber correctly stated that the requisite discriminatory intent cannot be inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity, however, it "may be inferred from such a context of the attack so long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such

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[2570] Đorđević Response Brief, para. 18.
[2571] Đorđević Response Brief, paras 19-20, referring to *Naletilić and Martinović* Appeal Judgement, para. 129, *Kvočka et al.* Appeal Judgement, para. 460, *Blaškić* Appeal Judgement, para. 164, *Krnojelac* Appeal Judgement, para. 184. Đorđević asserts that the cases referred to by the Prosecution are distinguishable from the current case since in those cases the circumstances involved crimes against prisoners on the basis of their ethnicity or religion and "it was the pattern of multiple perpetrators among the same group that showed a discriminatory intent" (Đorđević Response Brief, para. 20, referring to Prosecution Appeal Brief, fn. 140).
[2572] Đorđević Response Brief, para. 22; Appeal Hearing, 13 May 2013, AT. 194-196. Đorđević argues in particular that the Trial Chamber's reference to the "limited number of incidents relied on to support" the allegation of persecutions through sexual assault clearly indicates that it examined all the relevant facts (Đorđević Response Brief, para. 22).
[2573] Đorđević Response Brief, paras 21-22 (emphasis in original).
[2574] See Đorđević Response Brief, paras 10-11, 35; Appeal Hearing, 13 May 2013, AT. 193.
[2575] Đorđević Response Brief, para. 21.
[2576] Đorđević Response Brief, para. 22 (emphasis in original).
[2577] *Krnojelac* Appeal Judgement, para. 184.

intent".[2578] Circumstances that may be taken into consideration include the operation of a prison (in particular, the systematic nature of the crimes committed against a racial or religious group within that prison) and the general attitude of the alleged perpetrator of the offence as seen through his or her behaviour.[2579] The Appeals Chamber further recalls that, if out of a group of persons selected on the basis of racial, religious, or political grounds, only certain persons are singled out and subjected to mistreatment, a reasonable trier of fact may infer that this mistreatment was carried out on discriminatory grounds.[2580]

877. In making its finding on discriminatory intent, the Trial Chamber stated that "no *specific* evidence" had been presented and that, "considering the limited number of incidents", "the ethnicity of the two women *alone*" was an insufficient basis to establish discriminatory intent.[2581] The Appeals Chamber finds that, in so considering, the Trial Chamber failed to evaluate the surrounding circumstances of Witness K20's and Witness K14's sexual assaults and the broader context in which these crimes occurred.[2582] For example, the Trial Chamber failed to consider that these crimes occurred in the course of the forcible displacement of the Kosovo Albanian population carried out by the Serbian forces pursuant to the JCE.[2583] It further failed to take into account that the JCE was implemented through a systematic campaign of terror and violence, aimed at forcing the Kosovo Albanians to leave Kosovo to ensure Serbian control over the province.[2584] In the Appeals Chamber's view, the Trial Chamber's failure to consider these factors, together with its statement that "specific evidence" was required, shows that the Trial Chamber incorrectly applied the relevant legal standard and thereby committed an error of law.

[2578] Trial Judgement, paras 1759-1760. See *Blaškić* Appeal Judgement, para. 164, citing *Krnojelac* Appeal Judgement, para. 184. See also *Kordić and Čerkez* Appeal Judgement, para. 110.

[2579] *Krnojelac* Appeal Judgement, para. 184. There, the Appeals Chamber found that in a situation when only the non-Serb detainees in a prison were subjected to beatings and forced labour, it was reasonable to conclude that these acts were committed because of the political or religious affiliation of the victims, and that they were committed with the requisite discriminatory intent (*Krnojelac* Appeal Judgement, paras 186, 201-202, see also paras 236-237 regarding forcible displacement).

[2580] *Naletilić and Martinović* Appeal Judgement, para. 572, referring to *Kordić and Čerkez* Appeal Judgement, where the Appeals Chamber found that in a situation in which all the guards belong to one ethnic group and all the prisoners to another, it could reasonably be inferred that the latter group was being discriminated against (*Kordić and Čerkez* Appeal Judgement, para. 950); *Kvočka et al.* Appeal Judgement, where the Appeals Chamber stated that since almost all the detainees in the camp belonged to the non-Serb group, it could reasonably be concluded that the reason for their detention was membership of that group and that the detention was therefore of a discriminatory character (*Kvočka et al.* Appeal Judgement, para. 366).

[2581] Trial Judgement, para. 1796 (emphasis added).

[2582] As recalled above, provided that it is substantiated by the circumstances surrounding the acts allegedly underlying the crime of persecutions, the discriminatory intent may be inferred from the context of the attack (see *Naletilić and Martinović* Appeal Judgement, para. 129; *Blaškić* Appeal Judgement, para. 164; *Krnojelac* Appeal Judgement, para. 184).

[2583] See Trial Judgement, paras 817-832, 834-835, 1142-1160, 1617-1679, 1791, 1793, 2007, 2034-2035, 2126, 2128-2130, 2136.

[2584] See Trial Judgement, paras 2007, 2035, 2126, 2128, 2130-2131. See also *supra*, paras 116-120,153-159.

878. In light of this legal error, the Appeals Chamber will apply the correct legal standard to the evidence and determine whether it is itself convinced beyond reasonable doubt that the sexual assaults of Witness K20 and Witness K14 were committed with discriminatory intent and constituted persecutions as a crime against humanity.

879. In this regard, the Appeals Chamber also recalls that it has previously found that the Kosovo Albanian girl in a convoy in Priština/Prishtinë municipality and the other two young Kosovo Albanian women in Beleg were sexually assaulted,[2585] and notes the Prosecution's submission that these sexual assaults also constituted persecutions.[2586]

880. The Appeals Chamber will therefore consider the sexual assaults of these five young women together and determine whether it is convinced beyond reasonable doubt that these acts constituted persecutions.

3. Whether the sexual assaults constituted persecutions

(a) Arguments of the parties

881. With respect to Witness K20, the Prosecution argues that the Trial Chamber erred when it ignored the context in which she was raped and overlooked direct evidence of discriminatory intent.[2587] It submits that Witness K20's sexual assault was committed in the course of the forcible expulsion of Kosovo Albanians from Beleg, during which they were robbed, beaten, killed, detained, and subjected to many discriminatory acts by Serbian forces.[2588] The Prosecution further submits that the Trial Chamber ignored direct evidence of discriminatory intent, namely persecutory remarks made by the perpetrators.[2589]

882. With respect to Witness K14, the Prosecution contends that the Trial Chamber erred in fact when it concluded that no specific evidence had been presented to establish the discriminatory intent of the perpetrators of her rape.[2590] The Prosecution submits that leading up to her assault, Witness K14 endured a series of persecutory acts because she was Kosovo Albanian.[2591] It notes that Witness K14 and her family were among the Kosovo Albanians in Priština/Prishtinë town who

[2585] See *supra*, paras 859, 869.
[2586] See *supra*, para. 870.
[2587] Prosecution Appeal Brief, paras 25-33; Appeal Hearing, 13 May 2013, AT. 179-180.
[2588] Prosecution Appeal Brief, paras 25-26, 28, 33; Appeal Hearing, 13 May 2013, AT. 180.
[2589] Prosecution Appeal Brief, paras 25, 28-29, 31-33; Appeal Hearing, 13 May 2013, AT. 180-182, 204.
[2590] Prosecution Appeal Brief, para. 8. See Prosecution Appeal Brief, paras 9-17.
[2591] Prosecution Appeal Brief, paras 10-11, 15-17; Appeal Hearing 13 May 2013, AT. 182-183.

were forced from their homes and escorted from the town by Serbian forces, that she and her family were repeatedly forced from one village to another in order to seek safety from the Serbian forces' attacks against Kosovo Albanians, and that ultimately, following her rape, Witness K14 and her sister fled to FYROM out of fear.[2592] According to the Prosecution, Witness K14's rape "cannot be divorced from the chain of discriminatory acts" she endured prior to her flight.[2593]

883. With regard to the two young Kosovo Albanian women in Beleg, who were detained together with Witness K20, and the Kosovo Albanian girl in a convoy, the Prosecution submits that their sexual assaults also took place during, and as part of, the campaign of persecutory violence by Serbian forces with the aim of forcing the Kosovo Albanian population to leave Kosovo, and amounted to persecutions.[2594] It submits that it would be "simply wrong" to separate the acts of sexual violence from the other persecutory acts these young women endured.[2595] The Prosecution submits that the sexual assaults of the two women in Beleg were committed in the course of the forcible expulsion of Kosovo Albanians from Beleg, during which they were robbed, beaten, killed, detained, and subjected to many discriminatory acts by Serbian forces.[2596] During these events, women, such as the two women in question, were particularly vulnerable as they were separated from the men before being detained.[2597] The Prosecution also points to direct evidence of discriminatory intent, namely persecutory remarks made by the perpetrators of the sexual assaults of these two women.[2598] With respect to the Kosovo Albanian girl in a convoy, the Prosecution notes in particular that Serbian forces created an atmosphere of terror that caused Kosovo Albanians, including the girl in question, to flee in convoys.[2599] According to the Prosecution, in these circumstances the displaced persons were vulnerable to mistreatment by Serbian forces, who continued to harass and abuse displaced persons, including those fleeing in the same convoy as the girl.[2600] In such circumstances, "Kosovo Albanians girls were easy targets."[2601]

[2592] Prosecution Appeal Brief, paras 10-11, 15; Appeal Hearing 13 May 2013, AT. 182-183.
[2593] Prosecution Appeal Brief, para. 16.
[2594] Prosecution Appeal Brief, paras 6, 18, 23-24, 38; Appeal Hearing, 13 May 2013, AT. 179-180, 182, 184.
[2595] Appeal Hearing, 13 May 2013, AT. 182-183, 190.
[2596] Prosecution Appeal Brief, para. 38. See also Prosecution Appeal Brief, para. 26; Appeal Hearing, 13 May 2013, AT. 180, 182, 201.
[2597] Prosecution Appeal Brief, para. 38.
[2598] Prosecution Appeal Brief, paras 25, 28-29, 33.
[2599] Prosecution Appeal Brief, para. 19; Appeal Hearing, 13 May 2013, AT. 183.
[2600] Prosecution Appeal Brief, paras 20, 23.
[2601] Prosecution Appeal Brief, para. 23.

884. The Prosecution also argues that even if the motivation of the perpetrators of the sexual assaults was entirely sexual, this does not preclude a finding that they acted with discriminatory intent.[2602]

885. Đorđević responds that the sexual assaults of Witness K20 and Witness K14 were not linked to any "persecutory plan" but committed by "criminals operating in the theatre of war under the cover of night".[2603] He further responds that, while the Trial Chamber did not address Witness K20's evidence on the persecutory statements of the perpetrators, it is clear from the Trial Judgement that it thoroughly considered Witness K20's evidence in making its findings on the crimes in Beleg, and thus also "would have considered" her evidence on these statements.[2604] He also submits that "all references [which according to the Prosecution show discriminatory intent] were merely to 'NATO' (an alliance army) planes flying overhead and the 'UÇK' (a terrorist organization) and not persecutory statements with regard to an ethnicity".[2605]

(b) Analysis

a. Discriminatory intent

i. Introduction

886. In order to find that the sexual assaults of the five young women amount to the crime of persecutions, the Appeals Chamber must be satisfied that the only reasonable inference is that the sexual assualts were carried out with the intent to discriminate on political, racial, or religious grounds.[2606] In this respect, the Appeals Chamber recalls that the requisite discriminatory intent cannot be inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity.[2607] It may nevertheless be inferred from the context of the attack so long as, in the light of the facts of the case, circumstances surrounding the commission of the crime

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[2602] Appeal Hearing, 13 May 2013, AT. 184, 189, 206, referring to *Kunarac et al.* Appeal Judgement, paras 153, 155. In general, the Prosecution argues that sexual assault should not be treated differently from other violent acts simply because of its sexual component (Appeal Hearing, 13 May 2013, AT. 176).

[2603] Đorđević Response Brief, paras 25-30. Đorđević also submits that it is not sufficient for an accused to be aware that he or she is, in fact, acting in any way that is discriminatory, but must consciously intend to discriminate (Appeal Hearing, 13 May 2013, AT. 193-194, referring to Trial Judgement, para. 1759, *Brđanin* Trial Judgement, para. 996, *Kordić and Čerkez* Trial Judgement, para. 217).

[2604] Đorđević Response Brief, para. 29, referring to, *inter alia*, Trial Judgement, fns 4463-4480.

[2605] Đorđević Response Brief, para. 28 (citations omitted).

[2606] *Deronjić* Judgement on Sentencing Appeal, para. 109; *Blaškić* Appeal Judgement, para. 131; *Krnojelac* Appeal Judgement, para. 185. See Trial Judgement, para. 1755.

[2607] See *Kvočka et al.* Appeal Judgement, para. 366. See also *Blaškić* Appeal Judgement, para. 164, citing *Krnojelac* Appeal Judgement, para. 184; *Kordić and Čerkez* Appeal Judgement, para. 110.

substantiate the existence of such intent.[2608] Furthermore, the case law shows that the fact that crimes occurred while the victims were – on discriminatory grounds – deported or detained prior to deportation, has been considered in order to infer discriminatory intent from the circumstances.[2609]

887. The Appeals Chamber further recalls that personal motive does not preclude a perpetrator from also having the requisite specific intent.[2610] The Appeals Chamber emphasises that the same applies to sexual crimes, which in this regard must not be treated differently from other violent acts simply because of their sexual component. Thus, a perpetrator may be motivated by sexual desire but at the same time also possess the intent to discriminate against his or her victim on political, racial, or religious grounds.[2611] Furthermore, the Appeals Chamber recalls that, although the crime of persecutions often refers to a series of acts, a single act may qualify as persecutions as long as it discriminates in fact and is carried out deliberately with the intention to discriminate on one of the listed grounds.[2612]

888. As recalled earlier, the Trial Chamber found that a joint criminal enterprise existed, which had the discriminatory common purpose of modifying the ethnic balance of Kosovo to ensure Serb control over the province.[2613] The Appeals Chamber observes that the Trial Chamber found that, in the context of the JCE, in the period between March and June 1999, Serbian forces carried out "a campaign of terror and extreme violence in Kosovo directed against [the] Kosovo Albanian people".[2614] It found that "deportations, murders, forcible transfers and persecutions were typical features of [this] campaign" and that the actions of the Serbian forces: "were directed to terrorizing the Kosovo Albanian population, killing large numbers of them and making the remainder leave

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[2608] See *Kvočka et al.* Appeal Judgement, para. 366. See also *Blaškić* Appeal Judgement, para. 164, citing *Krnojelac* Appeal Judgement, para. 184; *Kordić and Čerkez* Appeal Judgement, para. 110.

[2609] *Krnojelac* Appeal Judgement, paras 185-186; *Kordić and Čerkez* Appeal Judgement, para. 950; *Kvočka et al.* Appeal Judgement, paras 462-463; *Naletelić and Martinović* Appeal Judgement, para. 572.

[2610] *Kvočka et al.* Appeal Judgement, para. 463; *Krnojelac* Appeal Judgement, para. 102; *Jelisić* Appeal Judgement, para. 49.

[2611] See *Kvočka et al.* Appeal Judgement, para. 370 (where the Appeals Chamber considered that the Trial Chamber reasonably conclude that Radić acted with the required discriminatory intent when he committed rape and sexual violence against non-Serb women "notwithstanding his personal motives for committing these acts" (*Kvočka et al.* Appeal Judgement, para. 370). See also *Kunarac et al.* Appeal Judgement, para. 153 (where the Appeals Chamber held that even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture (*Kunarac et al.* Appeal Judgement, para. 153)); *Jelisić* Appeal Judgement, para. 49 (where the Appeals Chamber held that a perpetrator of the crime of genocide may act to obtain personal economic benefits, or political advantage or some form of power, but this does not preclude him or her from also having the specific intent to commit genocide (*Jelisić* Appeal Judgement, para. 49)).

[2612] *Kordić and Čerkez* Appeal Judgement, para. 102, citing *Blaškić* Appeal Judgement, para. 135; *Vasiljević* Appeal Judgement, para. 113.

[2613] Trial Judgement, para. 2007. See also *supra*, para. 86.

[2614] See Trial Judgement, para. 2130. See also Trial Judgement, paras 1597-1601, 1617-1679, 2007, 2027-2029, 2034-2035, 2126, 2128-2130.

Kosovo, so that ultimately the whole, or a substantial proportion of the population of Albanian ethnicity would no longer live in Kosovo".[2615] The Trial Chamber found that this campaign was also carried out in the Dečani/Deçan and Priština/Prishtinë municipalities where, in the same time period, the five sexual assaults at issue took place.[2616] The Appeals Chamber will now look at these sexual assaults in turn to assess whether they were carried out with the required discriminatory intent.

ii. Witness K20 and the other two young Kosovo Albanian women in Beleg

889. The sexual assaults of Witness K20 and the other two Kosovo Albanian women took place in Beleg in Dečani/Deçan municipality.[2617] The Trial Chamber found that, on 29 March 1999, Kosovo Albanians in Beleg were violently forced from their homes, subjected to searches and beatings, forced to relinquish their identification documents, rounded up and detained under guard overnight, and ultimately deported to Albania by Serbian forces on 30 March 1999.[2618] The Trial Chamber also found that Serbian forces looted and set fire to the homes of Kosovo Albanians during these events in Beleg.[2619]

890. Witness K20, along with her family, and the other two young women were among the people who were targeted by Serbian forces in Beleg.[2620] Witness K20 gave evidence that in the early morning of 29 March 1999, she and her family were forced from their home and into a basement together with other families.[2621] While detained in this basement, members of the Serbian forces made comments to the group including: "[y]ou asked for NATO, now they will come and save you. Do not cry, there is no wedding without meat, you asked for this yourself" and "[y]ou shouldn't cry. You should have thought earlier, because now you're at war with the state. But NATO will come and help you."[2622] Later in the day, Witness K20 was brought to another house where she was again detained by Serbian forces together with her mother, sisters, and a group of other Kosovo Albanian women and children, including Witness K58, and the other two young

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[2615] Trial Judgement, paras 2035, 2130.
[2616] Trial Judgement, paras 817-832, 834-835, 1142-1160, 1649-1650, 1672-1673, 1791, 1793, 2027, 2029, 2034-2035, 2129-2130; *supra*, paras 859, 869.
[2617] Trial Judgement, para. 1793; *supra*, paras 866-869.
[2618] Trial Judgement, paras 1144-1149, 1153-1156, 1159, 1673, 1774, 2027.
[2619] Trial Judgement, paras 1148, 1155, 1160, 2027.
[2620] Trial Judgement, paras 1145-1153; Exhibits P1279 (confidential), pp 2-6; P1280, pp 2-6.
[2621] Exhibits P1279 (confidential), pp 2-3; P1280, pp 2-3. See Trial Judgement, para. 1146; K20, 27 Aug 2009, T. 8490-8492.
[2622] Exhibits P1279, p. 3 (confidential); P1280, p. 3; P1281 (confidential), pp 5221-2522. See Trial Judgement, para. 1146.

women.[2623] Late at night, members of the Serbian forces took Witness K20 and the other two women to a courtyard under the pretence that they needed women for cleaning.[2624] While the three young women stood in the courtyard, soldiers cursed NATO planes that flew overhead saying "[f]uck NATO's mothers" and pointed their thumbs to the planes.[2625] Witness K20 and the other two women were then taken to another house.[2626] Witness K20 became very scared as she "knew what was going to happen" having heard that "the Serbs were raping the Kosovar girls and women".[2627] Indeed, as found by the Trial Chamber, Witness K20 was raped by several Serbian soldiers.[2628] When she screamed, one of the soldiers threatened her, telling her not to scream or he would "fuck [her] mother".[2629] During Witness K20's ordeal, the same policeman who had expelled Witness K20 and her family from their home earlier in the day stood guard in the doorway of the room and she could see soldiers waiting in the hall behind him.[2630] The policeman commented to her afterwards: "[t]he [KLA] did worse than they are doing. You can handle them."[2631] The Appeals Chamber has found that like Witness K20, the other two young women were also sexually assaulted by members of the Serbian forces that same night while detained.[2632] Furthermore, there is evidence that on the same night, some twenty young Kosovo Albanian women in Beleg were systematically selected and removed by soldiers from the room where Witness K20 and the group of women and children were being held.[2633] When they returned to the room they were crying, had dishevelled hair, and one was overheard telling her mother that she had been raped.[2634] The next morning, Witness K20, Witness K58, the other two women, and the group of women and children were

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[2623] Exhibits P1079 (confidential), pp 5-6; P1080, pp 5-6; P1279 (confidential), p. 4; P1280, p. 4; P1281 (confidential), pp 2525-2526. See Trial Judgement, para. 1149; *supra*, paras 866-867.

[2624] K20, 27 Aug 2009, T. 8494 (closed session); Exhibits P1279 (confidential), p. 4; P1280, p. 4; P1281 (confidential), p. 2527. See also Trial Judgement, para. 1150; K58, 13 Jul 2009, T. 7299; Exhibits P1079 (confidential), p. 6; P1080, p. 6.

[2625] Exhibit P1279 (confidential), p. 4; P1280, p. 4.

[2626] Exhibit P1279 (confidential), p. 4; P1280, p. 4.

[2627] Exhibit P1279 (confidential), pp 4-5; P1280, pp 4-5.

[2628] Trial Judgement, para. 1151, 1793. See Exhibits P1279 (confidential), p. 5; P1280, p. 5; P1281 (confidential), p. 2529-2532.

[2629] Exhibits P1279 (confidential), p. 5; P1280, p. 5.

[2630] Exhibits P1279 (confidential), pp 4-5; P1280, pp 4-5.

[2631] Exhibits P1279 (confidential), p. 5; P1280, p. 5.

[2632] See *supra*, para. 869.

[2633] Trial Judgement, para. 1152; K58, 13 Jul 2009, T. 7298-7299; Exhibits P1079 (confidential), p. 6; P1080, p. 6; P1081, pp 7467-7468;.

[2634] Trial Judgement, paras 1152, 1794; Exhibits P1079 (confidential), p. 6; P1080, p. 6; P1081, p. 7468.

ordered to leave for Albania[2635] and were told: "America is waiting for you, you will live like in America."[2636]

891. In addition to these specific circumstances, the Appeals Chamber also takes into account the broader context of the sexual assaults. In this respect, it considers that Witness K20's rape took place in the context of the systematic campaign of terror and violence involving the commission of numerous persecutory acts against Kosovo Albanians[2637] with the aim to force the Kosovo Albanians out of Kosovo.[2638] Witness K20 was sexually assaulted just prior to her expulsion.[2639] The Appeals Chamber further notes that Witness K20 was Kosovo Albanian and that the perpetrators were members of the Serbian forces, who also carried out the general attack on the Kosovo Albanian population.[2640]

892. The Appeals Chamber finds that Witness K20's direct evidence of her rape as set out above and in the Trial Judgement, considered in conjunction with the circumstances surrounding her rape and the context in which it occurred, clearly supports the finding that Witness K20 was targeted because of her ethnicity and that her rape was carried out with discriminatory intent. In this respect, the Appeals Chamber, Judge Tuzmukhamedov dissenting, considers that, even if it were to be assumed that the perpetrators also were motivated by sexual desire when they raped Witness K20, their decision to do so arose out of a will to discriminate against her on the basis of ethnic grounds.

893. As set out above, the other two young women from Beleg were held in the same house as Witness K20 and Witness K58, and were taken to a nearby house together with Witness K20 on the evening of the sexual assault.[2641] The circumstances surrounding the sexual assaults of the other two women are therefore the same as those regarding Witness K20's rape. This includes, in particular, evidence regarding: (i) the clear discriminatory nature of comments made by members of the Serbian forces to the three women as they were standing in the courtyard, (ii) comments made to the group of women and children, (iii) the fact that the perpetrators were members of the Serbian

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[2635] K58, 13 Jul 2009, T. 7300; Exhibits P1079 (confidential), p. 7; P1080, p. 7; P1279 (confidential), p. 6; P1280, p. 6; P1281 (confidential), p. 2533. See Trial Judgement, para. 1153.

[2636] Exhibit P1279 (confidential), p. 6; P1280, p. 6; P1281 (confidential), p. 2533. Witness K58 stated that they were told "[g]o to Albania. You have asked for NATO." (Exhibits P1079 (confidential), p. 7; P1080, p. 7; K58, 13 Jul 2009, T. 7300).

[2637] See Trial Judgement, paras. 1145-1154, 1672-1673, 1777-1778, 1781, 1783, 1790, 1811, 1819, 1825, 1832, 1837, 1841, 1850, 1854-1856, 2027-2035, 2129-2130. See *supra*, Sections XVI.B, XVII.B. The Appeals Chamber notes that the Trial Chamber found that during this campaign, Kosovo Albanians were specifically targeted on the basis of their ethnicity (see Trial Judgement, paras 1649-1650, 1777-1778, 1781, 1783).

[2638] Trial Judgement, paras 2007, 2035, 2126, 2128-2130, 2143-2144.

[2639] Trial Judgement, paras 1151, 1153, and references cited therein.

[2640] Trial Judgement, paras 1151, 1597-1598, 1601, 1791, 1793, 2027-2029, 2036-2051.

[2641] See *supra*, paras 866, 890.

forces who were also involved in the forcible transfer of Kosovo Albanians, (iv) the fact that both women were Kosovo Albanian, and (v) the fact that their sexual assaults took place in the context of their forcible transfer.[2642] The Appeals Chamber, Judge Tuzmukhamedov dissenting, therefore finds that the only reasonable inference that can be drawn from the evidence is that the perpetrators acted with discriminatory intent when they sexually assaulted the other two young women. Like for Witness K20's perpetrators, the fact that they may have also been motivated by personal motives, does not affect the conclusion that they acted with the intent to discriminate.

iii. Witness K14

894. Turning now to Witness K14, this witness and her family were amongst the many Kosovo Albanians who were forcibly expelled from their homes and from the town of Priština/Prishtinë by Serbian forces in late March 1999.[2643] At the end of March 1999, they fled on a convoy to Graštica/Grashticë.[2644] Serbian forces swore at Kosovo Albanians in the convoy and told them to go to their "brothers in Albania" and ask NATO for help.[2645] After two or three weeks, Witness K14 and her family had to flee yet again in a convoy, together with many other Kosovo Albanians, and returned to Priština/Prishtinë, hoping to find safety.[2646] Serbian forces were standing along the road to Priština/Prishtinë as the convoy passed.[2647] After returning to Priština/Prishtinë, one morning in May 1999, six Serbian policemen came to the house where Witness K14 and her family were staying.[2648] They gave Witness K14 and her family green cards to fill out, and told them they would return the next day to take the family to the Bozhur Hotel to get their papers stamped.[2649] Witness K14 and her family became frightened upon hearing this since the Bozhur Hotel was known as a place where people were mistreated.[2650] The next day, two of the same policemen, accompanied by a third man, returned and forced Witness K14 and her sister to come outside with them to their car.[2651] While Witness K14's sister was then allowed to return to the house, Witness K14 was taken to the Bozhur Hotel.[2652] Many people of Kosovo Albanian ethnicity were queuing at the hotel.[2653] Witness K14, however, was taken to a separate room in the hotel where she

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2642 See *supra*, paras 866-869, 889-891; Trial Judgement, paras 1150-1151.
2643 Trial Judgement, paras 823-824, and references cited therein.
2644 Trial Judgement, paras 823-824, and references cited therein.
2645 Trial Judgement, paras 823-824, and references cited therein.
2646 Trial Judgement, para. 824, and references cited therein.
2647 Trial Judgement, para. 824, and references cited therein.
2648 Trial Judgement, para. 833, and references cited therein.
2649 Trial Judgement, para. 833, and references cited therein.
2650 Exhibit P1325 (confidential), p. 4.
2651 Trial Judgement, para. 834, and references cited therein.
2652 Trial Judgement, para. 834, and references cited therein.
2653 Trial Judgement, para. 835; Exhibit P1325 (confidential), p. 5.

was raped by one of the two policemen.[2654] A second policeman tried to come into the room, but was prevented by the first policeman after Witness K14 promised to come out with him again and bring her sister for the other policeman.[2655] In the subsequent days, the policemen continued to harass and intimidate Witness K14 and her family.[2656] Out of fear of further sexual assault, Witness K14 and her sister fled to FYROM shortly thereafter on 24 May 1999.[2657]

895. The Appeals Chamber considers that Witness K14's rape, like those of Witness K20 and the two other young women in Beleg, took place in the context of a systematic campaign of terror and violence involving the commission of numerous persecutory acts against Kosovo Albanians,[2658] and aimed at creating conditions of terror and fear so as to force the Kosovo Albanians out of Kosovo.[2659] The Appeals Chamber notes that Witness K14 actually fled as a result of her rape, fearing further sexual harassment.[2660] The Appeals Chamber further notes that Witness K14 was Kosovo Albanian and the perpetrators of her sexual assault were persons in a position of authority and members of the Serbian forces who also carried out the general attack on the Kosovo Albanian people.[2661] Given the specific and contextual circumstances surrounding Witness K14's rape, the Appeals Chamber, Judge Tuzmukhamedov dissenting, is satisfied that the only reasonable inference is that the perpetrators acted with discriminatory intent. In this regard, the Appeals Chamber, Judge Tuzmukhamedov dissenting, considers that, even if it were to be assumed that the policemen were also motivated by sexual desire, the decision to rape Witness K14 arose out of a will to discriminate against her on ethnic grounds.

iv. Kosovo Albanian girl in a convoy in Priština/Prishtinë municipality

896. The Appeals Chamber notes that the Kosovo Albanian girl in a convoy was fleeing with other displaced Kosovo Albanians in convoys from Graštica/Grashticë towards Priština/Prishtinë town in an effort to find safety.[2662] As they travelled, the girl and those in the convoy with her were

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[2654] Trial Judgement, para. 835, and references cited therein.
[2655] Trial Judgement, para. 835, and references cited therein.
[2656] Trial Judgement, para. 838, and references cited therein. The days after the incident, the policemen drove past K14's house several times honking the car horn (Trial Judgement, para. 838).
[2657] Trial Judgement, para. 838, and references cited therein.
[2658] See Trial Judgement, paras 817-832, 1649-1650, 1777-1778, 1790, 1811, 1819, 1825, 1832, 1837, 1841, 1850, 1854-1856, 2027-2035, 2129-2130; *supra*, paras 866-869, 889-891. See *supra*, Sections XVI.B, XVII.B. The Appeals Chamber notes that the Trial Chamber found that during this campaign, Kosovo Albanians were specifically targeted on the basis of their ethnicity (see Trial Judgement, paras 1649-1650, 1777-1778, 1781, 1783).
[2659] Trial Judgement, paras 1649-1650, 1791, 1793, 2007, 2035, 2126, 2128-2130, 2143-2144.
[2660] Trial Judgement, paras 838, and references cited therein.
[2661] Trial Judgement, paras 834-835, 1597-1598, 1601, 1791, 1793, 2027-2029, 2036-2051.
[2662] Trial Judgement, paras 824, 832, and references cited therein.

targeted and harassed by Serbian forces on the basis of their ethnicity.[2663] Serbian forces stood along the road when the convoy with the girl passed, they stopped and beat some Kosovo Albanians, and confiscated vehicles.[2664] The Appeals Chamber further notes Witness K14's evidence that she heard that Kosovo Albanian women were taken out of the convoy by members of the Serbian forces.[2665] As the Appeals Chamber has already found, the Kosovo Albanian girl was similarly taken out of the convoy and into the woods, where she was sexually assaulted by a policeman and another man, who carried knives and was dressed in green camouflage trousers.[2666]

897. The Kosovo Albanian girl's sexual assault took place in the context of the systematic campaign of terror and violence involving the commission of numerous persecutory acts against Kosovo Albanians,[2667] and aimed at forcing them out of Kosovo.[2668] The girl in a convoy was sexually assaulted while she and other Kosovo Albanians sought safety, and were travelling in a convoy along a road lined with Serbian forces.[2669] The Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that the specific and contextual circumstances surrounding the commission of this sexual assault demonstrate that the only reasonable inference was that it was carried out with discriminatory intent. Whether the perpetrators also acted out of sexual desire does not alter this conclusion. It particularly notes that the girl was travelling in a convoy with other fleeing Kosovo Albanians, who were systematically harassed by Serbian forces standing along the road while the convoy passed. The girl's sexual assault cannot be viewed separately from these circumstances.

898. Having concluded that the sexual assaults of the five women were carried out with discriminatory intent, the Appeals Chamber now turns to consider whether the other elements of persecutions as a crime against humanity are satisfied.

[2663] Trial Judgement, paras 824, 832, and references cited therein, 1776-1778, 2136; *supra*, paras 856-859; Exhibits P1325 (confidential), p. 3; P1326 (confidential), pp 1421-1425; K14, 24 Sep 2009, T. 8993-8996, 9016, 9022-9023 (closed session). The Appeals Chamber also notes generally that in Priština/Prishtinë, as previously described in the context of the sexual assault of Witness K14, Kosovo Albanians were forcibly expelled from their homes and subjected to violence and abuse by Serbian forces (Trial Judgement, paras 805-840, 1649, 2029; see *supra*, paras 894-895).

[2664] Trial Judgement, paras 824, 832, and references cited therein. See also Exhibit P1325 (confidential), pp 3-4.

[2665] Exhibit P1325 (confidential), p. 4.

[2666] See *supra*, para. 859. See also Trial Judgement, para. 832; Exhibit P1325 (confidential), pp 3-4.

[2667] See Trial Judgement, paras 817-832, 1649-1650, 1777-1778, 1790, 1811, 1819, 1825, 1832, 1837, 1841, 1850, 1854-1856, 2027-2035, 2129-2130; *supra*, para. 859. See *supra*, Sections XVI.B, XVII.B. The Appeals Chamber notes that the Trial Chamber found that during this campaign, Kosovo Albanians were specifically targeted on the basis of their ethnicity (see Trial Judgement, paras 1649-1650, 1777-1778, 1781, 1783).

[2668] Trial Judgement, paras 1649-1650, 1791, 1793, 2007, 2035, 2126, 2128-2130, 2143-2144.

[2669] Trial Judgement, paras 817-832, 1597-1598, 1601, 1792, 2027-2029, 2036-2051; *supra*, paras 857, 859.

b. *Chapeau* requirements and equal gravity

899. The Appeals Chamber recalls that the Trial Chamber found that, at the time the sexual assaults took place, an armed conflict existed and there was a systematic attack against the Kosovo Albanian civilian population.[2670] With regard to the nexus requirement, the Appeals Chamber finds that the evidence discussed above, viewed as a whole and together with the Trial Chamber's findings,[2671] establishes that all five sexual assaults were part of a widespread and systematic attack against the Kosovo Albanian civilian population, and that the perpetrators knew that their acts were part of this attack.

900. The Appeals Chamber further recalls that in order for underlying acts to amount to persecutions as a crime against humanity, they must be of equal gravity or severity as other acts enumerated under Article 5 of the Statute.[2672] In this regard, the Appeals Chamber notes that the Trial Chamber found that Witness K20 and Witness K14 were raped, which is listed as a crime against humanity under Article 5(g) of the Statute.[2673] The Appeals Chamber found that the Kosovo Albanian girl in a convoy and the two young women in Beleg were sexually assaulted,[2674] which is not listed in the Statute as a crime against humanity. The Appeals Chamber, however, recalls that sexual assault may be punishable as persecutions under international criminal law, "provided that it reaches the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute".[2675] The Appeals Chamber also recalls that sexual assault by definition constitutes an infringement of a person's physical or moral integrity.[2676] Furthermore, it notes that the sexual

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[2670] Trial Judgement, paras 1595-1600.

[2671] See Trial Judgement, paras 1595-1601, 1649-1650, 1672-1673. With respect to Witness K20, Đorđević argues that her sexual assault was "not condoned" by Serbian forces and that it has not been shown that the perpetrators "were attempting to persecute as part of a plan", submitting that instead "they were criminals operating in the theatre of war under the cover of night" (Đorđević Response Brief, paras 27-30). Regarding K14, Đorđević submits that the circumstances of her assault "does not point to persecutory intent, rather the crime appears to have been perpetrated by opportunistic criminals" (Đorđević Response Brief, para. 25). In support of this contention, he points to evidence that the perpetrator of her rape paid the "Roma" who had helped the perpetrator take Witness K14 to the Bozhur Hotel where she was raped, notes that the description of the perpetrator's car does not coincide with a regulation vehicle for MUP forces, and argues that the Trial Chamber failed to fully analyse whether the individuals, including the man who later raped her, and who came to Witness K14's house the day prior to her rape, were indeed "legitimate" Serbian forces in light of Witness K14's difficulty in identifying uniforms (Đorđević Response Brief, para. 25). Đorđević merely repeats arguments raised and rejected at trial without raising any new issues or demonstrating any error (see Đorđević Closing Brief, paras 951-952, 957-974).

[2672] *Simić* Appeal Judgement, para. 177; *Blaškić* Appeal Judgement, para. 135; *Krnojelac* Appeal Judgement, paras 199, 221.

[2673] Trial Judgement, paras 1791, 1793.

[2674] See *supra*, paras 859, 869.

[2675] *Brđanin* Trial Judgement, para. 1012. See *Brđanin* Appeal Judgement, para. 296; *Simić* Appeal Judgement, para. 177; *Naletilić and Martinović* Appeal Judgement, para. 574; *Blaškić* Appeal Judgement, para. 135; *Kordić and Čerkez* Appeal Judgement, paras 102-103.

[2676] See *supra*, paras 850-852.

assaults in question were committed against young women, by multiple perpetrators, and in a general context of fear, intimidation, and harassment.[2677] Therefore, the Appeals Chamber is satisfied that these sexual assaults reach the same level of gravity as other crimes listed in Article 5.

(c) Conclusion

901. Based on all the foregoing, the Appeals Chamber finds that the crime of persecutions as a crime against humanity has been established through the sexual assaults of Witness K20 and the other two young women in Beleg, Witness K14, and the Kosovo Albanian girl in a convoy.

D. Đorđević's responsibility

1. Introduction

902. The Trial Chamber found that a common plan existed among the political, military, and police leadership of the FRY and Serbia aimed at modifying the ethnic balance in Kosovo.[2678] It further found that Đorđević significantly contributed to this common plan, and that he shared the intent to implement it.[2679] The Appeals Chamber has upheld these findings of the Trial Chamber.[2680] Further, the Appeals Chamber has overturned the Trial Chamber's finding that the sexual assaults of Witness K20 and Witness K14 did not constitute persecutions as a crime against humanity.[2681] The Appeals Chamber has also found that the sexual assaults of the Kosovo Albanian girl in a convoy and the other two Kosovo Albanian women in Beleg amounted to persecutions as a crime against humanity.[2682]

903. Before addressing the Prosecution's submission that Đorđević should be convicted pursuant to the third category of joint criminal enterprise for persecutions through sexual assaults as a crime against humanity,[2683] the Appeals Chamber will first address two legal issues Đorđević raises in his response with regard to the third category of joint criminal enterprise.

[2677] See Trial Judgement, paras 824, 832, 1145-1156, 1649-1650, 1673.
[2678] Trial Judgement, paras 2007-2008, 2126-2130.
[2679] Trial Judgement, paras 2154-2158, 2193. See also Trial Judgement, para. 1981.
[2680] See *supra*, Chapters IV-VII, X-XI.
[2681] See *supra*, paras 877, 901.
[2682] See *supra*, para. 901.
[2683] See *infra*, Section XIX.D.3.

2. Legal issues raised by Đorđević

(a) *Mens rea* standard for crimes under the third category of joint criminal enterprise

a. Arguments of the parties

904. Đorđević submits that the Prosecution suggests an incorrect standard for criminal liability under the third category of joint criminal enterprise.[2684] He contends that the Prosecution applies an overly expansive standard in arguing that he was aware that sexual assaults "might" be committed.[2685] Instead, Đorđević submits that the requisite *mens rea* for the third category of joint criminal enterprise liability requires that the possibility that a crime could be committed is "sufficiently substantial as to be foreseeable to an accused".[2686]

905. The Prosecution replies that Đorđević misstates the foreseeability standard for the third category of joint criminal enterprise liability, and attempts to raise the standard from possibility to substantial possibility.[2687]

b. Analysis

906. The Appeals Chamber recalls that under the third category of joint criminal enterprise, an accused can be held responsible for a crime outside the common purpose if, under the circumstances of the case: (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the joint criminal enterprise) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused

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[2684] Đorđević Response Brief, paras 37, 39-40. See also Đorđević Response Brief, paras 49, 53.

[2685] Đorđević Response Brief, paras 39-40, referring to Prosecution Appeal Brief, para. 42, *Karadžić* Appeal Decision on Third Category of Joint Criminal Enterprise Foreseeability of 25 June 2009, para. 18. See also Đorđević Response Brief, para. 49. Đorđević reiterates his general objections to the third category of joint criminal enterprise as a mode of liability applied by the Tribunal, arguing that it is not supported by customary international law (Đorđević Response Brief, para. 41; see also Đorđević Appeal Brief, paras 68-71). Đorđević also repeats his challenge to the application of the third category of joint criminal enterprise to specific intent crimes (Đorđević Response Brief, para. 38; see also Đorđević Appeal Brief, para. 155). The Appeals Chamber has dismissed these arguments under his second and eighth ground of appeal and therefore will not address them here (see *supra*, Sections III. C. III. E.

[2686] Đorđević Response Brief, para. 39, referring to *Karadžić* Appeal Decision on Third Category of Joint Criminal Enterprise Foreseeability of 25 June 2009, para. 18.

[2687] Prosecution Reply Brief, paras 13-15. According to the Prosecution, such an elevated standard is closer to the "probability" standard or the "substantially likely to occur" standard which have previously been rejected by the Appeals Chamber (Prosecution Reply Brief, para. 14, referring to *Karadžić* Appeal Decision on Third Category of Joint Criminal Enterprise Foreseeability of 25 June 2009, paras 15-18, *Blaškić* Appeal Judgement, para. 33).

willingly took that risk (*i.e.* the accused participated in the joint criminal enterprise with the awareness that such crime was a possible consequence thereof).[2688]

907. The Appeals Chamber recalls that the *mens rea* standard for the third category of joint criminal enterprise liability does not require awareness of a "probability" that a crime would be committed.[2689] Rather, liability under the third category of joint criminal enterprise may attach where an accused is aware that the perpetration of a crime is a *possible* consequence of the implementation of the common purpose.[2690] However, the Appeals Chamber recalls that the "possibility standard":

> is not satisfied by implausibly remote scenarios. Plotted on a spectrum of likelihood, the JCE III *mens rea* standard does not require an understanding that a deviatory crime would *probably* be committed; it does, however, require that a crime could be committed is sufficiently substantial as to be foreseeable to an accused.[2691]

908. The Appeals Chamber will therefore apply this standard when determining whether Đorđević is liable for the crime of persecutions through sexual assaults pursuant to the third category of joint criminal enterprise.

(b) Link between the JCE and the direct perpetrators of the foreseeable crimes

a. Arguments of the parties

909. Đorđević submits that, in order for a crime to be imputable to him pursuant to the third category of joint criminal enterprise liability, it must be proven that one of the members of the JCE used the physical perpetrator(s) to commit the foreseeable crimes in furtherance of the common plan.[2692]

910. The Prosecution submits that Đorđević's argument that the physical perpetrators were not used *in order to commit sexual assaults* misunderstands the Prosecution's appeal.[2693] It argues that

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[2688] *Brđanin* Appeal Judgement, paras 365, 411; *Kvočka et al.* Appeal Judgement, para. 83; *Blaškić* Appeal Judgement, para. 33; *Vasiljević* Appeal Judgement, para. 101; *Tadić* Appeal Judgement, para. 228.

[2689] *Šainović et al.* Appeal Judgement, paras 1061, 1272, 1525, 1557-1558; *Karadžić* Appeal Decision on Third Category of Joint Criminal Enterprise Foreseeability of 25 June 2009, para. 18. See also *Brđanin* Appeal Judgement, paras 365, 411; *Kvočka et al.* Appeal Judgement, para. 83; *Blaškić* Appeal Judgement, para. 33; *Vasiljević* Appeal Judgement, para. 101; *Tadić* Appeal Judgement, para. 228.

[2690] *Brđanin* Appeal Judgement, paras 365, 411; *Kvočka et al.* Appeal Judgement, para. 83; *Blaškić* Appeal Judgement, para. 33; *Vasiljević* Appeal Judgement, para. 101; *Tadić* Appeal Judgement, para. 228.

[2691] *Karadžić* Appeal Decision on Third Category of Joint Criminal Enterprise Foreseeability of 25 June 2009, para. 18 (emphasis in original). See *Šainović et al.* Appeal Judgement, paras 1081, 1538, 1575.

[2692] Đorđević Response Brief, paras 42-45, referring to *Brđanin* Appeal Judgement, para. 413, *Limaj et al.* Appeal Judgement, paras 119-120, *Tadić* Appeal Judgement, para. 220.

[2693] Prosecution Reply Brief, para. 20.

Đorđević wrongly suggests that the Tribunal's jurisprudence requires that a member of a joint criminal enterprise use a perpetrator *in order to* commit a third category of joint criminal enterprise crime.[2694]

b. Analysis

911. The Appeals Chamber recalls that under the third category of joint criminal enterprise, an accused may incur criminal responsibility for crimes committed by non-members of the joint criminal enterprise.[2695] It has been established that in such circumstances:

> the accused may be found responsible provided that he participated in the common criminal purpose with the requisite intent and that, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk. The Appeals Chamber thus held that members of a JCE could be held liable for crimes committed by principal perpetrators who were not members of the JCE provided that it had been shown that the crimes could be imputed to at least one member of the JCE and that this member, when using a principal perpetrator, acted in accordance with the common plan.[2696]

912. On this basis, the Appeals Chamber rejects Đorđević's argument that persecutions through sexual assaults cannot be imputed to him as a natural and foreseeable consequence of the JCE for lack of showing that one of the JCE members used the direct perpetrators to commit the sexual assaults in furtherance of the JCE.[2697] In the case of crimes carried out by non-members of a joint criminal enterprise, it must be shown that one or more joint criminal enterprise members (in furtherance of the joint criminal enterprise) used the non-member to commit the *actus reus* of the crimes forming part of the common purpose.[2698] Should the non-members used by one or more members of the joint criminal enterprise commit crimes outside the common purpose, these crimes may also be imputed to members of the joint criminal enterprise, provided they were a natural and foreseeable consequence of the joint criminal enterprise.[2699] In such circumstances, the necessary link has been established and members of the joint criminal enterprise may incur liability, pursuant to the third category of joint criminal enterprise, for the perpetration of such extended crimes.[2700]

2694 Prosecution Reply Brief, paras 20-22.
2695 *Martić* Appeal Judgement, para. 168; *Brđanin* Appeal Judgement, paras 411, 431.
2696 *Martić* Appeal Judgement, para. 168 (citations omitted). See also *Krajišnik* Appeal Judgement, para. 225; *Brđanin* Appeal Judgement, paras 365, 411, 413, 430.
2697 See Đorđević Response Brief, paras 42-45.
2698 *Brđanin* Appeal Judgement, paras 410, 413. See also *Martić* Appeal Judgement, para. 168; *Krajišnik* Appeal Judgement, para. 225.
2699 *Martić* Appeal Judgement, para. 168; *Brđanin* Appeal Judgement, para. 411.
2700 *Martić* Appeal Judgement, para. 168; *Brđanin* Appeal Judgement, para. 411.

913. In the instant case, the Prosecution requests the Appeals Chamber to convict Đorđević for the crime of persecutions through sexual assaults under the third category of joint criminal enterprise.[2701] It does not allege that the sexual assaults were part of the common plan. Therefore, the Prosecution is not required to prove that one of the JCE members used the perpetrators in order to commit persecutions through sexual assaults. Rather, it must be shown that these crimes were committed by a person who was used by one of the JCE members to carry out the *actus reus* of crimes that *were* part of the common purpose. Whether this requirement is fulfilled will be addressed in the following section.[2702]

3. Đorđević's alleged responsibility for persecutions through sexual assaults under the third category of joint criminal enterprise

(a) Arguments of the parties

914. The Prosecution submits that Đorđević should be convicted for persecutions through sexual assaults as sexual assaults were a natural and foreseeable consequence of the JCE, Đorđević was aware of this, and he willingly accepted this risk when he participated in the JCE and furthered its common purpose.[2703]

915. The Prosecution submits that it was foreseeable that crimes that were not part of the common purpose, including sexual assaults, might be committed in the context of the campaign of terror and extreme violence by the Serbian forces against the Kosovo Albanian population.[2704] It further argues that it need not be established that sexual crimes were prevalent in order to be a natural and foreseeable consequence of the common purpose.[2705] Further, the Prosecution contends that it is a matter of common knowledge and a historical fact that women suffer sexual assaults during such violent, persecutory campaigns.[2706]

[2701] Prosecution Appeal Brief, paras 42-56. The Appeals Chamber notes that the Indictment does include persecutions through sexual assault among the crimes that were part of the JCE (Indictment, Count 5, paras 21, 27, 72, 76-77).
[2702] See *infra*, para. 927.
[2703] See Prosecution Appeal Brief, paras 42-55; Appeal Hearing, 13 May 2013, AT. 178, 184-188, 201.
[2704] Prosecution Appeal Brief, paras 42-43, 45-46; Prosecution Reply Brief, paras 13-15; Appeal Hearing, 13 May 2013, AT. 185, 187-188, 201-202. The Prosecution argues that the Tribunal's case law confirms the relevance of these factors in assessing the foreseeability of crimes (Appeal Hearing, 13 May 2013, AT. 187, referring to *Krstić* Trial Judgement, para. 616, *Krstić* Appeal Judgement, para. 149, *Kvočka* Trial Judgement, para. 327, *Stakić* Appeal Judgement, paras 93, 95; *Stanišić and Župljanin* Trial Judgement, vol. 2, paras 525-526, 776). Furthermore, it submits that the Trial Chamber relied on these same factors when it made its alternative finding that murder was a natural and foreseeable consequence of the JCE (Appeal Hearing, 13 May 2013, AT. 187-188, referring to Trial Judgement paras 2139, 2141, 2145).
[2705] Appeal Hearing, 13 May 2013, AT. 177.
[2706] Prosecution Appeal Brief, para. 44.

916. Regarding whether the sexual assaults were foreseeable to Đorđević, the Prosecution submits that he was a crucial member of the JCE.[2707] It further contends that he was aware of the massive displacement of civilians, as well as killings and other violent crimes against Kosovo Albanians committed during the course of the Serbian forces' campaign as a result of his position of authority, his direct involvement in operations and presence on the ground, and reports from various sources.[2708] According to the Prosecution, Đorđević was aware of the commission of such violence against Kosovo Albanians as early as 1998 and remained well-informed in 1999.[2709] The Prosecution submits that given these circumstances, Đorđević was aware of the possibility that, during this persecutory campaign, Kosovo Albanian women might be sexually assaulted.[2710] It contends that he willingly took that risk when, with such awareness, he participated in the JCE.[2711]

917. Đorđević responds that the sexual assaults were not foreseeable to him.[2712] He contends that notice of the commission of general crimes in 1998 does not establish foreseeability on his part that sexual assaults in particular were a "sufficiently substantial possibility".[2713] Đorđević also submits that there is no evidence that, during the relevant time period, he was informed of the ordering or occurrence of sexual assaults, which would have made him aware of the possibility that these crimes would occur.[2714]

918. In reply to Đorđević's argument that notice of general crimes was not sufficient to make him aware of the possible perpetration of sexual assaults, the Prosecution submits that the Appeals Chamber has never held that crimes are foreseeable to an accused only if he knows of prior, similar

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[2707] Prosecution Appeal Brief, para. 42.
[2708] Prosecution Appeal Brief, paras 44, 47-50, 53; Appeal Hearing, 13 May 2013, AT. 185-186.
[2709] Prosecution Appeal Brief, paras 47-53; Appeal Hearing, 13 May 2013, AT. 186.
[2710] Prosecution Appeal Brief, paras 44, 46, 51; Prosecution Reply Brief, paras 13-15; Appeal Hearing, 13 May 2013, AT. 185-186. The Prosecution adds that for sexual assaults to be foreseeable to Đorđević, it is not required that he had prior knowledge of the same types acts previously being committed (Appeal Hearing, 13 May 2013, AT. 202).
[2711] Prosecution Appeal Brief, paras 7, 42, 46, 52, 55; Appeal Hearing, 13 May 2013, AT. 188.
[2712] Đorđević Response Brief, paras 36, 46-52, 54; Appeal Hearing, 13 May 2013, AT. 196, 198. He argues that the cases referenced by the Prosecution to support a finding of foreseeability must be distinguished from the current case since they are camp cases or relate to the specific situation of Srebrenica (Appeal Hearing, 13 May 2013, AT. 196-197).
[2713] Đorđević Response Brief, para. 46. See also Đorđević Response Brief, para. 47. Đorđević further submits that "general knowledge of the potential for crime in war is not sufficient to meet the specific intent test of persecutory intent" (Đorđević Response Brief, para. 46).
[2714] Đorđević Response Brief, para. 50; Appeal Hearing, 13 May 2013, AT. 198-199. He argues that "[r]ape is a possibility in all wars and, indeed, in peacetime too such that isolated incidents of sexual assault do not on their own establish that repeat rapes are a substantial possibility" (Đorđević Response Brief, para. 50 (citations omitted); see also Appeal Hearing, 13 May 2013, AT. 196). Đorđević further submits that neither of the sexual assaults at issue were "sanctioned, approved, allowed or even known by superior officers" but rather "took place in secretive or highly irregular circumstances", and thus were not foreseeable (Đorđević Response Brief, para. 51).

crimes.[2715] The Prosecution further replies that the elements of the third category of joint criminal enterprise are satisfied as the sexual assaults were perpetrated by members of the Serbian forces who were controlled and used by the JCE members in the implementation of the common plan.[2716]

(b) Analysis

919. The Appeals Chamber recalls that the third category of joint criminal enterprise entails responsibility for crimes committed beyond the common purpose but which are nevertheless a natural and foreseeable consequence of that common purpose.[2717] The Appeals Chamber further recalls that where the alleged foreseeable crime is a specific intent crime such as persecutions, it must be established that it was foreseeable to the accused that the crime might be committed,[2718] though it need not be shown that the accused possessed specific intent.[2719]

920. In order to assess the foreseeability of sexual assaults, the Appeals Chamber will first consider the overall context in which these acts occurred. It will then address the evidence relevant to the determination of whether it was foreseeable to Đorđević, in particular, that sexual assaults were a possible consequence of the implementation of the JCE.

921. The Trial Chamber found that a common plan existed among the leadership of the FRY and Serbia aimed at modifying the ethnic balance in Kosovo.[2720] It further found that: "[a] core element of the common plan was the creation of an atmosphere of violence and fear or terror among the Kosovo Albanian population such that they would be driven, by their fear, to leave [...] Kosovo."[2721] Typically, Serbian forces shelled the area of a village and/or fired at houses causing the population to flee and then entered the village on foot, setting houses on fire, damaging property, looting, killing residents, forcibly expelling people from their homes, and threatening and physically harassing the population.[2722] In some cases, in addition to killing large numbers of men and boys, women were also targeted and killed with the intent to instil fear among the Kosovo

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[2715] Prosecution Reply Brief, para. 16; Appeal Hearing, 13 May 2013, AT. 185, referring to *Krstić* Trial Judgement, paras 616-617, *Krstić* Appeal Judgement, para. 149, *Kvočka* Trial Judgement, para. 327; *Kvočka* Appeal Judgement, para. 86. See also Prosecution Reply Brief, paras 17-18.

[2716] Prosecution Reply Brief, paras 21, 23.

[2717] *Kvočka et al.* Appeal Judgement, para. 83; *Tadić* Appeal Judgement, para. 204.

[2718] *Šainović et al.* Appeal Judgement, para. 1456; *Karadžić* Appeal Decision on Third Category of Joint Criminal Enterprise Foreseeability of 25 June 2009, para. 18. See also *Brđanin* Appeal Decision of 19 March 2004, paras 5-6.

[2719] *Šainović et al.* Appeal Judgement, para. 1456; *Brđanin* Appeal Decision of 19 March 2004, paras 5-6. See also *supra*, Section III. E.

[2720] Trial Judgement, paras 2007, 2126-2130.

[2721] Trial Judgement, para. 2143. See also Trial Judgement, paras 2007, 2035, 2152.

Albanian population and to force them to leave.[2723] Forced from their homes and fearing for their lives and welfare, massive columns or convoys of displaced Kosovo Albanians left their towns and villages and headed to Albania or FYROM, often directed and escorted by Serbian forces, who continued to intimidate and abuse them.[2724] In these circumstances, the Appeals Chamber considers that Kosovo Albanians were left highly vulnerable, lacking protection, and exposed to abuse and mistreatment by members of the Serbian forces.

922. The Appeals Chamber notes that, Kosovo Albanian men were frequently separated from the women and children.[2725] On several occasions, after being separated, the men were then killed by Serbian forces.[2726] In some instances, women and children were detained by Serbian forces separately from the men prior to their forced displacement.[2727] The Appeals Chamber considers that, separated from their male relatives, Kosovo Albanian women were rendered especially vulnerable to being targeted and subjected to violence by Serbian forces on the basis of their ethnicity, including violence of a sexual nature as one of the most degrading and humiliating forms.[2728] Defenceless Kosovo Albanian civilians were confronted with Serbian forces, who knew that they could act with near impunity. The Appeals Chamber has no doubt that in such an environment, sexual assaults were a natural and foreseeable consequence.

923. To be held liable for persecutions through sexual assaults pursuant to the third category of joint criminal enterprise, the sexual assaults, however, must have been foreseeable to Đorđević in particular.[2729] The Trial Chamber found that, as "one of the most senior MUP officials, he had detailed knowledge of events on the ground and played a key role in coordinating the work of the

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[2722] See Trial Judgement, paras 1617-1624, 1626-1674, 1676-1679, 2027, 2029. See also Trial Judgement, paras 2133-2137.

[2723] See Trial Judgement, paras 1636, 1652, 2137, 2139-2140. See also Trial Judgement, paras 2143-2145.

[2724] Trial Judgement, paras 1626, 1633, 1646, 1649, 1652, 1656, 1657, 1659, 1668, 1677, 2030-2031.

[2725] Trial Judgement, paras 1617, 1619, 1624, 1630, 1634, 1643, 1656, 1669, 1678-1679, 2028. See also Trial Judgement, paras 2136-2137.

[2726] Trial Judgement, paras 1617-1620, 1630, 1643, 1656, 1669, 2028. See also Trial Judgement, paras 2136-2137; *supra*, paras 770, 772.

[2727] See Trial Judgement, paras 1149, 1153.

[2728] The Appeals Chamber also notes the evidence of Witness K20 that, when she was taken by the members of the Serbian forces, she "knew what was going to happen [...] as [she] had heard that the Serbs were raping the Kosovar girls and women" (Exhibits P1279 (confidential), pp 4-5; P1280, pp 4-5). It further notes Witness K14's evidence that the man carrying knives and dressed in camouflage trousers who took the Kosovo Albanian girl "was known for doing these kinds of things" (Exhibit P1325 (confidential), p.4); that she heard from others that "they took more women out" from the convoy (Exhibit P1325 (confidential), p.4); and that, when, on the evening of her own rape, Witness K14 told a friend what happened to her, she confided in Witness K14 that "the same thing had happened to her. [...] [S]he was raped by four men and that she was brought back after two days" (Exhibit P1325 (confidential), pp 6-7).

[2729] See *Karadžić* Appeal Decision on Third Category of Joint Criminal Enterprise Foreseeability of 25 June 2009, para. 18; *Brđanin* Appeal Decision of 19 March 2004, para. 6. See also *Brđanin* Appeal Judgement, para. 365; *Stakić* Appeal Judgement, para. 65; *Kvočka et al.* Appeal Judgement, para. 86.

MUP forces in Kosovo in 1998 and 1999".[2730] In particular, the Trial Chamber noted that Đorđević: (i) was a member of the Joint Command and of the MUP Collegium and regularly attended meetings of these bodies as well as MUP Staff meetings; (ii) had direct and immediate contact with Lukić, Head of the MUP Staff, and several SUP chiefs in Kosovo; (iii) participated as part of the Serbian delegation in international negotiations, and (iv) was present on the ground in Kosovo in 1998 and 1999, including during VJ and MUP operations.[2731]

924. Through his role and involvement in the operations in Kosovo, Đorđević was well informed not only of the conduct of operations and overall security situation on the ground in Kosovo, but also of the commission of serious crimes, such as looting, torching of houses, excessive use of force, and murder (including of women and children) by Serbian forces during the course of operations in both 1998 and 1999.[2732] Moreover, with the knowledge that some units had committed violent crimes against Kosovo Albanian civilians in 1998 and 1999, and that such crimes had gone unpunished, Đorđević authorised the redeployment of some of the same units in 1999 into the volatile situation.[2733]

925. The Trial Chamber found that Đorđević shared the intent of the JCE with the common purpose to change the ethnic balance of Kosovo.[2734] It found that as a member of the JCE, he was fully aware that this common purpose was to be achieved by creating an atmosphere of terror and fear to induce the Kosovo Albanians to leave, including by subjecting them to persecutions through a variety of means.[2735] Furthermore, the Trial Chamber found that he was aware of the massive displacement of Kosovo Albanian civilians on the basis that he witnessed thousands of displaced persons in 1998 and that he received regular MUP reports throughout March to June 1999 that reported on the increasing numbers of Kosovo Albanians crossing the borders from Kosovo into Albania or FYROM.[2736] He also knew about the humanitarian situation as well as killings and other violent crimes against Kosovo Albanians through other sources, including the media.[2737]

926. Under these circumstances, the Appeals Chamber finds that it was foreseeable to Đorđević that crimes of a sexual nature might be committed. The Appeals Chamber recalls that thousands of

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[2730] Trial Judgement, para. 2154.
[2731] Trial Judgement, paras 1897-1898, 1900-1903, 1916-1917, 1919, 1925, 1985-1998, 2154, 2158, 2162, 2178.
[2732] See Trial Judgement, paras 1900-1907, 1918, 1920-1924, 1957-1958, 1961, 1963, 1981, 1985-1995, 2154-2158. See also Trial Judgement, paras 2178-2184.
[2733] Trial Judgement, paras 1258, 2155, 2179-2180, 2185. See also *supra*, paras 355-357, 360-362.
[2734] See Trial Judgement, para. 2158. See also Trial Judgement, paras 1999, 2128, 2130, 2154-2157, 2193; *supra*, Chapter XI.
[2735] Trial Judgement, paras 2127-2128, 2130, 2135-2137, 2143, 2151-2152, 2158.
[2736] Trial Judgement, paras 1903, 1990, 2178, 2182. See *supra*, paras 247-252, 489-492.

Kosovo Albanian civilians were being forcibly displaced and mistreated on a massive scale by Serbian forces who could act with near impunity, and that women were frequently separated from the men and thereby rendered especially vulnerable. The Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that in such environment, the possibility that sexual assaults might be committed was sufficiently substantial as to be foreseeable to Đorđević and that he willingly took the risk when he participated in the JCE. The Appeals Chamber, Judge Tuzmukhamedov dissenting, is further satisfied that, in light of his knowledge of the persecutory nature of the campaign, it was also foreseeable to Đorđević that such sexual assaults might be carried out with discriminatory intent.

927. The Appeals Chamber has found that the Trial Chamber did not err in concluding that Serbian forces were used by members of the JCE to implement the *actus reus* of crimes that were within the common purpose of the JCE.[2738] These same Serbian forces sexually assaulted Witness K20, the other two young women in Beleg, and Witness K14.[2739] With regard to the girl in the convoy, the Appeals Chamber notes that the identity of one the perpetrators, *i.e.* the man carrying knives and dressed in green camouflage trousers, is unclear.[2740] However, his identity is less relevant since it has been found that the other man who sexually assaulted her was a policeman and thus a member of the Serbian forces.[2741] Therefore, the Appeals Chamber, Judge Tuzmukhamedov dissenting, is satisfied that the required link between the crimes and Đorđević as a member of the JCE has been established. Under these circumstances, the Appeals Chamber finds that these crimes can be imputed to Đorđević.

928. Finally, in light of the above finding, the Appeals Chamber recalls that, contrary to Đorđević's contention,[2742] the Appeals Chamber may enter new convictions at the appellate stage. Article 25(2) of the Statute provides that the Appeals Chamber "may affirm, reverse or revise the decisions taken by the Trial Chambers". Moreover, the Appeals Chamber has exercised its

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2737 Trial Judgement, paras 1996-1998, 2183. See *supra*, paras 497-501.
2738 See *supra*, para. 171.
2739 See *supra*, paras 866-869; Trial Judgement, paras 1150-1151, 1791, 1793.
2740 The man was identified as "carrying knives and [...] dressed in a black sleeveless shirt and green camouflage trousers. He had a shaved head tied with a scarf and three earrings in one ear." (Trial Judgement, para. 832). Elsewhere the Trial Chamber found that "[t]here were also other men among the Serbian forces [standing along the road to Priština/Prishtinë where the convoy passed], who were dressed in green trousers, had bandannas on their shaved heads and wore knives. Evidence considered elsewhere in this Judgement, indicates that such dress is consistent with some Serbian paramilitary units, but the evidence is not sufficient to enable a positive finding about the identify of these troops" (Trial Judgement, para. 824).
2741 See *supra*, para. 859. See also Trial Judgement, paras 832, 1792.
2742 Đorđević Reponse Brief, para. 4.

discretionary authority to enter new convictions on several occasions[2743] and Đorđević has not offered any cogent reasons to depart from this practice.[2744]

E. Conclusion

929. The Appeals Chamber has found that: (i) the Trial Chamber erred in finding that the sexual assaults of the Kosovo Albanian girl in a convoy and two young Kosovo Albanian women in Beleg were not established;[2745] (ii) the Trial Chamber erred in finding that the sexual assaults of Witness K20 and Witness K14 were not carried out with discriminatory intent;[2746] (iii) the sexual assaults of Witness K20, the other two women in Beleg, Witness K14, and the girl in a convoy were in fact carried out with such intent and amount to persecutions as a crime against humanity,[2747] and (iv) these acts were foreseeable to Đorđević and that he willingly took this risk when he participated in the JCE.[2748] In light of the foregoing, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that Đorđević is responsible for persecutions through sexual assaults as a crime against humanity pursuant to the third category of joint criminal enterprise and enters a conviction thereon. Therefore, the Appeals Chamber grants the Prosecution's first ground of appeal in full. The impact of this finding, as well as the remainder of the Prosecution's first ground of appeal, will be addressed separately in Chapter XX.[2749]

[2743] See *e.g. Mrkšić and Šljivančanin* Appeal Judgement, para. 103, p. 169; *Krnojelac* Appeal Judgement, paras 172, 180, 188, 207, 247, p. 114; *Setako* Appeal Judgement, paras 262, 301; *Gacumbitsi* Appeal Judgement, paras 124, 207.

[2744] Đorđević submits that his right to appeal his conviction would be violated if the Appeals Chamber were to enter new convictions against him, referring in support to the Dissenting Opinion of Judge Pocar to the *Šljivančanin* Review Judgement (Đorđević Response Brief, para. 4). Đorđević does not raise any arguments that have not been considered before (see *e.g. Mrkšić and Šljivančanin* Appeal Judgement (compare majority opinion, para. 103, p. 169, with Partially Dissenting Opinion of Judge Pocar, para. 2); *Setako* Appeal Judgement (compare majority opinion, para. 262, p. 85 with Partially Dissenting Opinion of Judge Pocar, para. 2). The Appeals Chamber further recalls that dissenting opinions are not binding upon it (see *supra*, para. 841).

[2745] See *supra*, paras 859, 869.

[2746] See *supra*, paras 877-878, 892, 895.

[2747] See *supra*, paras 892-893, 895, 897, 901.

[2748] See *supra*, paras 926-927.

[2749] See *infra*, Chapter XX.

XX. SENTENCING

A. Introduction

930. The Trial Chamber sentenced Đorđević to a single sentence of 27 years imprisonment for his convictions for deportation (Count 1), other inhumane acts (forcible transfer) (Count 2), murder (Count 3), and persecutions (through deportation, forcible transfer, murder, and destruction of religious or culturally significant property) on racial grounds (Count 5), as crimes against humanity; and murder (Count 4), as a violation of the laws or customs of war.[2750] Both Đorđević and the Prosecution appeal Đorđević's sentence.[2751] The Appeals Chamber will set out the applicable law, before addressing Đorđević's and the Prosecution's grounds of appeal. The Appeals Chamber recalls that it has overturned a number of the Trial Chamber's findings and entered a finding of guilt with respect to the crime of persecutions through sexual assault[2752] and will accordingly assess the impact on Đorđević's sentence.

B. Applicable law and standard of review

931. Pursuant to Article 24 of the Statute and Rule 101 of the Rules, in determining the appropriate sentence a trial chamber must consider: the gravity of the offence; the individual circumstances of the convicted person; the general practice regarding sentencing in the courts of the former Yugoslavia; aggravating factors; and any mitigating circumstances.[2753] Due to its obligation to individualise penalties to fit the circumstances of the accused and the gravity of the crime, a trial chamber is vested with broad discretion in determining an appropriate sentence.[2754]

932. An appeal against sentencing is reviewed *stricto sensu*; it is corrective in nature and is not a trial *de novo*.[2755] The Appeals Chamber will not revise a sentence unless the trial chamber

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[2750] Trial Judgement, paras 2230-2231.

[2751] Đorđević Appeal Brief, paras 407-426; Đorđević Reply Brief, paras 137-143; Prosecution Appeal Brief, paras 57-96; Prosecution Reply Brief, paras 25-33.

[2752] See *supra*, paras 542, 695, 834, 877-878, 901.

[2753] Article 24 of the Statute; Rule 101(B) of the Rules.

[2754] See *D. Milošević* Appeal Judgement, para. 297; *Kalimanzira* Appeal Judgement, para. 224; *Bikindi* Appeal Judgement, para. 141; *Nchamihigo* Appeal Judgement, para. 384; *Mrkšić and Šljivančanin* Appeal Judgement, para. 352; *Karera* Appeal Judgement, para. 385; *Strugar* Appeal Judgement, para. 336; *Hadžihasanović and Kubura* Appeal Judgement, para. 302; *Blagojević and Jokić* Appeal Judgement, paras 137, 321; *Nahimana et al.* Appeal Judgement, para. 1037; *Simba* Appeal Judgement, para. 306; *Ntagerura et al.* Appeal Judgement, para. 429; *Semanza* Appeal Judgement, para. 312; *Blaškić* Appeal Judgement, para. 680. See also *Haradinaj et al.* Appeal Judgement, para. 321, citing *Krajišnik* Appeal Judgement, para. 734; *M. Jokić* Judgement on Sentencing Appeal, para. 8.

[2755] *Haradinaj et al.* Appeal Judgement, para. 321, referring to *Krajišnik* Appeal Judgement, para. 734.

committed a "discernible error" in exercising its discretion or failed to follow the applicable law.[2756] It is for the party challenging the sentence to prove that the trial chamber made a discernible error.[2757] In doing so, an appellant must show that the trial chamber: gave weight to extraneous or irrelevant considerations; failed to give sufficient weight to relevant considerations; made a clear error as to the facts upon which it exercised its discretion; or, its decision was so unreasonable or plainly unjust that the Appeals Chamber can infer that the Trial Chamber did not properly exercise its discretion.[2758]

C. Đorđević's nineteenth ground of appeal: alleged errors in relation to sentencing

933. Đorđević raises four arguments.[2759] He submits that the Trial Chamber erroneously: (i) considered his position of authority as an aggravating factor; (ii) ignored several mitigating circumstances; (iii) assessed his role in relation to those accused in *Milutinović et al.*; and (iv) failed to consider the sentencing practices of the FRY.[2760] The Appeals Chamber will address each argument in turn.

1. Alleged errors in considering Đorđević's position of authority as an aggravating factor

(a) Arguments of the parties

934. Đorđević submits that the Trial Chamber erred in law by "double-counting" his role and position as Chief of the RJB.[2761] He argues that the Trial Chamber erred by considering his role and position as an aggravating factor while using the same findings: (i) to serve as the basis for his conviction; and (ii) in its assessment of the gravity of the crimes.[2762] He contends that a circumstance which has been considered as an element of an offence or in assessing the gravity of the crimes cannot also be regarded as an aggravating factor.[2763] He further submits that his high rank or position alone does not justify an increased sentence and argues that only where an abuse of position is demonstrated can there "be a 7(3) aggravation based on position or role in the

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[2756] *Haradinaj et al.* Appeal Judgement, para. 321, citing *Krajišnik* Appeal Judgement, para. 734.
[2757] *Haradinaj et al.* Appeal Judgement, para. 321, referring to *Krajišnik* Appeal Judgement, para. 734.
[2758] *Haradinaj et al.* Appeal Judgement, paras 321-322; *D. Milošević* Appeal Judgement, para. 297.
[2759] Đorđević Appeal Brief, paras 407-426.
[2760] Đorđević Appeal Brief, paras 407-426.
[2761] Đorđević Appeal Brief, paras 407-408; Đorđević Reply Brief, para. 139. See Đorđević Appeal Brief, para. 409-411.
[2762] Đorđević Appeal Brief, paras 407-411. See also Đorđević Reply Brief, paras 137-139.
[2763] Đorđević Appeal Brief, para. 408, referring to *Galić* Appeal Judgement, para. 408, *Kordić and Čerkez* Appeal Judgement, para. 1089, *Deronjić* Judgement on Sentencing Appeal, para. 206, *Lukić and Lukić* Trial Judgement, para. 1050, *Milutinović et al.* Trial Judgement, vol. 3, para. 1149. See also Đorđević Reply Brief, para. 139, referring to Trial Judgement, para. 2210.

commission of a 7(1) mode of liability".[2764] Đorđević asserts that the Trial Chamber did not assess whether Đorđević abused his position.[2765]

935. The Prosecution responds that the Trial Chamber correctly assessed Đorđević's position of authority *only* as an aggravating factor and "did not 'double count' this factor by using it as a basis for both his conviction and the assessment of the gravity of the crimes".[2766] It contends that the Trial Chamber entered a conviction only under Article 7(1) of the Statute and did not therefore "double count" his role as the basis for his conviction.[2767] The Prosecution further responds that the Trial Chamber's reference to Đorđević's "leading and grave role" in its assessment of the gravity of the crimes relates to his "actions and contributions to the JCE, and not to his superior position".[2768] The Prosecution also submits that Đorđević misrepresents the Tribunal's case law on abuse of authority.[2769]

(b) Analysis

936. The Appeals Chamber recalls at the outset that double-counting for sentencing purposes is impermissible.[2770] In that regard, a factor considered by a trial chamber as an element of a crime cannot also be considered as an aggravating circumstance.[2771] Similarly, a factor taken into account by a trial chamber in its assessment "of the gravity of the crime cannot additionally be taken into account as a separate aggravating circumstance, and *vice versa*".[2772]

[2764] Đorđević Appeal Brief, paras 408, 410, 411. Đorđević argues that "[o]n the contrary, it was only by virtue of his position that he was found to have met the *actus reus* of JCE participation at all." (Đorđević Appeal Brief, para. 410). The Appeals Chamber has already dealt with this argument under Đorđević's ninth ground of appeal (see *supra*, paras 225-230, 235-239, 242-243, 257-265, 275-277, 315-324, 355-362, 366-370, 372-433, 454-456). See also Đorđević Reply Brief, paras 137-138.

[2765] Đorđević Appeal Brief, para. 411.

[2766] Prosecution Response Brief, paras 391-393, 397.

[2767] Prosecution Response Brief, paras 391-392.

[2768] Prosecution Response Brief, para. 396, referring to Trial Judgement, paras 2195, 2220, 2214 (citations omitted).

[2769] Prosecution Response Brief, para. 395. It contends that a trial chamber may consider an accused's superior position as an aggravating factor "[w]here both article 7(1) and 7(3) responsibility are alleged under the same count, and the legal requirements of both forms are met" but will enter a conviction based on Article 7(1) alone (Prosecution Response Brief, para. 395, referring to *Blaškić* Appeal Judgement, para. 91, *Kordić and Čerkez* Appeal Judgement, para. 34, *D. Milošević* Appeal Judgement, para. 302, fn. 873).

[2770] *Limaj et al.* Appeal Judgement, para. 143; *Deronjić* Judgement on Sentencing Appeal, para. 107; *D. Milošević* Appeal Judgement, paras 306, 309.

[2771] *Galić* Appeal Judgement, para. 408; *Kordić and Čerkez* Appeal Judgement, para. 1089; *Blaškić* Appeal Judgement, para. 693.

[2772] *D. Milošević* Appeal Judgement, paras 306, 309, citing *M. Nikolić* Judgement on Sentencing Appeal, para. 58; *Deronjić* Judgement on Sentencing Appeal, para. 107; *Limaj et al.* Appeal Judgement, para. 143.

937. The Appeals Chamber first notes that Đorđević was convicted for his participation in the JCE pursuant to Article 7(1) of the Statute.[2773] While his role and position were relevant to the Trial Chamber's assessment of his conduct and its conclusion that he contributed significantly to the JCE,[2774] the Appeals Chamber recalls that the role and position of an accused is not an element required to establish criminal liability for participation in a joint criminal enterprise.[2775] It was therefore within the discretion of the Trial Chamber to consider his role and position as an aggravating factor.

938. In relation to the assessment of the gravity of the offences, the Trial Chamber considered that Đorđević's "actions and conduct" as a member of the JCE.[2776] In assessing the gravity of the offences, the Trial Chamber noted that Đorđević's actions, "were in support of, and vital to, the common enterprise".[2777] The Trial Chamber ultimately concluded that it was his "leading and grave role in the JCE" which "warrant[ed] punishment".[2778] The Appeals Chamber therefore finds that the Trial Chamber considered Đorđević's leading role and his contribution to the JCE as a factor relevant to the assessment of the gravity of the offence.[2779]

939. The Appeals Chamber will now address Đorđević's argument that the Trial Chamber erroneously relied on his position without assessing whether he abused such authority.[2780] In entering a conviction against Đorđević for his participation in the JCE, the Trial Chamber correctly articulated that "[w]here both Article 7(1) and Article 7(3) are alleged under the same count, and where the legal requirements are met, a trial chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position as an aggravating factor in

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[2773] Trial Judgement, paras 2164, 2193-2194. Although the Trial Chamber also found Đorđević liable pursuant to Article 7(3) of the Statute, it correctly entered a conviction on the basis of Article 7(1) (Trial Judgement, para. 2195).

[2774] Trial Judgement, para. 2158. See Trial Judgement, para. 2154-2157. See also *supra*, paras 209-461.

[2775] The Appeals Chamber recalls its previous finding that the Trial Chamber correctly set out the elements of joint criminal enterprise (*supra*, para. 468. referring to Trial Judgement, paras 1864-1865, citing *Tadić* Appeal Judgement, paras 202-204, 220, 227-228). See *Galić* Appeal Judgement, para. 408.

[2776] Trial Judgement, para. 2210. The Trial Chamber considered that Đorđević "had a direct and leading role in efforts to conceal the crimes for which the joint criminal enterprise was responsible, and he failed to fulfill his responsibility to ensure that crimes committed by MUP forces in furtherance of the joint criminal enterprise were reported and investigated" (Trial Judgement, para. 2211).

[2777] Trial Judgement, para. 2210.

[2778] Trial Judgement, para. 2214. See also Trial Judgement, paras, 2211, 2213.

[2779] Trial Judgement, para. 2210. The Trial Chamber considered that Đorđević "had a direct and leading role in efforts to conceal the crimes for which the joint criminal enterprise was responsible, and he failed to fulfil his responsibility to ensure that crimes committed by MUP forces in furtherance of the joint criminal enterprise were reported and investigated" (Trial Judgement, para. 2211).

[2780] See Đorđević Appeal Brief, para. 410; Đorđević Reply Brief, para. 138.

sentencing."[2781] The Trial Chamber considered as an aggravating factor, *inter alia*, "the role of [Đorđević] who, as Chief of the RJB, was in a position of command and effective control of the MUP forces, except the RDB, who were among the actual perpetrators".[2782] In the Sentencing section of the Trial Judgement, however, the Trial Chamber failed to articulate that the case law establishes that it is not the superior position in itself which constitutes an aggravating factor, but rather the abuse of such position which may be considered as an aggravating factor.[2783]

940. In failing to carry out the assessment on whether or not Đorđević abused his position of authority, the Trial Chamber made a discernable error.[2784] This led the Trial Chamber to consider extraneous matters in its assessment of the aggravating factors applicable in this particular case. This error will be addressed by the Appeals Chamber in making a final determination on the sentence to be imposed on Đorđević.

2. Alleged failure to consider mitigating factors

(a) Arguments of the parties

941. Đorđević submits that the Trial Chamber erred in failing to properly consider as mitigating factors: (i) his behavior at trial and in detention; (ii) his cooperation with the Prosecution, work undertaken in establishing agreed facts, and the assistance provided in his testimony before Serbian courts; (iii) his expressions of remorse and sympathy for the victims; (iv) the impact of superior orders in a situation of duress; and (v) the "harsh environment" of armed conflict.[2785]

942. The Prosecution responds that the Trial Chamber took into account the relevant mitigating circumstances, and that Đorđević fails to show any error in the Trial Chamber's approach.[2786] It argues that Đorđević did not advance any specific mitigating factor at trial and raises these matters for the first time on appeal, which is not the appropriate forum.[2787] Furthermore, the Prosecution

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[2781] Trial Judgement, para. 1891, citing *Blaškić* Appeal Judgement, para. 91, *Kordić and Čerkez* Appeal Judgement, para. 34. See *Aleksovski* Appeal Judgement, para. 183; *Čelebići* Appeal Judgement, para. 745. See also Trial Judgement, paras 2192, 2195.
[2782] Trial Judgement, para. 2220.
[2783] Trial Judgement, paras 2217-2224; *Hadžihasanović and Kubura* Appeal Judgement, para. 320; *Stakić* Appeal Judgement, para. 411; *Babić* Judgement on Sentencing Appeal, para. 80; *Kamuhanda* Appeal Judgement, para. 347; *Aleksovski* Appeal Judgement, para. 183; *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 563; *Simba* Appeal Judgement, para. 285; *Kayishema and Ruzindana* Appeal Judgement, paras 358–359.
[2784] See *supra*, paras 931-932.
[2785] Đorđević Appeal Brief, para. 414.
[2786] Prosecution Response Brief, para. 398.
[2787] Prosecution Response Brief, para. 399.

responds that Đorđević fails to demonstrate that the consideration of the mitigating circumstances he proffers would have resulted in the reduction of his sentence.[2788]

943. Đorđević replies that a trial chamber is required to take account of mitigating circumstances and that "the jurisprudence shows that this is done routinely even if the parties have not raised any or all" of them.[2789]

(b) Analysis

944. The Appeals Chamber recalls that "neither the Statute nor the Rules exhaustively define the factors" which may be considered in mitigation of a sentence[2790] and that a trial chamber enjoys a considerable degree of discretion in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded to that factor.[2791] The Trial Chamber found:

> in the Accused's favour, by virtue of the position he held in the MUP, [that] the Accused had not previously been convicted of any serious offence and that he had been of good character prior to the events that are subject of the Indictment. No other matter is advanced as warranting mitigation of this sentence.[2792]

945. The Appeals Chamber further recalls that Rule 86(C) of the Rules provides that sentencing submissions shall be addressed during closing arguments.[2793] Rule 85(A)(vi) of the Rules provides that a trial chamber will consider any relevant information that may assist it in determining an appropriate sentence;[2794] however, case law establishes that a trial chamber is not "under an obligation to hunt for information that counsel did not put before it at the appropriate time".[2795] In addition, appeal proceedings are not the appropriate forum to raise such matters for the first time.[2796]

[2788] Prosecution Response Brief, para. 400.
[2789] Đorđević Reply Brief, para. 140, referring to *D. Milošević* Trial Judgement, para. 1003; *Haradinaj et al.* Trial Judgement, para. 495; *Boškoski and Tarčulovski* Trial Judgement, para. 601; *Milutinović et al.* Trial Judgement, vol. 3, paras 1178-1179.
[2790] *Babić* Judgement on Sentencing Appeal, para. 43.
[2791] *Lukić and Lukić* Appeal Judgement, para. 647; *Ntabakuze* Appeal Judgement, para. 264; *Kvočka et al.* Appeal Judgement, para. 715, referring to *Čelebići* Appeal Judgement, para. 780.
[2792] Trial Judgement, para. 2224.
[2793] Rule 86(C) of the Rules.
[2794] Rule 85(A)(vi) of the Rules.
[2795] *Kupreškić et al.* Appeal Judgement, para. 414. See *Kvočka et al.* Appeal Judgement, para. 674.
[2796] See *Kupreškić et al.* Appeal Judgement, para. 414. See also *Kvočka et al.* Appeal Judgement, para. 674.

946. The Appeals Chamber considers that Đorđević has failed to show that the Trial Chamber committed a discernible error in not considering the five mitigating circumstances, which he advanced for the first time on appeal.[2797]

3. Alleged error in assessing Đorđević's role in comparison to those sentenced in the *Milutinović et al.* case

(a) Arguments of the parties

947. Đorđević submits that his sentence of 27 years is "capricious and excessive" when compared to those sentenced for 22 years in *Milutinović et al.* case for participating in the same JCE.[2798] He argues that the Trial Chamber failed to reason why it found his role more significant in comparison to the participants of the same JCE warranting a more severe sentence.[2799] Đorđević contends that the Trial Chamber failed to provide a reasoned opinion as to how it concluded that his role was "more significant" than the accused in the *Milutinović et al.* case, and argues that the evidence demonstrates that he had a much less significant role.[2800]

948. The Prosecution responds that the Trial Chamber correctly took into consideration the sentences imposed by the Trial Chamber in *Milutinović et al.*, and that Đorđević fails to show that it was unreasonable in imposing upon him a higher sentence in comparison.[2801] It contends that similar cases do not serve as a legally binding pattern of sentences, but rather can be of assistance in sentencing if they involve the commission of the same offences in substantially similar circumstances.[2802] The Prosecution argues that Đorđević's role was not peripheral compared to that of the accused in *Milutinović et al*;[2803] rather, his contribution was crucial for the achievement of the JCE.[2804] According to the Prosecution, Đorđević fails to demonstrate how the Trial Chamber ventured outside its discretionary bounds in imposing a sentence of 27 years.[2805]

[2797] See also *supra*, paras 941-943.
[2798] Đorđević Appeal Brief, paras 416-418, referring to Trial Judgement, para. 2227; Đorđević Reply Brief, para. 142.
[2799] Đorđević Appeal Brief, paras 416, 420. See also Đorđević Reply Brief, para. 141.
[2800] Đorđević Appeal Brief, paras 419-420. See also Đorđević Reply Brief, para. 141.
[2801] Prosecution Response Brief, paras 402, 404.
[2802] Prosecution Response Brief, para. 401, referring to *Strugar* Appeal Judgement, para. 348, *Martić* Appeal Judgement, para. 330, *Furundžija* Appeal Judgement, para. 250.
[2803] Prosecution Response Brief, para. 403.
[2804] Prosecution Response Brief, para. 403. The Prosecution asserts that Đorđević: (i) was on the ground in Kosovo in 1998 and 1999, playing a direct role in MUP operations; (ii) participated at the highest level in the planning of MUP operations; (iii) deployed the PJP and the SAJ in Kosovo; and (iv) orchestrated the concealment of the crimes of the JCE by hiding the bodies of Kosovo Albanian civilians in Serbia (Prosecution Response Brief, para. 403).
[2805] Prosecution Response Brief, para. 405.

(b) Analysis

949. The Appeals Chamber recalls at the outset that trial chambers may consider sentences previously imposed by the Tribunal in similar cases.[2806] It was therefore within the discretion of the Trial Chamber to take into consideration the sentences imposed by the *Milutinović et al.* Trial Chamber, in light of the fact that that case concerns similar crimes in substantially similar circumstances. Sentences imposed in previous cases, however, are not binding on subsequent trial chambers, as each sentence must be tailored to fit the individual circumstances of a case.[2807] Further, the disparity between sentences rendered in similar cases may be considered "capricious or excessive", hence warranting the intervention of the Appeals Chamber, only "if it is out of *reasonable* proportion with a line of sentences passed in similar circumstances for the same offences".[2808]

950. The Trial Chamber carefully considered the sentences of the five accused in the *Milutinović et al.* case and noted that they were convicted for "their differing roles in essentially the same offences" as Đorđević.[2809] It also considered that no other member of the JCE, including those previously convicted in *Milutinović et al.*, made a more crucial contribution to the achievement of the JCE than Đorđević.[2810] The Appeals Chamber further notes that, the Trial Chamber, in the present case, additionally convicted him for the murder of 14 Kosovo Albanian women and children in Podujevo/Podujevë.[2811] The Trial Chamber further found, *inter alia*, that he had effective control over the forces committing the crimes.[2812] It therefore concluded that his role was more significant and called for a more severe sentence.[2813] The Appeals Chamber considers that the Trial Chamber's comparison with the *Milutinović et al.* case, assisted it in distinguishing Đorđević role. In light of the above, the Appeals Chamber finds that the disparity between the sentences is not out of reasonable proportion and that the comparison with *Milutinović et al.* assisted the Trial Chamber in exercising a uniform sentencing practice.

[2806] *Mrkšić and Šljivančanin* Appeal Judgement, para. 376, referring to *Strugar* Appeal Judgement, para. 348; *Limaj et al.* Appeal Judgement, para. 135; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 19, *Kvočka et al.* Appeal Judgement, para. 681; *Furundžija* Appeal Judgement, para. 250. See also *Čelebići* Appeal Judgement, para. 721.

[2807] See *Mrkšić and Šljivančanin* Appeal Judgement, para. 376, referring to *Strugar* Appeal Judgement, para. 348; *Limaj et al.* Appeal Judgement, para. 135, *Blagojević and Jokić* Appeal Judgement, para. 333; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 19, *Kvočka et al.* Appeal Judgement, para. 681; *Furundžija* Appeal Judgement, para. 250; *Čelebići* Appeal Judgement, paras 719, 721. See also *Musema* Appeal Judgement, para. 387.

[2808] *Limaj et al.* Appeal Judgement, para. 135 (emphasis added); *Dragan Nikolić* Judgement on Sentencing Appeal, para. 19; *Kvočka* Appeal Judgement, para. 681; *Jelisić* Appeal Judgement, para. 96.

[2809] Trial Judgement, para. 2227.

[2810] Trial Judgement, para. 2211. See Trial Judgement, para. 2213.

[2811] Trial Judgement, paras 2188, 2227. See *supra*, paras 351, 362, 371.

[2812] Trial Judgement, paras 2210-2211.

[2813] Trial Judgement, para. 2227.

951. In these circumstances, the Appeals Chamber finds that Đorđević has failed to demonstrate that the Trial Chamber's committed a discernible error in excising its discretion.

4. Alleged error in relation to the sentencing practices of the FRY

952. In determining Đorđević's sentence the Trial Chamber took into account the general sentencing practices of the FRY, and in particular that the maximum sentence for crimes committed before 2002 is 20 years imprisonment.[2814]

(a) Arguments of the parties

953. Đorđević submits that the Trial Chamber failed to properly consider the sentencing practices of the FRY by imposing a sentence exceeding the maximum penalty of 20 years.[2815] He further argues that the Trial Chamber failed to explain why it diverged from the sentencing practices of the FRY.[2816] Đorđević also contends that the Trial Chamber erroneously referred to the wrong statutory provisions concerning the sentencing practices of the FRY.[2817]

954. The Prosecution responds that the Trial Chamber properly considered the sentencing practices of the FRY.[2818] It further responds that the Trial Chamber was not bound by the sentencing practice of the law of the FRY.[2819] and that trial chambers may impose greater sentences than those applicable under that law.[2820]

(b) Analysis

955. Article 24(1) of the Statute and Rule 101(B)(iii) of the Rules provides that a trial chamber is required to take into account the general practice regarding prison sentences in the courts of the FRY. A trial chamber is however not bound by the general sentencing practices of the courts of the

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[2814] Trial Judgement, paras 2225-2226, referring to SFRY Criminal Code, Article 38.
[2815] Đorđević Appeal Brief, para. 422.
[2816] Đorđević Appeal Brief, paras 423-424.
[2817] Đorđević Appeal Brief, para. 425.
[2818] Prosecution Response Brief, para. 406.
[2819] Prosecution Response Brief, para. 407.
[2820] Prosecution Response Brief, para. 407.

FRY.[2821] The Appeals Chamber notes that the Trial Chamber expressly considered the sentencing practices of the FRY, taking into account both statutory provisions and case law.[2822]

956. When taking into account the sentencing practices of the former Yugoslavia, the Trial Chamber noted the penalties provided for in the applicable articles of the SFRY Criminal Code and observed that the maximum penalty could not exceed 15 years unless the crime was considered eligible for the death penalty, in which case the sentence could be up to 20 years.[2823] The Trial Chamber also expressly took into account that there were "no precise equivalents to the offences" for which Đorđević was sentenced and considered "a number of offences of a similar character".[2824] The Appeals Chamber finds that the Trial Chamber gave due consideration to the general sentencing practice of the former Yugoslavia and that it was within its discretion to impose a sentence which exceeds the maximum penalty of 20 years provided in the SFRY Criminal Code.[2825]

957. Đorđević has failed to identify any discernible error on the part of the Trial Chamber in its consideration of the general sentencing practice of the former Yugoslavia. Đorđević's arguments in this regard are dismissed.

5. Conclusion

958. The Appeals Chamber has found that the Trial Chamber made a discernable error when it considered Đorđević's position of authority as an aggravating factor, rather than the abuse of such power.[2826] Therefore, the Appeals Chamber grants, in part, Đorđević's nineteenth ground of appeal. The impact of this finding, if any, will be considered later in this Judgement.[2827] The Appeals Chamber dismisses the remainder of Đorđević's nineteenth ground of appeal.

[2821] See *Boškoski and Tarčulovski* Appeal Judgement, para. 212; *Blaškić* Appeal Judgement, para. 681; *Krajišnik* Appeal Judgement, para. 811; *M. Jokić* Judgement on Sentencing Appeal, para. 38; *Stakić* Appeal Judgement, para. 398; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 69; *Čelebići* Appeal Judgement, para. 813 See also *Bikindi* Appeal Judgement, para. 154; *Nahimana et al.* Appeal Judgement, para. 1063.

[2822] See Trial Judgement, para. 2226, fns 7433-7434. Since the same 20-year maximum penalty, as suggested by Đorđević, was considered by the Trial Chamber, the Appeals Chamber finds whether the Trial Chamber erroneously cited the SFRY Criminal Code as opposed to the FRY Criminal Code to be immaterial (see Đorđević Appeal Brief, para. 425; Trial Judgement, paras 2225-2226).

[2823] Trial Judgement, para. 2226.

[2824] Trial Judgement, para. 2226, referring to SFRY Criminal Code, Articles 141-145, 151. Đorđević contends that the Trial Chamber erred in referring to the "Republic of Serbia Criminal Code" which he alleges did not deal with the type of crimes alleged in this case (Đorđević Appeal Brief, para. 425).

[2825] See *Čelebići* Appeal Judgement, para. 816; *Krstić* Appeal Judgement, para. 262; *Blaškić* Appeal Judgement, para. 681; *Stakić* Appeal Judgement, para. 398; *Krajišnik* Appeal Judgement paras 749-750.

[2826] See *supra*, para. 940

[2827] See *infra*, Section XX.E.

D. Prosecution's second ground of appeal: Đorđević's sentence of 27 years is manifestly inadequate

1. Arguments of the parties

959. The Prosecution submits that the Trial Chamber erred in the exercise of its discretion by imposing a sentence that failed to reflect the seriousness of the crimes and Đorđević's role and degree of participation.[2828] It argues that the sentence is manifestly inadequate and requests that a life sentence be imposed by the Appeals Chamber upon Đorđević.[2829]

960. The Prosecution contends that the crimes committed in the implementation of the JCE were systematic in nature, massive in scale, and ranged over a broad geographical and temporal scope.[2830] It further argues that the crimes were particularly heinous because they were based on ethnic intolerance and, moreover, were committed in an "exceptionally cruel" manner.[2831] In addition to the hundreds of thousands of Kosovo Albanians who were forcibly transferred from their homes,[2832] the Prosecution highlights the murders of 724 unarmed men, women, and children.[2833] The Prosecution asserts that the resulting impact of these crimes is grave and, for those who survived the violence, includes physical, psychological, social, and economic suffering.[2834]

961. The Prosecution argues that Đorđević's crucial high-level government positions gave him both *de jure* and *de facto* powers to coordinate MUP operations in Kosovo and exercise effective control over the primary perpetrators of crimes.[2835] Furthermore, Đorđević acted in dereliction of his duties when he orchestrated the secret disinterment, transportation, and re-burial of Kosovo Albanians in Serbia.[2836]

[2828] Prosecution Appeal Brief, paras 59, 96.
[2829] Prosecution Appeal Brief, paras 59, 75, 96-97.
[2830] Prosecution Appeal Brief, paras 57, 60, 62.
[2831] Prosecution Appeal Brief, paras 64-65. The Prosecution provides three examples illustrating the particularly heinous nature of the crimes (Prosecution Appeal Brief, paras 68-74).
[2832] Prosecution Appeal Brief, paras 58, 61.
[2833] Prosecution Appeal Brief, para. 61, referring to Trial Judgement, paras 1715, 1717, 1728, 1731.
[2834] Prosecution Appeal Brief, para. 75.
[2835] Prosecution Appeal Brief, para. 83. The Prosecution cites examples of how Đorđević's used his high-level government positions as Head of the RJB and an Assistant Minister of the Interior to further the JCE. Đorđević integrated a notorious paramilitary group, the Scorpions, into the SAJ, and then later had them removed from the jurisdiction after they murdered 14 women and children, therefore protecting the unit from investigation. Additionally, Đorđević was a member of both the MUP Collegium and the Joint Command, whereby he met regularly with other members to plan the MUP and VJ actions in Kosovo (Prosecution Appeal Brief, paras 83-86).
[2836] Prosecution Appeal Brief, para. 87. Đorđević played a key role in creating clandestine operations to transport Kosovo Albanian corpses to mass gravesites at the Batajnica SAJ Centre and Petrovo Selo PJP Centre (Prosecution Appeal Brief, paras 89, 91).

962. The Prosecution notes that the Trial Chamber considered the sentences imposed in the case of *Milutinović et al.* when determining Đorđević's sentence.[2837] It asserts that if the Appeals Chamber were to increase the sentences in that case, it should also increase Đorđević's sentence in order to "maintain the relationship to those sentences".[2838]

963. Đorđević responds that the Prosecution's ground of appeal should be dismissed in its entirety.[2839] He asserts that the request itself is not consonant with the principles of sentencing in IHL[2840] and that the Appeals Chamber does not possess the power to increase a sentence when there is no right of further appeal.[2841] Further, he submits that the Prosecution failed to show any error or abuse in the Trial Chamber's sentencing discretion.[2842] Rather, he states that the Prosecution merely highlights findings of fact that the Trial Chamber considered when determining the sentence.[2843]

964. Đorđević also contends that the Prosecution's argument to increase the sentence based upon the seriousness of the crimes does not "appreciate" all the factors the Trial Chamber considered when determining his sentence.[2844] He further asserts that by requesting a life sentence on appeal, the Prosecution does not bear in mind that the Trial Chamber is required to tailor a sentence based on the individual circumstances of the accused.[2845] Furthermore, the sentence of 27 years reflects a "very serious sentence".[2846]

965. As to his alleged role in the JCE, Đorđević insists that the Prosecution made "incorrect assertions", particularly in reference to: his authority to the RJB; his knowledge of the crimes being committed by the MUP; his inclusion in the MUP Collegium and Joint Command; the facts of the Podujevo incident; and, the facts of the concealment of the bodies.[2847] Đorđević reiterates that he was found not to have planned or ordered any of the crimes, nor was he a direct perpetrator.[2848] He further maintains that the Trial Chamber found that his primary criminal liability lies in his

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[2837] Prosecution Appeal Brief, para. 94, referring to Trial Judgement, para. 2227 (stating that in the *Milutinović et al.* case, five of the accused were found guilty for their differing roles in some of the same offences for which Đorđević was charged. The Trial Chamber determined that Đorđević's role was more significant than that of the accused in the *Milutinović et al.* case and, therefore, deserved a higher sentence than the sentences imposed in that case).
[2838] Prosecution Appeal Brief, para. 94.
[2839] Đorđević Response Brief, para. 81.
[2840] Đorđević Response Brief, paras 76, 78.
[2841] Đorđević Response Brief, para. 4.
[2842] Đorđević Response Brief, para. 60.
[2843] Đorđević Response Brief, paras 59, 63, citing *D. Milošević* Appeal Judgement, para. 323.
[2844] Đorđević Response Brief, para. 69.
[2845] Đorđević Response Brief, para. 69, referring to *D. Milošević* Appeal Judgement, para. 327.
[2846] Đorđević Response Brief, paras 68-69.
[2847] Đorđević Response Brief, para. 72.
[2848] Đorđević Response Brief, para. 74 (citations omitted), referring to Trial Judgement, paras 2167-2168, 2213.

participation in a joint criminal enterprise with other Serbian leaders and authority figures and that holding a position of authority does not itself require a harsher sentence.[2849]

966. Finally, Đorđević challenges the Prosecution's "peremptory call for a raise of sentence based on a contingent raise of sentence(s)" in the case of *Milutinović et al.*[2850] He submits that any increase in sentence should be made only at trial, with an available review mechanism, and only based on facts presented to that trier of fact.[2851]

967. The Prosecution replies that the Appeals Chamber may increase a sentence without further appellate review.[2852] Moreover, the Prosecution contends that it can use the Trial Chamber's findings on both the gravity of the crimes and Đorđević's role to demonstrate the manifest inadequacy of the present sentence.[2853] Finally, the Prosecution states that Đorđević fails to rebut its arguments and refutes Đorđević's challenge of assertions made in the Prosecution Appeal Brief.[2854]

2. Analysis

968. At the outset, the Appeals Chamber recalls that a discernible error may be found with respect to a trial chamber's determination of the sentence even where the factual findings of a case are left undisturbed.[2855]

969. The Trial Chamber correctly noted that the gravity of an offence is a primary consideration in the determination of a sentence.[2856] It further remarked that a trial chamber may consider the nature of the crime, the scale and brutality of the crime, the role of the accused, and the overall impact of the crime upon the victims and their families.[2857]

[2849] Đorđević Response Brief, para. 74. See Đorđević Appeal Brief, paras 407-411.
[2850] Đorđević Response Brief, para. 80, referring to Prosecution Appeal Brief, para. 94.
[2851] Đorđević Response Brief, para. 80.
[2852] Prosecution Reply Brief, para. 1, referring to Article 25 of the Statute. The Prosecution also provides examples of cases where the Appeals Chamber has increased sentences: *Galić* Appeal Judgement, p. 185 (disposition); *Krnojelac* Appeal Judgement, para. 264; *Aleksovski* Appeal Judgement, para. 186, p. 80 (disposition) (Prosecution Reply Brief, para. 1).
[2853] Prosecution Reply Brief, para. 26, referring to *D. Milošević* Appeal Judgement, para. 297, *Galić* Appeal Judgement, para. 455.
[2854] Prosecution Reply Brief, paras 28-29. See also Prosecution Reply Brief, paras 31-32.
[2855] See *Galić* Appeal Judgement, para. 455 (stating that "[a]lthough the Trial Chamber did not err in its factual findings and correctly noted the principles governing sentencing, it committed an error in finding that the sentence imposed adequately reflects the level of gravity of the crimes committed by Galić and his degree of participation").
[2856] Trial Judgement, para. 2207, referring to *M. Nikolić* Judgement on Sentencing Appeal, para. 11; *Aleksovski* Appeal Judgement, para. 182; *Čelebići* Appeal Judgement, para. 731; *Kupreškić et al.* Appeal Judgement, para. 442; *Jelisić* Appeal Judgement, para. 101; *Blaškić* Appeal Judgement, para. 683.
[2857] Trial Judgement, para. 2207, referring to *Rajić* Sentencing Judgement, paras 83-95. See *Aleksovski* Appeal Judgement, para. 182; *Blaškić* Appeal Judgement, para. 683.

970. The Trial Chamber considered that the common plan of the JCE to alter the ethnic balance of Kosovo was implemented through a "systematic campaign of terror and violence" and found that the crimes committed in furtherance of such plan were grave.[2858] In doing so it considered the violent and peremptory manner in which the Serbian forces attacked the Kosovo Albanian villages, the hardship, deprivation, and harassment suffered by the Kosovo Albanians who were expelled from their homes, as well as the beatings, ill treatment, and killing of men, women and children.[2859]

971. The Trial Chamber determined the crimes had significant and, at times, irreparable consequences for the victims.[2860] It deemed these to be "absolute" for the hundreds of victims who lost their lives, while those who survived were left to cope with the loss of loved ones.[2861] It weighed not only the physical violence endured by Kosovo Albanians, but also the considerable mental and financial suffering.[2862] The Appeals Chamber is satisfied that the Trial Chamber duly considered the gravity of the crimes committed and therefore finds that the Prosecution fails to show that the Trial Chamber erred in its assessment of the seriousness of said crimes.

972. As for Đorđević's role and participation in the commission of the crimes, the Appeals Chamber recalls that a trial chamber may consider a person's position of authority in assessing the gravity of offence, and the assigned sentence should reflect the perpetrator's degree of responsibility for those crimes committed.[2863] The Appeals Chamber notes that the Trial Chamber found that besides Slobodan Milošević and Stoljijković, no other member of the JCE "made a more

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[2858] Trial Judgement, paras 2210, 2212.

[2859] Trial Judgement, para. 2212. The Trial Chamber found that Serbian forces expelled Kosovo Albanians, often by way of violence. Kosovo Albanians would leave their homes out of sheer fear for their lives. As a result, many Kosovo Albanians were displaced within Kosovo, or were forced to cross the borders to Albania, FYROM or Montenegro. During this forced migration across the borders, Serbian forces subjected Kosovo Albanians to harassment, beatings, and killings. In consequence of this conduct by Serbian forces, Kosovo Albanians endured great hardship and deprivation. The Trial Chamber also took into consideration that some 724 Kosovo Albanian residents were murdered and hundreds of thousands were displaced within Kosovo or across the borders. The typical method of achieving these ends was by Serbian forces attacking predominantly Kosovo Albanian neighborhoods, villages, and towns using tanks and other heavy weaponry. Then, after the VJ shelled these areas, MUP forces would enter and drive out the residents from their homes and set fire to houses and other buildings. In some cases, Serbian forces would destroy or damage mosques and other culturally significant sites. Additionally, the Trial Chamber considered that on multiple occasions, Serbian forces – particularly the PJP and SAJ – would separate the male residents from the women and children, then abuse the males before eventually killing them. At times, Serbian forces also killed women and children (Trial Judgement para. 2212).

[2860] Trial Judgement, para. 2215. See also Trial Judgement, para. 2212.

[2861] Trial Judgement, para. 2215.

[2862] Trial Judgement, para. 2215.

[2863] *Strugar* Appeal Judgement, para. 353; *Naletilić and Martinović* Appeal Judgement, paras 609-613, 625-626; *Musema* Appeal Judgement, paras 382-383; *Krajišnik* Appeal Judgement, para. 774; *Nahimana et al.* Appeal Judgement, para. 1038; *Limaj et al.* Appeal Judgement, para. 133; *Galić* Appeal Judgement, para. 409; *Stakić* Appeal Judgement, paras 375, 380; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 18; *Munyakazi* Appeal Judgement, para. 185.

crucial contribution to the achievement of its objective" than Đorđević.[2864] It also took into account Đorđević's command over MUP forces (who were the principal perpetrators of the crimes), his leading role in the efforts to conceal the crimes, and his failure to report and investigate crimes committed by the MUP forces.[2865] Thus, the Appeals Chamber is satisfied that the Trial Chamber sufficiently considered Đorđević's role and degree of participation in the crimes and finds that the Prosecution fails to show that the Trial Chamber erred in its assessment.

973. The Appeals Chamber also notes that the Trial Chamber correctly took into consideration the sentences imposed in other cases before this Tribunal, including the *Milutinović et al.* case.[2866] The Appeals Chamber however finds that a change in the sentencing in the *Milutinović et al.* case cannot show an error on the part of the Trial Chamber's exercise of its discretion, since each case is to be examined on its own facts.[2867]

974. As a final point, the Appeals Chamber notes that a sentence of 27 years imprisonment is "a very serious sentence", especially in light of Đorđević's age[2868] and considers it to be reflective of the grave crimes for which Đorđević is responsible. Additionally, contrary to the Prosecution's submission,[2869] the Appeals Chamber is satisfied that the sentence mirrors the outrage of the international community and is sufficient to act as a deterrent for other similar crimes in the future. Therefore, the sentence is not manifestly inadequate.

3. Conclusion

975. Accordingly, the Appeals Chamber finds that the Prosecution has failed to show that the Trial Chamber erred in the exercise of its discretion by imposing a manifestly inadequate sentence. The Appeals Chamber dismisses the Prosecution's second ground of appeal.

[2864] Trial Judgement, para. 2211. The Trial Chamber noted that Đorđević was not the physical perpetrator of the crimes; rather, his liability was based on his participation in the JCE, the purpose of which was to alter the ethnic balance of Kosovo (Trial Judgement, para. 2213).

[2865] Trial Judgement, paras 2210, 2211, 2214.

[2866] Trial Judgement, para. 2227.

[2867] See *Munyakazi* Appeal Judgement, para. 186.

[2868] See *Krajišnik* Appeal Judgement, para. 782. The Appeals Chamber observes that Đorđević was 62 years old when he was sentenced to a term of 27 years imprisonment. If he serves his entire term, and taking into consideration his time served, he will be 85 years old upon release (see Đorđević Response Brief, para. 68).

[2869] Prosecution Reply Brief, para. 31.

E. Impact of the Appeals Chamber's findings on Đorđević's sentence

976. The Appeals Chamber recalls that, by granting the Prosecution's first ground of appeal, it has found Đorđević responsible for persecutions through the sexual assault of five women as a crime against humanity (Count 5) pursuant to the third category of joint criminal enterprise.[2870]

977. The Appeals Chamber also recalls that, as a consequence of the arguments raised in relation to Đorđević's thirteenth and sixteenth grounds of appeal, it has overturned the Trial Chamber's findings concerning Đorđević's responsibility for committing the crimes of: (i) deportation as a crime against humanity (Count 1) from Kladernica/Klladërnicë in Srbica/Skënderaj municipality between 12 and 15 April 1999, Suva Reka/Suharekë town between 7 and 21 May 1999, Peć/Pejë on 27 and 28 March 1999, and Kosovska Mitrovica/Mitrovicë on 4 April 1999;[2871] (ii) other inhumane acts (forcible transfer) as a crime against humanity (Count 2) in relation to Brocna/Burojë and Tušilje/Tushilë, in Srbica/Skënderaj municipality between 25 and 26 March and on 29 March 1999, respectively, and Čuska/Qyushk, in Peć/Pejë municipality, on 14 May 1999;[2872] (iii) murder as a violation of the law or customs of war and a crime against humanity (Counts 3 and 4) of the two elderly Kosovo Albanian men at Podujevo/Podujevë town in Podujevo/Podujevë municipality on 28 March 1999, and of the nine men in Mala Kruša/Krusë-e-Vogël on 25 March 1999;[2873] (iv) persecutions as a crime against humanity (Count 5) through: (a) murder based on the killings of the two elderly men at Podujevo/Podujevë town, in Podujevo/Podujevë municipality on 28 March 1999, and the nine men in Mala Kruša/Krusë-e-Vogël, in Orahovac/Rahovec municipality on 25 March 1999;[2874] (b) deportation from Peć/Pejë on 27 and 28 March 2009, from Kosovska Mitrovica/Mitrovicë on 4 April 2009, from Kladernica /Klladërnicë, in Srbica/Skënderaj municipality between 12 and 15 April 1999, and from Suva Reka/Suharekë town between 7 and 21 May 1999;[2875] and (c) other inhumane acts (forcible transfer) at Brocna/Burojë and Tušilje/Tushilë, in Srbica/Skënderaj municipality between 25 and 26 and on 29 March 1999, respectively, and Čuska/Qyushk, in Peć/Pejë municipality, on 14 May 1999.[2876]

978. As a consequence of Đorđević's arguments raised in his eighteenth ground of appeal, the Appeals Chamber has also overturned all the Trial Chamber's findings concerning Đorđević's

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[2870] See *supra*, para. 929.
[2871] See *supra*, paras 541-542, 695-696.
[2872] See *supra*, paras 695-696.
[2873] See *supra*, paras 695-696.
[2874] See *supra*, paras 695-696.
[2875] See *supra*, paras 541-542, 695-696.
[2876] See *supra*, paras 695-696.

responsibility for aiding and abetting the crimes of deportation (Count 1), other inhumane acts (forcible transfer) (Count 2), murder (Count 3), and persecutions (through deportation, forcible transfer, murder, and destruction of religious or culturally significant property) (Count 5), as crimes against humanity; and murder (Count 4), as a violation of the laws or customs of war.[2877]

979. The Appeals Chamber further recalls that it has found that the Trial Chamber committed a discernable error when it considered Đorđević's position of authority as an aggravating factor, rather than the abuse of such position.[2878]

980. In light of the above, the Appeals Chamber finds that a reduction in Đorđević's sentence is appropriate. In particular, the Appeals Chamber considers that the convictions entered by the Trial Chamber which have now been overturned on appeal, outweigh the new convictions entered by the Appeals Chamber – not only in terms of number of victims but also by way of Đorđević's level of responsibility.[2879] By this, however, the Appeals Chamber by no means intends to suggest that the crimes for which Đorđević has been convicted on appeal are not grave. Considering the foregoing, and in the circumstances of this case, including Đorđević's age, the Appeals Chamber reduces his sentence by 9 years and imposes a sentences of 18 years' imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period already spent in detention.

[2877] See *supra*, para. 834.
[2878] See *supra*, paras 940, 958.
[2879] The Appeals Chamber notes in respect of the new convictions that Đorđević has been found criminally responsible on the basis of the third category of joint criminal enterprise.

XXI. DISPOSITION

981. For the foregoing reasons, **THE APPEALS CHAMBER,**

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the appeal hearing of 13 May 2013;

SITTING in open session;

WITH RESPECT TO ĐORĐEVIĆ'S APPEAL:

GRANTS Đorđević's Thirteenth Ground of Appeal, and **REVERSES** his convictions for deportation (Count 1) and persecutions through deportation (Count 5) with respect to the displacements of individuals to Montenegro from Peć/Pejë on 27 and 28 March 1999, and from Kosovska Mitrovica/Mitrovicë on 4 April 1999;

GRANTS, in part, Đorđević's Sixteenth Ground of Appeal, and **REVERSES** his convictions, in so far as they relate to:

- Deportation (Count 1) at Kladernica/Klladërnicë, in Srbica/Skenderaj municipality, between 12 and 15 April 1999 and Suva Reka/Suharekë town, between 7 and 21 May 1999;
- Other inhumane acts (forcible transfer) (Count 2) at Brocna/Burojë and Tušilje/Tushilë, in Srbica/Skenderaj municipality between 25 and 26 March and on 29 March 1999, respectively and Čuska/Qyushk, in Peć/Pejë municipality, on 14 May 1999;
- Murder, as a crime against humanity and as a violation of the laws or customs of war (Counts 3 and 4), of the two elderly men at Podujevo/Podujevë town, in Podujevo/Podujevë municipality, on 28 March 1999 and of nine men at Mala Kruša/Krusë-e-Vogël, in Orahovac/Rahovec municipality, on 25 March 1999;
- Persecutions (Count 5) committed through:
  - deportation at Kladernica/Klladërnicë, in Srbica/Skenderaj municipality, between 12 and 15 April 1999 and Suva Reka/Suharekë town, between 7 and 21 May 1999;
  - forcible transfer at Brocna/Burojë and Tušilje/Tushilë, in Srbica/Skenderaj

municipality between 25 and 26 March and on 29 March 1999, respectively and Čuska/Qyushk, in Peć/Pejë municipality, on 14 May 1999; and

- murder of the two elderly men at Podujevo/Podujevë town, in Podujevo/Podujevë municipality, on 28 March 1999 and of nine men at Mala Kruša/Krusë-e-Vogël, in Orahovac/Rahovec municipality, on 25 March 1999; and

GRANTS, in part, Đorđević's Eighteenth Ground of Appeal, **REVERSES** his convictions for Counts 1 to 5 on the basis of aiding and abetting, and consequently **DECLARES MOOT** Đorđević's Eleventh Ground of Appeal;

GRANTS, in part, Đorđević's Nineteenth Ground of Appeal and finds that the Trial Chamber erred in considering Đorđević's position of authority as an aggravating factor;

DISMISSES the remainder of Đorđević's appeal, Judge Güney dissenting with respect to Đorđević's Seventeenth Ground of Appeal, in part, and Judge Tuzmukhamedov dissenting with respect to Đorđević's Sub-Grounds 9(E), (F), and (G), and, in part, Twelfth, Fifteenth, and Seventeenth Grounds of Appeal;

AFFIRMS all other convictions pursuant to Counts 1 to 5;

WITH RESPECT TO THE PROSECUTION'S APPEAL:

GRANTS, Judge Güney and Judge Tuzmukhamedov dissenting in part, the Prosecution's First Ground of Appeal, and **FINDS** Đorđević guilty, pursuant to Articles 5 and 7(1) of the Statute, of the crime of persecutions through sexual assaults as a crime against humanity (Count 5), pursuant to the third category of joint criminal enterprise, in relation to the sexual assaults of Witness K20 and the other two young women in Beleg, Witness K14, and the Kosovo Albanian girl in a convoy, and **REVISES** Đorđević's conviction with respect to Count 5 accordingly;

DISMISSES the Prosecution's Second Ground of Appeal;

SETS ASIDE the sentence of 27 years of imprisonment and **IMPOSES** a sentence of 18 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period already spent in detention;

ORDERS, in accordance with Rules 103(C) and 107 of the Rules, that Đorđević is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where

his sentence will be served.

Judge Güney appends a Partially Dissenting and Separate Opinion.

Judge Tuzmukhamedov appends a Dissenting Opinion.

Done in English and French, the English text being authoritative.

Judge Carmel Agius, Presiding

Judge Patrick Robinson

Judge Mehmet Güney

Judge Khalida Rachid Khan

Judge Bakhtiyar Tuzmukhamedov

Dated this 27th day of January 2014,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

XXII. PARTIALLY DISSENTING AND SEPARATE OPINION OF JUDGE MEHMET GÜNEY

1. I respectfully disagree with the following conclusions contained in the Appeal Judgement: (i) upholding the finding that the killing of 281 Kosovo Albanians during the Operation Reka amounted to murder as a crime against humanity;[1] (ii) entering new convictions on appeal regarding the crime of persecution through sexual assaults.[2] I would also like to file a separate opinion regarding the Appeals Chamber's conclusions: (i) that the Trial Chamber was not required to examine the individual actions or scrutinize the intent of the other JCE members;[3] (ii) the dismissal of Đorđević's submissions regarding cumulative convictions under Article 5 of the Statute.[4]

1. The Killing of 281 Kosovo Albanians during Operation Reka

2. The Trial Chamber found that 281 Kosovo Albanians were shot and killed by Serbian forces in Meja/Mejë in Đakovica/Gjakovë municipality as part of a large coordinated joint MUP and VJ operation known as "Operation Reka" on 27-28 April 1999.[5] It based its conclusion on the following evidence: (i) that the bodies were buried in mass graves in Batajnica SAJ Center;[6] (ii) that the victims were wearing civilian clothes at the time of their death;[7] that they had been killed by gunshot wounds.[8] The Majority upholds this finding on the basis that: (i) the Trial Chamber found that there was no evidence of fighting between Serbian forces and the KLA in the area at the time of these events in Meja/Mejë, "save for a short unplanned fire fight in the village of Ramoc on 27 April 1999 between four KLA fighters and members of a VJ unit";[9] (ii) there was evidence that a large number of men in Meja/Mejë were forced to join a convoy and many of them were subsequently shot;[10] (iii) it was reasonable for the Trial Chamber to dismiss Đorđević's arguments

[1] Appeals Judgement, para. 772.
[2] Appeals Judgement, para. 981.
[3] Appeals Judgement, paras. 138-144.
[4] Appeals Judgement, para. 843.
[5] Trial Judgement, paras. 1738-1739.
[6] Trial Judgement, para. 991.
[7] Trial Judgement, para. 990.
[8] Trial Judgement, para. 991.
[9] Trial Judgement, paras. 980, 1739. The Trial Chamber also considered Đorđević's contention that the actions of the Serbian forces were directed against Kosovo Albanian terrorists but found that there was no evidence to suggest that those killed had participated or were participating in terrorist activities (Trial Judgement, para. 1739).
[10] Trial Judgement, paras. 958, 961, 967-979, 985-995, 1738.

that the Serbian forces directed their actions against terrorist activities based on the forensic evidence that the exhumed victims were wearing civilian clothing.[11]

3. I respectfully disagree with this conclusion. As noted by the Majority, in the context of establishing criminal responsibility, the burden to prove that the victims were civilians or hors de combat at the time of their deaths lied with the Prosecution.[12] In my view, the circumstances surrounding the death of those individuals remain in the sphere of speculation.[13] In my view, the circumstantial evidence relied upon to conclude that all 281 victims were civilians or combatants *hors de combat* allows for other alternative conclusions, and therefore the one reached by the Trial Chamber was not the only reasonable inference.

4. Indeed, as convincingly argued by my Colleague Judge Tuzmukhamedov in his dissenting opinion, in light of the evidence that (i) the victims exhumed from that mass grave were males who originated from Đakovica/Gjakova;[14] and (ii) that it was acknowledged that the Albanian paramilitary fighters were hiding within the civilian population, wearing civilian clothes, which was a tactic adopted by the KLA throughout the conflict,[15] I believe that it was reasonably open to a trial chamber, in its application of the correct legal standard, to conclude that in absence of other evidence in this regard, the 281 victims in question buried in the Batajnica mass grave could have been legitimate military targets at the time of their death. I would have therefore reversed the convictions in relation to these victims.

2. <u>New Convictions on Appeal related to the Crime of Persecution through Sexual Assaults</u>

5. The Trial Chamber acquitted Đorđević of the crime of persecution through sexual assaults as a crime against humanity as charged in the Indictment due to lack of evidence of discriminatory intent necessary as a basis for persecution.[16] The Appeals Chamber, by majority, grants the

[11] Appeals Judgement, para. 771.
[12] Appeals Judgement, para. 522, citing *D. Milošević* Appeal Judgement, para. 60; *Kordić and Čerkez*, Appeal Judgement, para. 48, referring to *Blaškić* Appeal Judgement, para. 111.
[13] The Trial Chamber relies on (i) the forensic reports of 109 of the 281 exhumed victims concluding that the victims died following gunshot wounds; (ii) that 15 victims also exhumed in Batajnica mass grave were killed by Serbian forces after having been removed from their homes and shot. *See* Trial Judgement, paras. 955-962, 1735-1737.
[14] Trial Judgement, para. 990. Except for two victims that were identified as being female.
[15] Trial Judgement, para. 944. I note in particular that evidence to the effect that 200 KLA combatants were posing as displaced persons in villages in this area.
[16] Trial Judgement, paras. 1791-1797, 2230. Indictment, para. 77 (c).

Prosecution ground of appeal and reverses the acquittals.[17] I note that the same approach was preferred by majority in the corresponding *Šainović et al.* case.[18]

6. I maintain my position taken in the *Šainović et al.* case that, considering the charges and the circumstances of this case, those convictions should not be entered on appeals. Indeed, the Appeals Chamber is endowed with the discretion to enter or not new conviction in the verdict on appeals, and I believe that, in the circumstances of this case, those convictions should be noted, but not entered as new convictions.[19] I, therefore, respectfully disagree with the majority on this issue.

3. Cumulative Convictions Regarding Article 5

7. As I have stated several times in the past, I maintain my position that a conviction for persecution, a crime against humanity pursuant to Article 5 of the Statute, cannot be cumulative to another conviction under Article 5 of the Statute, if both convictions are based on the same criminal conduct.[20] However, I also accept that it is now part of the applicable jurisprudence of this Tribunal, and will not formally dissent from the Appeals Chamber conclusion upholding the Trial Chamber entering convictions based on the same acts for the crimes of deportation, other inhuman acts (forcible transfer), murder and persecutions under Article 5 of the Statute.[21]

4. Other JCE Members

8. The Appeals Chamber concluded that "the Trial Chamber was not required to examine the individual actions or scrutinize the intent of each member of the JCE."[22] While I agree that this principle has been consistently applied by the Tribunal, I believe that, in the circumstances of this case, the results are regrettable and could have been avoided.

9. First, I consider the *Milutinović et al.* case file to have been very different, and presumably more complete, regarding some of those "other JCE members", including Lazarević and Ojdanić, than the case file before the *Đorđević* Trial Chamber. One cannot expect Đorđević to have presented the same defense evidence filed by Lazarević and Ojdanić in their own trials. This

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[17] Appeals Judgement, paras. 929, 981.
[18] *Šainović et al.* Appeal Judgement, para. 600.
[19] See *Šainović et al.* Appeal Judgement, para. 1604.
[20] *See Kordić and Čerkez* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, *Stakić* Appeal Judgement, Opinion dissidente du Juge Güney sur le cumul de déclarations de culpabilité, *Naletilić and Martinović* Appeal Judgement, Opinion dissidente conjointe des Juges Güney et Schomburg sur le cumul de déclarations de culpabilité, *Nahimana et al.* Appeal Judgement, Partly Dissenting Opinion of Judge Güney.
[21] Appeal Judgement, para. 846.

situation, in my view, led inevitably the two trial chambers to reach different conclusions different results.

10. In my view, the fact that the *Đorđević* Trial Chamber was not obliged to "scrutinize" the *actus reus* and *mens rea* of the other JCE members, can lead to the following regrettable consequences: (i) following an assessment of the evidence concerning the *mens rea* and *actus reus*, Lazarević/Ojdanić were acquitted for crimes related to the JCE in their own trials;[23] on the other hand (ii) the *Đorđević* Trial Chamber reached a finding "out of reasonable doubt" that Lazarević and Ojdanić were members of the JCE, but without having to legally and explicitly assess whether Lazarević/Ojdanić had the requisite *mens rea* and *actus reus*;[24] (iii) Đorđević can be held criminally responsible for the acts perpetrated by Lazarević/Ojdanić for which they themselves were found not guilty after a trial chamber scrutinised their *mens rea* and *actus reus*. I therefore agree with the submissions of Đorđević that this amounts to applying a double standard.

11. In order to avoid this situation, at least within the jurisdiction of this Tribunal, I believe it would have been advisable for the *Đorđević* Trial Chamber to take into account the findings of the *Milutinović et al* Trial Chamber. In my view, though not bound by the findings of the *Milutinović et al.* Trial Chamber, the *Đorđević* Trial Chamber was not precluded from considering them either. And, indeed, for obscure reasons, it, at times, did.[25] I believe it would have been fair to rule on this issue prior to the commencement of the trial and maintain a consistent approach towards the *Milutinović et al.* Trial Judgement, so to ensure consistency throughout the *Đorđević* Trial Judgement and to avoid potential unnecessary contradictions within the ICTY jurisdiction. However, since the ultimate finding is whether Đorđević acted in concert with *others*, the acquittals of Lazarević and Ojdanić do not undermine the Trial Chamber conclusion.

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[22] Appeal Judgement, paras. 138.
[23] See *Milutinović et al* Trial Judgement, vol. 3, paras. 1209, 1211.
[24] Trial Judgement, para. 2127.
[25] For instance, *see* Trial Judgement, para. 2120 where the Trial Chamber specifically refrained from making findings "about the involvement or knowledge of General Streten Lukić in the concealement of bodies." It noted that Lukić was before the Tribunal regarding the same events and his appeal was pending. *See also* Trial Judgement, para. 2211 where the Trial Chamber also considered the *Milutinović et al* case Judgement as a whole and opined that "no other member of the joint criminal enterprise [other than Đorđević] made a more crucial contribution to the achievement of its objective."

Done in English and French, the English text being authoritative.

Judge Mehmet Güney

Done this 27th day of January 2014 at The Hague, The Netherlands.

[Seal of the Tribunal]

XXIII. DISSENTING OPINION OF JUDGE TUZMUKHAMEDOV

A. Introduction

1. In this Judgement, the Appeals Chamber upholds Đorđević's convictions, pursuant to JCE I, for deportation, other inhumane acts (forcible transfer), murder, and persecutions (through deportation, forcible transfer, murder, and destruction of or damage to property of cultural and religious significance) as crimes against humanity, as well as murder as a violation of the laws and customs of war.[1] Furthermore, the Majority finds that the Trial Chamber erred in acquitting Đorđević of persecutions through sexual assaults as crimes against humanity, committed by Serbian forces against five Kosovo Albanian women, and enters new convictions against him for these crimes pursuant to JCE III.[2]

2. I respectfully disagree in part with the Majority's reasoning and conclusions regarding Đorđević's contribution to the common plan. Moreover, I consider that certain underlying crimes of murder as crimes against humanity and violations of the laws or customs of war and persecutions through the destruction of or damage to religious property as crimes against humanity could not have been reasonably attributed to Đorđević. I also cannot agree with the Majority that there is a sufficient basis to hold Đorđević responsible for persecutions though sexual assaults as crimes against humanity.

B. Đorđević's contribution to the common plan

3. For the following reasons, I take issue with the Majority's reasoning and conclusions in relation to the allegations that Đorđević contributed to the common plan, thus incurring criminal liability pursuant to JCE, through his involvement in the deployment of paramilitary units to Kosovo and help in the concealment of crimes of Serbian forces.

1. Deployment of paramilitaries

4. In assessing Đorđević's participation in the common plan, the Trial Chamber found that he contributed to the deployment of paramilitary units to Kosovo in 1999.[3] In this context, the Trial Chamber observed that, in February 1999, Đorđević "acted to implement a decision to engage

[1] See Appeal Judgement, paras 458-462, p. 381.
[2] See Appeal Judgement, paras 846-929, p. 381.
[3] Trial Judgement, para. 2155.

volunteers and paramilitary units by sending a dispatch to all SUPs in Serbia requesting them to establish complete control over volunteer and paramilitary units and their members".[4] It further considered that Đorđević was personally and directly involved in the incorporation of members of the Scorpions into the MUP reserve force, their formal attachment to the SAJ, and their deployment to Podujevo/Podujevë in March 1999, and that Đorđević subsequently authorized the re-deployment of members of the same unit to Kosovo.[5]

5. The Majority dismisses Đorđević's challenges to these findings in their entirety.[6] I respectfully disagree with this decision because in my view the Majority has not paid sufficient attention to the fact that the question of whether Đorđević made a significant contribution to the common plan through his involvement in the deployment of paramilitaries to Kosovo should be resolved in light of the Tribunal's jurisprudence on imputing liability to JCE members for crimes committed by non-JCE members. In the following, I will first briefly recall this jurisprudence and explain why it is pertinent to the allegations against Đorđević. I will then specifically address whether a reasonable trier of fact could have concluded that Đorđević was involved in the deployment of paramilitary units (other than the Scorpions) to Kosovo and that he significantly contributed to the common plan by deploying and re-deploying the Scorpions.

(a) General observations: contribution to a common plan by deploying non-JCE members

6. The JCE doctrine demands that the accused make a significant contribution to the crimes for which he is convicted.[7] The Trial Chamber made no finding that the paramilitary units operating in Kosovo during the Indictment period were members of the JCE.[8] In my view, this fact is crucial to the assessment of whether the Trial Chamber could have reasonably concluded that Đorđević significantly contributed to the common plan through his involvement in the deployment of paramilitaries. I submit that for such a conclusion to stand, it had to be shown that: (i) paramilitary units committed crimes which were attributable to the members of the JCE because the members "used" these units for the commission of crimes in furtherance of the common plan; and (ii) through his involvement in deploying the paramilitaries, Đorđević either personally "used" these units to commit crimes in furtherance of the common plan or contributed to such use in another significant way. Unless the first requirement was met, the conduct of paramilitaries in Kosovo at the relevant

[4] Trial Judgement, para. 2155.
[5] See Trial Judgement, para. 2155. See also *ibid.*, paras 1934-1943, 1953.
[6] See Appeal Judgement, paras 351-371.
[7] See, *e.g.*, *Krajišnik* Appeal Judgement, para. 215; *Brđanin* Appeal Judgement, para. 430.
[8] See Trial Judgement, paras 2126-2128. See also *ibid.*, paras 191-216.

time had no tangible effect on the accomplishment of the common plan and, for this reason alone, could not have been relevant to Đorđević's liability pursuant to JCE. If the second requirement was not fulfilled, it could not have been reasonable for the Trial Chamber to conclude that Đorđević's significantly contributed to the common plan through his involvement in the deployment of paramilitaries to Kosovo.

7. According to the Tribunal's jurisprudence, crimes committed by non-members of the JCE may be imputed to all members of the JCE if at least one of them "used" the physical perpetrators to commit the crime in question and in doing so acted in accordance with the common plan.[9] The existence of this link must be assessed on a case-by-case basis.[10] Factors which may be taken into account in this respect include whether any JCE member closely co-operated with the principal perpetrators in order to further the common plan or whether the principal perpetrators knew of the existence of the JCE.[11] The requisite link can also follow from the fact that a JCE member explicitly or implicitly requested a non-JCE member to commit a crime, or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime.[12] In my opinion, this jurisprudence is also relevant to the question under which circumstances an accused, such as Đorđević, may be considered to have significantly contributed to the common plan through his involvement in operations of non-JCE members.

(b) Đorđević's involvement in the deployment of paramilitary units other than the Scorpions

8. Both the Trial Chamber's conclusions on Đorđević's participation in the common plan as previously set out and the Majority's reasoning in this Judgement create the impression that Đorđević was involved in the deployment of several paramilitary units to Kosovo during the Indictment period.[13] The underpinning evidence is Đorđević's dispatch of 18 February 1999, which

[9] See *Brđanin* Appeal Judgement, paras 413, 430. See also *Krajišnik* Appeal Judgement, paras 225, 235; *Martić* Appeal Judgement, paras 171-172.
[10] *Brđanin* Appeal Judgement, para. 413; *Krajišnik* Appeal Judgement, para. 226.
[11] *Brđanin* Appeal Judgement, para. 410.
[12] *Krajišnik* Appeal Judgement, para. 226. I further note that the authority and control of a JCE member over non-members of the JCE has been considered to be a primary factor in determining whether the crimes of non-members could be attributed to the members of the JCE. See *Krajišnik* Appeal Judgement, paras 238-282; *Martić* Appeal Judgement, paras 187, 192, 195, 200, 205, 210.
[13] See Trial Judgement, paras 2155, 2158; Appeal Judgement, para. 371 (concluding that the Trial Chamber reasonably found that Đorđević "was involved in, and aware of, the deployment of paramilitary units to Kosovo, including the deployment of the Scorpions to Podujevo/Podujevë, in concert with MUP and RJB forces, and that this formed part of his significant contribution to the JCE.") (internal citations omitted; emphasis added).

called for the need to "establish complete control over volunteer and paramilitary units and their members".[14]

9. I note that the Trial Chamber found that various paramilitary groups operated in Kosovo during the Indictment period.[15] It observed that such groups were "used" by the VJ and MUP,[16] that the MUP reserve forces "included" many members of paramilitary groups,[17] and that paramilitaries regularly "served" in Kosovo at the relevant time.[18] Specifically with respect to "Arkan's Tigers", the Trial Chamber noted that members of this paramilitary unit were attached to and thus "associated with" the RDB, and that they "played an active part" in joint operations of the MUP and VJ in Kosovo.[19] In relation to the "White Eagles", the Trial Chamber considered that this paramilitary unit was "associated" with the deputy prime minister of Serbia, Vojislav Šešelj, and that its members "participated in coordination" with the MUP in operations in Kosovo in 1999.[20] The Trial Chamber also observed that the paramilitary unit "Pauk Spiders" was "absorbed into the VJ".[21]

10. However, I cannot clearly discern from the reasoning in the Trial Judgement whether the paramilitary units in question were actually deployed as a result of Đorđević's dispatch of 18 February 1999.[22] The Trial Judgement further lacks any indication that Đorđević personally co-operated with the paramilitary units during the Indictment period, issued specific instructions to them regarding the commission of crimes, or had authority over such groups. Under these circumstances, I consider that the Trial Chamber failed to adequately explain why it considered that Đorđević made a significant contribution to the common plan through his involvement in the deployment of paramilitary units to Kosovo (other than the Scorpions).[23] Unfortunately, the Majority does not address this issue even though Đorđević advances arguments to that effect.[24] Instead, the Majority repeats the Trial Chamber's interpretation of Đorđević's dispatch of

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[14] See Trial Judgement, paras 195, 926, 1929 (fn. 6616), 2021, 2155; Appeal Judgement, paras 363, 367.
[15] See Trial Judgement, paras 195-216.
[16] Trial Judgement, paras 195-196.
[17] Trial Judgement, para. 196.
[18] Trial Judgement, para. 202.
[19] See Trial Judgement, paras 209-210.
[20] See Trial Judgement, paras 212, 214.
[21] Trial Judgement, para. 216.
[22] I note that the Trial Chamber concluded that Minister Stojiljković and Đorđević prepared for the inclusion of paramilitary units into MUP units in early 1999, and that Đorđević's dispatch of 18 February 1999 "was quite clearly an instruction to implement the Minister's order to 'engage volunteers'". See Trial Judgement, paras 196, 2021. See also *ibid.*, para. 1929, where the Trial Chamber found that Đorđević "had knowledge of, and shared in, an intention of the MUP to engage paramilitaries in anti-terrorist operations prior to the start of the war".
[23] See Trial Judgement, paras 2155, 2158.
[24] See Đorđević Appeal Brief, para. 234. See also Appeal Judgement, para. 364.

18 February 1999, refers to evidence on which the Trial Chamber relied in finding only that Đorđević was aware that paramilitaries operated in Kosovo in 1998 and 1999, and recalls conclusions in the Trial Judgement that paramilitary groups worked in concert with MUP units in Kosovo and that Đorđević deployed the Scorpions to Podujevo/Podujevë.[25]

(c) Đorđević's involvement in the deployment of the Scorpions

11. As indicated above, the Trial Chamber concluded that Đorđević made a significant contribution to the common plan by deploying members of the Scorpions to Podujevo/Podujevë on 28 March 1999 and re-deploying the Scorpions elsewhere in Kosovo shortly thereafter.[26] I recall my prior observation that the Trial Chamber made no finding that paramilitaries, including the Scorpions, which operating in Kosovo during the Indictment period were members of the JCE. Accordingly, it had to be established that the Scorpions or units to which they were attached committed crimes which were attributable to members of the JCE and that Đorđević either personally "used" these individuals to commit crimes in furtherance of the common plan or in another significant way contributed to such use.

12. The Trial Chamber concluded that the Scorpions killed 14 women and children in a courtyard in Podujevo/Podujevë on 28 March 1999 and convicted Đorđević pursuant to JCE I in relation to this event for murder as a violation of the laws and customs of war and as a crime against humanity.[27] It could be argued that this fact, taken together with the Trial Chamber's conclusion that Đorđević was personally and directly involved in the Scorpions' incorporation into the MUP reserve force, their formal attachment to the SAJ, and their deployment to Kosovo,[28] implies that, in the Trial Chamber's view, he "used" the Scorpions to commit the murders at Podujevo/Podujevë on 28 March 1999 or at least contributed to such use.

13. However, as Đorđević points out on appeal, there is no evidence that he gave orders to the Scorpions to commit crimes in Podujevo/Podujevë.[29] Rather, the Trial Chamber noted that *en route*

[25] See Appeal Judgement, paras 366-367.
[26] See Trial Judgement, paras 2155, 2158. In this context, it might be informative to recall that according to evidence before the Trial Chamber, the SAJ unit which operated in Podujevo/Podujevë on 28 March 1999 comprised, among other individuals, former members of the Scorpions. See, in particular, Trial Judgement, paras 1238, 1934-1945. The Trial Chamber further concluded that the Scorpions were subsequently re-deployed to Kosovo with Đorđević's approval. See Trial Judgement, paras 1946-1948.
[27] See Trial Judgement, paras 1243-1245, 1247-1252, 1750, 1944, 2155, p. 883. See also *ibid.*, para. 1258. I observe that the Appeals Chamber finds that the Trial Chamber erred in holding Đorđević responsible for the additional killing of two elderly men by Serbian forces in Podujevo/Podujevë on 28 March 1999 because these incidents were not properly pleaded in the Indictment. See Appeal Judgement, paras 659-661.
[28] See Trial Judgement, para. 2155.
[29] Đorđević Appeal Brief, para. 229; Đorđević Reply Brief, paras 69-70. See also Appeal Judgement, para. 353.

to Podujevo/Podujevë these individuals were tasked to "clear up" parts of the town.[30] The Trial Chamber further accepted that Đorđević was informed about the crimes perpetrated at Podujevo/Podujevë only after they were perpetrated.[31] While the Majority brushes these issues aside as irrelevant,[32] I consider them to be important because they call into question whether a reasonable trier of fact could have concluded that Đorđević acted in furtherance of the common plan when he decided to deploy the Scorpions to Podujevo/Podujevë.

14. Regarding the re-deployment of the unit to which the Scorpions were attached, I note that the Trial Chamber accepted that: (i) an on-site investigation into the killings at Podujevo/Podujevë was conducted on 30 March 1999;[33] (ii) the unit was initially withdrawn in light of what had happened at this location;[34] (iii) Đorđević ordered Živko Trajković, then commander of the SAJ,[35] to bring the unit back to Belgrade, disarm its members and send them home;[36] and (iv) Đorđević requested Trajković to provide a report on the events at Podujevo/Podujevë, which was submitted by Trajković on 13 May 1999 and forwarded by Đorđević to Minister Stojiljković.[37]

15. The Majority declares these facts to be "moot" because Đorđević subsequently authorized the re-deployment of the Scorpions to Kosovo.[38] The Majority also points to findings in the Trial Judgement that the perpetrators of the crimes in Podujevo/Podujevë were not prosecuted or convicted.[39] The Majority further suggests that the Trial Chamber's conclusion that the re-deployment "further displayed [Đorđević's] contribution to the furtherance of the JCE" was not affected by the fact that some of the perpetrators of the crimes in Podujevo/Podujevë may have been removed from the unit before it was re-deployed.[40]

16. However, the fact that members of the Scorpions were eventually re-deployed to Kosovo alone does not necessarily show that Đorđević personally "used" these individuals to commit crimes in furtherance of the common plan or contributed to such use in another significant way. Furthermore, I consider it to be relevant in this context whether Đorđević took *bona fide* measures to address what happened in Podujevo/Podujevë on 28 March 1999. Unlike the Majority, I tend to

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[30] See Trial Judgement, paras 1238, 1938. See also *ibid.*, para. 2144; Appeal Judgement, para. 358.
[31] Trial Judgement, paras 1258, 1943.
[32] See Appeal Judgement, para. 358.
[33] Trial Judgement, paras 1258, 1261, 1959.
[34] See Trial Judgement, paras 1943, 1963.
[35] Trial Judgement, para. 1260.
[36] Trial Judgement, paras 1943, 1945, 1963.
[37] Trial Judgement, paras 1260, 1961.
[38] Appeal Judgement, para. 358.
[39] Appeal Judgement, para. 359.
[40] Appeal Judgement, para. 360.

think that whether the perpetrators of the killings at this location were removed from the unit before it was re-deployed is relevant to the question of whether a reasonable trier of fact could have concluded that Đorđević acted in furtherance of the common plan when arranging for the re-deployment.[41] Accordingly, it should have been directly addressed in this Judgement whether it was reasonable for the Trial Chamber to reject evidence suggesting that all perpetrators of the crimes committed at Podujevo/Podujevë on 28 March 1999 were removed from the unit in question before it was re-deployed.[42] Moreover, since I cannot discern from the Trial Judgement that Đorđević had any influence on judicial proceedings at the relevant time, I am not convinced that he could have reasonably been faulted for a lack of prosecutions in relation to the events at Podujevo/Podujevë.[43]

(d) Conclusion

17. In light of the above, I cannot subscribe to the Majority's decision to dismiss Đorđević's submission that the Trial Chamber erred in finding that he made a significant contribution to the common plan through his involvement in the deployment of paramilitary units to Kosovo.[44]

2. The Račak/Raçak incident

18. In assessing Đorđević's participation in the common plan, the Trial Chamber observed that he played "a leading role in the efforts of the MUP to limit any independent investigation of the killings of not less than 45 men in Račak/Raçak in January 1999".[45] The Majority dismisses Đorđević's challenges to this finding.[46] For the following reasons, I am unable to agree with this decision.

19. The Trial Chamber observed that the operation in Račak/Raçak started at 0600 or 0700 hours on 15 January 1999 with the VJ firing into the village.[47] Subsequently, while the VJ

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[41] *Contra* Appeal Judgement, para. 360.
[42] See Trial Judgement, para. 1964.
[43] *Contra* Appeal Judgement, para. 359.
[44] *Contra* Appeal Judgement, paras 362, 371.
[45] Trial Judgement, para. 2154. The Trial Chamber found elsewhere that Đorđević had full information about the operation at Račak/Raçak on 15 January 1999 and "took an organising role regarding the actions of the police on the ground." See Trial Judgement, para. 1923. See also *ibid.*, para. 425. However, since these findings are not mentioned in the conclusions on Đorđević's participation in the JCE (see Trial Judgement, paras 2154-2158), I understand that the Trial Chamber ultimately did not consider that Đorđević contributed to the JCE by playing a role in the Račak/Raçak incident as such. Nonetheless, I submit that my explanations in the following also indicate that no reasonable trier of fact could have found that there was sufficient evidence to conclude that Đorđević took an active part in the actual operation at Račak/Raçak. For theses reasons, I believe that the assessment of the Račak/Raçak incident is related the allegation that Đorđević contributed to the common plan by concealing crimes.
[46] See Appeal Judgement, paras 344-350.
[47] Trial Judgement, paras 257, 1920. The Trial Chamber considered that coordination activities by the MUP related to the operation occurred in nearby police stations as early as 0630 to 0700 hours. See Trial Judgement, para. 397.

bombardment was still ongoing, the MUP entered the village and conducted a house-to-house search.[48] The Trial Chamber was satisfied that Đorđević arrived at the Štimlje/Shtime police station (about a kilometre away from Račak/Raçak) at about 0830 or 0900 hours, that he stayed there for over one hour and, during that time, received two brief phone calls from Deputy Prime Minister Nikola Šainović.[49] The operation appears to have lasted until 1500 or 1600 hours, and the Trial Chamber considered that the close coordination between the VJ and MUP forces indicated that they were "controlled by a single commander on the ground".[50] Furthermore, the Trial Chamber considered later denials about VJ involvement in the operation to be false.[51]

20. The Trial Chamber further considered that KVM observers started investigations in Račak/Raçak on the morning of 16 January 1999.[52] The KVM observers noticed police and VJ in the area.[53] In the village, the KVM observers were shown about 45 bodies of Kosovo Albanian civilians who appeared to have been executed.[54] Later in the day, villagers moved the bodies into the mosque of Račak/Raçak.[55] Around the same time, investigating Judge Marinković made several unsuccessful attempts to enter Račak/Raçak in order to conduct investigations, all of which failed because she and her team were fired upon.[56]

21. Judge Marinković finally gained access to Račak/Raçak on 18 January 1999, in the company of the deputy public prosecutor and SUP inspectors.[57] Shortly before, she met with Đorđević at the Štimlje/Shtime police station.[58] The Trial Chamber noted that while in Račak/Raçak, Judge Marinković was instructed by police that there were bodies in the mosque. When she went there, she found 40 bodies, all but one male, wearing shoes which looked like military boots and other military attire.[59]

22. The Trial Chamber ultimately concluded that the scene presented to Judge Marinković was staged by the MUP and that, in particular, Đorđević personally incurred "ultimate responsibility"

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[48] Trial Judgement, paras 257, 1920.
[49] Trial Judgement, paras 398, 1921.
[50] Trial Judgement, paras 257, 397, 1920.
[51] Trial Judgement, para. 406.
[52] Trial Judgement, para. 405
[53] Trial Judgement, para. 407.
[54] Trial Judgement, paras 405, 407.
[55] Trial Judgement, para. 408
[56] See Trial Judgement, para. 411.
[57] Trial Judgement, para. 412.
[58] Trial Judgement, para. 424.
[59] Trial Judgement, para. 412.

and led the efforts for covering up the use of excessive force by the police during the Račak/Raçak operation.[60]

23. I note that the Trial Judgement does not mention any evidence on what happened in Račak/Raçak between the visit of the KVM observers on 16 January 1999 and Judge Marinković's arrival two days later. Rather, the Trial Chamber's conclusion that the MUP and specifically Đorđević arranged for the scene presented to Judge Marinković was based on circumstantial evidence and thus had to be the only reasonable inference available.[61]

24. In this respect, I observe that the Trial Chamber appears to have accepted that, in addition to "police" forces, the VJ was present in the surrounding area of Račak/Raçak on 16 January 1999,[62] and that there was an overt KLA presence at this location on 17 January 1999.[63] This evidence indicates that the MUP was not the only force operating in the vicinity of Račak/Raçak at the time. In my view, it was therefore incumbent upon the Trial Chamber to explain on which basis it considered it to be proved beyond reasonable doubt that the MUP staged the scene presented to Judge Marinković and that Đorđević was behind such activity.

25. The Trial Judgement does not contain an explanation as to how exactly the Trial Chamber arrived at the conclusion that the MUP was responsible for presenting the altered evidence to Judge Marinković.[64] Moreover, in finding that Đorđević was personally involved in the concealment of the crimes committed at this location, the Trial Chamber merely reasoned that Đorđević's "presence at Štimlje/Shtime police station on at least 15 January 1999 confirms his awareness of the joint VJ and MUP operation in Račak/Raçak on 15 January and its importance; and reveals his ultimate responsibility for what occurred in Račak/Raçak, including the staged misrepresentation of bodies and other circumstances presented to Judge Marinković's team and the international representatives and the media on 18 January 1999".[65]

26. However, the Trial Judgement does not mention evidence on what exactly Đorđević did during his one-hour stay at the Štimlje/Shtime police station in the morning of 15 January 1999. The Trial Chamber did not find that he gave any instructions to MUP forces regarding their

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[60] See Trial Judgement, paras 415, 425, 1924, 2084.
[61] See *Lukić and Lukić* Appeal Judgement, para. 149; *Boškoski and Tarčulovski* Appeal Judgement, para. 99.
[62] See Trial Judgement, para. 407.
[63] See Trial Judgement, para. 410. The Trial Chamber also appears to have accepted that the KVM warned Judge Marinković on 17 January 1999 that it could not guarantee her safety if she insisted on entering Račak/Raçak with a heavy MUP presence. See Trial Judgement, para. 410.
[64] See, in particular, Trial Judgement, paras 415, 425, 1924.
[65] Trial Judgement, para. 425.

participation in the operation at Račak/Raçak.[66] Although Đorđević had two brief telephone conversations with Šainović while at the Štimlje/Shtime police station, there appears to be no evidence as to what they discussed.[67] In particular, there is no indication, and the Trial Chamber did not establish, that the decision to conceal crimes committed in the course of the Račak/Raçak operation had already been made at that time.[68] Neither does the Trial Judgement mention evidence showing how, when, and by what conduct Đorđević subsequently arranged for the ultimate concealment of such crimes.[69]

27. In light of the above, I consider that no reasonable trier of fact could have safely concluded, based on the evidence discussed in the Trial Judgement, that the MUP staged the scene presented to Judge Marinković and that Đorđević was behind such activity. Unfortunately, instead of directly addressing these issues, the Majority essentially repeats observations made by the Trial Chamber in relation to the events at Račak/Raçak, and recalls findings in the Trial Judgement on the "general pattern of disproportionate use of force by the Serbian forces in joint MUP and VJ 'anti-terrorist operations'" and the "pattern of lack of investigations and concealment of crimes in 1998 and 1999".[70] On this basis, the Majority finds that Đorđević has failed to show that no reasonable trier of fact could have concluded that he took a leading role in efforts "to conceal the excessive use of force by the Serbian forces during joint operations".[71] However, in making these broad statements with respect to Đorđević's role in the general cover-up of criminal conduct of Serbian forces in Kosovo, the Majority leaves open whether it was reasonable for the Trial Chamber to conclude that he was personally responsible for the events at Račak/Raçak. I therefore respectfully dissent from the Majority's reasoning and conclusion on this matter.

[66] In this respect, I recall that the operation was already underway when Đorđević arrived at the Štimlje/Shtime police station. See Trial Judgement, paras 257, 397, 1920-1921.
[67] See Trial Judgement, paras 398, 1921.
[68] I note that the Trial Chamber elsewhere found that "the body concealment operation was planned from the very beginning of the operations by Serbian forces in Kosovo on 24 March 1999." See Trial Judgement, para. 2118. When discussing the evidence in support of this finding, the Trial Chamber did not refer to the events at Račak/Raçak in January 1999. See Trial Judgement, paras 2109-2117.
[69] In this respect, I note that, while the Trial Chamber rejected Đorđević's testimony that he was in meetings at Prizren and Peć/Pejë on 15 and 16 January 1999 and then went on a skiing trip until 17 January 1999 (see Trial Judgement, para. 425), the Trial Judgement does not mention any evidence positively placing Đorđević at another location during that time, especially not in the vicinity of Račak/Raçak.
[70] See Appeal Judgement, paras 348-349.
[71] See Appeal Judgement, para. 349.

3. Concealment of crimes

28. In assessing Đorđević's participation in the common plan, the Trial Chamber found that he played a leading role in MUP efforts to conceal the murder of Kosovo Albanian civilians and others taking no active part in the hostilities during the Indictment period.[72] In this context, the Trial Chamber observed that Đorđević gave instructions for the clandestine burial of bodies found in the Danube River and Lake Perucac.[73] It considered that these operations and the transportation of bodies from Kosovo to the Batajnica and Petrovo Selo centres were undertaken "as part of a coordinated operation to remove evidence of crimes by Serbian forces against Kosovo Albanians in Kosovo during the Indictment period".[74]

29. On appeal, Đorđević submits, *inter alia*, that the Trial Chamber's findings on the concealment of bodies could not have supported its conclusion that his actions constituted a significant contribution to the common plan, rather than fulfilling the elements of Article 7(3) of the Statute.[75] In my view, this contention would have merited an elaborate analysis. In particular, I tend to think that it should have been explained how, from a legal point of view, concealment operations may constitute a contribution to a common plan, thereby allowing for a conviction for commission pursuant to JCE. Moreover, it should have been assessed whether the Trial Chamber provided adequate reasons as to why it concluded that the concealment of killings contributed significantly to the common plan which consisted of a campaign of terror and violence by Serbian forces against Kosovo Albanians with the purpose of changing the demographic composition of Kosovo.[76] Since the Majority does not address these matters, I respectfully dissent from its decision to dismiss Đorđević's appeal on the issue.[77]

C. Underlying crimes

1. Murder

(a) Introduction

30. The Trial Chamber convicted Đorđević for murder as a crime against humanity and as a violation of the laws or customs of war in relation to the killing "of not less than 724 Kosovo

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[72] Trial Judgement, para. 2156.
[73] Trial Judgement, para. 2156.
[74] Trial Judgement, para. 2156.
[75] See Đorđević Appeal Brief, para 240. See also Appeal Judgement, para 375.
[76] Trial Judgement, paras 2007, 2131.
[77] *Contra* Appeal Judgement, para. 384.

Albanians".[78] It held that these crimes were committed by Serbian forces in a number of municipalities throughout Kosovo between March and June 1999.[79] On appeal, Đorđević submits that the Trial Chamber erred in finding that the crime of murder was established in relation to a number of incidents, essentially maintaining that there was insufficient evidence to safely conclude that the victims were protected under international humanitarian law.[80] The Majority dismisses Đorđević's submissions in their entirety.[81] For the following reasons, I cannot entirely agree with the Majority's reasoning and conclusions.

(b) Observations on the applicable law

31. In the Appeals Chamber's understanding, the Trial Chamber considered that a non-international armed conflict existed between the KLA and the Serbian forces in Kosovo at the relevant time.[82] Moreover, the Trial Chamber concluded that, as of May 1998, the KLA was an "organised armed group".[83] In order to understand the impact of these findings on Đorđević's convictions for murder, I find it useful to make some observations on the law governing non-international armed conflicts.

32. In international armed conflicts, a member of the armed forces of a party to the conflict is considered to be a combatant.[84] This status bestows certain protections upon the person in question. Under international humanitarian law, a combatant is allowed to participate in armed hostilities and may not be held criminally responsible for such participation, provided that he does not breach specific rules, for example by intentionally attacking civilians.[85] Once captured by the enemy, a combatant becomes a prisoner of war and is entitled to protection under Geneva Convention III.[86] The corollary for such privileges is that a combatant is also considered to be a legitimate target of attack, unless he has laid down his arms and expressed a clear intention to surrender or is *hors de combat*.[87] The Tribunal has accepted this to mean that a combatant who is not *hors de combat* may

[78] See Trial Judgement, para. 2230. See also *ibid.*, para. 2212.
[79] See generally Trial Judgement, paras 1709-1752.
[80] See Đorđević Appeal Brief, paras 304-315, 317-376.
[81] See Appeal Judgement, paras 522-523, 749-790.
[82] Appeal Judgement, para. 521.
[83] Trial Judgement, para. 1578. See also *ibid.*, para. 1522.
[84] See Additional Protocol I to the Geneva Conventions, Art. 43(2).
[85] See Additional Protocol I to the Geneva Conventions, Arts. 43(2), 44(2). See also ICRC, Commentary on the Additional Protocols, para. 1679.
[86] See Geneva Convention III, Art. 4.
[87] *Cf.* Additional Protocol I to the Geneva Conventions, Arts. 43(2), 51(2).

be legitimately attacked even if he is unarmed and does not engage in immediate fighting at the time of the attack.[88] This equally applies to members of organized resistance groups.[89]

33. In non-international armed conflicts, the protection of persons is regulated by Article 3 common to the Geneva Conventions and Additional Protocol II. Article 3 common to the Geneva Conventions provides protection to "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause." The ICRC commentary to Additional Protocol II to the Geneva Conventions mentions that those belonging to organised armed groups "may be attacked at any time".[90] This suggests that, as a general rule, in non-international armed conflicts, members of organised armed groups enjoy protection against wounding and killing similar to that provided to combatants in international armed conflicts. Consequently, the killing of members of organised armed groups in non-international armed conflicts should only amount to a war crime or a crime against humanity if it can be established that the individuals in question had laid down their arms and expressed a clear intention to surrender or were *hors de combat* at the time of the attack.

34. The Tribunal's jurisprudence supports this interpretation. In *Strugar*, the Appeals Chamber explained that "[t]he notion of participation in hostilities [within the meaning of Article 3 common to the Geneva Conventions] is of fundamental importance to international humanitarian law and is *closely related to the principle of distinction between combatants and civilians*."[91] It concluded that:

> [I]n order to establish the existence of a violation of Common Article 3 under Article 3 of the Statute, a Trial Chamber must be satisfied beyond a reasonable doubt that the victim of the alleged offence was not participating in acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the enemy's armed forces. Such an enquiry must be undertaken on a case-by-case basis, having regard to the individual circumstances of the victim at the time of the alleged offence. As the temporal scope of an individual's participation in hostilities can be intermittent and discontinuous, whether a victim was actively participating in the hostilities at the time of the offence depends on the nexus between the victim's activities at the time of the offence and any acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the adverse party.[92]

In this context, the *Strugar* Appeals Chamber further noted that "it may be necessary for a Trial Chamber to be satisfied beyond a reasonable doubt that the alleged offence committed against the victim was not otherwise lawful under international humanitarian law", and that if the victim was a

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[88] *Blaškić* Appeal Judgement, para. 114; *Kordić and Čerkez* Appeal Judgement, para. 51.
[89] See *Blaškić* Appeal Judgement, para. 113. The Tribunal's jurisprudence also indicates that the killing of a combatant who is not *hors de combat* does not satisfy the requirements for murder as a crime against humanity. See *Martić* Appeal Judgement, paras 306-314; *Blaškić* Appeal Judgement, paras 113-114. See also Appeal Judgement, para. 747.
[90] ICRC, Commentary on the Additional Protocols, para. 4789.
[91] *Strugar* Appeal Judgement, para. 174 (emphasis added).

combatant, "his injury or death would not amount to a violation of international humanitarian law *even if he was not actively participating in hostilities at the time of the alleged offence.*"[93]

35. Finally, I note that it is expressly accepted in the Tribunal's case law that for the purpose of establishing the individual criminal responsibility of an accused for the crime of murder as a violation of the laws or customs of war, the Prosecution bears the burden of proof regarding the civilian status of the victim.[94] In my view, this rule generally leads to the following consequences: (i) where it is clear that a person killed was a civilian, it must be established beyond reasonable doubt that he was not actively participating in the hostilities at the time of his death; (ii) where there remain doubts as to whether a person was a civilian, rather than a combatant or member of an organised armed group, the Prosecution has to prove that this person had laid down his arms and indicated a clear intention to surrender or was *hors de combat* when he was killed.

36. I have no doubt that the Trial Chamber was cognizant of the relevant law.[95] However, I believe that the Trial Chamber erred in its application of this law with respect to the following incidents.

(c) Bela Crkva/Bellacërkë (Orahovac/Rahovec municipality)

37. The Trial Chamber held Đorđević responsible for the killing of Sedat Popaj, Irfan Popaj, Hajrulla Begaj, Hysni Zhuniqi, Mhedi Zhuniqi, and Agim Zhuniqi in the area of in Bela Crkva/Bellacërkë on 25 March 1999.[96] Đorđević submits on appeal that because the Trial Chamber "relieved the Prosecution of its burden of proving [the] civilian status" of these victims, the Trial Chamber erred in convicting him for murder as a violation of the laws or customs of war and as a crime against humanity in relation to this event.[97] The Majority dismisses Đorđević's challenges.[98]

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[92] *Strugar* Appeal Judgement, para. 178 (internal citations omitted).
[93] *Strugar* Appeal Judgement, para. 179 (internal citations omitted; emphasis added).
[94] See *D. Milošević* Appeal Judgement, para. 60; *Kordić and Čerkez* Appeal Judgement, para. 48. See also Appeal Judgement, para. 522. See also *Strugar* Appeal Judgement, para. 178, where the Appeals Chamber held that if a reasonable doubt subsisted as to the existence of a nexus between the victim and acts of war, an accused could not be convicted under Article 3 of the Statute.
[95] I note, in particular, the Trial Chamber's comments on the applicable law in the context of its assessment of Đorđević's responsibility pursuant to JCE. See Trial Judgement, para. 2054. In addition, the Trial Chamber often found that specific victims were not taking an active part in the hostilities when assessing individual incidents of murder. See, *e.g.*, Trial Judgement, paras 1715, 1721, 1723, 1739, 1745, 1751, 1790. See also *ibid.*, paras 1707, 2065.
[96] See Trial Judgement, paras 473, 1712.
[97] Đorđević Appeal Brief, para. 318.
[98] See Appeal Judgement, fn. 1726. I note that, unlike the other incidents discussed below, the Majority addresses the killing of Sedat Popaj, Irfan Popaj, Hajrulla Begaj, Hysni Zhuniqi, Mhedi Zhuniqi, and Agim Zhuniqi in relation to Đorđević's twelfth ground of appeal. However, I consider that Đorđević's submissions under this ground of appeal are interrelated with Section XVII of the Appeal Judgement and should therefore be assessed together.

38. However, the underlying evidence for this killing was provided by Witness Sabri Popaj. He testified that, on 25 March 1999, shortly after the shooting of a group of civilians at the Belaja Bridge, Serbian police forces followed the stream in the direction of Celina/Celinë.[99] Five minutes later, the witness heard more gunfire from the direction taken by the police; however, he could not see what was happening.[100] On 28 March 1999, Witness Popaj found the bodies of Sedat Popaj, Irfan Popaj, Hajrulla Begaj, Hysni Zhuniqi, Mhedi Zhuniqi, and Agim Zhuniqi in a channel near the Belaja Bridge.[101] The Trial Chamber considered that this location corresponded with that from which Witness Popaj had heard further shooting on 25 March 1999 and concluded that the six individuals had been killed by the Serbian police.[102] The Trial Chamber also noted that there was no evidence to suggest that the victims were armed, taking part in the hostilities or members of the KLA at the time of the shooting.[103]

39. I note that there is no evidence as to what the victims were doing when they were killed and under which exact circumstances they died. In light of these facts, I consider that no reasonable trier of fact could have concluded that the only reasonable inference to be drawn from the available evidence was that these individuals were civilians taking no active part in the hostilities or *hors de combat* when they were attacked. I therefore respectfully dissent from the Majority's decision to uphold Đorđević's convictions for murder as a violation of the laws or customs of war and as a crime against humanity in relation to this event.[104]

(d) Mala Kruša/Krusë-e-Vogel (Orahovac/Rahovec municipality)

40. The Trial Chamber held Đorđević responsible for the killing of Hysni Hajdari, who died during the course of an attack by Serbian forces at Mala Kruša/Krusë-e-Vogël on 26 March 1999.[105] The Majority dismisses Đorđević's submissions that because there was insufficient evidence to find that Hysni Hajdari was killed by MUP forces and no proof as to the circumstances of his death, the Trial Chamber erred in finding that the crime of murder as a violation of the laws or customs or war

[99] Trial Judgement, para. 470.
[100] Trial Judgement, para. 470.
[101] Trial Judgement, para. 473. While the Trial Chamber mentioned in this context 26 March 1999 as the date of the shooting, it appears that the event in fact took place a day earlier. See Trial Judgement, paras 459-470.
[102] Trial Judgement, para. 473.
[103] Trial Judgement, paras 473, 1712.
[104] *Contra* Appeal Judgement, fn. 1726.
[105] See Trial Judgement, paras 493, 1402, 1718.

and as a crime against humanity had been established.[106] For the following reasons, I disagree with the Majority's conclusions.

41. In finding that Hysni Hajdari was killed by MUP forces, the Trial Chamber relied the evidence of Witness Mehmet Krasniqi. This witness was one of 114 Kosovo Albanian men who were detained on 26 March 1999 in the Batusha barn on the outskirts of Mala Kruša/Krusë-e-Vogël, which was first shot at and then set on fire by Serbian forces.[107] Witness Krasniqi escaped this situation and testified that he left for the mountains, where he saw the dead body of Hysni Hajdari who, according to the witness, had also escaped from the Batusha barn.[108] Witness Krasniqi further testified that Hajdari's body had sustained gun shot wounds.[109] Based on this evidence, the Trial Chamber found that, although Hysni Hajdari's remains were never recovered, it was the only reasonable inference that he "died as a result of gunshot wounds inflicted by MUP forces whilst he was in the Batusha barn, or as a result of being shot by MUP forces, who were in the area, as he attempted to escape the Batusha barn when it was set on fire by MUP forces."[110]

42. Since Witness Krasniqi merely testified that Hysni Hajdari was initially detained in the Batusha barn and that he later observed Hajdari's dead body in the mountains, there is no evidence as to exactly where, when, how, and by whom Hysni Hajdari was killed. Moreover, the Trial Chamber made no finding as to whether Hysni Hajdari, who according to the schedule annexed to the Trial Judgment was 21 years old and thus arguably of fighting age,[111] was *hors de combat* or a civilian taking no active part in the hostilities when he died. Under these circumstances, I consider that no reasonable trier of fact could have concluded that the only reasonable inference to be drawn from Witness Krasniqi's testimony was that Hysni Hajdari was killed by MUP forces and that his killing amounted to murder as a violation of the laws or customs or war and as a crime against humanity.[112]

(e) Operation Reka (Đakovica/Gjakovë municipality)

43. The Trial Chamber found that Operation Reka was conducted in the Carragojs, Erenik, and Trava valleys from the early morning of 27 April until the evening of 28 April 1999.[113] It concluded

[106] See Appeal Judgement, paras 757-762.
[107] See Trial Judgement, paras 490, 493. See also *ibid.*, para. 1717.
[108] Trial Judgement, para. 493. See also *ibid.*, para. 1718.
[109] Trial Judgement, para. 493. See also *ibid.*, para. 1718.
[110] Trial Judgement, para. 493. See also *ibid.*, paras 1402, 1718.
[111] See Trial Judgement, p. 893.
[112] *Contra* Appeal Judgement, paras 756-758.
[113] See Trial Judgment, paras 938, 950. See also *ibid.*, para. 1738.

that, in the course of this operation, Serbian forces killed no less than 296 individuals.[114] This number comprised 15 individuals named by eye-witnesses as having been killed on 27 April 1999 in Meja/Mejë and Korenica/Korenicë,[115] as well as 281 Kosovo Albanians who, according to official records, had gone missing "from Meja/Mejë" on 27 to 28 April 1999, and whose remains were exhumed in 2001 from mass graves at the Batajnica SAJ Centre in Serbia.[116]

44. On appeal, Đorđević challenges the Trial Chamber's findings regarding the 281 individuals exhumed at the Batajnica grave site.[117] I disagree with the Majority's reasoning and conclusion to dismiss Đorđević's submissions.[118] In my view, the Majority overlooks that there was no evidence regarding the circumstances under which these individuals died. Instead, the Majority primarily refers to findings in the Trial Judgement which relate to the killing of the above-mentioned 15 victims,[119] and the killing of unnamed individuals as described by several witnesses at trial.[120] However, as indicated before, the Trial Chamber considered the 281 individuals exhumed at the Batajnica grave site in addition to the 15 individuals named by eye-witnesses as having been killed in Meja/Mejë and Korenica/Korenicë on 27 April 1999.[121] Furthermore, the Trial Chamber made no conclusive finding as to whether the other unnamed victims whose killing was observed by

[114] See Trial Judgement, paras 995, 1741.
[115] See Trial Judgement, paras 955-964, discussing the killing of five members of the Malaj and Kabashi families in Korenica/Korenicë, the killing of nine members of the Dedaj and Markaj families in Meja/Mejë, and the murder of Kolë Duzhmani in Meja/Mejë.
[116] See Trial Judgement, para. 990. See also *ibid.*, paras 992, 995, 1738.
[117] Đorđević Appeal Brief, para. 374, Đorđević Reply Brief, para. 122.
[118] See Appeal Judgement, paras 770-772.
[119] See Appeal Judgement, para. 770.
[120] See Appeal Judgement, paras 770-711, referring to Trial Judgement, paras 967-979, 985-995, 1738. I note that these paragraphs of the Trial Judgement refer specifically to the following: (i) Witness K90's testimony that, on 27 April 1999, he observed: (a) Serbian forces take at least three to four groups of Kosovo Albanian men from villages in the area of Korenica/Korenicë, each numbering from five to over ten people, to a compound guarded by PJP forces where the victims were shot (*ibid.*, para. 967); (b) at least four dead bodies along the road near the entrance of Korenica/Korenicë (*ibid.*, para. 968); and (c) police escorting a group of eight to ten men in or near Meja/Mejë to a compound where they were shot (*ibid.*, para. Trial Judgement, para. 969); (ii) Witness Nike Peraj's evidence that, on 27 April 1999, he: (a) saw the dead bodies of four men in the grass behind the toilets of the school opposite the checkpoint in Meja/Mejë (see *ibid.*, para. 970); (b) was told by Kosovo Albanian families about the killing of people near the Hasanaj house in Meja/Mejë and shortly thereafter found the bodies of 20 dead men laying in the meadow near this location (see *ibid.*, paras 970, 971); and (c) on his way towards Madanaj village, observed the bodies of eleven dead men about 600 metres away from the Shyt Hasanaj meadow as well as one dead body laying near the house of Peraj's brother-in-law (see *ibid.*, para. 973); (iii) Witness K73's evidence that the PJP killed four Albanian civilians taken hostage by the VJ (see *ibid.*, paras 975-976); and (iv) the testimony of Witness Martin Pnishi that seven young Albanian men were lined up and shot by Serbian forces on the Meja/Mejë side of the Ura e Traves bridge on 27 April 1999 (see *ibid.*, para. 986; see also *ibid.*, para. 966). I note that, in total, the victims of these incidents numbered at least 70 up to as many as 97 people.
[121] Trial Judgement, paras 990, 992, 995.

witnesses during Operation Reka were among the 281 individuals exhumed at the Batajnica grave site.[122]

45. I note that the Trial Chamber concluded that in the course of Operation Reka, Serbian forces killed all 281 individuals exhumed at the Batajnica grave site, reasoning that this was the only reasonable inference "on the basis of the clear and universal evidence of what occurred in the area on those days, the fact that these bodies were all buried in mass graves in the Batajnica SAJ Centre, and, where it could be ascertained [...], that all had been killed by gunshot wounds".[123] The Trial Chamber further observed that, "where it could be determined", the victims were wearing civilian clothing.[124] Elsewhere, the Trial Chamber emphasized that there was no evidence that any of the Kosovo Albanians killed during Operation Reka were "armed at the time or taking an active part in hostilities" and that "[i]ndeed, there is no evidence of fighting between the Serbian forces and the KLA in the area at the time of these events."[125]

46. Respectfully, I am not convinced by this reasoning. The Trial Chamber's general reference to "what occurred in the area on those days" is in my view too vague to reasonably establish that the victims exhumed at the Batajnica grave site were all killed by Serbian forces and that they were civilians not taking an active part in the hostilities or *hors de combat* when they died. Neither did this necessarily follow from the fact that the bodies were buried in mass graves at Batajnica or that a number of individuals died from gunshot wounds. Moreover, I note that, with the exception of two individuals, the bodies found at the Batajnica grave site were males of varying age and the cause of death could only be established for 172 of the 281 victims exhumed.[126] The Trial Chamber also acknowledged that the VJ was told during Operation Reka that KLA fighters had discarded their weapons and uniforms and were taking cover among the civilian population, dressed in civilian clothing.[127] It further accepted that the KLA resorted to such measures throughout the

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[122] See Trial Judgement, paras 967-979, 985-995, 1738. In particular, I note that the Trial Judgement includes a list of the names of the 281 individuals whose remains were exhumed at Batajnica in 2001 and that the Trial Chamber in this context stated that it was satisfied that, in addition to its findings on specific killings discussed above, the listed individuals were killed during Operation Reka. See Trial Judgement, para. 992. At the same time, the Trial Chamber concluded that Serbian forces killed 296 people in the course of Operation Reka and observed that it could not make a positive finding that the remaining 48 victims listed in Schedule H of the Indictment were murdered at the same time. See Trial Judgement, paras 995, 1740-1741. I recall that, in total, the victims of the incidents described in Trial Judgement, paras 967-979, 986, numbered at least 70 up to as many as 97 people.
[123] See Trial Judgement, para. 991.
[124] Trial Judgement, para. 990.
[125] Trial Judgement, para. 1739.
[126] Trial Judgement, para. 990. See also *ibid.*, para. 1738.
[127] Trial Judgement, para. 944.

conflict in Kosovo.[128] Under these circumstances, I believe that it was unreasonable for the Trial Chamber to rely on the fact that some of the bodies found at the Batajnica grave site were dressed in civilian clothes as being indicative of their civilian status.[129] Similarly, I maintain that whether the victims were armed or fighting with the KLA occurred at the time of Operation Reka was not decisive.

47. Under these circumstances, I consider that no reasonable trier of fact could have concluded that the only reasonable inference was that murder as a war crime and as a crime against humanity in relation to all 281 individuals exhumed at the Batajnica grave site was established.

(f) Vučitrn/Vushtrri municipality

48. The Trial Chamber found that, on 2 May 1999, Serbian forces killed Hysni Bunjaku, Haki Gerxhaliu, Miran Xhafa, and Veli Zhafa, while they were in a convoy of Kosovo Albanians traveling from Slakovce/Llakoc towards to Vučitrn/Vushtrri town.[130] Đorđević submits that there were KLA members among the people in the convoy and that the evidence did not establish that the four individuals killed were detained, thus leaving open the inference that they were legitimately targeted.[131]

49. With respect to Veli Xhafa, I note that the Trial Chamber made only one observation in passing, namely that, as the convoy progressed, "a witness observed seven or eight corpses" and that "[a]mongst them she recognized her cousin, Veli Xhafa, who lay dead on his tractor.[132] In the absence of any evidence as to the circumstances of Veli Xhafa's death, I consider that no reasonable trier of fact could have concluded that the only reasonable inference was that his killing amounted to murder as a war crime and as a crime against humanity and was attributable to Đorđević. I therefore dissent from the Majority's conclusion to the contrary.[133]

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[128] See Trial Judgement, paras 1562, 2065.
[129] *Contra* Appeal Judgement, para. 771. I note that the Majority elsewhere observes that the "Appeals Chamber has previously accepted that a Trial Chamber's reliance on the clothes of a victim when determining that he was not actively participating in hostilities at the time of his death." See Appeal Judgement, fn. 1737, referring to *Boškoski and Tarčulovski* Appeal Judgement, para. 81. However, in my view, this reference is inapposite because in relation to the incident discussed there, the Appeals Chamber also accepted the trial chamber's finding that the victim was not a member of an organised group (the NLA). See *Boškoski and Tarčulovski* Appeal Judgement, para. 81.
[130] See Trial Judgement, paras 1180, 1184-1185, 1191-1192, 1197, 1742.
[131] Đorđević Appeal Brief, para. 375; Đorđević Reply Brief, para. 123.
[132] Trial Judgement, para. 1192.
[133] *Contra* Appeal Judgement, paras 767-777.

2. Destruction of the Mosque in Landovica/Landovicë (Persecutions)

50. The Trial Chamber held Đorđević responsible for persecutions through destruction of or damage to property of cultural and religious significance as crimes against humanity in relation to, *inter alia*, the mosque in Landovica/Landovicë (Prizren municipality).[134] The Trial Chamber found that Serbian forces set fire to the interior of the mosque on 26 March 1999 and caused substantial destruction to the minaret and the structure of the mosque by an explosive device on 27 March 1999.[135] In support of these findings, the Trial Chamber relied on evidence of Witness Halil Morina, which was tendered by the Prosecution pursuant to Rule 92 *quater* of the Rules, as well as the testimony of Witness András Riedlmayer.[136]

51. On appeal, Đorđević essentially submits that the Trial Chamber erred in relying solely on Witness Morina's evidence in order to find that the destruction of the mosque in Landovica/Landovicë was caused by Serbian forces.[137] The Majority ultimately dismisses Đorđević's challenge.[138] For the following reasons, I cannot agree with this decision.

52. Rule 92 *quater* of the Rules allows, under certain circumstances, for the admission of evidence of a person in the form of a written statement or transcript where the person is unavailable to testify in court. It is accepted in the Tribunal's case law that crucial evidence admitted pursuant to Rule 92 *quater* of the Rules can be used to support a conviction only if it is corroborated.[139] Evidence pertaining to the acts and conduct of the accused or those of his close subordinates clearly is of crucial relevance.[140]

53. I note that Witness Morina's Rule 92 *quater* material is the only evidence mentioned in the Trial Judgement which directly implicated Serbian forces in the destruction of the mosque in Landovica/Landovicë.[141] By contrast, Witness Riedlmayer merely reported on his observations of the consequent damage to the mosque.[142] The Majority acknowledges that: (i) a conviction may not be based solely or in a decisive manner on Rule 92 *quater* material because the accused must have

[134] Trial Judgement, para. 1819, 2030.
[135] Trial Judgement, para. 1819.
[136] See Trial Judgement, paras 1817-1819.
[137] See Đorđević Appeal Brief, paras 347(i), 377(b); Đorđević Reply Brief, para. 127. See also Appeal Judgement, paras 804, 806.
[138] See Appeal Judgement, paras 807-809.
[139] See *Lukić and Lukić* Appeal Judgement, para. 570 with further references.
[140] See *Galić* Appeal Decision on Rule 92 bis(C) of 7 June 2002, paras 13, 15-16.
[141] See Trial Judgement, para. 1817.
[142] See Trial Judgement, para. 1818.

the opportunity to cross-examine witnesses providing crucial evidence;[143] (ii) Witness Morina's Rule 92 *quater* evidence was a "critical element of the Prosecution case and a vital link in demonstrating Đorđević's responsibility for the destruction of the mosque committed by Serbian forces";[144] and (iii) Witness Riedlmayer's testimony "does not directly" corroborate Witness Morina's account that it was Serbian forces who destroyed the mosque in Landovica/Landovicë.[145] However, the Majority notes that the Trial Chamber found elsewhere that there was a "consistent pattern of attack by the Serbian forces entering towns and villages on foot, beginning on March 1999, and setting houses on fire and looting valuables" in Kosovo, and that the "same pattern continued in the following days, on 26 March 1999 in Landovica/Landovicë".[146] On this basis, the Majority concludes that Đorđević's conviction for the destruction of the mosque in Landovica/Landovicë was supported by other evidence and that the Trial Chamber's decision in this regard was "not based solely or in a decisive manner on Morina's 92 *quater* evidence".[147]

54. In my view, the Majority ignores that there is no indication in the Trial Judgement that the Trial Chamber relied on the consistent pattern of attacks by Serbian forces throughout Kosovo or specifically in Landovica/Landovicë at the time in deciding whether Witness Morina's Rule 92 *quater* evidence was sufficiently corroborated. Rather, in this context the Trial Chamber reasoned that "the *nature of the damage* to the mosque and its mechanism, as suggested by András Riedlmayer, is consistent in material respects with the observations of the witness and provides independent confirmation of his account."[148]

55. However, as explained above and accepted by the Majority, Witness Riedlmayer did not implicate Serbian forces in the destruction of the mosque in Landovica/Landovicë. I therefore consider that the Trial Chamber did not have a reasonable basis for concluding that Witness Morina's Rule 92 *quater* evidence was sufficiently corroborated to support a conviction against Đorđević for this event. Since Witness Morina did not appear in court, Đorđević was ultimately left without the opportunity to test the crucial allegation that the mosque was destroyed by Serbian forces. Any cross-examination of Witness Riedlmayer on this issue would have been fruitless because the witness was in no position to comment on the identity of the perpetrators.

[143] See Appeal Judgement, para. 807.
[144] Appeal Judgement, para. 808.
[145] See Appeal Judgement, para. 808.
[146] Appeal Judgement, para. 808, referring to Trial Jugement, para. 2027.
[147] Appeal Judgement, para. 808.
[148] See Trial Judgement, para. 1819 (emphasis added).

56. Moreover, I cannot discern how Đorđević could have successfully challenged, by cross-examining witnesses, the relevance of general circumstantial evidence of a consistent pattern of attacks by Serbian forces in the area at the time to the particular destruction of the mosque in Landovica/Landovicë. Consequently, I believe that such general evidence cannot constitute a sufficient form of corroboration for crucial Rule 92 *quater* evidence. I therefore think that in relying on this evidence, the Majority has obviated Đorđević's fundamental right to cross-examine witnesses on crucial aspects of the case against him.[149]

57. In light of the above, I consider that the Trial Chamber erred in convicting Đorđević for the destruction of the mosque in Landovica/Landovicë and dissent from the Majority's decision to uphold this conviction.

D. Đorđević's responsibility for persecutions through sexual assaults

58. The Indictment charged Đorđević with persecutions through sexual assaults as crimes against humanity in a number of locations in Kosovo in 1999.[150] The Trial Chamber concluded that Witnesses K14 and K20 were raped by Serbian forces in Priština/Prishtinë and Beleg, respectively.[151] However, the Trial Chamber considered that it had not been proved beyond reasonable doubt that the physical perpetrators of these crimes acted with the requisite discriminatory intent to fulfill the elements of the crime of persecutions.[152] The Trial Chamber further found that there was insufficient evidence to conclude that a Kosovo Albanian girl traveling with other displaced persons in a convoy towards Priština/Prishtinë as well as two other Kosovo Albanian women in Beleg were sexually assaulted by Serbian forces.[153] Consequently, the Trial Chamber did not enter a conviction against Đorđević for persecutions through sexual assaults as crimes against humanity.[154]

59. The Prosecution challenges these findings on appeal, submitting that the Trial Chamber erred in failing to conclude that all five victims referred to above were subjected to sexual assaults by Serbian forces, that these crimes were committed with discriminatory intent, and that they were

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[149] *Cf. Galić* Appeal Decision on Rule 92 bis(C) of 7 June 2002, para. 13. I note that the Appeals Chamber has accepted a trial chamber's reliance on crucial Rule 92 *quater* evidence only where the evidence in question was corroborated by witnesses who personally appeared in court and could be cross-examined by the accused. See *Lukić and Lukić Appeal* Judgement, para. 570; *Galić* Appeal Decision on Rule 92 bis(C) of 7 June 2002, paras 18-20.
[150] Indictment, para. 77(c). See also *ibid.*, paras 27, 72.
[151] Trial Judgement, paras 1791, 1793. See also *ibid.*, paras 833-836, 1151.
[152] Trial Judgement, paras 1796.
[153] Trial Judgement, paras 1792, 1794.
[154] Trial Judgement, para. 2230.

foreseeable to Đorđević, thus requiring convictions under JCE III.[155] The Majority grants this ground of appeal and enters new convictions against Đorđević for persecutions through sexual assaults pursuant to JCE III with respect to all five victims.[156] For a number of reasons, I respectfully disagree with this decision.

60. First, I take issue with the Majority's reasoning and conclusion that it was proved beyond reasonable doubt that the physical perpetrators of all five sexual assaults acted with discriminatory intent.[157] In this respect, the Majority relies heavily on the fact that a JCE existed at the time, which had the "discriminatory common purpose of modifying the ethnic balance of Kosovo to ensure Serb control over the province," and that for this purpose, Serbian forces carried out a campaign of terror and extreme violence directed against the Kosovo Albanian population, typical of which were, *inter alia*, persecutions, and which was aimed at driving Kosovo Albanians out of the province.[158] However, in my view, these observations rather pertain to the general discriminatory nature of the attacks against the Kosovo Albanian population at the time and I note that it is accepted that the discriminatory intent in relation to a specific crime may not be directly inferred from such general circumstances.[159]

61. In the Majority's opinion, additional specific circumstances exist which allow for the only reasonable inference that all five victims were sexually assaulted because of their ethnicity. With respect to Witness K20 and the two other women assaulted in Beleg, the Majority considers that these individuals were in the detention of Serbian forces at the time of their assault, that the assaults were committed by members of the Serbian forces who also carried out the general campaign of forcible transfer against the Kosovo Albanian population, and that the crimes occurred prior to the

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[155] See Prosecution Appeal Brief, paras 1-56.
[156] See Appeal Judgement, paras 870-929.
[157] See Appeal Judgement, paras 881-903. I note that, with respect to the rapes of Witnesses K14 and K20, the Majority concludes that the Trial Chamber committed an error of law in finding that it had not been presented with "specific evidence" that the physical perpetrators of these crimes acted with the intent to discriminate because the Trial Chamber failed to evaluate in this context "the surrounding circumstances" of the crimes as well as the "broader context" in which they occurred. See Appeal Judgement, para. 877, referring to Trial Judgement, para. 1796. In my opinion, the Trial Chamber's statement that "no specific evidence has been presented with respect to either of the incidents that the perpetrators acted with intent to discriminate" (see Trial Judgement, para. 1796) does not as such indicate that the Trial Chamber did not consider the contextual factors relied upon by the Majority. Moreover, I consider that, even if it were assumed that the Trial Chamber failed to take proper account of such circumstantial evidence, I cannot discern how this could be anything other than an error of fact, which would still oblige the Appeals Chamber to grant a margin of deference to the Trial Chamber's ultimate conclusions. In finding that there was an error of law, the Majority conveniently grants itself the prerogatives of the trier of fact in order to assess whether it is convinced beyond reasonable doubt that the crimes were committed with discriminatory intent. See Appeal Judgement, para. 878.
[158] Appeal Judgement, para. 888. See also *ibid.*, paras 891, 895, 897.
[159] See *Kvočka* Appeal Judgement, para. 366; *Blaškić* Appeal Judgement, para. 164. See also Appeal Judgment, para. 886.

forcible displacement of Witness K20 and the two other women.[160] In addition, the Majority takes into account several comments made prior to and after the assaults by "members of the Serbian forces", "soldiers", and a policeman who guarded the door when Witness K20 was raped.[161] In relation to Witness K14, the Majority observes that this victim was Kosovo Albanian and raped by persons "in a position of authority" who were members of the Serbian forces that carried out the general attack against the Kosovo Albanian population at the time.[162] Regarding the girl in the convoy, the Majority's reasoning is essentially limited to the observation that she was sexually assaulted while she and other Kosovo Albanians sought safety, and were traveling in a convoy along a road lined with Serbian forces.[163]

62. I note that the Majority repeatedly emphasizes the ethnicity of the victims and perpetrators. Indeed, in relation to Witness K14 and the girl in the convoy, the Majority appears to primarily rely on such considerations, together with general circumstances of the overall attack against the Kosovo Albanian population at the time. However, based on this approach every crime committed during an overall attack against a population as a whole could automatically amount to persecution.[164] Regarding Witness K20 and the two other women in Beleg, I have no doubt that some of the comments referred to by the Majority were discriminatory. However I note that there is no evidence that the specific individuals who sexually assaulted these victims made similar remarks. I am also not quite convinced by the Majority's emphasis on the victims' detention. In this context, the Majority points to case law[165] which concerns the crimes of unlawful or inhumane detention,[166] or refers to additional circumstances which may indicate that detainees were subjected to crimes for discriminatory reasons.[167] This jurisprudence does not per se demonstrate that crimes committed against a person in detention amount to persecution, even if the detention itself was the result of discrimination.

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[160] See Appeal Judgement, paras 890-891, 893.
[161] See Appeal Judgement, para. 890. See also Trial Judgement, para. 1146.
[162] See Appeal Judgement, para. 895.
[163] See Appeal Judgement, para. 897.
[164] I note that the Trial Chamber expressly considered the ethnicity of Witnesses K20 and K14 and the fact that the perpetrators of their sexual assaults belonged to the Serbian forces but found that this did not in and of itself show that these crimes were committed with persecutory intent. See Trial Judgement, para. 1796.
[165] See Appeal Judgement, para. 886, fn. 2625.
[166] See *Kordić and Čerkez* Appeal Judgement, para. 950; *Kvočka et al.* Appeal Judgement, paras 462-463.
[167] See *Krnojelac* Appeal Judgement, para. 186, where the Appeals Chamber noted that, while the detention facility contained both Serbian and non-Serbian prisoners, only the non-Serbian prisoners were subjected to beatings. The Appeals Chamber also held in this context that relevant circumstances which may be taken into consideration when inferring the discriminatory intent behind crimes committed during detention "include the operation of the prison (in particular, the systematic nature of the crimes committed against a racial or religious group) and the general attitude of the offence's alleged perpetrator as seen through his behaviour." See *Krnojelac* Appeal Judgement, para. 184. Similarly, *Naletilić and Martinović* Appeal Judgement, para. 572.

63. Next, and most importantly, I disagree with the Majority that the five sexual assaults can be attributed to Đorđević pursuant to JCE III. First of all, the Majority acknowledges that the perpetrators were non-members of the JCE.[168] However, instead of assessing on a case-by-case basis whether there was a link between these individuals and Đorđević or another JCE member,[169] the Majority is satisfied with stating that "Serbian forces were used by members of the JCE" to implement the *actus reus* of crimes within the scope of the common purpose, and that "[t]hese same Serbian forces" sexually assaulted Witnesses K14 and K20 as well the two other women in Beleg.[170] In relation to the girl in the convoy, the Majority observes that the identity of one of the perpetrators is unclear but contends that "his identity is less relevant" since the other perpetrator was "a policeman and thus a member of the Serbian forces".[171] In my view, these generalizing statements are insufficient to show that the required link between the perpetrators of the five sexual assaults and a JCE member existed.[172]

64. Moreover, I am not convinced by the Majority's assessment of the foreseeability of the sexual assaults. In relation to crimes committed by a non-member of the JCE, it must be shown that it was foreseeable to the accused that "such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose", and that he willingly took that risk.[173] In my opinion, the Majority does not adhere to this standard. Rather, the Majority loosely connects a number of general facts pertaining to the broader context of the conflict in Kosovo and Đorđević's position within the MUP to conclude that it was foreseeable to him that "crimes of a sexual nature might be committed".[174]

65. Thus, the Majority refers, *inter alia*, to the Trial Chamber's finding that, as one of the most senior MUP officials, Đorđević had detailed knowledge of events on the ground and played a key

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[168] See Appeal Judgement, paras 911-913, 927.
[169] *Cf. Krajišnik* Appeal Judgement, para. 236; *Brđanin* Appeal Judgement, para. 413.
[170] Appeal Judgement, para. 927.
[171] Appeal Judgement, para. 927.
[172] For an example of a detailed examination of this requirement on a case-by-case basis, see *Krajišnik* Appeal Judgement, paras 239-282; *Martić* Appeal Judgement, paras 174-212. I note in particular, that in *Martić*, the Appeals Chamber reversed the appellant's conviction for criminal conduct of unidentified armed Serbs or soldiers, reasoning that "the origin of these men and their affiliation remain[ed] uncertain" and that "[w]ithout any further elaboration on the affiliation of these armed men, no reasonable trier of fact could have held that the only reasonable conclusion in the circumstances was that these crimes could be imputed to a member of the JCE." See *Martić* Appeal Judgement, para. 200.
[173] *Martić* Appeal Judgement, para. 168; *Brđanin* Appeal Judgement, para. 411.
[174] Appeal Judgement, para. 926.

role in coordinating the work of the MUP forces in Kosovo in 1998 and 1999.[175] It finds that, through his role and involvement in the operations in Kosovo, Đorđević was well informed about the conduct of operations, the overall security situation in Kosovo, as well as the commission of serious crimes by Serbian forces, such as looting, torching, excessive use of force, and murder.[176] The Majority further observes that Đorđević shared the intent of the JCE, the common purpose of which was to change the ethnic balance in Kosovo by creating an atmosphere of terror and fear among the Kosovo Albanian population, and that he was aware of the massive displacement of Kosovo Albanians.[177] Finally, the Majority notes that Kosovo Albanians were forcibly displaced and mistreated on a massive scale by Serbian forces who could act with near impunity, and that women were frequently separated from the men, thus rendering them especially vulnerable, and concludes that, "in such environment, the possibility that sexual assaults might be committed was sufficiently substantial as to be foreseeable to Đorđević".[178]

66. However, the Trial Judgement mentions no evidence that Đorđević ever received any information about sexual assaults either during the Indictment period or before, which could have at least alerted him to the proclivity of certain members of the Serbian forces to commit crimes of a sexual nature. While the Majority points to Đorđević's knowledge of looting, torching, excessive use of force, and murder by Serbian forces in Kosovo, I harbour doubts that it is appropriate to infer the foreseeability of sexual assaults from these other distinct types of crimes. Moreover, the Majority does not point to evidence that Đorđević was aware of factors placing Kosovo Albanian women in a vulnerable position at the relevant time. Likewise, I am not persuaded by the Majority's reliance on the common purpose and Đorđević's intent in this regard. These factors cannot as such show that it was foreseeable to Đorđević and that he willingly took the risk that JCE members or persons whom they used to commit crimes within the scope of the common purpose might also perpetrate persecutory sexual assaults.

67. In sum, the Majority appears to assess whether sexual assault as a type of crime was generally foreseeable during the conflict in Kosovo and, on this basis, holds Đorđević responsible for five specific sexual assaults. I find this outcome problematic with respect to the principle of individual guilt. I also question how Đorđević could have successfully defended himself against

[175] See Appeal Judgement, para. 923.
[176] Appeal Judgement, para. 924.
[177] Appeal Judgement, para. 925.
[178] Appeal Judgement, para. 926.

such generalizations and wonder where the Majority draws the line between crimes that were foreseeable to Đorđević and those that were not.

Done in English and French, the English text being authoritative.

Judge Bakhtiyar Tuzmukhamedov

Dated this 27th day of January 2014,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

XXIV. ANNEX A – PROCEDURAL HISTORY

A. Appeal proceedings

1. Composition of the Appeals Chamber

1. On 8 March 2011, Judge Patrick Robinson, the then President of the Tribunal, designated Judge Mehmet Güney, Judge Fausto Pocar, Judge Liu Daqun, Judge Andrésia Vaz, and Judge Carmel Agius to form the Appeals Chamber's bench assigned to this case.[1] On 14 March 2011, Judge Carmel Agius, having been elected as Presiding Judge in this case, appointed himself as Pre-Appeal Judge with responsibility for all pre-appeal proceedings in the present case.[2] On 7 March 2012, by order of Judge Theodor Meron, President of the Tribunal, Judge Khalida Rachid Khan was appointed to replace Judge Fausto Pocar on the bench before this case.[3] On 27 September 2012, President Theodor Meron appointed Judge Patrick Robinson, former President of the Tribunal, to replace Judge Liu Daqun on the bench before this case.[4] On 19 March 2013, by order of President Theodor Meron, Judge Tuzmukhamedov was appointed to replace Judge Andrésia Vaz on the bench before this case.[5]

2. Notices of Appeal

2. Pursuant to the Pre-Appeal Judge's decision of 16 March 2011, the time-limit for filing the notices of appeal in this case was extended by 60 additional days.[6] Consequently, both parties filed their notices of appeal on 24 May 2011.[7]

3. Briefs

3. On 27 May 2011, Đorđević filed a motion seeking an extension of 60 days to submit the appellant's brief and an extension of the word-limit for a total of 60,000 words.[8] By oral decision of the Pre-Appeal Judge rendered on 30 May 2011,[9] the deadline for filing the appellant's briefs in this case was extended by seven days to 15 August 2011 for both parties. Đorđević was further granted

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1 Order Assigning Judges to a Case Before the Appeals Chamber, 8 March 2011.
2 Order Appointing the Pre-Appeal Judge, 14 March 2011.
3 Order Replacing a Judge in a Case Before the Appeals Chamber, 7 March 2012.
4 Order Replacing a Judge in a Case Before the Appeals Chamber, 27 September 2012.
5 Order Replacing a Judge in a Case Before the Appeals Chamber, 19 March 2013.
6 Decision on Vlastimir Đorđević's Motion for an Extension of Time to File a Notice of Appeal, 16 March 2011, p. 3.
7 Prosecution Notice of Appeal, 24 May 2011; Vlastimir Đorđević Notice of Appeal, 24 May 2011.
8 Defence Motion for an Extension of Time and Variation of the Word Limit, 27 May 2011.
9 Status Conference, 30 May 2011, AT. 8.

an extension of up to 15,000 words for the appellant's brief, allowing him to file a brief of up to 45,000 words, and the Prosecution was granted a corresponding extension of the word-limit for the respondent's brief.[10]

4. During the Status Conference held on 21 September 2011, Đorđević made an oral request for an extension of time by 15 days to submit the brief in reply and an extension of the word-limit for a total of 15,000 words for the said brief.[11] By oral decision of the Pre-Appeal Judge, the deadline for filing of the reply briefs for both parties was extended until 26 October 2011.[12] Đorđević was also granted an extension of the word-limit for a total of 12,000 words.[13]

5. The Prosecution filed its Appeal Brief on 15 August 2011.[14] Đorđević filed the respondent's brief on 26 September 2011.[15] The Prosecution replied on 26 October 2011.[16]

6. Đorđević filed his Appeal Brief on 15 August 2011.[17] The Prosecution filed the respondent's brief on 26 September 2011.[18] Đorđević replied on 26 October 2011.[19]

4. Other Decisions and Orders

7. On 18 October 2012, by order of the Pre–Appeal Judge, any motions seeking a variation on the grounds of appeal following the BCS translation of the Trial Judgement were to be filed no later than 29 November 2012.[20] On 29 November 2012, Đorđević filed a submission drawing a number of matters to the attention of the Appeals Chamber, without seeking a variation of the grounds of appeal.[21]

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10 Status Conference, 30 May 2011, AT. 8-9.
11 Status Conference, 21 Sep 2011, AT. 16-17.
12 Status Conference, 21 Sep 2011, AT. 18.
13 Status Conference, 21 Sep 2011, AT. 18.
14 Prosecution Appeal Brief, 15 August 2011 (confidential; public redacted version filed on 17 August 2011).
15 Đorđević Response Brief, 26 September 2011 (confidential; public redacted version filed on 30 January 2012).
16 Prosecution Reply Brief, 26 October 2011 (confidential; public redacted version filed on 8 February 2012).
17 Đorđević Appeal Brief, 15 August 2011 (confidential; public redacted version filed on 23 January 2012). See also Book of Authorities for Vlastimir Đorđević's Appeal Brief, 15 August 2011, as supplemented on 23 January 2014 (see *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A, Decision on Vlastimir Đorđević's Request to File a Supplementary Authority, 23 January 2014).
18 Prosecution Response Brief, 26 September 2011 (confidential; public redacted version filed on 30 January 2012).
19 Vlastimir Đorđević Reply Brief, 26 October 2011 (confidential; reclassified as public on 9 February 2012).
20 Order Setting Out the Time Limit to File any Motion Seeking a Variation of the Grounds Of Appeal Following the Translation of the Trial Judgement into the BCS Language, 18 October 2012. The BCS translation of the Trial Judgement was filed on 17 October 2012 (*Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, *Presuda*, 17 October 2012 (partly confidential).
21 Vlastimir Đorđević Submissions Following the Translation of the Trial Judgement, 29 November 2012. See also Status Conference, 5 Dec 2012, AT. 42.

5. Status Conferences

8. In accordance with Rule 65*bis*(B) of the Rules, Status Conferences were held on 30 May 2011,[22] 21 September 2011,[23] 16 January 2012,[24] 11 May 2012,[25] 23 August 2012,[26] 5 December 2012,[27] 9 April 2013,[28] 17 July 2013,[29] and 13 November 2013.[30]

6. Appeal Hearing

9. On 22 March 2013, the Appeals Chamber issued a scheduling order for the Appeal Hearing in this case.[31] On 12 April 2013, the Appeals Chamber issued an *addendum* informing the parties of certain modalities of the Appeal Hearing and inviting them to address several specific issues.[32] The Appeal Hearing was held on 13 May 2013 in The Hague.

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22 Scheduling Order, 4 May 2011; Amendment to Scheduling Order, 17 May 2011; Status Conference, 30 May 2011, AT. 1-10.
23 Scheduling Order, 24 August 2011; Status Conference, 21 Sep 2011, AT. 11-19.
24 Scheduling Order, 29 November 2012; Status Conference, 16 Jan 2012, AT. 20-25.
25 Scheduling Order, 29 March 2012; Status Conference, 11 May 2012, AT. 26-30.
26 Scheduling Order, 10 July 2012; Status Conference, 23 Aug 2012, AT. 31-36.
27 Scheduling Order, 2 November 2012; see also Amendment to Scheduling Order, 22 November 2012; Status Conference, 5 Dec 2012, AT. 37-43.
28 Scheduling Order, 15 March 2013; Status Conference, 9 Apr 2013, AT. 44-52.
29 Scheduling Order, 12 June 2013; Status Conference 17 July, AT 210-215.
30 Scheduling Order, 14 October 2013; Status Conference, 13 November 2013, AT. 216-220.
31 Scheduling Order, 22 March 2013.
32 *Addendum* to the Scheduling Order for Appeal Hearing, 12 April 2013 ("Addendum"). On 8 May 2013, the Appeals Chamber issued an order amending the Addendum (Order Amending the *Addendum* to the Scheduling Order for Appeal Hearing, 8 May 2013).

XXV. ANNEX B – GLOSSARY

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4. ICC

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Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009

Prosecutor v. Germain Katanga and Mathieu Ngudjolo, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008

Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007 ("*Lubanga* Decision on Confirmation of Charges")

5. STL

The Prosecutor v. Salim Jamil Ayyash et al., Case No. STL-11-01/I/AC/R176bis, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 ("STL Decision of 16 February 2011")

6. ECCC

Prosecutor v. Ieng Thirith et al. (Case 002), Case File: 002/19-09-2007-ECCC/OCIJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010 ("ECCC Decision on Joint Criminal Enterprise of 20 May 2010")

Prosecutor v.Guek Eav Kaing alias "Duch", Case Case File: 001/18-07-2007/ECCC/TC, Trial Judgement, 26 July 2010 ("*Duch* Trial Judgement")

7. ICJ

North Sea Continental Shelf cases, ICJ, Judgement, 20 February 1969, ICJ Reports 1969

8. European Commission of Human Rights

Cyprus v. Turkey, European Commission of Human Rights, European Human Rights Reports, Vol. 4 (1982), pp 482-528 ("*Cyprus v. Turkey* case")

9. National jurisdictions

(a) Australia

Ivan Timofeyevich Polyukhovich v The Commonwealth of Australia and Anor, (1991) 172 CLR 501 ("*Polyukhovich* case")

(b) Israel

Israel v. Adolph Eichmann, District Court of Jerusalem, Judgement of 12 December 1961, 36 *International Law Reports* 5

B. Other authorities

1. Publications

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Robert. H. Jackson, *Report of Robert H. Jackson, United States Representative to International Conference on Military Trials* (U.S. Department of State, 1949) ("Jackson Report")

J.S. Martinez / A.M. Danner, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law", 93 *California Law Review* 75 (2005)

H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Hart Publishing, 2009)

S.G. Smith, "The Process and Meaning of Sexual Assault Disclosure", *Psychology Dissertation*, paper 7 (2005)

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Report of the International Law Commission on the work of its 48th Session, 6 May-26 July 1996, General Assembly Official Records, 51st Session, Supplement No. 10, U.N. Doc. A/51/10 (1996) ("1996 ILC Report")

Oxford English Dictionary Online (Oxford University Press, 2013)

C. List of designated terms and abbreviations

According to Rule 2(B) of the Rules, the masculine shall include the feminine and the singular the plural, and vice versa.

65*ter* Witness List	Annex II to Prosecution Pre-Trial Brief
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) of 8 June 1977, 1125 U.N.T.S. 3
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, 1125 U.N.T.S. 609
Appeals Chamber	The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
AT.	Transcript page from hearings on appeal in the present case All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to public
D	Designated "Defence" for the purpose of identifying exhibits
Defence	Counsel for Vlastimir Đorđević
Đorđević	Vlastimir Đorđević, the appellant
Đorđević Appeal	Vlastimir Đorđević's Notice of Appeal and Đorđević's Appeal Brief, collectively
Đorđević Appeal Brief	Vlastimir Đorđević's Appeal Brief, 15 August 2011 (confidential; public redacted version filed on 23 January 2012)
Đorđević Closing Brief	*Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Vlastimir Đorđević's Final Trial Brief, 30 June 2010
Đorđević Notice of Appeal	Vlastimir Đorđević's Notice of Appeal, 24 May 2011
Đorđević Pre-Trial Brief	*Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, Vlastimir Đorđević's Pre-Trial Brief Pursuant to Rule 65*iter*(F), 22 September 2008
Đorđević Response Brief	Vlastimir Đorđević's Response Brief, 26 September 2011 (confidential; public redacted version filed on 30 January 2012)
Đorđević Reply Brief	Vlastimir Đorđević's Reply Brief, 26 October 2011 (confidential; notice of reclassification to public filed on 9 February 2012)
ECCC	Extraordinary Chambers in the Courts of Cambodia
fn. (fns)	Footnote (footnotes)

FYROM	Former Yugoslav Republic of Macedonia
FRY	Federal Republic of Yugoslavia
Geneva Convention III	Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. 135
Geneva Convention IV	Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 U.N.T.S. 287
Geneva Conventions	Geneva Conventions I-IV of 12 August 1949
ICC	International Criminal Court
ICC Statute	Statute of the ICC
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
ICTR Statute	Statute of the ICTR
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
ICTY Statute	Statute of the ICTY
IHL	International Humanitarian Law
IMT	The Nuremberg International Military Tribunal for the Just and Prompt Trial and Punishment of the Major War Criminals of the European Axis, established on 8 August 1945
IMT Charter	Charter of the International Military Tribunal, *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement)*, August 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280
Indictment	*Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, Fourth Amended Indictment, 9 July 2008
JCE	The joint criminal enterprise with the purpose of modifying the ethnic balance of Kosovo, to ensure Serb of control over the region, by waging a campaign of terror against the Kosovo Albanian civilian population
JNA	Yugoslav People's Army (*Jugoslovenska Narodna Armija*)
Joint Command	Joint Command for Kosovo and Metohija
JSO	Special Operations Unit of the MUP (*Jedinica za Specijalne Operacije*)
Judgement	*Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A, Appeal Judgement, 27 January 2014

KiM	Kosovo and Metohija (*Kosova i Metohije*)
KLA	Kosovo Liberation Army
KVM	Kosovo Verification Mission
Minister's Decision	Exhibit P57 (decision of 16 June 1998 issued by Minister of Interior Vlajko Stojiljković establishing a "Ministerial Staff for the Suppression of Terrorism")
Ministerial Collegium	A body comprised of the MUP Minister and the chiefs of administrations in the RJB
Ministerial Staff	Ministerial Staff for the Suppression of Terrorism
MUP	Ministry of the Interior of the Republic of Serbia (*Ministarstvo Unutrasnjih Poslova*)
NATO	North Atlantic Treaty Organisation
OMPF	Office for Missing Persons and Forensics of the United Nations Mission in Kosovo
Operation Grom-3 Directive	A VJ directive of 16 January 1999, signed by Dragoljub Ojdanić
OUP	Municipal Police Station
P	Designates "Prosecution" for the purpose of identifying exhibits
PJP	Special Police Unit (*Posebne Jedinice Policije*)
Plan of the Suppression of Terrorism	FRY plan to quash KLA activity in Kosovo, adopted in July 1998
Prosecution	Office of the Prosecutor of the Tribunal
Prosecution Appeal	Prosecution's Notice of Appeal and Prosecution's Appeal Brief, collectively
Prosecution Appeal Brief	Prosecution Appeal Brief, 15 August 2011 (confidential; public redacted version filed on 17 August 2011)
Prosecution Notice of Appeal	Prosecution Notice of Appeal, 24 May 2011
Prosecution Pre-Trial Brief	*Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, Prosecution Pre-Trial Brief, 1 September 2008
Prosecution Response Brief	Prosecution Response Brief, 26 September 2011 (confidential; public redacted version filed on 30 January 2012)
Prosecution Reply Brief	Prosecution Reply Brief, 26 October 2011 (confidential; public redacted version filed on 8 February 2012)
RDB	State Security Department of the MUP (*Resor Državne Bezbednosti*)
RJB	Public Security Department of the MUP (*Resor Javne Bezbednosti*)
RPO	Reserve Police Squad (*Rezervni Policijski Odred*)
Rules	Rules of Procedure and Evidence of the Tribunal
SAJ	Special Anti-Terrorist Unit (*Specijalna Antiteroristička Jedinica*)
SAO	Serbian Autonomous District (*Srpska autonomna oblast*)

Serbian forces	Forces of the FRY, in particular forces of the VJ, or forces of the Republic of Serbia, in particular forces of the MUP, or a combination of these forces
SFRY Criminal Code	Criminal Code of the Socialist Federal Republic of Yugoslavia
Statute	Statute of the Tribunal
STL	Special Tribunal for Lebanon
SUP	Secretariat for Internal Affairs (*Sekretarijat Unutrasnjih Poslova*)
T.	Transcript page from hearings at trial in the instant case
TO	Territorial Defence (*Teritorijalna odbrana*)
Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
Trial Chamber	Bench of Trial Chamber II of the Tribunal assigned to *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1
Trial Judgement	*Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Public Judgement with Confidential Annex, 23 February 2011
VJ	Yugoslav Army (*Vojska Jugoslavije*)
Working Group	Working group set up in May 2001 to enquire into allegations concerning a refrigerated truck containing bodies discovered in the Danube in 1999.
Working Group Notes	Official Notes of interviews compiled by the Working Group