

THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

Case №: **IT-05-87-A**

IN THE APPEALS CHAMBER

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

REGISTRAR: Mr. John Hocking

DATE FILED: **23 September 2009**

THE PROSECUTOR

V.

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

**- PUBLIC -**

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**DEFENCE APPEAL BRIEF**

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## I INTRODUCTION

1. The Trial Judgement in this case was rendered by the Chamber on 26 February 2009.
2. In its Judgement, the Chamber found Šainović to be guilty of counts 1 to 5 of the Indictment, pursuant to Article 7(1) of the Statute, and has therefore sentenced the Appellant to a single sentence of 22 years imprisonment.
3. On 27 May 2009, the Defence, has submitted its Notice of Appeal, in which it announced its attention to appeal the Judgement, setting out errors in both fact and law, committed by the Chamber in its Judgement.
4. Pursuant to Rule 111 of the Rules, the Defence, hereby submits its public “Defence Appeal Brief”.
5. The Defence submits its Appeal Brief based on the ensuing appellate grounds and sub-grounds, as contained herein.
6. **All of the errors both in law and facts that are pointed out in the grounds and sub-grounds invalidate the Judgement and/or occasioning miscarriage of**

**justice. All errors in facts that are shown in the grounds and sub-grounds are errors which no reasonable trier of fact would commit. This statement will not be explicitly emphasized regarding every individual error so as to avoid unnecessary repetition considering the word limitation of this submission.**

## II GROUND AND SUB-GROUNDS OF APPEAL

### **Ground 1: Šainović did not participate in the JCE**

#### ***Sub-Ground 1(1): Šainović was the political co-ordinator of VJ and MUP in Kosovo***

7. The fundamental conclusion about Šainović stated that he was a political coordinator of the VJ and MUP forces in Kosovo in 1998 and 1999.<sup>1</sup>

8. The Chamber discusses Šainović's authority over the VJ and MUP in 1998 in two sections: Joint Command Meetings<sup>2</sup> and Other Meetings.<sup>3</sup> In both aspects, the Chamber concludes that Šainović was a political coordinator of the VJ and MUP in Kosovo.<sup>4</sup>

9. Regarding the meetings of the so-called JC in 1998, the Chamber concludes that Šainović, along with Minić, had the leading role in these meetings. However, the evidence points to the fact that Minić, as the head of the Working Group of the SPS, played a dominant role in these meetings.<sup>5</sup>

10. Further, the Chamber asserts that the VJ and MUP liaised with the politicians, that both VJ and MUP had to get approval from Milošević, characterising Šainović's role as pivotal in both giving such approval and issuing instructions.<sup>6</sup> This conclusion of the Chamber is incorrect and contradictory to its conclusions in other parts of this Judgement.

11. Firstly, Šainović's role has no pivotal characteristics in relation to the VJ and MUP. As the President of FRY, Milošević has all structures and chains of command at

<sup>1</sup> Judgement-vol.III:paras.462,331

<sup>2</sup> Judgement-vol.III:paras.306-330

<sup>3</sup> Judgement-vol.III:paras.332-335

<sup>4</sup> Judgement-vol.III:paras.331,335

<sup>5</sup> P1012,tt.14743,26461,P1468

<sup>6</sup> Judgement-vol.III:para.331

his disposal. All decisions on the deployment of the VJ and MUP are reached at the top and then forwarded down the command chain.<sup>7</sup> The Chamber accepts that the VJ command structure continued to operate in 1998.<sup>8</sup> More than twenty witnesses corroborated that the chains of command were preserved in the VJ and MUP during 1998 and 1999.<sup>9</sup> Milošević also held meetings with the highest representatives of the VJ and MUP.<sup>10</sup> These meetings were attended by Perišić, Samardžić, Milutinović, Stojiljković, Lukić and other highest ranking figures. The Chamber does not state in any part that there is a decision of strategic or local consequence that Milošević was unable to secure approval for and instruct through the regular chain of command, but needed to act through Šainović instead.

12. The Chamber draws the conclusions that Šainović is the political coordinator also on the basis of “Other meetings”,<sup>11</sup> wherein it gives further explanations on Šainović’s authority over the VJ and MUP in Kosovo in 1998. Three meetings are mentioned in this context. The first meeting<sup>12</sup> is the one held on 29 October 1998, at which Pavković, Lukić and Minić submitted reports on anti-terrorist operations, and where Šainović, as one of the last to take part, leads a short discussion of limited significance, primarily related to the latest developments and the arrival of the OSCE Verification Mission. The second meeting, held on 5 November 1998,<sup>13</sup> was the meeting at which Milutinović conveyed instructions, and at which Šainović said nothing.<sup>14</sup> The third meeting<sup>15</sup> is the one mentioned by Lukić at the MUP Staff meeting held in Priština. It is unclear what the circumstances under which Šainović attended this meeting were, and if he said anything at all. To sum up, the Chamber assesses Šainović’s participation, which is marginal in one meeting, inexistent in the second, and unknown at the third, as evidence of Šainović being a political coordinator for Kosovo, which no reasonable trier of facts would have done.

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<sup>7</sup> P1574; Judgement-vol.I:para995;4D137;tt.15076,26409

<sup>8</sup> Judgement-vol.III:para.1095

<sup>9</sup> Defence Final Trial Brief:paras.658-665

<sup>10</sup> Judgement-vol.I:paras.993,995,997,1001,1002,1003

<sup>11</sup> Judgement-vol.III:para.332-335

<sup>12</sup> Judgement-vol.III:para.332

<sup>13</sup> Judgement-vol.III:para.333

<sup>14</sup> P2805

<sup>15</sup> Judgement-vol.III:para.334

13. Regarding the section of the Judgement referring to Šainović's authority in 1999,<sup>16</sup> nowhere does the Chamber establish that Šainović is a political coordinator. No findings or reasons are given for the period after the commencement of the NATO bombing campaign, and neither is the wording that Šainović is a political coordinator used. Taking into account that this is the period in which the crimes, as established by the Chamber, were committed, it is particularly significant that there is no explanation as to how and whom Šainović coordinated. If the term "political coordinator" is used, then it must be substantiated by adding what Šainović coordinated in 1999 after the KVM had left, especially in the light of the fact that the Chamber concludes that the chains of command in the VJ and MUP remained separate and intact and the VJ and MUP units were commanded by their respective commands.<sup>17</sup>

14. In the conclusions about Šainović's responsibility, the Chamber establishes that Šainović was a crucial link between Milošević, who was in Belgrade, and the VJ and MUP units operating in Kosovo. His (Šainović's) role was, therefore, that of political coordinator of the forces in Kosovo.<sup>18</sup>

15. The assertion that Šainović was a crucial link lacks any evidence. Apart from the argument that Šainović was conveying Milošević's orders by referring to a newspaper article,<sup>19</sup> which cannot be perceived as a crucial link even in the broadest sense, which is addressed in other parts of the Appeal, there is no proof of anything remotely resembling the conveyance of Milošević's orders. In addition, the conveyance of (non-existent) orders is not political co-ordination and cannot be termed as such. The Chamber has abundant evidence of the functioning of the VJ and MUP command in 1999, as well as an abundance of evidence to establish that the chains of command remained separate and intact, whereas the Chamber does not have a single piece of evidence in support of the claim that Šainović ever relayed any Milošević's order from Belgrade to Kosovo.

16. The Chamber is neglecting the fact that there is proof that, after 24 March 1999, Šainović met with Milošević only two or three times in meetings attended by representatives of the state authorities of FRY and Serbia, which lasted ten minutes

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<sup>16</sup> Judgement-vol.III:paras.336-361

<sup>17</sup> Judgement-vol.I:para.1144

<sup>18</sup> Judgement-vol.III:para.462

<sup>19</sup> 5D1289,P1996

each,<sup>20</sup> and in one meeting held on 17 May 1999, of which Vasiljević and Farkaš have testified.<sup>21</sup> Šainović was not given a single order in any of those meetings for the purpose of conveying it to Kosovo. There is no proof that Šainović ever met with Milošević in private after 24 March 1999, and no evidence that they spoke on the phone in that period. All statements about the “crucial link” are mere assumptions on the basis of which no reasonable trier of facts can and should be allowed to draw conclusions on.

17. In addition to the lack of any explanation as to the nature and substance of political coordination, there is also no rationale as to how and by what means a political coordinator contributes to the accomplishment of objectives of the JCE.

18. The Chamber finds that Šainović acted as Milošević’s political coordinator in Kosovo and as the Chairman of the Federal Commission.<sup>22</sup> The Chamber is also inconsistent in this finding because it states previously that the Commission had no command authority over the VJ and MUP.<sup>23</sup> It is stated that Šainović was able, in the capacity of the Chairman of the Commission, to “*continue his dealings with high-level VJ and MUP officials in Kosovo, in the manner similar to that employed during 1998.*”<sup>24</sup> Šainović’s assignment as Chairman of the Commission was to review and coordinate the political, security and logistical aspect of the functioning of OSCE Mission.<sup>25</sup> Being the Chairman of the Commission, he was responsible for the safety aspect of functioning of the Mission, which was practically impossible without the cooperation with the VJ and MUP representatives. The Chamber mystifies this necessary cooperation and calls it exercising influence over Pavković and Lukić.<sup>26</sup>

19. The Chamber fails to provide an explanation of its understanding of the activities of a political coordinator. The Chamber avoids to answer the questions as to what this coordination consists of, does it mean the effective control over units, whether it implies the command of units, whether it entails the possibility of punishing the perpetrators of criminal acts and discipline offenders, whether a political coordinator influences the combat and non-combat deployment of units. The Chamber does not qualify whether

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<sup>20</sup> P605.p.865

<sup>21</sup> Judgement-vol.III:para.350-353

<sup>22</sup> Judgement-vol.III:para.462

<sup>23</sup> Judgement-vol.III:para.369

<sup>24</sup> Judgement-vol.III:para.401

<sup>25</sup> 2D8,para.1

<sup>26</sup> Judgement-vol.III:para.401

coordination has the characteristics and responsibilities of command. The Chamber finds Šainović guilty of being a political coordinator, without ever explaining what is culpable, if anything, about the function that Šainović allegedly exercised as claimed by the Chamber and convincingly disputed by the Defence.

20. The explanation of the adjective “political” in the syntagm “political coordinator” is not given anywhere in the Judgement. Is there a difference between a political and some other coordinator; does the political coordinator have any special responsibilities and duties in comparison with the ordinary coordinator; how does one become a “political” coordinator – is it sufficient to be a political official, or are there any other criteria?

21. The Chamber states that Šainović was also a coordinator of civilian activities in Kosovo.<sup>27</sup> This assertion is made as part of the conclusions pertaining to Šainović’s relationship with Milošević. However, there is no rationale as to which civilian affairs in Kosovo Šainović coordinated. During 1998, Milosavljević was sent to Kosovo by the Government of Serbia to coordinate the work of the state authorities in Kosovo.<sup>28</sup> In the period after the anti-terrorist operation was concluded, the TEC was established as a temporary executive body.<sup>29</sup> There is not a single word to indicate that Šainović played any role in coordinating the civilian activities in Kosovo.

22. For the reasons stated above, the Chamber erred in conclusion that Šainović was a political coordinator of the VJ and MUP units in Kosovo.

***Sub-Ground 1(2): Denial of right to a fair trial***

23. The Chamber sentenced Šainović as the political coordinator of the VJ and MUP forces in Kosovo.<sup>30</sup>

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<sup>27</sup> Judgement-vol.III:para.427

<sup>28</sup> tt.14652-14653

<sup>29</sup> P907

<sup>30</sup> Judgement-vol.III:para.462

24. In the Indictment, however, Šainović was not accused of coordinating. The indictment holds Šainović responsible, as the Head of the JC, for having commanded, controlled, directed and otherwise exercised effective control over forces of the FRY and Serbia in Kosovo.<sup>31</sup> It is also alleged that he participated in planning, instigating and ordering the operations of the FRY and Serbian forces in Kosovo.<sup>32</sup>

25. The Chamber does not perceive the position of a political coordinator as a description of some tasks that Šainović deals with, but rather as a function that entails rights and obligations, the violation of which enters the sphere of criminal responsibility. Consequently, the Chamber is not giving a narrative description of his role; instead, it is treating the position of coordinator as a function with its respective rights and responsibilities that entail criminal responsibility in the case of infringement or abuse thereof.

26. Šainović was not defending himself against charges that he was politically coordinating the forces in Kosovo; he was defending himself from the charges that he commanded these forces, planning and ordering their deployment. Had Šainović been notified that he was not charged with being the commander of the JC, but with being a political coordinator, the concept of his defence would have been different from that which he presented during the trial.

27. Considering that Šainović was not indicted as a political coordinator, but as the Head of the JC who commanded the VJ and MUP forces, Šainović was denied the right to a fair and equitable trial.

***Sub-Ground 1(3): Šainović as Milošević's representative in Kosovo***

28. The Chamber establishes that Šainović was Milošević's representative in Kosovo, who not only conveyed information to Milošević and conveyed Milošević's orders with

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<sup>31</sup> Third Amended Joinder Indictment, para.46(c)

<sup>32</sup> Third Amended Joinder Indictment, para.46(d)

regard to events in Kosovo, but also had influence on the events in the province and that he was authorized to make decisions. The Chamber concludes that Šainović's position was not restricted to his function of Chairman of the Commission, but that it existed prior to and independently from this function.<sup>33</sup>

29. The Chamber debates on the manner in which Šainović was sent to Kosovo in the summer of 1998.<sup>34</sup>

30. With regard to the fact that he was on a fact-finding mission, the Defence emphasizes that this fact by no means qualifies Šainović for that position any more than Lilić, who had accompanied him on that occasion, or any more than any of the other state officials who visited Kosovo, or who were apprised of the situation in Kosovo by nature of their office. Šainović and Lilić went to Kosovo in line with the task that had been assigned to them by the PM of the Federal Government Bulatović.<sup>35</sup> Šainović's and Lilić's function in the context of these one-day visits does not differ. Both had travelled there in compliance with the agreement they had with Bulatović, both had pursued the same activities, and upon their return, they both briefed Bulatović on the talks they had had, and both notified Milošević about their trips.

31. It is also indisputable that Milošević, as the President of the State – FRY, and President of the ruling party in Serbia and the FRY– SPS, had a whole array of sources of information at his disposal.<sup>36</sup> Army, police, state and party bodies brief a head of state on all relevant issues on a daily basis. That Milošević would have waited for Šainović's and Lilić's report on these one-day visits to Kosovo in order to gain insight into the situation and acquire information that could have been relevant for adopting a decision with regard to the situation in Kosovo is entirely unfounded and impossible.

32. Consequently, the visits to Kosovo which took place in April and May 1998 were by no means a recommendation for sending Šainović to Kosovo in the summer of 1998.

33. Arguing about the manner in which Šainović had been dispatched to Kosovo in the summer of 1998, the Chamber draws a key conclusion on the status and authority of Šainović:

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<sup>33</sup> Judgement-vol.III:para.299,292-299

<sup>34</sup> Judgement-vol.III:para.292

<sup>35</sup> P605,p.29

<sup>36</sup> P605,p.77

*“It is the Chamber’s view that, if Bulatović was not issuing tasks to Šainović, the only possible source of Šainović’s actual authority was Milošević.”<sup>37</sup>*

34. The Defence contends that the Chamber has grossly violated the standards of proof in drawing the above conclusion. Namely, the Chamber establishes that Bulatović is not a source of authority with respect to Šainović, and this does not provide any grounds for determining who the source of authority was. Without any evidence, merely on the basis of assumptions with regard to the manner in which the political system in Serbia functioned, the Chamber establishes that the only possible source of authority was Milošević. There is no explanation in the Judgement as to how that system functioned, and neither is there any evidence in the Judgement to corroborate Milošević’s position and role. In several sections of the Judgement, the assertion that in FRY’s and Serbia’s political system everything begun and ended with the extra-institutional position and decision-making authority of Milošević, is treated as an axiom by the Chamber. No evidence was presented to the Chamber about the position and role of Milošević, furthermore, the trial against Milošević before this Tribunal or any other court of any other jurisdiction has never been brought to conclusion, and therefore there is no irrefutable truth about Milošević.

35. The Chamber has concluded that since Bulatović did not issue to Šainović “specific tasks”, then Milošević must have been the one who did. The Chamber ignores Bulatović’s testimony that the Deputy MP is not issued specific tasks, but that rather, the members of the Government work pursuant to general politics and general objectives, as well as that the relationship between the Government members is based on principles of cooperation in achieving common goals.<sup>38</sup>

36. The Chamber concludes that Milošević had instructed Bulatović to send Šainović to Kosovo.<sup>39</sup> Nowhere does the Chamber give its rationale as to how is it possible that Šainović’s authority towards other participants in the events stemmed from a conversation between Milošević and Bulatović that was not witnessed by any third

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<sup>37</sup> Judgement-vol.III:para.293

<sup>38</sup> tt.13901-13902

<sup>39</sup> Judgement-vol.III:para.292

person. There is no evidence showing that either Milošević or Bulatović have transmitted to anyone that a special authority was given to Šainović on the basis of that conversation.

37. The conclusion about Milošević being Šainović's source of authority only because the source of authority is not Bulatović, is a conclusion which the Chamber could not have made beyond reasonable doubt.

38. The Chamber tries to substantiate its contention with impressions, assumptions of individuals who met with Šainović at a given time, or who exercised functions within foreign diplomatic or political missions.

39. The Defence first of all wishes to emphasize that the contention that "*the only possible source of Šainović's actual authority was Milošević*" may not and cannot be based on impressions. If the Chamber contends that someone is exerting authority then there must be examples, there must be concrete events to substantiate that someone is implementing authority in actual fact.

40. Thus, the Chamber quotes Naumann saying that "*during the meetings of 24 and 25 October 1998, Milošević introduced Šainović to him as a FRY Deputy Prime Minister and 'the man responsible for Kosovo.'*"<sup>40</sup> However, the Chamber is evading the full context of this event. Namely, at the time about which Naumann testifies, Šainović had been appointed to the position of Chairman of the Federal Commission. Šainović had been appointed to this position by Decision of the Federal Government of the FRY of 19 October 1998.<sup>41</sup> Naumann arrived in Belgrade within the context of implementation of the Milošević – Holbrooke agreement. Naumann confirmed that the substance of Šainović's engagement in Kosovo, according to his knowledge corresponded with the tasks assigned to Šainović by Decision of the Federal Government.<sup>42</sup> Therefore, Milošević's statement, made colloquially, is entirely in accordance with the position that Šainović occupied at the time when that statement had been made.

41. Vollebaek has "*testified that he was under the impression that Šainović was the person with responsibility for Kosovo within the FRY Government*".<sup>43</sup> The Defence would like to reiterate that impressions may not and cannot be grounds for drawing conclusions

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<sup>40</sup> Judgement-vol.III:para.295

<sup>41</sup> 2D8

<sup>42</sup> tt.8369,2D8

<sup>43</sup> Judgement-vol.III:para.295

on things which are of an exact nature, and the existence of which can easily be verified based on available facts.

42. The Chamber quotes Ciaglinski as the person who “*testified that Šainović was responsible for Kosovo and that Milošević was the only person higher than Šainović in that respect.*”<sup>44</sup> First of all, the Chamber ignores the point of view from which Ciaglinski observes events and the roles of individuals. Ciaglinski was the lieutenant-colonel in the KVM headquarters in charge of organizing and planning verification visits.<sup>45</sup> During his mandate, Ciaglinski had no opportunity to meet with any of the members of the Government of Serbia or the FRY, nor did he have any first hand knowledge about their work, based on which he could draw conclusions on the tasks and authorities within the power structures of Serbia and FRY. Furthermore, the Chamber uses Ciaglinski’s testimony selectively. Namely, when describing Šainović, Ciaglinski stated that he was certain that Šainović spoke on behalf of the Federal Government in Belgrade,<sup>46</sup> which, although simplified, corresponds to Šainović’s position and role. The Chamber proceeds to quote Ciaglinski’s conclusion that “*Milošević was the only person higher than Šainović in that respect*” and refers to transcript page 6825, however, here Ciaglinski states “*I could only imagine at the time that it was Milošević*”,<sup>47</sup> which clearly places Ciaglinski’s conclusions in the domain of an assumption.

43. The Chamber also quotes Phillips to whom, allegedly, “*Šainović introduced himself as the personal representative of Milošević in Kosovo*”.<sup>48</sup> However, when Phillips testified about the substance of Šainović’s work in Kosovo, he confirmed that Šainović’s activity in Kosovo amounted to performing tasks assigned to him by decision of the Federal Government.<sup>49</sup> Furthermore, Phillips conceded that Šainović was responsible to the Federal Government and that it is therefore logical that tasks were assigned to him by this Government and that he reported on their accomplishment. Phillips testified that when he says that Šainović had to consult Belgrade about some issue, this does not

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<sup>44</sup> Judgement-vol.III:para.295

<sup>45</sup> P2488,witness statement:21-23 March 2000,p.2

<sup>46</sup> P2488,witness statement:21-23 March 2000,p.11

<sup>47</sup> tt.6825

<sup>48</sup> Judgement-vol.III:para,295

<sup>49</sup> tt.11864

necessarily mean that he is consulting Milošević, but also the Federal Government which appointed him.<sup>50</sup>

44. The Chamber also quotes Maisonneuve who “*testified that he never heard Šainović defer to another person when it came to interactions about Kosovo. In his opinion, there was no doubt Šainović was well apprised of what was happening in Kosovo, and the power to act was in his hands to a great degree*”<sup>51</sup>. First of all, the fact that a witness never heard of something does not rule out the existence of a given relation. The Chamber invokes the opinion of Maisonneuve, however, the latter is unable to provide any facts. Maisonneuve met with Šainović only once,<sup>52</sup> at a meeting where several other people were present, where many spoke and which was a brief meeting.<sup>53</sup> Maisonneuve agrees that Article 2 of document 2D8 describes Šainović’s tasks.<sup>54</sup> Maisonneuve explained that it had been a meeting led by Šainović and Keller, where the two of them knew exactly what the authorities of the other were and what issues may be discussed at the meeting.<sup>55</sup>

45. Except for a generalized assessment, Rugova does not mention, either in his testimony in the Milošević case,<sup>56</sup> or in his written statement,<sup>57</sup> what he really knows about Šainović’s tasks. However, Rugova’s closest associate Merovci, who was present at almost all of Rugova’s activities, testified in this case and stated what Šainović’s role was: “*Mr. Šainović was the person who came more frequently and announced meetings. In a way, he could have been the person who acted in a capacity of an envoy, who conveyed opinions of higher ranks.*”<sup>58</sup> The Chamber used Merovci’s testimony as a significant factor in deciding whether to accept Rugova’s testimony in accordance with rule 94<sup>quater</sup>, stating that Merovci’s testimony clarifies the context into which the evidence of Rugova’s fits, and that Rugova’s testimony is generally consistent with the evidence of

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<sup>50</sup> tt.11864-11865

<sup>51</sup> Judgement-vol.III:para,295

<sup>52</sup> tt.11033

<sup>53</sup> tt.11162

<sup>54</sup> tt.11162-11163

<sup>55</sup> tt.11163-11164

<sup>56</sup> P2612

<sup>57</sup> P2613

<sup>58</sup> tt.8535

Merovci and Surroi.<sup>59</sup> Rugova's testimony was entered into evidence at the request of the Chamber, although the Chamber had dismissed the first motion of the Prosecution for including Rugova's statement. Considering that Rugova was not cross-examined regarding Šainović, as well as considering the inconsistency in relation to Merovci, the probative value of Rugova's statement must be minimal.

46. Lončar clearly stated that everything that Šainović "did within the commission was within the part of his duties as the Deputy Prime Minister, based on the tasks and position he received from the Federal Government"<sup>60</sup> Lončar stated that Šainović consulted the Federal Government on all issues and requests made by KVM.<sup>61</sup> Lončar stated that with regard to some tasks in Kosovo, he had more responsibility than Šainović.<sup>62</sup> The Chamber views Lončar's statement out of context: "*informally, trying to do much more than his various functions strictly compelled him to do.*"<sup>63</sup> The Chamber fails to observe what Lončar was actually referring to,<sup>64</sup> which is that Šainović was trying to do more in the direction of stabilizing and improving the situation in Kosovo, such as supporting Anđelković's attempt to help establish a local multi-ethnic police force, as will be discussed in more detail below.

47. The Chamber quotes Drewienkiewicz as saying that "*no one ever raised a constitutional or legal objection to referring a matter to Šainović.*"<sup>65</sup> Although the Chamber uses this contention in support of its conclusion that Šainović occupied some kind of extra-institutional status on account of Milošević's special trust, the said citation proves that Šainović was actually acting within the framework of his legal powers, as set forth in the Rules of Procedure of the Federal Government, and in the decisions regulating Šainović's status in Kosovo.<sup>66</sup> Drewienkiewicz merely relates what others have told him about the status of Šainović, he has no first hand knowledge.<sup>67</sup>

<sup>59</sup> Decision on Second Prosecution Motion for Admission of Evidence Pursuant to Rule 92quater, 5 March 2007, para.9

<sup>60</sup> tt.7585

<sup>61</sup> tt.7587

<sup>62</sup> tt.7589

<sup>63</sup> Judgement-vol.III:para,295

<sup>64</sup> tt.7590

<sup>65</sup> Judgement-vol.III:para 295,P2508,para.201

<sup>66</sup> 1D260,2D8,2D346,Art.9

<sup>67</sup> P2508,para.201

48. Surroi states that Šainović was the most trusted man of Milošević and his closest associate regarding Kosovo issues.<sup>68</sup> The Chamber however fails to mention that Surroi allegedly acquired this information from Hill.<sup>69</sup> The Chamber recognized the need to include Hill's testimony in the case and requested US authorities to allow him to take the stand,<sup>70</sup> however, the Defence was never notified about the outcome of that request, but was merely informed that Hill would not testify.<sup>71</sup> Moreover, the Defence had subsequently requested the Chamber to *subpoena* Hill to testify, but this request was denied.<sup>72</sup>

49. The Chamber states that Petritsch confirmed that Šainović was in charge of Kosovo-related issues.<sup>73</sup> However, when questioned about the content of Šainović's activities, Petritsch confirmed that Šainović's role was described in the decision on establishing the Federal Commission.<sup>74</sup>

50. The Chamber also quotes Byrnes, who "*testified that he had the impression that Šainović was the "go-to, the point man politically on Kosovo."*"<sup>75</sup> Like other witnesses, Byrnes in principle agrees that Šainović had his role in Kosovo. However, when asked about what this role entails in actual fact, Byrnes agreed that Šainović's role essentially entailed performing tasks, as decided by the Federal Government.<sup>76</sup>

51. Therefore, the Chamber quotes 11 witnesses in support of its conclusion that Šainović's source of authority was Milošević, and that Šainović, in addition to conveying Milošević's orders also had the authority to make decisions on his own with regard to Kosovo.<sup>77</sup> The evidence that the Chamber refers to does not point to these conclusions because:

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<sup>68</sup> Judgement-vol.III:para.295

<sup>69</sup> tt.4546-4547

<sup>70</sup> Letter to the US Embassy, 16 April 2008

<sup>71</sup> tt.26574

<sup>72</sup> Decision on Sainovic Defence Motion for Trial Chamber to Summon Christopher Hill and Boris Mayorski, 3 July 2008

<sup>73</sup> Judgement-vol.III:para.296

<sup>74</sup> 2D8,tt.10944

<sup>75</sup> Judgement-vol.III:para.297

<sup>76</sup> tt.12185-12186,2D8

<sup>77</sup> Judgement,paras.293,299

- In Judgement Vol. III paras. 291 to 299 the Chamber does not state a single example of an order issued by Milošević that Šainović conveyed;
- In Judgement Vol. III paras. 291 to 299 the Chamber does not state a single example of an independent decision made by Šainović with regard to Kosovo;
- In Judgement Vol. III paras. 291 to 299 the Chamber does not state a single example of how Šainović's activity affected events in Kosovo, especially not events which could contain elements of a criminal act;
- Witnesses that the Chamber quotes claim that Šainović is responsible for Kosovo, but are unable to describe any single activity that Šainović exercised beside the activities that he exercised as Chairman of the Federal Commission.

52. The Chamber concludes that Šainović had a great deal of power prior to his appointment as Chairman of the Federal Commission. Witnesses quoted by the Chamber who testified before the time of KVM are only Surroi, Petritsch, Byrnes and witness 92<sup>quater</sup> Rugova. With the exception of Rugova, none of the other witnesses mention a great deal of power or anything similar.

53. With regard to the fact that Šainović enjoyed Milošević's trust, despite announcing in Vol. III para. 292 that it will present its conclusions with regard to this contention further in the text of the Judgement, the Chamber did not explain them adequately in its Judgement.

54. The Defence points out that Šainović was never Milošević's man of trust. There is no evidence corroborating such an allegation in this case. Milošević had his own special envoy who participated in the Rambouillet conference in this capacity, as well as in some earlier negotiations.<sup>78</sup> At key meetings of the SPS, whose President was Milošević, Šainovic did not participate in the discussion, including on Kosovo-related issues.<sup>79</sup> When the SPS formed a team to coordinate political activities in Kosovo, the SPS Main Board appointed Minić as team leader at Milošević's proposal.<sup>80</sup>

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<sup>78</sup> tt.10828,13846

<sup>79</sup> P1012,tt.14147,

<sup>80</sup> P1012,p.6,p.79,tt.14743,

55. On 24 April 1997, Šainović was deposed from that position of SPS Vice-President at the proposal of Milošević himself.<sup>81</sup> How is it possible that Milošević should depose his man of trust, while at the same time, in the highest echelons of the party, he keeps Milutinović who, according to the Chamber's finding did not have a close personal or professional relationship with Milošević,<sup>82</sup> despite the fact that he was Milošević's successor to the position of President of Serbia, despite the fact that he was a member of the SDC, despite the fact that he was the member of the top party's leadership.

56. The Chamber insists that Šainović was sent to Kosovo by decision of Milošević, and not Bulatović who was PM of the Federal Government of which Šainović was a member. The Chamber ignores the testimonies of a whole range of persons who were directly involved in the decision-making process on this issue, and who described the circumstances under which Šainović was sent to Kosovo in a detailed and rational manner.<sup>83</sup>

57. The relationship between Bulatović and Šainović is also a keystone in the Chamber's contention that Šainović was Milošević's man of trust who acted only upon his orders. The Chamber tries to simplify the relations between the highest state officials, the PM and Deputy PM in the Federal Government, and expects their mutual relations to be regulated in such a way that the PM issues orders to the Deputy PM on a daily basis which are to be carried out on that same day, and before issuing a new order expects a report on yesterday's results.<sup>84</sup>

58. The fact that Milošević recommended Milutinović to the post of President of Serbia, and consequently a member of the SDC, does not lead the Chamber to conclude that Milutinović was a man of trust. Milošević's appointment of and long-term cooperation with Milutinović within the country's supreme authority, which has a key role in the defence affairs of a country was not sufficient to lead the Chamber to conclude that Milutinović had a close relationship with Milošević.<sup>85</sup> All findings on Milutinović's relationship with Milošević are derived on the basis of a single piece of evidence, P604,

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<sup>81</sup> tt.14198

<sup>82</sup> Judgement-vol.III:para.239

<sup>83</sup> tt.13817,13819,13997,14589,14743

<sup>84</sup> tt.13901

<sup>85</sup> Judgement-vol.III:para.239

Milutinović's interview with the Prosecution.<sup>86</sup> In his interview, given after the indictment was issued and after Milošević's arrest and transfer to the Tribunal, Milutinović explains that he had disagreed with Milošević, that he used to tell Milošević many unpleasant things, but that he told nobody about his disagreement with Milošević except his wife.<sup>87</sup> Regardless of the foregoing, the Chamber extensively relies on this piece of evidence.

59. The conclusion that Šainović was Milošević's man of trust is incorrect, it is not founded on evidence presented and it is contrary to all facts pointing to the nature of the relationship that Šainović and Milošević had.

60. The conclusions that Šainović was Milošević's representative in Kosovo, who had the authority, granted to him by Milošević himself, who conveyed information to Milošević, who conveyed Milošević's orders to those in Kosovo are not based on presented evidence.

***Sub-Ground 1(4): Genesis of the Joint Command***

61. Based on Dimitirjević's testimony, the Chamber erroneously establishes that the rationale for the development of a JC was the need to find effective mechanisms for ensuring the better coordination of the activities of the state forces involved in Kosovo.<sup>88</sup>

62. In his evidence, Dimitirjević never mentions the need for developing a mechanism for the coordination of forces in Kosovo. All Dimitirjević says about the JC is that the term "Joint Command" was coined later to serve Pavković's needs by providing *cover for some of his activities, so that he could say, "I have the Joint Command behind me"*<sup>89</sup> Dimitirjević never talks about the need to create efficient coordination mechanisms. Dimitirjević exclusively talks about Pavković's endeavours in relation to VJ.<sup>90</sup> The part of Dimitirjević's testimony that clearly refers to Pavković's actions in connection with the VJ "*the Trial Chamber understood that to include securing*

<sup>86</sup> Judgement-vol.III:paras.233-238

<sup>87</sup> Judgement-vol.III:para.238,P604,p.156

<sup>88</sup> Judgement-vol.I:para.1006

<sup>89</sup> tt.26595

<sup>90</sup> tt.26713

*co-ordination between VJ and MUP forces.*”<sup>91</sup> However, not only did Dimitrijević not testify about relations between VJ and MUP, but he clearly admitted his testimony was speculative.<sup>92</sup>

63. The Chamber mentions that the SPS Working Group for Kosovo was set up, and that Šainović was sent to Kosovo by the Federal Government.<sup>93</sup> The Chamber however does not link in any way Pavković’s intentions with the fact that civilians, state and party officials had been sent to Kosovo in the summer of 1998 in various roles. The Chamber does not point out any facts in corroboration of the finding that the formation of a JC with the participation of civilian representatives was necessary to ensure better co-operation between VJ and MUP.

64. Accordingly, the Chamber fails to give reasons why a JC was needed and why the participation of civilians was needed in the body designated by the Chamber as the JC.

65. Based on a sentence that the witness Dimitrijević himself calls speculation, the Chamber tries to prove that there was a need from some sort of JC, although there is credible evidence on the manner in which VJ and MUP actions were run in the course of 1998.<sup>94</sup> Furthermore, the Chamber completely disregards credible explanations about the manner in which VJ<sup>95</sup> and MUP<sup>96</sup> were co-ordinated. The co-ordination of VJ and MUP activities was implemented by Đaković on the VJ side and Stevanović, Adamović and Mijatović on the MUP side.<sup>97</sup> This co-ordination eliminated the need for any kind of additional body or authority.

66. The conclusion that the JC was established in order to provide effective mechanisms for ensuring better coordination between VJ and MUP is a conclusion that no reasonable trier of facts would have drawn.

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<sup>91</sup> Judgement-vol.I:para.1005

<sup>92</sup> tt.26713

<sup>93</sup> Judgement-vol.I:paras.1007-1010

<sup>94</sup> Final Brief paras.143-146

<sup>95</sup> Final Brief paras.147-161

<sup>96</sup> Final Brief paras.162-163

<sup>97</sup> tt.26394,26397

***Sub-Ground 1(5): Termination of the Joint Command***

67. The Chamber does not accept the fact that the JC ceased to exist in the fall of 1998.<sup>98</sup> The Chamber states that the JC continued to operate and that there are mentions by high officials, orders of the JC and at least one meeting in 1999 to corroborate this.

68. The participants in the meetings designated by the Chamber as the JC testified in this case, *inter alia*, about the circumstances pertaining to the period of time in which these meetings took place. Minić testified that the meetings ceased in October 1998.<sup>99</sup> Matković claims that there were no such meetings after September 1998.<sup>100</sup> Anđelković confirms that in the course of 1999 there were no meetings which would remind of the meetings in 1998, either in their form or content.<sup>101</sup> This was also confirmed by Đaković and Gajić.<sup>102</sup> Pavković stated that his command in Niš believes that JC should cease to exist.<sup>103</sup>

69. The Chamber completely disregards the altered circumstances after the October 1998 agreements. The changed circumstances had an impact on the position and role of the actors of the meetings in 1998.<sup>104</sup>

70. The Defence notes that no reasonable trier of facts could have drawn the conclusion that the body designated by the Chamber as the “Joint Command” existed after October 1998.

***Sub-Ground 1(6): Assessment of knowledge of witnesses on Joint Command***

71. The Chamber explains the nature of the JC.<sup>105</sup> In its attempt to state its reasons, the Chamber ignores the testimonies of those witness whose statements it has quoted in

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<sup>98</sup> Judgement-vol.I:para.1010

<sup>99</sup> tt.14754

<sup>100</sup> tt.14597

<sup>101</sup> tt.14663

<sup>102</sup> tt.26389,15413

<sup>103</sup> P1468:p.160

<sup>104</sup> Final Brief,para.99

<sup>105</sup> Judgement-vol.I:paras.1065-1077

an attempt to explain the nature of the JC.<sup>106</sup> Thus, Minić denies that a subordinate relationship existed among the participants,<sup>107</sup> Anđelković states that the term “Joint Command” did not refer to the meetings which he attended;<sup>108</sup> Matković denies that these meetings could have been called “Joint Command”, taking into consideration their nature.<sup>109</sup> Đaković explained that he and Pavković coined the term “Joint Command”.<sup>110</sup> Đaković, as the witness of the Chamber, stated that the “*Joint Command was an internal fictitious name when there were discussions for the most part between General Pavković and myself*”.<sup>111</sup> Đaković explained that the term “Joint Command” only referred to Pavković and Lukić, as the Commander of the PrK, and the chief of MUP staff in Priština, and nobody else, particularly not Minić and Šainović.<sup>112</sup>

72. The only source quoted by the Chamber, claiming that the JC had been set up at the highest level is Cvetić.<sup>113</sup> Cvetić’s statement is in contradiction with the testimonies of a whole series of witnesses who described the nature of the meetings and the term JC.<sup>114</sup> Cvetić’s statement is also in contradiction with the testimony of the participants in the meeting at which he had allegedly heard that a JC had been set up.<sup>115</sup> The testimonies of Mijatović,<sup>116</sup> Vučurević,<sup>117</sup> and Adamović,<sup>118</sup> differ diametrically from Cvetić’s evidence.

73. The Chamber above all errs in relying on an issue of “Vojska” magazine from 2001,<sup>119</sup> in which it is allegedly mentioned that a handbook was printed and distributed by the JC.<sup>120</sup> From the contents of this publication, it is unclear what kind of document this is, it is unclear whether on the handbook itself there is any mention of who is behind

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<sup>106</sup> Final Brief, paras. 86-90

<sup>107</sup> tt. 14752

<sup>108</sup> tt. 14655, 14690

<sup>109</sup> tt. 14595

<sup>110</sup> tt. 26382

<sup>111</sup> tt. 26444

<sup>112</sup> tt. 26382, 26445

<sup>113</sup> Judgement-vol.I:para.1071

<sup>114</sup> Final Brief, paras. 655-657

<sup>115</sup> Final Brief, paras. 731-745

<sup>116</sup> tt. 22284

<sup>117</sup> tt. 21130-23131

<sup>118</sup> tt. 24967-24968

<sup>119</sup> P1011, p.49

<sup>120</sup> Judgement-vol.I:para.1077

this publication, the Chamber simply relies on the interpretation of a journalist and that interpretation is not supported by any other evidence.

74. Based on the sources quoted in the aforesaid paragraphs, the Chamber draws the conclusion that *“it is clear from the evidence that meetings were held between members of the SPS Working Group, Šainović and MUP and VJ officers.... and that these meetings were referred to as Joint Command meetings”*<sup>121</sup> In the previous section “Nature of the Joint Command”<sup>122</sup> the Chamber examines the testimonies of more than 40 witnesses and only the testimony of one of these, Cvetić, somewhat corresponds to the formulation of the Chamber. The Chamber ignores the contents of the witness testimonies that it, itself, quotes, disregarding not only the number but also the position, the credibility of the witnesses who describe the content and name of the meetings that were held in the summer and fall of 1998, with the participation of civilian representatives, VJ and MUP officers. All the participants in the meeting who have testified, including Đaković as the witness for the Chamber, deny that the meetings were called meetings of the JC. All others have a fragmentary knowledge on the substance of the events.

75. Consequently, the witnesses quoted by the Chamber as the witnesses explaining the nature of the JC, do not provide any grounds for drawing a conclusion about the name and nature of the meetings held in the summer and fall of 1998.

76. The Chamber mentions the statements of more than 40 witnesses with regard to the “nature of the Joint Command”, it does not assess these statements, either separately, or in relation to each other, it does not explain whether it believes in them or not, but rather draws a conclusion which is partially founded on the statement of only one of them.

77. In drawing conclusions about the “nature of the Joint Command” and in its assessment of the knowledge of witnesses about the JC, the Chamber erred in respect to the standards of proof as well as in respect to the determined facts.

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<sup>121</sup> Judgement-vol.I:para.1078

<sup>122</sup> Judgemnt-vol.I:paras.1056-1077-“Nature of the Joint Command”

***Sub-Ground 1(7): Working Group for Kosovo and the Temporary Executive Council (TEC)***

78. The Chamber establishes facts which regard the Working Group for Kosovo formed by the decision of the Main Board of the SPS and headed by Minić,<sup>123</sup> and facts which regard the TEC, headed by Anđelković.<sup>124</sup>

79. As can be understood from the reasons given for the part of the Judgement which regards the Working Group for Kosovo and TEC, the Chamber does not express any doubts with regard to the description of their composition and role, at least not in the part of the Judgement that regards these two bodies. However, in the Chamber's conclusions concerning the JC for 1998, these facts are ignored.

80. The Working Group was formed at the 16<sup>th</sup> session of the SPS Main Board presided by Milošević.<sup>125</sup> Minić made an introductory statement and presented a detailed assessment of the situation and a proposal for future activities.<sup>126</sup> Minić was appointed as team leader.<sup>127</sup>

81. The Group was defined as a separate entity, with separate authorities and with its leader. The Group was not set up in any way to represent some kind of JC or to be some part of it. If there really was a decision to establish a JC at the same time as the Working Group, there is not a single plausible reason why Milošević would have withheld this information at the party meeting which was closed to the public. There is not a single plausible reason why Milošević would have a motive to withhold from the highest body of the SPS, whose undivided support he enjoyed, that he intends to appoint Minić as the leader of the SPS team, while secretly intending to send Šainović to Kosovo as his representative in Kosovo.<sup>128</sup>

82. As far as TEC is concerned, this fact should have prompted the Chamber to draw the conclusion that a new political situation arose in Kosovo after September 1998, i.e. following the October agreements, that a TEC was formed with the task to work on a

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<sup>123</sup> Judgement-vol.I:paras.302-307

<sup>124</sup> Judgement-vol.I:paras.308-311

<sup>125</sup> tt.14586

<sup>126</sup> P1012,p.4,26-42,tt.14586

<sup>127</sup> P1012,p.6,tt.14743

<sup>128</sup> Judgement -vol.III:paras.292,299

political resolutions of the crisis and in particular to organize elections in Kosovo,<sup>129</sup> that one of the members of the Working Group for Kosovo, Anđelković was appointed to a new duty, the duty of TEC President, which was different from the duty that he had performed until then, and which is fully incompatible with the role of member of the JC which the Chamber had attributed to him in the period from July to September.

83. Furthermore, Milošević clearly specifies that Šainović is taking over the new duty of Chairman of the Federal Commission,<sup>130</sup> whereby a clear discontinuation is made marking the beginning of a significantly different phase in Šainović's engagement in Kosovo. This phase would change once again at a later stage, with Šainović's engagement with regard to the negotiations in Rambouillet, but it is clear that his engagement will not have any analogies with the type of work that existed in the summer of 1998.

84. Therefore, the description of the position and role of the Working Group for Kosovo and TEC,<sup>131</sup> is incompatible with the contention that the JC was composed by, *inter alia*, representatives of the political structures of FRY and Serbia. Furthermore, the reasons for forming a Working Group for Kosovo were clearly stated at the time of its formation and implemented through its fieldwork. Those reasons are incompatible with the objectives that are attributed to the members of this group and other civilians in the Chamber's formulation that the JC was established by Milošević's decision in order to respond to the need for greater co-ordination of VJ and MUP.

85. Also, had the Chamber translated evidence into conclusions, it would have been evident that the meetings which numerous witnesses, including the participants in the meetings have described as meetings of various structures for the purpose of sharing information,<sup>132</sup> yet denoted by the Chamber as meetings of the JC, ceased taking place in the month of October 1998.

86. The Chamber misconstrues or fails to assess the type of work, the time and circumstances related to the Working Group for Kosovo and TEC, and thus errs in

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<sup>129</sup> tt.14657

<sup>130</sup> P2166,p.15

<sup>131</sup> Judgement-vol.III:paras.302-311

<sup>132</sup> tt.14748-14750

establishing that the JC continued to exist after October 1998, with the same goals and the same purposes as before that time.

***Sub-Ground 1(8): Conclusions about the Joint Command in 1998***

87. The Chamber draws its conclusions on the authority of the Joint Command in relation to VJ and MUP in a manner that no reasonable trier of fact would, for the following reasons.

88. Everything that the Chamber denotes as “*more than a daily flow of information*”,<sup>133</sup> is precisely flow of information, judging by its content. In all the examples quoted, there is no evidence of anything even remotely resembling a suggestion that something must be done by VJ and MUP, based on the complete content of Đaković’s notes P1468. Furthermore, the Chamber’s position that the JC meetings are “*more than a daily flow of information*” is an example of inadmissible inaccuracy by the Chamber in drawing conclusions. Namely, if these meetings were more than just flow of information, the Chamber fails to define what these meetings were, what their content was and what their relevance with respect to the events that unfolded in the field was. According to Đaković’s Notes, and also the testimony of the participants, none of the meetings were wrapped up with some kind of decision or conclusion. This confirms that these meetings were of an informative nature, that they had the character of a platform for discussions and not a command or coordination body.

89. The Chamber can evaluate evidence, but it cannot evaluate indications and suppositions because it will in this way jeopardize the right of the accused to a fair and unbiased trial.

90. Judgement Vol. I para. 1082, the Chamber states that Šainović allegedly reported that a helicopter was to be painted in white with a red cross and used for access to civilians, the request was forwarded by Pavković to the 3-A Command which responded that the request had not been approved by the GS. The epilogue was Pavković informing

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<sup>133</sup> Judgement-vol.I:para.1079

that the request had not been approved.<sup>134</sup> Pavković issued another request in compliance with the requirements of the Commander of the 3-A, only to inform on 13 September 1998 that the helicopter had not been approved.<sup>135</sup> This situation with the helicopter which was to be used to provide humanitarian help to civilians, clearly demonstrates not as the Chamber states the “*effects of the requests made during the meetings of the Joint Command*” but to the contrary, a complete lack of power to influence the deployment process of VJ resources even in humanitarian missions, let alone the deployment of these units in combat.

91. In Judgement Vol. I para. 1084 the Chamber indicates a link between discussions held during a JC meeting and a subsequent request submitted within the VJ. A quote is cited from a document of the PrK signed by Pavković and dated 22 September 1998, in which Pavković noted that at a briefing of the JC “*other command organs pointed out that the VJ had not carried out two of its duties under the plan*”.<sup>136</sup> The Defence would first of all like to note that in exhibit P1468 which the Chamber denotes as notes from the meeting of the JC of 10 September 1998 there is no mention of any references to the fact that duties under the plan were not being carried out, even though Đaković had made five pages of notes for that day.<sup>137</sup> If the Chamber’s conclusions with regard to the fact that Đaković used to write down the most important things, are correct, it is inconceivable that he could have omitted to note down such important remarks. With regard to this situation, which the Chamber quotes, everything points to Dimitrijević’s assessment that the JC served Pavković as a “*cover for some of his activities*”.<sup>138</sup>

92. In addition to Dimitrijević’s conclusion, there is a need to assess if what was said at the JC meeting had any influence on the events and activities in the field. Namely, the deployment of three combat units and the relocation of one combat unit are mentioned. All of Pavković’s invocations of the authority of the JC had no influence whatsoever on the 3-A Commander. As seen in P1435, the formation and deployment of combat

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<sup>134</sup> 4D230

<sup>135</sup> P1468:p.109

<sup>136</sup> P1435,Judgement-vol.I:para.1084

<sup>137</sup> P1468,pp.98-102

<sup>138</sup> tt.26595,Judgement-vol.I:para.1005

groups, occurs exclusively based on the assessment of the 3-A Commander, regardless of any requests made by Pavković.<sup>139</sup>

93. In Judgement Vol. I para. 1085, in a further elaboration of the influence of the JC meetings on the VJ, mention is made of the meetings held on 19 and 20 September 1998, at which, according to Pavković's document P1439, it had been allegedly decided to form rapid-intervention forces. In document P1468, Đaković, once again, made no record of any of this.

94. Đaković however recorded that Šainović said the following: "*to prepare units for faster interventions*".<sup>140</sup> The Defence would like to note the implausibility of the Chamber's construction in which Pavković's statement that during the meeting of the JC it had been decided to form forces, new rapid-intervention forces, is being interpreted through Šainović's remark in an unclear context where he mentions preparing units – existing ones, for faster interventions.

95. No matter how the non-existent decisions of the JC on rapid intervention forces are interpreted, the only relevant thing is the implementation, in other words, even if the decision had existed, would it have had any influence on the actual situation in Kosovo. It is evident that the 3-A Commander denied Pavković's request for the second time, regardless of the fact that Pavković attempted once again to present his request as a supposed decision of the JC for Kosovo.

96. In Judgement Vol. I para. 1086 it is mentioned that Pavković notified the 3-A IKM that on 31 July 1998 at the JC meeting, a decision had been taken with regard to the implementation of the third stage of the plan. Again, Đaković's Notes for 31 July 1998 fail to record information of crucial importance, which, had it been discussed, would have undoubtedly been recorded.<sup>141</sup> The Chamber attempts to determine whether the decision had perhaps been taken on 30 July 1998, since there is mention there of the "*realisation of the third phase*"<sup>142</sup> but it is not clear who had uttered these words, with what reason and if at all. It is worth mentioning that in his document of 1 August 1998, P1419, Pavković clearly states that the meeting was held on 31 July 1998, even pinpointing the

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<sup>139</sup> The Defence notes that in this context, the Chamber also mentions document P1439, footnotes, 2933, 2934, which have no correlation with this situation at all.

<sup>140</sup> P1468, Judgement-vol.I:para.1085

<sup>141</sup> P1468, pp.33-34

<sup>142</sup> P1468, p.33

time of the meeting from 18:30 to 20:00 hrs. Again, it is evident that Pavković makes use of the JC in his correspondence with the 3-A Command. In this case too, it is of key importance that no changes were triggered in the field by that which the Chamber considered as a decision of the JC. The 3-A Commander banned with his two orders the use of these units.<sup>143</sup> The Chamber concludes that this instance indicates that the VJ chain of command was sometimes circumvented or ignored by Pavković and the JC. The Defence notes that it has no evidence on the actions of anyone except Pavković, who quotes a decision that had not been adopted.

97. The Chamber also misconstrues the gist of Perišić's letter of 23 July 1998. Perišić only mentions an attempt to make an impact on the chain of command.<sup>144</sup> Through regular and extraordinary inspections he followed in detail the activities of the PrK and in August 1998, he personally inspected the Corps and had no remarks about the functioning of the chain of command.<sup>145</sup>

98. The Chamber heard the testimony of Crosland and Dimitrijević on the impact on the chain of command during 1998. The Chamber accepts as true the content of the telegram which allegedly reflects the matter of the discussions between the two intelligence service officers,<sup>146</sup> disregarding the generally known fact that in intelligence matters, often partial information, or false information is provided in order to fob off the other side and achieve some goal in accordance with the activity of the intelligence agency to which the provider of information belongs. Moreover, Dimitrijević testified about what he had talked about with Crosland.<sup>147</sup>

99. Dimitrijević was called to take the stand for the Chamber, and that, after all other evidence was presented. Dimitrijević, as well as Đaković, who is also a witness for the Chamber, were questioned principally about the role of Šainović. When Dimitrijević was heard a mere hour before his entry into the courtroom, the parties were notified about the topics on which he would be questioned, probably in order to preserve the integrity of his testimony. Consequently, Dimitrijević's evidence must be accepted as honest and true.

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<sup>143</sup> 4D125,4D458

<sup>144</sup> P717,pp.2,3,tt.26722-26723

<sup>145</sup> 3D757,p.6,4D506,para.7,4D99,tt.17657

<sup>146</sup> P683

<sup>147</sup> tt.26667-26668,26670-26672,

100. The Chamber also mentions the Instructions for the defence of populated areas.<sup>148</sup> The Defence reiterates that Đaković described the manner in which these Instructions were created.<sup>149</sup> More importantly, the Defence reiterates that there is not a single piece of evidence in this case to prove that these Instructions had been implemented in any way or that they triggered any activities in the field. The same applies to the Operative Reports<sup>150</sup> These Reports cover the period after 15 October 1998<sup>151</sup> and were created in the PrK Command by merging and copying MUP and VJ reports.<sup>152</sup>

101. The Chamber discusses the engagement of VJ and MUP<sup>153</sup> by orders of the PrK of 11 August 1998<sup>154</sup> and 14 August 1998<sup>155</sup> in which it is stated that the commanding will be executed by the JC for KiM for the IKM of the PrK in Đakovica. The Chamber establishes that the activities were under the control of the PrK Command, but states that the function of the JC “*was that of coordination*”,<sup>156</sup> despite the fact that there is no mention of some kind of co-ordination role in the explanation given with regard to this engagement. Moreover, Vol. I para. 1083 indicates that in relation to this operation Pavković only informs at the meeting what was ordered by Samardžić, *id est* what he, himself, has ordered.

102. Something that had already been coordinated at the VJ and MUP meeting could not have been coordinated subsequently, as Pavković already had orders approved by the IKM and General Simić and/or Samardžić, prior to the meeting.

103. The Chamber also discusses the alleged role of the JC in approving combat actions<sup>157</sup> in the context of the confusing contents of some documents.<sup>158</sup> However, here too the Chamber concludes: “*the Trial Chamber considers that, although the order of the 125<sup>th</sup> Motorised Brigade Commander referred to “the approval of the Joint Command”,*

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<sup>148</sup> P2086,P1064

<sup>149</sup> tt.26416-26417

<sup>150</sup> Judgement-vol.I:para.1090

<sup>151</sup> Judgement-vol.I:para.1090,footnote-2961

<sup>152</sup> tt.26429-26430

<sup>153</sup> Judgement-vol.I:paras.1091-1092

<sup>154</sup> P1427

<sup>155</sup> P1428

<sup>156</sup> Judgement-vol.I:para.1092

<sup>157</sup> Judgement-vol.I:para.1096

<sup>158</sup> P2113,tt.20507

*in reality it required that the Priština Corps and MUP Commands approve the operations, not the Joint Command.*"<sup>159</sup>

104. The Chamber accepts the document P2166 as an authentic record of the meeting that took place on 29 October 1998. The Chamber states that the meeting was convened in order to review the actions in terms of the Plan and in the name of the JC.<sup>160</sup>

105. First of all, the Chamber erred by establishing that P2166 is the authentic record from the meeting held on 29 October 1998. None of the persons attending the meeting were aware of any records or minutes being taken.<sup>161</sup> Dimitrijević, neither saw Sušić, who was denoted as the author of the record, take any notes, nor recalls that the course of the meeting was as it is illustrated.<sup>162</sup> Dimitrijević testified that the document appeared to him as though it was created to cover some things.<sup>163</sup> The document is also disputable in terms of the form it was created in. It is impossible to distinguish the parts of the document showing the participants' statements from those giving the author's narrative.<sup>164</sup> The Chamber neither has a consistent stance with regard to P2166.<sup>165</sup>

106. The Chamber established that the substance of P2166 is corroborated by two events. Firstly, the fact that Milutinović spoke in the meeting held in the MUP on 5 November 1998 of the meeting on 29 October 1998<sup>166</sup> and, secondly, that in the *Vojska* magazine published in 2001 an extract was presented from the "*Report and Conclusions on the Implementation of the Plan on Stamping Out Terrorism in Kosovo and Metohija.*"<sup>167</sup> The Defence contends that the facsimile of the document is not published anywhere in the document P1011. All that can be found of relevance in that document is the narrative of the article author speaking of the existence of a certain report signed by the JC, from which the author extracted details. It is inconclusive from P1011 as to whether the report actually exists and what its contents are.

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<sup>159</sup> Judgement-vol.I:para.1096

<sup>160</sup> Judgement-vol.I:para.1107

<sup>161</sup> tt.14764,14767,26597-26598

<sup>162</sup> tt.26597-26598

<sup>163</sup> tt.26612-26615

<sup>164</sup> P2166,pp.1,7,8

<sup>165</sup> Judgement-vol.III:para.136

<sup>166</sup> Judgement,para.1105,P2805

<sup>167</sup> Judgement,para.1106,P1011,p.51

107. The Chamber concludes that the JC had influence over the MUP and VJ in respect of implementation of the various stages of the Plan for Combating Terrorism (Vol. I para. 1110). The conclusion as such is impossible on the basis of the analysis of the evidence that the Chamber invoked:

- Example of the request for helicopters (Vol. I para. 1082) – regardless of the requests, the use of helicopters is decided on by the GS and the 3-A Command;
- Example of the deployment of Combat Groups (Vol. I para. 1084) – Combat Groups are deployed exclusively at the order of the 3-A Commander, regardless of any requests by Pavković;
- Example of the rapid-intervention forces (Vol. I para. 1085) – irrespective of the discussions, the rapid-intervention forces had never been formed;
- Example of the implementation of the third phase of the Plan (Vol. I para. 1086) – regardless of the attempts made by Pavković, the PrK units cannot be engaged without the order issued by the 3-A Commander;
- Example of the Perišić's letter P717 (vol I para. 1088) – Perišić speaks only of attempts, i.e. potentially wanted influence on the use Corps units, but never put to practice;
- Example of the Instructions on the Defence of Populated Areas and the JC Operative Reports (Vol. I paras. 1089, 1090) – There is no evidence that these documents produced any changes on the ground;
- Example of the PrK decisions P1427 and P1428 (Vol. I paras. 1091, 1092) – the Chamber concludes that the operation was under control of the PrK Command;
- The Chamber accepts that the chain of command within the VJ was preserved (Vol. I para. 1095);

- Example of the orders wherein approval is sought from the JC (Vol. I para 1096) – the Chamber accepts that, in reality, the approval was issued by the PrK Command;
- Example of the meeting held on 29 October 1998 (vol. I para 1097-1107) – the substance of the JC activities is not explained.

108. The Chamber concludes that certain members of the JC brought their influence to bear on how the plan was put into effect, utilising the established systems of command and control within the VJ and MUP. The only source for this is the statement about the implementation of the third stage of the plan.<sup>168</sup> However, regardless of any attempts by Pavković, the PrK units were never deployed without the order issued by the 3-A Commander, and always before the meeting of the so-called JC.

109. The Chamber states that the “*Joint Command played a role in the coordination and exchange of information and intelligence between the MUP and the VJ*”.<sup>169</sup> The Chamber does not qualify the nature of this role in the coordination. Coordination is a specific activity of attuning different units with a view to accomplishing the ordered results or objectives. The Chamber does not expound on the role in coordination, but instead keeps its rationale on the level of speculations on the “*influence over VJ and MUP*”, or on “*utilising the established systems of command and control over VJ and MUP*”.<sup>170</sup> The Chamber mentions the case of helicopters but this request was of humanitarian, rather than combat nature and, most importantly, it was never approved.

110. The conclusion of the Chamber that the decisions on how and when the plan was to be executed were discussed<sup>171</sup> should be reconsidered in the context of the outcome of those discussions, as was previously said. Particularly surprising was the conclusion that Šainović played the leading role in discussions regarding the plan execution, without denoting where this is stated in the P1468 Notes by Đaković.<sup>172</sup>

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<sup>168</sup> Judgement-vol.I:para.1086

<sup>169</sup> Judgement-vol.I:para.1110

<sup>170</sup> Judgement-vol.I:para.1110

<sup>171</sup> Judgement-vol.I:para.1110

<sup>172</sup> In footnote 3022 in vol.I,para.1110,the Chamber only generally refers to P1468

111. It is especially important to point out the fact that, although the Chamber also speaks of MUP in its conclusions about the JC in 1998,<sup>173</sup> the rationale in vol. I para 1055 to 1107 features almost no analysis of evidence establishing the link between the JC and the MUP.

112. The conclusions that the JC was formed in May 1998 as a part of the coordination system put in place to help the MUP and VJ work together, as well as the conclusion that the JC was formed in order to “*allow the commanders of the MUP to “save face” by not having to be commanded by the VJ both before and during the state of emergency*”<sup>174</sup> are groundless speculations. The Defence wonders what indicates to the fact that the JC was formed in May 1998, that the legality of the action was problematic, that the MUP commanders needed to “save faces”.

113. Moreover, the conclusion that Milošević, through Pavković, was to direct the actions of the MUP in Kosovo is groundless. There is nothing to indicate that Pavković was needed for the purpose of controlling the MUP. There is nothing to indicate that there were subordination problems in the MUP units. In particular, why should Milošević need to act through Pavković in order to ensure the VJ support to the MUP units with all the existing decisions for VJ deployment, which were issued by the competent authorities.<sup>175</sup> The Chamber states that certain VJ members disagreed with the deployment of VJ in Kosovo. The Defence contends that the disagreement in the system of military organization is overcome by issuing orders, and the discussions about different opinions on the ways to solve a problem become irrelevant once the order has been issued. The activities of VJ in Kosovo in the summer of 1998 were controlled in full capacity by all actors of the defence system, including the SDC, the Chief of GS and others down the chain of command. The Defence emphasizes that on 29 September 1998 Perišić presented a detailed assessment of the course of the anti-terrorist action, which also stated that VJ had fully and professionally accomplished its tasks.<sup>176</sup> In addition,

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<sup>173</sup> Judgement-vol.I:para.1110

<sup>174</sup> Judgement-vol.I:para.1111

<sup>175</sup> The Decision on VJ Intervention in Case of Escalation of the Terrorist Activities was issued at the session of the SDC on 9 June 1998:P1574,p.4;tt.13863-13864;the Antiterrorist Operation in KiM was staged on the basis of the directive by Perišić,Chief of the VJ GS:4D137;tt.15076;based on the directive by Perišić, the 3-A Commander made his decision of breaking down the forces of the armed rebellion:4D140;

<sup>176</sup> 3D757,p.5

Perišić conducted an inspection of the PrK units in August 1998 and found no fault in the functioning of the chain of command.<sup>177</sup>

114. Particularly unclear is the definition of the need, recognized by the Chamber in Vol. I para. 1111, of Milošević to act through Pavković in order to fulfil his ideas, and that he needed Pavković because some of the VJ officers disagreed on the matter of deployment of VJ in Kosovo. If Milošević was able with the support of Milutinović to issue a decision on relieving Perišić of duty, namely on 24 November 1998,<sup>178</sup> if he was able to decide on relieving the 3-A Commander, Dušan Samardžić, of duty on 25 December 1998,<sup>179</sup> if he was authorized under the Constitution and the Law on Army to dictate the VJ staffing policy, than it is unclear why Milošević would be disinclined towards these changes, why he would establish special bodies, why he would need Pavković to by-pass the officers that supposedly disagreed with the VJ deployment, when he was able to constitutionally, simply, legally and quickly introduce changes and remove the opposition, if it really existed and posed a problem for engagement of VJ units according to Milošević's ideas. The Chamber's conclusions are illogical.

***Sub-Ground 1(9): Meetings in 1999 and elaboration of large scale plans***

115. In Vol. I para 1012-1023, the Chamber elaborates the plans for use of the VJ and MUP units in case of escalating terrorist activities and/or the NATO intervention. The Chamber states the VJ plans and, most importantly, explains the coordination between the MUP and VJ. Namely, based on the plans of the Chief of GS, the 3-A Commander and his own plan titled *Grom 3*, Lazarević drew up, on 16 February 1999, the Order for the Elimination of Albanian Terrorist Forces in the Sectors of Malo Kosovo, Drenica and Mališevo.<sup>180</sup> Lazarević testified that the Corps Command bodies established coordination with the persons responsible for planning in the MUP in order to have co-ordination and

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<sup>177</sup> 4D506,para.7,4D99,tt.17657

<sup>178</sup> P1576

<sup>179</sup> P1000

<sup>180</sup> P2808

co-ordinated action.<sup>181</sup> As early as the next day, on 17 February 1999, Lukić announced that MUP Staff planned to take actions in the same areas as those referred to in Lazarević's order of 16 February 1999.<sup>182</sup>

116. The Chamber concludes that "*evidence shows that the VJ and the MUP communicated and exchanged information during the elaboration of the plan pursuant to which three major operations were to be carried out in the areas of Malo Kosovo, Drenica, and Mališevo*"<sup>183</sup> Hence, the planning and coordination between the same parties, as in the summer of 1998, continues into 1999. The coordination between the VJ and MUP functioned with no obstructions and in a continuous fashion, without any need for intermediaries, supervisors or civilian instructors.

117. The Chamber concludes that "*plans for actions involving VJ and MUP units were prepared within the VJ and the MUP before the major joint operations were conducted at the end of March 1999. Before specific joint operations were carried out, the VJ and the MUP met during co-ordination meetings to ensure co-ordination between their respective plans.*"<sup>184</sup> The Chamber states that "*before the major joint VJ/MUP operations were conducted at the end of March and to mid-April 1999, the two bodies co-ordinated their respective plans and activities*".<sup>185</sup>

118. The coordination activity, its 1998 part being attributed by the Chamber to the JC,<sup>186</sup> is clearly defined by the Chamber as being carried out by the VJ and MUP bodies during 1999. This conclusion makes the situation in 1999 dramatically different to that in 1998, which fundamentally alters the position and role of both the JC and the persons believed by the Chamber to be the members of that body. In these co-ordination activities there are no civilian representatives; hence, Šainović is not attending.

119. A very important fact is that Šainović does not play a role in coordination. In addition to the conclusions stated in Vol. I para. 1015, the Chamber had to conclude that Šainović did not play any role in the process of planning and implementing the plans, and had no authority over or influence on the plans and implementation.

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<sup>181</sup> Judgement-Vol.I:para.1015,tt.17917-17919

<sup>182</sup> Judgement-Vol.I:para.1015,P1990

<sup>183</sup> Judgement-Vol.I:para.1015

<sup>184</sup> Judgement-Vol.I:para.1039

<sup>185</sup> Judgement-Vol.I:para.1041

<sup>186</sup> Judgement-Vol.I:para.1110-1111

***Sub-Ground 1(10): Conclusions about Joint Command in 1999***

120. As regards the JC in 1999, the Chamber makes the following preliminary conclusions:

- The existence of the JC as an entity during 1999 is less apparent than in 1998;
- The evidence is more nebulous, and there is no record of its meetings;
- There is scant evidence specifically indicating a JC through 1999;
- There is also no evidence of a clear mandate for the JC in 1999.<sup>187</sup>

121. In the analysis of the existence of the JC in 1999, the Chamber has but a few sources.

122. The vast majority of witnesses, who are well apprised of the events and personally took part in them, explicitly argue that the JC did not exist in 1999.<sup>188</sup> The statement of Vasiljević about the role of the JC is incorrect and unrealistic, and despite quoting that statement, the Chamber has evidently reached different conclusions.<sup>189</sup> Everything that Vasiljević knows about the JC in 1998 was told to him by Stojanović.<sup>190</sup> Vasiljević confirmed that he heard nothing from Stojanović about the JC in 1999,<sup>191</sup> thus Vasiljević's testimony about the JC in 1999 has no value. This is especially true considering that Vasiljević was retired until 27 April 1999 and had no access to information from the VJ security administration.<sup>192</sup>

123. The documents P2016 and P2017 clearly refer to the orders of the PrK Command, upon which the Chamber drew conclusions in Vol. I para. 1135 and 1144, which makes it impossible to use these documents as evidence of the existence of the JC in 1999.

124. Additionally, Pavković's public statements in 2001 were nothing more than his attempt at redirecting the responsibility for the events, naturally, during the time before he was indicted before the Tribunal. In this statement, Pavković defended himself from

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<sup>187</sup> Judgement-Vol.I:para.1112

<sup>188</sup> Judgement-Vol.I:paras.1113,1115

<sup>189</sup> Judgement-Vol.I:paras.1114,1150-1152

<sup>190</sup> tt.8812

<sup>191</sup> tt.8820

<sup>192</sup> tt.26755,P2594,para.53

the accusations thrown by the then Minister of Interior after the discovery of the facts about the refrigerated lorry that was found in the Danube in 1999.<sup>193</sup> Pavković's closest associate, Đaković, denied the accuracy of these allegations.<sup>194</sup>

125. With respect to Ojdanić's suggestions to Pavković,<sup>195</sup> the Defence stresses that, although the JC is mentioned in the text, it is clear that these are suggestions are addressed to Pavković. Ojdanić states: "*It is our opinion that it would be useful for you to consider our suggestions thoroughly and correct your decision...*".<sup>196</sup> It is clear that all communication is directed towards Pavković and that, for Ojdanić, a decision bearing the label of the JC is exclusively a decision by Pavković.

126. The position of the Chamber that the chain of command functioned with a degree of flexibility<sup>197</sup> is related exclusively to Pavković. No consequence whatsoever can be established in relation to the JC from that conclusion.

127. It is especially significant to underline that the 16 orders with the JC heading do not prove the existence of the JC in 1999. Namely, the Chamber accepts that the PrK "*was the source of these 16 orders*".<sup>198</sup> The Chamber also establishes as follows:

*"The Chamber finds that, although the 16 orders contained a clause stipulating that the combat operations were to "be commanded by the Joint Command", the VJ and MUP chains of command remained separate and intact and the VJ and MUP units were commanded by their respective commands. At most their separate commands might have been based in a common command post."*<sup>199</sup>

128. Based on Vasiljević's evidence, the Chamber concludes that the meeting of 1 June 1999 "*was similar to the Joint Command meetings held in 1998.*"<sup>200</sup> The Chamber establishes this merely on the basis of Vasiljević's testimony, despite hearing a whole series of witnesses – participant in that meeting, who gave clear and credible explanations

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<sup>193</sup> P1281

<sup>194</sup> tt.26473-26474

<sup>195</sup> Judgement-vol.I:para.1118

<sup>196</sup> P1487

<sup>197</sup> Judgement-vol.I:para.1119

<sup>198</sup> Judgement-vol.I:para.1135

<sup>199</sup> Judgement-vol.I:para.1144

<sup>200</sup> Judgement-vol.I:para.1149

about the manner in which the meeting had been convoked, the reasons for its convocation, participants and their roles.

129. First of all, the Chamber misconstrues Vasiljević's testimony. Vasiljević gave a whole series of testimonies concerning that meeting and these testimonies stand in stark contradiction to each other. The Chamber however opts to accept only one of the several versions offered by Vasiljević. In one of his statements and in his notebook from 1999, Vasiljević calls this meeting as the meeting in the PrK Command.<sup>201</sup> In another one of his statements, Vasiljević says that it is a JC meeting.<sup>202</sup> The labelling this meeting, in terms of its name, is impossible based on Vasiljević's testimony. The Chamber does not explain why it has accepted precisely that description of the meeting in which Vasiljević identifies it as JC. The Chamber fails to give any reason why it accepts as true only one version of Vasiljević's evidence, while choosing to disregard its other versions, as well as, more importantly, credible testimony of other participants, Anđelković,<sup>203</sup> Stojanović.<sup>204</sup> Stojanović explained that the meeting of 1 June 1999 was not a JC meeting.<sup>205</sup> Stojanović also denied telling Vasiljević anything about the JC.<sup>206</sup> Anđelković testified that at the meeting Šainović talked about the progress of the negotiations, which were at that time in their final stage.<sup>207</sup>

130. The finding that the meeting of 1 June 1999 was "*similar to the Joint Command meetings held in 1998*" is unsustainable. The only similarity between the meetings of 1998 and 1999 is that it was a meeting held in Kosovo, at which discussions revolved around Kosovo or Kosovo-related issues. The main difference is that the meeting was held in a state of war, which makes the position and responsibilities of the participants in the meeting significantly different with respect to 1998. The difference is that the key participants of the meetings of 1998 were not present at this meeting, primarily Minić. The difference is that there is no continuity of meetings. The fact that only one meeting was held, demonstrates that the nature of this meeting is essentially different from the meetings held in 1998. If, for the purposes of this discussion, one accepts the Chamber's

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<sup>201</sup> 2D387,para.1,P2862

<sup>202</sup> P2600,para.80,Final Brief,para.744

<sup>203</sup> tt.14663-14664

<sup>204</sup> tt.19774-19777

<sup>205</sup> tt.19802

<sup>206</sup> tt.19804-19805

<sup>207</sup> tt.14663

finding that the JC played a role in the co-ordination and exchange of information between MUP and the VJ,<sup>208</sup> and if only one meeting had been held in 1999,<sup>209</sup> then this purpose could not have been achieved with one single meeting held just a few days before the end of the war. If there is no similarity in respect to the purpose of the meeting, then the facts that some of the participants were the same, that the venue of those meetings was not far from the place where they were held in 1998, that the item on the agenda was related to the situation in Kosovo, cannot lead to the conclusion that this was a meeting similar to the meetings held in 1998. There is a difference in the peculiar facts too, such as the fact that participants were served food and drinks after the meeting,<sup>210</sup> but which cast an entirely different light upon the nature of the meeting.

131. The finding on similarity is unsustainable since it is incomplete. “Similarity” is an assessment rendering any further use of this finding impossible. Indeed, an assessment asserting that something is similar means that it is not the same. Consequently, it might be similar but it is not the meeting of the JC for Kosovo. The Chamber may not stay undecided with respect to the standing on the issue whether it is or it is not a meeting of the JC. If the said meeting is not the meeting of the JC, then the Chamber cannot draw conclusions to Šainović’s disadvantage solely based on the fact that a meeting was held. *In dubio pro reo.*

132. The Chamber cannot conclude that the JC existed in 1999 on the basis of the following facts:

- Vasiljević, who attended only one single meeting and whose testimony is not only self-contradictory but is also contradictory to the testimonies of other witnesses (vol. I para. 1114, 1145-1149);
- Several military documents mentioning a JC but obviously referring to the PrK (vol. I para. 1116);
- Ojdanić’s suggestions to Pavković (Vol. I para. 1118-1119) from which it is obvious that no such thing as a JC existed but only Pavković;
- 16 orders the Chamber itself finds to be orders issued by the PrK and that the operations were under separate commands of the VJ and the MUP.

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<sup>208</sup> Judgement-vol.I:para.1110

<sup>209</sup> Judgement-vol.I:para.1150

<sup>210</sup> P2594,para.83

133. The finding of the Chamber regarding the JC in 1999 is very vague and imprecise.<sup>211</sup> This finding contains no answer to the key questions of the case but avoids, instead using rather evasive explanations and semi-conclusions, to state the obvious fact that no JC existed in 1999, and in particular that there were no civilian members in its makeup.

134. The Chamber finds that *“important actors, including some of the Accused, referred to the “Joint Command” in 1999, which they had to take into account in their duties. When referring to the “Joint Command” in 1999, they adverted to the whole co-ordination system established in 1998 between the VJ and the MUP”*.<sup>212</sup>

135. This finding of the Chamber means only one thing. The JC did not exist in 1999. The Chamber did not find any other evidence of existence of the JC in 1999, like the findings drawn for the year 1998. All the evidence at the Chamber’s disposal is to the effect that someone mentioned “Joint Command” in order to divert attention to or give an account of the existence of or, indeed, vaguely recollected something that allegedly existed in 1998. Such type of evidence *per se* speaks nothing about existence of the body, speaks nothing about whether the sole mention of it causes any changes in the events in the field.

136. The Chamber asserts that in 1998, the JC was part of the system and that the co-ordination system continued to function in 1999.<sup>213</sup> This finding of the Chamber disregards the key facts about the manner in which various structures of a state must function in. The finding implies that co-ordination of the army and the police of a country is an exceptional activity not regulated by doctrine, thus requiring special, extra-institutional solutions.

137. The Chamber contends that *“It had become standard practice for MUP and VJ representatives to hold co-ordination meetings before finalising plans for and conducting joint operations”*.<sup>214</sup> The Chamber elaborates the co-ordination between the VJ and the MUP during 1999 in the previous excerpt from the Judgement with no reference at all to

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<sup>211</sup> Judgement-vol.I:para.1151

<sup>212</sup> Judgement-vol.I:para.1151

<sup>213</sup> Judgement-vol.I:para.1151

<sup>214</sup> Judgement-vol.I:para.1151

the JC.<sup>215</sup> This standard practice has nothing to do with the JC, let alone with participation of civilians in the practice.

138. The Chamber asserts that the heading “Joint Command” was added to make the orders of the Corps more acceptable for the MUP. Witnesses Stefanović and Lazarević explain that the orders bore the heading JC to earmark the activities to be executed together with the MUP.<sup>216</sup> Đaković testifies, in contrast to the Chamber’s interpretation outlined in Vol. I para. 1151, that the heading “Joint Command” was added to show in the documents that co-ordination between the Army and the MUP had been executed.<sup>217</sup>

139. The Chamber finds that the PrK added the heading “Joint Command” to secure “*an air of greater authority*” for its orders. The Chamber errs in logic when, in reference to the military system, it speaks about “*lend[ing] them greater authority*”. Firstly, there is no evidence that there were any problems in execution of superior commands’ orders within the PrK system, requiring some kind of additional “prompting” in the orders to be understood more seriously than the usual ones. Particularly in light of the fact that in 1999, there were numerous units in Kosovo which had not participated in activities in 1998 and to which the term JC meant nothing. Thus, for instance, Diković and Mandić were told that “Joint Command” meant nothing but the PrK Command.<sup>218</sup> There is no evidence that the MUP received any orders headed “Joint Command” at all. The witnesses, former MUP members, did not receive any such orders and the Chamber does accept that part of their testimony.<sup>219</sup> Further to the point, the Chamber is convinced that the MUP forces received map extracts provided by the VJ containing no specific instructions on the way certain attacks were supposed to be launched and that the MUP prepared its own orders for its own units during execution of joint operations.<sup>220</sup> Therefore, the “*air of greater authority*” places no extra weight upon the shoulders of either the VJ or the MUP.

140. In the final part of Vol. I para. 1151, the Chamber asserts that “*the references to the “Joint Command” constituted an important factor during the planning and*

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<sup>215</sup> Judgement-vol.I:para.1033-1042

<sup>216</sup> tt.21661,17928

<sup>217</sup> tt.26389,26392

<sup>218</sup> tt.19881,20926

<sup>219</sup> Judgement-vol.I:para.1143

<sup>220</sup> Judgement-vol.I:para.1029

implementation of joint operations between the VJ and the MUP, as they evoked the authority of the entity referred to in 1998 as the “Joint Command”<sup>221</sup> Such an opinion might imply that in 1999, the JC exists only as an evocation, a reminder. Thus, there was no such body, only the persons who may have evoked something that used to exist.

141. Based on its own arguments and findings contained in Vol. I para. 1151, the Chamber could have reached only one conclusion, that no JC existed in 1999. All the assumptions to the effect that the mention of the JC adverted the system, or that it lent greater authority, or that referring to the JC evoked authority do not constitute firm grounds for the allegation that the JC actually existed. By avoiding to explicitly admit that the JC did not exist in 1999, particularly in the period after 24 March 1999, i.e., in the period when all the crimes charged in the Indictment were committed, the Chamber seriously violates the standards of proof by drawing a conclusion that no reasonable trier of facts could have drawn.

***Sub-Ground 1(11): Contradictory findings on the Joint Command in 1999***

142. The Defence contends that in Vol. I para. 1151, the Chamber implicitly concludes that the JC did not exist in 1999.

143. However, in Vol. III para. 300 the Chamber states:

*“The Chamber has already found that a co-ordinating body called the Joint Command existed in the second half of 1998 and the first half of 1999, and that it had significant influence over the actions of MUP and VJ forces”<sup>222</sup>*

144. In the part referring to the alleged responsibility of Šainović, the Chamber makes no distinction between the JC in 1998 and in 1999. The Chamber alleges that there was such a body in both 1998 and 1999, the body having a significant influence on actions of VJ and MUP.

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<sup>221</sup> Judgement-vol.I:para.1151

<sup>222</sup> Judgement-vol.III:para.300

145. The Chamber bases its contention on Šainović's authority over the MUP and the VJ on a finding that it failed to make in the part of the Judgement in which it deals with the control over the VJ and the MUP in Kosovo, in Vol. I. All the ensuing findings on Šainović are burdened with the erroneous and non-existing finding on the existence and position of the JC.

146. The various findings on the same issue make the Judgement contradictory and incoherent.

***Sub-Ground 1(12): Šainović as a member of the Joint Command***

147. In its findings on Šainović's role in vol. III para. 462, the Chamber alleges that he was one of the leading members of the JC.<sup>223</sup> Such a finding is based on the assumption contained in Vol. III para. 309, which reads that Šainović played a leadership role, overseeing the meetings, and frequently directing the group. In turn, this assumption, according to footnote 632 in Vol. III, is based on yet another assumption in Vol. I Part VI-E. In Part VI-E. of Vol. I. Šainović's leadership role is mentioned in the "Conclusions about the Joint Command in 1998" in para. 1110 where one can find that the source of that assumption is, according to footnote 3022, "*See generally* P1468 (Notes of the Joint Command)". In the part of the Judgement in Vol. I, containing the arguments for the "Conclusions about the Joint Command in 1998" there is not even a mention of Šainović's leadership role.

148. The Chamber, therefore, treats its own position on the leadership role of Šainović in the JC as some sort of a presumption requiring no further corroboration.

149. The Chamber entirely disregards the circumstances and reasons why Šainović was sent to Kosovo in the summer of 1998 and simply reduces its findings on Šainović's role to his membership in the JC.

150. The Chamber disregards the field situation in Kosovo in the summer of 1998 when the vast international presence in Kosovo required response from the Federal

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<sup>223</sup> Judgement-vol.III:para.462

Government.<sup>224</sup> In that context, the Federal Government acknowledged the need to send to Kosovo a high-ranking state official to demonstrate a politically responsible attitude towards the international community and to express interest in cooperating with the international community.<sup>225</sup>

151. Šainović's arrival in Kosovo meant strengthening of the foreign-policy engagement of the state considering the fact that Šainović was competent and authorized to contact with representatives of the international community in full capacity.<sup>226</sup>

Šainović was sent to Kosovo in a situation when the internationalisation of the Kosovo issue was imminent and Šainović was in charge of the foreign policy affairs in the federal Government.<sup>227</sup> Šainović had numerous meetings with foreign diplomats and delegations visiting Kosovo.<sup>228</sup>

152. In the second phase of his activity related to Kosovo, Šainović headed the Federal Commission, a political body having no connection whatsoever with commanding the VJ and MUP.<sup>229</sup> The Federal Commission headed by Šainović never discussed work and tasks of VJ and MUP, but only the activities of importance for the work of the Commission.<sup>230</sup>

153. In Rambouillet, Šainović participated as Deputy PM of the Federal Government, in charge of international relations.<sup>231</sup> In addition to such activities, Šainović exercised his regular duties, during the NATO bombing as well.<sup>232</sup> During the war, Šainović participated in displacement of toxic materials, assessment of level of risk exposure of nuclear installations, etc.<sup>233</sup>

154. In 1999, after the outbreak of the war, no meetings were held similar to those held in the summer of 1998 with participation of civilian representatives in Kosovo.<sup>234</sup>

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<sup>224</sup> tt.13817,13993,14756,14598,2D347,2D367

<sup>225</sup> tt.13997

<sup>226</sup> tt.14415

<sup>227</sup> tt.14652

<sup>228</sup> tt.14744,14756,14598,2D347

<sup>229</sup> 2D89,tt.7584,7585

<sup>230</sup> tt.7601

<sup>231</sup> tt.14661

<sup>232</sup> tt.10946,14039,2D15,2D324,2D196,2D330,2D332

<sup>233</sup> Final Brief paras.791-802

<sup>234</sup> tt.18142,22047-22049

Šainović's key activity throughout the war was focused on trying to establish a political dialogue with Rugova.<sup>235</sup>

155. All the evidence points to the fact that Šainović, throughout the entire period relevant for this case performed the functions of Deputy PM in the Federal Government in charge of foreign affairs, including chairing a working body of the Federal Government - the Federal Commission. The only "point of contact" he had in line of his work with the VJ and the MUP existed due to his position's demand to be informed on more important events in order to successfully perform his duties. This fact has nothing to do with a membership in the JC, particularly not with a leadership position in such a body. All the findings of the Chamber arguing that Šainović was member of the JC with a leadership role, in addition to the findings dismissing the correct assessment of Šainović's position and role in the relevant time period, are conclusions no reasonable trier of facts could have drawn.

***Sub-Ground 1(13): Assessment of exhibit P1468 and Milan Đaković's testimony***

156. The Chamber argues that the exhibit P1468 shows that Šainović "took a leading role during these meetings and demonstrate that Šainović exercised de facto authority in directing actions of the VJ and/or the MUP in 1998"<sup>236</sup>

157. The Chamber interprets the contents of the notes independently from the field events. In its analysis of the statements of exhibit P1468 attributed to Šainović, the Chamber says nothing about whether anything Šainović said actually happened in the field, whether what he said had been already ordered through the usual command channels of the VJ and the MUP.

158. Thus, for instance, on 22 July 1998 Đaković makes a note of Šainović's loud thinking "Can we undertake new actions", "we need to define a new list of goals."<sup>237</sup> While Đaković makes notes on Šainović's discussion offered in the manner of a high-ranking politician, both VJ and MUP commands decide on directing actions of the VJ.

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<sup>235</sup> Final Brief paras.803-826

<sup>236</sup> Judgement-vol.III:para.309

<sup>237</sup> P1468,p.4

PrK Commander requests task clarification from the 3-A Commander regarding a task issued by FRY President for implementation of the plan for combating terrorist forces that includes co-operation with the MUP in blocking the villages of Junik and Jasić and unblocking roads.<sup>238</sup> In response to the PrK request, the 3-A Commander, Samardžić, instructs the PrK Commander to prepare a proposal of direct and indirect engagement of the Corps units in blocking of the villages of Junik and Jasić and unblocking of certain roads.<sup>239</sup>

159. On the same issue, on 23 July 1998, Đaković writes down Šainović's words that the operation is no longer a secret, that it is necessary to discuss the measures of observing the state borders, and that the State Security needs to intensify its activity.<sup>240</sup>

160. While Šainović discusses, the units are directed by their respective commands. The PrK Command suggests, under item 1, blocking the villages of Junik and Jasić listing the units that should execute the blockade and, under item 2, unblocking the Priština – Kijevo-Peć – Dulje – Suva Reka highway, listing the units that should execute the unblocking.<sup>241</sup> The 3-A Commander approves item 1 proposed by the PrK Commander but does not approve an item 2 of the same proposal.<sup>242</sup>

161. The Chamber takes Šainović's words of 23 July 1998 as evidence of his leadership role.<sup>243</sup> However, that same day Matković says "*The Prisoners are to be questioned...*", Minić says "*Measures to be undertaken...*", "*Prepare plans of action...*".<sup>244</sup>

162. On 25 July 1998, Đaković writes down Šainović's words "*units should be stabilized and security measures undertaken*".<sup>245</sup> On that same day, Đorđević says "*from Orahovac tomorrow to work demonstratively, from Banje to continue the attack*".<sup>246</sup>

163. The Chamber asserts that on 26 July 1998, Šainović said "*that he would take responsibility for failures, although it is unclear whether he was referring to the failures*

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<sup>238</sup> P4D100

<sup>239</sup> 4D119

<sup>240</sup> P1468, pp.7,8, Judgement-vol.III:para.310

<sup>241</sup> 4D101

<sup>242</sup> 4D457

<sup>243</sup> Judgement-vol.III:para.310

<sup>244</sup> P1468:p.7,8

<sup>245</sup> P1468,p.11

<sup>246</sup> P1468,p.11

of the Joint Command or of specific VJ/MUP actions”.<sup>247</sup> The Chamber draws this rather extensive and arbitrary interpretation of the records out of the following entry: “*I will not be responsible for /illegible/, but I will take responsibility for failures*”.<sup>248</sup> First of all, the key word here has remained illegible, and it was not clarified either at the time of Đaković’s testimony or at the time he prepared the document IC199. The Chamber interprets, entirely arbitrarily, that Šainović’s words on taking responsibility refer to either the JC or a specific VJ/MUP action regardless of the fact that none of the above is mentioned in the recorded text.

164. At the meeting held on 29 July 1999, Šainović mentions Rudnik and Lauša.<sup>249</sup> However, his mention of Lauša immediately next to Srbica is a comment of the action in the Drenica region that has commenced before and without any role on his part. On 26 July 1998, Đorđević mentions actions in Rudnik.<sup>250</sup> On 27 July 1998, Lukić mentions the surrounding of Rudnik<sup>251</sup> Đorđević informs that the road leading to Rudnik is clean.<sup>252</sup> On 28 July 1998, Paković, Lukić and Gajić speak of the same operation in the region of Srbica.<sup>253</sup>

165. At the meeting of 7 August 1998, according to Đaković’s notes, Šainović speaks about movements of the civilian population, about the damage caused by torching the houses.<sup>254</sup> On that same day, however, Pavković issues an order – a decision on joint engagement of VJ and MUP forces obviously referring to the next phase of the antiterrorist operation.<sup>255</sup> This decision and the content thereof were discussed at neither the 7 August 1998 meeting nor at any other previous meetings which shows that the meetings, beside exchange of information and discussion on various issues had no role whatsoever in the process of making decisions on execution of actions and engagement of units.

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<sup>247</sup> Judgement-vol.III:para.311

<sup>248</sup> P1468,p.16

<sup>249</sup> P1468,p.637

<sup>250</sup> P1468,IC199,p.1

<sup>251</sup> P1468,p.17

<sup>252</sup> P1468,p.20

<sup>253</sup> P1468,p.21,22

<sup>254</sup> P1468

<sup>255</sup> 3D9

166. At the meeting of 8 August 1998, the Chamber establishes that Šainović “instructed that “the next phase is to be prepared for Tuesday [and] the village of Jasić is to be “done”.”<sup>256</sup> Although the words are attributed to Šainović, there is no evidence that these words caused any change in the field. Šainović mentions Tuesday, 11 August 1998, but there are no notes or any other sources pointing to either the existence of consequences or a lack thereof, with regard to the above statement. On the contrary, although Šainović allegedly said “village of Jasić is to be done” it is clear from a report of the 3-A Commander to the VJ GS of 14 August 1998 that the combat groups blocking the villages of Junik and Jasić respond to the fire opened by terrorist forces under siege and neutralize the observed pockets of resistance.<sup>257</sup> This example demonstrates just how limited is the use of Đaković’s Notes, intended to show some kind of Šainović’s influence on the field events, actually is.

167. On 16 August 1998, Šainović allegedly said that Combat Groups are to be disposed around Junik.<sup>258</sup> However, Junik was already under siege before and the Combat Groups already held positions around the village.<sup>259</sup> The statements “increase control in villages”, “the positions be arranged”<sup>260</sup> are incomplete, vague and unclear. In addition, as already said, there is no evidence whatsoever to indicate that the above statements were carried out in any way.<sup>261</sup> The issues pertaining to Combat Groups, the formation and disposition thereof, were within the exclusive competence of the military commands of the 3-A and the PrK.<sup>262</sup>

168. On 2 September 1998, it is allegedly said “that the police undertakes measures in Rugovo and particularly in Čičevica.”<sup>263</sup> From the Notes it is not clear whether Šainović only states that something is going on, or just gives an account of what was said before, or whether he simply expresses his position on an issue, leaving this position of his vague and incomplete. Fragments like this may not constitute serious evidence in favour of the allegation that Šainović issued directions to VJ and MUP.

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<sup>256</sup> Judgement-vol.III:para.311

<sup>257</sup> 4D433,p.2, also 4D101

<sup>258</sup> P1468,p.55-56

<sup>259</sup> 4D433,p.2

<sup>260</sup> Judgement-vol.III:para.311

<sup>261</sup> Judgement-vol.III:para.312

<sup>262</sup> e.g.4D531

<sup>263</sup> P1468,p.85,Judgement-vol.III:para.312

169. The Notes from 15 September 1998 also, although unclear, primarily refer to civilian activities.<sup>264</sup> The issues pertaining to the local police are in no relation whatsoever with directing activities of the VJ and the MUP as implied by the Chamber.<sup>265</sup> Šainović had no connections with the local police, i.e., the local security, and he merely supported that idea in a political sense, because he believed that was the way to bring the ethnic communities of Kosovo closer to each other.<sup>266</sup>

170. Referring to the Notes from 21 September 1998, the Chamber alleges that Šainović says that the JC should not implement Milošević and Yeltsin matters. This simply does not correspond to what was recorded since Šainović never used the term JC and neither did Đaković record him use it. Šainović actually says “*we shouldn’t...*”.<sup>267</sup> The “*we*” might refer to the Federal Government, to the state leadership as a whole, or even to some other, third party. In addition, the Milošević-Yeltsin agreement is a significant foreign policy fact that in its complexity pervades numerous segments of the political situation at the time, thus, such a laconic interpretation of the fragment attributed to Šainović as his instruction not to comply with Milošević’s agreement may only be assessed as a simplified and incorrect finding.

171. The Notes from 22 September 1998 are interpreted by the Chamber as examples of directive-issuing regardless of the fact that the Notes in question are once again incomplete, unclear and contradictory.<sup>268</sup> Thus, Šainović allegedly says that when the operation is finished, a platoon is to be engaged to surround the village housing the terrorists.<sup>269</sup> If the operation is finished, how come there are terrorists in the village that is to be surrounded. A directive-issuing manner of speaking in P1468 is by no means characteristic only for Šainović. Đaković records words spoken by other participants in the same manner. Thus, on the same day Anđelković allegedly says: “*to organize operative surveillance of terrorists*”,<sup>270</sup> which by no means can be interpreted as a directive since the context, fragmentariness and vagueness do not allow for conclusions to be drawn on the true content of what was said.

<sup>264</sup> Judgement-vol.III:para.312,P1468,p.115

<sup>265</sup> Judgement-vol.III:para.312,tt.14658-14659,14696-14698,6D614,para.18-20

<sup>266</sup> tt.14659-14660

<sup>267</sup> P1468,p.124, transcription and translation problem also evident in this part of P1468

<sup>268</sup> Judgement-vol.III:para.312

<sup>269</sup> P1468,p.127,

<sup>270</sup> p1468,p.127

172. Šainović's statement that the "Jezerce operation" should be continued is allegedly given on 26 September 1998.<sup>271</sup> However, as early as 25 September 1998, Pavković states that "Jezerce" plan was reviewed.<sup>272</sup> From the contents of the Notes from 25 September 1998 it is clear that the meeting attended by the civilians is not the place where the plan was reviewed. Pavković only informs the audience, and obviously, the influence of the attendees on the content of the plan is non-existent. In addition, the Jezerce operation commences and lasts irrespective of what, if anything, Šainović says about it. In his report to the VJ GS, the 3-A Commander informs that part of the Army's forces are engaged in providing support to the MUP,<sup>273</sup> that he, - Commander of 3-A, Samardžić, has decided to continue providing support to MUP forces with part of the Army forces on the Jezerske mountains and elsewhere.<sup>274</sup> This means that the realization of the plans is ordered by the 3-A command, which excludes any role of Šainović in this. There is no evidence of any contacts or other special relations between Samardžić and Šainović.

173. Some aspects of the interpretation of Đaković's notes of Šainović's words have the characteristics of a biased, inaccurate and incorrect analysis. All the sentences contained in Vol. III para. 310 through 314 are cited out of context, one cannot see what the other participants said before him, and out of sight is also the content of the decision on the use of the units of the PrK that Pavković received from the 3-A Command prior to his arrival at the meeting.<sup>275</sup>

174. The analysis of exhibit P1468, as well, is reduced to an analysis of Šainović's words.<sup>276</sup> However, in order to judge Šainović, it is necessary to analyse the role of other participants as well. The Chamber tries to put an equal sign between the roles of Minić and Šainović, even though Đaković testified that Minić dominated the meetings.<sup>277</sup> Thus, Minić opens the first meeting on 22 July 1998<sup>278</sup> and sums up the conclusions of the

<sup>271</sup> Judgement-vol.III:para.312,P1468,p.129

<sup>272</sup> P1468

<sup>273</sup> 4D405,item3

<sup>274</sup> 4D405,item5

<sup>275</sup> tt.15531-15532,4D91,15683,15685

<sup>276</sup> Judgement-vol:III.paras.310-314

<sup>277</sup> tt.26481

<sup>278</sup> P1468:p.2

meeting.<sup>279</sup> Minić opens one of the last meetings on 28 October 1998.<sup>280</sup> Minić also concludes the meeting of 23 July 1998,<sup>281</sup> and, on 27 July 1998, he concludes the meeting by saying “*go on with the plan as agreed*”.<sup>282</sup> Minić also concludes the meeting held on 28 October 1998.<sup>283</sup> Minić’s words are recorded in the most detailed and comprehensive way.<sup>284</sup>

175. Further to the point, the Chamber fails to take into account the existence of uninterrupted chains of command within all of the structures. The Chamber alleges that Šainović exercised *de facto* authority in directing actions of the VJ and the MUP,<sup>285</sup> but the Chamber states that during 1998, the commanding structure of the VJ continued to operate.<sup>286</sup> In the evidence of this case, there are hundreds of orders and combat reports containing orders, i.e., reports on engagement of the units of VJ and /or MUP.

176. The Chamber, in Vol. III para. 310-315, quotes Šainović’s words as recorded in the Notes, but on no occasion does the Chamber make any effort to establish whether what Šainović really said actually happened and whether it happened because of what Šainović had said or because VJ and MUP units, in accordance with the uninterrupted chain of command, executed the orders of their respective superior commands. It is not enough just to cite a few words, a semi-sentence and conclude that it constitutes a directive issued to VJ and MUP. The entire effort of the Chamber made in Vol. III para. 310-315 makes no sense, since it is out of the context of the events in the field and presented in complete isolation with respect to other participants in the events.

177. In Vol. I para. 1063, the Chamber offers several examples bringing the Notes recorded in P1468 into connection with the other evidence.<sup>287</sup> Among the very few examples listed, there is none to corroborate Šainović’s alleged role at the meetings with respect to the field events.

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<sup>279</sup> P1468:p.5

<sup>280</sup> P1468:p.161

<sup>281</sup> P1468:p.8

<sup>282</sup> P1468:p.20

<sup>283</sup> P1468:p.163

<sup>284</sup> e.g.P1468,pp.23,24

<sup>285</sup> Judgement-vol.III:para.309

<sup>286</sup> Judgement-vol.I:para.1095

<sup>287</sup> Judgement-vol.I:para.1063

178. The Chamber dismisses the explanation offered by the author of the Notes P1468 himself, the Chamber's witness, Đaković. Đaković explains that he did not keep minutes, that everybody spoke fast and that he did not make notes of what was said word for word. He says that this particularly refers to political representatives and that he tended to translate their words into military-speak, familiar to him. Đaković also says that he was selective in taking notes.<sup>288</sup> Đaković never asked anybody for clarification and he jotted down what he managed to jot down the way he understood it.<sup>289</sup> In addition, Đaković did not write down what Pavković and Lukić said or he only jotted down considerably less of what they said because for the most part, he already knew the content of their speech.<sup>290</sup>

179. The Chamber finds that Đaković is "*a straightforward witness in general*",<sup>291</sup> but does not place any faith in his interpretation of the Notes he himself made. Also, the Chamber does not place any faith in his interpretation of Šainović's role only because it seems that otherwise is contained in his Notes.<sup>292</sup> This means that the Chamber, despite stating otherwise, accepts from Đaković only the fact that the notes marked P1468 are made in his handwriting while dismissing all other explanations about what he wrote down, how he had written, what he wrote down and why he made those notes. Such a standing could be accepted if it concerned minutes, but Đaković did not keep minutes of the meeting but only notes for his personal use.<sup>293</sup> The Chamber does not accept Đaković's explanation that Minić held the highest post but rather attempts to put an equal sign between Minić and Šainović by stating that Šainović had an active role during the JC meetings.<sup>294</sup> This finding is erroneous if only because nowhere does the Chamber analyse all the participants of the meeting but only Šainović, disregarding the rest. Such a partial analysis by the Chamber produces an erroneous result and consequently this finding of the Chamber is incorrect.

180. In Đaković's Notes, there is a clearly articulated imbalance between Đaković's notes of what was said by Pavković or Lukić and other participants because, logically, Đaković had no reason to write down the content of, say, Pavković's decisions for the

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<sup>288</sup> tt.26375

<sup>289</sup> tt.26425

<sup>290</sup> tt.26426

<sup>291</sup> Judgement-vol.III:para.330

<sup>292</sup> Judgement-vol.III:para.330

<sup>293</sup> tt.26425

<sup>294</sup> Judgement-vol.III:para.330

following day since he was familiar with it, in fact he prepared a number of those decisions himself. For this reason, Đaković's notes lack the contents of decisions made for the following days, that the VJ and the MUP inform the attendees about, and therefore, with the actual context missing, the Notes may leave the impression that the civilian representatives offer some opinions of their own about actions of the VJ and the MUP, although it would be easy to conjecture that these are an interpretation of the words spoken by the previous speakers.

181. With regard to 1,572 objections of the Šainović Defence, pertaining to vagueness and inaccuracy of the translation of P1468, the Chamber finds that the Šainović Defence waived its objections based on what had been said during the hearing of 20 May 2008.<sup>295</sup> However, a correct interpretation would be that the counsel for Šainović pointed out that every one of the mistakes was really there, that the Chamber was going to have an incomplete document and that it was up to the Chamber to decide.<sup>296</sup> This means that the Defence pointed to the mistakes and inconsistencies of the document,<sup>297</sup> it had previously pointed out as well, leaving it to the Chamber to decide whether it wanted to have the mistakes in the document or not. However, the Chamber did not order that the mistakes and inconsistencies be removed, but it did find its key arguments against Šainović precisely upon document P1468 containing 1,572 mistakes in translation, vague or illegible portions.

182. The Chamber erred in finding, based on exhibit P1468, that Šainović had been directing actions of the VJ and MUP during 1998 and that he had had a leadership role. In addition, the Chamber erroneously dismissed all the explanations given by Đaković about the role of Šainović and Minić during the meetings held at the time of the anti-terrorist action in the summer and fall of 1998.

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<sup>295</sup> Judgement-vol.I:para.1064

<sup>296</sup> tt.26511

<sup>297</sup> tt.26511,Final Brief,para.204,Confidential Defence Request Seeking that Exhibit P1468 be Removed from Evidence,6 November 2007

***Sub-Ground 1(14): Ljubinko Cvetić's testimony***

183. Cvetić alleges that on 10 July 1998, during a MUP meeting, he was informed that the JC had been formed at the highest level and that during another MUP meeting, on 22 July 1998, he was informed about the composition of the JC and that Šainović was appointed Head thereof.<sup>298</sup> The Chamber finds Cvetić to be a credible witness and accepts his testimony regarding the meeting in the MUP Staff building in July 1998.<sup>299</sup>

184. The Defence points out that, first of all, it is not clear what the Chamber does accept. If the Chamber accepts Cvetić that means that it also accepts what he has heard at the meeting, which is that Šainović was Head of JC. Nowhere else in the Judgement does the Chamber establish anything quite to that effect, although the essence of the Prosecution case against Šainović is contained in the assumption that he was the Commander of JC. This means that the Chamber mistrusts Cvetić on the issue.

185. If it accepts that the JC was formed on 10 July 1998 at the latest, then it is in contradiction to Đaković's testimony on how the term JC was actually created.<sup>300</sup> If Cvetić's testimony is accepted, this means that none of the testimonies given by the participants of the meetings the Chamber calls meetings of the JC, namely Minić, Anđelković, Matković, are accepted, and neither are those of the participants of the meetings in MUP – Mijatović,<sup>301</sup> Vučurević,<sup>302</sup> Adamović,<sup>303</sup> Bogunović.<sup>304</sup> Cvetić's allegation is isolated and not credible.

186. In his testimony Cvetić also alleges that he saw the orders of the JC.<sup>305</sup> Even though other witnesses from the ranks of the MUP testified that they never saw anything like that,<sup>306</sup> and the Chamber does not believe him either, because it establishes that in connection with joint operations with VJ, MUP only received map extracts, based on

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<sup>298</sup> Judgement-vol.III:para.315

<sup>299</sup> Judgement-vol.III:para.317

<sup>300</sup> tt.26381,26378-26379

<sup>301</sup> tt.22284,

<sup>302</sup> tt.23130-23131

<sup>303</sup> tt.24967-24968

<sup>304</sup> tt.25118-25119

<sup>305</sup> tt.8088

<sup>306</sup> tt.22290,23131,24190

which MUP produced its own orders.<sup>307</sup> Cvetić is not credible for personal reasons as well, about which Bogunović testified.<sup>308</sup>

187. The Chamber errs in finding Cvetić's testimony credible, disregarding the plethora of evidence which would have led the Chamber to conclude that no faith can be placed upon his testimony.

***Sub-Ground 1(15): Exhibit P1459***

188. The Chamber concludes that P1459 is an authentic document, due to its consistency with the other information that Ojdanić was receiving at the given time, as well as due to the fact that the Chamber does not find the testimony of Aleksić to be reliable.<sup>309</sup>

189. The Chamber errs in finding that the information contained in said letter is consistent with other information. The document reads that the MUP command should be returned to the *"hands of the Ministry of Interior-Staff of the MUP of the Republic of Serbia through the Joint Command as has so far been the case."*<sup>310</sup> There are neither any documents nor is there any testimony that would show that MUP was commanded during the war through JC. Moreover, the document states that there was information in the regular combat reports regarding serious crimes being committed by MUP against civilians. The Chamber had before it almost all of the PrK and 3-A reports that were addressed during the war to the SC Staff. None of the foregoing contain any mention of serious crimes being committed against civilians by the MUP. Furthermore, numerous witnesses have confirmed that this report was never received by the SC Staff.<sup>311</sup> The Chief of Security department of PrK has never reported that MUP was committing serious crimes against civilian population.<sup>312</sup>

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<sup>307</sup> Judgement-vol.I:para.1029

<sup>308</sup> Final Brief,para.725-727

<sup>309</sup> Judgement-vol.III:para.594

<sup>310</sup> P1459,pp.2

<sup>311</sup> tt.8720-8721,15315,15429,1567117021,16058,3D1112,para.16

<sup>312</sup> tt.19815

190. Apart from the said, P1459 was found in the VJ archives under suspicious circumstances. Mladenovski, as the archivist who has archived the relevant document list on 24 September 1999, has confirmed that he has not made any alterations to the archive list for the Ordinal unit 82. He further confirmed that he would never accept any alteration thereto unless it contained the initials of the person who performed the said alteration.<sup>313</sup> Furthermore, had Mladenovski altered the list, it would have contained 278 documents, containing 737 pages, and not 277 documents with a total of 735 pages.<sup>314</sup>

191. Additionally, Dimitrijević has testified that Pavković's term JC was thought up later, after the events so as to cover up some of his activities.<sup>315</sup> Dimitrijević believes that the documents that mention JC have come into existence at a later date.<sup>316</sup> The Defence reminds that the significant numbers of documents including P1459 were surrendered, to Del Ponte by Đinđić in 2002, on behalf of Pavković.<sup>317</sup> The Documents were handed over without adhering to the prescribed procedure.<sup>318</sup>

192. All of these facts, considered in concert, would lead any reasonable trier of fact to conclude that the document in question is not authentic.

***Sub-Ground 1(16): Role of the forward command post***

193. In Vol. I para. 587, the Chamber states that Samardžić, Commander of the 3-A, was at the IKM of that Army in Priština, from the end of July until October 1998 and that the Chief of Staff of the 3-A, Simić, worked there.<sup>319</sup> The Chamber states these facts but fails to draw any conclusion whatsoever about the role of the IKM in the events of 1998.

194. An explanation of the role of the IKM would also explain the position and role of the meetings the Chamber refers to as meetings of the JC. Namely, every day, at about 18.30h, Pavković would report to the 3-A Commander or to his Chief of Staff on activities of the units in the course of the day and on plans of the units for the following

<sup>313</sup> tt.25795,25797,25810

<sup>314</sup> 3D1135,para.14,3D1130

<sup>315</sup> tt.26595,26611-26612,26617

<sup>316</sup> tt.26599

<sup>317</sup> tt.12080,12081

<sup>318</sup> Defence Response on Prosecution Request for Admission of Exhibits,Annex1,31 January 2007

<sup>319</sup> Judgement-vol.I:para.587

day. The 3-A Commander would approve, deny or amend the ideas.<sup>320</sup> With that decision, Pavković would go to the meeting of the JC and after the meeting he would go back to the IKM of the 3-A to ask the Army Commander or his Chief of Staff to approve, amend or deny a request of the MUP he had heard at the meeting of the JC.<sup>321</sup> Decisions of the IKM with respect to the units of the PrK during 1998 were final, regardless of requests stated at the meetings of the JC.<sup>322</sup>

195. Therefore, had the Chamber correctly assessed the position and role of the IKM of the 3-A in Priština, it would not have found that members of the JC were utilising the established systems of command and control within VJ,<sup>323</sup> or that Šainović had politically coordinated VJ and MUP in Kosovo,<sup>324</sup> or that Šainović was directing actions of the VJ and MUP in Kosovo in 1998.<sup>325</sup>

***Sub-Ground 1(17): Composition and role of VJ Collegium***

196. The Chamber misinterprets the significance and function of the VJ GS Collegium.<sup>326</sup> Thus, for instance, a discussion at the VJ GS Collegium of 21 January 1999 is taken as an evidence of existence and role of the JC.<sup>327</sup> The Chamber, however, fails to acknowledge that the Collegium was not a commanding body of the VJ and that its only purpose was exchange of opinions and information. The minutes do not constitute commanding acts, so the positions of the GS could only be judged based their orders issued to the subordinate commands and the reports the GS submitted to the SDC.

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<sup>320</sup> tt.15531-15532

<sup>321</sup> tt.15532,4D91

<sup>322</sup> tt.15685

<sup>323</sup> Judgement-vol.I:para.1110

<sup>324</sup> Judgement-vol.III:para.468

<sup>325</sup> Judgement-vol.III:para.309

<sup>326</sup> Judgement-vol.I:para.478

<sup>327</sup> Judgement-vol.I:para.1120,P939,P928

***Sub-Ground 1(18): Aleksandar Dimitrijević's testimony***

197. The Chamber errs in not accepting Dimitrijević's explanation of Šainović's role in the events during 1998 and deciding to attach more weight to the telegrams of a British military attaché in Belgrade than to the testimonies of a direct participant in the events.<sup>328</sup>

198. The British Military Attaché in Belgrade, John Crosland, bases his conclusions about Šainović upon a "*well known fact amongst the foreign attaches*",<sup>329</sup> since he never met with Šainović, i.e., he bases his assessment of Šainović's role upon assumptions and impressions of other persons, as the wording used also confirms.

199. Dimitrijević expresses his surprise at the content of the telegrams Crosland wrote and says that it is clearly the author's interpretation and that there was no way he could have said that he disagrees with the actions taking place upon Šainović's arrival in Kosovo, because "*Šainovic absolutely was no authority in Kosovo, and that would have been a lie*".<sup>330</sup> Dimitrijević testified that the content of the telegram of 3 October 1998 is just an impression of the author about certain segments of the talks, maybe a misunderstanding, and maybe yet even the author's arbitrary interpretation. Some parts of the talks were not even interpreted and Crosland spoke very little Serbian.<sup>331</sup> The same applies to the telegram of 6 October 1998.<sup>332</sup>

200. The Chamber takes as credible the Confidential Sitrep from UK Military Representative of 3 October 1998,<sup>333</sup> as giving a true account of the position and role of Šainović (and Pavković), based on the conversation with Dimitrijević. However, in the same this telegram, Crosland notes that "*He may have an eye on possible ICTY investigation of recent events and was very keen to shuffle responsibility to the MUP*".<sup>334</sup> In a telegram of 5 October 1998, commenting on the conversation with Dimitrijević, Crosland notes: "*Possibly an attempt to distance the VJ Gen Staff from 3<sup>rd</sup> Army actions*

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<sup>328</sup> Judgement-vol.III:para.325

<sup>329</sup> P2645,para.58

<sup>330</sup> tt.26666-26669,Judgement-vol.III,para.323

<sup>331</sup> tt.26667-26669

<sup>332</sup> tt.26670-26672

<sup>333</sup> P683

<sup>334</sup> P683,para.12

*under gen. Pavković*".<sup>335</sup> He also notes down that Dimitrijević allegedly said "*Please not tell Šainović that he (Dimitrijević) had said that*".<sup>336</sup>

201. In evaluating what was said and recorded at the Crosland – Dimitrijević meeting, one should first of all bear in mind that this was a conversation between two intelligence officers of two countries whose relations at that moment were burdened by two distinctly different positions on numerous issues, primarily in connection with the situation in Kosovo. The contents of those telegrams should be viewed in the context of intelligence and counter-intelligence activity exercised by both participants in the conversation.

202. Therefore, the finding of the Chamber that the role of Šainović can be judged based on the documents associated with Dimitrijević and Crosland is not acceptable for two reasons that shatter the credibility of these documents. Firstly, stating his reasons, Dimitrijević convincingly denies that he ever had a conversation of the foregoing content with Crosland at all, and secondly, Crosland himself expresses doubt in what he was allegedly told, assessing it as "*an attempt to distance*".<sup>337</sup>

203. Further to the point, the Chamber fails to list one single reason why it dismissed Dimitrijević's description of Šainović's position and role. Dimitrijević, summoned by the Chamber, appeared before the Tribunal, and under oath answered all the questions asked, giving a coherent and logical testimony. The Chamber, however, in spite of its own, well founded decision that the evidence should be supplemented with Dimitrijević's testimony, when he finally appeared, completely ignores everything he said. By doing this the Chamber completely abandons the principle of directness in evidence presentation, invalidates the significance of hearing the witness examined by this Chamber and by both parties in the trial, and bases its decision upon the written evidence that were in the possession of the Chamber even on the day of commencement of this trial.

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<sup>335</sup> P684,para.5

<sup>336</sup> P683,para.9

<sup>337</sup> P684,para.5

***Sub-Ground 1(19): Šainović at the meeting in MUP on 4 April 1999***

204. The Chamber erroneously assesses Šainović's participation in the meeting as exhibiting a leadership role with respect to the use of the MUP forces in Kosovo, much like the one Šainović had during summer 1998.<sup>338</sup>

205. With regard to the meeting, the Chamber first of all ignores the facts related to Šainović's presence. Šainović arrived just before the end of the meeting, which is obvious from the minutes,<sup>339</sup> and the testimony of four other participants.<sup>340</sup> The Chamber, however, ignores even the very perception of the reason for his arrival.<sup>341</sup> Vojnović testifies that it was a normal and routine activity of political representatives to come and visit the members of the defence force in a war-time situation.<sup>342</sup> Thus, the participants do not perceive Šainović as an order-giver, or a person directing their activities, but rather as a politician paying them a visit under war-time circumstances. Even Cvetić agrees with that.<sup>343</sup>

206. Of particular significance is the content of what Šainović allegedly said. From the contents of the written records it is obvious that he simply repeated what he had previously heard, considering the fact that he arrived during Stevanović's speech.<sup>344</sup> Stevanović says: "*the first phase of anti-terrorist operations is to be drawn to an end today*".<sup>345</sup> Šainović repeats: "... Šainović joined the work, pointing out to the need of ending the first phase of anti-terrorist operations today".<sup>346</sup> Stevanović says "... while maintaining the necessary level of readiness for the execution of tasks".<sup>347</sup> Šainović paraphrases the necessary level of readiness by saying "*in order to ensure active defence*".<sup>348</sup>

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<sup>338</sup> Judgement-vol.III:para.341

<sup>339</sup> P1989,p.4

<sup>340</sup> tt.22285,22719-22720,24184-24186,24841-24842

<sup>341</sup> tt.24186,24841-24842

<sup>342</sup> tt.24186

<sup>343</sup> tt.8135

<sup>344</sup> tt.22720

<sup>345</sup> P1989,p.4

<sup>346</sup> P1989,p.4

<sup>347</sup> P1989,p.4

<sup>348</sup> P1989,p.4

207. As another example of Šainović's direct relation with the MUP, the Chamber takes Šainović's words that the state borders need to be protected against the aggressor's attack and deep infiltration into the territory of the state.<sup>349</sup> Šainović's statement, that the police of the state should protect the territory of the state from aggressor's infiltration, is a notorious fact every police officer and, indeed, every citizen is aware of. The allegation that the police needed Šainović's directive to protect the country against a potential aggressor and that it is the evidence of Šainović's directing the police is an assumption on the verge of the unbelievable. The Chamber wants to present this notorious phrase used by Šainović as a directive.

***Sub-Ground 1(20): Meeting of 13 April 1999 with Zlatomir Pešić***

208. The Chamber erroneously interprets the testimony of Pešić as a confirmation of the allegation that Šainović was in a position to exert influence over the VJ and its high level officers during the NATO bombing.<sup>350</sup> All that Pešić says, however, is that he was summoned to a building near the "Grand Hotel" in Priština. He does not say who summoned him but from the further conversation it is obvious that it was Pavković - Pešić says: "*I was blamed by Pavković*", "*He (Pavković) asked what sort of camp was formed...*".<sup>351</sup>

209. Consequently, the above statements are strictly limited to the fact that Šainović, along with a number of other persons was present when Pešić was summoned to the building next to the "Grand Hotel". Nothing in Pešić's testimony implies that it was Šainović who summoned him, that it was Šainović who talked to him, or that it was Šainović who gave him any orders. The mere fact of being present says nothing about Šainović's influence over the VJ during the NATO bombing.

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<sup>349</sup> P1989,p.4

<sup>350</sup> Judgement-vol.III:para.342

<sup>351</sup> P2502,para.34

***Sub-Ground 1(21): Šainović and the meeting of 4 May 1999***

210. The Chamber notes that Šainović either attended or, at the very least, was fully informed about the meeting held at Milošević's on 4 May 1999.<sup>352</sup> There is no evidence whatsoever about Šainović's presence at the meeting. Any attempt at connecting Šainović with this meeting is incorrect and therefore references to this meeting cannot be used for any purpose at all, particularly not as evidence of Šainović's authority over the VJ and MUP in 1999, as the Chamber has done.

211. It is particularly symptomatic that the Chamber states this meeting as a confirmation of Šainović's authority, while no weight is given to the presence of Milutinović who undoubtedly attended the meeting.<sup>353</sup> First of all, this meeting was a detailed meeting during which Milošević heard the reports given by the 3-A Commander, Pavković and Commander of the MUP headquarters in Kosovo, Lukić, regarding the defence of the country and the situation in Kosovo.<sup>354</sup> The meeting was so important that Lukić ordered his subordinates to get acquainted with the conclusions made at that meeting.<sup>355</sup> In the case of Milutinović, although the security situation in Kosovo was discussed during the meeting, based on the reports of the most responsible representatives of both VJ and MUP, the Chamber deliberates upon the issue whether Milutinović knew the exact sentences imposed on the perpetrators of criminal offences<sup>356</sup> and finds that these were meetings which "*were general morale-boosting speeches, designed to ameliorate concerns of the officials working in Kosovo*".<sup>357</sup> Thus, in the case of Milutinović, the meeting during which Pavković and Lukić submitted their report on the security situation amidst the NATO bombing is characterized as a morale-boosting meeting, while when it comes to Šainović, although he did not even attend the meeting, but must have certainly been informed about it, the meeting is denoted as evidence of his authority over VJ and MUP.

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<sup>352</sup> Judgement-vol.III:para.343

<sup>353</sup> P1696

<sup>354</sup> P1696

<sup>355</sup> 5D1289

<sup>356</sup> Judgement-vol.III:para.141

<sup>357</sup> Judgement-vol.III:ara.143

212. No reasonable trier of facts could find that the meeting of 4 May 1999 constitutes any evidence of Šainović's authority over the VJ and the MUP in 1999. Particularly, no reasonable trier of facts could find the presence of one of the accused at a meeting as morale-boosting while the absence of the other accused who was only informed about the content of the meeting, as the evidence of authority over the VJ and the MUP.

***Sub-Ground 1(22): Šainović at the meeting in MUP on 7 May 1999***

213. Šainović's participation at the meeting in the MUP Staff building on 7 May 1999 is erroneously assessed by the Chamber as providing approval for MUP actions, as issuing instructions and conveying Milošević's orders.<sup>358</sup>

214. First of all, in deliberating upon Šainović's role at the meeting, one should bear in mind that Šainović was present only at the beginning of the meeting,<sup>359</sup> which means that nobody reported to Šainović and that nobody acquainted him with the details of events in the field.

215. At the meeting, Šainović speaks about the 45 days of war, stating that the country is defending itself against the aggressor, he speaks about the attacks on Vojvodina, statements given by Drašković, functioning of the postal and communications system, activities of civilian authorities, functioning of public services, health care, distribution of food and medications, activities of the NATO and the UN.<sup>360</sup> It would be unthinkable for a person directing actions of the MUP on a daily basis to give a political speech of the kind that would be given by every single political official of the FRY at the time.

216. The Chamber interprets Šainović's sentence that the main goal is the fight against terrorism<sup>361</sup> as his approval of and instruction for actions.<sup>362</sup> His position on the need to maintain public order and peace, to secure safety for all citizens, to punish perpetrators of criminal offences is interpreted in the same way.<sup>363</sup> This sentence is something any

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<sup>358</sup> Judgement-vol.III:para.348

<sup>359</sup> tt.22287,22721,23974,P1996

<sup>360</sup> P1996,pp.2,3

<sup>361</sup> P1996,p.2

<sup>362</sup> Judgement-vol.III:para.346,348

<sup>363</sup> P1996,p.3

political official in the FRY at the time would have said. Further to the point, everything that is mentioned here in connection with the role of the MUP is entirely in accordance with the Constitution and legislation governing the work thereof. Labeling a speech given to police officers, on the need to persecute perpetrators of criminal offences, as imparting directives for their operations is completely erroneous.

217. As an evidence of Šainović's instructions, the Chamber also quotes his words "*task to clean up the terrain*".<sup>364</sup> Here, again, Šainović says nothing new and nothing unusual. Lukić also speaks about the need to clean up the terrain, during a meeting of MUP Staff for Kosovo in April 1999.<sup>365</sup> Moreover, Šainović mentions mixed patrols of VJ and MUP,<sup>366</sup> although such patrols existed before, ever since April 1999.<sup>367</sup>

218. In addition to the foregoing statements, the Chamber finds that even the mention of operation Jezerce is evidence of Šainović's directing MUP and approving their operations.<sup>368</sup> The Chamber presents the one, isolated sentence, taken out of context, as crucial evidence. There is a number of possible reasons for how and why Šainović would mention this operation: maybe he heard about its unrolling in Belgrade in an internal information session for the top ranking officials of the Federal Government, maybe he heard about it from members of the MUP Staff or PrK prior to the meeting, maybe from the political officials conducting their activities in Kosovo. Of all the possibilities, the Chamber opts for the assumption that Šainović must have heard about it from Milošević and that by mentioning operation Jezerce he was actually conveying Milošević's orders.<sup>369</sup>

219. Regarding the action "Jezerce" that the Chamber mentions,<sup>370</sup> the same was ordered by the PrK command as early as 15 April 1999.<sup>371</sup> The action proceeds even after 15 May 1999, as the command of the 243 mtr reports to the PrK command.<sup>372</sup> Even though the Chamber interprets Šainović's words "*operation Jezerce*" as evidence of his

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<sup>364</sup> Judgement-vol.III:para.346

<sup>365</sup> P1989,p.5

<sup>366</sup> P1996,p.3

<sup>367</sup> 5D1031

<sup>368</sup> P1996,p.2,Judgement-vol.III:para.348

<sup>369</sup> Judgement-vol.III:para.348

<sup>370</sup> Judgement-vol.III:para.348

<sup>371</sup> P1976

<sup>372</sup> 5D683

leadership role, it is apparent that the said operation had commenced and was proceeding without any influence on his part.

220. The finding of the Chamber that it was necessary for Šainović to come all the way from Belgrade to instruct the MUP Staff about the need to put an end to operation Jezerce, an operation of a limited significance, one the of dozens of similar operations executed all over Kosovo, is simply inconceivable.

221. Of particular relevance is the fact that there is evidence of only two MUP Staff meetings attended by Šainović<sup>373</sup> and that there is no evidence whatsoever that anything Šainović said caused any change in the events in the field or with respect to the content or method of operation of MUP members.

222. The finding of the Chamber that Šainović conveys Milošević's orders is based on one sentence only, contained in exhibit P1996 which reads: "*...Milošević heard the report of the Commander of the Third Army and the MUP Police Staff of the Republic of Serbia for Kosovo and Metohia and the text of the statement was made public, representing a state directive and order issued by the Supreme Commander, Slobodan Milošević, which should be relayed to all police commanders as a task assigned by the Supreme Command.*"<sup>374</sup>

223. All Šainović did was refer to a press release published about the meeting at Milošević's. Even more importantly, the press release Šainović refers to, at the time he speaks about it, has already been sent to the members of the MUP. Namely, the press release Šainović spoke about on 7 May 1999 had been served upon the MUP departments in Kosovo as early as 6 May 1999.<sup>375</sup>

224. The Defence points out that the only evidence throughout the entire Judgement pointing to a conclusion that Šainović conveyed Milošević's orders is actually this one about Šainović's reference to an article in the press.

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<sup>373</sup> P1996,P1989

<sup>374</sup> P1996,pp.3,4

<sup>375</sup> 5D1289,p.2,tt.22287-22289,22721,23975,24188

***Sub-Ground 1(23): Šainović at the meeting with Milošević on 17 May 1999***

225. The Chamber erroneously concludes Šainović's presence at the meeting of 17 May 1999 in favour of its allegation that Šainović had authority over VJ and MUP.<sup>376</sup> In addition, the Chamber finds that Šainović did not organize an investigation with respect to what was said at the meeting he attended.<sup>377</sup>

226. The Chamber further elaborates the meeting of 17 May 1999 mainly by incorporating entire paragraphs from Vasiljević's statements into the Judgement.<sup>378</sup>

227. Firstly, the Chamber states that the topics of discussion between the VJ and the MUP were the crimes, involving 800 bodies.<sup>379</sup> Nowhere does Vasiljević speak about 800 crime victims but only about 800 bodies, for which it was not known whether they belonged to the victims of a crime or to the people who died for other reasons, so the VJ and the MUP actually discussed the jurisdiction over carrying out investigations.<sup>380</sup>

228. Then, the Chamber states that Pavković, at a meeting with Ojdanić on 16 May 1999, mentions that he informed Šainović about his orders that military organs were to conduct an investigation<sup>381</sup> and that he informed Šainović that he had seen a group of Scorpions outside Kosovo, in Prolom Banja.<sup>382</sup> There is no evidence whatsoever, that Pavković really said something to Šainović, save for Vasiljević's allegation that Pavković said something about what he – Pavković had told Šainović. Although the meeting was also attended by Farkaš and Gajić, who were also witnesses in this trial, they do not support this allegation of Vasiljević's. Vasiljević has no way of knowing whether Pavković really said something to Šainović. Here, one should pay special attention to Dimitrijević's testimony with respect to Pavković who was looking for a cover for his actions by referring to other persons.<sup>383</sup> Also, both statements about Šainović as retold by Vasiljević have nothing to do with either the crimes or authority over the VJ and the MUP.

<sup>376</sup> Judgement-vol.III:para.349-343

<sup>377</sup> Judgement-vol.III:para.353

<sup>378</sup> P2600,P2589

<sup>379</sup> Judgement-vol.III:para.349

<sup>380</sup> P2594,para.62,tt.8761-8763,8791

<sup>381</sup> P2600,para.62

<sup>382</sup> P2600,para.62,Judgement-vol.III:para.349

<sup>383</sup> tt.26595,26713

229. The Chamber offers only a superficial analysis of the meeting of 17 May 1999 in the context of Šainović's alleged authority over VJ and MUP. This meeting, however, offers genuine evidence that Šainović had no authority over the VJ and the MUP whatsoever.

230. Firstly, the state commission tasked with investigating the developments in Kosovo was proposed by Pavković and Ojdanić, and Šainović agreed with the establishment of such a Committee, with the remark that there should be an independent investigation of events.<sup>384</sup> The Chamber concludes "*Neither Milošević nor Šainović arranged that such investigation occurred*".<sup>385</sup> It is wholly unclear why the Chamber should implicate Šainović here, why Šainović would have organized an investigation, what it was that qualified Šainović for organizing an investigation, under what authority and on what grounds he could have organized such an investigation. The Chamber infers the powers and responsibilities of Šainović in an arbitrary and incorrect manner, based solely on prejudice concerning Šainović's role in the events.

231. Indeed, this meeting demonstrated Šainović's marginal role in the important matters concerning Kosovo. All that Šainović said were a few comments on the SAJ, after Pavković, Marković and Vasiljević had talked about the Scorpions and Petručić.<sup>386</sup> Šainović's entire involvement boiled down to a few comments.

232. If it is true that Šainović had authority over VJ and MUP in Kosovo, all questions at the meeting would have been addressed to him, all responsibility would have been attributed to him. If it is true that Šainović had authority over VJ and MUP, there would not have been any tension between these two structures, as Šainović would have resolved these disagreements by virtue of his authority. If Šainović had been the political coordinator for Kosovo and/or Milošević's representative for Kosovo, Milošević would have given him orders or expected answers from him. However, Šainović gave a few incidental comments at the meeting, while the core of the issue was discussed by others, naturally, in line with their respective duties and responsibilities regarding the situation in Kosovo.

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<sup>384</sup> tt.8827,8783

<sup>385</sup> Judgement-vol.III:para.353

<sup>386</sup> tt.8824

233. This closed meeting, attended by Milošević and a few other people holding senior positions in the public administration, VJ and MUP is proof that there was no JC in 1999. It is impossible to conceive a situation that at a secret, closed meeting of confidential people, where the situation in Kosovo was discussed and a debate between VJ and MUP on the responsibility for conducting investigation was taking place, nobody said a single word about a body that coordinated and managed the VJ and MUP forces in Kosovo, or that such a body or its members even existed.

***Sub-Ground 1(24): Meeting of 1 June 1999 and assessment of Aleksandar Vasiljević's testimony***

234. The Chamber misconstrued the substance of the meeting of 1 June 1999, as well as Šainović's role at that meeting. The Defence reiterates here all its contentions contained in the rationale under sub-ground 1(10) of this Appeal Brief.

235. The Chamber begins its interpretation of the meeting of 1 June 1999 with the following: "*another meeting of the Joint Command took place*".<sup>387</sup> There is not a single piece of evidence that any meeting which could be referred to as a JC Meeting was held after October 1998.

236. Based on the fact that the participants rose when the Deputy PM of the Federal Government entered the room, as well as on the place where Šainović sat,<sup>388</sup> the Chamber draws the conclusion that Šainović was seen by other participants at the meeting as the most senior figure.<sup>389</sup> The Chamber also states that Šainović was treated differently, that he gave a distinct impression that he was the head.<sup>390</sup> It is unthinkable that the fact that some people rose when the Deputy PM entered the room, which is a generally accepted custom throughout the civilized world, or the fact that Šainović gave an impression of being important, should give rise, *inter alia*, to the Chamber's conclusion concerning Šainović's position and authority.

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<sup>387</sup> Judgement-vol.III:para.355

<sup>388</sup> Judgement-vol.III:para.355

<sup>389</sup> Judgement-vol.III:para.359

<sup>390</sup> Judgement-vol.III:para.357

237. The Chamber assessed the facts concerning the meeting of 1 June 1999 by, apparently, accepting Vasiljević's testimony, as well as the testimonies of Stojanović, Lazarević and Anđelković.<sup>391</sup> Namely, the Chamber first states that, according to Vasiljević, Šainović's participation in the meeting was limited to his "approval" of forthcoming actions.<sup>392</sup> After this, however, the Chamber states that Šainović said that an agreement would soon be signed with the international community, that VJ and MUP forces would withdraw from Kosovo and that operations would therefore have to be finalised, according to the testimonies of Lazarević and Stojanović;<sup>393</sup> this is, however, not mentioned by Vasiljević at all. Lazarević and Lukić objected to the withdrawal, which is not mentioned by Vasiljević either.

238. Vasiljević's account of Šainović's role is wrong and inconsistent in his different statements. In one statement, Vasiljević says that he does not know what Šainović's function at the meeting was,<sup>394</sup> that he does not have the impression that Šainović was head of the JC, while in another statement he says that "*His (Šainović's) authority was the commander of the Joint Command and to coordinate the operations of the MUP forces and the forces of the army*".<sup>395</sup> In one statement, Vasiljević says that Šainović agreed with what the VJ and MUP generals had presented,<sup>396</sup> while, according to another statement, he told them to do as they had planned, that the remaining terrorist groups were to be destroyed in the following three or four days, and that the organisation of the activities in the field and co-operation between the MUP and the VJ was to be improved.<sup>397</sup>

239. In addition to being inconsistent and unreliable, Vasiljević is at variance with all other witnesses that testified about 1 June 1999. The Chamber, however, finds that the different accounts of the meeting of 1 June 1999 are largely consistent with each other.<sup>398</sup> However, the key difference is the account of what Šainović said. While Vasiljević is trying to say that Šainović approved actions justified by previous speakers, Stojanović

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<sup>391</sup> Judgement-vol.III:para.356

<sup>392</sup> P2600,paras.81-82

<sup>393</sup> tt.19772-19776,19802-19803,18122-18124

<sup>394</sup> 2D387,para.3

<sup>395</sup> P2589,p.16430

<sup>396</sup> 2D387,para.2

<sup>397</sup> P2600,para.81

<sup>398</sup> Judgement-vol.III:para.359

testifies that Šainović came to tell them that the agreement will be signed, that the withdrawal was imminent and that the activities would therefore be ended. Šainović responded to Lazarević and Lukić's remark with "*I don't know*" and added that the agreement under which VJ and MUP would have to withdraw would be signed.<sup>399</sup> Stojanović testified that Šainović's words were not an order, but rather statement of fact.<sup>400</sup>

240. The Chamber concludes that Šainović's role at this meeting was consistent with the leadership role which he had in 1998 at the JC meetings.<sup>401</sup> This conclusion is erroneous, since Vasiljević is not only ignorant of Šainović's function but also gives differing accounts of his role at the meeting. Furthermore, this conclusion is wrong because the core purpose of Šainović's arrival was to inform the participants that the agreement was under way and that the withdrawal would follow shortly, which was, in fact, the content of Šainović's address, according to the testimonies of Stojanović, Anđelković and Lazarević.

241. The Chamber concludes that this meeting confirms that Šainović was responsible for conveying Milošević's orders to Kosovo. Firstly, it is unclear to which Milošević's order this refers, as the evidence concerning this meeting offers no clue to the notion that Šainović may have conveyed any order. It is unthinkable that the Chamber should believe that Šainović came to Kosovo to convey Milošević's order concerning some local operation which – according to Vasiljević – was planned by Pavković and Lukić and of which these two informed the participants.

242. The Chamber concludes that Šainović was somebody "*who could order that activities of the joint forces cease due to the agreement reached between Milosevic and Ahtisaari*".<sup>402</sup> Firstly, this conclusion is in stark contradiction to Vasiljević's account. Accepting this conclusion renders Vasiljević's entire account of the meeting nonsensical. Furthermore, this conclusion can only be drawn on the basis of the testimonies of Stojanović, Anđelković and Lazarević, who did not say a single word about any order: they are all agreed that Šainović came to inform the participants of the status and

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<sup>399</sup> tt.19774-19775

<sup>400</sup> tt.19775

<sup>401</sup> Judgement-vol.III:para.359

<sup>402</sup> Judgement-vol.III:para.359

probable outcome of negotiations. It is beyond belief that the Chamber should claim that VJ and MUP forces withdrew from Kosovo as a result of what Šainović said at this meeting. It is beyond belief that the Chamber should claim that Milošević had no other means of conveying this order except sending Šainović to convey it. Moreover, the forces of FRY and Serbia withdrew as a result, and only after, the signing of the Military-Technical Agreement on 9 June 1999, pursuant to the decision of the Serbian National Assembly dated 3 June 1999.<sup>403</sup>

243. The Chamber draws another implausible conclusion. It states that the meeting of 1 June 1999 had all the characteristics of the meetings in 1998, and “*it is therefore clear that also in 1999 he (Šainović) was able to convey orders and provide approval for certain VJ and MUP activities.*”<sup>404</sup> How is it possible to draw a conclusion concerning the entire year 1999, on the basis of one single meeting which in fact took place merely a few days before the end of the war? How can Šainović’s responsibility throughout 1999 be inferred on the basis of one single meeting? What evidence is there to show that during 1999, especially in the period when crimes of which Šainović was found guilty by the Judgement of the Chamber were committed, Šainović had influence over the developments in the field and what are those orders that he supposedly conveyed? The Chamber uses the analogy with 1998 in an unallowable and arbitrary way and draws conclusions that no reasonable trier of facts could reach.

***Sub-Ground 1(25): Meetings between Šainović and Rugova***

244. The Chamber erroneously concludes that Šainović’s talks with Rugova were not an attempt at negotiating solutions, but rather a campaign including threats to Rugova and his associates, in order to show that the FRY/Serbian authorities were meeting with Kosovo Albanians in the hope that this would lead to cessation of the NATO campaign.<sup>405</sup>

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<sup>403</sup> Judgement-vol.I:para.1215

<sup>404</sup> Judgement-vol.III:para.359

<sup>405</sup> Judgement-vol.III:para.417

245. First the Chamber erroneously concludes that Rugova and his associates were in house arrest. After the launching of the NATO campaign, Merovci moved around the city,<sup>406</sup> visited Rugova on a daily basis and returned to his home or to that of his brother.<sup>407</sup> Merovci testified that Rugova did not want to leave Kosovo and insisted on staying in Kosovo. Merovci also decided to stay in order to be around Rugova.<sup>408</sup> Merovci travelled abroad to Skopje, met there with ambassadors Hill, Hutzinger, Walker, Petritsch, Koch and gave many interviews for the press.<sup>409</sup>

246. Merovci also talked with Hill on the phone and never told him that he was held in confinement. Rugova's associates, such as Shala, were able to decide whether they wished to leave Kosovo, or stay.<sup>410</sup>

247. Joksić was given instructions by his superiors to see to the safety of Rugova.<sup>411</sup> Joksić proposed a meeting with Milošević on 1 April 1999 to Rugova, which he decided to accept.<sup>412</sup> Rugova and Merovci told Šainović in the first conversation with him that they were available for a meeting with Marković.<sup>413</sup>

248. Journalists visited Rugova's home, several press conferences were held, the Russian Ambassador Kotov visited, therefore there is no evidence to sustain the claim that Rugova and Merovci said that they were arrested.<sup>414</sup>

249. The Chamber states that the discussions with Rugova were only propaganda, rather than an attempt at negotiations. This propaganda was aimed at ending the NATO bombing.<sup>415</sup> The Chamber has reached this conclusion in an utterly arbitrary fashion, because, if all those dealings were mere propaganda, then the reasons for it should be treated on the basis of what was publicly announced. After the meeting of Rugova and Šainović, a public announcement of the Federal Government and the Government of Serbia was aired, with two fundamental points – the work on the political agreement and

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<sup>406</sup> P2588,para.46

<sup>407</sup> P2588,para.49

<sup>408</sup> P2588,para.50

<sup>409</sup> P2588,para.66,tt.8528-8529

<sup>410</sup> P2588,para.61

<sup>411</sup> tt.21989

<sup>412</sup> tt.21988

<sup>413</sup> P2588,para.62

<sup>414</sup> P2588,paras.63,69,tt.21988

<sup>415</sup> Judgement-vol.III:para.417

the efforts on the return of all refugees.<sup>416</sup> This announcement publicly presented Šainović's position, as well as the position of the Federal Government of which he was the Deputy PM of Federal Government, with respect to the issue of refugees: all refugees were to return with the encouragement of Rugova, UNHCR and ICRC. The call for return and the invitation to dialogue were not propaganda, but an attempt at resolving the situation that troubled Kosovo.

250. Bulatović testified that the contact with Rugova was quite significant, and that it was upon Šainović to establish this contact.<sup>417</sup> Šainović's role in the continuation of activities related to Rugova was described by Merovci: "*Šainović was the person who come more frequently and announced meetings. In a way, he (Šainović) could have been the person who acted in a capacity of an envoy, who conveyed opinions of higher ranks.*"<sup>418</sup> Šainović came on 4 April 1999 to propose a meeting with Marković,<sup>419</sup> on 13 April he came with a proposal for a meeting with Milutinović,<sup>420</sup> on 28 April he was present at the meeting with Rugova for which Milutinović travelled to Priština.<sup>421</sup>

251. The Defence concludes that the meetings with Rugova cannot be termed as a campaign designed to end the bombing, considering that the Chamber never provided an explanation as to how the purpose of the alleged campaign – which was the return of the refugees and the political dialogue – could have procured the cessation of the bombing, when the bombing was conducted for entirely different reasons and motives. Moreover the Defence points to the testimony of Odalović, who stated that the most intense attacks on Priština ensued immediately after the announcement of the Federal Government and the Government of Serbia about the talks of Šainović and Rugova.<sup>422</sup> This fact demonstrates that, at that point, military defeat was the primary goal rather than the political process. This fact probably explains why Rugova asked Milutinović to enable him to leave Priština, where he had no opportunity anymore for pursuing political activities.<sup>423</sup>

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<sup>416</sup> 1D36

<sup>417</sup> tt.13849-13850

<sup>418</sup> tt.8545

<sup>419</sup> P2588,para.62

<sup>420</sup> P2588,para.67

<sup>421</sup> P2588,para.72

<sup>422</sup> tt.14426

<sup>423</sup> tt.21994-21995

252. The Defence remarks that Šainović participated in the political process with Rugova, although his role was inconsequential and reduced to intermediation and arranging meetings with the highest ranking state officials.

253. The Defence particularly draws attention to double standards applied by the Chamber when assessing the participation of Šainović and Milutinović in the same process.

254. For instance, when discussing the individual criminal liability of Milutinović, “*the Chamber’s impression is that these negotiations with Rugova amounted to a propaganda exercise designed to give the impression of ongoing attempts at negotiations with the Kosovo Albanians, with a view to procuring the cessation of the NATO bombing.*”<sup>424</sup> Namely, the Chamber mentions the “*negotiations with Rugova*”. When the same process is assessed in relation to Šainović, the Chamber states that “*this was not an attempt of negotiating a solution but rather a campaign which involved threats to the personal security*”.<sup>425</sup> In describing the role of Milutinović, the Chamber does not make an effort to reach any conclusions about the substance of his participation. When assessing the role of Šainović in the same process, the Chamber argues that Šainović knowingly and wilfully participated in this campaign.<sup>426</sup>

255. The Chamber continually minimizes the role of Milutinović. Thus, for instance, the first meeting with Milutinović was followed by numerous photographers and reporters.<sup>427</sup> Milutinović’s second meeting with Rugova was also covered by the media, and the two of them even gave statements to the journalists.<sup>428</sup> Šainović’s meetings with Rugova and Merovci were conducted without the presence of the public. Consequently, if propaganda had been the objective, as erroneously concluded by the Chamber, then the exponent of propaganda was Milutinović.

256. The Chamber concludes that Milutinović was not aware that Rugova was allegedly under house arrest. However, as early as on 16 April 1999, in a meeting with Milutinović, Rugova and Merovci requested to leave Kosovo.<sup>429</sup> They also reiterated that

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<sup>424</sup> Judgement-vol.III:para.221

<sup>425</sup> Judgement-vol.III:para.417

<sup>426</sup> Judgement-vol.III:para.417

<sup>427</sup> Judgement-vol.III:para.217,1D741,para.47

<sup>428</sup> Judgement-vol.III:para.218

<sup>429</sup> tt.8466

request in the meeting with Milutinović on 28 April 1999.<sup>430</sup> If Rugova and Merovci allegedly asked Milutinović twice to leave Kosovo, it is then unclear how it is possible that Milutinović had no knowledge of the fact that they were not allowed to leave Kosovo. Therefore, it is either incorrect that Rugova and Merovci requested to leave Kosovo, at least not until there was any hope for the initiated political process, which the Defence strongly believes, or the Chamber plays down the role of Milutinović who was asked by Rugova and Merovci for permission to leave, while he was puzzled as to why they needed that permission in the first place.

257. Moreover, on 28 April 1999 in Priština, Milutinović said that he could not understand why people were leaving Priština. Merovci then told him that people were forced out of their homes and that uniformed Serbian men were to blame. Milutinović then asked Šainović in front of Merovci if that were true.<sup>431</sup> Milutinović was receiving reports from the MUP on daily basis about the affairs in the sphere of competence of that Ministry, as well as daily information from the VJ, including the information from the intelligence administration.<sup>432</sup> During the war, Milutinović was receiving the SC Staff Report on daily basis.<sup>433</sup> It took almost an entire page of footnotes in the Judgement to list all the reports that Milutinović received.<sup>434</sup> Milutinović's services were monitoring CNN, BBC and other media and passing information to Milutinović.<sup>435</sup> Nevertheless, the Chamber is not in the least surprised by Milutinović's mock question to Šainović, and fails to notice Milutinović's inapt attempt to appear naïve and poorly informed before Rugova. In contrast, the Chamber uses every opportunity to reiterate that the real authority lies in Šainović, even in the part of the Judgement that deals with Milutinović although there is no need for that.<sup>436</sup>

258. The Chamber applies double standards in assessing the role of Milutinović, on the one hand, and that of Šainović, on the other. By doing so, the Chamber derogates from the principles of assessment of evidence, infringes its obligation to treat the defendants

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<sup>430</sup> tt.8472

<sup>431</sup> Judgement-vol.III:para.218

<sup>432</sup> 1D741,paras.25,45

<sup>433</sup> Judgement-vol.III:para.261

<sup>434</sup> Judgement-vol.III:pp.105- 106

<sup>435</sup> tt.13772

<sup>436</sup> Judgement-vol.III:para.217,footnote-455

equally and misconstrues facts with respect to the positions and roles of Milutinović and Šainović.

***Sub-Ground 1(26): Incongruity between the assessment of the roles of Šainović and Milutinović in the same events***

259. Milutinović and Šainović are the only two political officials tried before the Chamber. There is a significant number of events in which both participated, albeit in different roles. The Chamber, in its assessment of the respective roles of Milutinović and Šainović, applied starkly opposing criteria, whereby it occasioned a miscarriage of justice and misconstrued the facts pertaining to Šainović. The Defence of Šainović does not contend that Milutinović is responsible for any of the actions with which he is charged, but that the Chamber failed to apply the same criteria in weighing the same evidence relating to the same events and same participants in those events.

260. Thus, as regards the meeting in the MUP building on 5 November 1998, Milutinović recounted the meeting of 29 October 1998 at Milošević's, referred to the so-called JC, mentioned that considerable "*Šiptar terrorist forces*" had been "*put out of action*", stated that "*with regard to the Yugoslav army and police, everything will stay the same as it has been up to now*", that the "*police and the Army shall reserve the right to continue to intervene*", stated that the "*local police (100 settlements) is so far showing good results and that is how it should continue*", ordered that "*all military buildings and communications have to be protected*", ordered to "*continue planning the activities with the same dedication and enthusiasm*", justified the action from 1998 and said "*Had we not done what we have done so far, we would have been in a much more difficult political situation*".<sup>437</sup> The meeting was held solely in order to have the most senior officers of MUP in Kosovo listen to Milutinović. The meeting was also attended by the Working Group of the SPS in Kosovo, Šainović, the PJP unit commanders, the entire leadership of the PrK.<sup>438</sup> After the meeting at Milošević's which is described by the Chamber in the

<sup>437</sup> P2805p.4,5,Judgement-vol.III:para.137

<sup>438</sup> P2805,p.3

Judgement as one of the key meetings,<sup>439</sup> Milutinović arrived in Kosovo and, in the capacity of both President of Serbia and member of the SDC, conveyed the conclusions of this meeting to the most senior officers of MUP and VJ in Kosovo; yet, in its interpretation of his involvement, the Chamber states that he did not have a significant role in those meetings, or that his speeches were “*morale-boosting speeches designed to ameliorate concerns of the officials working in Kosovo*”.<sup>440</sup>

261. Šainović was also present at the same meeting at which Milutinović conveyed the conclusions of the meeting at Milošević’s. He did not say a word. The Chamber, however, interprets Šainović’s presence in section (B) Other meetings<sup>441</sup> and concludes as follows: “*Šainović attended other meetings in Kosovo...These meetings involved both officials at the highest level in Belgrade, as well as the officials at the highest level entrusted with dealing with the situation in Kosovo. This is in line ...of the influence Šainović exerted when it came to Kosovo. It is also in line with the earlier conclusion that he was a political co-ordinator of the VJ and the MUP at this time*”.<sup>442</sup> A meeting at which Šainović did not say a single word is used by the Chamber to draw a conclusion on his authority over VJ and MUP in Kosovo, whereas the same meeting is regarded as morale boosting where it concerns Milutinović.

262. Milutinović participated in the meeting of the SDC on 25 December 1998 in the capacity of a member with voting rights. At this meeting, Milošević relieved the commander of the 3-A of his duty and appointed Pavković in his place,<sup>443</sup> appointed Lazarević commander of the PrK,<sup>444</sup> Đukanović, as the third member of SDC with voting rights, objected to Pavković’s appointment,<sup>445</sup> Milutinović defended Milošević’s choice and stated that accounts of undisciplined and unconstitutional conduct of the PrK (under Pavković’s command in 1998) were “*usually inflated*”.<sup>446</sup> As regards this view on the part of Milutinović, the Chamber laconically states that it is true that Milutinović

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<sup>439</sup> P2166

<sup>440</sup> Judgement-vol.III:para.143

<sup>441</sup> Judgement-vol.III:p.332

<sup>442</sup> Judgement-vol.III:para.335

<sup>443</sup> P1000,p.8

<sup>444</sup> P1000,p.11

<sup>445</sup> P1000,p.13

<sup>446</sup> P1000,p.14

supported Milošević, but even if he had not, the outcome would have been the same.<sup>447</sup> Perhaps the outcome would have been the same regarding the appointments of VJ generals, but the SDC adopted concrete decision on that day. Since Đukanović was obviously in the minority, Milutinović and Milošević accepted the conclusion that the PrK had discharged its tasks very successfully,<sup>448</sup> this is obviously a reference to the tasks in 1998, during which year the Corps was under Pavković's command.

263. Šainović attended the same meeting, naturally, without voting rights; he was there by Bulatović's decision, and this was the first and the last time that he participated in a meeting of SDC.<sup>449</sup> Šainović took part in a discussion on the state border, which was benign in view of the circumstances, without taking part in the discussion on PrK, Pavković, co-ordination of VJ and MUP or any similar matter.<sup>450</sup> The Chamber, however, uses Šainović's participation in this meeting as evidence that he was aware of the crimes.<sup>451</sup> The Chamber refers to Šainović's participation as a "report", assesses it as "further evidence that he (Šainović) was well informed on the ground". It also states: "*This participation in an SDC meeting indicates to the Chamber that Šainović was considered to be so well informed about Kosovo as to be able to participate meaningfully in a meeting of the highest state organ exercising command over the VJ in the province.*"<sup>452</sup>

264. The part relating to the mental aspect of responsibility in Milutinović's case is referred to as "knowledge of events",<sup>453</sup> whereas in the case of other accused it is referred to as "*knowledge of crimes*";<sup>454</sup> it does not mention that Milutinović, learnt about any crimes at that meeting, unlike Šainović. Thus the same words and the same meeting imply knowledge of crimes when they concern Šainović, whereas in Milutinović's case they merely mean that "*Milutinović does not appear to have raised any concerns*".<sup>455</sup>

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<sup>447</sup> Judgement-vol.III:para.216

<sup>448</sup> P1000,p.15

<sup>449</sup> tt.13859

<sup>450</sup> P1000

<sup>451</sup> Judgement-vol.III:para.446

<sup>452</sup> Judgement-vol.III:para.446

<sup>453</sup> Judgement-vol.III:p.100

<sup>454</sup> Judgement-vol.III:p.439

<sup>455</sup> Judgement-vol.III:para.127

265. The same applies to the meeting of 21 July 1998. Although the plan for combating terrorism was adopted at this meeting at Milošević's, Milutinović's participation is deemed to be insignificant,<sup>456</sup> whereas Šainović's participation serves as evidence of his authority over VJ and MUP during 1998.<sup>457</sup>

266. As regards the participation in the meeting of 29 October 1998, Milutinović<sup>458</sup> accepted the reports of Pavković, Lukić and Minić on the realisation of the anti-terrorist plan.<sup>459</sup> The Chamber also assesses Milutinović's participation in this meeting as not significant.<sup>460</sup> Šainović, however, reported neither on actions nor on co-ordination; he spoke primarily of forthcoming activities and highlights the importance of providing the prerequisites for the work of KVM, as the most efficient way of deterring terrorists from undertaking new actions.<sup>461</sup> Milutinović's participation is again assessed as not significant and/or representing morale boosting,<sup>462</sup> while Šainović's participation is interpreted in the context of his authority over VJ and MUP in 1998 as evidence of the influence Šainović exerted when it comes to Kosovo.<sup>463</sup>

267. As regards the meeting with Milošević on 4 April 1999, where there is no evidence of Šainović's presence, Milutinović's presence is, again, not significant and/or representing morale boosting.<sup>464</sup> Although there is no evidence that Šainović attended the meeting, the Chamber says "*Šainović either attended or at the very least was fully informed about the content of the meeting*",<sup>465</sup> which is interpreted as evidence in support of the assertion that Šainović had authority over VJ and MUP in Kosovo in 1999. However, when Šainović reiterated Milošević's message from that meeting at the meeting of MUP Staff on 7 May 1999,<sup>466</sup> which had been published by the newspapers, this is interpreted by the Chamber as key evidence in this trial that Šainović conveyed

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<sup>456</sup> Judgement-vol.III:para.143

<sup>457</sup> Judgement-vol.III:para.304

<sup>458</sup> Judgement-vol.III:para.136

<sup>459</sup> P2166,p.12

<sup>460</sup> Judgement-vol.III:para.143

<sup>461</sup> P2166,p.13

<sup>462</sup> Judgement-vol.III:para.143

<sup>463</sup> Judgement-vol.III:para.335

<sup>464</sup> Judgement-vol.III:para.140,143

<sup>465</sup> Judgement-vol.III:para.343

<sup>466</sup> P1996

Milošević's orders in Kosovo.<sup>467</sup> When Milošević's words from a closed meeting, of which the public became aware only during the trial of Milošević before the Tribunal, were recounted by Milutinović to the entire VJ and MUP leadership in Kosovo after the completion of the anti-terrorist operation in 1998,<sup>468</sup> which has been mentioned above, the Chamber regards this as another meeting without significant participation on the part of Milutinović and/or as a morale-boosting meeting.<sup>469</sup>

268. As regards Rambouillet, Petritsch testifies that the meetings with Milutinović were “*absolutely unproductive*”,<sup>470</sup> while he regards the talks with Šainović as very useful and describes Šainović as willing to be co-operative, to listen to the other side and try to respond to their arguments.<sup>471</sup> Petritsch also testifies that on 5 March 1999 Milutinović issued a communication which clearly indicated the change of attitude on behalf of the FRY/Serbian delegation.<sup>472</sup> Milutinović participated in the Paris negotiations from the start and was obviously the most prominent member of the FRY/Serbian delegation. According to Petritsch, Milutinović came to Paris with instructions from Milošević to decline any agreement.<sup>473</sup> Following this, Milutinović addressed the National Assembly of the Republic of Serbia at a public session, on which occasion he explained to the deputies and the public why the Rambouillet ultimatum had had to be refused.<sup>474</sup>

269. According to Petritsch's testimony, the Rambouillet conference ended in good atmosphere but, between 23 February 1999 and 15 March 1999, the atmosphere on the Yugoslav side changed,<sup>475</sup> and in Paris Šainović and Professor Marković had wholly different roles than in Rambouillet. As regards Šainović and Professor Marković in Paris, Petritsch says: “*These two gentlemen never even spoke*”.<sup>476</sup>

270. With respect to Milutinović's role, the Chamber explains that he was not a member of the delegation and that that he appeared *to serve* as its *de facto*

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<sup>467</sup> Judgement-vol.III:paras.346,359

<sup>468</sup> P2508

<sup>469</sup> Judgement-vol.III:para.143

<sup>470</sup> Judgement-vol.I:para.371

<sup>471</sup> tt.10945

<sup>472</sup> tt.10758,Judgement-vol.I:para.391

<sup>473</sup> Judgement-vol.I:para.393,P2792,p.5

<sup>474</sup> Judgement-vol.I:para.400

<sup>475</sup> tt.10758

<sup>476</sup> tt.10930

spokesperson.<sup>477</sup> It is unclear how can a President of a state be a spokesperson, and how can it be said that he, as such, serves anyone when he represents the state. With respect to Šainović, however, the Chamber considers the Rambouillet negotiations as evidence that Šainović was one of Milošević's closest associates and the most senior and most influential member of the delegation at Rambouillet.<sup>478</sup>

271. As regards Milutinović, the Chamber returned a verdict of not guilty on the basis of justified reasons. The Chamber, however, occasions a gross miscarriage of justice in treating Šainović and Milutinović unequally and in being biased against Šainović. The Chamber applies inconsistent criteria in weighing evidence and thereby misconstrues the facts pertaining to Šainović.

#### II(A) RELIEF SOUGHT-FIRST GROUND OF APPEAL

**272. All of the sub-grounds within the first ground of appeal, when considered individually and/ or cumulatively, show that the Chamber has erred in establishing beyond a reasonable doubt that Šainović participated in a JCE to forcibly displace part of the Kosovo Albanian population, both within and outside of Kosovo to thereby change the ethnic balance in the province to ensure continued control by the FRY and Serbian authorities there.**

273. The Defence seeks that the Appeals Chamber returns the verdict of not guilty for Counts 1 until 5.

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<sup>477</sup> Judgement-vol.I:para.359

<sup>478</sup> Judgement-vol.III:para.409

**Ground 2: Šainović's contribution to JCE was not significant*****Sub-Ground 2(1): Šainović's contribution to JCE was significant***

274. The Chamber concludes that Šainović's contribution to the accomplishment of the JCE was significant. Šainović's significant contribution is reflected in the following: he was the person that Milošević used to orchestrate events in Kosovo, namely he conveyed Milošević's instructions, co-ordinated the forces in Kosovo, provided his own instructions, all in order to retain the control in Kosovo.<sup>479</sup>

275. Firstly, in terms of principles, the conclusion on "*the person Milošević used to orchestrate the events*" is inaccurate because this conclusion implies the absence of state institutions and procedures, and aims to portray the functioning of FRY and Serbia as Milošević's private affair with his own people who manage his affairs in the field independently from the public administration system and the laws. The Chamber implicitly portrays the state as Milošević's private property, but fails to provide the evidence that it bases its opinion upon. The Chamber depicts the communication among the highest-ranking state officials as a private affair, as if there were a political system in the world where communication between stakeholders on the political stage is effected solely by means of formal conclusions and written statements.. Milošević's authority is undisputed, but his authority derives from the fact that Milošević was the President of FRY, Chief of the FRY SDC with the authority to make decisions on key issues related to national defence, and the leader of the ruling political party in FRY and Serbia. The modality and extent of Milošević's influence over the position and role of Šainović, as a high state official, can be interpreted only in that context, which is typical of any state organization and carries no criminogenic implications whatsoever.

276. The formulation "*the person used to orchestrate*" is to suggest that, in the background of Šainović's activities in Kosovo, there was only criminal action beyond the constitutional and legal boundaries. However, all the while Šainović was engaged in Kosovo, he acted within his constitutional and legal powers. There are four clearly distinct affairs that Šainović attended to with respect to Kosovo: a) Being sent to Kosovo

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<sup>479</sup> Judgement-vol.III para. 467

in the summer of 1998, as the Deputy PM of the Federal Government; b) Chairman of the Federal Commission, c) Participation in Rambouillet and d) The process with Rugova.<sup>480</sup> Therefore, Šainović's tasks did not involve the fabricated orchestration of the events in Kosovo, but rather legitimate activities within the state systems of FRY and Serbia, decided upon according to the procedure stipulated by law and the Constitution, where all players – prime ministers, political party leaders and presidents of the republics – participate and exert their respective influences. Consequently, Milošević also has certain influence over Šainović's engagement, but the extent of this influence is restricted by his constitutional position of the President of FRY and his political position of the leader of the ruling party.

277. Šainović did not conduct any coordination of the forces and activities, especially not after 24 March 1999. Šainović did not provide any instructions or suggestions to the VJ and MUP forces in Kosovo that in any way influenced the events in the field, movement and activity of units, especially not with a view to pursuing the "*ultimate goal to retain control in Kosovo*".

278. In its rationale, the Chamber failed to point to a single piece of evidence indicating the effects of Šainović's activities on the events on the ground, especially after the departure of the KVM. In order to assess Šainović's contribution to JCE as significant, there would have to be evidence that Šainović influenced the way in which that enterprise operated, and that such influence was significant.

279. The Chamber *establishes "that the direct evidence of his activity in influencing and co-ordinating the activities of the forces of the FRY and Serbia in 1999 is not as extensive as that relating to 1998"*.<sup>481</sup> The Chamber nevertheless concludes that Šainović had authority and influence, as well as that he attended a number of meetings during the NATO campaign. The Defence submits that the Chamber, in absence of any evidence for 1999, inadmissibly, applies analogy and projects the conclusions from 1998 on the period in 1999. The Chamber does not possess any evidence that Šainović participated in coordination during 1999. The Chamber also lacks evidence of the existence of the JC in 1999; instead, the Chamber presents the existence of this alleged entity through

<sup>480</sup> tt.13817,13997,14589,14743,2D8,tt.14028,2D81,tt.13840-13841,tt.13545,P967,tt.14661,tt.13849-13850

<sup>481</sup> Judgement-vol.III:para.467

impressions and recollections of 1998. The Chamber completely disregards the essential differences between 1998 and 1999, which are crucial for drawing conclusions about this issue: the state of war was proclaimed in 1999, NATO had decisive influence on the nature of the armed conflict in 1999, and there were no civilian participants in the meetings of VJ and MUP in 1999.

280. The Chamber commits an error in law in using analogy as means of evidence; namely, conclusions about one period in time are drawn on the basis of the findings regarding a different period.

281. The Chamber establishes the evidence of Šainović's significant contribution to the JCE on the basis of probability standards, as opposed to the standards beyond a reasonable doubt, thereby committing an error in law.

282. The Chamber, namely, states that the available evidence is insufficient, or of poor quality with respect to the role of Šainović in 1999, but it concludes, as described above, that if Šainović played a role of coordination in 1998, then he must have played the same role in 1999 as well. Hence, the Chamber commits an error in law by not applying the principle *in dubio pro reo* with respect to the evidence regarding the significance of Šainović's role.

***Sub-Ground 2(2): Šainović was the crucial link between Milošević and VJ and MUP in Kosovo***

283. The Chamber erroneously concludes that Šainović was the crucial link between Milošević in Belgrade and the VJ and MUP units located in Kosovo.<sup>482</sup> This crucial link is a circumstance that qualifies Šainović's contribution to the JCE as significant.<sup>483</sup> The Defence reiterates here all statements made in the rationale under sub-ground 1(1) of this Appeal.

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<sup>482</sup> Judgement-vol.III:para.462

<sup>483</sup> Judgement-vol.III:para.467

284. The VJ GS, i.e. the SC Staff was in daily contact with Milošević.<sup>484</sup> Ćurčin testified that the Chief of GS was in daily contact with Milošević, that he reported to him on a daily basis about the state of affairs in Kosovo and received orders from him. Ćurčin states that the chain of command was intact during the NATO air campaign.<sup>485</sup> The Chamber also establishes that the 3-A Commander had direct interactions with Milošević during the NATO bombing.<sup>486</sup>

285. Immediately before the NATO air campaign, the Chief of GS issued orders for mobilisation of the VJ units, thus providing the basis for their deployment in Kosovo.<sup>487</sup> On the basis of the *Grom 3* order, the VJ units were engaged in operations alongside the MUP in Kosovo.<sup>488</sup> The Chief of GS issued orders to the VJ units in Kosovo throughout the NATO air campaign.<sup>489</sup>

286. The Minister of Interior was responsible for giving assignments to members of MUP forces.<sup>490</sup> During the NATO air campaign, the Minister directed the operation of the MUP units.<sup>491</sup> The Chamber concludes that Lukić coordinated the exchange of information between the MUP Staff in Kosovo and the MUP in Belgrade.<sup>492</sup> In the case file, there are dozens of reports of the MUP Staff in Priština addressed to the Ministry in Belgrade.<sup>493</sup>

287. The SPS Working Group was sent to Kosovo at Milošević's proposal.<sup>494</sup> This Working Group submitted its reports regularly to the party headquarters in Belgrade. The operation of the Working Group was steered in the meetings of the SPS Chief and Executive Boards, chaired by Milošević at the time.<sup>495</sup> The co-ordinator sent by the Government of Serbia to co-ordinate the work of state authorities in Kosovo reported his actions to the Prime Minister of Serbia, Marjanović.<sup>496</sup> The SMIP had its outposts in

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<sup>484</sup> Judgement-vol.III:para.487

<sup>485</sup> tt.16979

<sup>486</sup> Judgement-vol.III:para.710

<sup>487</sup> Judgement-vol.III:para.531,3D690,3D696

<sup>488</sup> Judgement-vol.III:para.532

<sup>489</sup> Judgement-vol.III:paras.533,535,536,537,538

<sup>490</sup> tt.24983-24984

<sup>491</sup> 6D132,tt.22247,26386,P1251

<sup>492</sup> Judgement-vol.III:para.1059

<sup>493</sup> Judgement-vol.III:para.1053

<sup>494</sup> P1012,p.79

<sup>495</sup> tt.14151,14158,14164,2D56,2D77,2D88

<sup>496</sup> tt.2D356,tt.14267

several towns in Kosovo prior to the NATO air campaign.<sup>497</sup> These outposts received instructions for their work from and reported to the Ministry in Belgrade.<sup>498</sup> Districts in Kosovo were established by the Government of the Republic of Serbia as administrative institutions and they reported their work directly to the Government.<sup>499</sup>

288. There is an array of uninterrupted communication channels between Belgrade and Priština. There are plenty of uninterrupted communications channels between Milošević, in the capacity of the President of FRY and the leader of SPS, with the bodies, organisations and individuals in Kosovo. There is not a single piece of evidence that Milošević encountered difficulties in exerting influence on the events in Kosovo from Belgrade, to the extent of his constitutional and political position.

289. The fact that during the NATO campaign there was daily uninterrupted communication between Milošević and the VJ is especially important. Milošević was briefed regularly and assigned tasks to the VJ on a daily basis.

290. The only piece of evidence available to the Chamber indicating that Milošević used Šainović to convey orders is the newspaper article,<sup>500</sup> which has been discussed above. However, there is no real need to provide a crucial link with the VJ and MUP units outside the normal chain of command by “using” Šainović. In order for Šainović to be indispensable as a liaison, there would have to be a situation or a problem that hindered Milošević’s communication with and command of the VJ and MUP units in Kosovo, especially during the NATO campaign. The Chamber concludes erroneously that in 1998 some members of VJ forces disagreed with the deployment of the VJ in Kosovo.<sup>501</sup> However, there is no such evidence relating to 1999.

***Sub-Ground 2(3): Šainović’s leadership role at Joint Command meetings***

291. The Chamber erroneously draws its conclusion on Šainović’s significant contribution also based on its claim that Šainović was one of the leading members of the

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<sup>497</sup> tt.13995

<sup>498</sup> tt.13996

<sup>499</sup> tt.14385-14386

<sup>500</sup> 5D1289

<sup>501</sup> P717,Judgement-vol.I:para.1088

JC.<sup>502</sup> The Defence reiterates here the arguments presented in sub-grounds 1(12) and 1(13) of this Appeal.

292. In its conclusion in Vol. III para. 309, the Chamber states that Šainović's leadership role is analysed and ascertained in Vol. I section VI. E. However, Vol. I section VI. E, in which conclusions are drawn with respect to the so-called JC in 1999,<sup>503</sup> does not contain any conclusion that Šainović had a leadership role. In the reasons given for the finding on the JC in 1999,<sup>504</sup> Šainović is referred to once in connection with the JC, namely in connection with the meeting of 1 June 1999.<sup>505</sup> There is no evidence whatsoever linking Šainović with the so-called JC before 1 June 1999. The crimes identified in the Judgement took place before 1 June 1999. It is, therefore, not possible to assert that there was a link between Šainović and JC at all, especially not before 1 June 1999.

***Sub-Ground 2(4): Šainović's de facto powers over the VJ and the MUP forces in Kosovo***

293. The Chamber erroneously concludes that Šainović possessed extensive *de facto* powers over both VJ and MUP, which is proof of his significant contribution.<sup>506</sup>

294. The Chamber, in its conclusions regarding Šainović, consistently disregards the difference between the situation in 1998 and that in 1999, which is a crucial year for the assessment of Šainović's role. Thus, the Chamber fails to recognize different characteristics of different periods and different roles of Šainović; instead, some evidence pertaining to 1998 is generalized and presented as evidence pertaining to the period throughout 1998 and 1999.

<sup>502</sup> Judgement-vol.IIIpara.309,462

<sup>503</sup> Judgement-vol.I:paras.1150-1152

<sup>504</sup> Judgement-vol.I:paras.1112-1149

<sup>505</sup> The Defence refers to its rationale under sub-ground 1(24)

<sup>506</sup> Judgement-vol.III:para.462

295. If evidence pertaining to 1999 is reviewed, in particular the NATO campaign, which is the only relevant period in view of the restrictions in the Indictment, it is unclear how the Chamber derived the finding of “extensive”. The Chamber is aware of three events which, in the broadest possible interpretation, may be described as meetings at which contacts between Šainović and VJ and MUP representatives in Kosovo took place.<sup>507</sup> It is not possible to describe these three events as evidence of extensive power in a situation when hundreds of combat orders are issued to the VJ and MUP units in Kosovo and the related reports are submitted to their commands out of Kosovo.

***Sub-Grounds 2(5): Šainović’s authority over the VJ and the MUP in 1998***

***2(6): Šainović’s authority in 1999***

***2(8): Šainović as a powerful official***

***2(9): Šainović’s presence at the meetings***

296. The Chamber erroneously finds that the conveying of orders and instructions by Šainović to the VJ and MUP, both his own and those of Milošević, constitutes evidence of Šainović’s significant contribution.<sup>508</sup> Here the Defence would like to refer to the rationale in sub-grounds 1(1), 1(3), 1(8), 1(10), 1(19), 1(21), 1(22) and 1(24).

297. The Chamber regards Šainović’s presence at the meetings of civilian representatives and representatives of the VJ and MUP held from July to October 1998 as key evidence of Šainović’s authority.

298. The Chamber refers to meetings held in 1998 that were attended by Šainović,<sup>509</sup> such as those held in Kosovo in May 1998 and at *Beli Dvor* on 21 July 1998. The Chamber does not have any evidence as to what Šainović said at these meetings, or if he said anything at all. From the fact that he was present, irrespective of the presence of numerous other people, the Chamber derives a conclusion on his authority over VJ and MUP in an inadmissible way.

<sup>507</sup> Meetings of 4 April 1999, 7 May 1999, 1 June 1999, the Defence refers to its rationale in sub-ground 1(19), 1(22), 1(24)

<sup>508</sup> Judgement-vol.III:para.462,467

<sup>509</sup> Judgement-vol.III:para.302-305

299. In addition, the Chamber disregards the witnesses' overall testimonies pertaining to certain circumstances and only accepts specific parts of testimonies. The Chamber is entitled to believe specific parts of witnesses' testimonies. However, the Chamber cannot accept some and dismiss other parts of the testimonies pertaining to the same circumstances, given in the same manner and at the same time. Thus, the Chamber accepts the testimony of Gajić given in the direct examination, but dismisses the testimony given in response to the same questions in cross-examination.<sup>510</sup> At best, such testimony must be dismissed as unreliable.

300. Dimitrijević explains before the Chamber what he said to Crosland,<sup>511</sup> what he said at the VJ GS Meeting, how these talks developed, what the circumstances pertaining to these talks were. However, the Chamber relies on the same evidence it had relied on at the time when the trial commenced – various pieces of written evidence. The Chamber must attribute greater weight to directly presented evidence than to various other means of evidence in the proceedings.

301. The Chamber disregards the testimonies of direct participants in the events. Thus, senior officers of the VJ, who were, by nature of their office, acquainted with all the details related to the functioning of the system and Šainović's position in it, testify about the role of Šainović. The Chamber, however, accepts the statements of Vollebaek, who met Šainović only once, Ciaglinski, who attended some meetings as a junior-ranking officer, Crosland, who never met Šainović,<sup>512</sup> and disregards the testimonies of the Chamber Dimitrijević,<sup>513</sup> and Đaković.<sup>514</sup> The Chamber seems to disregard Đaković only when his statements concern Šainović, considering that his testimony is assessed as straightforward in general.<sup>515</sup>

302. As regards Šainović's authority, the Chamber commits an error in law by making a selection of witnesses and testimonies in an inadmissible manner, by disregarding the procedural principle of direct presentation of evidence, by drawing conclusions based on assessment of probability rather than beyond reasonable doubt.

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<sup>510</sup> Judgement-vol.III:para.318

<sup>511</sup> Judgement-vol.III:paras.320-325

<sup>512</sup> Judgement-vol.III:para.295

<sup>513</sup> Judgement-vol.III:para.325

<sup>514</sup> Judgement-vol.III:para.330

<sup>515</sup> Judgement-vol.III:para.330

***Sub-Ground 2(7): Making proposals, giving suggestions and issuing instructions***

303. The Chamber states in several places that Šainović was able to issue instructions, make proposals, give suggestions.<sup>516</sup>

304. The Chamber omits to present its legal interpretation of the meaning of the terms instruction, proposal or suggestion. The Chamber fails to differentiate between issuing orders, on the one hand, and issuing instructions, proposals or suggestions, on the other. The Chamber, however, seems to equate the effects of issuing orders with those of issuing instructions, proposals and suggestions, in terms of their respective consequences.

305. Thus, the Chamber finds that Šainović conveyed Milošević's instructions and provided his own suggestions and instructions.<sup>517</sup> The fact that, according to the findings of the Chamber, he conveyed or provided instructions constitutes sufficient evidence for the Chamber to assess Šainović's contribution to JCE as significant.<sup>518</sup> In analyzing Pavković's responsibility, the Chamber concludes that Pavković ordered VJ operations throughout the period during which the crimes were committed, for which reason Pavković's contribution to JCE is significant.<sup>519</sup>

306. The Chamber equates an order with a suggestion, proposal and instruction. Order is, however, a category which is legally defined as a method of committing a crime as part of individual criminal responsibility.<sup>520</sup> An order has its legally defined features: it need not be in a special form, it need not be in writing,<sup>521</sup> ordering must be a affirmative act, it is not possible to order by omission,<sup>522</sup> order is "*proof of some position of authority on the part of the Accused that would compel another to commit a crime in following the Accused's order*".<sup>523</sup>

<sup>516</sup> Judgement-vol.III:paras.331,341-342,359,346-348,462

<sup>517</sup> Judgement-vol.III:para.467

<sup>518</sup> Judgement-vol.III:para.467

<sup>519</sup> Judgement-vol.III:para.782

<sup>520</sup> Statute,Art.7(1)

<sup>521</sup> Strugar Trial Judgement-para.331,Blaškić Trial Judgement,para.281

<sup>522</sup> Galić Appeal Judgement-para.176

<sup>523</sup> Samanza Appeal Judgement-para.361

307. The Defence contends that suggestions, proposals and instructions are not and cannot be identified with orders. Giving suggestions, proposals and instructions does not imply the existence of some relation with the person on the receiving end, or the obligation of the recipient. These terms suggest a non-existence of a relationship of subordinate level of connection between the persons giving them and those receiving them, and indicate their discretionary nature and absence of obligation and consequences if they are not followed. All this is in contrast to an order, which entails a defined legal relationship between the party issuing the order and the one receiving it, with defined responsibilities of both sides.

308. The Chamber has no evidence as to what kind of suggestions, proposals and instructions were given, or were followed and resulted in changes to the state of affairs on the ground.

309. The Chamber commits an error in law, thus invalidating the decision by equating the definition and the legal consequences of an order with the definition and consequences of an instruction, suggestion and proposal.

***Sub-Ground 2(10): Meetings in Belgrade in 1998***

310. The Chamber describes the meetings of the highest state officials in Belgrade during 1998, but omits to appraise their significance in a proper and thorough manner.<sup>524</sup>

311. The Chamber establishes in Vol. I of the Judgement that the meetings did take place, elaborates who the participants were and outlines the course of the meetings according to the available evidence. In Vol. III of the Judgement, the Chamber uses the presence at the meetings to demonstrate the significance and authority deriving from the presence and participation in the meeting, as in the case of Šainović, or the marginality and insignificance, as in the case of Milutinović,<sup>525</sup> which has been discussed hereinabove.

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<sup>524</sup> Judgement-vol.I:paras.992-1004,vol.III:paras.136-137,332

<sup>525</sup> Judgement-vol.III:paras.136-137,143

312. According to the evidence at hand, these meetings were arranged to discuss the most important aspects of the anti-terrorist operation. These meetings convened by Milošević were attended by two members of the SDC, the Chief of GS, the 3-A Commander, the PrK Commander, the Serbian Minister of Interior, the heads of the Serbian MUP departments for public and state security, the Chief of the MUP Staff in Kosovo.<sup>526</sup>

313. All officials authorised to make any decisions pertaining to the deployment of the VJ and MUP units were present. Two members of the SDC constituted the quorum of the SDC according to the Rules of Procedure in force at the time.<sup>527</sup> The VJ was commanded by the President of FRY, in accordance with the decisions of the SDC.<sup>528</sup> Every decision on VJ deployment passed by Milošević and Milutinović, both of them being present at most of the meetings, would serve as legal grounds for any engagement of the VJ units. Thus, the meetings were attended by four VJ command levels, from SDC to the PrK. The Serbian Minister of Interior, as the highest-ranking official authorised for any form of deployment of the MUP forces, was also present at the meetings. As previously stated, Milutinović attended most of the meetings as well. It should be reiterated that in an SDC session Milošević said: *“Police is not within my jurisdiction - there is the President of Serbia Milutinović and for other things too.”*<sup>529</sup>

314. If the plan for antiterrorist action in 1998 was discussed in these meetings, if the reports on the developments in Kosovo were reviewed in these meetings and if the final report on the implementation of the antiterrorist action was submitted by Pavković, Lukić and Minić on 29 October 1998,<sup>530</sup> as established by the Chamber, then it is clear that the most important point of decision-making and reporting is in Belgrade, in the meetings with Milošević. Consequently, it is also clear that Šainović’s role and the need of his involvement in Kosovo in terms of the interaction with the VJ and MUP are unnecessary and non-existent.

315. In a proper appraisal of evidence, the Chamber would have concluded that the centre of decision-making regarding the engagement and deployment of the VJ and MUP

<sup>526</sup> P2166,p.1, Judgement-vol.I:paras.993,995,997,1001,1003

<sup>527</sup> P2622,Art.7

<sup>528</sup> 1D139,Art.135

<sup>529</sup> P2831,p.23

<sup>530</sup> Judgement-vol.I:para.995,1001,1003,P2166

units was in Belgrade, and that Milošević did not need anybody to provide a “*crucial link*” between Belgrade and Kosovo.

***Sub-Ground 2(11): Šainović’s authority as the Chairman of the Commission for Co-operation with the KVM***

316. The Chamber erroneously concludes that Šainović also continued to play his role of the crucial link between Belgrade and Kosovo after the anti-terrorist actions were terminated, as the Chairman of the Federal Commission.<sup>531</sup>

317. The Chamber does not consider the substance of the Federal Commission’s work; instead, the Chamber regards the isolated elements in the work of the Commission as evidence that the purpose of the Federal Commission was also to expand Šainović’s role as Milošević’s representative in Kosovo.<sup>532</sup>

318. The arrival of the KVM and the successful cooperation with the Mission were among the priorities of the Federal Government.<sup>533</sup> Considering the critical nature of the affairs that the Federal Commission was to address, the most important ministers at the federal and republic levels, as well as the most senior representatives of the VJ, were nominated to the Federal Commission.<sup>534</sup> The composition of the Federal Commission was adapted to the expected assignments.<sup>535</sup> The composition of the Federal Commission is the result of the intention to achieve the best possible cooperation with the Mission. Hence, Lončar was also subsequently nominated to the Commission.<sup>536</sup>

319. The tasks and contents of the Federal Commission’s work were to examine and coordinate the political, safety and logistical aspect of the functioning of the Mission. It was upon the Commission to ensure a uniform treatment of the Mission by all state authorities.<sup>537</sup> The Commission and its members were supposed to ensure the freedom of movement for the Mission and its safety in Kosovo, to assist the members of the Mission

<sup>531</sup> Judgement-vol.III:para.401,462,368-399

<sup>532</sup> Judgement-vol.III:para.380

<sup>533</sup> tt.13837

<sup>534</sup> 2D8

<sup>535</sup> tt.7583,14028

<sup>536</sup> 2D9,P2521,para.14,tt.7690,7584

<sup>537</sup> 2D8,para.2

in finding accommodation in Kosovo, to ensure that the incidents be investigated and clarified, to ensure the safety of the Mission 24 hours a day, 7 days a week, to note and convey the Mission's requests, to ensure communication between the Mission and the FRY state authorities.<sup>538</sup>

320. The success of the Mission was vitally significant for the FRY. Suffice it to mention the ACTORD issued by NATO on 13 October 1998 for limited air operations and phased air campaign against FRY.<sup>539</sup>

321. A complex mission arrived in Kosovo at a very delicate moment, from the aspects of both safety and foreign policy. The role of the Commission was crucial with respect to the deployment of the Mission and the conduct of verification. The successful work of the Commission was immensely important for the country in the context of the threat of imminent air attack.

322. In the context of the Commission's role, it was only natural that the members of the Commission, including Šainović as its Chairman, had to be informed of any developments on the ground,<sup>540</sup> and that all matters in the Commission's sphere of competence, but not including the issues related to the command and use of the VJ and MUP units, needed to be discussed.<sup>541</sup>

323. The conclusion that Milošević appoints Šainović so as to enable him to continue his dealings with high level VJ and MUP officials in Kosovo is unfounded.<sup>542</sup> Any reasonable person can conclude that the Chairman of the Commission, with his mandate as described, cannot perform his function in a vacuum. Nevertheless, the Chamber attributes greater weight to the means and method of work, which includes the communication with the VJ and MUP representatives, than to the dramatic events on the ground and the purpose for establishing the Commission in the first place.

324. For instance, the Chamber states that at the meeting of Walker and Šainović, i.e. the meeting between the head of the Mission and the head of the Commission, "*Phillips had the impression that Šainović was the one in charge at the meeting*",<sup>543</sup> or "*Phillips's*

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<sup>538</sup> P2521, paras.18,24, tt.7582-7583

<sup>539</sup> 2D10, tt.8246-8247

<sup>540</sup> Judgement-vol.III:para.373,376

<sup>541</sup> Judgement-vol.III:para.369,378

<sup>542</sup> Judgement-vol.III:para.401

<sup>543</sup> Judgement-vol.III:para.384, tt.1832

*impression during this meeting was that Milošević was responsible for security decisions which Šainović was then to implement in Kosovo*".<sup>544</sup> There is also Maisonneuve, who says that Šainović was well aware of the activities going on in Kosovo at the time.<sup>545</sup> These statements show only that Šainović was discharging his duty in accordance with his function and/or that Šainović is being tried on the basis of assumptions and impressions.

325. In the absence of real evidence, the Chamber draws conclusions on the basis of the order in which people sat down in the meeting, just as it does with respect to the meeting of 1 June 1999. Phillips states and the Chamber quotes: "*None of Šainović's team would sit down until he sat down*".<sup>546</sup>

326. The Chamber also gives some examples of Šainović's authority. For instance, in relation to the incident in Podujevo,<sup>547</sup> Lončar spoke on the telephone to a superior and Ciaglinski did not know who exactly he was talking to, except that it was someone with a high level of authority.<sup>548</sup> The Chamber establishes, as evidence in support of Šainović's authority: "*It does not matter whether it was Šainović or Milošević whom Lončar contacted since they were in regular contact with each other*".<sup>549</sup> This is a distinct example where the Chamber draws conclusions only on the basis of an assumption.

327. As regards the incident with the nine VJ soldiers,<sup>550</sup> all statements are strictly within the boundaries of Šainović's position as the Chairman of the Commission. Drewienkiewicz received a piece of information and Keller, as the Deputy Chief of the Mission, conveyed this information to Šainović, whose task was to receive and forward the information.<sup>551</sup> Subsequently, the VJ forces did not take any action, but there is no testimony showing to whom Šainović forwarded the information and who decided that the VJ should or should not take any action, if the initial information given by Drewienkiewicz was accurate in the first place. The same applies to Ciaglinski's visit to

<sup>544</sup> Judgement-vol.III:para.386,tt.11842-11844

<sup>545</sup> tt.11033

<sup>546</sup> tt.11832

<sup>547</sup> Judgement-vol.III:para.391

<sup>548</sup> tt.6822-6828

<sup>549</sup> Judgement-vol.III:para.391

<sup>550</sup> Judgement-vol.III:para.393

<sup>551</sup> tt.7742-7745,2D8

the imprisoned KLA members.<sup>552</sup> All that Ciaglinski knows is that he put the request to Šainović and that Šainović said that there were procedures for approval of the visit.<sup>553</sup> Ciaglinski does not know who approved the visit and what the procedure was; he had contact only with Šainović and other members of the Commission, precisely because it was their mandate to receive requests and pass on answers.

328. The Chamber states, without any grounds, that the aftermath of Račak was “*closely managed by Šainović*”,<sup>554</sup> although there is evidence only that Šainović was informed of the event,<sup>555</sup> which is, again, in line with the position that he held.

329. None of the examples of the supposed authority of Šainović as the Chairman of the Federal Commission confirm anything except that Šainović moved within the boundaries of his official powers.

***Sub-Ground 2(12): The position of Šainović within the delegation and his role at Rambouillet***

330. The Chamber erroneously concludes that Šainović’s participation in Rambouillet confirms that Šainović was one of Milošević’s closest associates and in effect the most senior and influential member of the delegation.<sup>556</sup>

331. Šainović participated in Rambouillet in the capacity of the Deputy PM of the FRY Federal Government in charge of international relations. Šainović was selected as one of the 12 members of the delegation upon decision of the Government of the Republic of Serbia<sup>557</sup> at Anđelković’s proposal.<sup>558</sup>

332. In drawing its conclusions, the Chamber does not consider or assess Šainović’s role in Rambouillet. Neither does it use Šainović’s views and actions in Rambouillet in its assessment of his state of mind, although there is an array of valuable testimonies

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<sup>552</sup> Judgement-vol.III:para.394

<sup>553</sup> tt.6878-6879,P2488,p.5

<sup>554</sup> Judgement-vol.III,para.395

<sup>555</sup> Judgement-vol.III,paras.395-397

<sup>556</sup> Judgement-vol.III:para.409

<sup>557</sup> tt.13545,P967

<sup>558</sup> tt.14661

about this matter. The only thing of interest to the Chamber with respect to Rambouillet is whether this is an opportunity to show that Šainović was one of the closest associates of Milošević.

333. The fact that at one point during the negotiations Šainović traveled to Belgrade is evidence of being the closest associate. The Chamber does not consider reasons for the trip, but only the fact that he did travel to Belgrade.

334. Firstly, Šainović had the co-chairman's permission to travel to Belgrade.<sup>559</sup> Secondly, Šainović traveled to Belgrade at the point when negotiations were at a standstill since the Serbian and FRY delegation was asked to accept principles beyond the established basic principles of the Contact Group.<sup>560</sup> Professor Marković testified that Šainović, not being a lawyer and not being included in the work on the text of the agreement, traveled to Belgrade to discuss the problematic principles with the highest state officials.<sup>561</sup> The result of these discussions with Milošević, Bulatović and Jovanović are the conclusions that enabled the continuation of negotiations.<sup>562</sup>

335. The substance of the events around Šainović's trip to Belgrade is that this trip contributed to the continuation of negotiations. It is also important that the only member of the delegation with the position and experience in the field of foreign policy matters was Šainović, and – since the problematic matter was not of the legal nature but rather a matter of foreign policy – it is understandable that it was Šainović who traveled. All this bears no relevance to the issue of whether Šainović was or was not Milošević's closest associate.

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<sup>559</sup> tt.13543,14055

<sup>560</sup> tt.14056

<sup>561</sup> tt.13546

<sup>562</sup> tt.14055-14056

***Sub-Grounds 2(13): Šainović and Milošević******2(14): Removal of Šainović from the position of Vice-President of SPS***

336. The Chamber erroneously concludes that, on the basis of “*voluminous evidence recounting various meetings between Šainović and Milošević*”, Šainović was one of the closest and most trusted associates of Milošević, both in 1998 and 1999.<sup>563</sup>

337. As has already been stated, it is not clear why it is important for the Chamber to ascertain who is close and who the closest associate of Milošević. Nowhere in the Judgement does the Chamber establish Milošević’s responsibility, since this is not possible. Neither does it present the rationale for using the closeness to Milošević as a measure of responsibility of the accused. It is hence unclear how the closeness to Milošević should be regarded as a key criterion in the assessment of responsibility for the events in Kosovo.

338. The Chamber has two sources for its assertion on closeness, namely the position of Šainović in the SPS and the meetings at which he was present.

339. The position of Šainović in the SPS indicates exactly the opposite, namely that Šainović was not, or no longer, a close associate of Milošević. As has already been stated, on 24 April 1997,<sup>564</sup> Šainović was removed from the position of Vice-President of SPS, having been elected at the SPS Congress in 1996.<sup>565</sup> Milošević was present and gave the opening and closing addresses at the meeting of the SPS Main Board at which Šainović was removed. From the position of Vice-President, he was nominated to the Executive Board of the Party, which is a collegial body and comprises 35 members.<sup>566</sup> The removal of Šainović from the position of Vice-President and nomination to the Executive Board constitute a *de facto* demotion in the party hierarchy.<sup>567</sup> Šainović was removed for not fulfilling Milošević’s expectations after being appointed Vice-President of the SPS.<sup>568</sup>

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<sup>563</sup> Judgement-vol.III:para.427

<sup>564</sup> tt.14198

<sup>565</sup> P2875

<sup>566</sup> 2D25,tt.14144

<sup>567</sup> tt.14199

<sup>568</sup> tt.14198

340. Šainović was removed and replaced at the proposal of Milošević. The formal decision was adopted by the Main Board, but, according to the Statute of the SPS, Milošević was the only person authorized to propose appointments or removals of Party Vice-Presidents.<sup>569</sup>

341. The Chamber refers to three more meetings of the SPS; the first is the one at which Šainović did not speak and was present as one of the 185 members of the SPS Main Board.<sup>570</sup> The second is the SPS Executive Board meeting of 14 October 1998, when the opening address was given by Milutinović, while Šainović only took part in the discussion.<sup>571</sup> The third is the meeting at which Milutinović, Jovanović, Minić, Andjelković, Šainović and others participated in the discussion. Minutes of this meeting do not show what was said by Milutinović, what by Šainović and what by other participants in the discussion.<sup>572</sup>

342. The position of Šainović in the SPS in no way indicates closeness to Milošević; on the contrary, Milošević kept Šainović in the Executive Board only because he had had good election results in his election district.<sup>573</sup>

343. The Chamber concludes that Šainović met with Milošević on a regular basis as part of political consultations in which representatives of the Government of Serbia and the Federal Government participated. The Chamber concludes this solely on the basis of the interview given by Šainović.<sup>574</sup> These meetings, involving numerous government representatives, can hardly indicate any special status of Šainović. Meetings with Milošević alone were uncommon, states Šainović.<sup>575</sup> Šainović talked to Milošević once a week.<sup>576</sup> Common sense indicates that the president of any country has dozens of meetings every day, and even more telephone calls. The Chamber represents one talk a week as evidence of frequent communication and a relationship of closest associates. The Chamber possesses no evidence concerning the contents of those talks.

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<sup>569</sup> tt.14198

<sup>570</sup> P1012,P2875

<sup>571</sup> 2D77

<sup>572</sup> 2D88

<sup>573</sup> tt.14199

<sup>574</sup> Judgement-vol.III:para.422,P605

<sup>575</sup> P605,pp.227,348

<sup>576</sup> P605,pp.223-224

344. For the period which is the most important for the Judgement, namely the time after 24 March 1999, the Chamber possesses evidence that Šainović, as part of a group of representatives of Serbian and FRY bodies, met Milošević for up to ten minutes.<sup>577</sup> In addition, Milošević met Šainović on 17 May 1999. There is no evidence of telephone calls in the period after 24 March 1999.

345. Three or four meetings in the crucial period cannot lead to the conclusion in support of the claim that Šainović was the crucial link between Milošević and Kosovo or the closest and most trusted associate, which is the case in the denoted places in the Judgement.

346. Unlike Šainović, during the NATO air campaign, Milutinović was in an underground bunker where the Supreme Command was located. Again, the Chamber states, benevolently, that Milutinović was seen there once or twice during the conflict,<sup>578</sup> but Mučibabić says: *“I saw him (Milutinović) a number of times”*. Mučibabić saw him *“whenever he (Milutinović) came back in the evening to rest with his wife”*.<sup>579</sup> During the war, Simić too saw Milošević and Milutinović together in the underground bunker where the command post of the SC Staff was located.<sup>580</sup> These testimonies are not taken into consideration by the Chamber; instead, the Chamber concludes that Milutinović had less interaction with Milošević.<sup>581</sup>

347. Therefore, the Chamber does not have a unique standard for measuring closeness to Milošević and the significance of contacts with Milošević for the position and responsibility of an accused.

348. The Chamber possesses no evidence of the contents of the talks between Šainović and Milošević, if there had been any at all. The Chamber, however, presents the conclusion that it is impossible that Šainović and Milošević did not talk about matters of the VJ and MUP.<sup>582</sup> The Chamber concludes this because Šainović is a political coordinator.<sup>583</sup> And Šainović is a political coordinator because he conveys Milošević's

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<sup>577</sup> Judgement-vol.III:para.424,P605,pp.865

<sup>578</sup> Judgement-vol.III:para.130

<sup>579</sup> tt.16580

<sup>580</sup> tt.15634-15635

<sup>581</sup> Judgement-vol.III:para.239

<sup>582</sup> Judgement-vol.III:para.426

<sup>583</sup> Judgement-vol.III:para.426,462

order to Kosovo.<sup>584</sup> Therefore, the first fact, uncorroborated by evidence, constitutes evidence of the second fact, the second is evidence of the third, and the first fact must be true because the second and the third are true. In drawing conclusions about Šainović's closeness to Milošević, from which his liability stems, the Chamber used a series of mutually conditional assumptions.

349. The Chamber concludes erroneously that Šainović was a close associate of Milošević, and this on the basis of assumptions, through erroneous applications of rules of evidence and erroneous ascertainment of facts in this matter.

## II(B) RELIEF SOUGHT – SECOND GROUND OF APPEAL

350. **All of the sub-grounds within the second ground of appeal, when considered individually and/ or cumulatively, show that the Chamber has erred in determining beyond a reasonable doubt that Šainović's contribution to the JCE was significant.**

351. The Defence seeks that the Appeals Chamber returns the verdict of not guilty for Counts 1 until 5.

**Ground 3: Šainović did not have the intent to forcibly displace Kosovo Albanians.**

*Sub-Grounds 3(1): Šainović's intent to forcibly displace part of the Kosovo Albanian population*

*3(4): Mens rea – circumstantial evidence*

352. The Chamber erroneously concludes that Šainović had the intent to forcibly displace part of the Kosovo Albanian population, both within and without Kosovo and thereby change the ethnic balance in the province to ensure continued control by the FRY

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<sup>584</sup> Judgement-vol.III:para.462

and Serbian authorities over it.<sup>585</sup> In this context, the Chamber concludes that Šainović was of the stance that the Kosovo Albanian population did not belong in Kosovo.<sup>586</sup> In this part of the Judgement, the Chamber quotes Naumann, Phillips, Byrnes, Lončar and Petritsch.

353. The Chamber quotes Naumann's testimony; however, Naumann is not certain of any of the statements he makes relating to Šainović.<sup>587</sup> Naumann is not certain of the source of any of the statements on "*solving Albanian problem*" or "*high birth rate*".<sup>588</sup> The Chamber accepts that Naumann's testimony may not be used as evidence of Šainović's attitude towards Albanians.

354. Byrnes was the Head of US KDOM in the respective period and he testified that:<sup>589</sup> "*...Šainović, being a practical politician, thought that the situation in Kosovo should be resolved by political means: he sought to find a mutually acceptable political solution to the problem and was working in that direction.*" Byrnes also confirmed that during his meetings with Šainović the latter was always co-operative and did not deliver propaganda.<sup>590</sup> As stated above, in January 1999 Šainović was also campaigning for the release of a number of VJ soldiers and their exchange with captured KLA fighters.<sup>591</sup> Byrnes accepted that, following the success of this endeavour, Šainović tried to negotiate with the KLA and "*reach out to the KLA leadership in an effort to find some sort of a solution*" in hope that the prisoner exchanges could be expanded "*into something that had a broader political consequence.*"<sup>592</sup>

355. Byrnes testified on his conversation with Šainović during the continuation of the Rambouillet Conference, held in Paris in March 1999, when Byrnes explained to Šainović that Serbia would not receive a better offer, that the only option was war and new victims, and that the only way that Serbia could retain connections with Kosovo was to accept the offer.<sup>593</sup> Byrnes remembers Šainović sitting there thoughtfully and finally

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<sup>585</sup> Judgement-vol.III:para.466

<sup>586</sup> Judgement-vol.III:para.438

<sup>587</sup> Judgement-vol.III:para.430

<sup>588</sup> P1757,para.29,tt.8374-8375

<sup>589</sup> Judgement-vol.III:para.434

<sup>590</sup> tt.12188

<sup>591</sup> tt.12189,10946

<sup>592</sup> tt.12188–12189

<sup>593</sup> tt.12190-12191

responding that he (Šainović) could do nothing in the given situation in terms of accepting the agreement.<sup>594</sup> Byrnes, who knew Šainović well, testified that he believed what Šainović told him.<sup>595</sup>

356. Petritsch, who was Ambassador of Austria in Belgrade and Special EU Envoy for Kosovo and a crucial participant in the negotiations held in Rambouillet, testified that Šainović had always been a “*very correct and pleasant partner to talk to*”.<sup>596</sup> Petritsch states that Šainović was “*the most constructive force in terms of seeing the overall situation and the necessity to come to a positive outcome*”.<sup>597</sup>

357. There is also other evidence thereof and of Šainović’s state of mind as regards Kosovo Albanians, indicating that Šainović was in favour of a peaceful solution and co-existence in Kosovo.<sup>598</sup>

358. The Chamber, however, bases the conclusion that Šainović believed that Kosovo Albanians did not belong in Kosovo on a single sentence by Phillips.<sup>599</sup> However, Phillips also testified:

- that Šainović was sincere about arriving at some sort of co-existence strategy, for both the Serbian population and the Albanian population to co-exist together;<sup>600</sup>
- that Šainović said during the meeting of 24 November 1998 that the majority in Kosovo believed that it was possible to arrive at a political solution and that Šainović hoped that such a solution was feasible;<sup>601</sup>
- that Šainović put forward his proposals at the meeting with Walker on 8 December 1998 sincerely and with willingness that problems be resolved;<sup>602</sup>
- that Šainović said at the meeting with Walker on 14 January 1999 that he was satisfied with the joint work and that “*in both places, KLA and VJ, we must seek political solution, we want to work on the main elements of the agreement*”.<sup>603</sup>

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<sup>594</sup> tt.12191

<sup>595</sup> tt.12191

<sup>596</sup> tt.10717

<sup>597</sup> tt.10747

<sup>598</sup> Judgement-vol.III:paras.436,437

<sup>599</sup> tt.11840

<sup>600</sup> tt.11887

<sup>601</sup> 2D17,p.2,tt.11878-11879

<sup>602</sup> tt.11881

<sup>603</sup> 2D20,tt.11884-11885

359. Phillips, therefore, testifies that Šainović was in favour of the co-existence of Serbs and Albanians in Kosovo, that he was in favour of a political solution, that Šainović hoped that such a solution was feasible and that an agreement had to be worked on. That is what Phillips had written down in his notebook at moment of the meetings.<sup>604</sup>

360. The Chamber accepts only a single sentence referred to in Phillips's testimony, although at least four other situations indicate a completely different viewpoint on the part of Šainović. If Šainović was in favour of the co-existence of Serbs and Albanians, if he was in favour of arriving at a joint solution by means of negotiations, if he was sincere in his willingness to resolve the problems by virtue of negotiations, then it is not possible to accept one single sentence, vague in form and with no clear context in which it was said. At the very least, the Chamber cannot rely on Phillips.

361. However, the Chamber cannot rely on that single sentence by Phillips, since all other testimonies on Šainović's attitude indicate that Šainović's attitude towards Albanians could be described as willingness to achieve peaceful co-existence to be arrived at through negotiations. Byrnes, Lončar and Petritsch are witnesses of the Prosecution, and Byrnes and Petritsch are high ranking diplomats in their respective countries, they both knew the situation well and had dealt with the situation for an extended period of time. Their perception, along with Lončar's testimony, other evidence and most of Phillips's testimony leave no room for the conclusion drawn by the Chamber.

362. Byrnes and Petritsch are people who spent a lot of time with Šainović and the weight of their testimonies cannot be compared with the testimonies of people who met Šainović once or a few times, such as Vollebaek or Ciaglinski, or Maisonneuve, or with the testimonies of people who never met Šainović, such as Crosland.

363. The Chamber has erred in law when it attributes the same or lesser weight to testimony relative to Šainović's *mens rea* of those witnesses who has had direct insight into his state of mind, in comparison to those witness who have never met him, such as Crosland, or who were present at the meetings attended by numerous people, and who, consequently, did not have an opportunity to learn of to Šainović's state of mind, but rather who draw conclusions based on impressions and second-hand information.

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<sup>604</sup> 2D17,2D20

364. The Chamber fails to explain at any instance why it does not accept Byrnes's testimony, why it ignores Petritsch's and Lončar's testimonies and why it ignores the entire testimony given by Phillips except for one sentence.

365. In addition to the above, Jovanović, Bulatović, Milosavljević, Matković and Anđelković all confirm that Šainović was in favour of a peaceful solution with regard to Kosovo, by means of dialogue and cooperation.<sup>605</sup>

366. If there are clear and convincing testimonies that Šainović attempted to resolve the issues of Kosovo by means of negotiations and in a peaceful manner both in the autumn of 1998 and during the negotiations held in Rambouillet in February and in Paris in March 1998, and if Petritsch and Byrnes, who had substantially and frequently cooperated with Šainović, confirmed this unequivocally, the conclusion of the Chamber that Šainović had the intent to forcibly displace a part of the Kosovo Albanian population as such is not possible.<sup>606</sup>

367. It is impossible that Šainović made every effort in February and March 1999 to resolve the issue in Kosovo by negotiations and that his sincere attitude was the intent to resolve the issues by negotiations, and that he was at the same time a member of a JCE to forcibly displace the Albanians. Simply, these facts are mutually exclusive.

### ***Sub-Ground 3(2): Šainović's knowledge of crimes***

368. The Chamber erroneously establishes that Šainović had knowledge of crimes committed by individuals associated with him before and during the NATO air campaign and that this is conclusive of Šainović's intent.<sup>607</sup>

369. In support of this statement, the Chamber notes the robbing and burning of houses in 1999.<sup>608</sup> The Chamber also states inconclusive sentences pulled from Đaković's

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<sup>605</sup> tt.14070,13808,14309,14600,14665,2D323

<sup>606</sup> Judgement-vol.III:para.466

<sup>607</sup> Judgement-vol.III:para.463

<sup>608</sup> Judgement-vol.III:para.441

notebook P1468 on a mass grave in Jablanica,<sup>609</sup> in which it is unclear what mass grave they refer to, whether it has been located, and there is virtually no mention of the perpetrators.

370. The appearance of refugees due to the fighting in 1998 is no proof of crime,<sup>610</sup> rather, it is proof of the gravity of the conflict in Kosovo at the time. It seems that the Chamber wants to present the appearance of refugees in 1998 as an indication of forcible displacement which allegedly took place in 1999; however, there is no trace thereof in the evidence for the year 1998. The emergence of refugees and the crime of forcible displacement have no common components and may not be compared for the purpose of confirming Šainović's knowledge of the alleged crimes.

371. Moreover, the Chamber draws conclusions on displaced persons in 1998 and speaks about the use of excessive and disproportionate force in the displacement of 200,000 civilians.<sup>611</sup> However, in a section of the Judgement, the Chamber speaks of the "use of force in 1998", establishing that the specific reasons may have varied, of the excessive use of force, but also the continuing combat operations between KLA and forces of FRY.<sup>612</sup> When it mentions Šainović's liability, the second important reason with regard to the displacement is left out.

372. The Chamber also states the example of Gornje Obrinje.<sup>613</sup> The report relating to the event in Obrinje was requested by the VJ GS.<sup>614</sup> The PrK command notified the GS that they did not have information on a massacre at Gornje Obrinje.<sup>615</sup> A Finnish forensic team was supposed to conduct an investigation and arrived in Kosovo; however, they did not finalize their work due to the issues of access and security.<sup>616</sup> The investigating judge of the District Court of Priština conducted an investigation of the case.<sup>617</sup> Minić also concurred that an investigation should be conducted.<sup>618</sup> It is evident that the terrain of Gornje Obrinje was under control of the KLA and that this fact strongly affected the

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<sup>609</sup> Judgement-vol.III:para.441

<sup>610</sup> Judgement-vol.III:paras.442,463

<sup>611</sup> Judgement-vol.III:para.456

<sup>612</sup> Judgement-vol.I:para.919

<sup>613</sup> Judgement-vol.III:para.441

<sup>614</sup> 4D403

<sup>615</sup> P1440

<sup>616</sup> Judgement-vol.I:para.910

<sup>617</sup> tt.23523-23525

<sup>618</sup> P1468,p.134

impossibility of finalizing the investigation. In any case, it has not been ascertained, either by international investigators or by the national judiciary, that a crime was committed.

373. Everything else stated by the Chamber relating to the year 1998<sup>619</sup> are reminiscences of the consequences of a conflict which do not contain elements of crime.

374. It is particularly significant that all of the events that the Chamber refers to as “crimes” are events from 1998. There are no court proceedings, nor has any evidence been presented in this case that might serve as the basis for trying these events. For example, when it comes to Gornje Obrinje, the Chamber describes events based on the testimony of an author of the report on violations of humanitarian law in Kosovo Abrahams.<sup>620</sup> In the formal sense, the testimony of Abrahams and his book are nothing but an indication that something did happen in Gornje Obrinje. The same applies for the “warnings” conveyed by the officers of the British or Canadian army, serving as part of KVM at the time.<sup>621</sup> They were neither qualified nor authorized, nor did they have an opportunity to ascertain what the crime was and who the perpetrators were.

375. It is particularly significant that nothing referred to by the Chamber as “*knowledge of crime*” in 1998 resembles in any way the crimes which took place in 1999 and of which Šainović was found guilty. The events of 1998, which are termed crimes by the Chamber, bear no resemblance to the events of 1999 either by their major characteristics, the manner of their execution, the scale or circumstances in which the events took place. The events of 1998 are not and cannot represent knowledge and warnings of the events in 1999.

376. Furthermore, the awareness of a crime in 1998 cannot be used as evidence of the predictability of crimes in 1999, which differ in all important components.

377. In drawing its conclusions on the crimes of 1998, the Chamber erred in law in applying a wrong legal standard, thereby equating an indication with an established fact. As a result of the error in law, the Chamber drew erroneous conclusions on the existence of crimes in 1998.

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<sup>619</sup> Judgement-vol.III:para.447

<sup>620</sup> Judgement-vol.I:para.899-903

<sup>621</sup> Judgement-vol.III:para.447

***Sub-Ground 3(3): Knowledge about crimes and meetings of 4 April 1999 and 17 May 1999***

378. The Chamber erroneously establishes in its conclusion that Šainović was aware of the crimes, since he said at the meeting of 4 April 1999 that detained persons should be held in custody until they were taken over by judicial organs.<sup>622</sup>

379. There are no data that Šainović knew of any crime at the moment when this statement was uttered, or that somebody spoke of crimes during the part of the meeting attended by Šainović. Šainović stated a fact that was commonplace and widely known. There is no evidence that he alluded to anything or anyone in particular. As a senior state official, he used his presence at the meeting with police officers to point to the need of abiding by the law. Any other implication stated by the Chamber is unfounded.

380. As regards the meeting of 17 May 1999, the Chamber fails to analyse the substance of the meeting with care, and erroneously concludes that Šainović learns of the crimes during his presence at said meeting.<sup>623</sup> Šainović learnt during that meeting that a married couple had been murdered and that perpetrators were being investigated.<sup>624</sup> Šainović also learnt of 800 cases of death; however, it is not clear whether the cause of death in these cases had been crime or some other reason.<sup>625</sup> There was no other information during this meeting. The only issue that Šainović was informed of during the meeting was the murder of the married couple and that investigation was being conducted in relation to the persons responsible.

381. The Defence also underlines that the information on the presence of the Scorpions,<sup>626</sup> on condition that it is true that Pavković notified Šainović thereof, which is discussed elsewhere in this Appeal, is no information on crime.

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<sup>622</sup> Judgement-vol.III:para.464

<sup>623</sup> Judgement-vol.III:para.452,464

<sup>624</sup> P2592,p.1

<sup>625</sup> P2594,para.62,tt.8761-8763,8791

<sup>626</sup> Judgement-vol.III:para.452

***Sub-Ground 3(5): Mens rea direct and/or intermediary perpetrators***

382. The Chamber has failed to determine to Šainović's *mens rea* in respect to the crimes that were established to have been committed in the Judgement by direct/principal and intermediary perpetrators.

383. The Chamber has determined the existence of *mens rea* through indirect evidence, such is the knowledge of crimes and omitting to prevent or punish crimes. This indirect evidence could have very well led to an entire palette of other conclusions regarding to Šainović's state of mind. Considering that there is no direct evidence regarding to Šainović's state of mind, the Chamber could not have concluded as to his intent to commit the crimes determined in the Judgement.

384. The Chamber has applied the strict liability test in respect to Šainović's responsibility, thereby determining that he is responsible for all crimes committed by direct/principal and intermediary perpetrators, without any evidence as to his *mens rea* regarding those crimes. This is contrary to the basic principle of criminal law which is that *mens rea* must be proven beyond a reasonable doubt.

***Sub-Ground 3(6): Knowledge of crimes and efforts to prevent***

385. The Chamber establishes Šainović's knowledge of crimes committed by individuals associated with him,<sup>627</sup> which is a completely erroneous conclusion. Moreover, the Chamber erroneously concludes that Šainović had a duty to prevent crimes or punish the perpetrators thereof.

386. The meetings of 4 April 1999 and 17 May 1999 were discussed in sub-ground 3(3) and these arguments are reiterated herein.

387. The Chamber mentions Pešić with reference to 13 April 1999; however, the allegations concerning a detention camp proved to be untrue.<sup>628</sup>

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<sup>627</sup> Judgement-vol.III:para.463

<sup>628</sup> P2502,paras.34,35

388. The Chamber states that Šainović learnt of crimes against Albanians, including displacement, during talks with Rugova. However, Šainović attended a meeting at which Merovci told Milutinović that people were being forced to leave their homes.<sup>629</sup> The Chamber uses this statement by Merovci in its analysis of Milutinović's participation,<sup>630</sup> yet the Chamber does not find that this constitutes knowledge of crimes, which is yet another example of double standards applied by the Chamber.

389. In support of the claim that Šainović was informed of displacement, the Chamber also refers to Rugova's statement accepted under Rule 92<sup>quater</sup> – P2613 p.12. (Vol. III footnote nr. 986). As regards Milutinović and his being informed of displacement based on talks with Rugova, the Chamber makes the same reference P2613 p.12 (Vol. III footnote 548); however, the statement is dismissed on the grounds of not being corroborated by any other evidence, and is therefore not taken into account in the assessment of Milutinović's behaviour.

390. The final piece of evidence is the letter by Arbour dated 26 March 1999,<sup>631</sup> which does not contain any information on any specific crimes.

391. The Defence maintains that the Chamber did not point to a single crime of which Šainović learnt during 1999, in particular after 24 March 1999. The Defence particularly underlines that there is no evidence that Šainović learnt of any of the crimes with which he is charged in the Indictment.

392. As regards Šainović's efforts to prevent and/or punish crimes, the Trial Chamber states that he made little effort to ensure that they were either prevented or dealt with and Šainović's statements are referred to as simply "*window dressing*".<sup>632</sup>

393. The Defence first underlines that there is no evidence that Šainović had the right or obligation to prevent or punish perpetrators. The Chamber does not even attempt to explain this obligation on the part of Šainović. The Chamber refers to several situations in which Šainović called for abiding by the law in a general manner, which is in line with the position of Deputy PM of the Federal Government.<sup>633</sup> Šainović also supported

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<sup>629</sup> P2588,para.72

<sup>630</sup> Judgement-vol.III:para.218,264

<sup>631</sup> P400

<sup>632</sup> Judgement-vol.III:para.457

<sup>633</sup> Judgement-vol.III:para.454,455

Pavković's suggestion to establish a committee which would investigate the issues raised at the meeting of 17 May 1999.<sup>634</sup>

394. The Chamber concludes that, since Milošević did not accept Pavković's idea of the committee, it was Šainović who was supposed to encourage MUP to investigate the situation. Šainović is held accountable for not having used his authority to persuade the persons accountable to eliminate the behaviour of those who committed crimes.<sup>635</sup> The Chamber based the entire construction of Šainović's authority on Šainović being Milošević's representative in Kosovo and a crucial link in Kosovo. The Chamber, however, establishes that Šainović is accountable for not having stood up to Milošević and ordered an investigation. Šainović should therefore have used the authority vested in him by Milošević against Milošević, which is an impossible conclusion.

## II(C) RELIEF SOUGHT – THIRD GROUND OF APPEAL

**395. All of the sub-grounds within the third ground of appeal, when considered individually and/ or cumulatively, show that the Chamber has erred in determining beyond a reasonable doubt that Šainović had the intent to forcibly displace part of the Kosovo Albanian population, both within and outside of Kosovo and thereby change the ethnic balance in the province to ensure continued control by the FRY and Serbian authorities there, and that he shared this intent with the other participants in the JCE.**

396. The Defence seeks that the Appeals Chamber returns the verdict of not guilty for Counts 1 until 5.

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<sup>634</sup> Judgement-vol.III:para.542

<sup>635</sup> Judgement-vol.III:para.457

**Ground 4: Murders were not reasonably foreseeable to Šainović**

397. The Chamber erroneously concludes that murder of Kosovo Albanians, even though falling outside of the object of the JCE, was in fact reasonably foreseeable to Šainović.<sup>636</sup>

398. The Chamber contends that Šainović was aware of the strong animosity between ethnic Serbs and Kosovo Albanians, and that consequently he could have foreseen that other crimes would be committed, including murder.<sup>637</sup> The Chamber also quotes the examples of Gornje Obrinje, and some grave in Jablanica, the killing of one and the wounding of another person around 26 October 1998, the harassment in Mališevo and the events in Račak.<sup>638</sup> The Chamber deals with the events in Jablanica, but does not draw any conclusions about the murders.<sup>639</sup> The same is true of Mališevo.<sup>640</sup>

399. Some of the events listed are mentioned in other sections of this brief and those allegations are incorporated here.<sup>641</sup> It is unclear how the murders in 1999 were reasonably foreseeable to Šainović, based on the alleged harassment in Mališevo. Further to the point, no evidence is presented with regard to Račak, nor are there any findings on Račak, consequently it is unclear how anything can be deduced based on the fact that some people were killed in Račak. In the absence of any information on the background of the events, the killing of one and wounding of another person, which occurred around 26 October 1998, cannot be accepted as grounds for concluding that the crimes were foreseeable. In one word, 1998 does not provide any grounds for establishing that Šainović could have foreseen the murders.

400. The Chamber cites the meetings of 4 April 1999 and 7 May 1999,<sup>642</sup> but at those meetings, at least the part that Šainović attended, there is no mention of any murders. The general statement that perpetrators of crimes must be punished, or the mentioning that procedures for VJ reservists must be regulated, does not provide grounds for concluding that crimes were foreseeable, not even in the broadest sense. With regard to the meeting

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<sup>636</sup> Judgement-vol.III:para.471

<sup>637</sup> Judgement-vol.III:para.470

<sup>638</sup> Judgement-vol.III:para.470

<sup>639</sup> Judgement-vol.I:paras.874-881

<sup>640</sup> Judgement-vol.I:para.882-886

<sup>641</sup> Sub-ground-3(2)

<sup>642</sup> Judgement-vol.III:para.471

of 17 May 1999, the Defence refers here to the arguments presented in sub-ground 3(3) and contends that this meeting could not have served to foresee anything, also because it took place at the very end of the war.

401. The Defence establishes that the existing evidence does not indicate that Šainović could have foreseen murder.

402. The Chamber erred in law invalidating the decision and erred in fact occasioning a miscarriage of justice by establishing that the crimes of murder of Kosovo Albanians were reasonably foreseeable to Šainovic and that he willingly took the risk that they would be committed.

#### II(D) RELIEF SOUGHT – FOURTH GROUND OF APPEAL

**403. The Chamber erred by establishing beyond a reasonable doubt that the crimes of murder of Kosovo Albanians were reasonably foreseeable to Šainović and that he willingly took the risk that they would be committed.**

404. The Defence seeks that the Appeals Chamber returns the verdict of not guilty for Counts 3 until 5.

#### **Ground 5: Destruction or damage of religious property was not reasonably foreseeable to Šainović**

405. The Chamber erroneously contends that it was reasonably foreseeable to Šainović that the forces of the FRY and Serbia would commit wanton destruction or damage of Kosovo Albanian religious sites, cultural monuments and Muslim sacred sites.<sup>643</sup>

406. The Chamber fails to state any reasons for its finding. It merely states that the conflict involved ethnic divisions and that the common purpose was to be achieved by

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<sup>643</sup> Judgement-vol.III:para.473

means of a campaign of terror and violence. There is no evidence of destruction of religious sites in 1998, while ethnic tensions in Kosovo have existed for hundreds of years before. It is unclear how Šainović might have been able to foresee the destruction that he is held accountable for.

407. The Defence reiterates that the Chamber's line of reasoning leads to one conclusion only, which is that the mere existence of a common purpose also entails the existence of crimes falling outside of common purpose, without the need to prove that those crimes were reasonably foreseeable.

408. The Chamber erred in law invalidating the decision and erred in fact occasioning a miscarriage of justice in concluding that the crimes of destruction or of damage to religious property were reasonably foreseeable to Šainović and that he willingly took the risk that they would be committed.

#### II(E) RELIEF SOUGHT – FIFTH GROUND OF APPEAL

**409. The Chamber has erred in establishing beyond a reasonable doubt that the crimes of destruction of or damage to religious property were reasonably foreseeable to Šainović and that he willingly took the risk that they would be committed.**

410. The Defence seeks that the Appeals Chamber returns the verdict of not guilty for Count 5.

## **Ground 6: JCE to forcibly displace did not exist**

### ***Sub-Grounds 6(1): The existence of a common plan***

#### ***6(2): Factual and legal findings on crimes***

411. The Chamber erroneously established that the common purpose of the JCE was to ensure continued control by FRY and Serbia over Kosovo by criminal means through a widespread and systematic campaign of terror and violence due to which, the Kosovo Albanian population was to be forcibly displaced both within and without Kosovo.<sup>644</sup> The Chamber concludes that there was a plurality of persons in the JCE and that the contribution made by the Accused had been significant.<sup>645</sup> Ground 2 of this Appeal challenges the contention on Šainović's significant contribution.

412. The Chamber finds the most compelling evidence of a common plan is pattern of crimes in 1999.<sup>646</sup>

#### *a. Seizure of Identity Documents*

413. The Defence points out that the Chamber has failed to provide any explanation about the relevance of the seizure of IDs, or about the consequences thereof, and about how the fact that the documents were seized would have contributed to the achievement of the plan to alter the ethnic balance.

414. Records are kept of every single document issued by MUP departments in Kosovo, and elsewhere in the FRY and Serbia. It is particularly significant that records on personal documents issued during NATO bombing were preserved and handed over to UNMIK.<sup>647</sup> Because records were kept, lost personal IDs can easily be re-issued, considering that the holder's photographs are stored in the database.<sup>648</sup>

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<sup>644</sup> Judgement-vol.III:para.95

<sup>645</sup> Judgement-vol.III:paras.97,98

<sup>646</sup> Judgement-vol.III:para.17

<sup>647</sup> tt.23106,23331-23335

<sup>648</sup> tt.23343-23345

415. The loss of documents does not entail the loss of civil rights. The population registers were not sorted by ethnicity, so it would have been impossible to erase Albanians, without erasing everybody else as well.<sup>649</sup>

416. Seizure of IDs could not have prevented the return of persons that did not have any, because records are kept on every document issued, and these were preserved. Had the seizure of IDs been the means to achieve a plan, it is inconceivable that all the records would have been kept. The existence and preservation of these records is the evidence corroborating that the seizure of IDs had not been part of a common purpose.

417. Further to the point, MUP officials working on state border crossing issues at the relevant time period, denied the existence of any order to seize documents.<sup>650</sup>

418. Moreover, documents were not seized from everyone. The existence of a plan would have entailed the systematic seizure of IDs everywhere, not just at border crossing points. There are many witnesses who were in contact with members of the VJ and/or MUP, testifying that their documents were not seized. Xhavahire Rrahmani was stopped at a police check point and her documents were not seized.<sup>651</sup> Fazliu Hadije crossed the state border to Albania Qafa e Prushit and nobody had either requested or seized documents from the group with which she was travelling.<sup>652</sup>

419. There is evidence that VJ unit commanders prohibited the inspection of personal documents.<sup>653</sup>

420. Cases of seizure of IDs, if any, can be viewed only in the context of isolated incidents motivated by the debased lucrative purposes of the direct perpetrators. Evidently, it was not part of a plan, because, had there been a plan, then documents would have been seized everywhere, not only at the border crossing points, and from everyone. Most importantly, the seizure of documents does not entail the loss of any kind of status and does not prevent or preclude anyone from returning to the country.

421. Moreover, the conclusion regarding the importance of the seizure of documents, that the Chamber gives in context of evidence of JCE, is contrary to the conclusion

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<sup>649</sup> tt.23103,23107-23109

<sup>650</sup> 23311-23312,23076-23077,23858

<sup>651</sup> tt.1826-1827

<sup>652</sup> P2241

<sup>653</sup> tt.19023

relative to the importance of Milutinović's decree vis-à-vis IDs, where it is stated that the loss of IDs does not simultaneously mean the loss of citizenship.<sup>654</sup>

*b. Pattern of Forcible Displacement*

422. The Chamber erroneously contends that the forces of FRY and Serbia used the beginning of the NATO bombing campaign as an opportunity to launch a widespread and systematic attack on villages, leading to people fleeing from the neighbouring villages as well.<sup>655</sup>

423. First, the Defence draws attention to the implausible finding that FRY and Serbia waited for the attack of the most powerful military alliance in order to accomplish their common plan under those circumstances. Thus, the Chamber establishes that of all the opportunities they had, the FRY and Serbia waited for the most unfavourable one – Serbia's clash with the NATO, the one opportunity which definitely could not have had a favourable outcome for the FRY and Serbia. The allegation that the bombing, i.e. the war with the NATO was a "*window of opportunity*" is an impossible conclusion.

424. Further to the point, without any evidence, the Chamber contends that the objective of the attack were the villages. However, a multitude of evidence corroborates that these had not been attacks on villages, but coordinated activities aimed at blocking and destroying KLA forces in the areas with the biggest concentration of KLA forces. The plans were developed from the level of VJ GS, through the 3-A to the PrK Command.<sup>656</sup>

425. In the PrK Command's order, the villages of Malo Kosovo, Dranica, Mališevo, Šalja, Bajgora are identified as the biggest KLA strongholds and the mission is defined to block, break down and destroy KLA forces in these regions, in a combined action with MUP.<sup>657</sup> MUP also had its plans which were coordinated with the PrK Command.<sup>658</sup>

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<sup>654</sup> Judgement-vol:III:para.164

<sup>655</sup> Judgement-vol.III:para.41

<sup>656</sup> 3D690,5D245,5D249

<sup>657</sup> P2808

<sup>658</sup> P1990,tt.17917

426. All orders of the PrK to root and destroy terrorist forces contained intelligence about the enemy, specifically their position, strength and armament and their activities.<sup>659</sup> For instance, in P1966 KLA strongholds are tagged: Gornji Lab, Šalja, Bajgora, Dranica. The KLA forces are stationed in the village of Lapastica, in the proximity of the elementary school near the graveyard, the command of the 141<sup>st</sup> KLA brigade with 200 terrorists is stationed in the village of Smrekovica, special KLA units are stationed in the village of Bajgora, the command of the 152<sup>nd</sup> KLA brigade is located in the village of Bradaš, the command of the 153<sup>rd</sup> KLA brigade is located in the village of Zlas.<sup>660</sup>

427. Consequently, VJ and MUP activity aimed at neutralizing terrorist forces is not an attack on the village, but an attack on the KLA, which is located in the village, operating from the village and hiding in civilian areas and amidst the civilian population. As expected, the legitimate operations of the VJ and MUP and the unlawful concealment of the KLA amongst civilians led to people fleeing, for which the FRY and Serbia are held accountable, as a result of the Chamber's incorrect findings.

428. In its analysis of the overall pattern of events<sup>661</sup> the Chamber states that people might have left their homes for different reasons, such as instructions from the KLA, the desire to avoid being present while combat between the VJ and MUP forces and the KLA, or the fact that "*NATO was bombing targets close to where they lived*".<sup>662</sup> The Chamber thus contends that there might have been other reasons for abandoning homes. However, the Chamber does not in the least try to establish how many people left as a result of the NATO bombing, or combat between the VJ and MUP with the KLA, or how many left because they were instructed to do so.

429. The Chamber contends that at least 700,000 Kosovo Albanians left Kosovo, as a consequence of the deliberate actions of the forces of the FRY and Serbia.<sup>663</sup> At least 700,000 is the total number of people who left Kosovo, and the Chamber attributes their leaving entirely to forces of FRY and Serbia, although it conceded that there were other reasons too. However, the Chamber fails to examine the consequences of the bombing of

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<sup>659</sup> P1966,item-1,P1968,item-1,1969,item-1,P1970,item-1

<sup>660</sup> P1966,item-1

<sup>661</sup> Judgement-vol.II:paras.1150-1178

<sup>662</sup> Judgement-vol.II:para.1175

<sup>663</sup> Judgement-vol.II:para.1178

a civilian convoy of Kosovo Albanians in the vicinity of Đakovica in April 1999,<sup>664</sup> or of the bombing of the Korisa village in May 1999,<sup>665</sup> or of the bus near the village of Luzane in May 1999,<sup>666</sup> in other words, how many of “at least 700,000” people left for fear of the mass killings caused by the NATO air strikes.

430. The Chamber fails to examine how many people left due to the fighting with the KLA in the towns of Peć,<sup>667</sup> or Đakovica,<sup>668</sup> as well as how many people left Kosovo due to the vigorous clashes of the VJ and MUP against the KLA in other parts of Kosovo.<sup>669</sup> The KLA brigades were deployed across the entire territory of Kosovo,<sup>670</sup> in addition to which there were armed Albanian villages and terrorist bases.<sup>671</sup>

431. Finally, 100,000 Serbs, almost half of the Serbian population have left Kosovo as a result of NATO campaign<sup>672</sup> leaving the ethnic balance unchanged. If the aim of the JCE was to change ethnic balance it would be essential for the perpetrators to keep Serbs, but that had not happened. This clearly demonstrates that the common purpose to change ethnic balance was not in existence.

432. The Chamber establishes that the overall pattern of events is a pattern of forcible displacement, mainly and almost exclusively relying on the testimonies of a large number of Kosovo Albanians, because, according to the Chamber, it is inconceivable that a large number of Kosovo Albanians, from a broad cross-section of that community, from various parts of Kosovo, and with no connection to one another, could all have concocted such consistent statements as to having been forcibly displaced by the VJ and MUP.<sup>673</sup>

433. Similarly, a large number of witnesses, Kosovo Albanians, living in the areas where the KLA were active, and in the areas where the pattern of displacement was most prominent, denied any knowledge of the KLA’s activity or even presence, maintaining their claims in the same manner, consistently providing the same answers, even when

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<sup>664</sup> 4D90,para.45,5D1158

<sup>665</sup> 4D90,para.86,5D914

<sup>666</sup> 6D998,5D617

<sup>667</sup> 6D1639

<sup>668</sup> 6D1638

<sup>669</sup> 6D1640,6D1637

<sup>670</sup> 5D1335

<sup>671</sup> 5D1334

<sup>672</sup> tt.565-566

<sup>673</sup> Judgement-vol.II:para.1175

confronted with reliable evidence as to the contrary. With reason, the Chamber assesses that this consistency seemed to “border upon the irrational”.<sup>674</sup>

434. The Defence maintains that the consistency, which in many instances exceeds a natural similarity between testimonies given by different people from various places on different events, is precisely the reason leading to the conclusion that the credibility of these witnesses is doubtful, that the uniformity of their statements is affected and that their testimonies do not constitute grounds for adopting conclusions about forcible displacement beyond reasonable doubt.

435. All factual and legal findings, regarding the events between March and May 1999 in 13 municipalities in Kosovo, are based upon the erroneous findings of the Chamber, which are stated above, and cannot be used to corroborate the existence of a common plan.

### *c. Arming and Disarming*

436. The Chamber erroneously concludes that the arming and disarming process was carried out on a discriminatory basis, in order to make the Albanian population vulnerable to the forces of the FRY and Serbia.<sup>675</sup>

437. The Chamber does not deny the legitimacy of arming in general stating that it is unable to make a conclusion with regard, but considers that the primary issue is whether it was done upon ethnic lines.<sup>676</sup> The armed persons were reservists of police departments, or civil protection and civilian defence units, under the control of the MUP,<sup>677</sup> or the Ministry of Defence.<sup>678</sup>

438. The Chamber states in several sections of the Judgement that there were tensions and conflicts between the FRY and Serbia authorities and the Kosovo Albanians, which had lasted for decades, with a history of armed, political and ideological clashes, polarizing the Kosovo society on a key issue: Kosovo as part of Serbia, or Kosovo as an

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<sup>674</sup> Judgement-vol.I:para.55

<sup>675</sup> Judgement-vol.III:para.72

<sup>676</sup> Judgement-vol.III:para.56

<sup>677</sup> tt.14696,14698

<sup>678</sup> tt.15830,16331

independent state. At the stage when the Kosovo issue is afflicted by wide-spread terrorist activity, a blockade of communications, kidnappings and murder of non-Albanian population,<sup>679</sup> in a situation of a deepened conflict and mistrust between the ethnic communities, where one of them does not recognize the state and strives to break away from it, it is unreasonable to expect from that same state to arm the ethnic community constituting the majority and demanding the secession of one part of that state.

439. The state's attempt to disarm the Albanian population is misconstrued by the Chamber as proof of discrimination based on ethnic lines. First, the Chamber has neglected to examine the question of legality, how is it possible that anybody outside the defence structures of a state should carry weapons, the possession of which is prohibited to civilians. Any state, including the FRY and Serbia, would have attempted to disarm armed individuals, found in illegitimate possession of arms, which they, as civilians, may not carry.

440. In addition, Zyrapi, KLA Chief of Staff, testified that the KLA had village staffs which remained in villages and provided arms to the KLA.<sup>680</sup> Furthermore, in the course of 1998, the KLA wanted to arm the entire population above 16 years of age.<sup>681</sup> The only reasonable action the state could have undertaken was to attempt to disarm armed citizens, found in possession of weapons which they are not permitted to have.

441. In an instance where the Chamber is unable to conclude whether the arming of the members of the reserve police department (RPO), civil defence and civil protection units reserves had been illegal, in a situation which has all the characteristics of an armed uprising, the Chamber's conclusions that the state should have avoided discriminating by arming the population that actively or passively supported the armed uprising, or by disarming units which were legitimately formed as a measure to protect the population from the devastating effects of armed insurrection, are unreasonable.

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<sup>679</sup> tt.14593

<sup>680</sup> tt.6232

<sup>681</sup> P2453,p.5

*d. Other evidence regarding the existence of JCE*

442. In support of its allegation on the existence of a common plan, the Chamber quotes breaches of October Agreement, and erroneously concludes that Serbia and the FRY used the negotiations period to send reinforcements to Kosovo.<sup>682</sup> Here, the Defence would like to refer to the arguments presented in sub-ground 6(4). The Chamber assessed that the dispatch of reinforcements was a preparation for the attack against Albanian villages, although there is no evidence to corroborate this theory. However, there is persuasive evidence on the reasons why parts of the VJ forces entered the territory of Kosovo at the time when the NATO attack was imminent, when significant NATO forces were amassed in Macedonia and when the KLA activities culminated.

443. The Chamber contends that the replacement of the people of “*independent judgement*” and positioning of new high level officials is also evidence of a common plan.<sup>683</sup> In this category, of people of independent judgement, the Chamber also includes Perišić, who was Chief of GS of the VJ from 1993 until 1998, at the time when Milošević was President of Serbia and the FRY.

444. The Chamber corroborates the existence of a common plan with circumstantial evidence, and specifically on the basis of the conclusions described above, which, according to the Defence, no reasonable trier of facts would have done.

445. The Prosecution should have proven the circumstantial evidence beyond reasonable doubt and also demonstrated that this is the only reasonable inference available for the evidence.<sup>684</sup> Where more than one inference is reasonably open on the facts, one of which is consistent with innocence, an acquittal must be entered.<sup>685</sup>

446. The Chamber erred in dismissing all evidence confirming the nonexistence of the plan. A multitude of witnesses denied ever hearing about a plan, or the intention to expel Albanians in order to alter the ethnic balance in Kosovo.<sup>686</sup> The Chamber had at its disposal evidence consisting of records of secret meetings, at which participants spoke freely and without fear of the public opinion, and there had never been any mention, at

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<sup>682</sup> Judgement-vol.III:para.73

<sup>683</sup> Judgement-vol.III:paras.77-85

<sup>684</sup> Brđanin TC Judgement,para.353,Martić TC Judgement,para.24

<sup>685</sup> Čelebići AC Judgement,para.458,Galić AC Judgement,para.218

<sup>686</sup> Final Trial Brief,paras.872-874

those meetings, and in the notes from those meetings, about plans of expulsion.<sup>687</sup> There is no intelligence evidence, intercepted talks, or sequestered documents, despite the fact that the international forces were present in Kosovo since June 1999. No evidence was found in the archives of the FRY and Serbia either, though the latter fully complied with their obligations with respect to the Prosecution, pertaining to the access to the archives.

447. On the other hand, there is a vast amount of evidence that shows the true intentions and acts on the part of FRY and Serbia in the attempt to solve the problem through dialogue and political means.<sup>688</sup>

***Sub-Ground 6(3): The Podujevo incident***

448. The Chamber erroneously establishes that the Podujevo incident was a clear and intentional breach of the October Agreement.<sup>689</sup> The Chamber does not acknowledge that this was a training exercise, but alleges that it was a planned provocation to draw KLA fire and provide an excuse to introduce more forces in Kosovo.<sup>690</sup>

449. The Chamber acknowledges that the situation around Podujevo had been exceptionally difficult and that 2,000 KLA fighters were concentrated in that area, and that the situation of the Serb civilians significantly deteriorated.<sup>691</sup>

450. Byrnes testified that the KLA moved into the positions abandoned by the VJ after the October Agreements, and that he personally tried to convince the KLA Commander to withdraw the units which endangered the strategically important route Podujevo-Priština, that the KLA was a military threat.<sup>692</sup> Byrnes, as Head of US KDOM, confirmed that he believed that the KLA units positioned there represented a military threat and that the VJ activity, aimed at neutralizing this threat, was in compliance with the provisions of the Clark-Naumann Agreement.<sup>693</sup>

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<sup>687</sup> P2166,P1468,minutes of the VJ Chief of GS Collegium,minutes from the meetings in MUP Staff in Priština etc.

<sup>688</sup> 1D78,1D91,2D12,2D384,

<sup>689</sup> Judgement-vol.I:para.989

<sup>690</sup> Judgement-vol.I:para.943

<sup>691</sup> Judgement-vol.I:paras.931-932

<sup>692</sup> tt.12193-12195

<sup>693</sup> tt.12197-12198

451. Crosland confirmed that attacks were frequent along the Niš-Priština route, in the vicinity of Podujevo, and that this route was strategically important for Serbia.<sup>694</sup>

452. In the agreement it is stated that “*as a last resort and consistent with the right to self defence, the State authorities retain the right to respond adequately and proportionately to any form of terrorist activity*”.<sup>695</sup>

453. The Chamber contends that the route Priština-Podujevo-Niš was not included in the Clark-Naumann Agreement in the routes which could be patrolled by the VJ. But that route was of great strategic importance for the FRY and Serbia.<sup>696</sup>

454. Thus, 2,000 KLA fighters occupied positions which had been abandoned by the VJ and MUP, in compliance with the agreement, then attacked Serbian civilians, occupied positions along the Priština-Podujevo-Niš route, launched attacks from these positions on this route, which is of vital importance, and refused to comply with the international observers’ requests for their withdrawal.

455. In reaction to that, the FRY and Serbia sends a company to the military field in order to prevent, or limit, with its presence, KLA activities in those areas. Although the deployment of this company was denoted as a drill, this procedure had all the characteristics of self-defence, as set forth in the agreement, and was entirely legitimate.

***Sub-Ground 6(4): Increase in VJ and MUP personnel***

456. The Chamber erroneously contends that the increase in VJ and MUP personnel was a breach of the October Agreements. The Chamber concedes that the increase in forces in mid-March may be founded.<sup>697</sup>

457. The Chamber quotes the increased VJ presence in March 1999.<sup>698</sup> The Chamber emphasizes the deployment that took place on 16 March 1999, 8 days before the beginning of the NATO bombing.<sup>699</sup> The Decision on the extension of service of VJ

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<sup>694</sup> tt.9948,9949

<sup>695</sup> P395,Section-III

<sup>696</sup> Judgement-vol.I:para.931

<sup>697</sup> Judgement-vol.I:para.989

<sup>698</sup> Judgement-vol.I:para.964

<sup>699</sup> Judgement-vol.I:para.967

conscripts entered into force on 15 March 1999.<sup>700</sup> There is no clear information on the increased presence of MUP forces.<sup>701</sup>

458. Concurrently, NATO increased its presence in Macedonia from 1,850 at the beginning of 1999, to 12,500 in March 1999.<sup>702</sup> The activities of the KLA also significantly increased.<sup>703</sup>

459. All allegations with regard to an increased presence of the VJ and MUP forces in Kosovo are related to the period of the imminent NATO bombing, at the time when it was evident that the bombing would take place. The only possible and only rational response to increased NATO presence in Macedonia, increased KLA activities, all within a few days from the NATO strike, was a limited strengthening of their capacities. The Chamber does not indicate that there had been any increase of troop numbers before the end of February 1999,<sup>704</sup> nor is there any evidence to that effect in the case files.

#### ***Sub-Ground 6(5): The role of NATO***

460. The Chamber misconstrues the position and role of the NATO in the events discussed herein.<sup>705</sup>

461. First, the Chamber states the sequence of events, the collapse of the negotiations, the withdrawal of the KVM and the failure of Holbrooke's last mission in Belgrade.<sup>706</sup> The following allegation of the Chamber is that Clark had ordered the attack, upon a request by Naumann.<sup>707</sup> The Chamber makes no attempt to find a single fact explaining why the attack was ordered. Was it because of the failure of the negotiations, the humanitarian situation, the forcible displacement of the population of Kosovo Albanians, or was it because Milošević was in power in Serbia. Some of the answers to these

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<sup>700</sup> Judgement-vol.I:para.972

<sup>701</sup> Judgement-vol.I:para.981

<sup>702</sup> Judgement-vol.I:para.968

<sup>703</sup> Judgement-vol.I:paras.973-974

<sup>704</sup> Judgement-vol.I:paras.962-978

<sup>705</sup> Judgement-vol.I:paras.1205-1214

<sup>706</sup> Judgement-vol.I:para.1207

<sup>707</sup> Judgement-vol.I:para.1207

questions would help clarify whether Rambouillet in Paris had in fact been an ultimatum or negotiations.

462. The Chamber concludes that the FRY and Serbia used the NATO bombing as a window of opportunity to launch a widespread and systematic attack,<sup>708</sup> all in an attempt to explain the JCE. If the NATO created an opportunity with its bombing campaign, as the Chamber contends, then the question why this was done cannot remain unanswered. Naturally, the Defence strongly disagrees with the Chamber's conclusion with regard to the window of opportunity, as stated in other sections of this Appeal.

463. In the section describing the role of the NATO, the Chamber also fails to assess NATO's impact on the events in Kosovo, at the time in question. The Chamber states that the role of the NATO bombing is examined in relation to the individual municipalities where deportation and forcible transfer are alleged to have occurred.<sup>709</sup> However, the Defence contends that the role of the NATO cannot be assessed in relation to the specific municipality, for a specific day. The NATO strike changed the nature of the conflict. From a limited conflict in 1998, in a limited area, with the NATO strike, all of Kosovo and all of the FRY became the arena of an armed conflict. The NATO strike had an impact on the change in the balance of power, the change of the tactical and strategic goals of the KLA, the VJ and MUP position and possibilities for defence. A land NATO operation was expected,<sup>710</sup> the most powerful strikes occurred in the direction of Đeneral Janković-Uroševac-Priština,<sup>711</sup> which is the only road to Kosovo from the direction of Macedonia where more than 12,000 NATO soldiers were stationed.<sup>712</sup> The NATO strike, as a new and epochally significant fact, led to the proclamation of state of war,<sup>713</sup> to new and different circumstances which ruled out any chance of interference by civilians in command and coordination affairs, as previously stated in this Appeal.

464. The Chamber states that the issue of the impact of one of the warring sides - NATO, on the movement of the population is dealt with in relation to the individual

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<sup>708</sup> Judgement-vol.III:para.41

<sup>709</sup> Judgement-vol.I:para.1214

<sup>710</sup> tt.16786,26606

<sup>711</sup> tt.15750-15751

<sup>712</sup> tt.16921

<sup>713</sup> p992

municipalities.<sup>714</sup> However, the Chamber deals with a situation where in a very short period of time 2,000 air strikes were carried out on the territory of Kosovo, of which 37% on civilian targets.<sup>715</sup> However, though the strikes were individual, the targets and consequences of the NATO affected all of Kosovo, or all of the FRY. Contrary to NATO actions, the actions of some members of the VJ and MUP in some areas, in some of the municipalities in Kosovo, are assessed on a local level, but then the Chamber synthesizes these individual conclusion and attempts to transpose these conclusions to conclusions regarding the entire territory and all actions of the other warring side – the FRY and Serbia.

465. In the absence of an assessment of the magnitude and impact of one of the warring sides on the events in Kosovo, especially affecting the movement of the population, while at the same time reducing the implications of the NATO bombing to the level of individual events, the Chamber has neglected to assess all facts that are relevant for adopting a correct decision with regard to this matter, one grounded in facts.

***Sub-Ground 6(6): Historical background of the events in Kosovo***

466. The Chamber adopts erroneous conclusions about the historical background to the events in Kosovo in relation to 1998.<sup>716</sup>

467. A narrow historical perspective reduces the Chamber's conclusions to allegations that the authorities, (it is unclear whether this refers to the FRY or SFRY), wanted to exert firmer control over the province and to diminish influence of the Kosovo Albanians.<sup>717</sup> However, nowhere does the Chamber establish what the aspirations of Kosovo Albanians were before 1989, during the 1990s, and what they were after 1999, which is perhaps of no relevance for the case, but is for understanding the historical background to the events in 1998 and 1999.

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<sup>714</sup> Judgement-vol.I:para.1214

<sup>715</sup> tt.17949

<sup>716</sup> Judgement-vol.I:para.237

<sup>717</sup> Judgement-vol.I:para.237

468. The Chamber has to view the actions of the FRY and Serbia in the context of the incessant demands for Kosovo independence, ever since the Second World War,<sup>718</sup> demands for a Kosovo republic during the 1980s,<sup>719</sup> demands for an independent republic in the 1990s,<sup>720</sup> all the way to the declaration of independence in on 17 February 2008. The state was faced with continued demands for secession that at times manifested itself as a political request, and at other times as armed insurgence or terrorist attacks.

469. Therefore, the conclusion that the tense and unstable environment in Kosovo is a result of the desire of the FRY and Serbia to gain firmer control of the province is incorrect and simplified. The real reason is the demand for secession in violation of all international and national legislation on the one hand and the state efforts towards preventing this secession on the other hand.

470. The Chamber mistakenly reduces the historical background to the period of 1998 and erroneously characterizes it as a background of discrimination of the Albanian ethnic minority in Kosovo.

***Sub-Ground 6(7): Negotiations with Kosovo Albanians***

471. The Chamber erroneously concludes that the efforts of the FRY authorities to initiate negotiations with the Kosovo Albanians failed due to the absence of international involvement and because they were taking place in the context of major actions of the MUP and VJ forces in Kosovo.<sup>721</sup>

472. The Chamber disregards the fundamental military and political goals of a part of the Kosovo Albanians, which is the independence of Kosovo. The Defence would like to refer to the statements contained in sub-ground 6(6). Consequently, there were no negotiations because the demand for independence was not negotiable, as far as the FRY and Serbia were concerned.

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<sup>718</sup> tt.14391-14392

<sup>719</sup> P2377,p.3,P2588,para.4

<sup>720</sup> Judgement-vol.I:para.223

<sup>721</sup> Judgement-vol.I:para.404

473. As regards key international mediators, Holbrooke met with the members of the KLA for the first time in June 1998, wherewith he conferred full legitimacy to the KLA.<sup>722</sup> Shortly after that, Holbrook informed the KLA representative that the independence of Kosovo was possible “*if they (KLA) handled themselves correctly*”.<sup>723</sup> This political stance culminated in Rambouillet where Albright hands a side letter to the Kosovo Albanian delegation, confirming the interpretation of the draft Rambouillet agreement as a possibility to hold a referendum on the final status of Kosovo within a period of three years.<sup>724</sup>

474. The Chamber reproofs the authorities of the FRY and Serbia for failing to make an effort to build confidence and thereby create the pre-conditions for negotiations.<sup>725</sup> The Chamber is mistaken, because the only plausible conclusion is that part of the Kosovo Albanians, primarily the KLA, were disinclined to negotiate without international involvement guaranteeing Kosovo independence. Upon receiving confirmation on the deferred independence in the course of the Rambouillet negotiations, the Kosovo Albanian delegation approved the proposed draft agreement. The Chamber erred, because the only reasonable conclusion is that Kosovo Albanians did not want to negotiate either constitutional solutions or human rights, they wanted negotiations which would ensure the independence of Kosovo from the FRY, and Serbia.

***Sub-Ground 6(8): KLA was not bound by agreements and reasons for failure of agreements***

475. The Chamber erroneously establishes that the October Agreements did not impose any obligation upon the KLA with respect to maintaining a ceasefire and ceasing hostilities.<sup>726</sup>

476. The main purpose of the October Agreements, which foresee the KVM, was to “*verify compliance by all parties in Kosovo with UN Security Council Resolution 1199*”.

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<sup>722</sup> tt.14434

<sup>723</sup> 2D383,transcript,p.3

<sup>724</sup> 1D18,p.449,item-27

<sup>725</sup> Judgement-vol.I:para.404

<sup>726</sup> Judgement-vol.I:para.405

Resolution UNSC 1199 sets forth that the Security Council “*demands that all parties, groups and individuals immediately cease hostilities and maintain a ceasefire in Kosovo...* ”.<sup>727</sup>

477. In the context of the incidents provoked by the KLA, Naumann stated that the lack of an agreement between the NATO and the KLA had been a mistake.<sup>728</sup> The Chamber evidently bases its position on Naumann, but insight into the text of the Security Council Resolution and the text of the agreement on the KVM mission demonstrates that this position is not grounded in facts, and that it can only be explained by the benevolent attitude of the NATO representative towards KLA activities.

478. Based on the erroneous finding on the obligations of the KLA under the October Agreements, the Chamber adopts an incorrect conclusion with regard to the liability for the failure of the negotiations, which will be discussed further in sub-ground 6(11).

***Sub-Ground 6(9): Involvement of US Secretary of State introduced confusion***

479. The Chamber asserts that the arrival of Albright at Rambouillet, “*while providing added impetus to the negotiating process, also introduced confusion and uncertainty*”.<sup>729</sup>

480. The Chamber does not state what exactly the added impetus in the negotiating process consisted in, unless it refers to the fact that that Albright, in her side letter, offered an interpretation of the agreement in support of conducting a referendum on the final status after three years.<sup>730</sup> Albright’s arrival did in fact accelerate the negotiations, but this was in contravention of the non-negotiable principles based on which the Rambouillet conference had been convened.<sup>731</sup>

481. Based on an erroneous conclusion of Albright’s role in the Rambouillet negotiations, the Chamber draws an erroneous conclusion with respect to the responsibility for the failure of negotiations, as discussed in sub-ground 6(11).

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<sup>727</sup> P456,pp.2

<sup>728</sup> tt.8263-8266,8277-8280

<sup>729</sup> Judgement-vol.I:para.407

<sup>730</sup> 1D18,p.449,item-27,Final Trial Brief,paras.468-476

<sup>731</sup> 1D18,p.414.,tt.14055

***Sub-Ground 6(10): Milošević demonstrated that he had no interest in successful outcome of Rambouillet / Paris negotiations***

482. The Chamber asserts that Milošević clearly demonstrated that he had no interest in a successful outcome that would modify Serbian authority over Kosovo.<sup>732</sup> However, nowhere in the Judgement does the Chamber discuss either the content or the consequences of the Rambouillet and Paris “agreement”.<sup>733</sup> This agreement, for instance, foresees that the NATO troops be entitled to move across the entire territory of the FRY without any limitations,<sup>734</sup> as well as the right of the NATO to detain FRY citizens without explanation.<sup>735</sup> This agreement had all the characteristics of occupation of the entire territory of the FRY.<sup>736</sup>

483. Therefore, the reasons for not accepting the agreement can be found in the contents of the offered draft rather than in Milošević’s attitude towards modalities for resolving the status of Kosovo within the FRY and Serbia.

***Sub-Ground 6(11): Diplomatic efforts to solve Kosovo problem failed for a combination of reasons relating to the intransigence of both parties and the way in which the negotiations were handled***

484. The Chamber concludes that the diplomatic efforts to solve the Kosovo issue were fruitless owing to a combination of reasons for which both parties to the negotiations were responsible and to the manner in which the negotiations were conducted.<sup>737</sup>

485. This conclusion is erroneous for the reasons described in sub-grounds 6(7), 6(8), 6(9) and 6(10), which reasons are reiterated here.

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<sup>732</sup> Judgement-vol.I:para.408

<sup>733</sup> P474

<sup>734</sup> P474,p.24,item-8

<sup>735</sup> P474,p.25,item-21

<sup>736</sup> tt.14061

<sup>737</sup> Judgement-vol.I:para.412

486. The only reasonable conclusion concerning the failure of diplomatic efforts is that they were unsuccessful since the demand of the Kosovo Albanians that Kosovo be awarded the status of an independent state and the support of this demand on the part of the USA and some of the negotiators were not accepted by the FRY and Serbia, as this would have meant reneging on the obligation to safeguard territorial sovereignty and integrity of the state and abandoning the basic principles upon which the conference had been convened.

***Sub-Ground 6(12): Lawfulness of use of VJ outside the border area***

487. The Chamber takes no stance with respect to the legality of the use of the VJ in the border area during 1998 and early 1999.<sup>738</sup>

488. The Chamber had at its disposal all the arguments necessary for deliberation upon such an important issue.<sup>739</sup> Based on the Defence arguments, the Chamber should have concluded that the deployment of the VJ units was fully founded in legal regulations and all allegations of illegality are a result of personal ambitions and confrontations among the participants in the events of 1998.

489. The Chamber should have taken a stance, since the issue of questionable legality of the use of VJ in 1998 is stated as the reason for the establishment of the so-called JC. Namely, in the conclusions pertaining to 1998, it is asserted that the JC allowed Milošević, through Pavković, to direct the actions of the MUP in Kosovo in a situation of questionable legality, and for these actions of MUP to enjoy the support of the VJ.<sup>740</sup> The Chamber states that the JC was important to Milošević also because some members of the VJ disagreed with the deployment of the army within Kosovo save to guard the border.<sup>741</sup>

490. A finding to the effect that the VJ was used legally during 1998 would have invalidated the conclusion of the Chamber that Milošević needed the JC in order to bypass the VJ officers who questioned the legality. A finding that the VJ was used legally

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<sup>738</sup> Judgement-vol.I:para.579

<sup>739</sup> Final Trial Brief,paras.134-142

<sup>740</sup> Judgement-vol.I:para.1111

<sup>741</sup> Judgement-vol.I:para.1111

would annul the reason for the existence of the JC in the context of the explanation offered by the Chamber.

***Sub-Ground 6(13): Criminal activity of FRY forces in 1998***

491. The Chamber erroneously concludes that in some cases during 1998, excessive and indiscriminate force was used in operations evinced by the deliberate damage and destruction of houses and the killing of women and children.<sup>742</sup>

492. This primarily raises the issue of the standard of proof: whether, with respect to the events of 1998, the Chamber applies the standard of proof beyond reasonable doubt or the standard of indication or balance of probabilities. It follows from the contents of explanation that the Chamber draws its conclusions based on probability. The Chamber, however, uses the conclusions drawn in this way as the grounds for knowledge of crimes<sup>743</sup> and as evidence of participation in the JCE.<sup>744</sup> The Chamber commits an error in law, thereby invalidating the decision, when it uses the evidence established based on probability in proving the knowledge of crimes as an element of the *mens rea* of the accused.

493. The Chamber instructed the Prosecutor that the crimes of 1998 had to be proven;<sup>745</sup> the Chamber draws its conclusions without eyewitnesses of events, based on impressions of persons passing through those parts of Kosovo after the events, or based on testimonies of authors of books on those events, who have no personal knowledge of the events. There is a striking difference between the manner of presenting proof for 1998 and that for the events of 1999, of which Šainović is found guilty, although the consequences thereof are equally significant for an accurate assessment of Šainović's responsibility.

494. As regards the assertions concerning violation of humanitarian law in the villages of western Kosovo,<sup>746</sup> there are no testimonies pertaining to the events, no eyewitnesses

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<sup>742</sup> Judgement-vol.I:para.920

<sup>743</sup> Judgement-vol.III:paras.441-442,447,463

<sup>744</sup> Judgement-vol.I:para.844

<sup>745</sup> Decision of Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment,para.17

<sup>746</sup> Judgement-vol.I:para.874-991

who could testify as to who committed the crime, under what circumstances and with what motives. Crosland's testimony is vague and provides no grounds for drawing conclusions. Drewienkiewicz and Kickert testify about traveling through villages. Drewienkiewicz concluded there had been intentional fire without investigation or eyewitnesses.<sup>747</sup>

495. As regards the assertions concerning Mališevo, the Defence herein includes parts of its rationale under ground four of this Appeal.<sup>748</sup> In addition, the conclusions concerning Mališevo are based on Crosland, who is not an eyewitness, who passed through Mališevo after the event and obviously exaggerates in his account of what he saw. Although video footage<sup>749</sup> confutes Crosland's words "*razed to the ground*",<sup>750</sup> the Chamber draws a conclusion about excessive force based on Crosland, regardless of the fact that Crosland does not know how the clash developed in Mališevo, how the sides were armed, which side caused property damage and in what manner. All that Crosland knows are assumptions and post-event observations of little value for the understanding and assessment of the events.

496. Regarding Drenica<sup>751</sup>, the evidence consists in what Kickert saw from a control point while riding en route Priština–Peć<sup>752</sup> and in Crosland's impressions gathered after the events.<sup>753</sup>

497. Regarding Gornje Obrinje,<sup>754</sup> the Defence herein refers to and includes its rationale under sub-ground 3(2). All the statements on the crimes are contained in a book and in the testimonies of persons who are in no way related to the events.

498. In connection with displaced persons, the Defence refers to and includes herein its rationale under sub-ground 3(2).

499. The Defence concludes that the Chamber erred with respect to the erroneous standard of proof applied to the events of 1998 and early 1999.

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<sup>747</sup> Judgement-vol.I:paras.879-880

<sup>748</sup> Judgement-vol.I:para.882-886

<sup>749</sup> 5D1239

<sup>750</sup> tt.9926-9927

<sup>751</sup> Judgement-vol.I:para.887-894

<sup>752</sup> tt.11202,11269

<sup>753</sup> Judgement-vol.I:para.892

<sup>754</sup> Judgement-vol.I:para.912

***Sub-Ground 6(14): Breakdown in communication***

500. The Chamber lists examples of problems in the communication between KVM and the authorities of FRY and Serbia,<sup>755</sup> which are supposed to illustrate the authority of Šainović on the one hand and non-cooperativeness on the other. These problems are security of the KVM,<sup>756</sup> failure to establish a “consular office” in Priština<sup>757</sup> and information on mine fields.<sup>758</sup>

501. The Chamber fails to weigh the merit of the KVM’s requests in light of the Geremek-Jovanović agreement,<sup>759</sup> as has been done in the case of the helicopter for medical evacuation<sup>760</sup> and requests for barracks inspections.<sup>761</sup> Had the Chamber accurately and thoroughly assessed the nature of the requests that it describes as a breakdown in communication, the conclusion of the Chamber regarding Šainović’s attitude towards KVM could not have been that “*Šainović was at times helpful to the KVM*”,<sup>762</sup> but rather that Šainović fully cooperated with KVM, within the boundaries of his powers, which finding would have had a considerable impact upon the assessment of Šainović’s *mens rea* with respect to the events in Kosovo.

502. The Chamber states that after Račak, there were no more meetings between KVM and the authorities of FRY and Serbia.<sup>763</sup> However, Lončar testifies that, in February 1999, the Federal Commission considered intensifying the meetings and appointing new liaison officers in order to improve the communication with KVM.<sup>764</sup> Lončar stayed in Kosovo throughout the period until the withdrawal of KVM, discharging the duties for

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<sup>755</sup> Judgement-vol.I:para.944-951

<sup>756</sup> Judgement-vol.I:para.945

<sup>757</sup> Judgement-vol.I:para.948

<sup>758</sup> Judgement-vol.I:para.949

<sup>759</sup> P432

<sup>760</sup> Judgement-vol.I:para.956

<sup>761</sup> Judgement-vol.I:para.989,952-961

<sup>762</sup> Judgement-vol.III:para.401

<sup>763</sup> Judgement-vol.I:para.946

<sup>764</sup> P2521,para.69

which he had been appointed.<sup>765</sup> Moreover, all of the meetings with the liaison officers, as well as those held in regional centres, were held without interruptions.<sup>766</sup>

503. Here the Chamber errs in law in failing to draw conclusions about the facts of relevance for the assessment of responsibility of the accused. The Chamber erroneously establishes the facts by stating that at the beginning of 1999, the communication and cooperation between KVM and representatives of FRY and Serbia were interrupted.

#### II(F) RELIEF SOUGHT – SIXTH GROUND OF APPEAL

504. **All of the sub-grounds within the sixth ground of appeal, when considered individually and/ or cumulatively, show that the Chamber has erred in establishing beyond reasonable doubt that there was a JCE to forcibly displace part of Kosovo Albanian population.**

505. The Defence seeks that the Appeals Chamber returns the verdict of not guilty for Counts 1 until 5

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<sup>765</sup> P2521,para.73,2D239

<sup>766</sup> P460

## Ground 7: Sentencing

### *Sub-Ground 7(1): Determination of sentence*

506. The Chamber finds that Šainović was an important factor in the JCE and that he wrongfully exercised his authority, and that this aggravates his sentence.<sup>767</sup>

507. The Chamber finds that Šainović was the link between Belgrade and Priština, that he was a political coordinator and was able to make proposals, give suggestions and issue instructions.<sup>768</sup> In terms of their significance and impact, proposals, suggestions and instructions cannot be equated with commands and orders. Also, maintaining links is reduced to conveying information, which does not imply responsibility for the content of the information. Such responsibility, if any, cannot be compared with the responsibility within the chain of command or the responsibility for an issued order. The statements concerning the status of a political coordinator, as has already been discussed, are a vague assumption with no clear content, no clear position and role with respect to exerting influence on the units of the VJ and MUP. However, the claims of the political coordinator status certainly imply non-existence of effective control over the VJ and MUP units.

508. Nowhere in the Judgement does the Chamber state the effects of Šainović's engagement – which actions were executed under his influence, what the effects of such actions were, what the prohibited consequences, if any, of such actions were

509. The Defence has stated, in numerous places in the Appeal, the reasons why it believes that there was no authority on the part of Šainović's, no *de facto* powers over the VJ and MUP, and why Šainović is not the crucial link between Milošević and Kosovo. Acceptance of these reasons which shall not be repeated herein, would lead to the acquittal or at least to a considerably more lenient sentence for Šainović.

510. If Šainović ever conveyed a piece of information, or an "instruction", the number of such cases was very small. The Chamber was able to identify only a few such situations. In a multitude of events, in the enormous number of the VJ and MUP

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<sup>767</sup> Judgement-vol.III:para.1180

<sup>768</sup> Judgement-vol.III:para.462

activities, Šainović's "information" or "instructions" constitute a negligible fraction amidst hundreds or thousands of orders, commands and reports exchanged among the commanders of VJ, MUP and their respective superior structures. Regarding the period after 24 March 1999, the Chamber quotes Šainović saying on 4 April 1999 that the first stage of anti-terrorist operations was to be completed, Šainović's reference to the Operation Jezerce on 7 May 1999, and Šainović's words "do as you planned" on 1 June 1999. Three "instructions" or "proposals" throughout the entire period of war, throughout the entire period during which the crimes established by the judgement took place. If Šainović's role exists at all, if his contribution exists, if his authority exists, then his contribution is very small and the authority is rarely, if ever, used.

511. The Chamber erred in failing to make a clear distinction between 1998 and 1999. Šainović's sentence may and must be measured only in relation to the gravity of what he did in the time pertinent to the Indictment. The three "instructions" or "proposals" bear no weight or their weight is so low that Šainović's sentence may and must be minimal, measured in proportion with the minor significance of acts or omissions that he committed.

512. The Chamber erred in determining the sentence by imposing an inappropriately severe sentence on Šainović.

***Sub-Ground 7(2): Mitigating circumstances***

513. The Chamber erred in failing to take into account all the facts constituting mitigating circumstances for Šainović.

514. Firstly, the Chamber should have taken into account Šainović's efforts towards resolving the Kosovo issues peacefully, through dialogue.<sup>769</sup> The Chamber should have taken into account Šainović's persistent efforts to reach an agreement in Rambouillet;<sup>770</sup>

<sup>769</sup> tt.14070,13808,14309,14600,14665,12188,12189

<sup>770</sup> tt.10945

the Chamber should have taken into account Šainović's cooperativeness in contacts with representatives of the international community.<sup>771</sup>

515. Byrnes testifies about Šainović:

*“My clear impression, based on those discussions, was that he, as a practical politician sought to find a mutually acceptable political solution to this problem and he was working in that direction.”<sup>772</sup>*

516. Byrnes testifies that Šainović was willing to negotiate even with the KLA just to reach a solution,<sup>773</sup> and this in a situation when such an initiative would have been judged by the Serbian public as a dramatic betrayal of national interests.

517. Phillips testifies:

*“I would tell you Mr. Šainović was sincere about arriving at some sort of a co-existence strategy for both Serbian population and the Albanian population to co-exist together.”<sup>774</sup>*

518. Šainović's attempts to negotiate, his sincerity and persistence in finding solutions represent a strong mitigating circumstance which the Chamber failed to take into account.

519. The Chamber failed to take into account the statements of good character, since the testimonies to that effect allegedly refer to the time prior to the period referred to in the Indictment, although the witnesses give their accounts of his character based primarily on his conduct during the time relevant for the Indictment.

520. The testimonies about his activities in the negotiating process also constitute evidence of his good character and must be taken into account.

521. The Chamber based a great portion of its Judgement with respect to Šainović on the interview P605 which he gave to the Prosecution. Dozens of references in the Judgement are based on Šainović, which means that the Chamber assessed his interview as a credible basis for the formation of views in the Judgement. The Chamber should have attributed more weight to this fact.

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<sup>771</sup> tt.12139,12188

<sup>772</sup> tt.12188

<sup>773</sup> tt.12189

<sup>774</sup> tt.11887

522. The Chamber should have attributed more weight to Šainović's family situation,<sup>775</sup> as well as to Šainović's health condition<sup>776</sup>.

523. The Chamber does not consider that Šainović's surrender is a mitigating circumstance.<sup>777</sup> The Chamber had to treat Šainović's surrender as a mitigating circumstance and to thereby apply the same standard as in respect to other co-accused with regards to the mode and time of surrender, i.e. the time that has passed since the raising of the Indictment and his voluntary surrender to this Tribunal.<sup>778</sup>

524. Through a proper assessment and attachment of greater weight to the mitigating circumstances taken into consideration and through a proper assessment of those circumstances not taken into consideration by the Chamber, Šainović's sentence should be significantly reduced.

***Sub-Ground 7(3): Individualising the penalty***

525. The Chamber imposed one sentence on the persons convicted of participation in the JCE, and another on the persons convicted of aiding and abetting and stated it did not consider it appropriate in fixing the term of imprisonment to discriminate among three accused convicted on the basis of JCE.<sup>779</sup> The Chamber erred since it should have individualized the sentences in view of different respective circumstances and positions of each of the Accused.

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<sup>775</sup> Judgement-vol.III:para.1182

<sup>776</sup> "Confidential Ex Parte Registry Submission Pursuant to Rule 33(B) Regarding the Accused Sainovic's Health Status",30 December 2008,and 26 January 2009

<sup>777</sup> Judgement-vol.III:para.1184

<sup>778</sup> Judgement-vol.III:para.1200

<sup>779</sup> Judgement-vol.III:para.1205

**II(G) RELIEF SOUGHT – SEVENTH GROUND OF APPEAL**

**526. All of the sub-grounds within the seventh ground of appeal, when considered individually and/ or cumulatively, show that the Chamber has erred in imposing on Sainovic an excessive and inadequate sentence of 22 years of imprisonment**

**527. The Defence submits that the rendered sentence of 22 years must be substituted with a much more lenient sentence.**

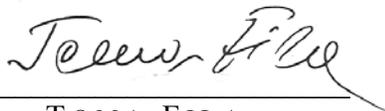
## III OVERALL RELIEF SOUGHT

528. In light of the errors identified in this Appeal Brief, the Defence respectfully seeks that the Appeals Chamber:

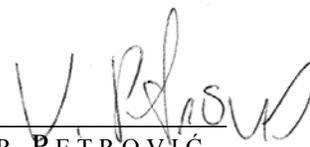
- a) Frees Šainović of the conviction imposed by the Trial Chamber, and find him not guilty of Counts 1 until 5 of the Indictment;
- b) Alternatively, quashes the Judgment rendered by the Trial Chamber and order a new trial in this case;

529. Finally, and in the alternative, if the Appeals Chamber should find that Šainović is indeed guilty in respect to some or all Counts of the Indictment, that it should further determine that the 22 year sentence is inappropriately severe and thus renders a significantly more lenient sentence.

Counsel for Mr. Nikola Šainović:



TOMA FILA  
Lead Counsel



VLADIMIR PETROVIĆ  
Co-Counsel

Dated, 23 September 2009

Belgrade, Serbia

/Word Count: **44.857**/

## APPENDIX

### List of Abbreviations and Names

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
Statute	Statute of the Tribunal
Rules	Rules of Procedure and Evidence of the Tribunal
Chamber	Trial Chamber
Prosecution	The Office of the Prosecutor
Indictment	Operative Indictment that entered force on 26 June 2006, after “Order Replacing Third Amended Joinder Indictment and Severing Vlastimir Đorđević”
Judgment	Trial Judgment rendered on 26 February 2009
Final Brief	Šainović Defence Final Trial Brief
Appellant/ Šainović	Mr. Nikola Šainović
Defence	Defence of Appellant/ Šainović
Notice of Appeal	“Defence Submission Notice of Appeal”, dated 27 May 2009
PM	Prime Minister
VJ	“Vojska Jugoslavije” (Yugoslav Army)
3-A	VJ 3 <sup>rd</sup> Army
mtbr	Motorised brigade
IKM	“Istureno komandno mesto”, Forward Command Post
MUP	“Ministarstvo unutrašnjih poslova” (Ministry of Interior Affairs)
SAJ	“Specijalne antiterorističke jedinice” (Special Antiterrorist Units – MUP)
PJP	“Posebne jedinice policije” (Special Police Units - MUP)
JCE	Joint Criminal Enterprise
JC	Joint Command
SDC	Supreme Defence Council (FRY)
SC	Supreme Command (VJ)

GS	General Staff (VJ)
SD	Security Department
SMIP	“Savezno ministarstvo za inostrane poslove” (Federal Ministry of Foreign Affairs – FRY)
TEC	Temporary Executive Council (for Kosovo)
ID	Identity document(s)
PrK	“Prištinski korpus” (Priština Corps)
SPS	Socialist Party of Serbia
FRY	Federal Republic of Yugoslavia
Federal Government	Federal Government of the FRY
Constitution	Constitution of FRY
Serbia	The Republic of Serbia
KiM	Kosovo and Metochia, Serbian autonomous province
US/ USA	United States of America
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
ICRC	International Committee of the Red Cross
Federal Commission/ Commission	Commission of the Federal Government of the FRY for Cooperation with the KVM
NATO	North Atlantic Treaty Organisation
ACTORD	“Activation order”- for NATO campaign
OSCE	The Organization for Security and Co-operation in Europe
KVM/ Mission	Kosovo Verification Mission (OSCE)
KDOM	Kosovo Diplomatic Observer Mission
KLA	“Kosovo Liberation Army”