

THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

Case No : **IT-05-87-A**

IN THE APPEALS CHAMBER

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

REGISTRAR: Mr. John Hocking

DATE FILED: **21<sup>st</sup> of July 2010**

THE PROSECUTOR

V.

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

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**NOTICE OF FILING  
OF  
PUBLIC REDACTED VERSION OF  
“DEFENCE BRIEF IN REPLY”**

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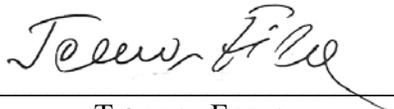
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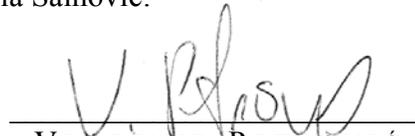
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The Defence of Mr. Nikola ŠAINOVIĆ, on appeal before the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, at The Hague, herewith submits to the Appeals Chamber its *public* “Notice of Filing of Public Redacted Version of “Defence Brief in Reply”, whereby it files its *public redacted* “Defence Brief in Reply”.

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Dated, 21<sup>st</sup> of July 2010  
Belgrade, Serbia

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DEFENCE BRIEF IN REPLY

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I INTRODUCTION

1. On 15 January 2010, the Prosecutor filed its Confidential Prosecution Response to Šainović's Brief (hereinafter "Response"). This was the Prosecutor's response to Šainović's Defence Appeal Brief filed on 22 September 2009 against the Judgement of the Trial Chamber of 26 February 2009, by which Šainović was sentenced to 22 years of imprisonment. In its Response, the Prosecutor alleges that none of the arguments contained in Šainović's Appeal prove that the Trial Chamber has committed any errors, either factual or legal, warranting appellate intervention.

2. Šainović's Defence hereby files its brief in reply, contesting all allegations of the Prosecutor. The Prosecutor's allegations in the Response are arbitrary and superficial. These allegations ignore the essence and complexity of the legal and factual problems laid out before the Appeals Chamber. The Defence fully upholds all of its arguments set forth in the Defence Appeal Brief.

## II ARGUMENTATION

3. In its Response, the Prosecutor alleges that Šainović, in his Appeal, wishes to distance himself from the violence and human tragedy resulting from the JCE implementation by painting his participation as attending only political meetings.<sup>1</sup> Already in the introduction of its Response, the Prosecutor demonstrates that it has failed to understand the meaning of Šainović's Appeal. In this trial, Šainović wants justice to be achieved, as foreseen by the Statute, the Rules of Procedure and Evidence and case law of the International Tribunal. Šainović wants his role in the events to be judged based on facts related to his participation in the events, the importance of his participation and the contribution of his participation in relation to the events he is being charged with in the Indictment, i.e. which have been established in the Judgement of the Trial Chamber. The fact that Šainović's role in the events amounts to nothing more than political activity, predominantly exercised in the form of meetings with various people at various levels, is not an attempt to distance oneself, but a request that due consideration be given to the factual situation and that Šainović's role not be judged on the basis of assumptions and analogies. In its Appeal, Šainović requests that his actions be assessed and measured in the context of the importance of his role and the influence that his actions had on the events on the ground. Such a request does not represent an attempt to distance oneself, it is merely a request for an accurate and complete assessment of the factual situation and for the amendment of errors in law that led to Šainović's conviction in this trial before the Trial Chamber.

4. The Prosecutor alleges that Šainović manufactures errors in the Chamber's careful factual findings and that the evidence viewed in its totality supports the Trial Chamber's reasoning.<sup>2</sup> The Defence contends that its Appeal is not about manufacturing errors and ignoring the evidence in its totality. On the contrary, throughout the entire Appeal the Defence proves that the Trial Chamber has fragmented the evidence, then generalizing the fragments of evidence and extending the range of the fragmented evidence to the totality of Šainović's actions, both from the aspect of time, as in respect of his role in the events. The best example of fragmentation are fragments of Milan Đaković's Notes contained in Exhibit P1468, created some time in 1998, which are vague, incomplete and often illegible, which the author drew up for his own purposes, but it is based on these fragments that the Trial Chamber builds the entire pattern of Šainović's actions and the alleged Joint Command (hereinafter "JC") in 1998.

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<sup>1</sup> Response, para.2

<sup>2</sup> Response, para.3

After this pattern has been established for the period from July to October 1998, its application is further extended not only to the end of 1998, but to the entire indictment period in 1999. In its Response, in Appendix A, the Prosecutor also takes fragments of Exhibit P1468 out of the context to corroborate that Šainović knew about the displacement of civilians and other crimes committed, discussed by Šainović or in his presence. It does this, entirely neglecting what these fragmented quotes refer to, who uttered them, with what intention, and entirely neglecting the fact that everything that had been said referred to the period up to October 1998. For instance, it neglects whether these statements and notes refer to crimes committed by KLA,<sup>3</sup> or to crimes of the KLA against other Albanians,<sup>4</sup> or to the efforts of state authorities to bring back home the people who fled from the fighting.<sup>5</sup> The record dated 4 August 1998 relates to the events for which Limaj was indicted, and from 1 September 1998, it relates to the events for which Haradinaj was indicted before this Tribunal. The record of 10 September 1998 relates to those killed in the KLA staff in Likovac, and the mass graves mentioned by Lukić on 1 October 1998 relate to the KLA crimes in the Jablanica region. With its mechanical approach, the Prosecutor establishes that the word refugee or the word crime were mentioned, and when it has established that the word was mentioned, it proceeds to purport that Šainović knew or spoke about the crime. However, what the crime was, who committed it, or was it a crime at all, is of no interest to the Prosecutor. The word was mentioned, the mere mentioning of the word is sufficient, even in a situation where the word refugee is mentioned in the context of aid and efforts to return those people home and begin the process of mitigating and stabilizing the situation on the ground. Hence, the Defence does not manufacture errors, in its Appeal the Defence only wishes to point out that the Trial Chamber's methodological approach, whose fragmentary and selective nature is supported by the Prosecutor in its Response, is unsustainable.

5. The Prosecutor alleges that the Defence seeks to substitute its interpretation of the evidence for that of the Trial Chamber.<sup>6</sup> The Defence reiterates that this is not a matter of the Defence objecting to the interpretation and the intention to adopt an alternative interpretation, but a matter of a whole series of errors of law and fact made by the Trial Chamber, which invalidate the Judgement and/or occasion miscarriage of justice. Furthermore, the Defence does not offer an alternative interpretation, but demonstrates with a whole set of examples that when errors of fact are concerned, these are errors that no reasonable trier of fact would commit.

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<sup>3</sup> e.g. Appendix A notes for 3 August 1998, notes for 1 September 1998

<sup>4</sup> *ibid*, notes for 4 August 1998

<sup>5</sup> *ibid*, notes for 7 September 1998, notes for 26 September 1998, notes for 21 October 1998

<sup>6</sup> Response, para.3

## SUB-GROUND 1(1)

6. With reference to sub-ground 1(1), the essence of the Defence Appeal concerns the findings of the Trial Chamber that Šainović's role has pivotal characteristics and that Šainović is the crucial link. The prosecutor alleges that:

- *If Minić had a leading role in the JC, Šainović could have had that role too, which is evident in Exhibit P1468.*<sup>7</sup>

The Defence contends that the label "leading role" is an arbitrary label lacking substance. The Defence contends that the term "leading role" is used several times in the Judgement and that Šainović's responsibility is assessed on the basis of that label. It is not sufficient to state that someone has a "leading role", it is not sufficient to rely on an impression on the existence of a "leading role". "Leading role" must be backed by substance: what orders did Šainović issue, what it is that Šainović did, or failed to do in Kosovo, that had key and essential repercussions on the situation on the ground. The allegation "leading role" must be operationalized, it requires consequences on the ground, in a situation where all decisions on the deployment of VJ and MUP are taken at the highest level and where the command structure runs smoothly.

- *Gajić testified that Minić and Šainović had been sent to Kosovo to co-ordinate certain political and economic activities*<sup>8</sup>

The Defence contends that the Prosecutor quoted only a fragment of Gajić's testimony. The Prosecutor quoted Gajić as saying on 11 September 2007 that the JC was a co-ordinating body, which is what he had heard said at the end of June or beginning of July 1998.<sup>9</sup> However, on 12 September 2007, in response to the questions of the Presiding Judge, Gajić answered that he had heard about the JC in the course of preparations for his testimony and that he had gained all knowledge about the JC in the course of preparations to testify<sup>10</sup> The Defence

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<sup>7</sup> Response, paras.21,22

<sup>8</sup> Response, para.23

<sup>9</sup> tt.15412

<sup>10</sup> tt.15446

reiterates that no reasonable trier of fact could accept two entirely contradictory statements given at the same time and under the same circumstances, and that any reference to Gajić in this context is unacceptable.

- *Perišić's complaint in letter P717*<sup>11</sup>

Perišić discusses the attempt, concerning which the Defence laid out its arguments.<sup>12</sup> Here, the Defence reiterates that Perišić's letter on the attempt was drawn up on 23 July 1998, then followed an anti-terrorist operation, then followed Perišić's orders, then followed by his inspection in Kosovo, after which Perišić attended a whole series of meetings, including meetings with Milošević,<sup>13</sup> without ever mentioning the allegation on the attempt or the allegations on command outside the foreseen chain of command. In his speech at the end of the anti-terrorist operation in 1998, Perišić stated that VJ completed its tasks successfully and professionally.<sup>14</sup> Perišić directed the work of the Priština Corps through regular and extraordinary controls.<sup>15</sup> Hence, the attempt, if there had ever been one, remained on the level of an attempt, because a whole sequence of events that transpired after the letter of 23 July 1998, resulted in Perišić never mentioning such allegations again.

- *Crosland's allegation that Dimitrijević complained to him that Pavković was acting outside the chain of command*

The Defence contends that Dimitrijević denied Crosland's allegations.<sup>16</sup> However, more importantly, Crosland himself does not believe Dimitrijević. With regard to Dimitrijević's allegations, Crosland stated that it was possibly Dimitrijević's attempt to distance the VJ General Staff from the actions of the 3<sup>rd</sup> Army.<sup>17</sup> Crosland was engaged in intelligence work, considering the position he occupied within the diplomatic service, and he assesses Dimitrijević's alleged statements by seeking the motives and interpreting the statement in the context of the motives. Therefore, a statement that even Crosland found doubtful at the relevant time, and

<sup>11</sup> Response, paras. 23, 24

<sup>12</sup> Defence Appeal Brief, para. 97

<sup>13</sup> P2166, 4D137, 4D429, 4D526, 4D432, 4D433, 4D143, 4D98, 4D416, 4D418, 3D697, 3D757

<sup>14</sup> 3D757, p. 6

<sup>15</sup> *ibid.*, p. 7

<sup>16</sup> tt. 26667-26668, 266670-26672

<sup>17</sup> P684, para. 5

that even the source of the alleged information denied, is presented as an indisputable and convincing fact.

- *The fact that Bulatović assigned Šainović to Kosovo at the behest of Milošević, and that the only possible source of Šainović's authority was Milošević*<sup>18</sup>

Several times the Defence stated that these allegations are incorrect,<sup>19</sup> and here it will contend that all allegations on Šainović's authority are assumptions and as such their quality cannot rise to the level of evidence. Furthermore, these assumptions say nothing about the substance of authority, and remain on the level of arbitrary allegations.

- *Witnesses testifying about Šainović's authority and its source based on political talks they participated in*<sup>20</sup>

The Defence contends that international representatives cannot be the primary source for the allegations on Šainović's authority. Any knowledge that they might have had could not have been much more than an impression on which they based their assumption that "the only possible source of Šainović's actual authority was Milošević". Impressions as a basis for assumptions cannot be considered proof beyond reasonable doubt, which was all argued in the appropriate sections of the Defence Appeal Brief.<sup>21</sup>

7. With regard to allegations concerning sub-ground 1(1), the Defence concludes that the Prosecutor failed to respond to the Defence's essential objection – which orders did Šainović transmit, what were the consequences thereof.<sup>22</sup> In its Response, the Prosecutor merely recounts parts of the Trial Chamber's Judgement, which abounds with allegations on the "leading and pivotal role", but without convincing evidence on what Šainović did and what events on the ground corresponded to his actions.

8. The Prosecutor changes the Defence's thesis and says that with regard to sub-ground 1(1) the Defence's objection is that the Trial Chamber has failed to state the decisions that Milošević could not implement through the chain of command, so that he needed Šainović.<sup>23</sup> The point of the arguments set

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<sup>18</sup> Rresponse,para.29

<sup>19</sup> Defence Appeal Brief,paras.28-37

<sup>20</sup> Response,para.30

<sup>21</sup> Defence Appeal Brief,paras.39-51

<sup>22</sup> Defence Appeal Brief,para.15

<sup>23</sup> Response,para.31

forth in the Defence Appeal is not to guess whether Milošević could theoretically have done something in one way or another, but to establish what Milošević actually did. The Trial Chamber sentenced Šainović to a harsh term of imprisonment by establishing a single “decision” that Šainović had transmitted, and that was a “decision” that had been published in all daily papers on the previous day.<sup>24</sup> The Trial Chamber does not have another example, nor does the Prosecutor, hence to sentence Šainović on the basis of one bizarre example and a set of assumptions and impressions is unacceptable.

9. The Prosecutor maintains that Šainović was a crucial link to Milošević in 1999,<sup>25</sup> based on the following allegations:

- *Vasiljević testified that the JC had executive command and that this command was in the hands of Šainović*<sup>26</sup>

The Prosecutor grossly misrepresents evidence. Vasiljević’s statement that the “Joint Command actually had executive command”<sup>27</sup> was his comment on a document shown to him which concerns 1998.<sup>28</sup> Here the Defence will not mention that in this part of Vasiljević’s testimony in the *Milošević* case, Vasiljević *de facto* testified as a military expert, considering that he interprets documents which date back to the time when he, as a military pensioner, took no part in the events. The Defence will also not mention that in Šainović’s trial, Vasiljević gave a significantly different assessment of the same circumstances.<sup>29</sup> The Prosecutor further alleges that at the meetings of 4 April 1999 and 7 May 1999 Šainović issued directives,<sup>30</sup> but here too the Prosecutor fails to state the circumstances, the content and consequences of the “directives”.

- *In 2001 Pavković stated that the army and police were coordinated through political actors*<sup>31</sup>

The Defence contends that this refers to an article in the press in Exhibit P1281 from 2001, from the time when the refrigerated truck was discovered in the Danube and when the actors who had not been indicted by the International Tribunal in 1999 participated in a public debate through press releases, which

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<sup>24</sup> 5D1289,P1996

<sup>25</sup> Response,paras.33-40

<sup>26</sup> Response,para.34,38

<sup>27</sup> Response,para.34-footnote 90

<sup>28</sup> P2589 p.15975

<sup>29</sup> 2D387, [REDACTED],P2862

<sup>30</sup> Response,paras.34,36

<sup>31</sup> Response,para.37

were nothing more but political manipulation with the sole purpose of diminishing or transferring the responsibility for the events to others.

- *Vasiljević's allegation that "Šainović must have been appointed by Milošević and must have reported to him"*<sup>32</sup>

The Defence believes that Vasiljević's line of reasoning and the Prosecutors references to it are a striking example of assumptions that cannot reach the quality of facts proven beyond reasonable doubt.

10. Concerning sub-ground 1(1) the Defence finds that the Prosecutor's allegation that Šainović's pivotal and crucial role must be deducted from the totality of evidence, the evidence mentioned in its analysis concerning this sub-ground of the Defence Appeal. The Defence however contends that the totality of evidence is not some abstract synthetic category, but that the totality of evidence is made up of all the relevant "individual" pieces of evidence in correlation with each other. If none of the "individual" pieces of evidence referred to by the Trial Chamber and indicated by the Prosecutor indicate how and in what way Šainović's "orders", his actions or failure to act influenced the events in Kosovo, the totality of evidence cannot create a new quality – the quality of a crucial link between Milošević in Belgrade and the events in Kosovo. Hence, the Defence concludes that all of the Prosecutor's allegations with regard to this sub-ground of the Appeal are unfounded.

#### SUB-GROUND 1(2)

11. The Prosecution's allegation with regard to the Chamber's finding that Šainović was a political coordinator is unfounded<sup>33</sup> and ignores the point of the Defence's objection. The Trial Chamber found that Šainović was a political coordinator, and did not use the term descriptively but to denote the function that Šainović occupied, a position imposing rights and obligations. The Prosecutor's theory during the first instance procedure was that Šainović was the Head of the JC, who exercised command, control and effective control in other ways. A political coordinator is a position that differs in all key aspects from the position of Head of the JC and this is why the Defence contends that Šainović did not have a fair trial.

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<sup>32</sup> Response, para. 38

<sup>33</sup> Response, paras. 45-49

## SUB-GROUND 1(3)

12. The Prosecution contends that the Trial Chamber correctly established that Šainović was Milošević's representative for Kosovo<sup>34</sup> and that there is no error in the Trial Chamber's reasoning. In support of its contention, the Prosecutor alleges the following:

- *That sending Šainović to Kosovo was Milošević's idea and that Šainović did not report to Bulatović about the incidents in Gornje Obrinje and Račak, nor about Rugova's house arrest*<sup>35</sup>

The Defence alleges that the Prosecution deliberately ignores and simplifies relations between the top ranking political representatives. The Prosecution expects a Deputy Prime Minister to report to the Prime Minister as if this was a matter of relations in a military unit of the lowest rank. Also, the Prosecutor wants to portray the participation of the President of the FRY and President of the ruling political party in a political process in which, among other things, various personnel issues are resolved, as mere instrumentalization and obedient directive.

- *that Dimitrijević and Perišić were not informed about Kosovo events*<sup>36</sup>

The Defence contends that Perišić issued a directive on the deployment of VJ in Kosovo in 1998.<sup>37</sup> Perišić inspected the units in Kosovo in August 1998 and had no remarks on the functioning of the chain of command.<sup>38</sup> At the meetings of the Chiefs of Staff, the first briefing always concerned the Kosovo situation.<sup>39</sup> Any allegations about not being informed are really motivated by what Crosland recognizes as an attempt to distance oneself from the events in Kosovo.<sup>40</sup>

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<sup>34</sup> Response, paras. 50-62

<sup>35</sup> Response, para. 50

<sup>36</sup> Response, para. 51

<sup>37</sup> 4D137, tt. 15076

<sup>38</sup> 4D506, para. 7, 4D99, tt. 17657

<sup>39</sup> 3D646

<sup>40</sup> P684, para. 5

- *that Merovci's testimony is consistent with the finding that Šainović conveyed Milošević's instructions and decisions*<sup>41</sup>

The Defence contends that Merovci stated that Šainović was the person who often visited and announced meetings.<sup>42</sup> The Defence contends that decisions and instructions can possibly be conveyed within the system of the FRY and Serbia, but that the talks with Merovci and the announcement of a meeting with Ratko Marković or Milan Milutinović cannot be qualified as evidence in support of the allegation that Šainović conveyed decisions and instructions. Claiming that Šainović was conveying orders by announcing a meeting with Milutinović, who was acquitted of all charges, and contending that this is a proof of his guilt, is a paradox.

- *that Petritsch's witness statement proves that Šainović's role extended beyond his powers as Chairman of the KVM Commission*<sup>43</sup>

The Prosecutor avoids recognizing the contents of Šainović's role, as set forth in the document establishing the KVM Commission. The task of the KVM Commission was to coordinate the political, security and logistical aspects of the functioning of the KVM.<sup>44</sup> In order to fulfil his role, Šainović could not have functioned in an information void. The political aspect entailed liaising with domestic and international political and diplomatic representatives, the security aspect entailed liaising with persons in charge for security, both in the KVM and in the structures of the FRY and Serbia. The conclusion of the Trial Chamber that Šainović was appointed Chairman of the Commission for Co-operation with KVM in order to continue his dealings with high-level VJ and MUP officials in Kosovo<sup>45</sup> is simply inconsistent with the position and role of the Commission, and the conditions on the ground under which this Commission operated.

- *that Šainović's deposal from the position of SPS Vice-President does not show that Šainović did not act as Milošević's man in Kosovo*<sup>46</sup>

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<sup>41</sup> Response, para. 57

<sup>42</sup> tt. 8535

<sup>43</sup> Response, para. 59

<sup>44</sup> 2D8, para. 2

<sup>45</sup> Judgement, vol. III para. 401

<sup>46</sup> Response, para. 62

The Defence reiterates that the central issue is the finding of the Trial Chamber that Šainović was Milošević's man of trust, his closest and most reliable associate. Šainović's deposal within the SPS mainly shows that the personal trust and reliability does not exist, at least not in the way that it existed between Milošević and Milutinović. The allegation that Šainović was appointed Chairman of the KVM Commission only to serve Milošević's influence neglects the manner in which Šainović was proposed for that position, the reasons and the procedure for his appointment,<sup>47</sup> which all together leads to a different conclusion on Šainović's position and role of Chairman of the Commission for Co-operation with KVM.

13. The Defence concludes that the allegations about Šainović as Milošević's representative for Kosovo are entirely unfounded. The Prosecutor supports the findings of the Trial Chamber and avoids replying to the fundamental objection of the Defence: specifically which of Milošević's orders did Šainović convey in Kosovo, which of these decisions with regard to Kosovo did Šainović make independently, which Šainović's activity influenced events in Kosovo, especially those that could contain elements of a criminal offence.

#### SUB-GROUND 1(4)

14. With regard to the allegations concerning the genesis of the JC, the Defence reiterates that the position of the Chamber is based on Dimitrijević's sentence that he himself calls a speculation.<sup>48</sup> The Defence in particular emphasizes that the Chamber opted only for some of the elements of Dimitrijević's speculation. In fact, on the same occasion, Dimitrijević testified that the term JC was coined to provide Pavković cover for some of his activities.<sup>49</sup> The Prosecutor cites Momir Stojanović testimony on co-ordination problems, albeit at lower levels.<sup>50</sup> These statements do not support the Trial Chamber's finding on the need to ensure efficient co-operation mechanisms, on the contrary, these statements indicate that the term JC was used in the context of accomplishing personal interests.

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<sup>47</sup> 2D81,tt.13840-13841,14028

<sup>48</sup> tt.26713

<sup>49</sup> tt.26595

<sup>50</sup> tt.19765

## SUB-GROUND 1(5)

15. With regard to allegations that concern the existence of a JC in 1999, the Prosecutor cites two orders in which the JC is mentioned. In document P2017, the JC decision is mentioned in the context of breaking down the forces in Malo Kosovo.<sup>51</sup> However, the Prosecutor forgets that the order that concerns Malo Kosovo is the order with the heading of the JC, P1966, which is one of the 16 orders that, as the Trial Chamber established, were made by the Priština Corps Command.<sup>52</sup> Furthermore, Exhibit P2016 concerns the order with the heading of the JC P1878 which, as the Trial Chamber also established, was drawn up by the Priština Corps. The same applies to Ojdanić's suggestions of 17 April 1999<sup>53</sup> which the Prosecutor cites as evidence in support of the existence of the JC in 1999.<sup>54</sup>

16. Further, the Prosecutor entirely misconstrues Đaković's testimony. In fact, when Pavković's article from the web site in 2001 was shown to him<sup>55</sup> Đaković replied several times "I don't know",<sup>56</sup> only after the question was repeated did he answer, with evident scepticism in relation to the contents of P1281, that he agreed with Pavković only in part, specifically as it relates to the representatives of VJ and MUP,<sup>57</sup> even as there is nothing in the text of the records indicating to which time period this answer refers. Đaković clearly distances himself from a question that he was asked to answer which involves the JC and co-ordination through political stakeholders.

17. The Defence in particular points to the groundlessness of the Prosecutor's allegation that the 16 orders, with the heading of the JC, corroborate the existence of the JC in 1999. As mentioned previously, the Chamber established that these were orders of the Priština Corps.<sup>58</sup> The Prosecution wants to prove the existence of a JC in 1999 on the grounds of these documents, despite the fact that the Trial Chamber has established that the Priština Corps documents were created under specific circumstances,<sup>59</sup> circumstances which do not indicate that there was any special body or authority called the JC. Of

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<sup>51</sup> P2017,p.2

<sup>52</sup> Judgement,vol.I paras.1135, 1144

<sup>53</sup> P1487

<sup>54</sup> Response,para.70

<sup>55</sup> P1281

<sup>56</sup> tt.26473

<sup>57</sup> tt.26474

<sup>58</sup> Judgement,vol.I para.1135

<sup>59</sup> Judgement,vol.I paras.1122-1144

particular importance is the fact that there is no evidence whatsoever that Šainović had any connection with the origin or implementation of these orders.

18. In support of its allegation that the JC existed in 1999, the Prosecutor states that a meeting was held on 1 June 1999 that was similar to the JC meetings held in 1998.<sup>60</sup> With one meeting which is similar, hence not the same, the Prosecutor wants to evoke a whole manner of work which entailed daily meetings of a specific content and various participants with different position and role at these meetings. The mere fact that there was only one meeting in 1999 strongly distances the meetings in 1998 from the event of 1 June 1999. The Prosecutor's intention is to present the JC as a body coordinating VJ and MUP in Kosovo, but it is clear, based on existing evidence, that no reasonable trier of facts could arrive to the conclusion that, at the time of NATO air strikes, at the time of a violent conflict with the KLA in all of Kosovo, such coordination could have been implemented by some body that Šainović was part of, which met only once, a few days before the end of the war. There is simply no evidence that Šainović, either autonomously or through a JC, in any way influenced the activities of the VJ and MUP on the ground in Kosovo. No reasonable trier of facts could conclude, based on a single meeting in 1999, that Šainović's role was to coordinate the VJ and MUP in a complex and intense conflict, such as the conflict in Kosovo, in the spring of 1999.

19. The key error of the Trial Chamber in the context of this sub-ground, is that it has misconstrued the facts concerning the substantially different circumstances in 1998 and 1999. These circumstances equally regard the character and the intensity of the conflict, and the position and role of the actors in the event. Equating these circumstances, attempting to draw similarities based on isolated and sporadic events, is not conducive to establishing the factual situation that can satisfy the standard beyond reasonable doubt.

#### SUB-GROUND 1(7)

20. With regard to the role of the working group for Kosovo and TEC, the Prosecutor alleges that nothing in the obligations of the members of these bodies could have prevented them from attending JC meetings. In its response, the Prosecutor ignores the essence of the error. This is not a matter of being physically present, but about the existence of different bodies which had their different members and

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<sup>60</sup> Response, para. 72

different roles. The point is that a joint meeting of people occupying different roles in different bodies does not automatically make them part of a third body, in this case the JC. The fact that representatives of the SPS working group for Kosovo on the one side, and Šainović as the representative of the Federal Government of the FRY on the other side sat together at meetings, in itself does not entail that they formed a third entity, but that each continued to perform their tasks, where those joint meetings were no more than a mutual exchange of information required to perform the tasks that were entrusted to them.

#### SUB-GROUND 1(8)

21. The Prosecutor alleges that in his Appeal, Šainović failed to indicate the errors in the findings of the Trial Chamber concerning the JC in 1998, and in support of its allegation, lists the following arguments:

- *Šainović's request for a helicopter that was to be marked with the red cross and used to provide help to civilians*<sup>61</sup>

By misconstruing evidence the Prosecutor wants to disguise the main issue with regard to the helicopter, reflected in the following: Šainović requested a VJ helicopter for humanitarian purposes and he did not get it. All other circumstances are ephemeral – Šainović's influence can be measured by different standards, but in practice it is such that he is unable to provide one helicopter for humanitarian purposes. The Trial Chamber and consequently the Prosecutor both erred, because the key issue here is the issue of the importance, the scope, the extent of Šainović's influence. The event with the helicopter is a proof of the insignificance of Šainović's influence on the VJ chains of command at the given time.

- *Request for rapid reaction forces mentioned by Pavković*<sup>62</sup>

The Prosecutor mentions that Pavković's request in his letter of 22 September 1998 demonstrates the link between discussions held during the JC meetings and requests submitted within the VJ. However, once again, the Prosecutor ignores the facts: in Exhibit P1468 on 10 September 1998 Đaković wrote five pages of notes

<sup>61</sup> Response, para. 80, Judgement, vol. I para. 1082

<sup>62</sup> Response, para. 82

without mentioning a word on the alleged position of the JC.<sup>63</sup> Nevertheless, regardless of Pavković's references to the (non-existent) stance of the JC, the 3<sup>rd</sup> Army Commander did not allow the formation of such units.<sup>64</sup> Again, the Prosecutor neglects the key issue here, which is that the alleged requests from the JC meetings did not influence the decisions in the VJ chain of command. The Prosecutor believes that it is sufficient that these requests existed – while the Defence believes that even if these requests had existed, the key issue is whether these requests had any influence on the decisions being made. All of the examples quoted, clearly demonstrate that the decision making within the VJ is autonomous and intact.

- *incidents between Pavković and Samardžić demonstrate that there was tension between the JC and the 3<sup>rd</sup> Army Command*<sup>65</sup>

Firstly, the Defence contends that the Prosecutor misconstrues evidence. The tension, if there ever was any, did not transpire between the JC and Samardžić, but between Pavković and Samardžić. Also, regardless of the “tension”, Samardžić's word is last.<sup>66</sup> Further to the point, as mentioned previously, Perišić's letter quoted by the Prosecutor once again<sup>67</sup> originated at the very start of the anti-terrorist action in 1998,<sup>68</sup> and was followed by a whole series of Pavković's activities, where there is no mention of any “attempt” by Šainović and Minić, or of by-passing of levels of command.

22. The Prosecutor did not succeed in responding to any of the arguments set forth by the Defence in sub-ground 1(8). The evidence quoted by the Chamber in support of the authority of the JC, its individual parts or its totality, could not convince any reasonable trier of facts about the authority of the JC in 1998.

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<sup>63</sup> P1435,P1468,pp.98-102

<sup>64</sup> P1439

<sup>65</sup> Response,para.84

<sup>66</sup> 4D458

<sup>67</sup> Response,para.85

<sup>68</sup> P717

## SUB-GROUND 1(9)

23. The Defence is especially concerned with the findings of the Trial Chamber concerning the meetings held in 1999 and the elaboration of VJ and MUP plans. The Prosecutor arbitrarily dismisses these contentions not recognizing the importance of the facts contained in this sub-ground. If civilians – political representatives have no role in co-ordination in 1999, then there is no need for a JC in which civilian representatives would participate, furthermore any reason for Šainović's engagement in Kosovo in 1999 also ceases to exist. The planning and co-ordination methods in 1999 rule out all motives and leave no space for Šainović's engagement, such as it is determined by the Trial Chamber.

## SUB-GROUND 1(10)

24. The Prosecutor does not have an answer for an important sub-ground of the Defence Appeal which concerns the findings about the JC in 1999. Firstly the Prosecutor states that the co-ordination system between the VJ and MUP continued to function,<sup>69</sup> which is not a proof of the existence of a JC but the type of co-operation inherent to all armed formations operating on the same territory. In support of its assertions, the Prosecutor cites Exhibits P2016 and P2017<sup>70</sup> although it is evident that these documents refer to the 16 orders of the Priština Corps Command. The Prosecutor concludes with Pavković's website article from 2001<sup>71</sup> in which Pavković argues about liability with Mihajlović, the Minister of Internal Affairs at the time. The Prosecutor does not respond to any of the arguments set forth by the Defence in this sub-ground, which, the Defence finds, is understandable, considering that the Trial Chamber's findings which the Defence contests here cannot withstand any test from the standpoint of proof beyond reasonable doubt.

## SUB-GROUND 1(11)

25. In its Appeal, the Defence pointed out evident and irreconcilable contradictions in the Trial Chamber's Judgement. In Judgement Vol. I para. 1151, which is the central point where conclusions are

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<sup>69</sup> Response, para. 91

<sup>70</sup> Response, para. 94

<sup>71</sup> Response, para. 95, P1281

drawn about the JC in 1999, there is no answer: it is said that some actors “*referred to the JC*” and that “*when referring ... they adverted to the whole co-ordination system established in 1998...*”<sup>72</sup> Hence, the Trial Chamber does not offer a clear and unambiguous answer to the key issue, instead it offers an explanation that some persons “referred” to something that had existed in 1998. The existence or non-existence of something as important and as serious as a command co-ordinating action in an armed conflict cannot be confirmed by means of “references”. The Command either exists or it does not. However, the Trial Chamber fails to provide the answer, while in some other sections of the Judgement it offers different conclusions, which makes the entire Judgement vague and contradictory on this issue.

#### SUB-GROUND 1(12)

26. The Prosecutor evaluates the Defence’s arguments contesting the conclusion that Šainović was a leading member of the JC as redundant.<sup>73</sup> The Prosecutor cannot or does not want to respond to tangible arguments, consequently grossly qualifying the Trial Chamber’s analysis and evident error as redundant. The Trial Chamber treats the allegation that Šainović was a leading member of JC as an axiom. The Trial Chamber concludes this in one paragraph and in making this contention it refers to another paragraph, which, in turn, is based on a third paragraph in which there is nothing on Šainović’s leading role.<sup>74</sup> Hence, this is not a case of redundancy of Šainović’s arguments but a gross error of the Trial Chamber. The Prosecutor does not respond to the arguments set forth in this sub-ground because there is no real answer to this mistake.

#### SUB-GROUND 1(13)

27. The Prosecutor contends that the fact that there is no other evidence to corroborate the statements attributed to Šainović in Exhibit P1468 is irrelevant.<sup>75</sup> For the Prosecutor, the fact that there are some statements corroborating Exhibit P1468 is sufficient, also to confirm everything that relates to Šainović.

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<sup>72</sup> Judgement, vol.I para.1151

<sup>73</sup> Response, para.97.

<sup>74</sup> Defence Appeal Brief, para.147

<sup>75</sup> Response, para.100

The Defence however, analyzes in its sub-ground all the statements attributed to Šainović, which may resemble some kind of imparting directives. The Defence showed the background of these statements, the circumstances and reasons for which they were made, and that background and those circumstances rule out Šainović's influence on decision-making, planning and activities of the units on the ground.<sup>76</sup>

28. The Prosecutor however has no interest in analyzing the background, or in the specific events, or how and why something was said, and whether what was said produced changes in the real state of affairs.<sup>77</sup> Perišić's letter of July 1998, concerning an attempt, which means that something was possibly attempted but not actually carried out, is sufficient proof for the Prosecutor. The Prosecutor also quotes Exhibit P683 and Crosland, even though there is nothing in these documents and in his testimony about the position and role of Šainović in the JC. Finally, the Prosecutor quotes Cvetić and Vasiljević, one of whom never attended any of the JC meetings, but gathered everything he knows from the contested and entirely unfounded allegation concerning the information that he received on 10 July 1998, that some JC had been established. Vasiljević, who was a pensioner up to April 1999, makes judgements based on a meeting held on 1 June 1999, which is discussed more extensively in other sections of the defence appeal briefs.

29. Exhibit P1468 is a piece of evidence with several hundred mistakes, illegible segments and other ambiguities. The allegation that the Chamber took all these circumstances into consideration in weighing the evidence, contained both in the Judgement, and in the Prosecutor's response, is an entirely arbitrary allegation. Although this is a document full of errors and ambiguities, although the author of the document explains how the document was created and what kind of and how much importance should be attached to it, the Judgement against Šainović is almost entirely founded on this document. Therefore, perhaps the Chamber has weighed the evidence, but its assessment when it comes to P1468 is inadequate and does not provide grounds for a series of wide-ranging findings that are based on this document.

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<sup>76</sup> Defence Appeal Brief, paras. 157-174

<sup>77</sup> Response, para. 101

## SUB-GROUND 1(14)

30. The Prosecutor contends that the Chamber correctly assessed Cvetić's testimony in every aspect and that Šainović did not show that the Chamber's assessment was unreasonable.<sup>78</sup> The Chamber's assessment was unreasonable because the Chamber superimposes Cvetić's testimony to the testimony of all participants to the so called JC meetings, as well as to numerous other witnesses from the MUP who participated to the meetings mentioned by Cvetić. They all testified about the same circumstances and the Chamber chooses to believe only Cvetić, although there is a whole set of circumstances that make Cvetić's testimony unreliable and untrustworthy. Even the Chamber does not believe everything Cvetić says,<sup>79</sup> but despite the fact that it does not trust him in important elements of his testimony, despite the fact that numerous other witnesses of undisputed credibility consistently talk about events in one way and Cvetić in another, this is not reason enough for the Trial Chamber to dismiss Cvetić. Such an approach and such an assessment of evidence are unreasonable according to the opinion of the Defence and require the intervention of the Appeals Chamber.

## SUB-GROUND 1(15)

31. The Prosecutor does not set forth a single argument why it believes that the Defence erred in challenging the authenticity of Exhibit P1459, instead, arbitrarily and unfoundedly, it requests that the Defence's arguments be summarily dismissed.<sup>80</sup> The Prosecutor contends that the use of Exhibit P1459 is corroborative in nature and that Šainović would have been convicted even if the Chamber had dismissed P1459.<sup>81</sup> However, the Defence does not share the Prosecutor's standpoint. The Defence maintained several times that the Trial Chamber built an artificial construction, in an unreasonable manner, founded on a handful of documents, among which P1459, and a huge number of assumptions and uncorroborated claims, which is supposed to demonstrate that Šainović had a leading role in 1998 and 1999. Considering that the documents which the Trial Chamber quotes are very few, that they are

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<sup>78</sup> Response, para. 104

<sup>79</sup> Judgement, vol. I para. 1029

<sup>80</sup> Response, para. 105

<sup>81</sup> Response, para. 106

almost controversial, (P1468 ,P1459, P2166), every document counts which is why the Defence requests that the Appeals Chamber intervene and correct the Trial Chamber's stance with respect to P1459.

#### SUB-GROUND 1(16)

32. Regarding this sub-ground, the Prosecutor entirely misunderstands the subject of the Defence's appeal. Namely, the Defence points to the fact that the Chamber did not take into consideration at all the significance and role of the 3<sup>rd</sup> Army forward command post in Priština in 1998, which had the central role in planning and approving actions of the Priština Corps. The Prosecutor mentions the existence of a JC order in reference to the Slup and Voksa operation, however, this order simply does not exist.<sup>82</sup> In addition, the Prosecutor alleges that the systems of command continued to operate but that the JC used the systems to "bring their influence on how the Plan for Combating Terrorism was put into effect"<sup>83</sup> The key question, in this sub-ground and elsewhere is what and how powerful that influence was - was the influence significant – which is of importance for establishing the legal elements of Šainović's responsibility as a member of the JCE. The answers to the questions of what and how powerful Šainović's influence was, how and at what point his influence gained the characteristics of a significant one cannot be found anywhere in the Trial Chamber's Judgement in this case.

#### SUB-GROUND 1(18)

33. The Prosecutor rejects all Defence's statements regarding the assessment of Dimitrijević's testimony offering no arguments of its own for such a rejection.<sup>84</sup> Dimitrijević testified as a Trial Chamber's own witness; the Trial Chamber invested huge efforts to bring Dimitrijević, convinced that he could offer to the Trial Chamber the information deemed necessary. However, when Dimitrijević finally arrived and presented his statements under oath, the Chamber refused to accept those statements. Although the Chamber's right to freely assess the evidence and assign to it the weight it deems adequate is undisputable, the Chamber also has to bear in mind the defendant's right to a fair trial and to have the

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<sup>82</sup> Response, para. 107

<sup>83</sup> Response, para. 110

<sup>84</sup> Response, para. 113

evidence presented to him directly, the necessity of allowing the defendant to question the witness and put forward to him his own theses and to demand from the witness to comment on such theses. On numerous issues, including Dimitrijević's testimony, the Chamber, and now the Appeals Prosecutor as well, act as if the trial was not necessary at all. Crosland's telegram and his statement were available to the parties even before the commencement of the trial. Both the Chamber and the Prosecutor dwell upon the evidence they had at the onset of the trial entirely ignoring the explanations extended by any witness, in this case by Dimitrijević. Dimitrijević explains what he said, when and why he said that. Further to the point, both the Chamber and the Prosecutor are inconsistent in quoting Crosland. Namely, Crosland, as a participant in this intelligence game of information, semi-information and misinformation so characteristic for any intelligence operation, writes in his telegram that Dimitrijević may have had in mind possible ICTY investigations and that for that reason he may have wanted to assign the responsibility onto the MUP.<sup>85</sup> Crosland also writes that what Dimitrijević told him was possibly an attempt to distance VJ General Staff from 3<sup>rd</sup> Army actions under Pavković.<sup>86</sup> This means that, on one side, Dimitrijević dismisses the content of the talks Crosland reports about and on the other, that Crosland himself has a dilemma about the accuracy of what was allegedly said. Under the circumstances, the Chamber's reliance upon the content of Crosland's telegram would not have been acceptable for any reasonable trier of facts.

#### SUB-GROUND 1(19)

34. The Prosecutor contends that all the elements related to the meeting of 4 April 1999 were correctly established.<sup>87</sup> The Prosecutor asserts that during that meeting, Šainović exhibited a leadership role.<sup>88</sup> The Prosecutor admits the possibility that Stevanović was the person issuing directives but insists that Šainović also exhibited a leadership role.<sup>89</sup> Thus, the Prosecutor shows essential lack of understanding of the MUP system functioning, in this particular case. Namely, if Stevanović issued directives, if Stevanović was formally and essentially empowered to issue such directives, if in this situation as well as in all other situations his directives were acted upon then this fact is the measure of

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<sup>85</sup> P683,para.12

<sup>86</sup> P684,para.5

<sup>87</sup> Response,para.116

<sup>88</sup> Response,para.118

<sup>89</sup> Response,para.118

Šainović's participation in the meeting. Šainović could have repeated Stevanović's words, he could have said nothing at all or he could have said something else but the point is that the MUP acted upon the directive issued by Stevanović. The essence of Šainović's appeal lies in the extent of his contribution and influence and therefore the meeting of 4 April 1999 is just one more example clearly showing that in no situation throughout the time covered by the Indictment could the extent of Šainović's influence and contribution be characterized as significant.

#### SUB-GROUND 1(20)

35. The Prosecutor asserts that it was Šainović who invited Pešić to a meeting held at the Grand Hotel.<sup>90</sup> From the fact that Pešić at one point used a plural form the Prosecutor draws the conclusion that the plural must have referred to Šainović as well which is completely arbitrary. At this point, and indeed, at numerous other points, the Prosecutor ignores the essence. It was Pavković who reprimanded Pešić, it was Pavković who talked to Pešić, it was Pavković who issued further orders.<sup>91</sup> The essence of the Defence appeal under this sub-ground is that the above allegations are aimed at showing that Pešić's report to Pavković is the evidence of Šainović's exertion of influence. The Defence notes that both the Chamber and the Prosecutor use each and every, even the least significant of circumstances in an attempt to prove some kind of Šainović's alleged influence. The Prosecutor neither asked Pešić, during his testimony, what and how powerful Šainović's influence had been nor did the Prosecutor ask the witness if Šainović had said anything at all. In the absence of true evidence the Chamber goes so far as to dwell upon the situations when Šainović was watching TV and listening to the agency reports on the NATO attacks on the FRY.<sup>92</sup> The essence of all these allegations is that none of them can, either individually or in their totality, elevate Šainović's role in the events to the level of significant contribution.

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<sup>90</sup> Response, para. 120

<sup>91</sup> P2502, para. 34

<sup>92</sup> Judgement, vol. III para. 340

## SUB-GROUND 1(21)

36. The Prosecutor misquotes the Judgement with respect to the double standard applied to Šainović and Milutinović.<sup>93</sup> The Chamber finds in Judgement Vol. III paras. 132 – 142 all the meetings held in the presence of Milutinović to be moral boosting<sup>94</sup> whereas Šainović's presence at those same meetings are found to be the evidence of his authority. The dual nature of the standards applied to Šainović and Milutinović is also reflected elsewhere in the Judgement for which fact the Prosecutor offers no explanation other than an arbitrary denial.

## SUB-GROUND 1(23)

37. The Prosecutor misinterprets the evidence when asserting that the meeting of 17 May 1999 proves that Šainović was informed of the crimes committed in Kosovo and that his presence at the meeting is the evidence of his authority.<sup>95</sup> The Prosecution alleges that his participation per se is the evidence of Šainović's deep involvement. At this point again, neither the Chamber nor the Prosecutor offers any explanation with respect to the content of the involvement, the significance and contribution thereof. Šainović is a marginal participant and it would be unthinkable that Milošević's "crucial link" and "special representative" would have such a minor, side role as indeed Šainović had at the meeting. The Prosecutor, however, views Šainović's responsibility as the matter of arithmetic – the more numerous the meetings, the more responsibility they bring, without offering any explanation and assessment of Šainović's participation and the possible consequences thereof.

## SUB-GROUND 1(26)

38. In its response, the Prosecutor misinterprets the statements contained in the Defence Appeal using the misinterpretation to defend the Chamber's findings regarding Milutinović in such a way that it is not clear why, if what it states is true, Milutinović was held in custody for years and was exposed to

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<sup>93</sup> Response, para. 122-123

<sup>94</sup> Judgement, vol. III para. 142

<sup>95</sup> Response, paras. 127, 128

the stress and strains of the long-lasting and difficult procedure before the Trial Chamber.<sup>96</sup> Thus, the Prosecutor asserts that Milutinović had no command authority over VJ<sup>97</sup> although Milutinović was member of the Supreme Defence Council of the FRY, the body bringing all the strategic decisions on the engagement of the VJ units, in spite of the fact that Milutinović always supported Milošević's initiatives in that body.<sup>98</sup> Together with Milutinović, Milošević carried out the key cadre changes, Milutinović called the accusations of the crimes committed in 1998 "usually inflated" at a meeting of the supreme body commanding the VJ".<sup>99</sup> The Chamber, however, takes one and only Šainović's participation at a meeting of the Supreme Defence Council, more precisely in a discussion about the situation along the state borders, as the evidence that Šainović was informed of the crimes.<sup>100</sup> The Prosecutor fails to essentially respond to the Defence's statements because the double standards applied by the Chamber against Šainović and Milutinović are inexcusably obvious. Let us only mention the example when the Chamber describes Milutinović's support to Milošević at a Supreme Defence Council meeting as the generally exhibited loyalty,<sup>101</sup> as if it is about a debate club and not about the body deciding on the engagement of VJ in Kosovo. Milutinović could have prevented the use of VJ in Kosovo with his vote alone since Đukanović was obviously opposed to both Milošević and Milutinović.<sup>102</sup> Milutinović, with his vote, could have changed the course of history but all these facts do not constitute any significant contribution according to both the Prosecutor and the Trial Chamber,<sup>103</sup> which proves the implementation of uneven criteria with respect to the two defendants.

#### SUB-GROUND 2(1)

39. The Prosecutor asserts that Šainović's role in the events is not reduced to the four fields quoted by the Defence but that Šainović also coordinates the forces, conveys Milošević's instructions and issues his own instructions as to how to retain control in Kosovo.<sup>104</sup> In support of the above allegations, the

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<sup>96</sup> Response, paras. 134-138

<sup>97</sup> Response, para. 135

<sup>98</sup> P1000

<sup>99</sup> P1000, p. 14

<sup>100</sup> Judgement, vol. III para. 446

<sup>101</sup> Judgement, vol. III para. 275

<sup>102</sup> P1000

<sup>103</sup> Response, para. 136

<sup>104</sup> Response, para. 144

Prosecutor refers to the concluding part of the Judgement on Šainović's individual responsibility.<sup>105</sup> This, however, constitutes no response to the Defence Appeal Brief but rather an arbitrary hiding behind the uncorroborated and substantiated finding of the Trial Chamber. At numerous points in the Judgement rendered by the Trial Chamber as well as in the Prosecution Response there is a mention of instructions, coordination of forces. However, when addressing the concrete instructions issued by Milošević, all that could be stated in support of such allegations is the conveyance of an instruction at the meeting of 7 May 1999 in the form of a publicly issued document.<sup>106</sup> Speaking about the coordination of forces, nowhere in the totality of the evidence is there even a shred of evidence indicating when and whom Šainović really coordinated, particularly with respect to the period of time after 24 March 1999. Several theses in the Judgement corroborate each other, for that purpose relying upon each other and not upon any presented evidence.

40. Thus, it is stated that Šainović, in the period after 24 March 1999, was also "able to convey orders and provide approval"<sup>107</sup> Further on, it is alleged that during the existence of the Commission for Cooperation with the KVM Šainović "was able to continue his dealings with high level VJ and MUP officials"<sup>108</sup> Such an ability to convey orders and to deal with officials is not the evidence of significant contribution. "Significant contribution" is not someone's impression or presumption, such a contribution requires evidence of Šainović's influence on the field events. For each and every single sentence within the scope of this sub-ground and elsewhere in its Appeal Brief, the Defence stated the context and extent of Šainović's participation. The Defence shall, of course, refrain from reiterating those statements but it firmly reaffirms that for each mention of Šainović in the presented evidence in connection with engagement of VJ and MUP forces there are concrete circumstances – orders, combat reports from which it is obvious that all the activities of both the VJ and the MUP, were commenced, conducted and completed independently of whatever Šainović did or said. Under the circumstances, no reasonable trier of facts can speak about any significant contribution.

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<sup>105</sup> Judgement, vol.III para.467

<sup>106</sup> P1996,5D1289

<sup>107</sup> Judgement, vol.III para.359

<sup>108</sup> Judgement, vol.III para.401

## SUB-GROUND 2(2)

41. The Prosecutor asserts that the Defence appeal referring to the allegation that Šainović was the crucial link should be dismissed because the finding that Šainović conveyed Milošević's orders was based on the totality of evidence.<sup>109</sup> The Defence responds that the totality of evidence still consists of individual pieces of evidence. No reasonable person could arrive at the conclusion that someone conveys orders if there is no evidence that this someone has conveyed at least one order. No reasonable person could find that Šainović conveys Milošević's orders if there is no evidence with respect to the content of their talks, whether held between the two of them or in the presence of other persons. All that the Chamber offers is an assumption to the effect that Šainović and Milošević must have talked about VJ and MUP activities because Šainović played the role of a political coordinator.<sup>110</sup> And Šainović is a political coordinator<sup>111</sup> because he conveys Milošević's orders to Kosovo.<sup>112</sup> This means that Šainović must have held talks because he was a political coordinator and he was a political coordinator because he held talks. This example of a closed circle of assumptions demonstrates just one of the commonly used methods in assessment of Šainović's responsibility. Of course, the Prosecutor has no response to all these statements; instead, when it comes to the analysis of individual pieces of evidence, the Prosecutor refers to a totality of evidence; when the Defence disputes the unsubstantiated findings the Prosecutor asserts that there are numerous individual pieces of evidence which in fact, neither individually nor in the totality thereof can constitute any grounds for finding that Šainović was a crucial link between Milošević and VJ and MUP in Kosovo.

## SUB-GROUND 2(3)

42. The Prosecutor asserts that Šainović directed meetings of the JC based on the totality of the evidence.<sup>113</sup> According to the Prosecutor, the totality of the evidence includes all the evidence referring to 1998 and one single piece of evidence referring to 1999 – the meeting of 1 June 1999. Allegedly, there is abundant evidence connecting Šainović with the JC prior to the meeting of 1 June 1999.

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<sup>109</sup> Response, para. 151

<sup>110</sup> Judgement, vol. III para. 426

<sup>111</sup> Judgement, vol. III paras. 426, 462

<sup>112</sup> Judgement, vol. III para. 462

<sup>113</sup> Response, para. 154

However, there is no mention of any concrete piece of evidence connecting Šainović with the JC between October 1998 and June 1999. There is also no mention of the fact that the circumstances and roles of all the actors underwent dramatic changes in that particular period of nearly 8 months. The Defence notes that no reasonable trier of facts could find, using analogy, that a person is criminally liable only because in some previous period of time that person had had a role the Chamber finds to have provoked criminal liability.

#### SUB-GROUND 2(4)

43. The Prosecutor finds that the Chamber was entitled to consider the evidence referring to 1998 to the extent that this evidence was probative of Šainović's powers in 1999.<sup>114</sup> The Defence notes that the Chamber may not replace the non-existing evidence for 1999 with the evidence referring to 1998. The Prosecutor misinterprets the Defence's position. The Chamber had at its disposal a total of three events where Šainović had had any contact with representatives of VJ and MUP in 1999, after 24 March 1999. These three events, neither by the character nor by the number thereof, could constitute the evidence of Šainović's alleged extensive *de facto* powers.<sup>115</sup>

44. In an effort to find some more evidence, the Prosecutor, once again quotes Vasiljević, in particular his words as noted in the minutes from the Milošević case<sup>116</sup> although this same Vasiljević gave numerous different statements about that same circumstance. Thus, for instance, Vasiljević says that he does not know in what capacity Šainović attended the meeting of 1 June 1999 and that he had no impression that Šainović was the commander of the JC.<sup>117</sup> One other piece of evidence is the Prosecution's own construction regarding Zlatomir Pešić,<sup>118</sup> who in fact said nothing whatsoever about Šainović's authority, as already discussed. The third piece of evidence - 1 June 1999 is of the same value as the first one since it, too, relies solely on Vasiljević. The above shreds of evidence could lead no reasonable trier of facts to the conclusion that in 1999 Šainović had any extensive *de facto* authority over VJ and MUP. Particularly not in the situation where Ojdanic receives orders directly from

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<sup>114</sup> Response, para. 156

<sup>115</sup> Judgement, vol. III para. 462

<sup>116</sup> P2589 tt. 15993

<sup>117</sup> 2D387, paras. 3, 4

<sup>118</sup> P2502, para. 34

Milošević,<sup>119</sup> where Milošević and Ojdanic remain in the same building all the time after 24 March 1999,<sup>120</sup> where Pavković maintains direct communication with Milošević,<sup>121</sup> where Milutinović stays in the same underground shelter with Milošević throughout the war,<sup>122</sup> where, as established by the Trial Chamber itself, the commanding chains of the VJ and MUP remained intact.<sup>123</sup>

#### SUB-GROUND 2(5), 2(6), 2(8) and 2(9)

45. The Prosecutor is of the opinion that if a witness, during two consecutive days, offers two completely different answers to the same questions, before the same Chamber, this does not affect the credibility of the witness and that the Chamber may rely on his testimony as long as there is other evidence corroborating one of the versions offered by the witness.<sup>124</sup> Although the Chamber is entitled to accept certain parts of a testimony while rejecting other parts thereof, no reasonable trier of facts would have used this discretion right under the circumstances as this Chamber did with respect to Gajić. The Defence notes that a priori statements of direct participants in the events should be assigned more weight than those given by persons who either did not take part in those events or, indeed, participated but only from quite afar. The Defence notes that the witnesses who did not participate in the events simply had no knowledge and neither did they have a chance to acquire such knowledge and master the information to such an extent that would give their version of the events priority over the version offered by the immediate participants. Thus, for instance, in 1998 Vasiljević was just a retiree who had no connection with Kosovo and Šainović whatsoever but his characterization of the term JC<sup>125</sup> prevails throughout the entire Judgement rendered by the Trial Chamber. Or Crosland, who never saw Šainović but that does not prevent him from offering his own Judgement on Šainović's position and role based simply on the allegation that it was a "*well known fact amongst the foreign attaches*".<sup>126</sup> Vollebaek, for instance, simply cannot have any knowledge about internal relationships among the leaders of the FRY and Serbia, about who has and who has not any influence; such pieces of information were simply not

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<sup>119</sup> tt.16979

<sup>120</sup> tt.26717

<sup>121</sup> tt.26623-26624,26717-26718

<sup>122</sup> tt.15634-15635,16580

<sup>123</sup> Judgement, vol.I para.1144

<sup>124</sup> Response, para.161

<sup>125</sup> P2589, p.15975

<sup>126</sup> P2645, para.58

available to the witnesses favoured by the Chamber because of the nature of their roles and the positions they held at the relevant time. If the Chamber mistrusts the immediate participants in the events, Đaković, Minić, Matković, Dimitrijević than the Chamber actually has no evidence of Šainović's position and role at all. The absence of quality evidence may not be compensated by just any other evidence, which is exactly what the Trial Chamber, as a rule, does with respect to Šainović.

#### SUB-GROUND 2(7)

46. Unlike the Prosecutor<sup>127</sup> the Defence contends that the existence of suggestions, proposals and instructions does not imply, in itself, a high level of influence. The level of influence is not an assumption but must be proven, which the Trial Chamber fails to do in Šainović's case.

#### SUB-GROUND 2(11)

47. The mentioning of a higher authority by Ciaglinski<sup>128</sup> for the Trial Chamber automatically means Šainović or Milošević.<sup>129</sup> The Prosecutor defends this conclusion and says that it does not even matter whether the decision came from Šainović or Milošević since they were in regular contact with each other.<sup>130</sup> It is incredible that the Trial Chamber, which is supposed to establish individual criminal liability, should say that it is not relevant who made that decision and conclude, based on the fact that Šainović and Milošević were in contact on the average once a week,<sup>131</sup> that the decision must have been made by one or the other, but that essentially it does not matter because Šainović and Milošević are one.<sup>132</sup> This should especially be emphasized since this pertains to the movement of one VJ Company, as if nobody could decide on the movement of a single company except for Milošević and Šainović. This is a position that no reasonable trier of facts could adopt.

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<sup>127</sup> Response, para. 168

<sup>128</sup> tt. 6822-6828

<sup>129</sup> Judgement, vol. III para. 391

<sup>130</sup> Response, para. 176

<sup>131</sup> Judgement, vol. III para. 423, P605

<sup>132</sup> Judgement, vol. III para. 391

## SUB-GROUND 2(13), 2(14)

48. The Prosecutor says that in his Appeal Šainović failed to show how it was wrong to conclude that Šainović and Milošević were closest associates given that they met only three times between 24 March 1999 and the end of the war.<sup>133</sup> Any reasonable trier of facts would have to conclude that Šainović could not have exercised the role of crucial link to the VJ and MUP in Kosovo attributed to him by the Chamber, merely by two or three contacts over a period of several months of NATO air strikes, at a time of war, which entails a multitude of events, a multitude of predictable and unpredictable circumstances.

49. The statement that Šainović and Milošević had weekly contacts exclusively refers to the time before the war, which is evident in Exhibit P605. The Prosecutor says that any comparisons between Šainović and Milutinović with respect to contacts with Milošević are inappropriate.<sup>134</sup> The Defence contends that it is really inappropriate to compare Šainović, who saw Milošević only two or three times during the war, with Milutinović who, together with Milošević, spent the war in the underground bunker of the supreme command, as mentioned previously.

## SUB-GROUND 3(1), 3(4)

50. The Prosecutor tendentiously interprets Šainović's arguments and alleges that Šainović's co-operation with international representatives did not undermine the fact that Šainović intended to forcibly displace the Kosovo Albanian population.<sup>135</sup> However, the Prosecutor completely misconstrues this sub-ground of the Defence. The Defence cites international representatives with whom Šainović had been in contact and with whom he spent hours and days negotiating, because these people, all of them witnesses for the Prosecution, had the best insight into Šainović's state of mind, into what Šainović thought, what Šainović wanted to do. Byrnes unambiguously confirmed that Šainović was in favour of a political solution of the problem,<sup>136</sup> that he wanted to negotiate with the KLA as well, just so long as a solution

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<sup>133</sup> Response, para. 181

<sup>134</sup> Response, para. 182

<sup>135</sup> Response, para. 197

<sup>136</sup> tt. 12188

could be found.<sup>137</sup> Petritsch confirmed that Šainović was constructive with a view to finding a positive solution.<sup>138</sup>

51. Phillips confirmed that Šainović was in favour of the co-existence strategy and a political solution.<sup>139</sup> Phillips noted this down at the time when he used to meet with Šainović. 2D17 and 2D20 are Phillips' notebooks which were created at the time of the events and the contents of which he confirmed in court. The Prosecutor ineptly tries to relativize the contents of Phillips' Notebook<sup>140</sup> but these documents speak for themselves.

52. Hence, the Defence contends that Šainović's *mens rea* that Kosovo Albanians do not belong to Kosovo is inexistent, not because Šainović was co-operative at the various meetings, but because the statements of international representatives, witnesses for the Prosecution, directly indicate Šainović's state of mind with regard to key issues: what the future of Kosovo is, what the solution for Kosovo is. These witnesses confirmed that Šainović was in favour of a political solution entailing the co-existence of all ethnic communities and their testimonies cannot be reduced to a tale about co-operation, which is how the Prosecutor would like to portray the Defence's appeal argument.

### SUB-GROUND 3(2)

53. The Prosecutor alleges that Šainović's gained knowledge about the crimes based on the Gornje Obrinje example.<sup>141</sup> The Prosecutor contends that it is irrelevant that investigators mandated by the International Community or the FRY and Serbian judiciary did not complete their investigations,<sup>142</sup> and that it is sufficient that Abrahams, who allegedly talked to some persons and was told by a witness that the Serbian forces committed the killings, completed his investigation and pronounced his verdict.<sup>143</sup> According to the Prosecution, an additional piece of evidence is the fact that in this area there were clashes between the FRY/Serbia and KLA forces, so he concludes that there were VJ reports which demonstrate that there was "at least initially some concern that VJ forces might have been involved"<sup>144</sup>

<sup>137</sup> tt.12188-12189

<sup>138</sup> tt.10747

<sup>139</sup> tt.11887,2D20,2D17,tt.11884-11885

<sup>140</sup> Response,para.205

<sup>141</sup> Response,paras.214-216

<sup>142</sup> Response,para.215

<sup>143</sup> Judgement,vol.I para.901

<sup>144</sup> Response,para.216

According to the Prosecutor it is irrelevant that the FRY/Serbia authorities initiated the investigation, that they invited the Finnish forensic team, that Minić said that there has to be an investigation, and that the investigation was never completed because the area was controlled by the KLA. The Prosecutor believes that Abrahams' confirmation is sufficient proof that civilians had been killed by FRY and Serbia forces in Gornje Obrinje, in spite of the fact that, apart from his book, not a single piece evidence was presented with regard to the killings of these civilians. No reasonable trier of facts could determine that the FRY and Serbia killed the civilians in Gornje Obrinje based on Abrahams' testimony and his book. All circumstances related to this case indicate that this example cannot corroborate that Šainović had any knowledge about the crimes in 1998.

54. The Prosecutor cites some examples from Exhibit P1468 which supposedly indicate that Šainović knew about the crimes in 1998<sup>145</sup> but the crimes mentioned here are not in any way comparable to the crimes for which Šainović was convicted by the Trial Chamber. The Prosecutor's theory that every crime is a warning of other crimes to come is unsustainable.

### SUB-GROUND 3(3)

55. The Prosecutor's insinuation that Šainović visited Kosovo at the end of March and beginning of April 1999, when most of the crimes occurred in unacceptable. Nothing in the Judgement of the Trial Chamber or presented evidence connects Šainović to the time when most of the crimes occurred. The Trial Chamber finds that out of the 78 days of war, Šainović had been in Kosovo for 9, which says enough about the likelihood that Šainović could have been the crucial link between Milošević and VJ and MUP in Kosovo.

56. The Prosecutor's claims about Šainović's knowledge about the crimes amount to three meetings that Šainović attended at the time. At the meeting of 4 April 1999, Šainović said that the persons arrested should be turned over to the judicial organs, which says nothing about crimes, especially not those for which Šainović was convicted by verdict of the Trial Chamber. The Prosecutor alleges that Šainović's statement followed a report by a MUP officer, neglecting the content of this statement which

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<sup>145</sup> Response, para.218

does not point to crimes in the way presented by the Prosecutor<sup>146</sup> and the fact that Šainović arrived at the end of that meeting, so that he could not have heard any previous discussions.<sup>147</sup>

57. The Prosecution alleges that Pavković had told Šainović about the Scorpions before the meeting of 17 May 1999. This allegation is no more than Vasiljević's account of the meeting with Ojdanić where Pavković allegedly said that he had told Šainović that the Scorpions were in Prolog Banja, outside the territory of Kosovo.<sup>148</sup> What and if Pavković said anything to Šainović is Vasiljević's third person account, which, in the context of the totality of Vasiljević's testimony, no reasonable trier of facts can rely upon.

#### GROUND 4

58. The Prosecutor alleges that in debating on Šainović's knowledge of the killings the Chamber does not rest on factual findings about particular murders but rather on the fact that Šainović was present at the JC meetings when this was discussed.<sup>149</sup> According to the Prosecutor's reasoning, it is completely irrelevant whether a particular information is correct or not, whether there is evidence or not, the Prosecutor's reasoning implies that the mere mentioning of the word murder by someone is sufficient to establish that knowledge existed and that the murders were foreseeable to Šainović also in the following year 1999.

59. Although there is no evidence whatsoever to corroborate that Šainović knew about the murders at the time when they occurred, although no murders were mentioned at the meetings attended by Šainović, the mere fact that Šainović said that perpetrators should answer for their crimes demonstrates Šainović's knowledge about the crimes.<sup>150</sup> The Defence emphasizes that it is specific knowledge that is required here, not general knowledge about crimes, on the level of universal awareness that crimes happen in all wars and that perpetrators must be punished, which is the underlying meaning of what Šainović said at this meeting.

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<sup>146</sup> P1989

<sup>147</sup> tt.22720,24185-24186,24841-24842

<sup>148</sup> P2600,para.62

<sup>149</sup> Response,para.248

<sup>150</sup> Response,para.250

## SUB-GROUND 7(1)

60. The Prosecutor maintains that the Defence's contention on Šainović's limited role in the events for which he has been convicted is unfounded, and repeats vague and arbitrary allegations on the key member of JCE and his significant contribution.<sup>151</sup> Likewise, in the section about the length of the sentence, the Prosecutor fails to articulate what his significant contribution consists of, which of Šainović's activities specifically contributed to the JCE, which of Šainović's words or which of Šainović's actions triggered activities in Kosovo which led to the crimes. Once again, the Prosecutor fails to explain how a political coordinator can have a decisive impact on the activities on the VJ and MUP units on the ground, in conditions where the chains of command and ordering are intact. Here too, the Prosecutor fails to explain how the crucial link between Milošević and VJ and MUP in Kosovo could not accomplish his role, without any evidence that he had discussed VJ and MUP related issues with Milošević and with evidence that Milošević issued orders to top ranking VJ and MUP officers on a daily basis. Šainović's specific *ad hoc* status denies all conjectures and seeks tangible evidence on tangible activities and tangible consequences of those activities. In the absence of such evidence no reasonable trier of facts could conclude that Šainović did not have a limited role in the events.

## SUB-GROUND 7(2)

61. The Prosecutor essentially does not answer why he believes that the Trial Chamber failed to correctly assess the mitigating circumstances.<sup>152</sup> The Defence contends that with a correct assessment of mitigating circumstances, which are indicated in the Defence Appeal, Šainović's sentence should be commuted to a significantly more lenient one.

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<sup>151</sup> Response, para. 357

<sup>152</sup> Response, paras. 359-366

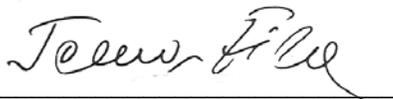
## SECOND SUB-GROUNDS OF THE DEFENCE'S APPEAL

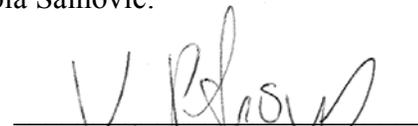
62. In its reply, the Defence did not retort to each individual allegation of the Prosecutor in connection with the grounds and sub-grounds of its Appeal. There are two reasons for this. The first reason is that in most of the sub-grounds the Prosecutor sets forth nothing more than an arbitrary, blatant denial of the Defence's Appeal. In such situations, the Prosecutor relied entirely on the content of the Judgement, as if the Judgement in itself is evidence that it was founded on a correct assessment of facts and adequate application of the law. With a view to the word limit, the Defence believed that it is pointless to argue with a mere paraphrase of the contested Judgement by the Prosecutor, in the sub-grounds where by citing the Judgement the Prosecutor tries to prove its validity. The second reason is that the Defence had a limited number of words at its disposal, as it was granted a word limit of only 12,000 out of the requested 19,000<sup>153</sup> which is why it had to prioritize by replying primarily to the sections of the Prosecutor's Response which directly concern Šainović's individual criminal liability.

### III CONCLUSION

63. The Defence reaffirms its arguments in their entirety, as set forth in the Defence Appeal Brief of 23 September 2009. All allegations contained in the Prosecution Response Brief are unfounded, hence the Defence requests that the Defence Appeal be upheld in its entirety.

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Dated, 15<sup>th</sup> of February 2010  
 Belgrade, Serbia

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<sup>153</sup> "Decision on Defence Requests for Extension of Time and Word Limits to File Reply Briefs", 20 January 2010