

THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

Case No. IT-05-87-T

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding  
Judge Ali Nowaz Chowhan  
Judge Tsvetana Kamenova  
Judge Janet Nosworthy, Reserve Judge

Registrar: Hans Holthuis

Submitted: 15 July 2008

THE PROSECUTOR

v.

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

*Public*

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**GENERAL DRAGOLJUB OJDANIĆ'S CLOSING BRIEF**

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Office of the Prosecutor

Mr. Thomas Hannis  
Mr. Chester Stamp

Counsel for the Accused

Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Milan Milutinović  
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Dragoljub Ojdanić  
Mr. Toma Fila and Mr. Vladimir Petrović for Nikola Šainović  
Mr. John Ackerman and Mr. Aleksander Aleksić for Nebojša Pavković  
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Vladimir Lazarević  
Mr. Branko Lukić and Mr. Dragan Ivetić for Sreten Lukić

## CONTENTS

<b>I. INTRODUCTION .....</b>	<b>4</b>
<b>II. JOINT CRIMINAL ENTERPRISE .....</b>	<b>8</b>
A. INTRODUCTION .....	8
B. DID A JOINT CRIMINAL ENTERPRISE EXIST?.....	8
1. <i>Prosecution evidence</i> .....	9
2. <i>Defence evidence</i> .....	9
C. CAN A JOINT CRIMINAL ENTERPRISE BE INFERRED?.....	13
1. <i>The alleged discriminatory arming of civilians</i> .....	16
2. <i>The Joint Command</i> .....	27
3. <i>The October 1998 Agreements</i> .....	29
4. <i>The alleged VJ troop build-up</i> .....	40
5. <i>Conduct of the VJ</i> .....	52
6. <i>Expert Statistical Evidence</i> .....	62
D. DID GENERAL OJDANIĆ PARTICIPATE IN THE ALLEGED JCE? .....	73
1. <i>General Ojdanić as Deputy Chief of Staff</i> .....	73
2. <i>Grom 98</i> .....	78
3. <i>General Ojdanić’s appointment as Chief of the General Staff</i> .....	81
4. <i>General Ojdanić’s good faith cooperation with the OSCE-KVM</i> .....	84
5. <i>Račak - January 1999</i> .....	90
6. <i>General Ojdanić orientated the VJ toward the threat from the KLA and NATO, not innocent civilians</i> .....	92
7. <i>Ojdanić and the Joint Command</i> .....	97
8. <i>Batajnica</i> .....	99
9. <i>Allegation that steps were not taken to punish those responsible for crimes</i> .....	100
<b>III. SUPERIOR RESPONSIBILITY .....</b>	<b>101</b>
A. INTRODUCTION .....	101
B. GENERAL OJDANIĆ’S AUTHORITY .....	101
C. ACTION TAKEN BY GENERAL OJDANIĆ TO ENSURE THAT INTERNATIONAL HUMANITARIAN LAW WAS FOLLOWED, CRIMES WERE REPORTED AND PUNISHED .....	103
D. GENERAL OJDANIĆ DID NOT RECEIVE COMPLETE INFORMATION .....	108
1. <i>General Ojdanić’s lack of knowledge of MUP crimes</i> .....	111
2. <i>Problems with VJ Reporting</i> .....	119
3. <i>General Ojdanić’s lack of knowledge of crimes committed by the VJ</i> .....	123
4. <i>Information on population movement</i> .....	125
5. <i>Specific evidence of failures to report within the VJ</i> .....	128
E. GENERAL OJDANIĆ TOOK APPROPRIATE ACTION, WITHIN THE LIMITS OF WHAT WAS POSSIBLE, WHENEVER HE RECEIVED INFORMATION OF CRIMINAL ACTS .....	129
1. <i>Action taken by General Ojdanić in relation to VJ volunteers</i> .....	130
2. <i>Action in establishing Military Courts and Prosecutors’ Offices and improving the military justice system</i> .....	136
3. <i>Action to improve information and further investigate crimes</i> .....	149
4. <i>Other specific actions to address crimes in Kosovo</i> .....	166

F. CONCLUSIONS.....	169
<b>IV. LEGAL ISSUES AND RESPONSIBILITY .....</b>	<b>171</b>
A. GENERAL OJDANIĆ HAS BEEN DENIED A FAIR TRIAL DUE TO INABILITY TO INVESTIGATE IN KOSOVO .....	171
B. THE CRIMES.....	173
1. <i>War Crimes</i> .....	173
2. <i>Crimes Against Humanity</i> .....	174
C. FORMS OF LIABILITY.....	180
1. <i>Omissions</i> .....	180
2. <i>Superior Responsibility</i> .....	190
<b>V. SENTENCING.....</b>	<b>212</b>
A. SENTENCING PRINCIPLES .....	212
B. EQUALITY BEFORE THE LAW .....	213
C. THE GRAVITY OF THE OFFENCE .....	214
D. AGGRAVATING FACTORS .....	216
1. <i>Superior Authority is not necessarily an aggravating factor</i> .....	217
E. MITIGATING CIRCUMSTANCES .....	218
1. <i>Specific Mitigating Factors</i> .....	218
2. <i>Personal Mitigating Factors</i> .....	221
F. CUMULATIVE CONVICTIONS .....	226
G. CONCLUSIONS ON SENTENCING.....	226
<b>VI. CONCLUSIONS .....</b>	<b>227</b>
<b>VII. ANNEXES .....</b>	<b>228</b>
A. COLLEGIUMS OF THE GENERAL STAFF .....	229
B. DAILY BRIEFINGS .....	230
C. 3 <sup>RD</sup> ARMY COMBAT REPORTS .....	232
D. SUPREME COMMAND STAFF COMBAT REPORTS .....	234
E. SECURITY ADMINISTRATION REPORTS .....	236
F. DOCUMENT CODING SCHEME OF THE 3 <sup>RD</sup> ARMY AND EXHIBIT P1459 .....	238
G. REPORTS ON THE WORK OF THE MILITARY JUDICIAL ORGANS .....	260
H. TABLE OF AUTHORITIES.....	286

## I. INTRODUCTION

1. General Ojdanić is charged in a five-count Third Amended Indictment with one count of war crimes in violation of Article 3 of the ICTY Statute (murder) and four counts of crimes against humanity in violation of Article 5 of the ICTY Statute (murder, deportation, persecution and forcible transfer as an inhumane act). The Prosecution claims that General Ojdanić is guilty of the alleged crimes pursuant to Article 7(1) of the ICTY Statute (including the doctrine of joint criminal enterprise) and Article 7(3) of the ICTY Statute.
2. Prosecutors in national jurisdictions indict upon the basis of evidence, but the Prosecution in this case issued a rushed indictment against General Ojdanić (and others) as NATO bombs continued to fall on the then Federal Republic of Yugoslavia (“FRY”). The Prosecution then began looking for evidence to try and implicate General Ojdanić.
3. General Ojdanić was brought before this Tribunal because of his position rather than his actions, his station rather than the evidence. Crimes were committed in Kosovo in 1999, there is no doubt about that. However the indictment of General Ojdanić on 24 May 1999 bears no relation to his conduct up to that point in time or thereafter. The Prosecution erroneously assumed that because General Ojdanić was Chief of the General Staff he must be responsible for at least some of the crimes committed in Kosovo in 1999.
4. Nine years later, after nearly three hundred days of trial and thousands of exhibits admitted in evidence, what began as an assumption now hangs as an inference. The Prosecution has provided no direct evidence that General Ojdanić participated in a joint criminal enterprise to expel ethnic Albanians from Kosovo or that he failed to take adequate steps to prevent or punish any crimes committed by his subordinates. Instead, the Prosecution’s case rests upon whether or not the Trial Chamber will infer guilt from circumstantial evidence. To prove guilt based upon inference the Prosecution must prove the primary facts upon which it relies beyond reasonable doubt and also prove that all reasonable inferences consistent with innocence have been excluded. This also applies

when inferring the state of mind of an accused.<sup>1</sup> Where the evidence before the Trial Chamber is reasonably open to more than one inference, General Ojdanić must be acquitted.<sup>2</sup>

5. The Defence submits that the Prosecution has failed to prove the existence of the joint criminal enterprise alleged in the Indictment. The evidence heard by the Trial Chamber does not establish the existence of a common criminal purpose to alter the ethnic balance of Kosovo by expelling ethnic Albanians. The Prosecution has not proved that the crimes alleged in the Indictment were committed pursuant to any common criminal plan to which General Ojdanić was a party. The Prosecution has not proved that General Ojdanić participated in any of the Indictment crimes or indeed knew that they had occurred or were about to occur.
6. It is the Defence's submission that the Prosecution's case against General Ojdanić is weak. Facing a case based upon assumption and inference, the Defence has had to bring a great deal of evidence, in both witness and documentary form, to demonstrate to the Trial Chamber that General Ojdanić was not involved in the crimes alleged and did not participate in a joint criminal enterprise to expel ethnic Albanian civilians from Kosovo. The weight of attempting to demonstrate a negative is such that the danger of a reversal of the burden of proof is a real one in this case. The burden of proof must remain, at all times, on the Prosecution. It is the Defence's submission that this is a burden which the Prosecution has not satisfied.
7. The Trial Chamber is invited to recall the scale of the threat General Ojdanić faced in 1999: a violent and large-scale domestic insurgency coupled with a massive NATO bombing campaign and the threat of land invasion. The Defence's case is that in the face of these threats, the wealth of evidence, including the vast number of reports, orders and records of meetings involving General Ojdanić, reveals General Ojdanić to be a man with a profound sense of duty and respect for the law, who served his country to the best of his abilities during crisis, and is not guilty of the crimes charged.

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<sup>1</sup> *Kvočka* AJ, paragraph 237. (hereafter, "para")

<sup>2</sup> *Čelebici* AJ, para.456; *Stakić* AJ, para.219.

## Structure of the Brief

8. This Closing Brief is divided into the following sections:

**Section II Joint Criminal Enterprise.** This section addresses the generic evidence relevant to Joint Criminal Enterprise liability under the headings: (A) Did a Joint Criminal Enterprise exist? (B) Can a Joint Criminal Enterprise be inferred? and (C) Did General Ojdanić participate in the alleged Joint Criminal Enterprise?

**Section III Superior Responsibility.** This section addresses the generic evidence relevant to General Ojdanić's alleged superior responsibility under the headings: (A) General Ojdanić's authority as Chief of Staff; (B) action taken by General Ojdanić to ensure that international humanitarian law was followed, crimes were reported and punished; (C) General Ojdanić did not receive complete and accurate information despite his best efforts; and (D) General Ojdanić took appropriate remedial action based upon the information available to him.

**Section IV Legal Issues and Responsibility.** This section address legal issues and criminal responsibility under Articles 7(1) and 7(3) of the Statute under the following headings: (A) Fair trial issues; (B) The Crimes; and (C) Forms of Liability.

**Section V Sentencing.** Despite the Defence's absolute belief that General Ojdanić is not guilty of the crimes alleged, this section includes precautionary submissions on sentencing under the following headings: (A) Sentencing Principles; (B) Equality before the law; (C) Gravity of the Offence; (D) Aggravating Factors; (E) Mitigating Factors; (F) Cumulative Convictions; and (G) Conclusions.

**Section VI Conclusions.** This section summarises the Defence's submissions on verdict and sentence.

**Section VII Annexes.** This section contains annexes referred to during the Brief. The Annexes are: (A) Table of Collegiums of the General Staff; (B) Table of Daily Briefings of the Supreme Command Staff; (C) Table of 3<sup>rd</sup> Army Combat Reports to the Supreme Command Staff; (D) Table of Supreme Command Staff Combat Reports; (E) Table of Security Administration Briefings; (F) Document coding scheme of the 3<sup>rd</sup> Army archives and Exhibit P1459; (G) Reports of the work of Military Judicial Organs; and (H) Table of Authorities and Abbreviations.

## **II. JOINT CRIMINAL ENTERPRISE**

### **A. Introduction**

9. The central allegation made by the Prosecution in this case is that a plan existed to expel ethnic Albanians from Kosovo in order to ensure continued Serbian control of the then province.<sup>3</sup> The Prosecution's case is that this joint criminal enterprise came into existence no later than October 1998 - before General Ojdanić became Chief of Staff on 27 November 1998 - and continued throughout the time period of the crimes alleged in the Amended Indictment.<sup>4</sup> The Prosecution alleges that the Indictment crimes were perpetrated by Forces of the FRY and Serbia working in coordination and cooperation and performing complementary roles in order to achieve the common criminal purpose.<sup>5</sup>
10. The Defence submits that the Prosecution has neither proved the existence of the alleged Joint Criminal Enterprise nor proved General Ojdanić's participation in any Joint Criminal Enterprise. The mere fact that crimes were committed by Forces of the FRY and Serbia does not prove that the perpetrators were acting under orders or pursuant to any common criminal purpose shared by General Ojdanić.
11. Section II of this Brief addresses the generic evidence relevant to joint criminal enterprise under the following headings:
- a. Direct evidence shows that a joint criminal enterprise did not exist;
  - b. Can the existence of a joint criminal enterprise be inferred? and
  - c. Did General Ojdanić participate in the alleged joint criminal enterprise?

### **B. Did a Joint Criminal Enterprise exist?**

12. It is the Defence's submission that there was no criminal plan to expel ethnic Albanian civilians from Kosovo. The Prosecution has offered no positive evidence that such a plan existed. Instead, there is a plethora of credible, specific and positive evidence - from both Prosecution and Defence witnesses - that no such plan existed.

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<sup>3</sup> Third Amended Indictment, para.19; OTP PTB, para.59.

<sup>4</sup> Third Amended Indictment, para.20.

<sup>5</sup> Third Amended Indictment, para.32.

## 1. Prosecution evidence

13. The Prosecution itself led evidence which demonstrates that there was no criminal plan to expel ethnic Albanians from Kosovo.

- a. General Drewienkiewicz, leader of the UK Delegation of the OSCE mission, testified that having considered FRY operations after the NATO bombing began, all the factors suggested the absence of a master plan to expel ethnic Albanians from Kosovo.<sup>6</sup>
- b. General Vasiljević, a senior member of the Supreme Command Staff, testified that he knew of no plan to expel ethnic Albanians from Kosovo. General Vasiljević explained that had such a plan existed involving the VJ it would certainly have been discussed at the daily briefings of the Supreme Command Staff conducted during the war.<sup>7</sup> The detailed evidence of those briefings shows that there were no such discussions.<sup>8</sup> General Vasiljević testified in the *Milošević* trial that he received no information to indicate that a policy of expelling ethnic Albanians was being pursued.<sup>9</sup>
- c. General Lončar, VJ liaison officer to the OSCE mission, testified that he knew of no plan to expel Albanians from Kosovo.<sup>10</sup>

## 2. Defence evidence

14. A large number of Defence witnesses from various parts of the General Staff testified that there was no plan to expel ethnic Albanians civilians from Kosovo.

- a. General Simić was Assistant to the Chief of the Supreme Command Staff for the Land Army.<sup>11</sup> His evidence was that at the level of the General Staff and the

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<sup>6</sup> Exh.P2508, para.174.

<sup>7</sup> Tr.8840; Tr.9037.

<sup>8</sup> See Annex B.

<sup>9</sup> Exh.P2589, page16433. (hereafter, "p.")

<sup>10</sup> Tr.7687.

Supreme Command Staff there was no plan to ethnically cleanse Kosovo of ethnic Albanian civilians. Rather, the General Staff carried out its constitutional obligation to defend the country from the KLA and NATO.<sup>12</sup>

- b. General Ćurčin was Chief of the First Administration of the General Staff. He testified that it was his Administration which drew up plans in the General Staff for the use of the VJ.<sup>13</sup> Ćurčin's evidence was that he studied in detail all the plans that were made in the General Staff.<sup>14</sup> Ćurčin testified that he was certain that there was never a plan, order or anything similar which assisted or supported violence against the Albanian civilian population in Kosovo.
- c. General Obradović was Assistant for Operations and Staff Sector from July 1998 until March 1999. He testified that there was no plan in the General Staff to expel or relocate the ethnic Albanian population from Kosovo.<sup>15</sup> General Obradović's evidence was that the VJ did not take any measures to deport ethnic Albanians during his time in the General Staff or, as far as he knew, before or afterwards.<sup>16</sup>
- d. General Krga joined the General Staff on 14 January 1999 as Chief of the Intelligence Administration.<sup>17</sup> Krga's evidence was that when he joined the General Staff one of his first duties was to study defence plans and that there was,

“no special plan or, even, an annex to some global plan, or else any individual document or directive mentioning mass expulsion or any other kind of expulsion of Albanians from Kosovo....”<sup>18</sup>

Krga's evidence was that it would be impossible to conceal such a plan and that he is certain that no such plan existed.<sup>19</sup> Krga testified that he never heard any member of the Supreme Command Staff voice any interest in expelling the

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<sup>11</sup> Tr.15471.

<sup>12</sup> Exh.3D1089, para.24.

<sup>13</sup> Exh.3D1121, para.20.

<sup>14</sup> Exh.3D1121, para.8.

<sup>15</sup> Tr.15024.

<sup>16</sup> Tr.15027.

<sup>17</sup> Tr.16770.

<sup>18</sup> Exh.3D1120, para.2.

<sup>19</sup> Exh.3D1120, para.6.

civilian population.<sup>20</sup> Krga's evidence was that combat operations were directed against the KLA, and that no VJ operations were ever directed against the civilian population.<sup>21</sup>

- e. General Farkaš was appointed Chief of the Security Administration of the General Staff on 24 March 1999, replacing General Dimitrijević. As considered below, General Farkaš was instrumental in helping General Ojdanić discover the existence of crimes in Kosovo. General Farkaš testified that he did not know of any plan to expel the Albanian population from Kosovo.<sup>22</sup>
- f. General Pantelić was Assistant Chief of the Logistics Sector within the General Staff. His evidence was that General Ojdanić was resolute that the civilian population should be treated with utmost humaneness, regardless of their religion or ethnicity. His evidence was that he neither participated in nor ever heard about a plan to evict the Albanian population from Kosovo.<sup>23</sup> For example, Pantelić testified that he was in General Ojdanić's presence throughout a General Staff tour of Kosovo at the beginning of March 1999 during which Ojdanić had important meetings with the relevant subordinates, yet there was no mention of expelling the Albanian population from Kosovo.<sup>24</sup>
- g. Colonel Radoićić was General Ojdanić's Deputy Chief of Office. Radoićić testified that knew of no plan to ethnically cleanse Albanians from Kosovo.<sup>25</sup>
- h. General Smiljanić was Chief of the First Administration of the General Staff and in 1999 was promoted to Commander of the air force and air defence. General Smiljanić testified that he was never aware of any plan to relocate or expel ethnic Albanian civilians from Kosovo.<sup>26</sup>

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<sup>20</sup> Tr.16814.

<sup>21</sup> Exh.3D1120, para.5.

<sup>22</sup> Tr.16312.

<sup>23</sup> Exh.3D1113, para.32.

<sup>24</sup> Tr.16184-5; Exh.3D1097; Exh.3D1098.

<sup>25</sup> Exh.3D1111, para.14.

<sup>26</sup> Tr.15760.

- i. Colonel Novković was Chief of Information of the Supreme Command Staff during the NATO bombing. His evidence was that he was unaware of any plan carried out by the VJ to expel civilians from Kosovo.<sup>27</sup> His evidence was that he had access to most confidential documents on the war plan of the VJ and no document contained any reference which could be interpreted as a basis for violating the provisions of international humanitarian law.<sup>28</sup> Colonel Novković testified that he was not aware of any General Staff or Supreme Command Staff document where crimes and ethnic cleansing were planned or encouraged.<sup>29</sup>
  - j. Colonel Čučak was Chief of Service for the Department for Border Affairs within the General Staff of the VJ.<sup>30</sup> He testified that he had never heard of a plan nor did he ever implement a plan to expel Albanians from Kosovo.<sup>31</sup>
  - k. Colonel Jovanović was Chief of the Army's Foreign Liaison Service.<sup>32</sup> He testified that there was never any talk at the collegiums about a plan to expel Kosovar Albanians and that General Ojdanić never discussed such a plan.<sup>33</sup>
15. In addition to the testimony of Prosecution and Defence witnesses, General Dimitrijević testified that he was not aware of any plan to expel the Albanian population from Kosovo. He further testified that the idea of expelling the Albanian population was never mentioned in any meeting he attended as being the solution to the Kosovo problem.<sup>34</sup>
16. The Trial Chamber has before it a vast amount of documentary evidence of meetings, reports and orders involving the VJ and General Ojdanić. The Trial Chamber is invited to recall the evidence of Prosecution witness Philip Coe, who testified that he had access to what he described as a "complete collection" of VJ archives.<sup>35</sup> No Joint Criminal Enterprise is revealed by a detailed examination of all collegiums, briefings, combat

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<sup>27</sup> Tr.16249.

<sup>28</sup> Exh.3D1115, para.21.

<sup>29</sup> Exh.3D1115, para.21.

<sup>30</sup> Tr.14813.

<sup>31</sup> Tr.14857.

<sup>32</sup> Tr.14892.

<sup>33</sup> Tr.14898.

<sup>34</sup> Tr.26731.

<sup>35</sup> Tr.12074-5.

reports of both the General Staff and lower commands, security administration and intelligence department reports. Despite such access and the large number of witnesses heard in this case, there is a total lack of evidence of any plan to expel ethnic Albanians. In the Defence's submission it is inconceivable that such a plan could have existed without anyone either knowing about it or it at least being alluded to in meetings, reports or orders.

**C. Can a joint criminal enterprise be inferred?**

17. In the absence of any specific evidence that a criminal plan to expel ethnic Albanian civilians existed, on the fundamental issue in the case the Prosecution can only invite the Trial Chamber to infer the existence of such a plan from circumstantial evidence. For the Trial Chamber to be able to draw an inference of a common criminal plan, the Prosecution must prove the circumstantial evidence beyond reasonable doubt and also demonstrate that this is the only reasonable inference available from the evidence.<sup>36</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>37</sup>

18. It is the Defence's submission that the Prosecution has simply failed to rule out the possibility that the crimes which were committed in Kosovo in 1999 bore no relation to any criminal plan at the level of the General Staff or elsewhere. Indeed, the most reasonable inference that can be drawn from the evidence is that there was no central plan to expel Albanians from Kosovo and that the killings and instances of expulsion were the result of individuals or small groups acting out of revenge or hatred, or on the unauthorised orders of local leaders. The Prosecution has simply failed to rule out the possibility that the crimes that supposedly provide a basis on which to infer the existence of a Joint Criminal Enterprise were in reality a horrific by-product of wholly legitimate actions.

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<sup>36</sup> *Brđanin* TJ, para.353; *Martic* TJ, para.24.

<sup>37</sup> *Čelebici* AJ, para.458; *Galić* AJ, para.218; *Limaj* TJ, para.10.

19. In order for the Trial Chamber to infer that a criminal plan existed, it must decide three issues against the Defence.

- a. First, the Trial Chamber would have to reject the positive evidence before it that no such plan existed and conclude beyond reasonable doubt that either a large number of Prosecution and Defence witnesses lied or that somehow a plan was completely concealed from them both at the time and ever since.
- b. Secondly, the Trial Chamber would have to be satisfied with the Prosecution's inability to offer any positive evidence of such a plan despite:
  - i. there being an international presence on the ground in Kosovo in the form of the KDOM from mid 1998<sup>38</sup> and the KVM from late 1998;
  - ii. the intelligence capabilities of the world's richest and most militarily and technologically advanced nations being focused upon the FRY;
  - iii. Kosovo being under the total control of an international presence since June 1999;
  - iv. the fall of the government of President Milošević in April 2001; and
  - v. complete access to secret and candid FRY military documents such as the General Staff Collegiums and Daily Briefings.

In light of these factors, it is not credible to assert that a criminal plan existed yet be unable to offer any positive evidence in support. Indeed, the Prosecution led seemingly ominous evidence that plans to expel ethnic Albanians were issued orally rather than written down because "the Serbs had learned their lessons from

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<sup>38</sup> Exh.1D18, p.289, document2.

previous conflicts.”<sup>39</sup> Yet there is unchallenged evidence before the Trial Chamber that from the brigade level and down in the VJ it was impossible to encrypt either written or spoken communication because of insufficient resources.<sup>40</sup> Therefore, on the very level that the criminal plan was allegedly being implemented, VJ communications could be overheard and recorded. It is frankly incredible - given the intelligence capabilities of NATO forces - that the Prosecution has been unable to produce any such evidence.

In contrast to the Prosecution’s failure on this front, the Defence made repeated and strenuous efforts to try and obtain any intercept evidence relating to General Ojdanić. The Defence was ultimately unsuccessful in obtaining any intercept material from NATO and/or NATO member states under Rule 54 *bis*, although some non-intercept material was received under Rule 70.<sup>41</sup> It is significant that the Prosecution has been unable to produce any such evidence despite its case that a joint criminal enterprise to expel ethnic Albanians from Kosovo existed.

- c. Thirdly, the Trial Chamber would have to be satisfied that the General Staff planned and attempted to implement such a plan despite the obvious fact that the inevitable result would be a war against NATO which it could not win.

20. It is the Defence’s submission that each factor identified in paragraph 19, above, weighs against any inference that a criminal plan existed.

21. The Prosecution suggests that various pieces of circumstantial evidence support the inference that a joint criminal enterprise existed. This section of the Brief now addresses the generic circumstantial evidence relevant to the alleged Joint Criminal Enterprise under the following headings:

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<sup>39</sup> See testimony of Witness K90, Exh.P2391, para.41.

<sup>40</sup> Tr.16417. See also Exh.3D1116, p.112.

<sup>41</sup> Decision on Request of the United States of America for Review.

1. the alleged arming of ethnic Serbs and disarming of ethnic Albanians<sup>42</sup>;
2. allegations regarding the nature of the Joint Command;
3. the alleged breach of the October 1998 Agreements<sup>43</sup>;
4. the alleged preparation for a spring offensive<sup>44</sup>;
5. the alleged use of indiscriminate and disproportionate force by the VJ<sup>45</sup>;
6. the alleged scale and pattern of crimes<sup>46</sup>; and
7. the alleged failure to punish those responsible for crimes and obstruction of investigations.<sup>47</sup>

**1. The alleged discriminatory arming of civilians**

22. The Prosecution alleges that a policy of arming Serb civilians while disarming Albanian villages was discriminatory and indicative of a plan to expel ethnic Albanian civilians from Kosovo. The Prosecution says that the result was an “increasingly vulnerable ethnic Albanian civilian population.”<sup>48</sup> It is not the Prosecution’s case that this happened during General Ojdanić’s tenure as Chief of Staff. Rather, the Prosecution alleges that upon hearing that civilians had been armed before he became Chief of the General Staff, General Ojdanić did not show a “proportional degree of concern.”<sup>49</sup>

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<sup>42</sup> OTP PTB, para.80-82.

<sup>43</sup> OTP PTB, para.104-108.

<sup>44</sup> OTP PTB, para.124-128.

<sup>45</sup> OTP PTB, para.87-103.

<sup>46</sup> OTP PTB, para.129-136.

<sup>47</sup> OTP PTB, para.141-161.

<sup>48</sup> OTP PTB, para.82.

<sup>49</sup> Tr.12638.

23. It is the Defence's submission that the Prosecution has not proved that any arming or disarming of civilians was anything other than an entirely legal, necessary and proportionate response to the significant threat posed by the KLA. In fact, the evidence is that the General Staff was deeply concerned about the possibility of a more widespread inter-ethnic conflict in Kosovo. In its assessment of the security situation in February 1999, the expressed view was that because of,

“[s]ystematic terrorist acts, killings, abductions, pressures and threats against the Serbian and Montenegrin population, there is the realistic danger of those people organising resistance on their own, which may further complicate the existing situation in Kosovo and Metohija.”<sup>50</sup>

General Gajić explained that the General Staff viewed such a deterioration as a problem for the army and was something that the General Staff wanted to avoid.<sup>51</sup>

24. Moreover, there is no evidence that the VJ used armed civilians in any of its operations during the indictment period. The Prosecution has not proved that the arming of civilians resulted in crimes committed against civilians of ethnic Albanian origin.

a) Were Albanian civilians disarmed discriminately?

25. The Prosecution has not proved that civilians in predominantly Albanian villages were disarmed for any other reason than an attempt to disarm the KLA and reduce the risk of an even bloodier insurgency. The Trial Chamber will be aware that the region was saturated with weapons and ammunition following the collapse of the government and economy of neighbouring Albania in 1997.<sup>52</sup> It is the Defence's submission that it was entirely legitimate to attempt to stymie a dangerous KLA weapons source. As his Honour, Judge Bonomy, observed in response to the Prosecution's questioning of John Crosland, there may have been “an equally good reason for not even dreaming about arming the Albanian population which is quite unrelated to ethnic cleansing.”<sup>53</sup> The same principle applies to the attempt to disarm the KLA.

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<sup>50</sup> Exh.3D685, p.16, para.4.

<sup>51</sup> Tr.15252-3.

<sup>52</sup> See Exh.3D991; Exh.3D738; Exh.6D1637, para.2.

<sup>53</sup> Tr.9850.

26. The only evidence that the Prosecution has proffered relating to the disarming of Albanian Villages is the reference in a Joint Command Report dated 15 October 1998 to the collection of weapons from “Šiptar villages.”<sup>54</sup> This Report refers to a VJ task of “Collecting and pulling out weapons and ammunition left behind, discovered and seized from *šiptar* terrorists.”<sup>55</sup> Under tasks given to the MUP, there is reference to the collection of weapons continuing in villages “which have shown a willingness to surrender them voluntarily.”<sup>56</sup> The report includes a breakdown of terrorist actions in preceding days. It is submitted that this makes it clear that the collection of weapons was considered to be a necessary security measure so as to remove weapons from the reach of the KLA.
27. Bislim Zyrapi, the KLA’s Chief of Staff, described how the KLA had “village staffs” which remained in villages and provided arms to the KLA. Zyrapi also testified that these people did not normally have KLA uniforms.<sup>57</sup> In the summer of 1998, the KLA intended to supply weapons to the “whole population from the age of 16.”<sup>58</sup> The Defence submits that the collection of weapons from Albanian villages was a legitimate attempt to restrict the activities of the KLA.
28. In any event, the evidence upon which the Prosecution relies relates to the period before General Ojdanić became Chief of Staff. As to the period when General Ojdanić was Chief of Staff, there is evidence before the Trial Chamber of at least one attempt to arm ethnic Albanians. In March 1999, after the NATO bombing began, there was a *bona fide* attempt to form and arm an ethnic Albanian Military Territorial Detachment.<sup>59</sup> Colonel Pešić, a Prosecution witness and the former Commander of the Priština Military District, testified that he received a sufficient number of uniforms and weapons for this purpose, but was ultimately unsuccessful in persuading ethnic Albanian civilians to join the VJ.<sup>60</sup>

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<sup>54</sup> Exh.P1203.

<sup>55</sup> Exh.P1203, p.5.

<sup>56</sup> *Ibid.*

<sup>57</sup> Tr.6232.

<sup>58</sup> Exh.P2453, p.5.

<sup>59</sup> See para.557 – 561 discussing the factors which demonstrate that this action was *bona fide*.

<sup>60</sup> Tr.7250; Tr.7269; Exh.P2502, para.12.

Therefore, the evidence does not support an inference that ethnic Albanians were disarmed as part of a Joint Criminal Enterprise to expel civilians from Kosovo.

b) Were Serbs armed discriminately?

29. The Prosecution has not proved that the distribution of weapons in Kosovo and the establishment of methods to defend Serb villages were anything other than legitimate responses to the severe threat from the KLA. The evidence shows that weapons were distributed before General Ojdanić became Chief of Staff and that it was done in an organised and appropriate manner.

(1) Reserve members of the military

30. There is evidence that in mid-1998, reserve members of the military were armed and organised into village defence forces in Serb and Montenegrin villages. An order was issued by the Priština Corps Command to this effect on 26 June 1998, setting a deadline for arming of 1 July 1998 and for organisation of 3 July 1998.<sup>61</sup>

31. Notably, Colonel Pešić, who commanded the Priština Military District, testified that when he arrived in January 1999 he did not see anything like organised village defence units among reservists. He did, however, testify that he did not tour warehouses so he could not be certain that weapons were not stored there.<sup>62</sup>

(2) Reserve police units

32. There is evidence that in mid-1998 weapons were issued to reserve police units. A register dated 30 July 1998 shows that 7,436 weapons were issued to reserve police forces in Kosovo Mitrovica.<sup>63</sup>

33. Ljubinko Cvetić, head of MUP for Kosovo Mitrovica, testified that reserve police detachments were formed in each village as a protection from incursion by terrorist

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<sup>61</sup> Exh.P1415.

<sup>62</sup> Tr.7197-9.

<sup>63</sup> Exh.P1115.

gangs.<sup>64</sup> Colonel Pešić testified that he came across Reserve Police Units while touring as part of his duties as Commander of the Priština Military District.<sup>65</sup>

(3) Civilian Protection and Civilian Defence

34. Civilian Protection Units and Civilian Defence Units were provided for in Articles 59 and 61 respectively of the Law on Defence.<sup>66</sup> Prior to joining the General Staff on 24 March 1999, General Farkaš was Assistant Federal Minister for Civilian Defence.<sup>67</sup> His evidence was that there were over 9,000 persons under the organisational structure for Civilian Defence, Civilian Protection and related units.<sup>68</sup> The evidence before the Trial Chamber shows that, while having different purposes, both Civilian Protection and Civilian Defence fell under the jurisdiction of the Ministry of Defence.<sup>69</sup>

(a) Civilian Protection Units

35. Under Article 59 of the Law on Defence, Civilian Protection Units were intended to protect and rescue the population and resources from wartime destruction and natural disasters. A Ministry of Defence Request of 2 November 1998 requested that weapons be issued to the Civilian Protection units, although stored in warehouses, putting their number at 3,365 people at that time.<sup>70</sup>

(b) Civilian Defence Units

36. Under Article 61 of the Law on Defence, Civilian Defence Units were to protect the population, buildings and resources from attack. It would therefore be fair to say that Civilian Defence Units more closely resemble military bodies than Civilian Protection Units. Article 61 provided that Civilian Defence Units may be formed in a state of war and, if necessary, in case of an imminent threat of war. Such units were formed from

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<sup>64</sup> Tr.8050-2.

<sup>65</sup> Tr.7184.

<sup>66</sup> Exh.P985.

<sup>67</sup> Tr.16290.

<sup>68</sup> Tr.16331-2.

<sup>69</sup> Tr.15830; Tr.16331.

<sup>70</sup> Exh.P1061.

citizens who were not military conscripts and who were not assigned to Civilian Protection Units.<sup>71</sup> Under Article 63 of the Law on Defence (P985), such units were commanded via organs of the Ministry of Defence, but a VJ Officer of Battalion Commander or higher could issue “special tasks concerning the defence and protection of the civilian population and material resources” and “control them in the area of his responsibility.” However, the evidence before the Trial Chamber is that the tasks issued to Civilian Defence Units had to be within their field of competence and not more general combat duties.<sup>72</sup>

37. There is evidence before the Trial Chamber that an order was issued on 21 May 1998 by the Ministry of Defence to form Civil Defence Units.<sup>73</sup> This order provides an explanation of the steps taken, namely a concern that the population had begun organising itself to fight the KLA. This action was taken long before General Ojdanić became Chief of the General Staff. A Ministry of Defence Request of 2 November 1998 requested that weapons be issued to the Civilian Defence, although stored in warehouses, putting their number at 1,665 persons.<sup>74</sup>

(4) Number of weapons distributed

38. During the Collegium of 30 December 1998, General Dimitrijević made mention of there being 60,000 armed Serbs “outside State organs.”<sup>75</sup> General Radinović, the Military expert, testified that a reference to this number of people “outside state organs” is nonsensical because such a number in Kosovo was demographically impossible.<sup>76</sup> General Dimitrijević testified that the issuance of weapons at an earlier stage to Serb and Montenegrin villages had been a “contingency against a pogrom being perpetrated

<sup>71</sup> See also Exh.3D1116, p.34, para.74.

<sup>72</sup> Tr.17295.

<sup>73</sup> Exh.P1259, para.5.

<sup>74</sup> Exh.P1061.

<sup>75</sup> Exh.P928, p.9.

<sup>76</sup> Tr.17280.

against them” and that steps were taken to ensure that weapons would not end up being abused or misused.<sup>77</sup>

39. During the Collegium of 2 February 1999, General Ojdanić was informed by General Samardžić, the former commander of the 3<sup>rd</sup> Army, that there were 47,000 “armed civilians” in Kosovo.<sup>78</sup> General Ojdanić’s response to this information was to ask: “[w]hat are the war assignments of those armed Serbs and what is the plan for including them in the units.” This response is significant: it demonstrates General Ojdanić’s concern to confirm that arms had been properly distributed through official channels to those who had defined wartime roles.
40. General Samardžić’s response to General Ojdanić’s question during the 2 February 1999 Collegium is also significant. He confirmed that arms had been issued by his order and that the role of those with weapons was to defend villages and participate in operations in the immediate vicinity during the KLA offensive of 1998. This is corroborated by the evidence of Momir Stojanovic, Chief of the Security Section of the Priština Corps and General Samardžić’s subordinate at that time, who testified that weapons were issued in 1998 following an order by General Pavković.<sup>79</sup>
41. It was General Gajić’s evidence that approximately 47,000 Serbian civilians were armed as a forced measure to combat the KLA ethnic cleansing effort.<sup>80</sup> Importantly, General Gajić clarified during re-examination that these people were not armed outside the system, and that they fell within the Ministry of Defence.<sup>81</sup>
42. It is the Defence’s submission that the information General Ojdanić received during this Collegium was sufficient to answer any concern he might have had. As with the larger number of 60,000, there is uncontradicted evidence before the Trial Chamber that the number of 47,000 is demographically impossible without including military conscripts

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<sup>77</sup> Tr.26634-5.

<sup>78</sup> Exh.P931, p/23.

<sup>79</sup> Tr.20072-3.

<sup>80</sup> Tr.15420-1.

<sup>81</sup> Tr.15461-2.

and police reservists.<sup>82</sup> Radinović's evidence was that otherwise there were simply not that many Serbs in Kosovo.<sup>83</sup> Radinović's evidence is entirely logical such that, when coupled with the information that those issued with weapons had specified roles within the wartime establishment, the Prosecution has offered no basis upon which General Ojdanić ought to have been, in the context of the time, surprised or concerned by being told that there were 47,000 armed "civilians" in Kosovo. Seen in context of the threat from the KLA against civilians and the formation of defensive strategies in 1998 (before Ojdanić became Chief of Staff) such information was neither surprising nor concerning.

43. It is the Defence's submission that the evidence does not support the Prosecution's argument that there was a discriminatory and simplistic arming of one ethnic group and disarming of another. Rather, the evidence shows a strategy of defending villages threatened by the KLA, while at the same time attempting to limit a source from which the KLA obtained weapons. In any event, the evidence before the Trial Chamber is that this occurred before General Ojdanić became Chief of General Staff.

(5) References to the "armed non-Šiptar population"

44. In evidence before the Trial Chamber are a number of documents which contain a reference to the "armed non-Šiptar population." The phrase does not appear in any document sent by General Ojdanić or to General Ojdanić; rather it appears in certain orders issued by the 3<sup>rd</sup> Army, the Priština Corps, and orders with the heading "Joint Command."

45. The phrase "armed non-Šiptar population" is ostensibly discriminatory in that it focuses on non ethnic Albanians.<sup>84</sup> There is evidence before the Trial Chamber as to the provenance of this phrase. General Stefanović, Chief of Operations in the Priština Corps, explained that the phrase was included in the Priština Corps' Grom 3 plan of 16 February

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<sup>82</sup> Tr.17270; Tr.17277.

<sup>83</sup> Tr.17280.

<sup>84</sup> The Prosecution has not proved that the word "Šiptár" (meaning ethnic Albanian) on its own is necessarily derogatory. See Tr.19185-6; Tr.21396; Tr.20813-4.

1999 because it was simply lifted from the earlier order of the 3<sup>rd</sup> Army and inserted.<sup>85</sup>  
The phrase was then repeated in the orders of subordinate commands.

46. The evidence does not show, however, that the phrase “armed non-Šiptar population” reflected an identifiable group under the control of the VJ in general or General Ojdanić in particular. In any event, there is no evidence that any “armed non-Šiptar population” was involved in any crimes against ethnic Albanian civilians.
47. Ljubinko Cvetić commanded the MUP for Kosovo Mitrovica and testified for the Prosecution. It was his evidence, in commenting upon the Joint Command order of 24 March 1999, that he understood “armed non-Šiptar population” to be a reference to the Serb population assigned to reserve police squads and Military Technical Units, by which he meant the bodies set up to defend villages.<sup>86</sup>
48. Colonel Pešić was Commander of the Priština Military District. He testified, in commenting upon the Joint Command order of 24 March 1999, that he did not understand the term “armed non-Šiptar population” and that whoever had drafted such a phrase was not a “proper professional” because specific units were not identified as being given tasks. Colonel Pešić testified that he knew of Serbs being armed in 1996 or 1997 when weapons were simply taken by people after the old military territorial defence was disbanded.<sup>87</sup>
49. General Radinović’s evidence was that he understood “armed non-Šiptar population” to include all reservists (both military and police) as well as Civilian Defence and Civilian Protection.<sup>88</sup>
50. Several Brigade commanders testified that they did not understand what was meant by the phrase “armed non-Šiptar population.”

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<sup>85</sup> Tr.21832.

<sup>86</sup> Tr.8089.

<sup>87</sup> Tr.7190.

<sup>88</sup> Tr.17270.

- a. General Živanović was commander of the 125<sup>th</sup> Motorised Brigade. His evidence was that because the phrase is not defined in paragraph 5 (the operative part) of an order, it is an “empty phrase” without meaning. Pressed, he explained that “armed population” likely came historically from the concept of All People’s Defence and that he understood the term to refer to Civilian Protection and Civilian Defence.<sup>89</sup>
  - b. General Jelić was commander of the 243<sup>rd</sup> Motorised Brigade. His evidence was that “armed non-Šiptar population” refers to Civilian Protection and Civilian Defence.<sup>90</sup>
  - c. General Stefanović was Chief of Operations in the Priština Corps. His evidence was that the “armed non-Šiptar population” was controlled by the Ministry of Defence, meaning Civilian Protection and Civilian Defence.<sup>91</sup>
51. Therefore, witnesses have given differing explanations as to who comprised the “armed non-Šiptar population.” It is the Defence’s submission that the reason for this is that, as a number of witnesses have testified, the phrase did not correspond to anything or anyone on the ground.
- a. General Mandić was commander of the 252<sup>nd</sup> Armoured Brigade. He testified that there were no “armed non-Šiptar population” units within his command, nor was he aware of any such armed units in his area.<sup>92</sup>
  - b. Colonel Savić was commander of the 58<sup>th</sup> Light Infantry. He testified that he did not see any “armed non-Šiptar population” units on the ground.<sup>93</sup>

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<sup>89</sup> Tr.20560.

<sup>90</sup> Exh.5D1284; Tr.19070.

<sup>91</sup> Tr.21650; Tr.21833-4; Exh.5D300; Exh.5D301.

<sup>92</sup> Tr.20931-2.

<sup>93</sup> Tr.21008-9.

- c. General Delić was commander of the 459<sup>th</sup> Motorised Brigade. He testified that there was no “armed non-Šiptar population” in his zone, especially not Serbs because they had already been expelled.<sup>94</sup>
52. The evidence does not support a finding that the “armed non-Šiptar population” was under the control of the VJ and/or involved in offensive actions against the KLA or, crucially in this case, criminal acts against ethnic Albanian civilians. Radovan Radinović testified as a military expert for the Defence. His evidence in commenting upon the Joint Command order of 23 March 1999 was that the “armed non-Šiptar population” should not be understood as having been engaged in any action by the military because it is only section 5 (as opposed to section 2) which sets out specific tasks for units under the command of the military.<sup>95</sup> Radinović described this as the “abc” of the military and that if the “armed non-Šiptar population” were under the control of the military then one would have to see specific orders given to them in section 5.<sup>96</sup> This is corroborated by the evidence of, among others, General Lazarević,<sup>97</sup> General Živanović,<sup>98</sup> and General Delić.<sup>99</sup>
53. Finally, the Prosecution has offered no evidence that the “armed non-Šiptar population” was responsible for any crimes committed against ethnic Albanian civilians.

(6) Conclusion

54. The Prosecution has not proved that the arming of certain civilians and the disarming of others indicates a plan to expel ethnic Albanian civilians from Kosovo. Rather, the evidence is of a necessary and proportionate measure forced by the threat the KLA posed. The references to “armed non-Šiptar population” do not appear in any order issued by General Ojdanić and cannot be attributed to him. In any event, there is no evidence

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<sup>94</sup> Tr.19657-8.

<sup>95</sup> Tr.17281-2.

<sup>96</sup> Tr.17293-6.

<sup>97</sup> Tr.7907-8.

<sup>98</sup> Tr.20561.

<sup>99</sup> Tr.19653-4.

before the Trial Chamber that armed Serb civilians were responsible for any of crimes in the Amended Indictment.

## 2. The Joint Command

55. The Prosecution alleges that the Joint Command was the body by which the Joint Criminal Enterprise to expel ethnic Albanians from Kosovo was implemented. During its 98 *bis* submissions, the Prosecution argued that orders issued by the Joint Command reflect the crime sites listed in the Amended Indictment.<sup>100</sup>

56. There is no evidence that the Joint Command existed to implement a plan to expel ethnic Albanians from Kosovo. It is the Defence's submission that the highest at which the evidence can be put is that the Joint Command existed to coordinate legitimate VJ and MUP actions against the KLA. The VJ chain of command remained intact- this can be seen from the flow of orders from and reports to the General Staff- and whatever steps were taken in Kosovo to coordinate the VJ and MUP chains of command were measures within the discretion of the relevant tactical and operational commanders. If there was any break in the chain of command, it did not occur at the level of the General Staff.

57. The evidence of a number of witnesses demonstrates that the Joint Command was neither problematic from the perspective of the General Staff nor indicative of a criminal plan.

- a. General Ćurčin's evidence was that the chain of command remained in tact from the perspective of the Supreme Command Staff. Ćurčin described the usual procedure whereby General Ojdanić received instructions from President Milošević and then proceeded to pass orders down the chain of command.<sup>101</sup> Ćurčin's evidence was that the Joint Command simply coordinated joint activities carried out by the MUP and the VJ in the same area at the same time. Ćurčin pointed out that the Joint Command did not have any of the attributes of a command which was separate to or competing with the General Staff: there was

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<sup>100</sup> Tr.12580.

<sup>101</sup> Tr.16979.

no commander, no formal establishment structure, no seal of office or registry. Instead, Joint Command documents were simply registered under the number 455 in the command of the Priština Corps.<sup>102</sup>

- b. General Simić's evidence was that General Ojdanić exercised command of the Priština Corps exclusively through the commander of the 3<sup>rd</sup> Army.<sup>103</sup>
- c. Colonel Ivković was Chief of the Operations Centre of the General Staff. His evidence was that there was no separate communication established with a body called the Joint Command via the Operations Centre of the General Staff.<sup>104</sup>
- d. General Obradović led relations between the General Staff and the international observer missions.<sup>105</sup> His evidence was that from the perspective of the General Staff there was no "institution" of the Joint Command because neither reports nor orders, either going up or down the chain of command, flowed that way.<sup>106</sup>
- e. General Kosovac headed the Administration of the General Staff in charge of mobilisation and conscription.<sup>107</sup> His evidence was that during the NATO bombing he did hear mention of the Joint Command through his personal contacts, but that it did not concern him. Kosovac testified that he understood the Joint Command to be a coordinating body.<sup>108</sup>

58. The above was corroborated by the evidence of General Dimitrijević, who testified that to his knowledge the Joint Command was never established and he never saw any documents relating to it.<sup>109</sup>

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<sup>102</sup> Tr.17045-7.

<sup>103</sup> Exh.3D1089, para.17.

<sup>104</sup> Exh.3D1117, para.31.

<sup>105</sup> Tr.14950.

<sup>106</sup> Tr.15091.

<sup>107</sup> Tr.15791-2.

<sup>108</sup> Tr.15883.

<sup>109</sup> Tr.26617-8; Tr.26595-6.

59. Further, evidence from Prosecution witnesses confirms that, despite its name, forces on the ground were not commanded by the Joint Command.

- a. Colonel Pešić testified that he, as commander of the Priština Military District, never received an order from the Joint Command.<sup>110</sup>
  - b. Ljubinko Cvetić testified that from his perspective as commander of the MUP for Kosovo Mitrovica, the Joint Command was not an extraordinary body and that the prescribed chain of command was followed. It was Cvetić's evidence that the Joint Command was formed to coordinate activities between the army and the police and to verify and approve certain plans involving both units.<sup>111</sup>
60. The highest at which the evidence can be put is that from the perspective of the General Staff, the Joint Command was a coordinating body which did not interfere with the VJ chain of command, the war plan or relevant Directives on the use of the VJ. There is no evidence that the Joint Command impacted upon the chain of command of the VJ. Rather, there is positive evidence that it did not. The Prosecution has offered no evidence as to why the existence of the Joint Command, at a level subordinate to the General Staff, should have troubled General Ojdanić. The Prosecution has not substantiated its contention that the Joint Command was the means by which a plan to expel ethnic Albanians was implemented.

### **3. The October 1998 Agreements**

61. It is the Prosecution's case that the FRY breached the October 1998 Agreements prior to the withdrawal of the Kosovo Verification Mission on 20 March 1999 and the commencement of NATO air-strikes on 24 March 1999, and that the breaches alleged are somehow indicative of a joint criminal enterprise.

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<sup>110</sup> Tr.7267.

<sup>111</sup> Tr.8194.

62. In the Defence's submission, given that the Prosecution's case is that the VJ acted in breach of these agreements in a way that is indicative of a criminal purpose, the structure and content of these agreements and statements is key. The October Agreements consisted of a number of separate agreements and statements signed by a number of different people.

- a. On 12 October 1998, President Milošević and Richard Holbrooke struck an accord which provided for, among other things, the monitoring of the situation in Kosovo by the international community.<sup>112</sup> It was agreed that this task should be carried out by a mission from the Organisation for Security and Cooperation in Europe.
- b. On 15 October 1998, a NATO Air Verification Regime was agreed in Belgrade, signed by General Wesley Clark and General Perišić.<sup>113</sup> It was Smiljanić's evidence that under this Agreement the FRY ceded its airspace to unimpeded flights by NATO surveillance aircraft.<sup>114</sup>
- c. On 16 October 1998, the Chairman of the OSCE, Bronislaw Geremek, and the Foreign Minister of the FRY signed the Agreement on the Kosovo Verification Mission.<sup>115</sup> This provided for an OSCE mission of 2,000 unarmed verifiers. The stated aim of the mission was to "verify compliance by all parties in Kosovo with UN Security Resolution 1199, and report instances of progress and/or non compliance" to the relevant organisation. The specific terms of reference provided, among other things, as follows:

"The Verification Mission will travel throughout Kosovo to verify the maintenance of the cease-fire by all elements. It will investigate reports of cease-fire violations. Mission personnel will have full freedom of movement and access throughout Kosovo at all times."

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<sup>112</sup> Exh.1D601; Exh.1D204; Tr.13168-70.

<sup>113</sup> Exh.P440.

<sup>114</sup> Tr.15742. See Exh.3D709, para.5 evidencing FRY compliance.

<sup>115</sup> Exh.P432.

d. On 24 and 25 October 1998 there were further meetings held in Belgrade to discuss the implementation of the earlier agreements. Exhibit P394 is a specific agreement reached between the KDOM/KVM mission and the FRY Ministry of the Interior. General Naumann testified in Milošević that this was a separate agreement on police behaviour, providing that 27 observation points would be established along lines of communication.<sup>116</sup> From General Ojdanić's perspective, however, the more important document is Exhibit P395 which is an agreed note of a meeting together with a position statement issued by the Serbian authorities of which NATO "took note."<sup>117</sup> With regard to the VJ, the following commitments are of note:

- i. All VJ units and additional equipment brought to Kosovo after February 1998 would be withdrawn.
- ii. Except for those VJ units augmenting border areas, all VJ elements remaining in Kosovo would be returned to garrison except for three company-sized teams which were permitted to remain and protect lines of communications between:
  - 1) Peć – Lopusnik – Priština;
  - 2) Dakovica – Klina; and
  - 3) Prizren – Suva Reka – Priština.<sup>118</sup>
- iii. VJ border guards would be permitted to remain in position along the international border of the FRY and conduct ongoing border security operations.
- iv. As a last resort, and consistent with the right of self defence, the State authorities retained the right to respond adequately and

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<sup>116</sup> Exh.P2512, p.6988.

<sup>117</sup> This raises questions as to the binding force, in international law, of this aspect of the October Agreements.

<sup>118</sup> Exh.P395, para.5.

proportionately to any form of terrorist activity or violation of the law which could jeopardise the lives or safety of citizens or state authorities.

63. The KLA was not a signatory to any of the October Agreements. The conduct of the KLA was, however, determinative of whether a more lasting peace could be achieved. It is submitted that the evidence is unanimous that the FRY initially complied with the October Agreements, but was then faced with the situation where the KLA used the ceasefire and withdrawal to re-arm, regain territory and perpetrate further terrorist atrocities.

- a. Reports from the Security Department of the Priština Corps record the KLA re-taking territory after the VJ withdrawal.<sup>119</sup> This is corroborated by the testimony of numerous international observers.
- b. Shaun Byrnes was head of the US KDOM and had been in Kosovo as an international observer since 12 August 1998.<sup>120</sup> Given his presence in Kosovo both before and after the October Agreements, he was ideally placed to assess the parties' respective responses. It was Byrnes' evidence that the armed activities of the KLA increased after the October Agreements.<sup>121</sup> Byrnes testified that the US KDOM and KVM were "deeply concerned" that the KLA planned to move its attacks into urban centres.<sup>122</sup> In his view, the KLA commanders and leadership saw the October Agreements as "a chance to regroup and rearm." Byrnes testified that his mission saw evidence of this in the field, where they saw KLA training camps.<sup>123</sup> Byrnes testified that it was common knowledge among the "internationals" that the KLA was smuggling weapons from Albania into Kosovo before, during and after the October Agreements.<sup>124</sup>

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<sup>119</sup> Exh.3D1013; Exh.3D1015, para.2.2; Exh.3D1016; Exh.3D1019.

<sup>120</sup> Tr.12131.

<sup>121</sup> Tr.12209.

<sup>122</sup> Tr.12210.

<sup>123</sup> Tr.12243.

<sup>124</sup> Tr.12217-8.

- c. Richard Ciaglinski was liaison officer from the KVM to the VJ. His evidence when discussing the period from October 1998 to February 1999 was that the Serb side generally adhered to the October Agreements, whereas the KLA did not.<sup>125</sup> It was Ciaglinski's "own observation" that the KLA used the time the KVM was present in Kosovo to re-arm and re-enforce.<sup>126</sup> Ciaglinski described a KLA "campaign of terrorism."<sup>127</sup>
- d. General Drewienkiewicz, Deputy to the Head of Mission and the person in charge of KVM Operations, testified that the FRY initially complied with the October Agreement while the KLA gradually filled in the positions left by Serb forces.<sup>128</sup> General Drewienkiewicz testified that he tried unsuccessfully to dissuade the KLA from doing this.<sup>129</sup>
- e. General Maisonneuve, one of the KVM supervisors, agreed that the picture during this time was of increasing provocation by the KLA.<sup>130</sup>
- f. Ambassador Walker, the head of the KVM, is recorded in the notes of Colonel Phillips dated 30 November 1998 as observing that "[m]ost of the violent acts are being committed by the KLA."<sup>131</sup>
- g. Further, General Dimitrijević testified that the General Staff observed the October Agreement by withdrawing VJ units to garrisons, albeit some parts of the army may have breached the agreements.<sup>132</sup>

a) Podujevo - December 1998

64. An issue during the course of the trial has been the VJ deployment in the Podujevo area in December 1998 and whether this constituted a breach of the October Agreements or

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<sup>125</sup> Tr.6971.

<sup>126</sup> Tr.6879.

<sup>127</sup> Tr.6971.

<sup>128</sup> Tr.7915.

<sup>129</sup> Tr.7915-6.

<sup>130</sup> Tr.11117.

<sup>131</sup> Exh.3D564.

<sup>132</sup> Tr.26732.

bore any relation to the alleged Joint Criminal Enterprise. It is the Defence's submission that the evidence shows that the VJ deployment in Podujevo was both legitimate and necessary.

(1) The KLA Threat to Podujevo

65. While not listed as one of the three strategic routes where a VJ company-sized deployment was permitted under the October Agreements,<sup>133</sup> the Podujevo area was of vital importance. The Trial Chamber need only look at a map to see its significance – Podujevo lies on the main road linking Kosovo to Serbia.

66. This vital area came under extreme threat from the KLA in December 1998. On 6 December 1998 the Security Department of the 3<sup>rd</sup> Army reported to the General Staff that the KLA had dug trenches,

“enabling full control of the Podujevo – Priština road.... All approaches to villages are under control of patrols, observers and ambushes mounted by the civilian and military police of the so-called KLA.”<sup>134</sup>

Shaun Byrnes, head of the US KDOM, testified that the Podujevo area was “very troublesome” for the KVM and KDOM; that the KLA was very aggressive there and its commander in that area, known as Remi, was “constantly pushing the envelope”.<sup>135</sup> It was Byrnes' opinion that Remi was militarily a very aggressive and capable officer.<sup>136</sup> Byrnes also testified that he heard reports that the KLA was driving out Serbs from the Podujevo area.<sup>137</sup> Byrnes explained that he tried unsuccessfully to persuade Commander Remi to pull back from those areas where the KLA posed a military threat.<sup>138</sup>

67. Byrnes testified that Podujevo included a major strategic line of communication, consisting of a two lane highway and parallel train track. Byrnes testified that there was

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<sup>133</sup> See para.62(d)(ii), above.

<sup>134</sup> Exh.3D1025.

<sup>135</sup> Tr.12192.

<sup>136</sup> Tr.12193.

<sup>137</sup> Tr.12194.

<sup>138</sup> Tr.12193.

no other major strategic route running from Kosovo into Serbia proper, so retaining control of the Priština-Podujevo-Niš road was of “paramount concern” to Belgrade and the VJ and police leadership.<sup>139</sup> Byrnes testified that it was “clear” to any observer that the KLA deployment there threatened the road and rail line.<sup>140</sup>

68. Byrnes’ evidence is corroborated by that of other Prosecution witnesses:

- a. Drewienkiewicz’s evidence was that the road going through Podujevo was the “lifeline” between Belgrade and Kosovo, and that he would not have expected the Serbs to have just let the KLA take the road.<sup>141</sup>
- b. Ciaglinski’s evidence was that the Podujevo area was strategically important because it was the road that supplied Kosovo from Serbia.<sup>142</sup>
- c. Michael Phillips was William Walker’s Chief of Staff. His evidence was that in Podujevo there were numerous KLA terrorist acts committed upon civilians.<sup>143</sup>

69. Contemporaneous documentary evidence strongly corroborates the recollection of the international observers in relation to Podujevo. A KVM Report on Podujevo for the period 21 – 27 December 1998 stated as follows:

"The VJ withdrew from positions in this area in accordance with the agreement, but then watched as those positions were occupied and fortified by the KLA. The area is of particular strategic importance to the Serbs, since the main north-south highway from Belgrade is within it. But the same pattern of KLA occupying areas left by the security forces has been observed elsewhere in Kosovo."<sup>144</sup>

70. The threat to civilians in the Podujevo area was grave. There is contemporaneous evidence in the form of a detailed letter dated 11 December 1998 from the Podujevo Municipal Assembly to the authorities in Belgrade setting out in detail the crimes

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<sup>139</sup> Tr.12163-4.

<sup>140</sup> Tr.12233.

<sup>141</sup> Tr.7878.

<sup>142</sup> Tr.6925.

<sup>143</sup> Tr.11905.

<sup>144</sup> Exh.3D577, p.1.

committed by the KLA against both ethnic Serbs and ethnic Albanians.<sup>145</sup> Byrnes agreed with the letter's description of KLA attacks.<sup>146</sup> The letter, which pleads for the stationing of a VJ garrison in the area, graphically describes the threat posed by the KLA:

“They [the KLA] have become so strong that in addition to marauding literally armed to the teeth with automatic rifles, hand-held rocket launchers on their shoulders, necklaces of hand grenades and cartridge-belts in the camouflage and black uniforms of what they call their police, they come right up to the town. They encircle individual, isolated Serbian houses, carry out searches, mistreat people, and make threats and give deadlines to people to move out from Podujevo municipality.”<sup>147</sup>

71. During the Collegium of 30 December 1998, General Bojović described how terrorists had dug trenches along the Podujevo road, that the population had fled in response and that both ethnic Serbs and ethnic Albanians who were loyal to the State had been “gathered” by the KLA.<sup>148</sup> General Obradović attended that Collegium, and his evidence was that Bojović's presentation to the Collegium was powerful because he came from the Podujevo area.<sup>149</sup>

b) Was the VJ deployment in Podujevo an exercise?

72. An issue during the trial has been whether or not the VJ deployment in the Podujevo area in December 1998 was an exercise or a deliberate attempt to provoke the KLA. There is persuasive evidence before the Trial Chamber confirming that out of barracks training exercises were permitted under the October Agreements. A letter from the head of the KVM, William Walker, to President Milošević shortly after the October Agreements specifically contemplates training areas:

“information must also be provided for those security forces sites at which no formation, unit or sub-unit is located (e.g. training areas).”<sup>150</sup>

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<sup>145</sup> Exh.P414.

<sup>146</sup> Tr.12196.

<sup>147</sup> Exh.P414, p.2.

<sup>148</sup> Exh.P928, p.11. See also Exh.3D1038.

<sup>149</sup> Tr.14951; Exh.P928.

<sup>150</sup> Exh.P396, p.1.

73. It is therefore submitted that a VJ training exercise in the Podujevo area would not have violated the October Agreements and that defensive action taken in response to a KLA attack was similarly permitted.
74. Drewienkiewicz's evidence was that on 18 December 1998 a VJ armoured unit left its barracks and took up a position at a disused airfield south of Podujevo<sup>151</sup> and that there were then exchanges of fire between the KLA and VJ which developed in various villages over the following days.<sup>152</sup> Drewienkiewicz's evidence was that the KLA had initiated the fire and that they had taken over the territory when the FRY had complied with the October Agreements.<sup>153</sup> Drewienkiewicz continued that on 24 December a column of VJ and MUP left Priština for the Podujevo area.<sup>154</sup>
75. General Lončar testified as a Prosecution witness. His evidence was that the VJ deployment in Podujevo was not intended for combat purposes. His evidence was that the intention was to train personnel to operate tanks and that the ensuing exchanges with the KLA did not constitute an excessive use of force on the part of the VJ.<sup>155</sup>
76. General Obradović testified that the VJ soldiers involved in Podujevo were ill-equipped and young: easy prey for terrorists.<sup>156</sup> The suggestion is that it is inherently unlikely that the VJ would simply offer its troops as cannon fodder to the KLA. A 3<sup>rd</sup> Army Report to the VJ Liaison Team to the KVM describes how on 19 December 1998, a company strength unit went to the Batlava airfield to practice, whereupon the KLA opened fire. The Report suggests that the OSCE Mission was in fact informed about the planned exercises, and that after the weapons fire was encountered it was decided that, in response to the threat, the unit would remain in the area until after 22 December 1998.<sup>157</sup> Obradović testified that according to the reports the General Staff received, notification

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<sup>151</sup> Exh.P2508, para.94-97.

<sup>152</sup> Tr.7784-85.

<sup>153</sup> Tr.7877.

<sup>154</sup> Exh.P2508, para.99-100.

<sup>155</sup> Tr.7623.

<sup>156</sup> Tr.15054.

<sup>157</sup> Tr.14948; Exh.3D785.

was sent to the OSCE mission saying that this company was not a combat group and the OSCE checked the composition of the unit and had no objection.<sup>158</sup>

77. In contrast, Byrnes' evidence was that it was the US KDOM's understanding that the deployment of a VJ battle group to the Podujevo area was a "serious violation" of the agreement.<sup>159</sup> Ciaglinski's evidence was also that this deployment was a violation of the October Agreements.<sup>160</sup>

78. The explanation given by VJ authorities at the time was that the deployment in Podujevo was an exercise and therefore not prohibited by the October Agreements. Drewienkiewicz's evidence was that Colonel Kotur, General Lončar, and Major Dranković of the VJ all informed him that the VJ were deployed in Podujevo for training purposes whereupon they were targeted by the KLA.<sup>161</sup>

79. There is some evidence before the Trial Chamber, however, to undermine the explanation given at the time for the deployment. Byrnes testified that the explanation that the deployment in Podujevo was an exercise was an excuse.<sup>162</sup> Furthermore, in the Collegium of 30 December 1998, General Dimitrijević discussed events in Podujevo:

"In addition the current situation in the vicinity of Podujevo, I think that we must be completely consistent here and completely open towards each other, so to speak. This situation in Podujevo and the surroundings, it was complex before, but when did it suddenly become even more complicated. After the so-called pretend or real planned combat exercises in which this company took part in the field. General, these sort of moves will lead us to disaster, the explanation that this was not a planned exercise, this is not true, it was planned so that the MUP would provoke the terrorists so that the MUP would have to do whatever it would have to do."<sup>163</sup>

80. General Obradović also attended the Collegium on 30 December 1998, during which he noted that many institutions in the Podujevo area had stopped functioning- courts had

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<sup>158</sup> Tr.15057.

<sup>159</sup> Tr.12165-6.

<sup>160</sup> Exh.P2489, p.3147.

<sup>161</sup> Exh.P2508, para.94-97.

<sup>162</sup> Tr.12168.

<sup>163</sup> Tr.15054-5; Exh.P928, p.14.

stopped functioning because judges had fled in fear.<sup>164</sup> General Obradović rejected Dimitrijević's assertion as being even remotely possible.<sup>165</sup> Obradović testified that Dimitrijević's thesis was advocated on the basis of sources in the West and that the General Staff had had no reason disbelieve the explanation provided by subordinate commands.<sup>166</sup>

81. When asked about this passage, General Dimitrijević testified that he and General Ojdanić were "involved in a bit of a polemic" about the marching route taken by the VJ and that the details in relation to Podujevo were subsequently confirmed by General Obradovic at the request of General Ojdanić.<sup>167</sup> General Obradovic "explained that after an additional report was requested they established that, after all, this was not a provocation; rather, this was a planned exercise."<sup>168</sup> The Defence also notes that in the same Collegium General Dimitrijević expressed concern about KLA attempts to spread terrorism into urban areas and that this was especially pronounced in Podujevo.<sup>169</sup>

82. In any event, whether or not the VJ deployment was an exercise, or a violation of the October Agreements, should not detain the Trial Chamber. Even at the time, any criticism from the OSCE was in regards as to how the deployment was conducted rather than why it occurred. This is confirmed by the contemporaneous note of the meeting held between General Driewenciewicz and Dušan Lončar on 20 December 1998.<sup>170</sup> At its highest-training exercise or not- the evidence shows a legitimate response to a significant threat. General Perišić had expressly reserved the VJ's right to re-deploy in Podujevo in the event that the local population was threatened.<sup>171</sup> During the Collegium on 30 December 1998, General Ojdanić justified the deployment in Podujevo to protect the population:

"These claims presented here regarding the situation down there in and around Podujevo, that the presence of this unit added to it: it was really a matter of whether the marching

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<sup>164</sup> Tr.14951; Exh.P928, p.9.

<sup>165</sup> Tr.15055.

<sup>166</sup> Tr.15107-8.

<sup>167</sup> Tr.26632-3.

<sup>168</sup> Tr.26631.

<sup>169</sup> Tr.14951; Exh.P928, p.7-8.

<sup>170</sup> Exh.P506.

<sup>171</sup> Tr.14936.

route and the location of the camp were selected correctly, but /this unit really was bivouacked there. I was assured of this by the commander of the Army, but at one time General PERIŠIĆ said, when he agreed to the condition of withdrawal, that if they did not ensure what was expected of them, so if the other side continues to be active and threatens the Serbian population, we would be forced to bring this group back into this area. In accordance with this, and with the positions of the state leadership, this one I...! and when time ran out, you saw that they asked for the schedule, it was really extended for valid reasons but, as you can see, this did not make the Serbian population remain in the area, in the Podujevo area, either.”<sup>172</sup>

83. Overall, the evidence shows that the VJ reaction in the Podujevo area was commendable rather than worthy of criticism. Ciagliniski testified that on 26 December 1998, the KLA killed the last remaining Serb in Podujevo.<sup>173</sup> Ciagliniski commended the VJ on their professional conduct in response.<sup>174</sup> Further, in this context Byrnes testified that by the end of 1998 he was, if anything, more frustrated with the Albanians and felt them more obstructionist, particularly Commander Remi in Podujevo.<sup>175</sup>

c) Conclusion

84. The Prosecution has not proved that the VJ deployment in the Podujevo area was in breach of the October Agreements. The preponderance of the evidence shows that it was in fact an exercise which then became embroiled in a battle with the KLA. In any event, it is submitted that any VJ deployment was justified under the October Agreements as necessary to secure a vital road between Serbia and Kosovo as well as to protect the population. The Prosecution has offered no evidence from which it could possibly be inferred that the VJ deployment in Podujevo in December 1998 was part of a plan to expel Albanians from Kosovo.

**4. The alleged VJ troop build-up**

85. The Prosecution has not proved that the increased presence of VJ forces in Kosovo in early 1999 was anything other than a limited and necessary response to the increasing threat posed to the FRY. While neither the KLA nor NATO are on trial in these

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<sup>172</sup> Exh.P928, p.17.

<sup>173</sup> Tr.6893.

<sup>174</sup> Tr.6893-4.

<sup>175</sup> Tr.12238.

proceedings, in the Defence's submission it is necessary for the Trial Chamber to consider the threat that each posed to properly assess the gradual VJ build-up undertaken in the months preceding NATO's attack. Those circumstances demonstrate that the build-up of troops in and around Kosovo was not for the purpose of expelling Albanians, but for the purpose of defending the territorial integrity of the FRY.

a) The KLA threat

86. The KLA constituted a grave threat to the integrity of the FRY and the safety of its citizens. The scale of the threat and the tactics used by the KLA must be understood by the Trial Chamber in any assessment of the General Staff's response. The KLA was a large and organised guerrilla force which used ruthless terrorist tactics while at the same time occupying vast swathes of territory. While comparisons are inherently difficult, it is the Defence's submission that the KLA was more akin to the insurgency faced by Coalition forces in Iraq than other terrorist threats in Europe. Indeed, Prosecution witness Byrnes agreed that the threat posed by the KLA may well have justified the FRY authorities invoking the last part of the October Agreements that enshrined the right to self-defence and overrode the other provisions.<sup>176</sup>

(1) Strength

87. The most authoritative evidence before the Trial Chamber of the strength of the KLA was, for obvious reasons, the account of its Chief of Staff, Bislim Zyrapi. His evidence was that as of March 1999, the KLA had approximately 17,000-18,000 soldiers in Kosovo and that they were organised into squads, platoons, companies, battalions, brigades and zones.<sup>177</sup> Indeed, during the summer of 1998, a European Community Monitoring Mission report had described how membership of the KLA was almost unlimited.<sup>178</sup>

<sup>176</sup> Tr.12197-8. See para.62(d)(iv), above.

<sup>177</sup> Tr.5959-60.

<sup>178</sup> Exh.P2136; Tr.9905.

88. Zyrapi explained that in July 1998 the KLA held approximately 50% of the territory of Kosovo, including three of the four main access roads.<sup>179</sup> While the KLA had been weakened during the summer of 1998, Zyrapi's evidence was that the KLA filled in positions from which the Serbs withdrew under the October Agreements to the extent that by the end of December 1998 the territory under the KLA's control was then greater than before the Serb offensive during the summer of 1998.<sup>180</sup>
89. A report from the Security Department of the Priština Corps to the General Staff dated 13 January 1999 described how the "intensive rounding up and training of able-bodied Albanians continues," that recruitment centres were established and wartime training was being conducted by the KLA.<sup>181</sup>
90. A VJ intelligence assessment in February 1999 assessed the strength of the KLA as between 12,000 – 15,000 persons under arms with a further 5,000 – 6,000 people in Albania ready to move into Kosovo.<sup>182</sup> General Dimitrijević testified that this document was a realistic and justified assessment of the threat.<sup>183</sup>
91. A report from the Security Department of the 3<sup>rd</sup> Army to the General Staff dated 13 March 1999 described the KLA forcing able-bodied men to mobilise and join its ranks.<sup>184</sup> A report from the Security Department of the 3<sup>rd</sup> Army to the General Staff dated 16 March 1999 reported the mobilisation of the population by the KLA.<sup>185</sup>
92. Even John Crosland, who inexplicably and contrary to all other evidence before this Trial Chamber had suggested that the KLA did not include more than 400 "hard core" members, agreed with the assessment of the European Community Monitoring Mission<sup>186</sup>

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<sup>179</sup> Tr.6017.

<sup>180</sup> Tr.6034; Exh.P2460. See also, Exh.6D1671, para.3; Exh.6D1637, para.10.

<sup>181</sup> Exh.3D1040, para.2.2.

<sup>182</sup> Exh.3D685, p.14.

<sup>183</sup> Tr.26736.

<sup>184</sup> Exh.3D1052, para.2.2.

<sup>185</sup> Exh.3D1053, para.2.1.

<sup>186</sup> Exh.P2136

that the potential for KLA membership was virtually “unlimited.”<sup>187</sup> Indeed, Colonel Crosland stated that:

“I think that the clan based society that is Kosovo actually made the KLA stronger. You needed the tacit support of the whole family to get involved but once you had it, every one would support the cause.”<sup>188</sup>

Crosland also agreed that the VJ in general, and General Dimitrijević in particular, had “very good intelligence on the strength of the KLA.”<sup>189</sup>

## (2) Tactics

93. The Defence submits that there can be no dispute that the KLA was a legitimate military target. Prosecution witness Richard Ciaglinksi testified to this effect.<sup>190</sup> KLA tactics were ruthless and calculated.<sup>191</sup> As early as the summer of 1998, Prosecution witness John Crosland described the KLA as “increasingly revealing its fundamental characteristic as a terrorist organisation which has no qualms in liquidating its members for the slightest disobedience.”<sup>192</sup> There is voluminous evidence before this Trial Chamber (and others)<sup>193</sup> of the tactics employed by the KLA.

- a. Bislim Zyrapi, the Chief of Staff of the KLA, explained how the KLA was assisted by the civilian population, which provided lodging and other assistance.<sup>194</sup> Zyrapi explained that the KLA had village staffs which remained in villages and were provided with arms but did not wear KLA uniforms.<sup>195</sup> Zyrapi explained that a KLA soldier would surrender his uniform when going into a non-KLA area of Kosovo.<sup>196</sup> Zyrapi testified that the KLA “liquidated” people

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<sup>187</sup> Tr.9905.

<sup>188</sup> 3D510, para.49.

<sup>189</sup> Tr.9907.

<sup>190</sup> Tr.6837.

<sup>191</sup> See Exh.3D1020; Exh.3D1022; Exh.3D1023Exh.3D1032; Exh.3D1033; and Exh.3D1034.

<sup>192</sup> Tr.9909-12; Exh.3D511. See also Exh.3D1051, para.2.1.

<sup>193</sup> See *Limaj* TJ.

<sup>194</sup> Tr.6050.

<sup>195</sup> Tr.6232.

<sup>196</sup> Tr.5976.

suspected of being collaborators.<sup>197</sup> He described this fact as being “common knowledge.”<sup>198</sup>

- b. Drewienkiewicz described how a Kosovar Albanian in civilian clothes might be a KLA member who had simply taken his uniform off.<sup>199</sup> Drewienkiewicz testified that it was a common KLA tactic to operate from civilian areas, to carry out attacks and then when the VJ exercised its right of self-defence and responded, it would appear as if there was no KLA presence and then a “big claim” was made that civilians were being attacked.<sup>200</sup>

Drewienkiewicz further stated that, in December 1998, during efforts by Ambassador Chris Hill to secure an agreement with Kosovar Albanian officials, it was “public knowledge at the time that the KLA was threatening to kill anyone who signed any agreements.”<sup>201</sup>

- c. Maisonneuve’s evidence was that it was his first-hand experience that the KLA based itself in village houses. Maisonneuve described how he would meet a KLA Commander named Drini in villagers’ houses, and that he presumed the KLA were using houses as bases.<sup>202</sup>
- d. Byrnes testified that the thing that stuck in his mind from his time in Kosovo—which was from the summer of 1998 until just before the NATO bombing began—was the killing or disappearances of Serbs at the hands of the KLA. Byrnes described how he and his colleagues did everything they could to find these people or bring them back, but they were successful on too few occasions.<sup>203</sup> Byrnes described how he and his team strongly suspected that some KLA members sought to escape encirclement by posing as civilians.<sup>204</sup>

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<sup>197</sup> Tr.5950; Tr.15229; Exh.3D1033, para.2.4.

<sup>198</sup> Tr.6051.

<sup>199</sup> Tr.7835.

<sup>200</sup> Tr.7878.

<sup>201</sup> Exh.P2508, page8, para.47.

<sup>202</sup> Tr.11135.

<sup>203</sup> Tr.12142.

<sup>204</sup> Tr.12229.

(3) Impact upon the peace process

94. The evidence shows that through its numbers and tactics the KLA had a profound effect on the peace process. The Defence makes no submissions on the details of the political negotiations, save to say that it was not in the General Staff's interest for the negotiations to fail. Conversely, it was clearly in the KLA's interest to spark military action against the FRY.

- a. General Naumann's evidence was that in "most cases" the escalation came from the KLA.<sup>205</sup>
- b. Drewienkiewicz testified that the KLA had declared on 31 December 1998 that 1999 was to be the year of independence for Kosovo.<sup>206</sup> His evidence was that during the Rambouillet discussions (February 1998), Serb activities "declined significantly" whereas KLA actions declined "much less appreciably." Moreover, Drewienkiewicz's evidence was that the KLA became "more opportunistic" during this time.<sup>207</sup> Drewienkiewicz's notebook of 1 March 1999 described the impact of the return of the KLA leadership from the France negotiations, how KLA actions were becoming "increasingly unrestrained" including activity in areas which had previously been peaceful.<sup>208</sup> A KVM report covering the period 23 February to 11 March 1999 stated that: "Unprovoked attacks by the KLA against the police have continued and the number of casualties sustained by the Security forces has increased." The report states that "incidents of kidnapping and abductions by the KLA have continued."<sup>209</sup>
- c. The minutes of a meeting between Maisonneuve and the KLA on 23 January 1999 record that the KLA's plans for a more general resumption of hostilities were complete.<sup>210</sup> Similarly, Maisonneuve testified that during the Rambouillet

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<sup>205</sup> Tr.8264; Exh.3D377.

<sup>206</sup> Exh.P2508, para.114.

<sup>207</sup> Exh.P2508, para.189.

<sup>208</sup> Exh.3D573.

<sup>209</sup> Exh.3D179, p.1&4.

<sup>210</sup> Tr.11119; Exh.P2772, p.114(K0075720).

discussions, acts of provocation came mainly from the KLA.<sup>211</sup> Maisonneuve described how he had earlier been told by a KLA commander that the KLA was coordinated and had a strategy.<sup>212</sup> Maisonneuve's evidence was that the KLA informed the KVM that taking their campaign into towns was an "active element" in the next military step of the KLA.<sup>213</sup> Maisonneuve testified that increased KLA recruitment was taking place at this time as it attempted to position itself.<sup>214</sup> David Wilson, a British Army officer who Maisonneuve described as a "fairly astute guy," wrote in an assessment dated 15 March 1999 addressed to Drewienkiewicz, that the KLA would return to "full scale violence" and take the fight into towns and cities if the Serb side failed to sign an agreement.<sup>215</sup> Maisonneuve conceded that there was greater KLA recruitment during the Rambouillet discussions and that the KLA was positioning itself for future action.<sup>216</sup>

- d. Colonel Michael Phillips testified that the KLA targeted various urban areas, not only Priština.<sup>217</sup>
- e. On 9 January 1999 the Security Department of the Priština Corps reported to the General Staff information that a Colonel Richards of the KVM had been informed by the KLA that it intended to start attacking targets throughout Kosovo.<sup>218</sup>
- f. During the Collegium of 2 February 1999, General Obradovic indicated that the VJ had fully complied with the October Agreements for four months, but noted that circumstances had changed and that some VJ units had left their barracks. General Obradovic said that the deviation from the terms of the October Agreement was necessary in the circumstances and that the KVM had not called

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<sup>211</sup> Tr.11119-20; Exh.3D374.

<sup>212</sup> Tr.11044.

<sup>213</sup> Tr.11119.

<sup>214</sup> Tr.11121.

<sup>215</sup> Tr.11126-7; Exh.P641.

<sup>216</sup> Tr.11121.

<sup>217</sup> Tr.12015-6.

<sup>218</sup> Exh.3D1039, para.3.4. See also Exh.3D1051, Exh.3D1052; Exh.3D1053, para.2.1&2.4.

for these units to return to their barracks.<sup>219</sup>

- g. The Collegium of 4 February 1999 records the General Staff's assessment that the KLA was to increase terrorist activity following the Rambouillet discussions.<sup>220</sup>
- h. During the Collegium of 18 February 1999, it was noted that the KLA had continued to expand the territory under its control. The KLA announced that it would cut-off roads and conduct raids throughout Kosovo.<sup>221</sup> Indeed, this was precisely what came to pass in March 1999. It was further noted that the KLA's aim was to force a foreign intervention against the FRY.<sup>222</sup>
- i. During the Collegium on 25 February 1999 there was discussion of the deployment of an anti-terrorist battalion from the 72<sup>nd</sup> Special Brigade to Kosovo. The minutes of this Collegium make clear that the General Staff had not been consulted about this deployment and General Ojdanić noted that the essence of his previous order had been that such a unit should not have been brought to Kosovo.<sup>223</sup> Ojdanić noted that:

“... the proposal came from the commander of the Third Army, not for them to go to Nis but to Kosovo. I disagreed and responded, in general terms, that for the time being the units should be deployed at the edges of Kosovo and not inside Kosovo. However, most probably, I have unfortunately learned just now that they were transferred there...”<sup>224</sup>

- j. Drewienkiewicz's evidence was that by 3 March 1999, the VJ had 15 companies deployed in the field in Kosovo when in fact they were allowed only three companies under the October Agreements. Drewienkiewicz's evidence was that these were used to conduct search and destroy operations against the KLA.<sup>225</sup> It is the Defence's case that the number of 15 is unsupported and contradicted. General Lazarević demonstrated to the Trial Chamber that such a number ignores that deployments permitted under the October Agreements were split to protect

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<sup>219</sup> Exh.P931, p.12.

<sup>220</sup> Exh.P932, p.8.

<sup>221</sup> Exh.P937, p.8.

<sup>222</sup> Exh.P937, p.2.

<sup>223</sup> Exh.P941, p.16-17. See also Tr.16213 & Tr.26707.

<sup>224</sup> Exh.P941, p.25.

<sup>225</sup> Exh.P2508, para.187.

either side of strategic routes. Moreover, such a number ignores those permitted to operate in the border area<sup>226</sup> and those located in training areas.<sup>227</sup>

b) The NATO threat and VJ response

95. The NATO threat to the FRY was considerable and there can be little doubt of its severity. For example on 15 March 1999, General Ojdanić spoke to General Wesley Clark on the telephone when General Clark issued an ultimatum that the VJ would be “destroyed” if it entered into conflict with NATO. General Ojdanić is recorded as responding that the VJ was not doing anything it was not authorised to do.<sup>228</sup>

96. As to the weeks preceding the NATO military action, there is conflicting evidence as to whether NATO was prepared to launch a land invasion of the FRY. There is, however, strong evidence that General Ojdanić feared a land invasion and found it necessary to prepare for the worst whilst hoping for the best. Moreover, in the Defence’s submission the NATO threat was not one which can be viewed independently from the KLA threat.

a. John Crosland, who was Defence Attaché at the UK Embassy in Belgrade, testified that the international community supported the KLA, that it had decided that there was to be regime change in Kosovo and that the KLA was one of the “tools” to make that happen.<sup>229</sup> The significance of this evidence from a senior member of the military from a NATO member that was about to launch military operations against the FRY is obvious.

b. Defence witnesses have provided corroborating evidence to show that the NATO threat cannot be viewed as distinct from the KLA threat.<sup>230</sup>

c. A report from the Priština Corps command to the General Staff dated 24 December 1998 included operational intelligence that the KLA intended to secure

<sup>226</sup> See para.62(d)(iii).

<sup>227</sup> Exh.P2772, p.85(map); Tr.17864-9; Tr.20635-9.

<sup>228</sup> Exh.3D706; Exh.3D707; and Exh.3D985.

<sup>229</sup> Tr.9865-6; Exh.3D510 para.25.

<sup>230</sup> Tr.16415-7.

areas of Kosovo in order to facilitate the supply of weapons to it by NATO.<sup>231</sup>

- d. During the Collegium of 21 January 1999 General Dimitrijević observed that the KVM was passing on information to the KLA.<sup>232</sup>
- e. An assessment by the Security Department of the Priština Corp sent to the General Staff on 26 January 1999 referred to a source within KDOM who revealed that NATO intended to deploy forces in the spring. This was assessed in connection with a KLA announcement that “massive terrorist attacks” would be launched “throughout the territory” of Kosovo.<sup>233</sup>
- f. During the Collegium of 4 March 1999, it was noted that large numbers of terrorists had grouped in Podujevo, Orahovac and Kacanik to secure communications with NATO forces in Macedonia.<sup>234</sup>
- g. An assessment by the Security Administration of the 3<sup>rd</sup> Army Command on 22 March 1999 presented the KLA and NATO threats as closely related.<sup>235</sup>
- h. A report of the Intelligence Department of the Supreme Command Staff on 29 March 1999 stated that active NATO service personnel and special forces were infiltrated within the KLA and fighting alongside it.<sup>236</sup>
- i. During the Daily Briefing of 31 March 1999 it was reported that intelligence revealed that NATO was cooperating with and training the KLA.<sup>237</sup>
- j. Krga testified that during the NATO bombing campaign a connection was established between the increase in NATO airstrikes and an increase in KLA activities at the border, which led the General Staff to believe that NATO was

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<sup>231</sup> Exh.3D1035, para.2.1.

<sup>232</sup> Exh.P929, p.15-17.

<sup>233</sup> Exh.3D1044, para.2.1.

<sup>234</sup> Exh.P933, p.8.

<sup>235</sup> Exh.3D1054.

<sup>236</sup> Exh.3D783. See also Exh.3D770; Exh.3D762; and Exh.3D758.

<sup>237</sup> Exh.3D584, p.2.

providing support to KLA for the purpose of executing a breakthrough.<sup>238</sup>

97. It is the Defence's submission that the VJ had to respond to the NATO threat and that its response - in the form of a limited military build-up in Kosovo to defend the territorial integrity of the then FRY- was understandable. The Prosecution has not proved anything other than a cautious and proportionate VJ response to the threat posed. The evidence before the Trial Chamber clearly demonstrates that any military build-up had nothing to do with a Joint Criminal Enterprise aimed at ethnic Albanian civilians.

- a. Crosland testified that additional soldiers were brought to Kosovo, increasing the strength of the VJ from 12,000 to about 15,000.<sup>239</sup> Crosland conceded that this could have been in anticipation of a ground invasion from NATO and he complemented rather than criticised the planning done by the Army in this regard.<sup>240</sup>
- b. On 28 January 1999, General Krga, Chief of Intelligence in the General Staff, briefed the Collegium on the accelerated build-up of NATO air and naval forces in the region.<sup>241</sup> General Krga's evidence was that throughout this period, the Intelligence Administration of the General Staff received information that the KLA may begin a spring offensive escalating to a NATO military intervention.<sup>242</sup> Moreover, General Dimitrijevic testified as follows: "I personally issued warnings many times to the effect that we would have a serious problem. We as a service then had information to the effect that somewhere in Switzerland a decision had been made to wait for the spring in order to start a general uprising."<sup>243</sup>
- c. On 18 February 1999, it was reported to the Collegium that the number of NATO forces in Macedonia would be raised to 8,000 by the end of the month. General Ojdanić said that in response to the threat of invasion, VJ units should be

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<sup>238</sup> Tr.16815-6.

<sup>239</sup> Tr.9843.

<sup>240</sup> Tr.9844-5.

<sup>241</sup> Exh.3D559, p.6-7.

<sup>242</sup> Tr.16786.

<sup>243</sup> Tr.26606.

deployed near the border with Kosovo so that they could be deployed rapidly into Kosovo if necessary.<sup>244</sup> General Ojdanić explained: “[w]e must defend the country if we are attacked. Politics and diplomacy will do everything to resolve this by peaceful means if possible.”<sup>245</sup>

- d. General Pantelić testified that General Ojdanić still hoped that a peaceful solution could be found and war avoided. He described how in early March 1999 the logistics department assessed that it was necessary to start evacuating strategic war reserves (ammunition and lethal weapons) because everything suggested that NATO would soon attack. Pantelić’s evidence was that he proposed that General Ojdanić sign an order for such an evacuation to take place, but that General Ojdanić refused. Pantelić’s evidence was that this was indicative of General Ojdanić still believing that a peaceful solution would be found.<sup>246</sup>
- e. On 11 March 1999, Krga briefed the Collegium on the capabilities of the NATO rapid reaction force in Macedonia, indicating that either these new forces were being placed there as possible peacekeepers if an agreement was reached or, more worryingly, in preparation for a forceful invasion of Kosovo.<sup>247</sup> General Ojdanić said that the OSCE knew full well why the VJ had deployed more troops in the area. Ojdanić explained that “NATO is getting 9,500 people on board down there, we don’t know whether they will use them to invade, but we can’t sit here and be unprepared.”<sup>248</sup>
- f. On 18 March 1999, at the Collegium, General Ojdanić again stated that the army had increased its forces in and around Kosovo because of the NATO build-up of troops in Macedonia.<sup>249</sup> In a similar tone, General Panić discussed a meeting he had had with the American military envoy:

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<sup>244</sup> Exh.P937, p.16.

<sup>245</sup> Exh.P937, p.18.

<sup>246</sup> Exh.3D1113, para.16.

<sup>247</sup> Tr.16793.

<sup>248</sup> Exh.P935, p.21.

<sup>249</sup> Exh.P938, p.12.

“I heard him out and he said that Washington had sent him because they are particularly concerned about the deployment of the 211 and other units in the vicinity of Kosovska Mitrovica. My response was that the Army **cannot sit idly by considering the deployment of sizeable forces in our environment**, and that with the onset of the talks in Paris terrorism has started to expand rapidly and that they have started attacking both the Army and members of the MUP/Ministry of the Interior/ and the Serbian villages in all the locations and that in the future the Army shall continue to carry out its tasks in accordance with its obligations.”<sup>250</sup>

## 5. Conduct of the VJ

98. The Prosecution alleges that throughout 1998 and 1999 the VJ (i) used disproportionate force against the KLA and (ii) failed to differentiate between the KLA and civilians.<sup>251</sup> These are separate allegations, albeit linked to the extent that the use of disproportionate force might result in a failure to distinguish between a legitimate military target and civilians.
99. The significance of these allegations to the Prosecution’s case against General Ojdanić is unclear: the Prosecution has failed to articulate its case as to how these allegations, even if proved, would result in General Ojdanić being criminally responsible for the indictment crimes. In any event, the Prosecution has not proved either that indiscriminate or disproportionate force was used by the VJ or that General Ojdanić had specific knowledge thereof.
100. Under international humanitarian law (including the Rome Statute of the International Criminal Court) the death of civilians during an armed conflict, no matter how tragic, does not in itself entail criminal responsibility. International humanitarian law permits proportionate attacks directed against military objectives, even where it is known that civilian deaths or injuries will occur. Criminal responsibility is triggered either where there is an intentional attack directed against civilians (the principle of distinction)<sup>252</sup> or an attack is launched against a military objective with knowledge that civilian deaths would be clearly excessive in relation to the anticipated military advantage (the principle

<sup>250</sup> Exh.P938, p.7. (emphasis added)

<sup>251</sup> OTP PTB, para.90&137.

<sup>252</sup> See Article 8(2)(b)(i) and 8(2)(e)(i) of the ICC Statute; Article 51(2) of Additional Protocol I.

of proportionality).<sup>253</sup>

a) The principle of distinction

101. The evidence in this case is that General Ojdanić observed the principle of distinction and directed the VJ against the threats from the KLA and NATO, not civilians.<sup>254</sup>

102. Prosecution witness Shaun Byrnes testified that the VJ conducted itself professionally, both before and during the conflict.<sup>255</sup> Byrnes testified, for example, that he received information from Kosovar Albanians who worked for KDOM as well as members of the Kosovar Albanian political elite who fled after the conflict began that when the VJ encountered displaced ethnic Albanians they were treated with respect.<sup>256</sup>

103. Witness K73, a VJ Prosecution witness, testified that the VJ never fired at civilians. His evidence was that this would have gone against the grain of every military principle of the VJ.<sup>257</sup>

104. Witness K89, a VJ Prosecution witness, testified that from what he saw the VJ behaved fairly towards refugees.<sup>258</sup>

105. In his personal statement, John Crosland said:

“It was my impression that, when providing heavy fire support, the VJ or MUP would use radio communications to warn the KLA that an attack was imminent thereby allowing the population of the village to leave.”<sup>259</sup>

b) The principle of proportionality

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<sup>253</sup> See Article 8(2)(b)(iv) of the ICC Statute drawing upon the principles in Article 51(5)(b) and 85(3)(b) of Additional Protocol I to the 1949 Geneva Conventions.

<sup>254</sup> See para.194 *et seq.*

<sup>255</sup> Tr.12198.

<sup>256</sup> Tr.12199-200.

<sup>257</sup> Tr.3367.

<sup>258</sup> Tr.9186.

<sup>259</sup> Exh.P2645, para.17.

106. The disproportionate use of force is prohibited in international humanitarian law; however, a large number of civilian casualties does not necessarily mean that the use of force is disproportionate.<sup>260</sup>
107. The Prosecution in this case has failed to articulate the basis upon which the generalised (and in any event unsubstantiated) allegation that disproportionate force was used results in criminal liability for the indictment crimes. For example, wanton destruction not justified by military necessity falls under Article 3 of the ICTY Statute, yet the Prosecution has not articulated its case on this basis. Alternatively, the disproportionate use of force has been held to constitute the *actus reus* of unlawful attack under Article 3 of the ICTY statute.<sup>261</sup> Neither has the Prosecution advanced its case on this basis. The Defence has been left to guess at the significance of this allegation.
108. The practical application of the principle of proportionality requires an assessment of (i) the anticipated harm to civilians; (ii) the anticipated military advantage; and (iii) whether (i) was “clearly excessive” in relation to (ii).
109. The words “clearly excessive” appear in Article 8(2)(b)(iv) of the ICC Statute and offer important guidance when considering if criminal liability results. The ICC Statute clarifies the wording of Additional Protocol I and enshrines the principle that a large margin of appreciation must be given to the decision-maker. During the negotiation of the Rome Statute, many States had expressed concern about Article 8(2)(b)(iv) on the grounds that judges would not have sufficient military experience resulting in an overly onerous standard based upon hindsight rather than the reality of the fog of war.<sup>262</sup>
110. Article 8(2)(b)(iv) of the ICC Statute also requires an assessment of the “concrete and direct overall military advantage anticipated.” Footnote 36 of the Elements of Crimes in the ICC Statute clarifies that,

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<sup>260</sup> See ICTY Final Report, para.90 concluding that over 500 civilian deaths and hundreds injured by the NATO bombing of FRY was not disproportionate.

<sup>261</sup> *Galić* TJ, para.191.

<sup>262</sup> Cryer, p.251 and sources cited therein.

“[t]he expression ‘concrete and direct overall military advantage’ refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack.”

An example of an anticipated advantage that is specific and foreseeable, yet not temporally or geographically related to the target, could be an attack intended to divert the enemy: in World War II the Allies attacked military targets in the Pas de Calais, but the greater intended contribution was to deceive the enemy into believing that the amphibious landing would happen in the Pas de Calais rather than Normandy.<sup>263</sup> In such a situation, while civilian casualties inflicted in Pas de Calais might have been considered disproportionate when viewed in isolation, they were not considered to be disproportionate when considered in their full context.

111. The application of the principle of proportionality to a particular case is not straightforward. The *ICTY Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* noted that while it is comparatively simple to state the proportionality test in the abstract, it can be difficult to assess in practice:

“The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. For example, bombing a refugee camp is obviously prohibited if its only military significance is that people in the camp are knitting socks for soldiers. Conversely, an air strike on an ammunition dump should not be prohibited merely because a farmer is plowing a field in the area. Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.”<sup>264</sup>

112. The *ICTY Final Report* notes that the answers to these questions are not simple:

“answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close

<sup>263</sup> See Cryer, p.251; Dorman, p.171.

<sup>264</sup> ICTY Final Report, para.48.

cases. It is suggested that the determination of relative values must be that of the ‘reasonable military commander.’”<sup>265</sup>

113. This reliance on the “reasonable military commander” conflicts with the position under the ICC Statute, which emphasises the subjective assessment of the commander at the time. The Trial Chamber in this case does not need to resolve the question of which standard (subjective or objective) is to be preferred. Using either standard, the Trial Chamber would need to be satisfied that, considering the scale of the threat posed to the FRY by NATO and the KLA- threats which threatened the country’s very integrity- the level of force used by the VJ was clearly excessive, that General Ojdanić was aware of this and that (despite it not being clearly articulated by the Prosecution) this results in criminal liability for the Indictment crimes.

114. There is a wealth of evidence in this trial, in addition to that considered above, about the scale of the NATO attack against the FRY: the use of cluster munitions and depleted uranium,<sup>266</sup> the threat of land invasion,<sup>267</sup> strikes against civilian facilities and the overall scale of the bombing.<sup>268</sup> There is also a wealth of evidence before the Trial Chamber of the scale of the threat posed by the KLA, both in 1998<sup>269</sup> and 1999.<sup>270</sup>

115. In light of the threats faced by the FRY, the evidence does not support a conclusion that the VJ used clearly excessive force.

- a. During the course of this trial, Judge Bonomy observed that “...if you are dealing with a terrorist or combat force, there’s surely a distinction between using overwhelming force and the excessive use of force.”<sup>271</sup>

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<sup>265</sup> *Ibid*, para.50.

<sup>266</sup> Exh.3D778.

<sup>267</sup> Exh.3D772; Exh.3D779; Exh.3D781; Exh.3D782; Exh.3D902; Exh.3D955; Exh.3D918.

<sup>268</sup> Exh.3D898; Exh.3D906; Exh.3D913; Exh.3D 940; Exh.3D955; Exh.3D968; Exh.3D969; Exh.3D978; Exh.3D1102; Exh.3D1103; Exh.3D1119.

<sup>269</sup> Exh.3D993; Exh.3D994; Exh.3D995; Exh.3D997; Exh.3D998; Exh.3D999; Exh.3D1001; Exh.3D1004; Exh.3D1006; Exh.3D1010; Exh.3D1012.

<sup>270</sup> Exh.3D1021, para.2.2; Exh.3D1037, para.2.2. See also para.86 *et seq* for further consideration of the threat posed to the FRY.

<sup>271</sup> Tr.19557.

- b. On 11 February 1999, the Chief of the Russian Army, noting the “belligerent statements” made by politicians from NATO countries about the possibility of using armed force and the heightening tension regarding Kosovo, wrote to General Ojdanić in the following terms:

“The restraint, calm and courage shown by the Yugoslav people and your army’s personal composition deserve deep respect and support.”<sup>272</sup>

- c. General Dušan Lončar stated, “When discussing any incident, when discussions were held between me and my team and the OSCE, they never said that proportionate force was used; they always kept saying that it was excessive.”<sup>273</sup> He continued, “...their assessment was based on their opinion that we needed to use less forces, less troops; however, my opinion was to use what was available, and I believe that even those troops were insufficient to try and confront the situation that was on their hands at the time.”<sup>274</sup>
- d. General Radovan Radinović, a Military Expert, testified, “...there is nothing to say what is excessive and what is not excessive use of force. It’s a matter of analysis in each individual case for that to be established.”<sup>275</sup> He added, “During NATO airstrikes against the Federal Republic of Yugoslavia, I think we could talk about excessive use of force.”<sup>276</sup>
- e. When asked about the concept of excessive use of force, General Krsman Jelić (Commander of the 243<sup>rd</sup> Mechanised Brigade) responded:

“In our combat rules and the literature that I studied, we do not come across this term of ‘excessive use of force’ as a military term. This is more of an analytical matter, when one analyses certain events, when one analyses the situation, the ratio of resources used vis-a-vis the objective attained. So it depends on whether it is attack or defence, what kind of action is concerned.”<sup>277</sup>

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<sup>272</sup> Exh.3D776.

<sup>273</sup> Tr.7623.

<sup>274</sup> Tr.7624.

<sup>275</sup> Tr.17265.

<sup>276</sup> Tr.16886.

<sup>277</sup> Tr.18880.

He continued to say:

“...of the last century, especially in this beginning of this century, combat against terrorism practically requires a fight with all available resources used in order to destroy it. So there is no ratio that can say whether it is a cannon, a rifle, a Praga, whatever.”<sup>278</sup>

- f. When asked about the potential for units to use excessive force, Božidar Delić (Commander of the 549<sup>th</sup> Motorised Brigade) responded, “[a]s for my units specifically, I can say that it never used excessive force, not in 1998, not in 1999.”<sup>279</sup>
116. In fact, the evidence suggests that the allegations of disproportionate force were exaggerated based on the objective of the KLA to create a humanitarian crisis in order to justify a NATO intervention.
- a. In the Collegium of 25 February 1999, General Dimitrijević voiced the following concern in regards to the OSCE Verification Mission:

“One should expect that international organizations and institutions in KiM will also step up their activities in the period preceding the resumption of talks. We think that, in the light of its previous conduct, the OSCE Verification Mission will be in the centre of these activities and that it will focus on the activities of /our/ security forces in an attempt to collect evidence of their allegedly inappropriate engagement, excessive use of force, and things like that, which would then be used to exert additional pressure on the FRY. We should not rule out the possibility that some of the intelligence data will be passed on to the terrorist forces.”<sup>280</sup>

- b. When Branko Gajić (Assistant Chief of Security Administration of the General Staff) was presented with a report from the security section of the Priština Corps dated the 31<sup>st</sup> of May, 1998, he responded:

“That is precisely what I wanted to say. This relocation of women and children further into the territory of Kosovo and Metohija or to Montenegro was a planned, organised, activity of the KLA in order for them to later portray this in the media as being carried out because of the excessive use of force and that the army and the MUP were to be blamed for that. So there were a great many such activities. And in actual fact they, the KLA, were doing this in a planned

<sup>278</sup> *Ibid.*

<sup>279</sup> Tr.19291.

<sup>280</sup> Exh.P941, p.7, para.2. (emphasis added)

fashion. They were moving them deeper into Kosovo and across the border into Albania, Montenegro, even into Macedonia, their women and children, that is, and then by way of propaganda, through the media, they were saying that this was a humanitarian catastrophe. That is the core of the matter.”<sup>281</sup>

c. The VJ Liaison with the OSCE Mission, Dušan Lončar, also testified in this regard, stating that when the KLA planned an operation, they would order the civilians out of the area, but the civilians would say they were ordered out by the MUP.<sup>282</sup>

d. General Lazarević stated:

“My personal knowledge from 1998 and early 1999 is this: Only on one occasion at official meetings between the OSCE mission and the liaison team with OSCE was it stated that there was disproportionate use of force on the 8th of January against Slapuzane village where a tank projectile was fired. Nowhere else in the documents that I was able to see regarding cooperation with the OSCE mission or in any reports from my superiors or underlings did I find this complaint, that in 1998 the forces of the corps used force disproportionately.”<sup>283</sup>

117. In the Defence’s submission, the reality shows an attempt by the VJ to defend the integrity of the FRY against the KLA threat, while at the same time endeavouring to protect the civilian population from unnecessary exposure to combat activity.

118. When General Klaus Naumann was asked about the number of VJ forces in Kosovo and the use of disproportionate force, he had this to say:

“We saw disproportionate use of force, we saw establishment, I think, of additional check-points, and we saw some redeployments. But in most cases - and I think I have stated this before - the incidents were not triggered by the Yugoslav side. They were triggered by the Albanian side or the Kosovar side, who tried to explore -- take advantage of the vacuum left by the Serb side, who had withdrawn in accordance with the agreement; and then they moved in, in some cases acting rather provocatively as indicating that this was part of the -- of a Republic of Kosovo or something like this. And the Serb side reacted to that, I think in a way which – the reaction as such was understandable to us.”<sup>284</sup>

Following this, Judge Bonomy inquired whether the extent of the terrorist threat in Kosovo was a much greater one than other western European nations had experienced in

<sup>281</sup> Tr.15187. See also, 3D993, para.2.

<sup>282</sup> Exh.P2521, para.64.

<sup>283</sup> Tr.18560. (emphasis added)

<sup>284</sup> Tr.8264.

their own domestic circumstances?<sup>285</sup> Naumann replied:

“I think it was different from the terrorist threat which we have seen in other European countries, perhaps with the exception of the situation in Northern Ireland and in the Basque part of Spain. And, for instance, what we had seen in my country were terrorist activities were -- were nothing like this. In our case there were terrorist acts against individuals, but never the attempt to more or less be in control of a part of the country.”<sup>286</sup>

119. Dušan Lončar (VJ Liaison with the OSCE Mission) testified that while the KVM was in Kosovo, the KLA gained strength and the number of their ambushes increased,<sup>287</sup> thereby gaining more territory in KiM.<sup>288</sup> He stated that the KLA appeared to have access to information on Serb forces through the KVM.<sup>289</sup> Further, Lončar said that during the time period he was in Kosovo, the Serb forces did not engage in combat operations except for self-defence and a small number of anti-terrorist operations of which the KVM was informed in advance.<sup>290</sup> He testified that the KVM’s complaints that the Serbs responded with disproportionate or excessive force were unfounded.<sup>291</sup>

120. Echoing the sentiments above, Richard Ciagliniski (Liaison Officer of the KVM to the VJ) confirmed that from October 1998 through February of 1999, when there was tension and a campaign of terrorism, the KVM reporters on the ground reported back up the chain to him and to the other parts of the KVM hierarchy that while the Serbs were generally adhering to the cease-fire and other agreements, the KLA was not and was in fact being quite provocative.<sup>292</sup> During most of his time in Kosovo - from 5 December 1998 until the end of March 1999 - the VJ behaved correctly, and did not use “excessive force until the last few weeks of March.”<sup>293</sup>

121. Even Ciagliniski’s comment concerning the alleged VJ use of “excessive force” in the latter part of March 1999 must be viewed in the context of the sharp increase in KLA

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<sup>285</sup> Tr.8265.

<sup>286</sup> *Ibid.*

<sup>287</sup> Tr.7606.

<sup>288</sup> Tr.7616.

<sup>289</sup> Tr.7607.

<sup>290</sup> Exh.P2521, para.43.

<sup>291</sup> Exh.P2521, para.62-63.

<sup>292</sup> Tr.6971.

<sup>293</sup> Tr.6929.

provocations and terrorist acts during this period. The following three points are of note:

- a. In an “Assessment of KLA Attitudes as at 15 March,” David Wilson, a British Army intelligence officer and an assistant to General Maisonneuve of the KVM, wrote, “[t]he amount of localised activity and conflict in the lead up to the second round of Paris talks has been disturbing.”<sup>294</sup> These incidents included the KLA using Albanian civilians as human shields, terrorist kidnappings, and ambush tactics against FRY forces.<sup>295</sup> He continued, “These incidents occurred in 4 of 6 KLA zones and were all instigated by the KLA.”<sup>296</sup>
- b. During the Collegium of 18 March 1999, General Dimitrijević stated, “During this week, i.e. immediately before the start of the Paris talks, there has been a marked increase in terrorist actions and particularly in the frequency of attacks on the Yugoslav Army units....”<sup>297</sup>
- c. Lastly, Michael Philips (William Walker’s Chief of Staff for OSCE<sup>298</sup>) reported an ambush in Priština at approximately 1815 hours on 21 March 1999 carried out by the KLA.<sup>299</sup> In his report, Philips stated that this could become a flashpoint for Serb retaliation against Priština residents,<sup>300</sup> while noting that KLA attacks were beginning to include urban areas (not only Priština but other villages as well) at this point in time.<sup>301</sup>

## Conclusion

122. By the time the KVM left Kosovo on 20 March 1999 and NATO strikes were imminent, KLA activity had increased significantly. General Lazarević testified that when the OSCE mission left, attacks by the KLA doubled in intensity such that there

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<sup>294</sup> Exh.P641, Item 4.

<sup>295</sup> Exh.P641, Item4(a)-(e).

<sup>296</sup> Exh.P641, Item4.

<sup>297</sup> Exh.P938, p.11, para.4.

<sup>298</sup> Tr.11827.

<sup>299</sup> Exh.P407, p.820(K03525397).

<sup>300</sup> *Ibid.* See also, Tr.12016.

<sup>301</sup> Tr.12016-7.

were between 15-20 attacks per day in the Drenica region alone. General Lazarević's evidence was that the whole of Kosovo was affected by armed rebellion and that not a single village was immune. Additionally, Lazarević described the "certainty" that there would be a NATO invasion.<sup>302</sup>

123. The Prosecution has not proved that the action the VJ took against the KLA was unnecessary or disproportionate or that the any military build-up bore any relation to a joint criminal enterprise to expel ethnic Albanian civilians (as opposed to the KLA) from Kosovo. The Prosecution has failed to rule out the reasonable conclusion that any military build-up was a legitimate response to an escalating threat.

124. When the KVM left Kosovo and NATO airstrikes were imminent, the VJ was faced with a war on two fronts: an enormous armed rebellion from within coupled with devastating airpower and the threat of invasion. President Milošević declared that war was imminent on 23 March 1999,<sup>303</sup> with war declared the next day.<sup>304</sup> It was Smiljanić's evidence that once NATO decided to attack the FRY, General Ojdanić could only defend his country against attack and the armed rebellion taking place inside his country.<sup>305</sup>

125. The Ojdanic Defence hereby incorporates the submissions of the Pavkovic and Lazarevic Defence teams in regards to the VJ's alleged use of disproportionate force.

## **6. Expert Statistical Evidence**

126. In an attempt to bolster its case that there existed a joint criminal enterprise to expel ethnic Albanians from Kosovo, the Prosecution proffered what it characterizes as a statistical analysis of deaths in and migrations from Kosovo in 1999.<sup>306</sup> Dr Ball,

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<sup>302</sup> Tr.17945-6.

<sup>303</sup> Exh.P1664.

<sup>304</sup> Exh.2D294.

<sup>305</sup> Tr.15755.

<sup>306</sup> Dr Ball submitted a 3 January 2002 Report (Exh.P1506); a 19 February 2002 Addendum (Exh.P1391); a 15 November 2002 Corrigendum (Exh.P1394); and a 28 January 2007 Addendum (Exh.P2678). The testimony of Dr Ball in the Milošević Trial is also in evidence (Exh.3D521). Dr Ball's approaches are convoluted and difficult to follow. For example, the approach by which he constructed his data set for migrations over time does not appear in any of his reports. Rather, one is left to tackle an earlier study entitled "Policy or Panic" (Exh.3D516) to decipher the method used.

describing himself as a ‘human rights activist,’<sup>307</sup> presented a study theorising that there were three possible causes of ethnic Albanian migration and deaths within Kosovo, being: 1) KLA Activities; 2) NATO Activities; and 3) FRY/Serb forces activities.<sup>308</sup> Dr Ball’s study draws the following conclusions:

- a. (i) Kosovo Albanian deaths and migration exhibit “patterns” and (ii) the patterns of deaths and the patterns of migration are “similar”, implying (iii) a common cause for both deaths and migration;
- b. Kosovo Albanian deaths and migration cannot be explained by KLA and/or NATO “activities”; therefore
- c. the data of deaths and migration is consistent with a hypothesis that FRY forces conducted a systematic campaign of killings and expulsions.<sup>309</sup>

127. However, Dr Ball’s analysis quickly breaks down due to the fact that his data are flawed and his approach is lacking accepted statistical practices. Even assuming arguendo that Dr Ball’s data (which are entirely unreliable, as will be shown below) were completely accurate, that he had no data on FRY/Serb forces’ activity eliminates the possibility of concluding that from a statistical standpoint they were responsible for migration and deaths in Kosovo.<sup>310</sup> In this regard, Dr Fruits, a joint defence expert, concluded:

“Without reliable information on FRY forces activities by date and time, it is impossible statistically to draw any conclusions regarding activities’ contribution to Kosovo Albanian deaths and migration. Indeed, without reliable information on FRY forces activities - even if all the other variables (e.g., deaths, migration, KLA activities, and NATO activities) were appropriately and reliably measured - statistical analysis could not be used to draw any meaningful conclusions regarding FRY forces, KLA, or NATO activities’ contribution to Kosovo Albanian deaths and migration.”<sup>311</sup>

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<sup>307</sup> Tr.10282.

<sup>308</sup> Tr.25955. See also Exh.P1506(K021-3821).

<sup>309</sup> Exh.P1506(K021-3823–K021-3824).

<sup>310</sup> Tr.25955-6.

<sup>311</sup> Exh.3D893, p.34.

128. Due to the lack of reliability, Dr Ball's evidence is plainly prejudicial.<sup>312</sup> Moreover, his evidence bears no direct relationship to the conduct of General Ojdanić. Dr Ball did not even attempt to distinguish between types of FRY/Serbian forces - VJ and/or MUP. It is the Defence's submission that none of Dr Ball's conclusions withstand scrutiny and the Trial Chamber should place no weight on his evidence. The Trial Chamber's conclusions as to why people left Kosovo should be based upon reliable and tested evidence, and not on speculation cloaked under the guise of statistics. The remainder of this section examines the reliability (or lack thereof) of Dr Ball's data and conclusions.

a) Do deaths and migration of Kosovo Albanians exhibit similar patterns?

(1) Dr Ball's death and migration data are flawed

129. Dr Ball's evidence rests upon data sets of deaths and migration which he and his co-authors constructed. Dr Ball then manipulated the constructed data to estimate the number and impute the location of deaths and migration over time. These estimates, and the conclusions Dr Ball gleans from them, are then presented to the Trial Chamber as if they are precise and reliable. As will be shown below, Dr Ball's migration and death data lack the reliability necessary to support the assertions that he makes.

130. Dr Ball's migration data set relies upon records obtained from the Morina border crossing. These records, however, were incomplete. Dr Fruits explained that for 51% of the refugees that are estimated to have crossed the Morina border, Dr Ball did not in fact know their municipality of origin.<sup>313</sup> Rather, Dr Ball simply imposed a municipality of origin upon such people based upon a distribution derived from other surveys.

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<sup>312</sup> In fact, it appears that Dr Ball may be inherently biased against Milošević (and possibly the Serbian political and military leadership) based on comments he has made in the past. For example, he had no qualms about taking ownership of the following statement: "It would be very nice if we had a round of applause for the extradition of Slobodan Milošević to The Hague last week...[applause]...And I hope you're all excited as I am by the prospect of his very pleasant and drawn-out trial which will begin in about six months." Tr.10273.

<sup>313</sup> Tr.25973. See also, Exh.3D516, p.40(3D01-0277).

131. Having imposed municipality of origin on over half of his migration data set, Dr Ball next imposed the date upon which the individuals left their “home” municipality for the entire data set. To do this, he constructed a distribution of “transit times” based upon 753 interviews conducted by Physicians for Human Rights, the Institute for Policy and Legal Studies, and Human Rights Watch and then imposed that distribution upon his entire migration data set. Yet Dr. Ball conceded that results from the Human Rights Watch interviews cannot be applied to Kosovo as a whole.<sup>314</sup>

132. Dr Fruits’ evidence was that Dr Ball’s imputation of date of departure and municipality of origin introduces “substantial errors” and creates “unusual results.”<sup>315</sup> Despite only knowing where people came from half of the time and never knowing when they left their homes, Dr Ball’s constructed data set purports to show with great precision the number of people leaving the municipality of origin and the date of departure per two day period over time for hundreds of thousands of individuals.<sup>316</sup>

133. Dr Fruits also noted that Dr Ball mixed his estimate of the reported number of deaths with his inflated estimate of the number of deaths:

“As the dependent variable for his linear regression analysis, Dr. Ball mixes his estimate of the *reported* number of deaths with his *inflated estimate* of the number of deaths. The result is a statistically unreliable mishmash of estimates from different sources. Indeed, such a mistake would tend to reduce the statistical significance of the regression results. Dr. Ball interprets the lack of statistical significance as evidence that KLA and NATO activities are *not* associated with Kosovo Albanian deaths or migration. Thus, Dr. Ball’s error ultimately produces results supporting conclusions that prejudice the Accused.”<sup>317</sup>

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<sup>314</sup> Dr Ball agreed with the following statement on cross-examination: “Most importantly, Human Rights Watch did not randomly sample the interviewees. On the contrary, researchers purposely sought out not only the victims and witnesses of violations but specifically those with knowledge of the most serious violations such as torture, sexual violence, and executions. Therefore, these data cannot be extrapolated to general findings for Kosovo as a whole.” Tr.10280. See also, Exh.P438, page444. Yet, despite advising Mr. Abrahams of the limitations of the data, Dr Ball rejected his own advice in appropriating the data for his study.

<sup>315</sup> Tr.25973.

<sup>316</sup> As an example, Dr Fruits highlighted LepoSavić and Novo Brdo, noting that according to Dr Ball’s original data from the Morina crossing not a single person was registered as having travelled from these municipalities. Nevertheless, Dr Ball’s constructed data set purports to show that 514 people left LepoSavić and further purports to show the date upon which these non-existent refugees left. Tr.25974-5.

<sup>317</sup> Exh.3D893, p.33.

(2) Dr Ball's methodological approach is hindered by subjectivity

134. Dr Ball presented his constructed data for deaths and migration in graphical form and sought to draw conclusions based merely upon subjective perception. Dr Ball's evidence was that he observed three distinct phases of migration, with "transition dates" of 6-8 April and 23-25 April during which the number of people leaving their homes nearly ceased entirely.<sup>318</sup> Dr Ball then jumps to the conclusion that the pattern of deaths closely resembled the pattern of refugee flow.<sup>319</sup> Dr Ball's evidence was that "similar to the refugee flow data, the incidence of killings fall to nearly zero on 6-7 April and again on 22-24 April."<sup>320</sup> Relying on these "patterns" of deaths and migration, Dr Ball went one step further declaring there to be a common, systematic cause.<sup>321</sup>
135. Dr Fruits disputed this conclusion, noting that Dr Ball had performed no statistical test for relationship or "correlation" between deaths and migrations. Rather, Dr Ball relied upon subjective "eyeballing" of his flawed graphs in an attempt to draw conclusions. During oral testimony, Dr Fruits demonstrated that upon closer inspection there are, in fact, "substantial differences" between Dr Ball's graphs of deaths and migration such that peaks do not actually coincide as Dr Ball had asserted.<sup>322</sup>
136. Further, Dr Fruits criticised Dr Ball's conclusion that there exists a circumstantial link between the unilateral declaration of a ceasefire for Orthodox Easter over 6-7 April 1999 and a "drastic fall" in deaths and migrations. Dr Fruits highlighted this contradiction using Dr Ball's own data, where recorded deaths were higher on 6-7 April 1999 (the period of the ceasefire) when compared with both the preceding and the subsequent two day periods.<sup>323</sup> Dr Fruits' evidence was that a more obvious explanation for the observed drop in migration indicated by Dr Ball's data was that the Morina border

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<sup>318</sup> Exh.P1506, section3(K021-3824–K021-3825).

<sup>319</sup> Exh.P1506, section4.2(K021-3827).

<sup>320</sup> Exh.P1506, section4.2(K021-3827).

<sup>321</sup> Exh.P1506, section4.2(K021-3827).

<sup>322</sup> Tr.25966. See also, Exh.3D1144.

<sup>323</sup> Exh.3D893, p.22.

crossing was in fact closed for at least part of the period over 6-7 April 1999.<sup>324</sup> Indeed, when Mr Stamp asked Dr Ball about causality in regard to the alleged “circumstantial link” he replied, “There is no indication of a causal link. Let me be quite clear that observational statistics do not permit an affirmation of cause.”<sup>325</sup>

137. There is, therefore, no reliable basis upon which the Trial Chamber can conclude that deaths and migrations exhibit similar “patterns” in Kosovo in 1999.

b) Can deaths and migration of Kosovo Albanians be explained by NATO and/or KLA activity?

138. Just as Dr Ball constructed his own data sets for deaths and migration, he also constructed data sets for NATO air-strikes and KLA activity for each municipality, listing incidences by two-day period. The weakness in Dr Ball’s KLA and NATO datasets, which are highlighted below, fatally undermines the reliability of his conclusions.

(1) KLA activity and the flaws inherent in the data

139. Dr Fruits criticised Dr Ball’s measure of KLA activity, noting that Dr Ball provides no measure of the intensity of any battle such that an isolated skirmish with no casualties was given the same weight as large scale clashes involving heavy casualties.<sup>326</sup> Dr Fruits used a rainfall analogy to explain that the effect of Dr Ball’s method is to attribute the same weight to a raindrop as a downpour.<sup>327</sup> Dr Fruits’ evidence was that such distinctions could be critical when attempting to model and quantify the relationship between KLA activity and deaths and migrations.<sup>328</sup>

140. Dr Fruits testified,

“The other problem is in what [Dr Ball] calls the KLA killing data, which really isn’t -

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<sup>324</sup> Tr.25957.

<sup>325</sup> Tr.10256.

<sup>326</sup> Exh.3D893, p.22.

<sup>327</sup> Tr.25961.

<sup>328</sup> Exh.3D893, p.22.

it's more than just killings. It includes kidnappings, also injuries, and I believe what he calls disappearances of Serbs in what he describes as isolated incidents. It's not entirely clear what an isolated incident is, and it's not entirely - and, again, as with the KLA battle data, there's no measure of the intensity or the scale of these - of these variables.<sup>329</sup>

(2) NATO activity and the flaws inherent in the data

141. Dr Fruits' evidence was that Dr Ball's data for NATO air-strikes are mismeasured in regard to both number and location.<sup>330</sup> Dr Ball's source for NATO data was the announcements of air-strikes made by the FRY authorities. Dr Ball does not indicate that he made any attempts to verify the accuracy of the data he assembled. It was Dr Ball's evidence that he did not take further steps to obtain information on NATO air-strikes from NATO itself.<sup>331</sup>

142. As an example, Dr Fruits, using information available publicly since March 2000, noted that there were at least 10 NATO air-strikes on 3-4 April 1999, whereas Dr Ball's data-set indicated only two NATO air-strikes on those dates.<sup>332</sup> Dr Fruits highlighted at least six dates when air-strikes occurred whereas Dr Ball's data set records no air-strikes.<sup>333</sup> The fact is that Dr Ball used invalid data on NATO air-strikes to reach his conclusions. It is respectfully submitted that a study cannot be viewed as credible which uses invalid data to disprove a variable's participation (i.e. NATO) in a later result.

143. Additionally, it should be noted that the NATO data on which Dr Ball rely has the same flaw as the KLA data in that there is no measure of intensity for any of the days during the bombing campaign.<sup>334</sup>

<sup>329</sup> Tr.25960. See also, Exh.3D893, p.22.

<sup>330</sup> Exh.3D893, p.23-24.

<sup>331</sup> Tr.10346-7; Tr.25951. It should be noted that Dr Ball attempted to obtain NATO bombing data from the United States Department of Defence by way of two unreturned phone calls - a paltry effort. Tr.10282-3.

<sup>332</sup> Tr.25971-2; Exh.3D893, p.23.

<sup>333</sup> Tr.25961-2.

<sup>334</sup> Tr.25961.

c) Is the data consistent with the hypothesis that FRY forces were responsible for the pattern of deaths and migration?

144. Dr Ball did not test directly for the effect of FRY forces' activity on the death and migration of Kosovo Albanians in 1999.<sup>335</sup> Dr Fruits' evidence was that it is not possible to draw any conclusions about the effect FRY forces may have had in this regard without data of such activity.<sup>336</sup> Dr Fruits succinctly stated:

“My focus was narrowly on Dr. Ball’s statistical analysis; and as a statistician, his statistical analysis isn’t reliable simply because it doesn’t have that information on the Serb and Yugoslav forces’ activity.”<sup>337</sup>

145. Further, Dr Fruits' evidence was that Dr Ball's method of trying to test the explanatory power of two factors (KLA activity and NATO data) without any information on the third factor (activity of FRY forces) introduced bias:

“If the hypothesis is that Serb and Yugoslav forces’ activities contributed to the deaths and migration, without the Serb forces’ activities you cannot conduct a statistically reliable study. In fact, by omitting that variable, by leaving out the Serb forces’ activities, you are - you are committing an error known as an omitted variable error. And it generates biases, not just in the data that’s missing, but it also causes your estimates of the impacts of the KLA and the NATO activities to be unreliable; in other words, they may not reflect reality.”<sup>338</sup>

146. Additionally, there are a number of other explanations for migrations and killings for which Dr Ball did not test such that his conclusions are of no use to the Trial Chamber:<sup>339</sup>

a. Dr Ball did not consider whether some or all of those killed were in fact KLA

<sup>335</sup> See Statistics and Slobodan (Exh.3D520, 3D01-0395–3D01-0396) where Dr Ball writes: “...there was no data available to us that detailed Yugoslav government force deployments or movements during the period in question. We could not, therefore, directly test the hypothesis that Yugoslav forces were responsible for ethnic Albanians’ deaths and migration.” See also Tr.10290.

<sup>336</sup> Tr.25956.

<sup>337</sup> Tr.25959.

<sup>338</sup> Tr.25956. Following this comment, Judge Bonomy stated: “Can I ask you one question about the omitted variable error. Assuming Dr. Ball carries out the exercise in exactly the way he’s done it, but separately evidence is led here of activities of Serb and Yugoslav forces which turns out to be consistent with the hypothesis that he finds to be consistent with killings and expulsions, is his work equally invalid because he did not personally take into account information about the movements and activities of Serb and Yugoslav forces?” Dr. Fruits responded, “I think that would be a fair assessment.” Tr.25958.

<sup>339</sup> In fact, Dr Ball’s report (Exh.P1506, K021-3823) freely admits this possibility: “Although there may be other explanations for regular patterns in killings and refugee movement, we consider these three to be the most likely.”

fighters engaged in hostile activity and thus legitimate military targets. Further, despite phrasing his KLA hypothesis as whether KLA action motivated Kosovars to leave their homes “either directly because the KLA ordered people to leave, or indirectly because Kosovars fled fighting...,”<sup>340</sup> Dr Ball later admitted that he did not actually test for the possibility that orders by the KLA could be a possible explanation for people leaving their homes.<sup>341</sup>

The Trial Chamber is invited to recall the undisputed evidence that the KLA did indeed order Albanian civilians to leave their villages. Bislim Zyrapi (Chief of Staff of the KLA) testified that it was “normal” for the KLA to order the movement of the civilian Albanian population.<sup>342</sup>

- b. It is significant that Dr Ball, in one of his articles, stated: “We were unable, however, to obtain data on Yugoslav Army activity independent of interactions with the KLA.”<sup>343</sup> It is the Defence’s submission that it may be equally logical to conclude that combat activity between Yugoslav forces and the KLA were so closely related in both time and place that the most that can be said is that refugees simply fled areas where combat occurred.<sup>344</sup> However, when this assertion was put to Dr Ball on cross-examination he refused to agree that it was even a possibility.<sup>345</sup>
- c. Dr Ball’s evidence was that he did not consider the possibility that people moved in anticipation of NATO bombing, stating that he did not analyse “the psychology of rumour.”<sup>346</sup> Dr Ball’s evidence was that his method was not interested in *why* people left their homes.<sup>347</sup>

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<sup>340</sup> Exh.P1506 (K021-3822).

<sup>341</sup> Tr.10288.

<sup>342</sup> Tr.6003.

<sup>343</sup> Exh.3D520 (3D01-0394). See also Tr.10293.

<sup>344</sup> Tr.10293-4.

<sup>345</sup> Tr.10294.

<sup>346</sup> Tr.10360-1.

<sup>347</sup> Tr.10386-7. Dr Ball stated: “I am interested in when people said they left their homes. I’m interested in when they crossed the border. I am not interested – and we did not ask – why people left their homes, nor what their fears were or any other of the psychological discussions that surrounded the conversation to which you allude.”

It is the Defence's respectful submission that the key issue for this Trial Chamber is exactly that: *why people left their homes*. Dr Fruits' evidence was that a well-known and respected branch of social science, rational expectations, attempts to model how information - including announcements, threats, or promises - affects people's actions.<sup>348</sup> Psychology and rumour are a key part of real life, and Dr Ball's indifference toward such factors fatally undermines his conclusions.

- d. Another reasonable explanation that Dr Ball fails to test as a hypothesis is the possibility that NATO and the KLA were, in fact, working together in Kosovo.<sup>349</sup>

This was highlighted by Judge Bonomy who asked Dr. Ball:

“The other question I have for you, Dr. Ball, that may display a basic misunderstanding of something but I hope it doesn't. Mr. Milošević tried to ask you about the notion that NATO and the KLA were working together and tried to suggest that that was a separate hypothesis from the three that you were working on. First of all, is that a different hypothesis from any of the three you were working on?”<sup>350</sup>

Dr Ball confirmed that this was indeed a separate hypothesis, which was not dealt with previously or by the updated 2007 report.<sup>351</sup> It is the Defence's submission that this is a valid possibility, which further displays the lack of appropriate statistical methodology on Dr Ball's behalf.

d) Conclusions

147. It is the Defence's submission that Dr Ball's evidence is flawed and it would be inappropriate for the Trial Chamber to rely upon his conclusions in a criminal trial such as this.

148. In a statistical analysis, the conclusions drawn are only as strong (or weak) as the underlying data, which leads to Dr Fruits' conclusion that Dr Ball's study cannot be

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<sup>348</sup> Tr.25964.

<sup>349</sup> As Dr Ball notes in his own report (Exh.P1506, K021-3823): “Although they are not necessarily mutually exclusive, each of the hypotheses...implies differing responsibility.”

<sup>350</sup> Tr.10416.

<sup>351</sup> *Ibid.*

relied upon.<sup>352</sup> As has been shown above, Dr Ball's data falls short on the following fronts: 1) migration data is entirely manufactured and shown to be nonsensical; 2) deaths data is unnecessarily inflated and his mixing of measurements undermines his regression; 3) KLA data cannot be verified as reliable or accurate; and 4) NATO data regarding the bombing campaign is inaccurate.

149. Further, Dr Ball's approach falls short on the following fronts: 1) he "eyeballs" his graphs to confirm a "pattern" instead of performing a valid statistical test as would be appropriate; 2) he arbitrarily declares a "circumstantial link" to exist between the ceasefire and the "drastic fall" in deaths and migrations, when there are other reasonable explanations; 3) he refuses to entertain reasonable alternatives that may serve to explain deaths and migration of Kosovo Albanians in 1999; and 4) his regression results cannot be duplicated.<sup>353</sup>

150. Even if it could be assumed that all the factors noted above were satisfactory (i.e. data was flawless and statistical procedures met accepted standards) it would still be for naught because no statistically valid conclusion can be drawn in this instance without reliable information on the activities of FRY/Serb forces.<sup>354</sup>

151. Lastly, Dr Ball's own admissions serve to undermine the strength with which he puts forward his conclusions. Dr Ball conceded that, "[i]t is beyond the capacity of statistical analysis to prove that any of these hypotheses is the definitive cause of the patterns seen in the two forms of violence."<sup>355</sup> Outside of the inability to offer affirmative proof, Dr Ball confirmed that there was insufficient data to draw a conclusion based on his third hypothesis (that Yugoslav forces were responsible for the migration and deaths of Kosovar Albanians).<sup>356</sup>

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<sup>352</sup> Tr.25953, where Dr Fruits testified that the fundamentals of statistics do not change. The practice of statistics is simply a tool to be applied to data, but without accurate and reliable data the analysis has no merit.

<sup>353</sup> Exh.3D893, p.32. Dr Ball did not provide sufficient data for duplication of his regression analysis, nor did he provide enough information so that someone reasonably skilled in the practice of statistics could duplicate his results.

<sup>354</sup> Tr.25955-6. Exh.3D893, p.34.

<sup>355</sup> Exh.P1506 (K021-3823). See also Tr.10352-4.

<sup>356</sup> Tr.10352.

**D. Did General Ojdanić participate in the alleged JCE?**

148. Even were the Trial Chamber to decide that a joint criminal enterprise did exist, the Prosecution has not proved that General Ojdanić participated in any such criminal purpose. In the Amended Indictment and its Pre-Trial Brief, the Prosecution lists a number of means by which it says General Ojdanić participated in the alleged Joint Criminal Enterprise. The majority of these allegations demonstrate nothing other than General Ojdanić's role in responding to the threat posed by the KLA and NATO. The evidence of General Ojdanić's actions demonstrates that he did not participate in any Joint Criminal Enterprise.

149. The Prosecution's case is that the alleged Joint Criminal Enterprise came into existence no later than October 1998.<sup>357</sup> At the time the Prosecution alleges a Joint Criminal Enterprise to expel ethnic Albanians had solidified, General Ojdanić was Deputy Chief of Staff. In fact, General Ojdanić did not become Chief of the General Staff until 27 November 1998. It is therefore necessary to consider General Ojdanić's conduct as Deputy Chief of Staff as well as his conduct after becoming Chief of Staff in order to determine whether or not he participated in any Joint Criminal Enterprise.

**1. General Ojdanić as Deputy Chief of Staff**

150. As Deputy Chief of Staff, General Ojdanić's powers and responsibilities were circumscribed in theory and even more limited in practice.

151. First, under the Rules on Competencies the powers and responsibilities of the Deputy Chief of Staff were limited. General Ojdanić did not attend meetings of the Supreme Defence Council as Deputy Chief of Staff. Indeed his only competency of any significance, it is submitted, was to administer relations with foreign military representatives and international organisations.<sup>358</sup>

152. Secondly, in practice General Ojdanić's influence was limited. Radinović testified that during his tenure as Deputy Chief of Staff, from March 1998 General Ojdanić

<sup>357</sup> Third Amended Indictment, para.20.

<sup>358</sup> Exh.3D1116, p.72-3.

attended 50 out of 76 Collegiums and contributed to only five where significant issues in relation to Kosovo were addressed.<sup>359</sup> During the Collegium of 22 June 1998, General Ojdanić complained that he was not receiving the combat reports from the relevant subordinate commands in Kosovo.<sup>360</sup> There was debate during the testimony of Radinović as to whether General Ojdanić's complaint was that he was not receiving reports (plural) or whether he had simply not received a single report. Radinović's evidence, however, was unequivocal: the complaint used the verb in the continuous form and it can only be understood that Ojdanić was not receiving reports in general.<sup>361</sup> The Prosecution has offered no contradictory evidence.

153. The evidence before the Trial Chamber demonstrates that as Deputy Chief of Staff General Ojdanić consistently and persistently took a principled stance against an expanded use of the army as the means by which to defeat the KLA. The Collegiums reveal a man who wanted to engage with the international community rather than seek confrontation and who was understood by colleagues to be advocating this position.

a. In the Collegium of 26 September 1997, General Ojdanić made clear that he was against any action by the VJ in Kosovo which would exceed its constitutional role and would offend domestic or international public opinion.<sup>362</sup> General Spasoje Smiljanić was then Commander of the Air Force and Air Defence and attended this Collegium. He testified that General Ojdanić's comments were understood to mean that a peaceful approach was needed to the Kosovo problem.<sup>363</sup> The Trial Chamber will be aware that in the spring of 1997 neighbouring Albania had descended into chaos, bringing down the government and opening arms depots, with the result that arms and ammunition flooded into Kosovo.

b. In the Collegium of 12 December 1997, General Ojdanić emphasised the importance of dialogue to solve the Kosovo problem. He warned against

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<sup>359</sup> Exh.3D1116, p.75, para.20.

<sup>360</sup> Exh.P923, p.15.

<sup>361</sup> Tr.17205.

<sup>362</sup> Exh.3D1074, p.3, para.3-4.

<sup>363</sup> Tr.15730.

attempting to tackle the issue with military force.<sup>364</sup> In 1997, General Pantelić was Chief of the Logistics Operations Administration of the General Staff and attended this Collegium. He testified that he could “particularly remember” General Ojdanić’s position that the FRY should cooperate internationally and that Kosovo could not be solved by military force and that Kosovo should have the highest level of autonomy granted to ethnic minorities without the trappings of statehood.<sup>365</sup>

- c. In the Collegium of 15 December 1997, General Ojdanić described his vision and the full rejection of the military option with regard to Kosovo. He described how during a recent trip to Kosovo he met a large number of Serbs who favoured “the war option.” General Ojdanić’s view was clear: “fools like these can lead us into a war, but I will not stand behind them.”<sup>366</sup>
- d. In the Collegium of 10 April 1998, General Ojdanić said that the FRY would not preserve Kosovo by fighting a war lest the result be calamity. General Ojdanić expressed his view that the use of the VJ could serve to legitimise a full-scale armed rebellion by the KLA.<sup>367</sup> Admiral Nonković was then Assistant Chief of the General Staff for the Navy and attended this Collegium. His evidence was that the essence of what General Ojdanić said was that the Kosovo problem could not be resolved through war, but only by politics and diplomacy.<sup>368</sup> The Trial Chamber will recall that fighting had occurred at the end of February 1998 at the Jashiri family compound and on 31 March 1998 the United Nations Security Council had passed Resolution 1160.
- e. In the Collegium of 4 May 1998, General Ojdanić was even more insistent in saying that “the shortest and fastest way to lose Kosovo is by war, precisely because nobody will allow us to resolve that on our own....”<sup>369</sup> Radovan

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<sup>364</sup> Exh.3D1075, p.4, para.1-3.

<sup>365</sup> Exh.3D1113, para.6.

<sup>366</sup> Exh.3D1076, p.5.

<sup>367</sup> Exh.3D657, p.2.

<sup>368</sup> Tr.16198. See also Exh.3D1116, p.76, para.21.

<sup>369</sup> Exh.3D659; Tr.16205.

Radinović gave expert evidence for the Defence and it was his opinion that this Collegium represented General Ojdanić's strongest anti-war stance.<sup>370</sup>

- f. In the Collegium of 23 June 1998 General Ojdanić stated that he was specifically against mobilisation of the VJ at that point in time.<sup>371</sup>
- g. In the Collegium of 29 June 1998, General Ojdanić emphasised that diplomacy and politics were the only way out of the Kosovo crisis and that it was "utopia to think that the world will let us resolve the Kosovo problem by force."<sup>372</sup>
- h. In the Collegium of 10 July 1998, General Dimitrijević called for the use of the VJ to protect the population in Kosovo. General Ojdanić responded by saying that while psychological protection was acceptable, physical protection would be very serious and said that he was against such an extension of the army's engagement in Kosovo because such protection was a job for the MUP rather than the VJ.<sup>373</sup>

At this same Collegium, General Ojdanić stated that he was "not aware" of any anti-terrorist operation immediately following which General Dimitrijević confirmed that such activities "are being carried out."<sup>374</sup> Dimitrijević added that he had "said nothing about this" previously.<sup>375</sup>

Accordingly, it was General Radinović's expert conclusion, and it is submitted that it is a reasonable one, that General Ojdanić was not involved in developing the Grom 98 plan which was ultimately issued on 28 July 1998 and provided for the expanded use of the VJ against the KLA.<sup>376</sup> This is corroborated by the evidence of General Milorad Obradović, who testified that General Ojdanić was not present when Grom 98 was approved.<sup>377</sup>

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<sup>370</sup> Exh.3D1116, p.79, para.27.

<sup>371</sup> Exh.P923, p.11.

<sup>372</sup> Exh.P927, p.12.

<sup>373</sup> Exh.3D641, p.1.

<sup>374</sup> Exh.3D641, p.1-2.

<sup>375</sup> *Ibid.*

<sup>376</sup> Exh.3D1116, p.77-79, para.24-26.

<sup>377</sup> Tr.14943.

154. Further evidence shows that General Ojdanić was concerned about expanding the role of the VJ in the fight against the KLA. On 27 August 1998, General Ojdanić briefed the defence attachés organisation. The Prosecution presented a sworn statement by Colonel John Crosland that, prior to this briefing, he showed General Ojdanić a video in which the VJ was involved in internal security operations by “shelling villages.”<sup>378</sup> Crosland’s trial testimony was that a video containing footage of shelling by joint VJ-MUP operations in Kosovo was “handed to Ojdanić” at the end of Ojdanić’s presentation.<sup>379</sup> During the course of his testimony, however, Crosland changed his version of events yet again to state that he had in fact not given the video to General Ojdanić but “probably” gave it to Negovan Jovanović, chief of the VJ Foreign Liaison Service.<sup>380</sup> Negovan Jovanović testified that neither he nor anyone else in his staff received such a video from John Crosland.<sup>381</sup> The video has never been located. It is submitted that Crosland’s unsupported and contradictory evidence on this point is simply wrong, General Ojdanić’s was never provided with such a video.<sup>382</sup>

155. In any event, Crosland’s evidence was that during this meeting General Ojdanić outlined to the defence attachés that, while the MUP had the primary task of dealing with the internal security situation in Kosovo, four extra tasks were being given to the VJ in support of the MUP. The tasks which General Ojdanić outlined were: (1) to guard lines of communication; (2) to guard various areas where the VJ had historically been deployed; (3) to guard areas where the VJ performed exercises; and (4) to guard the border area which had grown to between 10km and 15km at that point.<sup>383</sup> Crosland testified that this briefing was the sole occasion when he discussed the use of force with General Ojdanić and that Ojdanić explained to him that “force would be met with force.”<sup>384</sup> Crosland’s evidence was that Ojdanić said that the degree to which the VJ was

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<sup>378</sup> Exh.P2645, p.11, para.49.

<sup>379</sup> Tr.9789-90.

<sup>380</sup> Tr.9891.

<sup>381</sup> Tr.14911.

<sup>382</sup> The similarity with General Dimitrijević’s evidence is striking. He described how Crosland said that he would provide video evidence of the excessive use of force, but no video was ever forthcoming: Tr.26627-8.

<sup>383</sup> Exh.3D512/P2554.

<sup>384</sup> Tr.9788.

involved in Kosovo was commensurate with the situation. Crosland testified that from a military point of view he could understand such involvement.<sup>385</sup>

156. There is no evidence to suggest that the language General Ojdanić used in speaking to Crosland bore any relation to a joint criminal enterprise to expel ethnic Albanians from Kosovo. Rather, General Ojdanić was representing the VJ in his capacity of Deputy Chief of Staff and simply relayed the legitimate position of the VJ, as outlined in General Perišić's Grom 98 Directive, in response to the KLA threat. There is no suggestion that General Ojdanić advocated the disproportionate use of force or the illegal use of the VJ in Kosovo to commit crimes against the civilian population. Rather, Crosland testified that General Ojdanić agreed that combined VJ attacks on certain villages had created a humanitarian problem.<sup>386</sup> This is corroborated by the evidence of General Ojdanić's contribution to the Collegium of 24 August 1998 during which he expressed disapproval at the VJ being "engaged too much outside the border" area of the FRY.<sup>387</sup>

157. Finally, the evidence shows that during the negotiation of the October Agreements, General Ojdanić favoured an even more conciliatory stance than General Perišić. General Obradović testified that General Ojdanić wanted all units in Kosovo to be taken out of the field and returned to their barracks.<sup>388</sup> Obradović explained that one of the reasons that these units stayed (instead of withdrawing as suggested by General Ojdanić) was a fear that the Serb population would flee out of fear of terrorist attacks.<sup>389</sup>

## 2. Grom 98

158. Grom 98 was issued by General Perišić, General Ojdanić's predecessor as Chief of Staff. The Prosecution's case is that General Perišić (in contrast, it says, to General Ojdanić) was against the use of the VJ to defeat the KLA.

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<sup>385</sup> Tr.9803.

<sup>386</sup> Tr.9789.

<sup>387</sup> Exh.3D513, p.13.

<sup>388</sup> Tr.14938; Exh.3D645.

<sup>389</sup> Tr.14942; Exh.3D645.

159. It has not been suggested by the Prosecution that Grom 98 or the actions of General Perišić bore any relation to a plan to expel Albanian Civilians from Kosovo. This is inconsistent with the Prosecution's case that the joint criminal enterprise to expel ethnic Albanians from Kosovo had materialised by October 1998.<sup>390</sup>
160. On 28 July 1998, General Perišić as Chief of General Staff issued a "Directive to deploy the Yugoslav Army for securing the state border with Albania, units and facilities in the territory of KiM/Kosovo and Metohija/ and crush the armed rebel forces."<sup>391</sup> This Directive should be understood as issued pursuant to a decision of the Supreme Defence Council of 9 June 1998, which decided that if terrorist activities escalated the Yugoslav Army would intervene adequately and that the VJ should be ready to oppose any kind of external intervention that could endanger the sovereignty and territorial integrity of the FRY.<sup>392</sup>
161. The Directive issued on 28 July 1998 is known as Grom 98 and provided for the VJ to be used in two stages: (1) secure borders and supply routes and coordinate with the MUP of the Republic of Serbia to "overwhelm and destroy" the terrorist forces in Kosovo as per a special order from the General Staff; and (2) in case of all-out armed rebellion, the VJ is to be ready for a partial mobilisation to break up the rebellion and prevent a spill-over. These two stages have at times been referred to in this trial as Grom 1 or Grom 2 respectively.<sup>393</sup>
162. The Prosecution has at times taken the position that Grom 98 did not take immediate effect, that it was a planning document and was never implemented. In the Defence's submission, the evidence shows that the first stage of Grom 98 (otherwise known as Grom 1) was indeed implemented. The following evidence supports such a conclusion:

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<sup>390</sup> Third Amended Indictment, para.20.

<sup>391</sup> Exh.4D137, p.1.

<sup>392</sup> Exh.P1574, p.4.

<sup>393</sup> Exh.4D137.

- a. First, orders were issued by the then Chief of General Staff, General Perišić, to (1) the 3<sup>rd</sup> Army<sup>394</sup>; and (2) the other armies and parts of the Armed Forces.<sup>395</sup> These orders were similar, but differ in a vital respect showing that the 3<sup>rd</sup> Army would implement Grom 1:
- i. Paragraph 3 of the Order to the 3<sup>rd</sup> Army, as clarified during the testimony of General Obradović, reads “I shall carry out approval of the plan of engagement on the 3<sup>rd</sup> of August, 1998, at 1100 hours in the GS of the army of Yugoslavia.”<sup>396</sup>
  - ii. Paragraph 3 of the Order to the other armies and parts of the Armed Forces reads: “Submit the Plan of engagement to the GS VJ on 3 August 1998 by 1000 hours.”<sup>397</sup>
- b. Secondly, the then Commander of the 3<sup>rd</sup> Army, General Samardžić, on 29 July 1998 issued an order to subordinate commands to smash Šiptar terrorist and armed rebellion forces in Kosovo.<sup>398</sup> Prosecution witness John Crosland described this order as classical dissemination of orders down the chain of command.<sup>399</sup> General Obradović’s evidence was that once the decision of the 3<sup>rd</sup> Army Commander was approved, then it came into force and the 3<sup>rd</sup> Army Commander then carried out the task.<sup>400</sup> It was Obradović’s evidence that as soon as the Chief of General Staff verified and approved Grom 98, it entered into force and implementation could begin.<sup>401</sup>

163. The Defence submits that whatever posturing General Perišić may have performed in relation to the use of the VJ against the KLA without the declaration of a

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<sup>394</sup> Exh.3D702.

<sup>395</sup> Exh.3D703.

<sup>396</sup> Tr.15164.

<sup>397</sup> Exh.3D703.

<sup>398</sup> Exh.4D140.

<sup>399</sup> Tr.9986.

<sup>400</sup> Tr.15164.

<sup>401</sup> Tr.15136.

state of emergency,<sup>402</sup> the evidence in this trial shows that he issued and oversaw the implementation of the first phase of Grom 98 which provided for precisely that. In contrast, the second phase of Grom 98 never, as General Obradović testified, came to fruition.<sup>403</sup> Obradović confirmed, however, that anti-terrorist operations were conducted by the VJ in Kosovo in 1998 on the basis of its Grom 98 plan.<sup>404</sup>

164. There was a running debate throughout portions of the trial about whether the use of the VJ in Kosovo in 1998 and thereafter was constitutional- the main question being whether the VJ, in addition to protecting the borders of the FRY, had the right to conduct what is described as security operations against the KLA in the absence of a declaration of a state of emergency. The Trial Chamber has before it the Yugoslav Constitution<sup>405</sup> and the VJ Rules of Service.<sup>406</sup> These documents provide a clear basis upon which to conclude that they vested in the VJ an inherent right to conduct operations against a terrorist organisation which so affected the sovereignty and territorial integrity of the FRY. Professor Marković, a constitutional law expert, testified that the VJ was duty-bound to defend the constitutional order of the FRY and thus the use of the VJ in 1998 was indeed permitted under the terms of the Constitution without the need to declare a state of emergency.<sup>407</sup> This, however, is a criminal case rather than an academic debate, and the central question for the Trial Chamber is whether General Ojdanić and the VJ leadership acted in good faith in taking the actions they did before the war to repel a determined and ruthless KLA force; the evidence is that they did precisely that.

### **3. General Ojdanić's appointment as Chief of the General Staff**

165. The Prosecution has flitted between portraying General Ojdanić as either a hard-line ringleader of a joint criminal enterprise to expel ethnic Albanians from Kosovo or else a puppet of President Milošević put in place to help achieve that same aim. The Prosecution in this case has attempted to juxtapose General Ojdanić against his predecessor, General Perišić, whom it suggests was obstructionist and more moderate. In

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<sup>402</sup> Exh.P717.

<sup>403</sup> Tr.15058.

<sup>404</sup> Tr.15086.

<sup>405</sup> Exh.P1623.

<sup>406</sup> Exh.P1085/4D532.

<sup>407</sup> Tr.13006-7; Exh.1D682, para.3.44-3.61.

effect, the appointment of General Ojdanić is presented as clearing the way to implement the alleged joint criminal enterprise.

166. Yet in another Trial before this Tribunal, the Prosecution seeks to denigrate General Perišić.<sup>408</sup> It is the Defence's submission that the Office of the Prosecutor cannot have it both ways and it is inconsistent to advance such differing positions without offering a reasonable explanation. Rather, the evidence of General Ojdanić's conduct resembles none of the metaphors by which the Prosecution portrays him and does not support the allegation that he participated in a Joint Criminal Enterprise to expel ethnic Albanians from Kosovo.

167. In the Defence's submission, there is no evidence upon which the Trial Chamber can rely to reach such a conclusion. Indeed, three factors weigh strongly against such a conclusion.

- a. First, there is persistent and consistent evidence over a prolonged period of time that General Ojdanić was even more reluctant than General Perišić to use the VJ against the KLA.<sup>409</sup>
- b. Secondly, the Minutes of the Supreme Defence Council meeting of 14 November 1998 reveal that President Milošević did not know General Ojdanić particularly well: President Milošević stated that he was "less well-acquainted" with General Ojdanić although, as second in command to General Perišić, he was the logical choice to replace him.<sup>410</sup>
- c. Thirdly, the evidence shows that the appointment of General Ojdanić did not result in any change of policy by the General Staff in relation to the use of the VJ. General Perišić's Grom 98 Directive remained in place until January 1999. Colonel Vlajković, the Chief of Office of the Chief of General Staff, served under

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<sup>408</sup> Perišić, Second Amended Indictment.

<sup>409</sup> For example, see para.153-154

<sup>410</sup> Exh.P1576, p.4.

both Generals Perišić and Ojdanić and testified that General Ojdanić's approach to the use of the VJ was the same as that of General Perišić.<sup>411</sup> In fact, Colonel Vlajković's evidence was that General Ojdanić raised the bar of accountability for the work of the General Staff.<sup>412</sup> General Dimitrijević testified that General Ojdanić was no different on the issue of the limited use of the army.<sup>413</sup> Similarly, General Ćurčin testified that General Ojdanić did not change a single one of General Perišić's orders or plans or render anything that his predecessor had done invalid.<sup>414</sup>

168. During the Collegium of 27 November 1998- at which General Ojdanić took over from General Perišić as Chief of Staff- General Ojdanić emphasised to those present that the story that he was a hardliner was the opposite of what his colleagues had witnessed in meetings of the Collegium. General Ojdanić announced:

“To what extent I am a hardliner, how blind or loyal I am, whether I was in favour of dragging the Army into political games in Montenegro or of using the Army to put down protests in connection with the elections, or my position on resolving the problems in Kosovo and Metohija- I hope that you know and are witnesses of my participations in the meetings of the collegium if nothing else. That the contrary is being attributed to me, by public opinion in some quarters, is another story, and when the time is right, I will tell you what I think about this in particular.

Rest assured that in your colleague, who has been given this difficult task of leading you, you have a man who above all thinks with his own head and is his own man. This is how I've been and I remain so, and I have no intention to, nor can I, change at this very late stage in my career.”<sup>415</sup>

169. Together, the evidence heard by the Trial Chamber militates against any suggestion that General Ojdanić was a hardliner handpicked by President Milošević because he favoured the expanded use of the VJ against the KLA. Finally, any suggestion that the removal of General Perišić was illegal is unfounded. Such a step was entirely within the discretion of President Milošević, and there is uncontradicted testimony before the Trial Chamber confirming that the appropriate procedures were

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<sup>411</sup> Exh.3D1112, para.27.

<sup>412</sup> Exh.3D1112, para.12.

<sup>413</sup> Tr.26731-2.

<sup>414</sup> Exh.3D1121, para.8.

<sup>415</sup> Exh.P925, p.9.

followed.<sup>416</sup> In any event, General Ojdanić had nothing to do with the decision to remove General Perišić. The Prosecution has simply not proven that the appointment of General Ojdanić as Chief of Staff was part of a Joint Criminal Enterprise to expel ethnic Albanians from Kosovo. In fact such a proposition is simply not true.

#### **4. General Ojdanić's good faith cooperation with the OSCE-KVM**

170. The evidence before the Trial Chamber demonstrates that General Ojdanić endeavoured to cooperate with the OSCE-KVM and comply with the October Agreements. Indeed, the Trial Chamber will understand that the incentive to cooperate was strong: to avoid military action being taken against the FRY. During its assessment of the threat in February 1999, the General Staff's concluded view was that,

“our primary objective should be to avoid the deployment of foreign armed forces in our territory and in particular an armed conflict with NATO, and at the same time to preserve our vital government and national interests.”<sup>417</sup>

171. General Krga testified that General Ojdanić personally advocated the cessation of fighting and the start of political dialogue.<sup>418</sup>

172. On the first day in his new role, General Ojdanić expressed his attitude toward cooperation with the newly formed Kosovo Verification Mission:

“I personally think that every unit, every troop rotation, we can and should report to the verifiers, and this will not cause us any problems. This goes out, this comes in,...rather than having them accusing us of bringing in reinforcements, given the situation we've been put in.”<sup>419</sup>

173. The same day, General Ojdanić met General Drewienkiewicz.<sup>420</sup> Drewienkiewicz's evidence was that General Ojdanić assured him that VJ would fulfil all of its obligations under the October Agreements, and he expressed a desire for

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<sup>416</sup> Tr.16497.

<sup>417</sup> Exh.3D685, p.25. General Dimitrijević testified that the “basic goal” of the General Staff was to find a political solution to the Kosovo problem: Tr.26672.

<sup>418</sup> Exh.3D1120, para.23.

<sup>419</sup> Exh.P925, p.16.

<sup>420</sup> Exh.P2508, para.64.

transparent troop rotations in and out of Kosovo which Ojdanić said were a normal part of operations and should not be misunderstood by the international community.<sup>421</sup>

174. In his trial testimony Drewienkiewicz described the 27 November 1998 meeting with General Ojdanić as a “very open” meeting and that he left thinking that he and General Ojdanić had established a basis for future cooperation.<sup>422</sup> Drewienkiewicz testified that the impression he had was that General Ojdanić had given him the “green light” to open discussions with the lower levels in the chain of command, which Drewienkiewicz said was the “whole purpose” of the meeting.<sup>423</sup>

175. Drewienkiewicz wrote a letter to Ojdanić thanking him for the meeting of 27 November 1998, in which he described General Ojdanić’s attitude as “correct.”<sup>424</sup> Drewienkiewicz confirmed during oral testimony that on 29 November 1998 the KVM was provided with the information which General Ojdanić had promised to provide.<sup>425</sup> However, Drewienkiewicz testified that he did not receive all of the information he wanted because of a difference of interpretation regarding what was required under the October Agreements.<sup>426</sup> However, the evidence was consistent throughout the trial that it was not for the VJ to interpret the October Agreements; rather, interpretation was a political prerogative.<sup>427</sup>

176. It is submitted that General Drewienkiewicz’s oral testimony provides the true picture of General Ojdanić as a man new to the job and offering his full cooperation. This evidence is corroborated by General Ojdanić’s private statements during the VJ Collegiums, in which he consistently urged cooperation with the KVM and warned of the consequences of not doing so.

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<sup>421</sup> Tr.7919-20. In his pre-trial statement, Drewienkiewicz said that he suggested to Ojdanić that the KVM should be involved in verifying the change-over so that it would not be perceived as a reinforcement of forces, but this was “flatly refused by Ojdanić and refused with considerable authority.” [Exh.P2508, para.66.] In his trial testimony, Drewienkiewicz changed his statement and testified that, as to the refusal to verify troop rotations, this was at a subsequent meeting, and he was “pretty sure it was General Lončar quoting General Ojdanić.” Tr.7927.

<sup>422</sup> Tr.7927.

<sup>423</sup> Tr.8013-4.

<sup>424</sup> Exh.P2543; Tr.7923.

<sup>425</sup> Tr.7923.

<sup>426</sup> Tr.7924.

<sup>427</sup> *Ibid.*

177. For example, in the Collegium of 17 December 1998, General Ojdanić made clear that the General Staff's basic position on Kosovo was the "total equality of all national communities."<sup>428</sup> Moreover, in a discussion about a recent US missile strike on Iraq, General Ojdanić emphasised that as much as possible had to be done to avoid giving cause for such an action against the FRY.<sup>429</sup>

178. Similarly, in the Collegium of 24 December 1998, General Ojdanić demanded that the October Agreements be strictly observed, saying that nobody had the right to violate those Agreements:

"...All commanding levels shall be obliged to study in detail, and it also pertains to all of us sitting here, to study all Security Council resolutions and all agreements signed by the FRY and, sometimes, the Army of Yugoslavia and, of course, demand that they all be strictly observed. Nobody in this Army has the right to subordinate, sorry, violate any provisions of the resolutions and agreements that have been signed, except in we know which cases where it was defined in final resolutions or agreements. Each, so to say, adventurism or false patriotism which results in wilful behaviour which goes against the resolutions and agreements must be severely sanctioned because such behaviour could have fatal consequences for both this country and this people."<sup>430</sup>

179. After the meeting with Drewienkiewicz on 27 November 1998, the VJ in general and General Ojdanić in particular attempted to comply with the October Agreements. There were legitimate differences of interpretation. It is submitted, however, that an objective reading of the October Agreements confirms the legitimacy of the position taken by the FRY. In any event, there is no evidence that the FRY interpretation of the October Agreements related to any joint criminal enterprise to expel ethnic Albanians from Kosovo.

180. An example of legitimate differences in the interpretation of the October Agreements was whether or not the KVM was entitled to inspect VJ barracks. Drewienkiewicz's evidence was that he interpreted the OSCE-FRY agreement as giving the KVM free access throughout Kosovo, including the right to inspect VJ barracks.<sup>431</sup> He described how on 9 December 1998, he tried to inspect the Priština Brigade barracks

<sup>428</sup> Exh.3D494, p.24.

<sup>429</sup> Exh.3D494, p.12-13.

<sup>430</sup> Exh.P924, p.27. (emphasis added)

<sup>431</sup> Tr.7860. See para.62(c).

but was refused entry.<sup>432</sup> On 10 December, he tried to inspect the Prizren barracks but was again denied entry. He was, however, allowed to inspect one of the companies which was outside its barracks.<sup>433</sup>

181. The October Agreements provided for the free movement of the KVM but did not state that the KVM was entitled to enter VJ barracks. General Obradović testified that General Perišić had specifically noted that the KVM had no authority to enter barracks under the October Agreements.<sup>434</sup> Moreover, Prosecution witness Ljubinko Cvetić- who was head of the MUP for Kosovo Mitrovica- testified that the MUP did not permit the KVM access to police stations. These two points support the FRY's position that the KVM was not authorised to enter VJ barracks. In any event, the interpretation of the October Agreements on the FRY side was not made by General Ojdanić. As General Lončar pointed out, the VJ simply carried out the interpretation of those who had negotiated the Agreements in the first place.<sup>435</sup>

182. As regards troop rotations, it is submitted that there were good reasons for caution on the part of the General Staff in giving advance notice of troop rotations to the KVM, the concern being that terrorists would ambush essentially defenceless troops as they travelled to Kosovo from Serbia proper.<sup>436</sup> There is no evidence that troop rotations violated either the letter or the spirit of the October Agreements. General Obradović testified that the number of troops which left Kosovo on rotation equalled the number which arrived.<sup>437</sup>

183. The evidence shows systematic and prolonged attempts by General Ojdanić and the General Staff to cooperate with the KVM right up until it withdrew from Kosovo in advance of the NATO bombing.

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<sup>432</sup> Exh.P2508, para.80.

<sup>433</sup> Exh.P2508, para.84.

<sup>434</sup> Tr.15034.

<sup>435</sup> Tr.7673.

<sup>436</sup> Tr.15002; Exh.3D484; Exhibit3D644, p.6.

<sup>437</sup> Tr.7644-45.

- a. General Dušan Lončar was a Prosecution witness and was VJ liaison to the KVM. He testified that the composition of the Federal Commission for Cooperation- the FRY body set up to oversee cooperation with the KVM- and the profile of the individuals involved, indicated that the FRY intended to cooperate with OSCE to the fullest possible extent.<sup>438</sup>
- b. General Obradović testified that a team in the General Staff was created to deal with relations with the KVM. The Chief of General Staff ordered that General Obradović be the leader of that team, and the team also included representatives of almost all the sectors and administrations of the General Staff.<sup>439</sup>
- c. During the Collegium of 10 December 1998, General Ojdanić described the difficulties encountered with interpretation of the October Agreements, but emphasised that it was not for the General Staff to interpret the Agreements.<sup>440</sup> Rather, throughout difficult times, as tension escalated and the KLA and NATO threats increased, General Ojdanić continued to attempt to cooperate with the KVM.
- d. On 11 December 1998, a General Staff Working Group was formed and toured the subordinate units to assess cooperation with the KVM.<sup>441</sup> The Working Group submitted a report, including a framework for VJ relations with the KVM, and highlighted a number of areas for improvement.<sup>442</sup> The report emphasised the FRY's interpretation of the October Agreements- an interpretation which General Ojdanić had to accept- that the KVM was not entitled to access VJ barracks.<sup>443</sup>
- e. During the Collegium on 17 December 1998, General Ojdanić stated that,

“all members of the verifier group all have diplomatic status and that is how they should be approached. There should be no forms of crudeness shown to them. This is the least painful form of intrusion and we should

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<sup>438</sup> Tr.7584; Exh.3D411; Exh.3D458.

<sup>439</sup> Tr.14963; Exh.3D409.

<sup>440</sup> Exh.3D484, p.16.

<sup>441</sup> Exh.3D786.

<sup>442</sup> Exh.3D787.

<sup>443</sup> Tr.14982-3.

not give them a reason to withdraw.”<sup>444</sup>

- f. In December 1998 General Ojdanić issued an order improving the cooperation with the OSCE by relieving liaison officers of other duties and providing for the submission of daily (rather than weekly) reports to the OSCE.<sup>445</sup>
- g. During the Collegium of 24 December 1998, General Ojdanić reiterated that all commanding levels should study the Security Council resolutions and agreements and demand that they be strictly observed. General Ojdanić emphasised that “[n]obody in the army has the right to violate these agreements.”<sup>446</sup>
- h. During the Collegium of 11 February 1999, General Ojdanić directed that the Army’s liaison officers with the KVM be upgraded and that English speaking officers be transferred to perform liaison duty.<sup>447</sup>
- i. As late as 8 March 1999 General Ojdanić issued an order to improve cooperation by appointing officers fluent in English and relieving officers of other duties so that they could communicate with the OSCE with greater ease.<sup>448</sup> Also on 8 March 1999, General Ojdanić ordered that a seminar be organised to further train liaison officers to the OSCE and NATO missions.<sup>449</sup>
- j. As late as 20 March 1999, General Ojdanić issued an Order entitled “Warning on taking measures to avoid incidents.”<sup>450</sup> General Ćurčin testified that Ojdanić ordered that movements of small groups and units should be reduced to a minimum to prevent any chance of provocations or skirmishes with the KLA occurring. Ćurčin testified that the reason for this was to try and avoid any kind of pretext which NATO could use to justify military action.<sup>451</sup>

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<sup>444</sup> Exh.3D494, p.21.

<sup>445</sup> Tr.7675-6; Exh.3D408.

<sup>446</sup> Exh.P924, p.27.

<sup>447</sup> Exh.P934, p.24-25; Exh.3D406; Tr.7677&7680.

<sup>448</sup> Exh.3D407, item#7.

<sup>449</sup> Exh.3D784.

<sup>450</sup> Exh.3D682.

<sup>451</sup> Tr.16947.

184. Further, there is evidence before the Trial Chamber that the KVM did not always behave with utmost good faith toward the FRY. General Dimitrijevic described how 90% of the KVM were active officers of their respective armies and there were a number of cases where members of the KVM were transferring weapons and providing information about the VJ.<sup>452</sup> The perception from the General Staff was that the KVM had an over-expansive interpretation of its mandate and sided with the KLA.<sup>453</sup>

185. Taken together, the evidence before the Trial Chamber shows General Ojdanić to be a man with a profound sense of duty and respect for the law who strove for peace but in the circumstances, like any responsible military commander, had to prepare for the worst.

### **5. Račak - January 1999**

186. The events that occurred in Račak in January 1999 are of limited relevance in this trial. The general allegations surrounding Račak are as well-known as they are unproven; namely that a number of ethnic Albanian civilians were massacred. This Trial Chamber has directed the parties that it will not be rendering verdicts on the alleged killings in Račak on 15 January 1999. Therefore, no submissions are made in that regard. Rather, the Trial Chamber has indicated as follows:

“Issues that are potentially relevant to the indictment in relation to Račak may include the following: Coordination between the VJ and MUP in the vicinity of Račak in January 1999, command and control of the VJ and MUP in the same area at the same time, the activities of the OSCE-KVM at the same place and same time, and the disproportionate use of force in that area in January 1999, and in relation to that issue, also the presence and strength of KLA forces in the vicinity of Račak in January 1999.”<sup>454</sup>

187. Therefore the evidence of General Maisonneuve that Colonel Jelić of the 243<sup>rd</sup> Mechanised Brigade “gave admissions that were tantamount to VJ involvement in Račak” is irrelevant.<sup>455</sup> In fact, the Trial Chamber has heard limited evidence even in relation to the issues it identified as “potentially relevant” to Račak.

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<sup>452</sup> Tr.26733-34.

<sup>453</sup> Exh.3D644, p.6; Exh.P936, p.9, fn.1; Exh.P939, p.15; Exh.P941, p.9; Exh.P933, p.8.

<sup>454</sup> Tr.11160.

<sup>455</sup> Exh.P2772, para.30.

188. The key issue concerning General Ojdanić is how he reacted to the accusation that civilians (as well as KLA fighters) had been killed in Račak. In the Collegium of 21 January 1999- the first Collegium after Račak- General Ojdanić was insistent: “As the Chief of the General Staff I want to know the truth.”<sup>456</sup>
189. General Ojdanić ordered that a Working Group investigate whether or not the VJ had been in any way involved.<sup>457</sup> General Obradović attended this Collegium. His evidence was that the overall policy of the General Staff and General Ojdanić was to find out the truth, whatever that truth looked like.<sup>458</sup> He described how General Ojdanić ordered that his deputy, General Marjanović, take the required number of men to assist him to get an overview of the entire situation concerning Račak, study in detail the reports from subordinate commands and the teams for relations with the missions, gather information which was available to diplomatic institutions, as well as any other available information, in order to prepare a thorough analysis of what had happened.<sup>459</sup>
190. Further steps were taken.<sup>460</sup> General Ćurčin’s evidence was that he drafted a telegram based upon orders given by General Ojdanić during the 21 January 1999 Collegium following media reports about a massacre. Ćurčin’s evidence was that the telegram asked the relevant commander to answer four questions and submit a report as soon as possible and no later than the following morning as to what happened in Račak.<sup>461</sup> General Obradović described how General Ojdanić ordered that the Priština Corps reports should be more detailed and that daily reports were to be submitted to the General Staff in order to be able to note any discrepancies with information coming from the 3<sup>rd</sup> Army.<sup>462</sup>
191. The results of the Working Group’s analysis were presented at the very next Collegium on 28 January 1999. The Working Group concluded that the VJ in general

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<sup>456</sup> Exh.P939, p.12.

<sup>457</sup> Exh.P939, p.31.

<sup>458</sup> Tr.15015.

<sup>459</sup> Tr.15014.

<sup>460</sup> See Exh.3D1116, p.110-112.

<sup>461</sup> Exh.3D671; Tr.16931.

<sup>462</sup> Tr.15016.

and units of the Priština Corps in particular had not been involved in Račak.<sup>463</sup> This is corroborated by the testimony of General Obradović. General Obradović stated in that meeting,

“The official position of the Army Command is that the VJ, that is, the units of the Priština Corps, did not take part in the operations near the village of Dac [i.e. Račak].”<sup>464</sup>

Similarly, General Ćurčin testified that the response the General Staff received from the 3<sup>rd</sup> Army was unequivocal: the contemporaneous daily report relating to Račak was true and the VJ had not participated in what had been a MUP action.<sup>465</sup>

192. This is corroborated by the evidence of General Dimitrijević, who testified that after the second or third check made by General Ojdanić, the specific answer was that the army did not participate in the action at Račak.<sup>466</sup>

193. This evidence shows that General Ojdanić took the allegations of VJ involvement in Račak seriously. He acted swiftly and diligently in ordering a full investigation and report. The result of that investigation was that the VJ had not been involved. Therefore, General Ojdanić took all reasonable and necessary measures required based upon the information available to him. This was a pattern which would continue as the war in Kosovo unfolded.

**6. General Ojdanić orientated the VJ toward the threat from the KLA and NATO, not innocent civilians**

194. It is the Prosecution’s case that the crimes committed in Kosovo and the population movement observed were caused by actions of forces of the FRY which would have required months of preparation.<sup>467</sup> It is the Defence’s submission that the Prosecution has not proved, as it must, that General Ojdanić as Chief of Staff orientated the VJ toward anything other than the military threat from the KLA and later NATO.

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<sup>463</sup> Exh.3D559, p.21.

<sup>464</sup> Tr.15017; Exh.3D559.

<sup>465</sup> Exh.3D672; Tr.16931.

<sup>466</sup> Tr.26636-8.

<sup>467</sup> Tr.12591.

There is no evidence that, through the use of the VJ, the General Staff planned to expel ethnic Albanians from Kosovo or target civilians rather than the KLA and NATO.

195. The evidence before the Trial Chamber is that three key General Staff directives regulated the use of the VJ during the relevant period: Grom 98 of 28 July 1998;<sup>468</sup> Grom 3 of 16 January 1999; and the Directive of 9 April 1999. The evidence is that a Directive was the “highest type of order regarding the deployment of the VJ.”<sup>469</sup> General Simić testified that a Directive would define the concept for the use of the VJ over a long period.<sup>470</sup> It is the Defence’s submission that, were General Ojdanić to gear the VJ toward participating in a planned expulsion of ethnic Albanian civilians from Kosovo, it would have to be at least implicit in these Directives.

a) Grom 3

196. On 16 January 1999, General Ojdanić as Chief of General Staff issued a Directive for the engagement of the VJ to prevent the introduction of a multinational NATO brigade into Kosovo.<sup>471</sup> This Directive, as indicated on its face, was known as “Grom 3.” It comprised two stages, both aimed at repelling the introduction of a NATO force from Macedonia with a simultaneous attack by the KLA and introduction of further terrorists from neighbouring Albania. As expressed in the Directive, the first stage was to block the introduction of the NATO brigade and terrorist forces from Macedonia and Albania respectively. The second stage was to be to crush the NATO brigade and destroy the KLA.

197. There is no mention in Grom 3 of a plan to expel ethnic Albanian civilians from Kosovo, nor can one be inferred. General Smiljanić described Grom 3 as a reaction to the threats faced by the FRY at that point in time.<sup>472</sup> Čurčin testified that Grom 98 had become obsolete because of developments since the summer of 1998, and that Grom 3

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<sup>468</sup> See para.158 *et seq.*

<sup>469</sup> Tr.15487.

<sup>470</sup> Tr.15636-7.

<sup>471</sup> Exh.3D690.

<sup>472</sup> Tr.15747.

was necessary to protect the territorial integrity of the FRY. He explained that there was a danger that NATO troops would move into the FRY.<sup>473</sup>

198. It is the Defence's submission that Grom 3 was the basis for VJ action in the period following 16 January 1999 and was treated by subordinate commands as such.
199. On 27 January 1999, General Pavković issued an order for the use of the 3<sup>rd</sup> Army in "preventing the forceful introduction of a NATO Brigade, its routing and the destruction of Šiptar/Albanian/terrorist forces in Kosovo and Metohija."<sup>474</sup> General Lazarević in his testimony described this as the basis and fundamental document for the Grom 3 Plan at the level of the 3<sup>rd</sup> Army and that its scope determined the tasks given to the Priština Corps.<sup>475</sup>
200. On 1 February 1999, General Pavković issued a further order.<sup>476</sup> General Lazarević during his testimony explained that this was a further development of Grom 3, focusing on the dispersal of military assets, the defence of the state border and ordering that the Priština Corps prepare a special plan to block and destroy the KLA in Drenica, Lab and Mališevo, areas where there was a "major build-up" of KLA forces.<sup>477</sup> General Stefanović explained further that the areas of Drenica, Mališevo and Malo Kosovo were vulnerable areas where it was feared that a NATO multinational brigade could be landed.<sup>478</sup> This order contains a preparatory order for a rapid call-up of anti-aircraft artillery and rocket units- clearly weaponry aimed at countering the growing NATO threat.<sup>479</sup>
201. On 12 February 1999, General Ojdanić briefed President Milošević on Grom 3.<sup>480</sup> In outlining the Grom 3 Directive and describing its two stages, there is no mention of a plan to expel ethnic Albanians from Kosovo, nor can one be inferred. The VJ

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<sup>473</sup> Tr.16992.

<sup>474</sup> Exh.3D676/5D245.

<sup>475</sup> Tr.17897.

<sup>476</sup> Exh.5D249.

<sup>477</sup> Tr.17904-5.

<sup>478</sup> Tr.21817.

<sup>479</sup> Exh.5D249, para.12.

<sup>480</sup> Exh.3D704.

intelligence assessment prepared at this time outlined the options available to the VJ were the Rambouillet negotiations to either succeed or fail.<sup>481</sup> The evidence before the Trial Chamber is that Grom 3 was prepared by the General Staff and was aimed at NATO and terrorist forces rather than ethnic Albanian civilians.<sup>482</sup>

202. On 16 February 1999, General Lazarević issued the plan requested by General Pavković on 1 February 1999.<sup>483</sup> It is the Prosecution's case that this document formed the basis for the series of Joint Command orders that followed. It is the Defence's submission that this document was entirely within the prerogative of the commander of the Priština Corps in preparing to implement Grom 3: its focus, as requested by the General Staff, was the KLA in the event that war broke out.

203. From the perspective of the General Staff, Grom 3 was the strategy by which the VJ was engaged in Kosovo. When a state of war was declared as a result of the NATO attack on 24 March 1999, Grom 3 was implemented together with general war plans for the defence of the country. There was no plan for the expulsion of ethnic Albanian civilians and General Ojdanić never participated in any such plan. Rather, from the perspective of the General Staff, operative deployments of the VJ continued to be conducted under Grom 3.<sup>484</sup>

b) Directive of 9 April 1999

204. For the first 16 days of the war, Grom 3 and the war plan for the defence of the country remained the basis for VJ actions. On 9 April 1999, General Ojdanić issued a Directive for the engagement of the VJ in Defence against the NATO Aggression.<sup>485</sup> The Directive outlined the VJ's strategy to respond to "intensive operations from airspace" and "operations by multinational land forces and Šiptar terrorists in Kosovo." The Directive outlined a "General aim of Strategic Defence" as follows:

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<sup>481</sup> Exh.3D685.

<sup>482</sup> Tr.15020; Exh.3D1113, para.9.

<sup>483</sup> Exh.P2808.

<sup>484</sup> Tr.15481.

<sup>485</sup> Exh.P1481.

“To protect the forces of the Yugoslav Army from massive casualties, mobilise and prepare for combat use according to the degree of danger, secure the state border and control of territory, smash and destroy the [TS in KiM and close the axes leading from the territory of the Republic of Albania and the Republic of Macedonia into the FRY.

In the event of land forces aggression, use persistent defence from the state border to prevent rapid breakthrough, create conditions to complete mobilisation, regrouping and bringing forces to shatter and eject the aggressor from the territory of the FRY.”<sup>486</sup>

205. There is no mention of a plan to target ethnic Albanian civilians, nor can one be inferred. Indeed, the Directive expresses concern that the KLA will take advantage of returning refugees by infiltrating their number in order to continue fighting. General Ojdanić sent an additional order to General Pavković personally asking that he prepare a proposal outlining how this should be dealt with.<sup>487</sup>

206. General Simić’s evidence was that the Directive of 9 April 1999 was issued because Grom 3 had to be amended. The reason Grom 3 had to be amended was that it had been aimed at an air-borne assault by NATO forces from Macedonia, by which he explained he meant the introduction of ground forces by the air.<sup>488</sup> When it was clear that this had not been NATO’s initial strategy, it was important to re-orientate VJ strategy by way of a new Directive. At the Collegium on 9 April 1999, Simić briefed those present that the operative deployment of units had been conducted under a decision of the 3<sup>rd</sup> Army Commander and that those same units were then involved in protecting the state border, crushing “terrorist Šiptar forces,” and blocking their axes from Albania and Macedonia.<sup>489</sup> The Collegium of 9 April 1999 contains no mention of a plan to expel ethnic Albanians from Kosovo, nor can one be inferred.

c) Supplemental Directive of 12 April 1999

207. General Ojdanić issued a Supplemental Directive on 12 April 1999 to the Directive of 9 April 1999.<sup>490</sup> The Supplemental Directive made no material change to

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<sup>486</sup> Exh.P1481, p.4.

<sup>487</sup> Exh.P1480.

<sup>488</sup> Tr.15484.

<sup>489</sup> Exh.P938.

<sup>490</sup> Exh.P1483.

the orientation of the VJ. The Supplemental Directive contains no reference to a plan to expel ethnic Albanian civilians, nor can one be inferred.

## **7. Ojdanić and the Joint Command**

208. The Prosecution does not allege that General Ojdanić was a member of the Joint Command or that he ever participated in any of its meetings, if any such meetings took place in 1999. The very need for, or existence of, a “Joint Command” as a vehicle through which crimes would be ordered and committed presupposes that those in the regular chain of command such as General Ojdanić would not participate in or tolerate such activities. However advantageous to General Ojdanić’s defence the existence of such a Joint Command might be, the highest at which the evidence can be put is that the Joint Command was simply a body instituted to coordinate action taken at the operational and tactical level of command against the KLA in Kosovo.

209. General Dimitrijević described how General Ojdanić headed a General Staff team of 30-40 people on a tour of Kosovo. Dimitrijević testified that it is inconceivable if such a body was the highest command in the area that such a tour could be conducted yet nobody notice or sit down with the Joint Command.<sup>491</sup>

210. The Prosecution relies upon a “Suggestions” document issued by General Ojdanić on 17 April 1999<sup>492</sup> in relation to an earlier Joint Command Order of 15 April 1999.<sup>493</sup> The Prosecution alleges that by issuing this document, General Ojdanić acknowledged the existence of the Joint Command and somehow approved of its criminal purpose.

211. The Defence submits that the best way to understand Ojdanić’s “Suggestions” document is to look at the document itself.<sup>494</sup> General Ojdanić’s “Suggestions” are in relation to a specific operation against the KLA, not civilians. The Suggestions are directed toward preventing terrorists managing to withdraw so that the fundamental objective of “destruction” can be achieved. Neither General Ojdanić’s suggestions nor

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<sup>491</sup> Tr.26715; Tr.26724-5.

<sup>492</sup> Exh.P1487.

<sup>493</sup> Exh.P1878.

<sup>494</sup> Exh.P1487.

the underlying Joint Command order- which in any event General Ojdanić did not see-bear any relation to any action directed against ethnic Albanian civilians.

212. The detailed evidence of General Djordje Ćurčin explained the provenance of Ojdanić's "Suggestions" and that it was issued on the basis of an A3 map showing combat operations in the Rugovo area, rather than on actual written order.<sup>495</sup> Ćurčin testified that he typed up the Suggestions document for General Ojdanić without any reference to the written Joint Command order.<sup>496</sup> Ćurčin's evidence was that Ojdanić showed Ćurčin a segment of a map of Rugovo and told him that it was a Joint Command plan made on 15 April 1999. General Ojdanić explained that he had met General Pavković, who said that he had seen President Milošević. General Ojdanić drafted his suggestions and General Ćurčin then typed them out. When the document was brought back, General Ojdanić corrected a mistake on it in pen before it was sent to the command post of the 3<sup>rd</sup> Army.<sup>497</sup> Ćurčin testified that he did not discuss this document with Ojdanić because Ojdanić said that the telegram was urgent. Ćurčin's evidence was that he was not concerned about the reference to the Joint Command because the document was addressed to the 3<sup>rd</sup> Army.<sup>498</sup>

213. The Trial Chamber may be concerned as to why General Ojdanić would issue suggestions rather than an order. Prosecution witness Vasiljević expressed his opinion that this document shows the "duality" of the Joint Command: that it was not a typical command and control body.<sup>499</sup> Radinović testified in relation to General Ojdanić's "Suggestions" that he would expect a senior military officer to ask questions because it invokes an order that he did not issue.<sup>500</sup>

214. It may not have been customary for the Chief of Staff to give "Suggestions," but the fact that General Ojdanić did so on this occasion is not indicative of a plan to expel ethnic Albanians from Kosovo. While giving a "Suggestion" to a subordinate command

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<sup>495</sup> Tr.16971-2; Tr.17025.

<sup>496</sup> Tr.17027.

<sup>497</sup> Tr.16972-3.

<sup>498</sup> Tr.16972.

<sup>499</sup> Exh.P2589, p.15973.

<sup>500</sup> Tr.17333; Exh.P1878.

was uncommon, it was not unprecedented or unlawful.<sup>501</sup> General Krga testified that a superior may suggest to a subordinate how a task should be carried out if there is a need for it.<sup>502</sup> It is submitted that in the circumstances it was entirely appropriate for General Ojdanić to issue “Suggestions” because he was involving himself in decisions within the prerogative of another level of command. As Chief of the General Staff, General Ojdanić was not usually involved in the details of a military action and subordinate commanders with greater familiarity with the situation on the ground would be expected to conduct operations as they saw fit.

## 8. Batajnica

215. The Prosecution contends that it was well-known that crimes were committed in Kosovo and that no real steps were taken to punish those responsible. The Prosecution says that, on the contrary, a concerted effort was made to cover-up the commission of crimes. It is the Prosecution’s submission that this leads to an “inescapable inference” that the crimes were committed in furtherance of a plan to expel ethnic Albanian civilians.<sup>503</sup>

216. The Prosecution alleged that the VJ was involved in an attempt to cover up crimes by transferring corpses to Batajnica. The Prosecution alleged that this was a military base and therefore senior members of the military must have been involved for such a cover-up to be possible. The Prosecution offered no direct evidence that General Ojdanić was in any way implicated.

217. In any event, the evidence was that the Batajnica base was empty during the NATO bombing. Witness K84 testified that members of the army were moved out of the base for security reasons, because it was exposed to heavy NATO shelling.<sup>504</sup> This is corroborated by the evidence of Witness K88<sup>505</sup>, General Farkaš,<sup>506</sup> Witness K87,<sup>507</sup> and

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<sup>501</sup> See Exh.6D1130, p.40, column112 (Suggestion to Commander of 3<sup>rd</sup> Army); Tr.16970-3; Tr.20805.

<sup>502</sup> Tr.16912-3.

<sup>503</sup> OTP PTB, para.155-6&220.

<sup>504</sup> Tr.5229.

<sup>505</sup> Tr.10464.

<sup>506</sup> Tr.16383.

Stojanović.<sup>508</sup> In the absence of any VJ presence at the base, the Prosecution's argument collapses. The Prosecution has not proved that the VJ had any involvement in the transfer of corpses to Batajnica or that General Ojdanić had any knowledge whatsoever of this crime and attempted cover up.

**9. Allegation that steps were not taken to punish those responsible for crimes**

218. The Prosecution alleges that General Ojdanić used his position to ensure that those who committed individual acts of violence were protected from punishment.<sup>509</sup> The Prosecution submits that this constitutes participation in the alleged Joint Criminal Enterprise. The Defence denies both the allegation and that any such omission can form the basis for participation in a Joint Criminal Enterprise.<sup>510</sup>

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<sup>507</sup> Exh.P2756, para.8–11.

<sup>508</sup> Tr.20089.

<sup>509</sup> OTP PTB, para.146.

<sup>510</sup> Section III contains a factual analysis of the allegation that General Ojdanić failed to prevent or punish crimes. Section IV includes the legal submission that it is confused to assert that a failure to prevent or punish- a duty which arises under Article 7(3)- can form the basis for liability under Article 7(1).

### **III. SUPERIOR RESPONSIBILITY**

#### **A. Introduction**

219. Section III of this Brief addresses the generic evidence relevant to General Ojdanić's alleged superior responsibility under the following headings:

- a. General Ojdanić's authority as Chief of Staff;
- b. Action taken by General Ojdanić to ensure that international humanitarian law was followed, crimes were reported and punished;
- c. General Ojdanić did not receive complete and accurate information despite best efforts; and
- d. General Ojdanić took appropriate remedial action based upon the information available to him.

#### **B. General Ojdanić's authority**

220. Articles 5 and 6 of the Law on the VJ<sup>511</sup> set out the powers that General Ojdanić had as Chief of the General Staff:

##### **Article 5**

The General Staff of the Army shall be the highest professional and staff organ for the preparation and use of the Army in times of peace and war.

In accordance with the basic principles of organisation, development, and establishment of the Army and the documents issued by the President of the Republic, the Chief of General Staff shall:

1. determine the organisation, plan of development, and establishment of the commands, units, and institutions of the Army;
2. determine the plan of recruitment and maintenance of manpower levels for the Army and the numerical distribution of recruits in the Army;

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<sup>511</sup> Exh.P984.

3. issue regulations on the training of the Army;
4. determine plans for the education and advanced training of professional and reserve commanding officers;
5. perform other duties as stipulated by this Law.

### **Article 6**

In order to implement documents issued by the President of the Republic and the duties of commanding the Army, as well as the duties stipulated by this Law, the Chief of General Staff shall issue rules, orders, commands, instructions, and other documents.

The commanding officers of units and institutions of the Army shall command these units and institutions in accordance with this Law and the command documents issued by their superior officers.

221. The evidence before the Trial Chamber is that during the period of the crimes in the Amended Indictment, General Ojdanić was Chief of Staff of the body known as the Supreme Command. Radovan Radinović's evidence was that the Supreme Command Staff was a specialist and operational staff organ of the Supreme Command and the Supreme Commander and such a structure was consistent with the fundamental documents of the FRY.<sup>512</sup> It was Radinović's evidence that the Supreme Command Staff was best understood as a part of the Supreme Command, in the sense of being the professional staff body of the Supreme Command.<sup>513</sup>
222. The evidence before the Trial Chamber is that during the war the routine of the Supreme Command Staff was that General Ojdanić would meet with President Milošević in the morning to discuss the combat reports and various proposals prepared the previous evening.<sup>514</sup> As Chief of Staff of the Supreme Command, General Ojdanić then carried out the orders of the Supreme Commander.
223. Although General Ojdanić was not a member of the Supreme Defence Council<sup>515</sup>, he attended its meetings. The evidence shows that, during the war, it was the Supreme Command, headed by President Milošević, which directed policy for the conduct of the war. Radovan Radinović testified that in effect the Supreme Defence Council became the

<sup>512</sup> Tr.17236-7; Article 5 of the Law on VJ (Exh.P984).

<sup>513</sup> Tr.17250. A number of other witnesses testified about the status of the Supreme Command Staff: see Tr.16091-3; Tr.15128-9; Exh.3D1084, para.160; Tr.16603.

<sup>514</sup> Tr.16979; Tr.17253-4.

<sup>515</sup> Exh.P1623, Article135.

Supreme Command, and the VJ General Staff became the Supreme Command Staff. President Milošević was the Supreme Commander and General Ojdanić was Chief of the Supreme Command Staff.<sup>516</sup> Although none of these terms appear in the relevant constitutional documents of the FRY, the evidence before the Trial Chamber shows that such was the practice.<sup>517</sup>

**C. Action taken by General Ojdanić to ensure that international humanitarian law was followed, crimes were reported and punished**

224. General Ojdanić took a number of steps before the NATO bombing began to try and ensure that international humanitarian law was observed and to ensure that crimes would be reported and punished.

225. General Terzić was Chief of the Training Administration in the General Staff. He described how General Ojdanić, when Deputy Chief of Staff in February 1998, ordered that a seminar be organised in International Humanitarian Law for the General Staff of the VJ and leaders involved in the defence of Yugoslavia against the threat from the KLA.<sup>518</sup> This was a significant enterprise: General Terzić's evidence was that this seminar took some nine months to organise and that the International Committee for the Red Cross was heavily involved.<sup>519</sup> The seminar took place over two full days on 25 and 26 November 1998.<sup>520</sup> It involved a large number of high level participants from the VJ.<sup>521</sup> It was Terzić's evidence that at least seven prior seminars had been held at various other levels of command. Terzić testified that General Ojdanić ensured that attendance was compulsory and had closely monitored preparations for the seminar, going through all the relevant documents and personally calling participants to emphasise its importance.<sup>522</sup>

226. Terzić explained that at the seminar General Ojdanić welcomed participants and invited them to have an open and well-argued discussion on the issues relating to

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<sup>516</sup> Tr.17261.

<sup>517</sup> See Tr.17008; Tr.15611; Tr.15603; Tr.15603; Tr.16578; Tr.16578-9.

<sup>518</sup> Tr.15888; Exh.3D712.

<sup>519</sup> Tr.15895.

<sup>520</sup> Exh.3D712.

<sup>521</sup> Tr.15889; Exh.3D713.

<sup>522</sup> Tr.15888-9; Exh.3D712.

Kosovo.<sup>523</sup> General Ćurčin also remembered this seminar, describing how, when making the opening speech, General Ojdanić emphasised the importance of training in international humanitarian law.<sup>524</sup> Ojdanić also emphasised that regardless of their ethnicity, the civilian population and citizens of Kosovo enjoyed the full protection of the state organs and the VJ, while at the same time the further democratic development of Yugoslavia implied a resolute struggle against all forms of violence, terrorism and attempts at separatism.<sup>525</sup>

227. Terzić testified that at this seminar, a Dr Radojević described how non-commissioned officers had four training classes devoted to regulating the conduct of operations, and that at the military academy there were eight classes per week on international humanitarian law.<sup>526</sup> Terzić further testified that at the command staff academy there were 16 classes, while at the school of national defence there were six classes.<sup>527</sup> Terzić explained that the obligations on the treatment of civilians were taught, as was the obligation to report all violations of the norms of the laws of war.<sup>528</sup>

228. There is further unchallenged evidence before the Trial Chamber that General Ojdanić emphasised the importance of the provisions of international humanitarian law to his subordinates. General Curin testified that General Ojdanić paid “special attention” to the implementation of international humanitarian law. Ćurčin testified that there were numerous warnings issued, and that reminders were printed for officers and especially soldiers.<sup>529</sup> General Simić’s evidence was that subordinates were always told to take disciplinary measures and ensure criminal sanction against individuals who breached the standards of international humanitarian law.<sup>530</sup>

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<sup>523</sup> Tr.15889-90; Exh.3D711.

<sup>524</sup> Exh.3D711, para.4.

<sup>525</sup> Exh.3D711, para.2.

<sup>526</sup> Tr.15894; Exh.3D714.

<sup>527</sup> Tr.15894.

<sup>528</sup> Tr.15894.

<sup>529</sup> Exh.3D1121, para.32.

<sup>530</sup> Exh.3D1089, p.12; Exh.3D1116, p.153-7.

229. The documentary evidence before the Trial Chamber from during the war also demonstrates General Ojdanić's sustained and persistent insistence that international humanitarian law be respected in its entirety:

- a. On 2 April 1999, General Ojdanić issued an order that detainees were to be treated humanely and in accordance with international humanitarian law.<sup>531</sup>
- b. On 3 April 1999, General Ojdanić issued an order on military discipline providing that all perpetrators of crimes were to be brought before a judge immediately on the submission of a criminal report. Moreover, the order provides that measures would also be taken against conscripts and volunteers who committed crimes,

“...because by joining wartime units... they acquire the status of a serviceman, to whom all the regulations governing VJ /Yugoslav Army/ life and work, as well as the regulations on criminal responsibility, are applicable.”<sup>532</sup>

- c. On 9 April 1999, General Ojdanić issued the Directive on the Deployment of the VJ.<sup>533</sup> This explicitly referred to the application of the whole of provisions of the Geneva Conventions and international humanitarian law. Moreover, General Simić gave unchallenged evidence that this provision was placed in a more prominent position in the Directive at the insistence of General Ojdanić, and that by doing so subordinates would be instantly aware of the seriousness with which the Supreme Command Staff viewed international humanitarian law.<sup>534</sup>
- d. On 16 April 1999, General Ojdanić issued a “warning” order that international humanitarian law must be complied with.<sup>535</sup> This referred to an earlier order on the same issue of 3 February 1999. General Gajić testified that this order was motivated by a sincere intention to observe the law.<sup>536</sup>

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<sup>531</sup> Exh.P1475/3D480.

<sup>532</sup> Exh.P1477.

<sup>533</sup> Exh.P1481.

<sup>534</sup> Tr.15489.

<sup>535</sup> Exh.P1486/3D482/4D216.

<sup>536</sup> Tr.15262.

- e. On 19 April 1999, rules of conduct were delivered to combatants as well as an international humanitarian law handbook to all commanders within the VJ.<sup>537</sup>
- f. On 28 April 1999 General Ojdanić ordered that students in the military academy be sent home rather than to the front line.<sup>538</sup> General Kosovac testified that General Ojdanić rejected a proposal to draft students of military schools and use them in VJ units.<sup>539</sup> It is the Defence's submission that this further demonstrates General Ojdanić's continued concern to ensure that only properly trained soldiers were involved in combat activity.
- g. General Gojović's evidence was that a small laminated leaflet that contained the most salient provisions of the international laws of war was provided to every soldier.<sup>540</sup>

230. One of the very first things General Ojdanić did on the outbreak of war was to issue an order that reports to the Supreme Command Staff had to be accurate and confirmed.<sup>541</sup> General Ćurčin testified that this was one of the first orders to come from the command post of the Supreme Command Staff and that it was one in a series of measures emphasising the need to get accurate reports from subordinate commands. Ćurčin testified that this order was sent to all subordinate commands.<sup>542</sup> Ćurčin further testified that this order was a response to General Dimitrijević's complaint during the Collegium of 18 March 1999 considered below.<sup>543</sup>

231. General Ojdanić issued a raft of further orders to ensure the delivery of accurate and timely information to the Supreme Command Staff.

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<sup>537</sup> Exh.3D488.

<sup>538</sup> Exh.3D748.

<sup>539</sup> Tr.15824.

<sup>540</sup> Tr.16647-8; Exh.3D988, Tab3.

<sup>541</sup> Exh.P1469.

<sup>542</sup> Tr.16953.

<sup>543</sup> See para.250 *et seq.*

- a. On 2 April 1999, General Ojdanić ordered that combat reports from subordinate commands to the Supreme Command Staff should contain reports of instances of a failure to obey international humanitarian law.<sup>544</sup>
  - b. On 11 April 1999, General Ojdanić ordered that subordinate commands should submit an “interim report” every morning to the Supreme Command Staff in addition to the main combat report received every evening.<sup>545</sup>
  - c. On 15 April 1999, General Ojdanić issued a further order, observing that reporting was “not being carried out in line with requirements and needs” and again ordered that all important developments be reported.<sup>546</sup>
  - d. On 2 May 1999, General Ojdanić ordered that reports containing any extraordinary events must be accompanied by the relevant commander’s signature.<sup>547</sup>
  - e. On 30 May 1999, General Ojdanić issued a further order emphasising the importance of accurate reports and improving the format of combat reports submitted by subordinate commands.<sup>548</sup> Simultaneously, an order improving the format of Supreme Command Staff combat reports was issued.<sup>549</sup> This emphasised that a specific section dealing with the work of the military judicial authorities was to be included in Supreme Command Staff combat reports.<sup>550</sup>
232. Finally, General Smiljanić’s evidence was that General Ojdanić was “adamant” that the principle of subordination be followed at all times and therefore because he had ordered compliance with the appropriate laws he reasonably expected that his orders would be followed.<sup>551</sup> This, however, included the principle that subordinate commands

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<sup>544</sup> Exh.3D480, item8.

<sup>545</sup> Exh.4D200.

<sup>546</sup> Exh.P1744.

<sup>547</sup> Exh.P1914.

<sup>548</sup> Exh.3D678.

<sup>549</sup> Exh.3D688.

<sup>550</sup> Exh.3D688, para.3.3. See Exh.3D863 as example.

<sup>551</sup> Tr.15755.

should take decisions at their “own level” and could use their own discretion to fulfil the order of the superior command. This is reflected in an order of 23 February 1999 where General Ojdanić ordered that the principle of subordination be strictly observed, while “demonstrating a higher level of inventiveness, initiative, decisiveness and readiness to answer for the decisions made.”<sup>552</sup> Subordinate commands were to take decisions at their “own level”<sup>553</sup> and only send matters to the Chief of General Staff which were exclusively within his jurisdiction.<sup>554</sup> This fact was also confirmed by testimony of General Lazarević, who stated with respect to the responsibility of commanders that, “My decision is my decision and my responsibility.”<sup>555</sup> Together the evidence before the Trial Chamber demonstrates that General Ojdanić took appropriate steps to try and ensure that international law was followed by subordinates and that if it was not, he would find out about it.

#### **D. General Ojdanić did not receive complete information**

233. During the NATO bombing the Supreme Command Staff was located at the command post in Belgrade. The primary mechanism by which the Supreme Command Staff was informed of events in Kosovo was via combat reports submitted by subordinate commands. General Vasiljević explained the flow of information to the Supreme Command Staff: the regular practice was for brigades to submit daily combat reports to the Corps command; the Corps command condensed the information into a single report which was forwarded to the 3rd Army; the 3rd Army would condense the reports from the corps and send information on to the Supreme Command staff; the staff of the Supreme Command condensed the report from the various armies into a daily combat report which would go to President Milošević.<sup>556</sup>

234. General Vasiljević testified that as regards potential crimes, there were three lines of reporting: from the Corps commander to the 3rd Army commander; via the security

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<sup>552</sup> Exh.3D669, para.4.

<sup>553</sup> Exh.3D669, para.1.

<sup>554</sup> Exh.3D669, para.6.

<sup>555</sup> Tr.18730-1.

<sup>556</sup> Tr.8659-64.

service; and via the military judicial organs.<sup>557</sup> Information from each of these sources would reach General Ojdanić through reports and briefings.

235. The evidence before the Trial Chamber demonstrates the importance of combat reports and their content to the Supreme Command Staff. General Ćurčin testified that upon receipt of combat reports during the NATO bombing, the Duty Operations Team of the Supreme Command Staff would draw up its own Combat Report to be submitted to General Ojdanić, President Milošević and others by 0600 every morning.<sup>558</sup> Ćurčin's evidence was that the Operations Administration was in charge of the command system in the VJ and oversaw the reporting line along the chain of command.<sup>559</sup> Ćurčin described how combat reports from the 3<sup>rd</sup> Army were carefully studied, and that if those reports reached the Supreme Command staff too late to be summarised then the complete 3<sup>rd</sup> Army Combat Report was in fact passed on.<sup>560</sup>

236. Similarly, General Simić testified that in the Operations Centre of the Supreme Command Staff there was a map on the wall showing the deployment of the Priština Corps and reflecting operations in the preceding 24 hours. The basis for this map was information received in combat reports from subordinate commands.<sup>561</sup>

237. The evidence of other witnesses corroborates Generals Ćurčin and Simić's account of the crucial role played by combat reports in determining what information reached General Ojdanić.<sup>562</sup> General Vasiljević testified that crimes committed by VJ soldiers should have been reported in daily combat reports or in interim reports.<sup>563</sup>

238. A second route by which information could reach General Ojdanić was via the General Staff's Security Administration, which had contacts with the security organs of subordinate commands. Generals Vasiljević, Gajić and Farkaš were the most senior

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<sup>557</sup> Tr.8964.

<sup>558</sup> Exh.3D1121, para.26.

<sup>559</sup> Exh.3D1121, para.26.

<sup>560</sup> Tr.16954.

<sup>561</sup> Tr.15474-6.

<sup>562</sup> Exh.3D1117, para.11&16; Tr.16292; Tr.16576.

<sup>563</sup> Tr.8744.

members of the Security Administration and all testified to this effect.<sup>564</sup> A number of reports from the Security Administration are also in evidence in this case.<sup>565</sup> General Gajić testified that during the war he would compile a daily written report based on the information he received and use that as the basis for his daily briefings to the Supreme Command Staff.<sup>566</sup> General Farkaš testified that shortly after his appointment, he changed the system of reporting to ensure that daily reports would be received from the Priština Corps security organ and from the 3<sup>rd</sup> Army security organ.<sup>567</sup> Farkaš explained that the reasons for this change were (i) that new communications had to be established due to the war time scenario and (ii) to speed up communications with subordinate commands.<sup>568</sup>

239. The key forum in which information reached General Ojdanić and issues were discussed was the Daily Briefing of the Supreme Command Staff. A large number of witnesses who were members of the Supreme Command Staff have given evidence as to the conduct of these briefings and their central role in the work of the Supreme Command Staff. General Anđelković explained that each administration had a representative at the command post of the Supreme Command Staff who would monitor the situation on the ground and report to the Chief of the Supreme Command Staff during the evening briefing.<sup>569</sup>

240. The Daily Briefings of the Supreme Command Staff were not recorded- as pre-war Collegiums had been- because of the simple fact that there were no recording facilities at the command post.<sup>570</sup> However, a vast number of minutes of the Daily Briefings are in evidence in this case.<sup>571</sup> Colonel Mucibabić testified that it was his responsibility, along with Colonel Paskas, to keep the minutes of the Daily Briefings.<sup>572</sup>

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<sup>564</sup> Tr.16339; Exh.3D1084, para.11; Tr.8964.

<sup>565</sup> See Annex E.

<sup>566</sup> Exh.3D1084, para.141.

<sup>567</sup> Tr.16361.

<sup>568</sup> Tr.16291.

<sup>569</sup> Tr.16404.

<sup>570</sup> Tr.16086-7.

<sup>571</sup> See Annex B.

<sup>572</sup> Tr.16553.

This is corroborated by the evidence of Milan Radoičić.<sup>573</sup> The evidence before the Trial Chamber is that General Ojdanić would issue tasks at Daily Briefings to various members of the Supreme Command Staff, then the person from the relevant sector would draft the order and take it to General Ojdanić to be signed before being dispatched from the communications centre.<sup>574</sup>

241. It was General Vasiljević's evidence that any crimes committed by VJ soldiers should have been reported in daily combat reports or in interim reports.<sup>575</sup> A large number of combat reports, at various levels of the command of the VJ, are in evidence in this case and the Trial Chamber is therefore in the privileged position of being able to accurately assess the information available to General Ojdanić.<sup>576</sup> It is hugely significant that when being asked by the Prosecution to draw inferences as to what General Ojdanić knew and when he knew it, a detailed record of nearly every Daily Briefing is in evidence together with the vast majority of Combat Reports.<sup>577</sup>

### **1. General Ojdanić's lack of knowledge of MUP crimes**

242. The Prosecution has not proved that General Ojdanić knew that crimes were committed against civilians by members of the MUP. This aspect of the Prosecution's case relies upon Exhibit P1459, which was received by the Prosecution among a batch of documents handed to the OTP by General Pavković.<sup>578</sup> Exhibit 3D1106 was received by the Ojdanić Defence Team from the National Council for Cooperation with the Hague Tribunal.<sup>579</sup> Both exhibits are the same document in terms of content. It is the Defence case that neither of these documents is authentic.

243. Exhibit P1459 purports to be a letter dated 25 May 1999 to General Ojdanić from General Pavković stating as follows:

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<sup>573</sup> Exh.3D1111 para.11.

<sup>574</sup> Exh.3D1089, para.28–30; Exh.3D1113, para.26; Exhibit, 3D1084, para.164.

<sup>575</sup> Tr.8744.

<sup>576</sup> See Annex C&D.

<sup>577</sup> See Exh.3D1125 & Annexes B-D.

<sup>578</sup> Tr.16078.

<sup>579</sup> *Ibid.*

“It has been established beyond doubt, and we have already reported on it in regular combat and other reports, that due to the non-compliance with the resubordination orders, some MUP members and to a considerable extent entire smaller units, which “operate” independently on the ground are committing serious crimes against the Šiptar civilian population in settlements or refugee shelters – murder, rape, plunder, robbery aggravated, theft, etc., and they then purposefully attribute or plan to attribute those crimes to units and individuals in the VJ.”

244. The Prosecution relied on Exhibit P1459 during its *98bis* submissions to demonstrate that General Ojdanić was aware of war crimes committed by members of the MUP.<sup>580</sup> In its decision rejecting General Ojdanić’s *98bis* submissions, the Trial Chamber noted:

“[General Ojdanić] was informed of criminal acts committed by the MUP via Pavković’s 25 May 1999 report to the Supreme Command Staff about crimes being committed by the MUP in Kosovo.”<sup>581</sup>

245. It is the Defence’s case that General Ojdanić never saw Exhibit P1459 or any similar document during the war and the circumstances of its inclusion among the archives of the Yugoslavian Army indicate that it was planted there sometime after 25 May 1999.

246. Despite it being addressed to the Supreme Command Staff, not a single witness from the Supreme Command Staff or even General Ojdanić’s personal office had ever seen the document before:

- a. General Vasiljević, a Prosecution witness, noted that there was no stamp on Exhibit P1459 to show that it was received by the General Staff.<sup>582</sup>
- b. General Gajić testified that he did not remember seeing Exhibit P1459 at the relevant time and that had it been received by the General Staff, its subject matter means it would have come to his attention.<sup>583</sup> Gajić’s evidence was that paragraphs 4 and 6 of Exhibit P1459 are clearly issues which the Security

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<sup>580</sup> Tr.12628-30.

<sup>581</sup> Tr.12798.

<sup>582</sup> Tr.8720-1.

<sup>583</sup> Tr.15315; Tr.15429.

Administration would have had to resolve had they actually occurred as alleged therein.<sup>584</sup>

- c. General Simić testified that he did not remember seeing Exhibit P1459 at the relevant time.<sup>585</sup>
- d. General Ćurčin testified that he did not see Exhibit P1459 at the relevant time. Ćurčin testified that had he ever seen this document, it would have had to have been included in his analysis of 6 June 1999<sup>586</sup> and would have been discussed at one of the evening briefings.<sup>587</sup>
- e. Milovan Vlajković, Ojdanić's Chief of Office, testified that he did not remember seeing Exhibit P1459 at the time.<sup>588</sup> Vlajković corroborated the above testimony of General Ćurčin regarding the analysis of 6 June 1999. Vlajković testified that "[t]he methodology of work of the Supreme Command Staff would definitely include such a document because all the requests of the 3<sup>rd</sup> Command were there, were covered."<sup>589</sup>
- f. Milan Radoičić testified that General Ojdanić wrote to him following the publication on 21 February 2002 of an article in the magazine *Vojska* which mentioned two reports (Exhibit P1459 – the report of 25 May 1999 - identified as no.872-94/1-2 and Exhibit P1725- identified as no.872-172/3) General Ojdanić wrote in the following terms:

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<sup>584</sup> Tr.15315.

<sup>585</sup> Tr.15671.

<sup>586</sup> Exh.4D135 is a "Report on the approval and implementation of the 3<sup>rd</sup> A /Army/ requests to the VK /Supreme Command/ Staff." The first paragraph states: "As part of the implementation of main tasks and with the aim of analyzing the state of combat readiness of the 3<sup>rd</sup> Army, the VK Staff has analysed in detail the approval and implementation of requests received from the 3<sup>rd</sup> Army Command." The report continues, "During combat operations carried out up to now, the 3<sup>rd</sup> Army Command has submitted 305 requests to the Supreme Command Staff..." The last paragraph of Exh.P1459 proposes a number of "urgent measures" to be taken by the Supreme Command, for example "to resubordinate the units of the MUP of the Republic of Serbia..." General Ćurčin stated that these proposals for measures to be taken would have been in this analysis of 3<sup>rd</sup> Army requests. Tr.17021.

<sup>587</sup> Tr.17021.

<sup>588</sup> Exh.3D1112, para.16.

<sup>589</sup> Tr.16058.

“To my horror, on 21 February 2002, a text was published in the magazine *Vojska* under the heading: “Problems with re-subordination in MUP /Ministry of the Interior/ forces.” One of the documents under the subheading “the summarization of report results,” is something **I am seeing for the FIRST TIME: a report of the Command of the 3<sup>rd</sup> Army strictly confidential no 872-94/1-2, about the re-subordination of units and organs of the MUP of the Republic of Serbia.**”

“As Chief of the SVK, I want my conscience to be completely clear in every respect. You know well my conscience and responsibility in carrying out my duty. Can you imagine that I would silently pass over such a report if I received it, and in so doing never directly informed my Collegium and Supreme Command, examined the proposed measures, and notified the Command of the 3<sup>rd</sup> Army of all this as per the methodology of work which was applied by the SVK.”

“I note that besides the abovementioned report, the magazine *Vojska* also refers to an alleged request of the Command of the 3<sup>rd</sup> Army for solving problems which affect the combat readiness of the Priština Corps, strictly confidential no.872-172/3 of 4 June 1999. Again, I never received or saw such a request, and I do not have it in my combat documentation. So I am also interested in that combat document. I will give no further comment at this time until I arrive at the real truth.”<sup>590</sup>

Colonel Radoičić in a response letter to General Ojdanić, wrote:

“With regard to your second letter, your reminder which I received on 11 March 2002, I have no knowledge, for the reasons stated above (because I was not Chief of Office at the time) that any such a report was ever sent to the Chief of the General Staff of the VJ. **In addition, a check shows that such documents have not been recorded in the register of the Office of the VJ NGS.**”<sup>591</sup>

This correspondence establishes a link between Exhibits P1459 and P1725 in that neither document was received by General Ojdanić during the indictment period. Exhibit P1725 is a request by General Pavković to solve certain problems that affected the combat readiness of the Priština Corps. Similarly, Exhibit 3D1136 further supports this submission as it represents the Serbian Government’s Conclusion that Exhibit P1725 was never received by the Supreme Command Staff.<sup>592</sup>

<sup>590</sup> Tr.16130; Exh.3D1078, para.3-4. (emphasis added)

<sup>591</sup> Tr.16129; Exh.3D1077, para.3. (emphasis added)

<sup>592</sup> Exh.3D1136, page 2 states: “The Ministry of Defence, Centre for Cooperation with the ICTY, submitted a response in a letter of 4 December 2007, to the effect that archive materials of the relevant organization unit of the Serbian Army were examined and it was established that [Exh.P1725] was not logged in the archived lists of incoming documents in the ledger of the Supreme Command Staff for 1999.” This is corroborated by evidence that General Ljubisa Stojimirovic, Chief of Staff of the 3<sup>rd</sup> Army, never saw Exh.P1725 despite the document stating that “a telegram can be sent to” him. When asked about Exh.P1725 Stojimirovic replied, “I cannot confirm having seen this document, since it relates to the beginning of June. I am not sure that I saw this document... I do not remember

247. Further, there is voluminous and persuasive evidence before the Trial Chamber questioning the authenticity of Exhibit P1459:

- a. Exhibit P1459 is inconsistent with other contemporaneous documentation. It suggests that there had been “regular” combat reports stating that MUP members and other smaller units which “operate” independently on the ground had committed serious crimes against civilians.<sup>593</sup> The Trial Chamber has virtually all of the 3<sup>rd</sup> Army Combat Reports before it<sup>594</sup> and the text of Exhibit P1459 plainly does not reflect the reality.

This is corroborated by the evidence of Momir Stojanovic, Chief of the Security department of the Priština Corps at the time, who testified that no security organ had ever reported that the MUP were committing serious crimes against civilians as alleged in Exhibit P1459. He testified, “I never said anything to this effect.”<sup>595</sup>

When cross-examining Stojanovic, Mr. Hannis asked,

“Mr. Višnjić asked you the question and he asked you if any organ of your security service, not necessarily you personally, made that report; and your answer was that: I did not make that report. What I want to ask you is: Separate and apart from yourself, did any organ of your security service make a report that the MUP were committing serious crimes against the Šiptar civilian population and ascribing those crimes to the VJ? Did -- was that report made?”<sup>596</sup>

Stojanovic replied, “No, it was not...” further corroborating that MUP crimes were never reported by the 3<sup>rd</sup> Army to the Supreme Command Staff.<sup>597</sup>

- b. The manner in which Exhibit P1459 is recorded in the VJ Archive list<sup>598</sup> raises serious doubts as to its authenticity:

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having verified the document so that it could be sent as a telegram. I signed a large number of documents because a telegram cannot be sent without the signature of one of the authorized officials who have the right to sign this kind of document. I don't remember having signed this...I don't know why there is no signature here.” Tr.17664-6.

<sup>593</sup> Exh.P1459, para.4.

<sup>594</sup> See Annex C.

<sup>595</sup> Tr.19815.

<sup>596</sup> Tr.20028.

<sup>597</sup> Tr.20028.

- i. Dušan Mladenovski was the VJ archivist and completed the relevant archive list on 24 September 1999. He testified that the proper procedure was not followed for ordinal number 82 of the archive list - where Exhibit P1459 (no. 872-94/1-2) was logged.<sup>599</sup> The mistaken method of modifying the archive list is displayed by Exhibit IC195, whereby Mr. Mladenovski demonstrated how he would have made the changes had he recorded Exhibit P1459 at the time the VJ archives were collated.<sup>600</sup> Further, Mr. Mladenovski stated that if this correction was made to the archive list before it arrived at his desk, such a correction would require the initials of the person who entered it,<sup>601</sup> or he would not have accepted it.<sup>602</sup>

Additionally, Mr. Mladenovski stated that he recognised all of the changes in the archive list as his own except those in ordinal unit 82.<sup>603</sup> This was supported by Professor Aleksić, a permanent court expert on documents and handwriting in Belgrade, who concluded that the changes made in relation to ordinal number 82, columns 4, 5 and 6, were **not** made by Mladenovski's hand.<sup>604</sup>

- ii. Mr. Mladenovski also took issue with the number of documents and pages (or "sheets") currently described in relevant Archive List,<sup>605</sup> which he had previously checked for accuracy.<sup>606</sup> Again, this is corroborated by the conclusions of Professor Aleksić:

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<sup>598</sup> Exh.3D1108/3D1130.

<sup>599</sup> Tr.25775. In this regard he stated, "...wherever we found a correction or where a number had to be corrected that we should strike through the number with a single line and the number should remain visible, and above the number we have crossed out we should write the other number, for example, in columns 5 and 6."

<sup>600</sup> Tr.25775-6; Exhibit IC195.

<sup>601</sup> Tr.25795 and 25810. Exh.3D1135, para.12.

<sup>602</sup> Tr.25797&25810-1.

<sup>603</sup> Tr.25774. Exh.3D1135, p.2, para.8.

<sup>604</sup> Exh.3D1140, p.3, para.8.

<sup>605</sup> Tr.25771.

<sup>606</sup> Exh.3D1135, para.14: "If I had made the correction of the ordinal number 82, then the total number of documents would have to be 278 and not 277 as written in the document. The total number of sheets would also be 737 and not 735, as I correctly entered."

“The total number of documents and sheets in the archive units from p.1 to p. 8 is 278 documents and 737 sheets, which means that **there is a difference of one document of two sheets.**”<sup>607</sup>

c. The manner in which Exhibit P1459 is recorded in the VJ General Staff Log Book<sup>608</sup> raises serious doubt as to its authenticity:

- i. Defence witnesses Vlajković and Radoićić both testified about the appropriate registry procedure for documents from the General Staff.<sup>609</sup> Vlajković’s evidence was that Exhibit 3D1106 was not entered properly in the log book because it was improperly connected to 3D1105 (15 May 1999) by way of its sub-number. Vlajković testified that the registry entry number 248 was the starting number on 15 May 1999, when under the same number, under sub-number 1, was entered the document 3D1105.<sup>610</sup> In order for Exhibit 3D1106 to be entered under the same registry number, its contents would have to be related. They are obviously not related. Exhibit 3D1105 is an Official Note from a meeting between General Ojdanić and the duty team of the Federal Ministry of Defence held on 7 May 1999. Therefore Exhibit P1459/3D1106 was not properly recorded in the VJ Log Book.<sup>611</sup>
- ii. Professor Aleksić, who testified as a handwriting expert, concluded that the date stamp for columns 248 and 250 was “predated or antedated.”<sup>612</sup> In his expert report, he stated:

“The impression of the figure 2 in heading 248 subnumber 2 is strikingly different to the impression under the other numbers, and this difference can hardly be explained by /the use of/ another pad or a different underlay. It may be concluded from this that the stamp (date

<sup>607</sup> Exh.3D1140, para.12. (emphasis added)

<sup>608</sup> Exh.3D1109 and Exh.3D1131.

<sup>609</sup> Tr.16052-55; Tr.16123-48.

<sup>610</sup> Exh.3D1114, p.2-3.

<sup>611</sup> Tr.16036.

<sup>612</sup> Tr.26068.

stamp) which was used for columns 323-2-68, 325, 326, 327, and 329 was different to the date stamp used in column 248.”<sup>613</sup>

Exhibits IC197 and IC198 show the differences that lead to the Professor Aleksić’s conclusion.<sup>614</sup> He testified in relation to these exhibits that,

“...I can confirm that the first and second numerator [i.e. heading 248 and 250] is of a different kind than in the rest of those imprints and that its use in this particular document was something that pointed me in the direction of predation.”<sup>615</sup>

He continued,

“Now, whether they changed the dates twice, I wouldn’t be able to say, but they were definitely changed, and they were stamped separately from the others, which created this prominent difference in calibre. This is what gives me the basis for claiming what I have claimed.”<sup>616</sup>

- d. Exhibit P1459 is the **only** 3<sup>rd</sup> Army document in evidence which has a sub-sub-number in terms of its archiving status (i.e., 872-94/1-2).<sup>617</sup>
- e. Professor Aleskic’s expert report established that at least two “originals” exist of the 25 May 1999 3<sup>rd</sup> Army Report (Exhibit P1459/3D1106), which is in contravention of regular VJ practice related to the production of documents.<sup>618</sup>

248. Finally, the Defence stresses the obvious point that the question concerning the authenticity of Exhibit P1459 becomes moot if the Trial Chamber accepts the Defence’s submission that it was never received by General Ojdanić. Counsel for General Pavković has conceded that General Ojdanić “never saw the document”<sup>619</sup> but this concession, of

<sup>613</sup> Exh.3D1140, para.14.

<sup>614</sup> See Exh.3D1148.

<sup>615</sup> Tr.26086; Exhibits IC197&IC198. See Exh.3D1148.

<sup>616</sup> *Ibid.*

<sup>617</sup> See Annex F, which is a table of all 3<sup>rd</sup> Army Reports excerpted from Exh.6D1130 (an Overview of VJ Archives for 1998 and 1999) demonstrating that Exh.P1459/3D1106 is the only document logged in with a sub-sub-number. See also Tr.16116-8.

<sup>618</sup> Exh.3D1140, para.15: “Both examples [i.e. Exh.P1459 and Exh.3D1106], however have been authentically signed by Commander Colonel General Nebojša Pavković, each example separately. Both examples received the stamp of the relevant command. Differences may be observed in the signature (for example, the final strokes of the signature differ from one another; the pause/space between the letters “vk” in the word Pavković). The stamp also indicates that in both examples the stamp was added subsequent to the signature, but the stamp was placed at a different angle.”

<sup>619</sup> Tr.17355, Mr Ackerman stated, “Well, if the purpose of that evidence is to – to tend to prove that General Ojdanić never saw the document, we agree with that. I’ll – I don’t have any contention that he ever saw it.”

course, cannot bind the Trial Chamber or the Prosecution. Both the Prosecution and the Trial Chamber relied upon Exhibit P1459 to show General Ojdanić's guilty knowledge of MUP crimes to create the alleged "atmosphere of impunity"<sup>620</sup> claimed by Mr. Hannis. Perhaps in a more trusting world General Ojdanić's denial that he never received this document would be enough. But the Ojdanić Defence is unable to divine how much respect either the Trial Chamber or the Prosecution would give to General Ojdanić's denial – hence the duty to demonstrate the document's lack of authenticity and its placement in the VJ archives well after the fact.

249. No submissions are made as to who bears responsibility for this. However, the Defence notes that General Ojdanić was initially indicted for war crimes on 24 May 1999 along with Milošević, Milutinović, Šainovic and Stojilković. The remaining defendants (Pavković and others) were not indicted until 22 September 2003. It is left to the Trial Chamber to determine whether the totality of the evidence demonstrates that Exhibit P1459 was inserted into the archives at a later date in an attempt to shift the blame to General Ojdanić by putting him on "notice" of the various alleged crimes committed by the MUP. It is left to the Prosecution to consider whether, in presenting its case, it has relied on a document which is demonstrably false.

## **2. Problems with VJ Reporting**

250. In its 98 *bis* decision, the Trial Chamber relied upon an exchange involving Generals Dimitrijević, Ćurčin and Ojdanić during the Collegium on 18 March 1999 in which Dimitrijević queried the accuracy of subordinate reports to the General Staff. The Trial Chamber indicated its view that General Ojdanić "showed no interest in the issue and moved on to another topic."<sup>621</sup>

251. In the Collegium in issue, General Dimitrijević suggested that while the reports from the Priština Corps all suggested a "textbook" return of fire following KLA offensive action, in fact the VJ were launching operations against the KLA and this was

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<sup>620</sup> Tr.12630-1.

<sup>621</sup> Tr.12797.

not being accurately reported to the General Staff. Dimitrijević's view was that this was not "correct behaviour" toward General Ojdanić as Chief of Staff.<sup>622</sup>

252. General Ćurčin answered General Dimitrijević's question during the Collegium by stating that his report to the General Staff faithfully reflected the subordinate reports, pointing out that it was not possible for him to check on whether or not an attack had in fact been launched by the Army in the first instance. General Ojdanić then said, and it is this which appears to have troubled the Trial Chamber, "Do you have any suggestions on how to resolve this? If not, then let us move on."<sup>623</sup>

253. The Defence makes three observations in relation to the evidence of General Ojdanić's reaction to General Dimitrijević's complaint.

- a. First, General Dimitrijević's complaints were limited in nature. He was querying the sequence of events as presented in subordinate reports. He was not querying the conduct of the VJ in general. Regardless of the accuracy or otherwise of Dimitrijević's complaint, there was no indication of broader concerns about the conduct of VJ soldiers, for example in relation to the treatment of civilians as opposed to the KLA. The inference cannot be drawn that General Ojdanić wished to condone or contribute to criminal actions directed against Albanian civilians.
- b. Secondly, it is not the case that General Ojdanić showed no interest in this issue during the Collegium. While he did not say anything at the specific moment to which the Trial Chamber referred, at the end of the Collegium General Ojdanić said that it was obvious that something was not right and that he would call the Commander of the 3<sup>rd</sup> Army to come to the General Staff to "talk properly on this subject."<sup>624</sup> However, Ojdanić urged caution saying that the army, together with the MUP, had to undertake some measures to block and search terrain and

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<sup>622</sup> Exh.P938, p.21.

<sup>623</sup> Exh.P938, p.22. It is noted that General Dimitrijević also complained that combat reports did not accurately reflect the reality during the Collegium of 4 March 1999 (Exh.P933).

<sup>624</sup> Exh.P938, p.25.

that if someone is discovered they had to be attacked.<sup>625</sup> However, General Ojdanić warned that while measures had to be taken against the KLA “any other rampage without the knowledge of the army and corps commanders must be prevented at higher levels....”<sup>626</sup>

c. Thirdly, in addition to viewing Ojdanić’s comments in the context of the actual Collegium, they must be viewed in the context of his prior and subsequent comments and actions.

i. On 21 January 1999, a little over 8 weeks previously, General Ojdanić had issued orders on reporting following the Račak incident. At that stage he made clear that they had to get reporting right.<sup>627</sup> He explained in that Collegium both in relation to Račak and in general that reports should be read with care and checked if something looked wrong or illogical. He ordered that if this was the case, then the individual concerned should seek additional information from channels available to them:

“The reports are important and I ask you not to read them just for form’s sake, and those who find something wrong or illogical in them, let them ask for additional information through the channels, via their organs, because we cannot miss facts such as that such and such a number of 100mm bullets were first and that nothing was done. How come there was not shooting if so many were used? Things like that.”<sup>628</sup>

This is corroborated by the evidence of General Dimitrijević:

“[e]very time a question was tabled concerning which we were unsure of whether reports were good or not, [General Ojdanić] usually insisted that we use all possible lines to inquire.”<sup>629</sup>

General Ojdanić demanded: “[a]s the Chief of the General Staff I want to know the truth.”<sup>630</sup>

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<sup>625</sup> Exh.P938, p.25-26.

<sup>626</sup> Exh.P938, p.25.

<sup>627</sup> Exh.P939.

<sup>628</sup> Exh.P939, p.31.

<sup>629</sup> Tr.26725.

<sup>630</sup> Exh.P939, p.12.

- ii. General Dimitrijević testified in relation to the Collegium of 28 January 1999 that General Ojdanić ordered that he should be personally informed of any extraordinary incident or event involving the VJ:

“he said that such incidents and events have to be examined carefully and that all levels responsible need to undertake measures. When such incidents occurred, usually it will be dealt with by the General Staff rather than at the level where it took place...”<sup>631</sup>

- iii. General Dimitrijević testified in relation to the Collegium of 4 March 1999 that General Ojdanić was “angry because he did not have full and accurate information as to what was happening in the territory.”<sup>632</sup>
- iv. One of the first orders General Ojdanić issued during the war was his “warning on the delivery of accurate and confirmed reports.”<sup>633</sup> General Ćurčin’s evidence was that this was a response to the information General Ojdanić received during the 18 March 1999 Collegium.<sup>634</sup>
- v. Exhibit 3D1073 is dated 18 March 1999 and is titled “Tasks from the sessions of the Collegium of the Chief of the General Staff of the VJ/Yugoslav Army/ of 18 March 1999.” This evidences General Ojdanić’s reaction to the information provided by Generals Dimitrijević and Pantelić during the Collegium of 18 March 1999, as task number one was to “Write an order on reporting to regulate issues/content...” Indeed, General Dimitrijević testified that this represents a measure taken by General Ojdanić in response to difficulties with reporting and that it was typical of General Ojdanić’s general practice of issuing specific tasks at the end of a Collegium<sup>635</sup>: “whenever [General Ojdanić] said at the collegiums meetings that something should be done, then it was – it got translated into tasks.”<sup>636</sup>

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<sup>631</sup> Tr.26726; Exh.3D559, p.20.

<sup>632</sup> Tr.26653-4; Exh.P933, p.15.

<sup>633</sup> Exh.P1469.

<sup>634</sup> Tr.16953.

<sup>635</sup> Tr.26729.

<sup>636</sup> Tr.26710.

254. Finally, the Prosecution position on this issue is two-faced. On the one hand it is suggested that General Ojdanić was on notice from complaints made by General Dimitrijević that Reports were inaccurate and incomplete yet General Ojdanić failed to remedy the situation. On the other hand, the Prosecution says that General Ojdanić was fully apprised of crimes being perpetrated against civilians and that he,

“issued instructions to his immediate subordinates to ensure that periodic reports, including daily reports, were sent up the chain of command and that he was kept fully apprised of developments on the ground and the progress of operations.”<sup>637</sup>

255. These two positions are in conflict and the Prosecution cannot have it both ways. In the Defence’s submission, the reality is that General Ojdanić wanted accurate information, not least because it was upon information received that decisions were made by the General Staff. General Ojdanić persistently and consistently acted to try and ensure that the information the General Staff received was accurate. General Dimitrijević testified that there was “no doubt” that General Ojdanić was sincere in his efforts to get accurate information as to conduct of the VJ in Kosovo.<sup>638</sup>

### **3. General Ojdanić’s lack of knowledge of crimes committed by the VJ**

256. The Combat Reports, Daily Briefings and other evidence before the Trial Chamber show that until early May 1999, General Ojdanić knew only that, in general, some individual crimes had been committed by members of the VJ but that they were being dealt with appropriately. General Ćurčin’s evidence was that he studied reports from the 3<sup>rd</sup> Army Command on a daily basis and that there were individual cases of criminal activity of members of the Priština Corps.<sup>639</sup> General Simić’s evidence is highly significant: the Supreme Command Staff did not have knowledge of massive violations of international humanitarian law or war crimes by members of the VJ.<sup>640</sup>

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<sup>637</sup> OTP PTB, para.278.

<sup>638</sup> Tr.26730.

<sup>639</sup> Exh.3D1121, para.27.

<sup>640</sup> Exh.3D1089, p.11.

257. General Simić's evidence is accurate and corroborated. Colonel Ivković's evidence was that reports of the commands of the 3<sup>rd</sup> Army and the Priština Corps made no mention of organised crimes but only possible individual cases, against which appropriate legal measures were promptly being taken.<sup>641</sup> Colonel Ivković testified that during the NATO bombing "the 3<sup>rd</sup> Army did not report, in combat or other kind of reports, on deportation of civilians, mass killing of civilians, rapes, deliberate destruction of civilian and religious facilities or other crimes."<sup>642</sup>

258. The documentary evidence before the Trial Chamber confirms the veracity of such testimony. For example, the 3<sup>rd</sup> Army Combat Report of 26 March 1999 recorded "isolated incidents of unacceptable behaviour" which were "being successfully resolved by measures undertaken by commands and security organs."<sup>643</sup>

259. The first indication General Ojdanić had that any crimes had been committed was a 3<sup>rd</sup> Army Combat Report of 31 March 1999, which mentions "individual cases of robbery and other crimes during combat operations, but these are being successfully suppressed by command measures." The Report lists a number of criminal reports received, with indictments being issued and prosecutors beginning their investigations.<sup>644</sup> Similarly, the 3<sup>rd</sup> Army Combat Report of the next day, 1 April 1999, mentions that in the Priština Corps zone,

"isolated cases of attempted theft and similar criminal activity have been registered but the security, military police and command organs have undertaken measures and are dealing with the problem successfully."<sup>645</sup>

260. The 3<sup>rd</sup> Army Combat Report of 3 April 1999 indicated that Military Prosecutors' Offices had received 32 criminal complaints, but again it indicated that these were "isolated incidents" which were being dealt with and "successfully prevented from reoccurring."<sup>646</sup> The Defence observes that the 3<sup>rd</sup> Army Combat Report of 3<sup>rd</sup> April

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<sup>641</sup> Exh.3D1117, para.13.

<sup>642</sup> Exh.3D1117, para.27.

<sup>643</sup> Exh.4D272, p.2.

<sup>644</sup> Exh.4D273.

<sup>645</sup> Exh.4D274, p.3, section5.

<sup>646</sup> Exh.4D276.

1999 differs from the Priština Corps Combat Report of that day, which the Supreme Command Staff did not receive, which among the 32 criminal reports specifies that eight were for murder, one for abuse, three for attempted murder, two for taking vehicles, six for thefts and 12 for wilful abandonment.<sup>647</sup> In any event, the Priština Corps Combat Report indicates that these crimes were being dealt with appropriately.

261. During the Daily Briefing of 18 April 1999, the minutes record the Security Administration briefing of the “drastic case” of rape and looting in the Djakovica area.<sup>648</sup> General Gajić testified that on 16 April 1999 three soldiers from the 52<sup>nd</sup> Anti-Aircraft Defence Artillery Rocket Brigade had raped a 16 year old Albanian girl and that the soldiers were identified, arrested, a criminal report filed, and as far as he knew they were convicted and sentenced to prison.<sup>649</sup>

262. The evidence from the early part of the war is therefore of isolated instances of reports of crimes reaching the Supreme Command Staff. Yet there is no evidence that at this time General Ojdanić was aware that crimes were being committed against civilians. As late as 18 April 1999, a single act of rape and looting was described to General Ojdanić as “drastic.”

#### **4. Information on population movement**

263. The Prosecution has not proved that General Ojdanić was either a party to or aware of a criminal plan to expel ethnic Albanian civilians from Kosovo. Rather, the evidence before the Trial Chamber is that at the level of the General Staff, the belief was that the KLA planned to orchestrate a massive population movement, for two reasons: to precipitate military action against the FRY and to provide cover for KLA fighters. Rather than the mass migration being intended by General Ojdanić, the evidence shows that General Ojdanić and the General Staff considered the movement of the population out of Kosovo to be undesirable. Intelligence available to the General Staff before the NATO bombing revealed a KLA plan to move the population in the event of war.

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<sup>647</sup> Exh.5D84.

<sup>648</sup> Exh.3D589.

<sup>649</sup> Tr.15317.

- a. Throughout 1998, reports from the Security Department of the Priština Corps documented the movement of the civilian population at the behest of the KLA.<sup>650</sup>
- b. VJ Intelligence Department Reports highlighted false media manipulation and propaganda used to portray an alleged humanitarian crisis caused by Serbs in order to justify NATO bombing.<sup>651</sup>
- c. On 13 January 1999, the Security Department of the Priština Corps reported to the General Staff that the KLA were making considerable efforts (using a “dramatic tone”) to persuade civilians to leave Kosovo.<sup>652</sup>
- d. On 25 February 1999, the 14<sup>th</sup> Counter-Intelligence Group reported to the General Staff that the KLA had ordered civilians to leave the village of Brusnik.<sup>653</sup>
- e. During the Collegium of 4 March 1999, General Dimitrijević- whose evidence the Prosecution relies upon for other issues in this Trial- reported that the KLA was at that time moving civilians from villages in Kosovo to try and bring the humanitarian crisis to the fore and provoke an international reaction.<sup>654</sup>
- f. On 5 March 1999, the Security Department of the 3<sup>rd</sup> Army reported to the General Staff that large numbers of terrorists and civilians were moving together in Kosovo.<sup>655</sup>
- g. On 18 March 1999, the Security Department of the 3<sup>rd</sup> Army reported to the General Staff that Albanian residents in the border area with Macedonia were

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<sup>650</sup> Exh.3D993, para.1; Exh.3D994; Exh.3D995; Exh.3D1000; Exh.3D1001. See Tr.15187.

<sup>651</sup> Exh.3D719, p.3; Exh.3D586, p.3; Exh.3D601, p.4; Exh.3D719, p.3; Exh.3D586, p.3; Exh.3D723, p.4.

<sup>652</sup> Exh.3D1040, para.2.4.

<sup>653</sup> Exh.3D1046, para.3.

<sup>654</sup> Exh.P933, p.4; Exh.3D1050; Exhibit 1053.

<sup>655</sup> Exh.3D1050, para.2.5.

preparing to leave because of the presence of NATO troops and the likelihood of conflict.<sup>656</sup>

- h. During a briefing of the Intelligence Department of the General Staff on 3 April 1999, it was noted that there were allegedly 630,000 refugees and it was proposed that border organs organise reception centres for their return to Kosovo.<sup>657</sup> This demonstrates a lack of intent on the part of the General Staff to expel civilians from Kosovo on a permanent basis.
- i. On 7 April 1999, the day of a unilateral ceasefire,<sup>658</sup> the evidence shows that General Ojdanić issued an announcement encouraging refugees to return to their homes. General Ojdanić stated:

“Albanians, only life together without hatred and contempt leads to a happier future, a carefree childhood for our children, regardless of religion or nation. Let us all together make an effort to restore peace to these parts of ours. Return to your homes and your everyday work. Do so today.”<sup>659</sup>

- j. During the Collegium held on 9 April 1999, members of the Supreme Command Staff evidently believed that the KLA, not FRY forces, was the driving factor behind the population movement out of Kosovo. General Krga described the “planned withdrawal of the Shiptar people” which had created a “difficult humanitarian situation.”<sup>660</sup> General Gajić described KLA activity conducted to push out civilians so as to accuse the VJ of ethnic cleansing and create suitable conditions for NATO action.<sup>661</sup> Concern was expressed that the KLA was attempting to mingle with refugees.<sup>662</sup> The Collegium proposed announcing that unarmed people and refugees should not be “played with” and that refugees should be allowed to return to their homes.<sup>663</sup>

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<sup>656</sup> Exh.3D1053, para.2.2.

<sup>657</sup> Exh.3D911.

<sup>658</sup> Exh.3D918; Tr.13851-2; Tr.16806.

<sup>659</sup> Exh.3D753, page2; Exh.3D1120, para.4; Tr.8492-3; Tr.8507-8.

<sup>660</sup> Exh.P929.

<sup>661</sup> Exh.P929, p.8-11.

<sup>662</sup> Exh.P929, p.33-34.

<sup>663</sup> Exh.P929, p.34.

- k. The Directive issued by General Ojdanić on 9 April 1999 makes provisions for the receipt of refugees in an attempt to prevent the KLA infiltrating their number and using civilians as cover from which to launch further attacks.<sup>664</sup>
- l. During the briefing of the Intelligence Department of the General Staff of 25 April 1999- noting the refugee crisis was being used by NATO to justify continued attacks- it was proposed to call again for refugees to return to their homes.<sup>665</sup> The use of “again” refutes any suggestion that there had been no such prior calls.

### **5. Specific evidence of failures to report within the VJ**

264. If the crime basis evidence in this case is accurate, it should be clear to the Trial Chamber that accurate information was not reaching General Ojdanić. It is a useful exercise to consider the evidence of those VJ witnesses who testified for the Prosecution. These provide clear examples, even according to the Prosecution’s own evidence, of a failure to report information on criminal activity to superior commands.

- a. Witnesses K82 and K54 were both lower ranking VJ soldiers who testified about an alleged crime committed in Trnje near Prizren at the end of March 1999. Exhibit P1981 is the written order issued by Commander Delić of the 549 Motorised Brigade to conduct an operation to destroy “Šiptar Terrorist Forces” in the area. Witnesses K82 and K54 both testified to crimes committed during the course of this operation. Exhibit P1995 is the written report submitted by Commander Delić to the Priština Corps Command. This report makes no mention of any such crimes. Therefore, even if one assumes the accounts given by witnesses K82 and K54 were truthful, the evidence reveals no means by which General Ojdanić could have known about the alleged crimes.

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<sup>664</sup> Exh.P1481.

<sup>665</sup> Exh.3D938.

- b. Witnesses Peraj, K90 and K73 were also lower ranking VJ soldiers who testified about an alleged crime in Meja in April 1999. Peraj was a member of the 52<sup>nd</sup> Rocket Artillery Brigade whereas witnesses K90 and K73 were members of another Brigade. Peraj testified that he saw his commander typing up a report on the alleged crime perpetrated at Meja.<sup>666</sup> Yet there is no evidence of such a report ever reaching the Supreme Command Staff. Therefore, even if one assumes that the accounts given by witnesses Peraj, K90 and K73 were truthful, the evidence reveals no means by which General Ojdanić could have known about the alleged crimes.
- c. Witness K90 testified that from the command post in the area where he operated, he could see shooting all around and houses burning. He testified that he asked a policeman what was happening and the reply was that they were “skinning Šiptars.”<sup>667</sup> However, Witness K90 did not know whether his commander reported any crimes which took place up the chain of command and K90 himself testified that he did not report this incident to his superiors.<sup>668</sup> Therefore, the evidence reveals no means by which General Ojdanić could have known about the alleged crimes.
- d. Witness K89 testified that he never reported any shootings or tearing up of identity documents that he claimed to have witnessed to any senior officers, or to anyone for that matter.<sup>669</sup> Therefore, the evidence reveals no means by which General Ojdanić could have known about the alleged crimes.

**E. General Ojdanić took appropriate action, within the limits of what was possible, whenever he received information of criminal acts**

265. The Prosecution has not proved that General Ojdanić had knowledge of the crimes alleged in the Amended Indictment. The evidence in this case shows that until at least early May 1999, the information reaching General Ojdanić was that there were

<sup>666</sup> Exh.P2253, para.83; Tr.1636; Tr.1682.

<sup>667</sup> Tr.9330.

<sup>668</sup> Tr.9399.

<sup>669</sup> Tr.9223.

incidences of crimes, including some murders, committed by members of the VJ. However, the information reaching General Ojdanić also indicated that such crimes were being dealt with, not least because of the steps taken by General Ojdanić to set up and improve the functioning of the military justice system. The evidence also shows that General Ojdanić made concerted and effective efforts to improve the accuracy of the information reaching the Supreme Command Staff in Belgrade and further investigate any criminal acts. This section of the Brief further considers General Ojdanić's actions in relation to criminal activity in Kosovo under the following subheadings:

- a. action in relation to VJ volunteers;
- b. action in establishing and improving the military justice system;
- c. action to improve the quality of information and further investigate crimes; and
- d. examples of other specific actions to address crimes in Kosovo.

#### **1. Action taken by General Ojdanić in relation to VJ volunteers**

266. The Prosecution has at times during this trial attempted to suggest that General Ojdanić's orders were issued too late. In fact, the evidence shows that General Ojdanić acted swiftly targeting an area- volunteers- that a reasonable person would most likely target were he attempting to prevent crimes. Regular VJ units were generally disciplined and trained in the relevant provisions of international humanitarian law, hence a less obvious source of concern.

267. Volunteers are to be distinguished from military reservists. Military reservists, upon the outbreak of war, were mobilised through the structures of the Military Districts. Hundreds of thousands of people were mobilised through the Military Districts, whereas the evidence shows that less than 6,000 volunteers were enlisted into the VJ.<sup>670</sup> Radinović's evidence was that people who did not have a war assignment in the structure but who wanted to fight had the status of volunteers.<sup>671</sup>

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<sup>670</sup> Tr.15810; Tr.15856.

<sup>671</sup> Exh.3D1116, p.163, para.235.

268. There was nothing improper with admitting volunteers into the armed forces in war. Quite the opposite: Yugoslavia had a long tradition of “All People’s Defence” when under attack.<sup>672</sup> The procedure for incorporation of volunteers into war units was provided for in Article 15 of the Law on the VJ<sup>673</sup> and Article 439 of the Rules on the Mobilisation of the VJ.<sup>674</sup>

269. It was General Kosovac’s evidence that volunteers began reporting to the army between the night of 23 and 24 March 1999 and that his Administration of the General Staff drew up an order to attempt to “head off” any problems. Kosovac explained that the General Staff wanted to protect the integrity of units from any pressure that may be exerted by volunteers enlisting in groups and also prevent people who had not been properly trained from joining the VJ. Kosovac described how the overall activity of his Administration of the General Staff was geared towards preventing criminals entering the army as volunteers.<sup>675</sup> Kosovac explained that a firm set of criteria were established in relation to volunteers. These were:

- a. a volunteer is a military conscript, so is trained and has a military record;
- b. once enlisted in one unit, a volunteer is never assigned to a different unit;
- c. medical checks are conducted; and
- d. the candidate is vetted by the appropriate security bodies. Kosovac explained that the objective was to prevent problematic people from reporting to the VJ as volunteers and that a decision was adopted on 24 March 1999 to deal with all these aspects.<sup>676</sup>

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<sup>672</sup> *Ibid.*, para.234.

<sup>673</sup> *Ibid.*, para.235; See also Exh.P984.

<sup>674</sup> *Ibid.*, para.237.

<sup>675</sup> Tr.15857.

<sup>676</sup> Tr.15806-8; Tr.15859.

270. It was Kosovac's evidence that around 6,000 volunteers reported in total and were processed through reception centres, around 20 to 30 per cent of whom were not admitted to the VJ.<sup>677</sup>

271. There is further evidence before the Trial Chamber of specific action taken by General Ojdanić in relation to the admission of volunteers. The evidence shows that General Ojdanić acted early, consistently and persistently:

- a. On 24 March 1999, General Ojdanić issued an initial order to deal with the admission of volunteers. This was followed by a supplemental order on 29 March 1999. These orders are not in evidence in this case, but are referred to in a subsequent order of 7 April 1999 which was expressed to supersede the previous order of 24 March 1999 and supplement of 29 March 1999.<sup>678</sup> Further Kosovac's evidence indicated that there were orders issued prior to 7 April 1999.<sup>679</sup>
- b. On 5 April 1999, General Ojdanić issued an order providing for the reception of foreign nationals as volunteers, providing that they were to be sent to the *Bubanj Potok* Training Battalion.<sup>680</sup>
- c. On 7 April, General Ojdanić issued more detailed guidance on the reception, admission and assignment of volunteers.<sup>681</sup> In this order General Ojdanić forbade the reception of volunteers as groups and also forbade the reception of members of paramilitary groups who had not gone through the proper procedures.

General Terzić testified that General Ojdanić tasked him with taking over the *Bubanj Potok* Training Battalion in order to better train volunteers. Terzić explained that people who had already done their military service were admitted for a short period of training of seven to ten days, with the emphasis on

<sup>677</sup> Tr.15810; Tr.15856. See also General Vasiljević's evidence, Exh.P2600, para.26.

<sup>678</sup> See Exh.P1479.

<sup>679</sup> Tr.15802&15808. See also Exh.P1938, p.1.

<sup>680</sup> Exh.P1678.

<sup>681</sup> Exh.P1479.

familiarisation with weapons and duties within the VJ.<sup>682</sup> Terzić's evidence was that he established that there were a number of problems in relation to the admittance and training of volunteers and that he made a number of demands of General Ojdanić. Terzić's evidence was that every single one of his proposals was accepted by General Ojdanić such that there followed a single all-inclusive order on 14 April 1999.<sup>683</sup> In relation to the operation of the Training Battalion, it was Terzić's evidence that from when he took over until it was disbanded on 22 May 1999, 800 volunteers were admitted to training, of whom 15 per cent were discharged for various reasons.<sup>684</sup>

- d. On 14 April 1999, General Ojdanić issued an all-inclusive order superseding previous orders.<sup>685</sup> This order should be viewed as a response to a 3<sup>rd</sup> Army Command Report of 10 April 1999 on the admittance, reception and deployment of volunteers which discusses problems, including that on 1 April 1999 seven volunteers were detained for "rebellion, killing, robbery, rape, insubordination and desertion."<sup>686</sup> Radovan Radinović described this as a merging of previous orders to make procedures more concrete.<sup>687</sup> The 14 April 1999 order provided that during the training of volunteers, they were to be specifically warned that unlawful and other negative behaviour would not be tolerated and that legal measures applicable in wartime would be taken against the perpetrators of such acts. The order also made the provision that volunteers should undergo psychological screening in order to ensure their suitability for service in the VJ.
- e. On 20 April 1999 General Matović issued a further response to General Pavković's Report of 10 April 1999, sending it to subordinate commands including the information that seven volunteers had been detained on 1 April 1999

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<sup>682</sup> Exh.3D1093, para.12.

<sup>683</sup> Exh.3D1093, para.9.

<sup>684</sup> Exh.3D1093, para.11.

<sup>685</sup> Exh.3D481/P1485.

<sup>686</sup> Exh.P1938.

<sup>687</sup> Exh.3D1116, p.168, para.247.

for “murder, rape, refusing to obey orders and desertion.”<sup>688</sup> This document ordered that steps be taken to implement General Ojdanić’s order of 14 April 1999. General Terzić’s evidence was that this document represented a further step to put into operation General Ojdanić’s order of 14 April 1999. Terzić pointed out that the order was sent directly to the commands of Military Districts, even though usually they would have been informed of the order by Army Commands.<sup>689</sup> It was Kosovac’s evidence that this document was circulated widely and that it served as a warning to all.<sup>690</sup> Kosovac testified that his administration was receiving information that there were problems regarding how volunteers were being deployed to units.<sup>691</sup>

Indications of problems with the behaviour of volunteers had been first raised in the Supreme Command Briefing of 3 April 1999.<sup>692</sup> General Ojdanić issued an order in the meeting that General Pavković had to explain why volunteers had been admitted in groups and explain who was responsible. It was General Gajić’s evidence that a group of seven volunteers had been identified as problematic and that a criminal report was filed. Gajić testified that Vlado Zmajević was sentenced to twenty years in prison and the rest of the group got one-year sentences.<sup>693</sup>

- f. On 4 May 1999 General Ojdanić issued an urgent telegram to all commanders regarding the reception of volunteers and recruits with psychological problems.<sup>694</sup> General Gajić explained that this was an attempt to prevent “sidestepping” whereby some paramilitaries attempted to participate in the VJ without authorisation.<sup>695</sup> Gajić explained that some illegal paramilitaries had accomplices in the VJ who enabled them to “get around” official procedures.<sup>696</sup> This testimony

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<sup>688</sup> Exh.P1943.

<sup>689</sup> Exh.3D1093, para.9.

<sup>690</sup> Tr.15808. It was also Kosovac’s evidence that any reference to “groups” is an assumption because volunteers were processed as volunteers.

<sup>691</sup> Tr.15807-8.

<sup>692</sup> Exh.3D721.

<sup>693</sup> Tr.15333. Exh.3D1110 confirms that this case was transferred to a civilian court.

<sup>694</sup> Exh.P1688.

<sup>695</sup> Tr.15264&15309.

<sup>696</sup> Tr.15309-11; Tr.15372.

was corroborated by the evidence of General Vasiljević, who described how a “self-declared captain of the Military Police” had not passed through the necessary procedures and that once this came to light he was removed from the VJ.<sup>697</sup>

272. General Vasiljević agreed that from the orders issued in relation to volunteers, it can be seen that the General Staff constantly kept improving procedures in an effort to avoid negative consequences.<sup>698</sup> Vasiljević’s evidence in the *Milošević* trial was that there were strict orders regarding procedure for volunteers to be integrated as individuals. There was to be no integration of groups.<sup>699</sup>

273. General Kosovac similarly testified that volunteers were admitted on an individual basis in a bid to prevent the formation of paramilitary entities within the VJ.<sup>700</sup> It was General Kosovac’s evidence that the series of orders issued throughout the war represented reactions to each and every mistake or difficulty encountered as to how volunteers were being sent out.<sup>701</sup>

274. General Farkaš testified that if a volunteer was discharged from the VJ, then the MUP organs were informed of the reasons why so the person could not simply go and join the MUP.<sup>702</sup>

275. Prosecution witness K90 was a volunteer incorporated into the VJ. His evidence was that volunteers were never able to operate outside the chain of command and the system of subordination which existed in the VJ.<sup>703</sup> While witness K90 also testified that he as a volunteer did not receive training before being incorporated into the VJ, this example of an individual failing does not negate the concerted efforts made by General Ojdanić to improve the system in relation to volunteers.

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<sup>697</sup> Exh.P2600, para.27.

<sup>698</sup> Tr.8862.

<sup>699</sup> Exh.P2589, p.15984.

<sup>700</sup> Tr.15860.

<sup>701</sup> Tr.15806.

<sup>702</sup> Tr.16314.

<sup>703</sup> Tr.9277-80.

276. Overall, the evidence is that General Ojdanić took sensible and logical steps in relation to volunteers, indeed exactly the type of actions one would expect of an officer concerned to avoid breaches of international humanitarian law.

**2. Action in establishing Military Courts and Prosecutors' Offices and improving the military justice system**

277. The principal means by which General Ojdanić could punish those subordinates who committed crimes was through the military justice system. The Prosecution alleged General Ojdanić “had the authority and obligation to ensure that the military justice system was functioning throughout the VJ.”<sup>704</sup> However, the Prosecution then states that the military justice system “was properly functioning throughout the period of the indictment,” but that “none of [the] proceedings concerned war crimes or similarly grave crimes committed against Kosovo Albanians.”<sup>705</sup> In effect, the Prosecution contends that General Ojdanić should be held criminally responsible because of an alleged failure on the part of the military justice system to effectively prosecute war criminals.

a) The Military Justice System

278. On the morning of 25 March 1999, a matter of hours after NATO airstrikes had commenced on the evening of 24 March 1999, General Ojdanić ordered that all the wartime military courts and wartime military prosecutors be mobilised and that they organise their work immediately.<sup>706</sup> General Ojdanić’s order also provided that reports on the progress of the mobilisation be sent to the Supreme Command Staff.<sup>707</sup>

279. Radinović’s evidence was that three military courts and prosecutors’ offices had jurisdiction in Kosovo: the court and prosecutor’s office attached to the 3<sup>rd</sup> Army

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<sup>704</sup> OTP PTB, para.141.

<sup>705</sup> OTP PTB, para.143.

<sup>706</sup> Exh.P1470/4D217, para.1. See the signature strip indicating that the Order was sent to various bodies at 12h30.

<sup>707</sup> Exh.P1470/4D217, para.6.

Command; the court and prosecutor's office attached to the Priština Corps Command; and the court and prosecutor's office attached to the Priština Military District.<sup>708</sup>

280. The organisational structure of the military courts was determined by the 3<sup>rd</sup> Army Order of 28 March 1999.<sup>709</sup> Under Article 74 of the Law on Military Justice there were separate military courts for the Priština Corps and the Priština Military District. Both Đorović<sup>710</sup> and Pešić<sup>711</sup> testified that members of the Priština Military District who committed crimes were prosecuted by the organs of that district rather than the Priština Corps.

281. It was Radosavljević's evidence that military courts only had jurisdiction to try military offences perpetrated by military personnel and some civilians in specific situations.<sup>712</sup>

282. Under the Rules of Procedure of Military Courts during a State of War, military courts of first instance have territorial jurisdiction over trials of persons in the units, i.e. commands where they are established. The rules provide that in certain circumstances the military courts will have jurisdiction over civilians. Under Article 15 of the Law on the VJ, volunteers are equal members of the VJ, meaning that military courts also have jurisdiction over their actions.<sup>713</sup> Under Article 9 of the Law on Military Courts, a military court can only try military personnel for crimes and thus loses jurisdiction when a reservist leaves the army or the war ends.<sup>714</sup>

283. The documentary evidence reflects the urgency with which General Ojdanić established the wartime military justice system. The 3<sup>rd</sup> Army Combat Report of 26 March 1999 confirms that mobilising wartime courts and prosecutors was a "focus of

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<sup>708</sup> Exh.3D1116, page147, para.194.

<sup>709</sup> Exhibits 4D424&4D153.

<sup>710</sup> Tr.11433-4.

<sup>711</sup> Tr.7277.

<sup>712</sup> Tr.17485.

<sup>713</sup> Exh.P984.

<sup>714</sup> Exh.P1309; Tr.21560-62.

activity” for the next day.<sup>715</sup> On 29 March 1999, the Supreme Command Staff report stated that “setting up military courts and military prosecutor’s offices is under way in all strategic and operational forces.”<sup>716</sup> The Daily Briefing of 29 March 1999 indicated initial organisational problems, and that “[t]he start of the work of military courts has been delayed.”<sup>717</sup> Nevertheless, the importance of this issue to General Ojdanić is apparent. It was General Gajić’s evidence that Ojdanić ordered that a public announcement be made on the establishment and functioning of war courts.<sup>718</sup> It was Radinović’s evidence that on the same day, General Ojdanić ordered a tour of the Military Judicial Organs to check that they were up and running.<sup>719</sup>

284. The Supreme Command Combat Report of 30 March 1999 records that the Chief of the Legal Section of the General Staff had inspected and visited wartime judicial organs in the 3<sup>rd</sup> Army and determined that they were “ready with regards to personnel and expertise to carry out tasks within their competence.”<sup>720</sup>

285. General Gajić testified that on 2 April 1999, General Ojdanić ordered that the Legal Administration prepare and send a letter to all units that the military judicial organs would treat all law-breakers equally, whether they be conscripts or volunteers.<sup>721</sup> General Ćurčin testified that in late March 1999 General Ojdanić ordered that combat reports of subordinate armies should include a section on the work of the judicial organs.<sup>722</sup>

286. In the General Staff Briefing of 5 April 1999, General Ojdanić expressed dissatisfaction with the operation of the Military Justice system up to that point:

“I’m not satisfied with the Sector, the Legal Administration of Morale /as printed/ must immediately respond to imperfections in some solutions, legal regulations and measures rendered. I request that a minimal number of measures be rendered and announced to the Yugoslav public. Unusual incidents that occurred outside of combat – they should

<sup>715</sup> Exh.4D272, p.4.

<sup>716</sup> Exh.3D803, p.4.

<sup>717</sup> Exh.3D582, p.6.

<sup>718</sup> Exh.3D1084, para.163.

<sup>719</sup> Exh.3D1116, p.147, para.193-4. See also Exh.4D153; Exh.5D1342.

<sup>720</sup> Exh.3D804, para.3.3.

<sup>721</sup> Exh.3D1084, para.163; Exh.P1477.

<sup>722</sup> Tr.16961.

undergo the same procedure as in peacetime. **Measures against perpetrators should be undertaken immediately.** Colonel Ivković must immediately write up a warning. All losses must be analysed from the perspective of command errors.”<sup>723</sup>

287. The evidence shows that General Ojdanić continued to press on this issue. At the Daily Briefing on 28 April 1999, he complained that the efficiency of the military courts was unsatisfactory.<sup>724</sup> On 30 April 1999, he complained about the pace of proceedings and demanded that a solution be found.<sup>725</sup>

288. It was General Radinović’s evidence that by mobilising war judicial organs the Supreme Command Staff,

“created the necessary conditions for prosecuting every crime, naturally to the extent permitted by war conditions and, what is also very important, that, in turn, contributed to reducing the number of crimes, although, regrettably, crimes were not completely prevented.”<sup>726</sup>

b) Improving the Military Justice System

289. The evidence shows that difficulties were experienced in relation to the efficient functioning of the military justice system. The evidence also shows that General Ojdanić took steps to improve a military justice system which was under significant strain. It was Radosavljević’s evidence that during the war he received information from first instance military courts indicating that on average 100 criminal reports per day were being received.<sup>727</sup> His evidence was that the Prosecutor of the Priština Corp received 2,500 criminal reports.<sup>728</sup>

290. On 16 April 1999, Radomir Gojović was appointed as Chief of the Legal Department of the General Staff. Gojović testified that one or two days beforehand, General Ojdanić had told him that he sought a person to “improve the operation of the military courts” in wartime. Gojović testified that General Ojdanić told him that he had

<sup>723</sup> Exh.3D723, p.4. (emphasis added)

<sup>724</sup> Exh.3D598, p.4.

<sup>725</sup> Exh.3D600, p.5.

<sup>726</sup> Exh.3D1116, p.148, para.197.

<sup>727</sup> Tr.17465.

<sup>728</sup> Tr.17465.

sought a recommendation from the President of the Supreme Military Court and the Supreme Military Prosecutor, both of whom had recommended Gojović.<sup>729</sup> Gojović explained that he had experience as both a military judge and prosecutor and was former President of the Military Court in Belgrade from 1994-99.<sup>730</sup>

291. Gojović testified that there were organisational difficulties in the establishment of military courts and prosecutors' offices. He explained that this was the first time such courts had been set up since the end of the Second World War, so problems were inevitably encountered.<sup>731</sup> Gojović testified that Ojdanić indicated to him that problems with personnel were the central issue.<sup>732</sup> Gojović said that he noticed immediately upon his appointment that the number of judges and prosecutors was inadequate and that they were generally insufficiently qualified.<sup>733</sup> Gojović's testified that 125 new judges and prosecutors were quickly appointed.<sup>734</sup> This is indicated by the number promoted to the rank of second lieutenant in Tab 12 of Exhibit 3D1110, page 3D-11-0372.<sup>735</sup>

292. This evidence of Gojović is corroborated by the evidence of Radosavljević, the Deputy Military Prosecutor for Nis, who testified that in early May he and Gojović toured military prosecutors' offices and upon touring Priština decided that the Prosecutor of the Priština Military District- Blagojević - was not sufficiently senior or experienced. Radosavljević testified that Gojović said to him that someone more senior than Blagojević would be appointed.<sup>736</sup>

293. Gojović testified that on 12 May 1999 he wrote a report to the Supreme Command Staff stating his assessment that,

“the volume and complexity of the tasks faced by military judicial organs... was too great a load for the existing establishment and after making adjustments and overcoming initial difficulties, the military judicial organs have become fully operational.”<sup>737</sup>

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<sup>729</sup> Tr.16642-3.

<sup>730</sup> Tr.16642.

<sup>731</sup> Tr.16643.

<sup>732</sup> Tr.16707.

<sup>733</sup> Tr.16658.

<sup>734</sup> Tr.16659-60.

<sup>735</sup> Tr.16659.

<sup>736</sup> Tr.17460.

<sup>737</sup> Exh.P2826, para.2.3.

Gojović explained that although this report appears dated 12 September 1999, the actual date was 12 May 1999. Gojović testified that this assessment remained his opinion throughout the remainder of his time as Chief of the Legal Department of the General Staff.<sup>738</sup>

294. Gojović's report notes difficulties encountered by the Priština Military District, including a difficulty filling vacancies and that there were "complex criminal cases that deal with serious crimes (terrorism, murder, robbery, theft, et cetera)."<sup>739</sup> The report also notes an increase in serious crimes which represent a threat to society and require greater engagement of competent organs to uncover and prevent crimes. The source of this information was reports received from courts and prosecutors' offices.<sup>740</sup> This is corroborated by Đorović's testimony that he was informed about the information in Exhibit P2826 during a meeting between military prosecutors and judges prior to his replacing Blagojević on 15 May 1999.<sup>741</sup>

295. A further report dated 14 May 1999 submitted to the Supreme Command Staff explained the difficulties being addressed:

"Military judicial organs at the Command of the Priština Corps in their work came across very complex criminal cases concerning serious crimes, which require exceptional professionalism and experience of prosecutors and judges."<sup>742</sup>

296. The above report was likely based upon information contained in a Priština Corps Command Report received from the Priština Corps Court Report which mentions 14 cases of suspected murder, including one officer and one non-commissioned officer.<sup>743</sup>

297. On 15 May 1999, Prosecution witness Lakić Đorović was appointed Prosecutor of the Priština Military District Command.<sup>744</sup> He replaced Blagojević, the inexperienced

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<sup>738</sup> Tr.16663-4; Exh.P2826.

<sup>739</sup> Tr.16665.

<sup>740</sup> Tr.16671.

<sup>741</sup> Tr.11509; Exh.P2671, para.5.

<sup>742</sup> Exh.P1918, section2.3.

<sup>743</sup> Exh.5D1290; Tr.18118.

<sup>744</sup> Exh.P2780.

prosecutor referred to above.<sup>745</sup> The Defence takes issue with the vast majority of Mr Đorović's evidence.<sup>746</sup> In any event, it was Mr Đorović's testimony that he was sent to Kosovo to become Prosecutor of the Priština Military District because the situation was "catastrophic" and that he had been informed of this in a large meeting with Gojović and others at the beginning of May 1999.<sup>747</sup> Đorović, while viewing his posting to Kosovo from Belgrade as a demotion, testified that he was sent to Priština "to try to improve things."<sup>748</sup> Irrespective of the veracity of Đorović's testimony as to what took place upon his arrival in Priština, it cannot be disputed that his appointment was an attempt to improve the military justice system.

298. General Farkaš testified that after the 17 May 1999 meeting with President Milošević and others, General Ojdanić ordered "in the **strictest possible terms**" that the courts, the security service and the prosecutors' offices and the commands of strategic groups should take measures to clear up all those crimes fully.<sup>749</sup>

299. Throughout this period, there are references in the Daily Briefings of the Supreme Command Staff to General Ojdanić watching over the improvements to the military justice system.

- a. On 15 May 1999 General Ojdanić demanded a breakdown analysis of the work of military judicial organs in the VJ.<sup>750</sup>
- b. On 21 May General Ojdanić ordered consideration of whether "the number of military courts is sufficient in view of the number of criminal reports."<sup>751</sup>
- c. On 22 May 1999, pursuant to a decision of General Ojdanić, guidelines in the form of an *aide memoire* were issued to improve the functioning of the military

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<sup>745</sup> Tr.21583.

<sup>746</sup> See para.312 *et seq.*

<sup>747</sup> Tr.11507-8.

<sup>748</sup> *Ibid.*

<sup>749</sup> Tr.16369.

<sup>750</sup> Exh.3D615, p.2.

<sup>751</sup> Exh.3D621, p.5.

justice system.<sup>752</sup> The letter by which these were sent to the 3<sup>rd</sup> Army Command stated that the reason they were being issued was to,

“enable the commanders of basic units, other organs of command in units and institutions, and the military judiciary organs, to efficiently implement appropriate measures and actions in the course of detecting crimes and their perpetrators, and thus successfully prevent crime and boost the morale and combat readiness of the Yugoslav Army.”<sup>753</sup>

- d. The evidence also shows that on 26 May 1999, General Ojdanić ordered that he receive a daily written overview,

“based on categories of sentenced persons, type of criminal offence and duration of punishment, and also a daily overview of the status of the conducted on-site investigations, completed investigations, and rulings at the Military Courts in the VJ.”<sup>754</sup>

This led to the inclusion of a frequent update on the military justice system in the Supreme Command Combat Reports.<sup>755</sup>

300. Prosecution and Defence witnesses have testified that on 28 May 1999 General Ojdanić met with the judicial organs. General Vasiljević testified that General Ojdanić had “another meeting” with the judicial bodies and informed them to “act more vigorously.”<sup>756</sup> General Gajić testified that at this meeting General Ojdanić demanded that the Military Prosecutor’s Office and the military courts had to be “extremely effective” at processing cases.<sup>757</sup> General Gajić’s evidence was that at this meeting, an analysis was made of the cases for which criminal sanctions should be instigated. General Ojdanić ordered that the Military Prosecutor, the Chief of the Legal Administration and the President of the Military Court were to take part in briefings of the Supreme Command Staff as and when needed.<sup>758</sup>

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<sup>752</sup> Exh.3D987.

<sup>753</sup> Exh.3D492.

<sup>754</sup> Exh.P1899, referring to General Ojdanić’s Order of 26 May 1999.

<sup>755</sup> See the Supreme Command Staff Report of 28 May 1999 (Exh.3D683) and thereafter.

<sup>756</sup> Tr.8878.

<sup>757</sup> Exh.3D1084, para.164.

<sup>758</sup> Exh.3D1084, para.156.

301. Finally and decisively, following the return of Generals Gajić and Vasiljević from Kosovo on 7 June 1999 General Ojdanić issued an order on 8 June 1999 stating:

“The military judicial organs shall prioritise the resolution of criminal reports as follows: **(1) violations of the provisions of international law**, (2) crime in the VJ /Yugoslav Army/, (3) desertion and (4) other crimes.”<sup>759</sup>

c) Conclusions

302. General Ojdanić acted swiftly to establish the military justice system; he acted decisively and vigorously to improve how it functioned. As the war was drawing to a close and as the severity and scale of the crimes committed was becoming apparent, General Ojdanić set the prosecution of violations of the laws of war as **the top priority** for the military judicial organs. In the Defence’s submission, it is difficult to imagine what more General Ojdanić could have done.

d) A failure to prosecute serious crimes?

303. The Prosecution alleges that despite General Ojdanić’s actions to ensure that the military justice system was operating there was a failure to prosecute war crimes and that responsibility for this rests with General Ojdanić.

304. The Trial Chamber should be alert to the transformation that has taken place in the Prosecution’s case in order to rely upon this submission. It is inconceivable that the Prosecution framed its case in this manner when the initial Indictment was issued on 24 May 1999, for the basic fact that it takes time for cases to come to light and the wheels of justice to turn. Gojović testified that even in a straightforward case an indictment could take two or three months to be confirmed, but that many of the cases facing the military courts in May 1999 and thereafter were far from straightforward.<sup>760</sup> It would, with respect, be ironic were this Tribunal (although not this Trial Chamber) to now rely upon the slow pace of judicial proceedings to criticise General Ojdanić.

<sup>759</sup> Exh.3D487. (emphasis added)

<sup>760</sup> Tr.16726.

305. Further, there is credible evidence before the Trial Chamber of the many practical difficulties faced in investigating and prosecuting serious cases. Gojović described how the difficulties of operating under conditions of war, with daily air strikes and alerts meaning that military prosecutors had to frequently move location. Gojović further described how this impinged upon the safety of movement for investigators and judges, as did the danger posed by the KLA.<sup>761</sup> Gojović testified that even he, in Belgrade, had to move a total of five or six times, as did other parts of the military organisation, making communication difficult.<sup>762</sup> Radosavljević described how alerts interrupted the work of the Military Court several times a day and that wartime conditions made it difficult to secure the attendance of witnesses and victims at court. Even the building in which the Military Court was situated in Nis was bombed.<sup>763</sup>
306. Neither did the situation miraculously improve after the end of the NATO bombing campaign, despite continuing efforts by the VJ to identify and locate perpetrators of crimes committed against the civilian population.<sup>764</sup> Radosavljević testified that under the Military Technical Agreement VJ units were removed from Kosovo, making it practically impossible to collect evidence, conduct investigations and locate witnesses and victims.<sup>765</sup>
307. Further, there is evidence before the Trial Chamber explaining what might at first sight appear to be a low number of prosecutions for war crimes. Gojović testified that war crimes under Article 142 of the FRY Criminal Code carried a 5-20 year sentence, whereas the crime of multiple murder under Article 47 of the Serbian Criminal Code carried a 10 year – life sentence, a more severe punishment.<sup>766</sup> Gojović testified that this influenced the charging decision of prosecutors, who would prefer to prosecute for multiple murder rather than war crimes because the former carried a harsher sentence.<sup>767</sup>

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<sup>761</sup> Tr.16660.

<sup>762</sup> Tr.16661.

<sup>763</sup> Exh.4D502, para.12.

<sup>764</sup> See Exh.3D1056; Exh.3D1057; Exh.3D1058; Exh.3D1059; Exh.3D 1061; Exh.3D1062.

<sup>765</sup> Exh.4D502, para. 22.

<sup>766</sup> Tr.16652.

<sup>767</sup> Tr.16653; Tr.16716-7; Exh.P2672.

308. It is simply not the case that serious crimes were not prosecuted. Gojović continued that there were 39 known perpetrators of crimes against life and limb with sentences ranging from four to fourteen years imprisonment.<sup>768</sup> The Prosecution in this case has not eliminated the reasonable explanation that practical difficulties in the FRY (as experienced by all militaries investigating war crimes) hindered prosecutions. Gojović testified that **he did not know of a single reported war crime that was not investigated and processed through the criminal justice system.**<sup>769</sup> Gojović also testified that many cases were transferred to the appropriate civilian court after the war.<sup>770</sup>

309. In any event, despite the real difficulties which any military encounters with gathering evidence and prosecuting war crimes and crimes against humanity, the evidence in this case shows that action was taken by General Ojdanić. Moreover the work continued after the war.

310. A report of the Security Administration of 3 August 1999 emphasised that the documentation and prosecution of war crimes “is an exceptionally important, complicated and large-scale task.”<sup>771</sup> Then in September/October 2001, Gojović wrote a report on prosecutions conducted by military courts of the 3<sup>rd</sup> Army.<sup>772</sup> It showed a vast number of trials as at 10 June 1999,<sup>773</sup> although a *relatively* small number for war crimes. Gojović testified that General Ojdanić queried this with him, to which Gojović replied that,

“...in times of war, it’s very difficult to identify perpetrators and find them, because the perpetrators hide very well. There is an atmosphere of fear, so that even those in the immediate surroundings of perpetrators are reluctant to report them. And even in cases when only fighting men were concerned, this seemed to be true as well. That is the flip side, the negative side of solidarity. But it is typical of all soldiers that they are bound by ties of solidarity regardless of the circumstances.”<sup>774</sup>

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<sup>768</sup> Exh.P955, Tab18; Tr.16687.

<sup>769</sup> Tr.16686.

<sup>770</sup> Tr.16724-5.

<sup>771</sup> Exh.3D1063.

<sup>772</sup> Exh.P955; Tr.16683.

<sup>773</sup> Tr.16745-6.

<sup>774</sup> Tr.16685.

311. The Prosecution has attempted to make much of a report of the Supreme Command Staff on the work of the military judicial organs during a state of war, dated 21 June 1999. According to the report, only 12% were perpetrators of “other crimes,” a relatively small number of which were crimes against life and limb.<sup>775</sup> The unsubstantiated allegation is that this is an unacceptably low number. It is the Defence’s respectful submission that this is a non-sensical submission. What number would have been sufficient? Further, it ignores the fact that cases were transferred to the civilian courts following the end of the war.<sup>776</sup>

e) The allegations of Lakić Đorović

312. The Prosecution alleges, solely on the evidence of Lakić Đorović, that judicial investigations of crimes were impeded. This is not true and the evidence of Đorović on this issue is not capable of belief. Đorović made sweeping accusations of criminality against innumerable people,<sup>777</sup> seemingly oblivious to his own actions (and convictions).

313. Aside from the fact that Đorović’s claims in regard to the military judiciary are nothing more than wild accusations, his character fatally undermines his credibility. The most drastic example of his aggressive behaviour was a physical assault of his former deputy (Dragoljub Zdravković), whom he pistol whipped and kicked causing grievous bodily harm on 30 May 1999.<sup>778</sup> In April of 2007, Đorović was again charged with a criminal offence for the illegal use of his assigned weapon.<sup>779</sup> These facts were confirmed by Svetko Kovac, the Director of the Military Security Agency.<sup>780</sup>

314. As a result of his unacceptable behaviour, Đorović was suspended and dismissed from his role as the wartime military prosecutor in Priština. Subsequently, (and apparently with revenge in mind) he starting making accusations against members of the VJ, the MUP, and others regarding alleged war crimes in Kosovo without any supporting

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<sup>775</sup> OTP PTB, para.143.

<sup>776</sup> Exh.3D1003.

<sup>777</sup> Exh.P2671&3D486.

<sup>778</sup> Exh.3D1137, p.9. See also Exh.3D541.

<sup>779</sup> *Ibid*, p.4.

<sup>780</sup> *Ibid*, p.8.

evidence.<sup>781</sup> When military security officers spoke with Đorović on 6 February 2001 in regards to his claims of crimes against humanity committed by FRY forces, he was unable to provide facts outside of an isolated case where 17 cars had allegedly been seized from ethnic Albanians.<sup>782</sup> The Military Security Agency undertook extensive measures to check whether Đorović's allegations were true and found that **“none of them have been confirmed.”**<sup>783</sup>

315. Crucially, Đorović's account to the Trial Chamber of alleged pressure upon the judiciary during May 1999 is at odds with the report he submitted on the work of military judicial organs on 1 June 1999, where he noted that “all criminal reports have been dealt with.”<sup>784</sup> Additionally, numerous witnesses who worked within the military justice system have rejected the general allegation that untoward pressure was exerted upon military judicial organs.<sup>785</sup> Lastly, Radomir Gojović (Chief of the Legal Department of the General Staff) described how the courts and prosecutors were fully independent in their decision-making and assessment of cases that were reported to them.<sup>786</sup> The evidence of Lakić Đorović is simply not capable of belief and the Prosecution has not proved either that the work of military judicial organs was impeded or that General Ojdanić had knowledge of the same.

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<sup>781</sup> *Ibid.*, p.9.

<sup>782</sup> *Ibid.*, p.10.

<sup>783</sup> *Ibid.* (emphasis added)

<sup>784</sup> Exh.3D534, p.1.

<sup>785</sup> See, for example, the evidence of: Vasiljević, Tr.8909; Radosavljević, Tr.17469; Mladenović, Tr.21248; Blagojević, Tr.21563; Spasojević, Tr.15990-1.

<sup>786</sup> Tr.16706.

### 3. Action to improve information and further investigate crimes

316. In the Defence's submission, the evidence demonstrates that even subject to aerial attack and domestic insurgency General Ojdanić did not simply put faith in the information he received through the traditional reporting channels from subordinates. The evidence before the Trial Chamber is that General Ojdanić took steps to try and ensure the accuracy of the information he received and to further investigate information regarding crimes.

#### a) Inspections and Tours

317. General Ojdanić sent a number of missions from the Supreme Command Staff in Belgrade to Kosovo- at no small risk- to try and ensure that he received an accurate picture of events on the ground. The Trial Chamber will be aware that it was only through these actions that General Ojdanić discovered the information he had been receiving was not entirely accurate.

318. It was Radinović's evidence that between March and the end of May 1999, General Staff teams carried out seven tours, not including daily individual tours.<sup>787</sup> It was Colonel Novković's evidence that during the NATO bombing, there were 83 inspections of the brigade and battalion ranks in order to assess order and discipline.<sup>788</sup> Inspections of various subordinate commands during the war included:

- a. 26 March – 4 April 1999 of the 2<sup>nd</sup> Army;<sup>789</sup>
- b. 22 – 25 April 1999 of the 37<sup>th</sup> Motorised Brigade, the 125<sup>th</sup> Motorised Brigade, the 549<sup>th</sup> Motorised Bridge, the 52<sup>nd</sup> Mixed Air Defence and Rocket Artillery Brigade and the 78<sup>th</sup> Motorised Brigade;<sup>790</sup>

<sup>787</sup> Exh.3D1116, p.171.

<sup>788</sup> Exh.3D1115, para.20.

<sup>789</sup> Exhibit 3D1116, p.171, para.258.

<sup>790</sup> Exh.3D489; Exh.3D1116, p.171-2.

- c. 11 – 14 May 1999 of the 37<sup>th</sup> Motorised Brigade, the 125<sup>th</sup> Motorised Brigade, the 549<sup>th</sup> Motorised Brigade, the 243<sup>rd</sup> Motorised Brigade, the 52<sup>nd</sup> Mixed Air Defence and Rocket Artillery Brigade;<sup>791</sup> and
- d. 23 – 26 May 1999 of the command of the Priština Corps and other units including the Judicial Organs.<sup>792</sup>

319. General Ćurčin testified that General Ojdanić sent inspection teams to, in particular, the 3<sup>rd</sup> Army and Priština Corps “even in the fiercest air strikes, to establish and check the actual situation.” Ćurčin was acutely aware of this because, he testified, orders on such inspections were drawn up in the First Administration where he worked, and reports were also forwarded to there.<sup>793</sup> Similarly, General Simić testified that General Ojdanić sent teams from the Supreme Command Staff to Kosovo.<sup>794</sup> General Simić testified that inspections did not note anything to point toward the commission of war crimes by members of the VJ.<sup>795</sup>

b) An alternative approach

320. In addition to the more traditional inspections of subordinate commands, there is evidence before the Trial Chamber of a study conducted by the General Staff Morale Department which attempted to garner information on the mental conditions of soldiers and officers. Colonel Danilović testified that, following an order by General Ojdanić, between 16 – 26 April 1999 a study was conducted of 1,200 soldiers in the field which involved randomly sampling members of the Priština Corps.<sup>796</sup> Colonel Danilović testified that the survey contained around 1,000 separate indicators of combat morale, from which it was possible to gauge soldiers’ fatigue, fear and any desire for revenge.<sup>797</sup>

<sup>791</sup> Exh.3D491; Exh.3D1116, p.172, para.261.

<sup>792</sup> Exh.3D692; Exh.3D693; Exh.3D859, p.5, section3; Tr.16457-8.

<sup>793</sup> Exh.3D1121, para.40.

<sup>794</sup> Exh.3D1089, p.8.

<sup>795</sup> Exh.3D1089; Exh.3D489.

<sup>796</sup> Tr.16462-3.

<sup>797</sup> Tr.16451.

321. Colonel Danilović testified that this study concluded that members of the Priština Corps had a slightly worse emotional state than the overall sample, but that it was still within the limits of what he termed a positive emotional state.<sup>798</sup> Danilović's conclusion was that it was difficult to expect that organised crimes could be committed by such personnel.<sup>799</sup>
322. It is submitted that Danilović's evidence is significant. Danilović explained that the surveys were not aimed at identifying individual perpetrators: those surveyed were not being asked to name names. Danilović's evidence was that this approach made it more likely that problems in subordinate commands would be revealed to the Supreme Command Staff.<sup>800</sup> The surveys, however, contained no information to indicate to General Ojdanić that the VJ was involved in the commission of any crimes against civilians.<sup>801</sup>
323. Further, the Trial Chamber has before it evidence indicating that General Ojdanić took steps to improve the quality of information reaching the Supreme Command Staff, beyond the initial order on the outbreak of war highlighted in paragraphs 230-231 above. General Ćurčin testified that General Ojdanić was dissatisfied with the reports he was receiving and that he issued written instructions as to how the reports were to be drafted. Ćurčin confirmed that Exhibit 3D688 was one such example, which was an instruction manual for drafting Supreme Command Staff Combat Reports.<sup>802</sup> General Ćurčin also testified that General Ojdanić ordered that Supreme Command Staff Combat Reports should contain a section on the work of the judicial organs.<sup>803</sup>

c) The Louise Arbour Letter

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<sup>798</sup> Tr.16455.

<sup>799</sup> Tr.16457.

<sup>800</sup> Tr.16466.

<sup>801</sup> Tr.16465.

<sup>802</sup> Tr.16961-2.

<sup>803</sup> Tr.16961.

324. The Prosecution introduced into evidence a letter written to General Ojdanić by the former Chief Prosecutor of this Tribunal.<sup>804</sup> This one page letter is dated 28 March 1999, although it is not clear when it was actually sent. The letter expresses concern that, in light of escalating violence in Kosovo, serious violations of international humanitarian law continue to be committed. The Prosecutor asked that General Ojdanić exercise his leadership to prevent the commission of future crimes and take all necessary steps to punish any of his subordinates who committed serious violations of international humanitarian law in Kosovo.

325. The evidence before the Trial Chamber shows that General Ojdanić did not receive this letter until 2 May 1999. Exhibit 3D1090 is the letter by which the Louise Arbour letter was forwarded to the General Staff; it explains that the Arbour letter was initially sent to the Federal Ministry of Foreign Affairs, from where it was forwarded to the Ministry of Justice on 21 April 1999 who in turn forwarded it to the General Staff on 29 April 1999. Colonel Vlajković was General Ojdanić's Chief of Office and testified that his office did not receive the letter from Louise Arbour until 2 May 1999.<sup>805</sup>

326. The letter was immediately forwarded on by Vlajković, with General Ojdanić's order that the General Staff "prepare an order for SG/strategic groups/ to prevent war crimes and take the necessary steps against those who violate provisions of international humanitarian law."<sup>806</sup> This order set a deadline of 4 May 1999- two days later- for that task to have been completed. It was Vlajković's evidence that this urgency demonstrates how important the issue was to General Ojdanić.<sup>807</sup> General Ojdanić also provided a copy of the Arbour letter direct to his subordinate, General Pavković.<sup>808</sup>

327. Once the order had been drafted by the legal section, it was sent by Vlajković to Colonel General Marjanović and Lieutenant General Kovačević for their comment.<sup>809</sup> That General Ojdanić sent this letter to two of his most important officers demonstrates

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<sup>804</sup> Exh.P401.

<sup>805</sup> Exh.3D1112, para.15; See Exh.3D1116, p.208, para.347.

<sup>806</sup> Exh.3D1090.

<sup>807</sup> Tr.16025; See Exh.3D1116, p.208-9.

<sup>808</sup> Exh.3D790.

<sup>809</sup> Exh.3D1091.

how seriously he took this issue. Vlajković testified that a response was received and that he then sent on these suggestions to the legal team responsible for this issue.<sup>810</sup>

328. Vlajković testified that after the procedural steps had been completed, the final document was signed by General Ojdanić on 10 May 1999.<sup>811</sup> Vlajković described this document as the ultimate response to the Louise Arbour's letter, and was an effort by General Ojdanić to ensure that all VJ forces were conducting themselves in accordance with international humanitarian law.<sup>812</sup> This order provided that,

“Each military officer who knows of the perpetration of violations of the principles, rules and regulations of international war law, who does not initiate disciplinary or criminal procedure shall be **personally responsible**.”<sup>813</sup>

329. General Radomir Gojović was the head of the Legal Department of the General Staff. He testified that he had drafted this order following discussions with his superior, General Matović. Gojović testified that the order was designed to ensure that commanders take all measures to prevent violations and that they would be held personally responsible if they know of violations and take no measures to prevent or punish them.<sup>814</sup>

330. General Vasiljević's evidence was that by this Order, General Ojdanić commanded that every officer who knew that the law had been violated is personally responsible for instituting proceedings against the perpetrator and that if he failed to do so he would be held personally responsible and face disciplinary charges.<sup>815</sup>

331. General Gajić's evidence was that there was an attachment to this order which concerned criminal liability for war crimes and crimes against humanity.<sup>816</sup> Paragraph 6 of the order refers to an annex which must be read and provides that commanders should warn their units about war crimes against civilians.<sup>817</sup>

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<sup>810</sup> Exh.3D1092.

<sup>811</sup> Exh.3D483.

<sup>812</sup> Tr.16029-30.

<sup>813</sup> Exhibit, 3D483, para.4. (emphasis added)

<sup>814</sup> Tr.16674.

<sup>815</sup> Tr.8876.

<sup>816</sup> Tr.15265.

<sup>817</sup> Tr.16675.

332. Above and beyond this Order, on 14 May 1999 General Ojdanić ordered that copies of all orders and acts under the responsibility of his subordinates from 24 March 1999 and relating to war crimes be sent to him.<sup>818</sup> The order included a deadline of 1200 the next day for this to be completed. Following this, General Ojdanić received a response from General Pavković, indicating measures had been taken at subordinate levels to prevent breaches of international humanitarian law.<sup>819</sup>

333. In the Defence's submission, the chain of events in relation to the Louise Arbour letter is indicative of General Ojdanić's general approach, acting whenever information came to his attention and involving subordinates in any response. This example of General Ojdanić's approach further supports the Defence's case that a plan to expel civilians could not have been created and implemented by General Ojdanić without anyone else in the General Staff knowing.

d) General Farkaš' sent to Kosovo from 5 – 7 May 1999 and subsequent information

334. General Farkaš testified that he was sent by General Ojdanić to Kosovo from 5 – 7 May 1999 because Ojdanić suspected that he was not receiving the full picture from subordinate commands.<sup>820</sup> Farkaš explained that in late April and early May there were some indications that the situation on the ground was not in line with Combat Reports.<sup>821</sup> Farkaš testified that he had received information that crimes were being committed and reported up to Brigade level, but not any further up the chain of command.<sup>822</sup> Farkaš explained that he received information in relation to this from counter-intelligence units (rather than from the security administration which he headed) and this prompted Ojdanić to send him to Kosovo to try and find out more.<sup>823</sup>

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<sup>818</sup> Exh.3D789; Tr.16034.

<sup>819</sup> Exh.3D790.

<sup>820</sup> Tr.16292.

<sup>821</sup> Tr.16302.

<sup>822</sup> Tr.16293-4.

<sup>823</sup> Tr.16302-3.

335. General Farkaš testified that when he returned from Kosovo on 7 May 1999 he immediately informed General Ojdanić and his collegium that there were problems in Kosovo. Farkaš testified that General's Ojdanić's reaction was "strong" but he was unable to give Ojdanić any of the specific details he wanted because his visit had been so brief.<sup>824</sup>
336. General Gajić's account of this issue corroborates General Farkaš' evidence. General Gajić testified that General Farkaš ordered him to set up a meeting with General Ojdanić because Farkaš was planning to tour Kosovo. General Gajić testified that the reason for this request was that the Security Administration had obtained information on paramilitary units in Kosovo and partial information about the engagement of volunteers in Kosovo and that General Farkaš wanted to visit security organs to find out more.<sup>825</sup>
337. General Gajić's evidence was that when General Farkaš returned to Belgrade from Kosovo, he telephoned Gajić and informed him that there were problems with paramilitaries operating in Kosovo. General Gajić testified that General Farkaš' findings were then reported to the collegium of the chief of security administration.<sup>826</sup>
338. General Farkaš testified that after he returned to Belgrade from Kosovo he held further talks to try and "amplify" the information, before subsequent meetings were held on 16 and 17 May 1999.<sup>827</sup> General Farkaš elaborated that the Security Administration met with Lieutenant Colonel Djurović, the deputy of the security organ of the Priština Corps, to garner more information.<sup>828</sup>
339. General Vasiljević testified to similar effect, that he met with Lieutenant Colonel Djurović on 8 May 1999 and was told of the commission of crimes.<sup>829</sup> Vasiljević's evidence was that the Security Service had become aware of a number of crimes committed by members of the military against civilians, including: a rape case involving

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<sup>824</sup> Tr.16294.

<sup>825</sup> Exh.3D1084, para.153.

<sup>826</sup> Tr.15353; Tr.16294.

<sup>827</sup> Tr.16324&16335.

<sup>828</sup> Tr.16335.

<sup>829</sup> Exh.P2600, para.59.

a reservist; the murder of an Albanian man in a village near Srbica; and the murder of a burek salesman in Sipovo among others as well as information that Slobodan Medic-Boca had been in Kosovo. In the *Milošević* trial, Vasiljević testified that he immediately informed General Farkaš of this information.<sup>830</sup>

340. General Vasiljević testified that on 12 May 1999 he and General Gajić verified the information they had received in relation to the commission of crimes.<sup>831</sup> Vasiljević's evidence was then that on 13 May 1999 he attended a "modest celebration" of the day of establishment of the security services where the representatives of the security department- General Farkaš, General Gajić and himself- were received by General Ojdanić. Vasiljević testified that it was at this event that General Farkaš acquainted General Ojdanić with the detailed information that he and Gajić had verified.<sup>832</sup>

341. Exhibit 3D1055 is the written Security Administration Report of 13 May 1999 "on the Activities of the Slobodana Medica-Boca Paramilitary Formation." It describes an atrocity in Podujevo on 31 March 1999 in which Boca's group killed two elderly people and about ten children of "Albanian nationality." The Report describes how a VJ commander expelled Boca's group from the area but that they then returned to Kosovo on 10 May 1999. The Report concluded that,

"...we currently have no data on the location of their activities or concrete operations they may have conducted, but we are conducting a detailed investigation."<sup>833</sup>

342. During his oral evidence, General Gajić was asked why the incident on 31 March had not been reported to General Ojdanić before the date of this report. General Gajić's response was that the Security Administration wanted to be 100% sure of what they reported.<sup>834</sup>

343. General Vasiljević's testified that General Ojdanić was "very taken aback" by what he was told on 13 May 1999. Vasiljević's evidence was that it was his impression

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<sup>830</sup> Exh.P2589, p.15998.

<sup>831</sup> Tr.8747-8.

<sup>832</sup> Tr.8748.

<sup>833</sup> Exh.3D1055, p.2.

<sup>834</sup> Tr.15340.

that this was the first time Ojdanić had heard such information.<sup>835</sup> Vasiljević described how, while he and the other officers from the Security Administration were still there, General Ojdanić telephoned President Milošević to inform him that “all sorts of things were being done in Kosovo.” General Ojdanić then, Vasiljević testified, informed the officers that President Milošević had said that they should meet with him on 17 May 1999. Vasiljević testified that the next thing Ojdanić did was to telephone General Pavković and that he overheard General Ojdanić ask: “Commander, what is going on down in your area?” General Vasiljević described how General Ojdanić then told Pavković to prepare all the information and report to the Supreme Command Staff on 16 May 1999 in advance of the meeting with President Milošević. Vasiljević testified that General Ojdanić stressed to Pavković, and also to the other officers there, that nothing should be concealed or covered up and that everything that had happened had to be put forward and dealt with.<sup>836</sup>

344. General Ojdanić gave Generals Vasiljević and Gajić the task in the security department to collect all available information, and it was decided that General Vasiljević should present the report to President Milošević.<sup>837</sup> General Vasiljević testified that during this investigation over the next few days, he learned that certain crimes had not come to the attention of the Supreme Command Staff.<sup>838</sup> This is corroborated by the evidence of General Farkaš.<sup>839</sup>

e) Meeting of 16 May 1999

345. General Vasiljević testified that a meeting took place on 16 May 1999 between Generals Ojdanić, Pavković, Farkaš, Gajić and himself.<sup>840</sup> Vasiljević testified that during the meeting the findings on criminal activities and how to present them to President Milošević were discussed.<sup>841</sup> General Vasiljević’s evidence was that General Ojdanić was not previously aware of the information presented during the 16 May 1999

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<sup>835</sup> Tr.8748.

<sup>836</sup> Exh.P2600 para.60; Tr.8748-49; Tr.8889-90.

<sup>837</sup> Tr.8749.

<sup>838</sup> Tr.8747.

<sup>839</sup> Tr.16364.

<sup>840</sup> Tr.8754.

<sup>841</sup> Exh.P2600, para.61; Tr.8755.

meeting, meaning that there must have been some shortcoming or interruption in reporting.<sup>842</sup>

346. General Vasiljević testified that General Pavković informed General Ojdanić of his findings from the command of the Priština Corps. General Vasiljević recalled that General Pavković outlined information of bodies discovered in Kosovo and that that investigations by the 3<sup>rd</sup> Army had established that 271 out of the 800 bodies had died in areas covered by the VJ whereas 326 persons were in MUP-controlled areas.<sup>843</sup> While any number of bodies located in VJ and/or MUP controlled areas may be cause for concern, it is submitted that the information conveyed at this meeting was not specific by any means. It was reported during the meeting that in some cases the cause of death could have been NATO air-strikes.<sup>844</sup> General Vasiljević described how General Pavković informed the meeting that he had asked General Lukić to form a joint commission to investigate but that General Lukić had refused. General Pavković told General Ojdanić that some kind of state commission was needed to establish responsibility for crimes.<sup>845</sup>

347. General Vasiljević also testified that General Pavković informed General Ojdanić that he had seen the Skorpions operating in Kosovo but that it was very difficult for him to control the movement of such groups because they were not under his command.<sup>846</sup> General Pavković also mentioned difficulties over who was in charge of the sanitisation or clean-up of the terrain, and that this depended on who was actually conducting activities in certain parts of the area.<sup>847</sup>

348. General Vasiljević testified that at this meeting he did not report on specific groups and volunteers within the VJ, but that he did speak about a group gathered around Jugoslav Petrisic and Slobodan Orasanin. General Vasiljević testified that there were 25

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<sup>842</sup> Tr.8751.

<sup>843</sup> Exh.P2600, para.62, Tr.8760-61.

<sup>844</sup> Tr.9040-1; Tr.8763.

<sup>845</sup> Tr.8760.

<sup>846</sup> Tr.8756.

<sup>847</sup> Tr.9040.

people who went with Petrisic to Kosovo by the procedure prescribed for volunteers but that they were sent back.<sup>848</sup>

349. General Gajić testified that during the meeting on 16 May 1999, General Ojdanić stated that every case of crimes should be urgently documented and investigated, with an arrest where appropriate.<sup>849</sup> General Farkaš testified that General Ojdanić was not previously aware of the information presented by General Pavković at the 16 May 1999 meeting.<sup>850</sup>

f) Meeting of 17 May 1999

350. The 17 May 1999 meeting with President Milošević and others is of significance. The focus of this meeting was to discuss crimes and present information to President Milošević following detailed investigations and discussions between General Ojdanić and other members of the General Staff. General Gajić testified that the “central theme” of this meeting was war crimes and how the authorities should deal with them in a coordinated manner.<sup>851</sup> A number of witnesses have testified to the content of the meeting with President Milošević.

351. General Vasiljević testified that the meeting of 17 May 1999 was attended by President Milošević, Šainovic, General Ojdanić, Rade Marković, Generals Farkaš, Pavković, Gajić and himself.<sup>852</sup> Exhibit P2592 is a brief contemporaneous note prepared by Vasiljević during the meeting.

352. General Vasiljević testified that when they arrived to the meeting, President Milošević, Šainovic, and Marković were already present.<sup>853</sup> General Vasiljević also testified that Marković and Šainovic stayed behind with President Milošević after the

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<sup>848</sup> Tr.8755.

<sup>849</sup> Tr.15285.

<sup>850</sup> Tr.16295-6.

<sup>851</sup> Tr.15360.

<sup>852</sup> Tr.8772; see Exh.P2592.

<sup>853</sup> Tr.8770-72.

meeting had finished.<sup>854</sup> During the meeting while General Ojdanić was present, the evidence shows that a number of different issues were discussed.

(1) Crimes committed by volunteers within the VJ

353. President Milošević was informed about the criminal activities of Jugoslav Petrušić, who had recruited a group and had committed crimes in Kosovo. General Gajić testified that the Security Administration had learned about the existence of the “Pauk group” under Petrušić and that following an investigation it was discovered that a group of 23 people were “illegally imbedded” within the 125 Mechanised Brigade.<sup>855</sup> It was General Gajić’s evidence that this group had by-passed the appropriate procedures.

354. This is corroborated by the evidence of General Vasiljević, who testified that during the meeting President Milošević ordered that Petrušić and another leader be arrested. General Vasiljević testified that these people were indeed arrested and prosecuted, although convicted of lesser charges because of difficulties getting witnesses to testify.<sup>856</sup>

(2) Crimes committed by the Skorpions, Arkan’s Tigers and the Drina Wolves

355. General Vasiljević testified that during the meeting, he reported to President Milošević that the Skorpions had committed crimes in Podujevo and that instead of being detained they had moved to Gnilane whereupon they had committed further crimes. In response to the reports of crimes in Kosovo by Slobodan Medic, Milošević instructed Rade Marković to convey to General Djordjevic and the Minister of the Interior, Vljako Stojiljkovic, that Boca should be held accountable but that their heads would not “roll.”<sup>857</sup>

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<sup>854</sup> Exh.P2600, para.71.

<sup>855</sup> Tr.15308-9.

<sup>856</sup> Tr.8780.

<sup>857</sup> Exh.P2600, para.68; Tr.8773.

356. General Vasiljević's evidence was that Rade Marković stated that he had been offered 100 members of Arkan's volunteers but that he had "only" taken 30 of them. Marković confirmed that they had been in Kosovo Polje and that they had allegedly killed an elderly couple there. He stated that they were under investigation for this and had been ordered to leave.<sup>858</sup>

357. General Gajić's evidence was that the Security Administration established that in Kosovo Polje there was "some kind of centre" for the reception of Arkan's volunteers and that they had killed an elderly couple. Gajić testified that this information was confirmed by Rade Marković during the meeting of 17 May 1999 in Belgrade, adding that they were under investigation.<sup>859</sup>

358. General Vasiljević's evidence on the discussion regarding the activities of paramilitaries was inconsistent. In his witness statement, Vasiljević said that President Milošević did not react to references to paramilitary groups such as Arkan's Tigers. Vasiljević's statement suggests that President Milošević's directions on how to proceed with addressing the alleged crimes and volunteer problems were incomplete and vague.<sup>860</sup> During oral testimony in this case, however, General Vasiljević testified that President Milošević had said that he supported the work of security organs in their efforts to have all the cases of what Milošević termed "big Serbs" resolved.<sup>861</sup> During his testimony in Milošević, Vasiljević testified that such drastic examples (like Arkan's Tigers) had to be "urgently sanctioned" and dealt with and that the "so-called great Serbs" doing this (i.e. committing crimes) were inflicting great damage on everything Yugoslavia had achieved in the war.<sup>862</sup>

359. General Farkaš also testified that during the 17 May 1999 meeting President Milošević ordered that the "para-police" units such as "Arkan, the Wolves, Boca etc"

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<sup>858</sup> Exh.P2600, para.66.

<sup>859</sup> Tr.15274; Tr.15357.

<sup>860</sup> Exh.P2600, para.71.

<sup>861</sup> Tr.8774.

<sup>862</sup> Exh.P2589, p.16001-2.

had to be resolved.<sup>863</sup> The evidence is that this was not an issue which fell within the authority of the VJ.<sup>864</sup>

(3) Evidence of other crimes committed in Kosovo

360. General Vasiljević's evidence was that General Pavković presented information that bodies had been found at Jezerce and other places and stated that the army was being accused of these crimes but that the army did not have operations in the area concerned. General Vasiljević's evidence was that Rade Marković acknowledged that this area was in fact under the control of the JSO.<sup>865</sup>

361. General Vasiljević's evidence was that towards the end of the meeting General Pavković and General Ojdanić emphasised the need to establish a mixed joint state commission to establish the truth of what was happening in Kosovo. General Vasiljević's evidence was to the effect that President Milošević did not deal with this suggestion.<sup>866</sup>

(4) Conclusions

362. From General Ojdanić's perspective, the meeting of 17 May 1999 is important for two principal reasons. First, the meeting itself and the steps taken in preceding days demonstrate concrete action taken by General Ojdanić to find out more when indications started to reach him that crimes were occurring in Kosovo that he had not previously been aware of. For the Trial Chamber to accept the Prosecution's case that General Ojdanić participated in a joint criminal enterprise to expel ethnic Albanians from Kosovo, or failed to punish crimes, the Prosecution must explain why General Ojdanić would place such emphasis on the information he had learned so as to precipitate this meeting. Secondly, the discussions during the meeting of 17 May 1999 involved the appropriate individuals (i.e. the MUP) being tasked with tackling issues such as the

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<sup>863</sup> Tr.16329-30.

<sup>864</sup> See Exh.6D1645.

<sup>865</sup> Exh.P2600, para.67.

<sup>866</sup> Tr.8783.

criminal acts of MUP individuals, including the existence of paramilitary formations related to the MUP.

g) Action to gather more information

363. General Gajić's evidence was that after the meetings of 16 and 17 May 1999 it was assessed by the General Staff that the Security Administration did not have complete information in relation to war crimes. General Gajić testified that General Ojdanić then decided that a further inspection of the situation in Kosovo was necessary.<sup>867</sup>
364. General Farkaš described how as they were walking out from the meeting with President Milošević on 17 May 1999, General Ojdanić was issuing orders to form an extremely strong group of security organs to inspect basic units and security organs in Kosovo.<sup>868</sup> In addition, Farkaš added, General Ojdanić gave orders to other organs of the General Staff to report on crimes committed and the remedial measures being taken.<sup>869</sup>
365. General Vasiljević testified that after the 17 May 1999 meeting, General Ojdanić and General Farkaš tried to reach Marković to discuss problems of cooperation with the MUP, but that they could never get hold of him.<sup>870</sup> This is corroborated by the evidence of General Farkaš, who described how after the 17 May meeting he tried to meet with Marković to discuss the coordination of the VJ Security Service and the RDB, but that he was unable to and Marković seemed to be avoiding contact with the VJ.<sup>871</sup>
366. The strong Security Administration team which General Ojdanić had described to General Farkaš was headed by Generals Vasiljević and Gajić. General Vasiljević described how the General Staff took its job seriously and conscientiously.<sup>872</sup> General Vasiljević's evidence was that General Ojdanić gave him and General Gajić an

<sup>867</sup> Tr.15291; Exh.3D1084, para.156-7.

<sup>868</sup> Tr.16300.

<sup>869</sup> Tr.16300.

<sup>870</sup> Tr.8793.

<sup>871</sup> Exh.P2600, para.74. General Vasiljević testified that this meeting eventually took place after the war was over, on either 8 or 9 July 1999: see Tr.8793.

<sup>872</sup> Tr.8827.

assignment to go to Kosovo to gather more detailed information on crimes, looting and the other problems that had been reported at the meetings of 16 and 17 May 1999.<sup>873</sup> General Vasiljević's evidence was that this was done despite President Milošević's refusal to agree to a joint commission to investigate crimes in Kosovo and that General Ojdanić took his job seriously.<sup>874</sup>

367. The record reflects that General Ojdanić briefed the Supreme Command Staff the next day, on 18 May 1999, on the steps being taken. During the Daily Briefing General Ojdanić informed his colleagues that "Security organs of the 3<sup>rd</sup> Army are to work on uncovering possible crimes and documenting them. The perpetrator must be identified, and responsibility assumed."<sup>875</sup>

368. General Gajić testified that he and General Vasiljević visited 16 security organs in Kosovo, by briefings in the security section and later visiting subordinate security organs. General Gajić explained that "we didn't have time to go into every detail but we gained an impression of the problem of war crimes and other activities contrary to the international laws of war."<sup>876</sup> Gajić explained that they established that security organs were very active in investigating, documenting, and submitting criminal reports for the processing of war crimes, but that there was then a problem in reporting steps taken.<sup>877</sup>

369. Vasiljević testified that he learned from Captain Perović of the 52<sup>nd</sup> Rocket Brigade that a MUP Colonel Kovačević commanded a group of about 15 people called Legija which killed and robbed Albanians in Djakovica and Mitrovica.<sup>878</sup> Vasiljević testified that this was reported to General Ojdanić and subsequently President Milošević in June.<sup>879</sup>

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<sup>873</sup> Tr.8707.

<sup>874</sup> Tr.8828.

<sup>875</sup> Exh.3D618, p.3.

<sup>876</sup> Tr.15292.

<sup>877</sup> Tr.15292.

<sup>878</sup> Tr.8698.

<sup>879</sup> Tr.8700.

370. Generals Gajić and Vasiljević reported to General Farkaš while they were on their Kosovo mission. General Farkaš reported some of their preliminary findings to the Daily Briefing on 2 June 1999:

“Crimes are being committed by our units in Kosovo. Reports on these acts are not going through regular channels and lines of command. Are serious things happening that the global public is aware of?”<sup>880</sup>

In the same Briefing, General Ojdanić’s deputy warned that, “[w]e must all be concerned about some of the problems presented by the Chief of Security Administration, and we must bear them in mind when inspecting subordinate units.”<sup>881</sup>

371. General Vasiljević testified during the mission to Kosovo it was established that that the Priština Corps security organ had not reported the occurrence of crimes up the chain of command. It was thought that the reason for this failing was because the crimes had already been prosecuted:

“They simply thought that the problem had been resolved, the perpetrators had been arrested, and that’s why they committed this omission in reporting.”<sup>882</sup>

372. Gajić testified that he and Vasiljević established during their mission that the security organs were very active in investigating, documenting, and submitting criminal reports regarding war crimes but that there was a problem with reporting.<sup>883</sup> Farkaš described the reporting problem as resulting from “filtering” before it reached the Supreme Command Staff.<sup>884</sup>

373. General Vasiljević’s evidence was that he made a written report after the visit to Kosovo which was given to General Farkaš on 7 June 1999, who then reported to General Ojdanić the next day who then forwarded the information to President Milošević. General Vasiljević explained that while General Ojdanić was preparing his defence, Ojdanić asked to have the report but that Vasiljević was unable to find it.<sup>885</sup>

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<sup>880</sup> Exh.3D633, p.1.

<sup>881</sup> Exh.3D633, p.3.

<sup>882</sup> Tr.8750.

<sup>883</sup> Tr.15292.

<sup>884</sup> Tr.16306.

<sup>885</sup> Tr.8786.

374. General Vasiljević testified that the report documented 42 cases of crimes, some committed by MUP and some by the VJ.<sup>886</sup> Vasiljević's evidence was that prosecution was initiated in every military case and that the cases included murders and rapes.<sup>887</sup> General Gajić also described a document containing information on 42 cases, containing both text and tables.<sup>888</sup> General Gajić testified that some cases involved groups of accused, including one concerning Lieutenant Colonel Stošić and six others.<sup>889</sup>
375. Farkaš' evidence was that when Generals Vasiljević and Gajić returned from Kosovo they reported that brigades were working well in detecting crimes and trying accused in difficult wartime conditions.<sup>890</sup> Farkaš testified that he briefed the Supreme Command Staff on 8 June 1999, stating that the inspecting organs had found out that over 95 per cent of criminal acts were prosecuted.<sup>891</sup> Farkaš testified that Ojdanić commended the Security Administration and gave credit for the work conducted.<sup>892</sup>

#### **4. Other specific actions to address crimes in Kosovo**

376. In addition to the steps General Ojdanić took to establish and improve the military justice system and find out about crimes, General Ojdanić took a number of other specific steps to address criminal acts. Again he acted early, consistently and persistently.
- a. On 3 April 1999, General Ojdanić issued an order that all perpetrators of crimes were to be dealt with in a timely fashion and brought before a judge. The Prosecution alleged that this order was aimed solely against crimes by VJ soldiers against the VJ. The words of the order itself make plain that it was aimed more widely:

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<sup>886</sup> Tr.8786.

<sup>887</sup> Tr.8789-90.

<sup>888</sup> Tr.15293.

<sup>889</sup> Tr.15293.

<sup>890</sup> Tr.16303.

<sup>891</sup> Tr.16304.

<sup>892</sup> Tr.16304-5.

“All perpetrators of crimes shall be brought before a competent investigating judge of a military court immediately on the submission of a criminal report.”<sup>893</sup>

- b. On 10 May 1999, General Ojdanić issued an order commanding that every officer who knew that the law had been violated was personally responsible for instituting proceedings against the perpetrator and that if an officer failed to do so, he would be held responsible and face disciplinary charges.<sup>894</sup> Gojović testified that he had drafted this order and that it was distributed to all units to ensure that they obeyed international humanitarian law and that commanders prevented and punished crimes.<sup>895</sup>
- c. On 17 May 1999, General Ojdanić informed President Milošević that the priority tasks included “measures against the perpetrators of disciplinary and criminal offences...”<sup>896</sup> This is corroborated by the testimony of General Farkaš, who testified that after the 17 May meeting General Ojdanić ordered that measures be taken to clear up crimes fully.<sup>897</sup>
- d. On 29 May 1999 General Ojdanić received a report following a General Staff tour of the Priština Corps conducted between 23–26 May 1999.<sup>898</sup> The Report identified a number of “shortcomings” and set out proposals for their solution. General Ojdanić responded to this report on the very same day he received it, and implemented the proposals in their entirety.<sup>899</sup>
- e. On 8 June 1999 General Ojdanić set the prosecution of violations of the provisions of international law as the top priority of the military justice system.<sup>900</sup>

377. The evidence also shows that General Ojdanić took a number of specific steps to try and address and punish the activities of paramilitaries in Kosovo.

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<sup>893</sup> Exh.P1477.

<sup>894</sup> Exh.3D483; Tr.8876.

<sup>895</sup> Tr.16674.

<sup>896</sup> Exh.3D852, p.7.

<sup>897</sup> Tr.16369.

<sup>898</sup> Exh.3D692; Tr.15497.

<sup>899</sup> Exh.3D694.

<sup>900</sup> Exh.3D487.

- a. In the Daily Briefing of 3 April 1999, there was mention of problems with paramilitary formations in Kosovo.<sup>901</sup> General Gajić testified that intelligence showed that individuals had arrived in Kosovo without the army being aware, but that in 99.9% of cases there were no paramilitary formations in the army but there were several linked to the MUP.<sup>902</sup>
- b. At the Daily Briefing on 16 April 1999, General Gajić proposed political measures be taken in response to problems with paramilitary activities.<sup>903</sup> General Ojdanić responded by ordering the Security Administration to investigate the existence of paramilitary organizations and to uncover their locations, planned assaults and have them expelled.<sup>904</sup> Gajić's testimony was that Ojdanić wanted this cleared up and he said that if there were such persons in Kosovo that they should "be expelled, that legal measures should be taken, so he was very precise on that as always."<sup>905</sup> General Ojdanić's order resulted in action against paramilitaries by the 3<sup>rd</sup> Army and lower down the chain of command.<sup>906</sup>
- c. At the Daily Briefing on 23 April 1999, General Gajić reported on the activities of paramilitaries in Kruševac.<sup>907</sup> General Gajić testified that the SOV (Serbian Liberation Army) was tried and convicted as paramilitary organization formation outside the VJ.<sup>908</sup> However, they were charged by the counter-intelligence service of the 3<sup>rd</sup> Army; this charge merited a military court because the leader of that group was a lieutenant of the VJ, Lieutenant Gajić.<sup>909</sup>
- d. On 26 April 1999, General Ojdanić issued an order directed at eliminating paramilitaries from Kosovo, by way of disarming them and prosecuting them in

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<sup>901</sup> Exh.3D721.

<sup>902</sup> Tr.15260&15273.

<sup>903</sup> Tr.15270; Exh.3D587.

<sup>904</sup> Tr.15270; Exh.3D587.

<sup>905</sup> Tr.15281.

<sup>906</sup> Exh.3D482.

<sup>907</sup> Tr.15278; Exh.3D593.

<sup>908</sup> Tr.15383.

<sup>909</sup> Tr.15383.

accordance with the laws of war.<sup>910</sup> This is corroborated by Farkaš, who testified that the order was that the VJ should check its respective areas for paramilitaries and take steps if any paramilitaries were found.<sup>911</sup> General Ojdanić gave detailed instruction to subordinates to:

- i. check if paramilitaries are in your zone of responsibility
- ii. check for disregard of orders of the Supreme Command Staff and MUP by the VJ;
- iii. observe the Geneva Conventions;
- iv. produce a special report to the Supreme Command Staff.<sup>912</sup>

Radinović's evidence was that this is a good example of Ojdanić attempting to deal with paramilitaries as quickly as possible.<sup>913</sup>

- e. Finally, Ojdanić's order of 8 June 1999 in which he prioritises the punishment of breaches of international humanitarian law also contains an order to take action in relation to paramilitaries in Kosovo and inform the MUP where appropriate.<sup>914</sup>

## **F. Conclusions**

378. The evidence shows that General Ojdanić took considerable steps to learn the reality of the situation in Kosovo when he first received information in early May 1999 that the reports he was receiving through the usual channels did not accurately depict the situation on the ground. General Ojdanić immediately called upon his subordinate, General Pavković, and instructed members of the General Staff to find out more. His instructions were unequivocal: nothing was to be concealed. He reported this information to his superior, President Milošević, then showed further initiative to send two of his most senior members of the Supreme Command Staff to Kosovo to conduct a

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<sup>910</sup> Tr.15280; Exh.P1490.

<sup>911</sup> Tr.16372.

<sup>912</sup> Exh.P1490.

<sup>913</sup> Exh.3D1116, p.160, para.221.

<sup>914</sup> Exh.3D487.

detailed investigation. When information came back regarding the existence of crimes, he praised the work of these individuals for their efforts in discovering the truth.

379. General Ojdanić made more than reasonable efforts to get to the bottom of any reports of criminal activity in Kosovo. His actions simply cannot be characterised as those of a man who is a participant, or complicit, in the commission of that criminal activity. The Prosecution's own witness, General Vasilijevic, confirms the good faith efforts made by General Ojdanić throughout his tenure.

380. The Prosecution has not proved that General Ojdanić failed to take adequate steps to prevent crimes in Kosovo. To the contrary, the overwhelming evidence reveals that General Ojdanić acted early, persistently and consistently to try and prevent crimes from being committed in Kosovo. It is difficult to imagine any commander in any Army with a better record of efforts to prevent crimes during a war.

381. General Ojdanić issued a number of specific orders aimed at punishing those who breached international humanitarian law as well as specific orders aimed at tackling paramilitaries. The Trial Chamber will recall that General Ojdanić ensured that the issue of crimes committed by paramilitaries was raised at the highest level on 17 May 1999, and it can be seen from his order of 8 June 1999 that he continued to address this issue. As Chief of the Supreme Command, General Ojdanić did all that he could do to ensure that crimes committed in Kosovo were punished by upgrading the military justice system. It would have been improper for him to intervene in specific cases pending before the military courts.<sup>915</sup> Therefore, the discharge of his duty to punish must be judged by his actions in upgrading the military justice system and not on the results of the particular cases being prosecuted.

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<sup>915</sup> See Exh.P1309, Article2.

#### **IV. LEGAL ISSUES AND RESPONSIBILITY**

382. This Section of the Brief addresses legal issues and criminal responsibility under Article 7(1) and Article 7(3) of the Statute. This Section is divided under the following headings:

- a. General Ojdanic has been denied a fair trial due to an inability to investigate in Kosovo;
- b. the crimes in the Amended Indictment; and
- c. forms of responsibility under the Statute.

##### **A. General Ojdanić has been denied a fair trial due to inability to investigate in Kosovo**

383. Unfortunately, the Defence has been prevented from making a full defence to the charges in the indictment because of an inability to investigate the crimes in Kosovo. As the Trial Chamber is well aware, when the Defence tried to visit the scenes of the crimes under UNMIK escort, General Ojdanić's Serbian lead counsel was attacked in Kosovo by a mob of Albanians in an incident that sent 41 people to the hospital.

384. As a result, cross examination of prosecution "crime base" witnesses had to proceed without an investigation or understanding of the actual situation on the ground.

385. Despite the life threatening attack, the defence team of General Ojdanić was willing to return to Kosovo after the conclusion of the Prosecution case in order to look for potential defence witnesses. However, the security situation in Kosovo never improved to the point where such a visit was either safe or feasible. Therefore, the Defence was never able to locate and identify witnesses within Kosovo who could have contradicted the Prosecution's "crime base" evidence.

386. During the course of the trial, the Trial Chamber denied three motions on this issue brought by General Ojdanić. Those motions, and the Trial Chamber's decisions, are incorporated by reference herein.<sup>916</sup>

387. The Defence submits that the Trial Chamber's last decision on the matter, further events in Kosovo have demonstrated that General Ojdanić's defence team was correct in its assessment that investigation in Kosovo was impossible.

388. In the *Haradinaj et al* trial, completed in January 2008, the Trial Chamber itself noted that "the difficulty in obtaining evidence was a prominent feature in this trial,"<sup>917</sup> and that "a high proportion of prosecution witnesses in this case expressed a fear of appearing before the Trial Chamber to give evidence."<sup>918</sup>

389. The Trial Chamber specified that:

"...throughout the trial, the Trial Chamber encountered significant difficulties in securing the testimony of a large number of witnesses. Many witnesses cited fear as a prominent reason for not wishing to appear before the Trial Chamber to give evidence. The Trial Chamber gained a strong impression that the trial was being held in an atmosphere where witnesses felt unsafe. This was due to a number of factors specific to Kosovo/Kosova, for example, Kosovo's/Kosova's small communities and tight family and community networks which make guaranteeing anonymity difficult. The parties themselves agreed that an unstable security situation existed in Kosovo/Kosova that was particularly unfavourable to witnesses."<sup>919</sup>

390. The Prosecution has appealed from the judgement in the *Haradinaj* case on the grounds that it did not receive a fair trial. If the Prosecution, with the weight of the international community and its substantial resources behind it, could not get witnesses in Kosovo to testify on behalf of Serbs, how could General Ojdanić's Serbian defence team possibly be expected to do the same?

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<sup>916</sup> *General Ojdanić's Motion for Stay of Proceedings* (2 June 2006); *Decision on Ojdanić Motion for Stay of Proceedings* (9 June 2006); *General Ojdanić's Second Motion for Stay of Proceedings* (31 July 2006); *Decision on General Ojdanić's Second Motion for Stay of Proceedings* (19 October 2006); *General Ojdanić's Third Motion for Stay of Proceedings* (23 July 2007); *Decision on Third Ojdanić Motion for Stay of Proceedings* (27 August 2007).

<sup>917</sup> *Haradinaj* TJ, para.28.

<sup>918</sup> *Haradinaj* TJ, para.22.

<sup>919</sup> *Haradinaj* TJ, para.6.

391. The reality is that the circumstances that existed in Kosovo during General Ojdanić's trial made it impossible to investigate the crimes alleged in the indictment and to obtain witnesses to contradict the "crime base" evidence offered by the Prosecution. Therefore, a fair trial was not possible, despite the good intentions and honourable efforts of the Trial Chamber in encouraging UNMIK to facilitate the defence investigation.

392. It is respectfully submitted that the Trial Chamber erred in declining to stay the proceedings until a fair trial could be guaranteed to the accused.<sup>920</sup>

## **B. The Crimes**

### **1. War Crimes**

393. General Ojdanić is charged with commission of war crimes in violation of Article 3 of the Statute.

394. For the applicability of Article 3 of the Statute two preliminary requirements must be satisfied. First, there must have been an armed conflict at the time the offences were allegedly committed. Secondly, there must be a close nexus between the armed conflict and the alleged offence, meaning that the acts of the accused must be "closely related" to the hostilities. The existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.<sup>921</sup>

In his pre-trial brief, General Ojdanić indicated that:

"The evidence in this case may show that one or more of the alleged crimes in the Third Amended Joinder Indictment were committed by perpetrators acting for personal reasons which were not sufficiently connected to the armed conflict to constitute a violation of Article 3."<sup>922</sup>

395. Because he was unable to adequately investigate the crime-base evidence in Kosovo, General Ojdanić was not in a position to develop evidence on this point during

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<sup>920</sup> General Ojdanić hereby joins in the submissions made as to the crime base evidence by his co-accused.

<sup>921</sup> *Stakić* AJ, para.342; *Strugar* TJ, para.215; *Halilović* TJ, para.29.

<sup>922</sup> *General Ojdanić's Pre-Trial Brief* (6 June 2006), para.17.

the trial. Nonetheless, he contends that where the Trial Chamber cannot exclude personal reasons for the commission of any particular crime, it must find that such crime was not sufficiently connected to the armed conflict to form the basis of a conviction under Article 3.

## 2. Crimes Against Humanity

396. General Ojdanić is also charged with Crimes Against Humanity in violation of Article 5 of the Statute.

397. For the applicability of Article 5, it must be established that there was an attack “directed at the civilian population.”<sup>923</sup> The Appeals Chamber has held that the civilian population must be the “primary object” of the attack.<sup>924</sup>

398. General Ojdanić contends that the evidence has shown that some attacks were not directed against the civilian population, but against the terrorist Kosovo Liberation Army. The Appeals Chamber in *Blaskić* recently observed that:

“Read together, Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention establish that members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status. Neither can members of organized resistance groups, provided that they are commanded by a person responsible for his subordinates, that they have a fixed distinctive sign recognizable at a distance, that they carry arms openly, and that they conduct their operations in accordance with the laws and customs of war.”<sup>925</sup>

399. An attack may be found not to have been directed against a civilian population even though some civilians are killed in the attack.<sup>926</sup>

400. Unfortunately, General Ojdanić’s inability to investigate in Kosovo prevented him from presenting evidence concerning the presence of KLA in areas which were the subject of the attack. It seems obvious that the Prosecution’s crime-base witnesses refused to provide truthful evidence of the presence of the KLA in their areas. As one

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<sup>923</sup> *Blagojević* TJ, para.541; *Limaj* TJ, para.181.

<sup>924</sup> *Kunerac* AJ, para.91.

<sup>925</sup> *Blaskić* AJ, para.113.

<sup>926</sup> *Limaj* TJ, para.228.

Trial Chamber has noted, “Notions of loyalty and honor, particularly strong in the culture of Kosovo Albanians, had a bearing on the credibility of some witnesses in the case.”<sup>927</sup>

401. Therefore, if the Trial Chamber cannot exclude the possibility that the object of a given attack was the Kosovo Liberation Army, rather than civilians, it must find that any crimes committed during such an attack did not violate Article 5. Attacks against legitimate military targets that impact upon the civilian population are more properly regulated by the *lex specialis* of the laws of war. Therefore, the Trial Chamber is invited to acquit on counts 1, 2, 3 and 5 of the Amended Indictment.

402. It must also be shown under Article 5 that each particular crime was connected to the attack on the civilian population.<sup>928</sup> In his pre-trial brief, General Ojdanić stated:

“The evidence in this case may show that one or more of the alleged crimes in the Third Amended Joinder Indictment were committed by perpetrators acting for personal reasons which were not sufficiently connected to an attack on the civilian population such as to constitute a violation of Article 5.”<sup>929</sup>

403. Because he was unable to adequately investigate the crime-base evidence in Kosovo, General Ojdanić was not in a position to develop evidence on this point during the trial. Nonetheless, he contends that where the Trial Chamber cannot exclude personal reasons for the commission of any particular crime, it must find that such crime was not sufficiently connected to the attack to form the basis of a conviction under Article 5.

a) Deportation and Forcible Transfer

404. The Prosecution bears the burden of proving that any deportations or transfers were both involuntary and unlawful.<sup>930</sup> While the defence accepts that “forcible” deportation also includes coercive measures short of physical violence, departures

<sup>927</sup> *Limaj* TJ, para.13.

<sup>928</sup> *Blagojević* TJ, para.547; *Limaj* TJ, para.190.

<sup>929</sup> *General Ojdanić’s Pre-Trial Brief* (6 June 2006), para.27.

<sup>930</sup> *Krstić* TJ, para.521.

motivated by fear of discrimination or persecution, or by a preference to avoid areas of armed conflict, are not necessarily in violation of the law.<sup>931</sup>

405. International law recognises certain grounds permitting forced removals, and that if an act of forced removal is carried out on such a basis, that act cannot constitute the *actus reus* of the crime of deportation.<sup>932</sup> Moreover, not all transfers are prohibited. Article 49 of the Fourth Geneva Convention provides in pertinent part:

“the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand...”

406. Article 17 of Additional Protocol II also lists security of the population and imperative military reasons as legitimate justifications for forcible transfer of civilians.

407. This was the basis of an acquittal of General Rendulic by the United States Military Tribunal at Nuremburg. General Rendulic had ordered the forced evacuation of civilians in the area where his forces expected to take on the Russian Army. The Tribunal concluded:

“It is our considered opinion that the conditions as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgement but he was guilty of no criminal act.”<sup>933</sup>

408. Evacuation to ensure the security of the population is authorised when the area in which the population is located is in danger as a result of “military operations” or “intense bombing.” In such situations, in the interest of the protection of the civilian population a military commander may, and is in fact duty bound to, evacuate the population. This situation is similar to that when evacuations for “imperative military reasons” may be carried out, *i.e.* when the presence of the population hampers military operations. There is an important distinction, however, in that evacuations in this latter situation may only be carried out when necessitated by overriding, *i.e.* imperative, military reasons. In considering whether these exceptions justify proven acts of forcible

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<sup>931</sup> *Krstic* TJ, para.528; Commentary to Geneva Convention IV (pp 219-220) cited in *Natic* TJ, footnote1357.

<sup>932</sup> *Stakić* AJ, para.284.

<sup>933</sup> *Wilhelm* p.69.

population displacements, the trier of fact should consider whether there was in actual fact a military or other significant threat to the physical security of the population, and whether the military operation in question was ‘imperative.’ It is unlawful to use evacuation measures as a pretext to remove the population and effectuate control over a desired territory.<sup>934</sup>

409. The law also provides for an exception to the general prohibition against forcible displacements that would permit evacuations for humanitarian reasons. The Commentary to Article 17 of Protocol II indicates that for other reasons – such as the outbreak or risk of outbreak of epidemics, natural disasters, or the existence of a generally untenable and life-threatening living situation – forcible displacement of the civilian population may be lawfully carried out by parties to the conflict. Such displacement must, however, comply with the requirements of evacuation, including among others, that they be of a temporary character.<sup>935</sup>

410. Deportation requires proof of intent to transfer persons on a non-provisional basis.<sup>936</sup> Intent to transfer people temporarily does not satisfy the *mens rea* requirement for deportation. In the two cases at the ICTY where accused have been convicted of forcible transfer, the significant factor was that the displaced persons were permanently, rather than provisionally, displaced.<sup>937</sup>

411. The alleged deportations in this case occurred in a country which was bombed with “all the other highly sophisticated state-of-the-art lethal weapons” except the nuclear,<sup>938</sup> and where the KLA ordered civilians to leave. General Ojdanić contends that the Trial Chamber must be satisfied beyond a reasonable doubt that as to each act of deportation, there was no military or humanitarian purpose behind the movement of the population and that there was an intention, at that time, to permanently deport the victims from Kosovo. In that connection, it is undeniable that most of the displaced

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<sup>934</sup> *Blagojević* TJ, para.597-98.

<sup>935</sup> *Blagojević* TJ, para.600.

<sup>936</sup> *Stakić* AJ, para.319.

<sup>937</sup> *Krstić* TJ, para.528; *Natelić* TJ, para.526.

<sup>938</sup> Tr.15749; Exh.3D1102; Exh.3D1103.

persons returned to their homes immediately after the war and the evidence shows that there was no intent on the part of the General Staff to permanently expel ethnic Albanian civilians.

b) Persecution

412. Count Five of the Third Amended Indictment charges General Ojdanić with persecution as a crime against humanity.<sup>939</sup> The elements of persecution consist of an act or omission which: (i) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law; and (ii) is carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics.<sup>940</sup>
413. The mental state required for persecution is higher than that for other crimes against humanity. In addition to proving the intent to commit the underlying act, the Prosecution must also prove that the perpetrator had the special intent to discriminate on racial, religious, or political grounds.<sup>941</sup>
414. In addition to the chapeau requirements of knowledge of a widespread or systematic attack against a civilian population, the *mens rea* for persecutions consists of the intent to commit the underlying act and the intent to discriminate on political, racial or religious grounds. This discriminatory intent requirement amounts to a *dolus specialis*.<sup>942</sup>
415. It is not sufficient for the accused to be aware that he is in fact acting in a way that is discriminatory; he must consciously intend to discriminate.”<sup>943</sup>

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<sup>939</sup> As noted by the Trial Chamber, the alleged deportations and forcible transfers are not included as persecutory acts in the Amended Indictment: Tr.12778-9.

<sup>940</sup> *Blagojević* TJ, para.579; *Kvočka* AJ, para.320; *Kordić* AJ, paras101,671.

<sup>941</sup> *Kupreškić* TJ, para.636.

<sup>942</sup> *Stakić* AJ, para.328.

<sup>943</sup> *Krnojelac* TJ, para.435; *Vasiljević* TJ, para.248.

416. The discriminatory intent must exist for the act itself, not the general attack.<sup>944</sup> And the result of the act must in fact be discriminatory—having discriminatory intent is not enough.<sup>945</sup>
417. Significantly for this case, discrimination on **ethnic** grounds is not a basis for persecution. This contrasts with the provisions of the Statute of the ICC, which additionally criminalises persecution on the grounds of ethnicity, nationality, culture or gender. That the drafters of the ICC Statute felt it necessary to include additional grounds confirms that persecution on grounds of ethnicity is not a crime under the ICTY Statute. What discrimination may have existed, or been intended, by the acts charged in Count Five of the Third Amended Indictment, was not on racial, religious, or political grounds.
418. In a case at the International Criminal Tribunal for Rwanda, an accused was acquitted of persecution where the discrimination was held to have been on ethnic grounds, rather than those prohibited by Article 5—racial, religious, or political discrimination.<sup>946</sup> Another Trial Chamber of the ICTR found that this element was satisfied only when the killings of the Tutsi ethnic group were accompanied by killings of moderate Hutus—evidencing a “political” motive for the crimes.<sup>947</sup> No such distinctions were made in Kosovo. Therefore, even if acts of persecution are established to have been committed in this case, an acquittal is likewise required because it has not been proven beyond a reasonable doubt that the acts were committed with the requisite discriminatory intent on racial, religious, or political grounds.

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<sup>944</sup> *Krnojelac* TJ, para.436; *Vasiljević* TJ, para.249.

<sup>945</sup> *Krnojelac* TJ, para.432; *Vasiljević* TJ, para.245; *Blagojević* TJ, para.583.

<sup>946</sup> *Semanza* TJ, para.350,470.

<sup>947</sup> *Nahimana* TJ, para.1071.

## C. Forms of Liability

### 1. Omissions

a) Omissions cannot satisfy the “significant participation” requirement of joint criminal enterprise liability

419. In resisting the Motions for Judgement of Acquittal at the close of the Prosecution case, the Prosecution contended that an accused could be found to have participated in a joint criminal enterprise by omission.<sup>948</sup> The Trial Chamber accepted this argument, holding that:

“...where evidence points to a legal duty and failure to act on the part of one or some of the accused, this may be considered sufficient evidence of participation in a JCE for liability under Article 7(1) if, by such omission, a significant contribution to the JCE is made.”<sup>949</sup>

420. This decision was made without the benefit of submissions by the accused. The Trial Chamber is now requested to reconsider, and squarely reject, this dangerous expansion of individual criminal responsibility.

421. The Appeals Chamber has found that the *actus reus* of joint criminal enterprise liability is composed of three elements: (i) a plurality of persons; (ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute; and (iii) the participation of the accused in the common plan involving the perpetration of one of the crimes provided for in the Statute.<sup>950</sup>

422. With respect to the third element—participation of the accused—the Appeals Chamber has held that such participation must be “significant.”<sup>951</sup>

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<sup>948</sup> Tr.12666-73.

<sup>949</sup> Tr.12776-77.

<sup>950</sup> *Tadić* AJ, para.227; *Blagojević* TJ, para.698; *Brđanin* AJ, para.430.

<sup>951</sup> *Brđanin* AJ, para.430.

423. General Ojdanić contends that this element of “significant participation” in a joint criminal enterprise cannot be satisfied by omissions, but requires a positive act on behalf of the accused.

424. The leading case involving an omission under Article 7(1) is the *Blaskić* case. There, the Appeals Chamber “left open” the possibility that an omission may constitute the *actus reus* of the aiding and abetting form of liability.<sup>952</sup> However, it held that since this form of participation was not adequately charged in the indictment, the Trial Chamber had not held the accused liable for aiding and abetting, and the issue had not been litigated on appeal, it would not specifically consider whether an omission could satisfy the *actus reus* of aiding and abetting.<sup>953</sup>

425. The Appeals Chamber in *Blaskić* went on to state the general rule that “criminal responsibility generally requires the commission of a positive act.”<sup>954</sup> It found, however, that there was a limited exception to that rule—wilful failure to discharge a legal duty to care for persons under the control of one’s subordinates.<sup>955</sup>

426. Applying that exception to the facts of the *Blaskić* case, the Appeals Chamber found that the accused was liable for the use of prisoners as human shields directly outside of his office, where he was present.<sup>956</sup> The Appeals Chamber held that:

“The Appellant was under a duty, imposed upon him by the laws or customs of war, to care for the protected persons put in danger, and to intervene and alleviate that danger. He did not. The consequential breach of his duty, leaving the protected persons exposed to danger of which he was aware, constituted an intentional omission on the part of the Appellant.”<sup>957</sup>

427. Since the Appeals Chamber did not specify the form of liability it was using to convict Blaskić for his intentional omission (i.e. aiding or abetting, or commission), Trial

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<sup>952</sup> *Blaskić* AJ, para.47.

<sup>953</sup> *Blaskić* AJ, para.52.

<sup>954</sup> *Blaskić* AJ, para.663.

<sup>955</sup> *Blaskić* AJ, para.663.

<sup>956</sup> *Blaskić* AJ, para.666.

<sup>957</sup> *Blaskić* AJ, para.668.

Chambers and scholars have been left to speculate on the status of omissions as the basis for a finding of liability under Article 7(1) of the Statute.

428. For example, in the *Mrkšić et al* judgement, the Trial Chamber concluded that Blaskić must have been convicted of aiding and abetting by omission, since the form of liability of committing was not charged in his indictment.<sup>958</sup> However, in their book, *Forms of Responsibility in International Criminal Law*, three former ICTY legal officers, including this Chamber's own Gideon Boas, conclude that "despite flirtatious references to it in the trial and appellate jurisprudence of the ad hoc Tribunals, there is no true support for aiding and abetting by omission as a form of responsibility in international criminal law."<sup>959</sup>

429. It would indeed be incongruous to find that omissions could satisfy the "participation" element of JCE, which punishes a person as a principal, when an omission can not even be clearly said to satisfy the secondary form of liability known as aiding and abetting.

430. In *Blaskić*, the Appeals Chamber found it critical that it be established that the accused was present at the place where the prisoners were held and that he had knowledge of their use as human shields before he could be held liable for an omission under Article 7(1).<sup>960</sup> Therefore, the most that can be taken from the *Blaskić* decision is that it is possible for Article 7(1) liability to be based upon an omission in the limited circumstances when the accused is present at the scene of the crime. The Appeals Chamber decision in *Orić* is also instructive. The Trial Chamber had found the accused guilty under Article 7(3) based upon the alleged criminal conduct of his subordinate. However, the Appeals Chamber found that the Trial Chamber had erred: it had not in fact established that the subordinate aided and abetted a crime by omission because he

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<sup>958</sup> *Mrkšić* TJ, para.554.

<sup>959</sup> Boas, Bischoff, & Reid, p.310-15.

<sup>960</sup> *Blaskić* AJ, para.667.

had not been physically present.<sup>961</sup> The subordinate's "conspicuous absence" from the scene of the crime was not sufficient to prove his liability for aiding and abetting.<sup>962</sup>

431. This is consistent with other decisions which have found an accused liable as an "approving spectator."<sup>963</sup> However, since General Ojdanić was nowhere near Kosovo during the commission of the crimes in this case, this form of liability by omission cannot be ascribed to him. Nor can it serve as authority for the application of omissions to the joint criminal enterprise form of liability, which has now been expanded to include vast enterprises of nationwide scope.

432. In the *Galić* case, the Appeals Chamber "affirm[ed] that the omission of an act where there is a legal duty to act can lead to individual criminal responsibility under Article 7(1) of the Statute."<sup>964</sup> However, the Appeals Chamber went on to hold that the *actus reus* of the form of liability of "ordering" could not be satisfied by an omission, but required a positive act.<sup>965</sup>

433. In the *Kvočka et al* case, the Appeals Chamber made the following statement:

"The Appeals Chamber has stated that the accused's participation in carrying out the joint criminal enterprise is likely to engage his criminal responsibility as a co-perpetrator, without it being necessary in general to prove the substantial or significant nature of his contribution: **it is sufficient for the accused to have committed an act or an omission which contributes to the common criminal purpose.** Contrary to the holding of the Trial Chamber, the Tribunal's case-law does not require participation as co-perpetrator in a joint criminal enterprise to have been significant, unless otherwise stated."<sup>966</sup>

434. The inclusion of word "omission" in the general statement that "it is sufficient for an accused to have committed an act or omission which contributes to the common criminal purpose" cannot be taken as binding precedent that an omission may suffice to

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<sup>961</sup> *Orić* AJ, para.42.

<sup>962</sup> *Orić* AJ, para.47.

<sup>963</sup> *Kayishema* AJ, para.202.

<sup>964</sup> *Galić* AJ, para.175.

<sup>965</sup> *Galić* AJ, para.176.

<sup>966</sup> *Kvočka* AJ, para.187. (emphasis added)

establish the *actus reus* for participation in a joint criminal enterprise. This is true for three reasons:

- a. First, the issue of omissions was never briefed or discussed in the *Kvočka* case. In fact, the Appeals Chamber endorsed the Trial Chamber's decision that an accused could not be held liable for crimes committed after he left the detention camp.<sup>967</sup> If failure to act could constitute participation in a joint criminal enterprise, an accused who had failed to punish crimes against detainees while at the camp could be liable for crimes committed after he left the camp, based simply upon his omission to punish past crimes.
- b. Secondly, the Appeals Chamber decision that formed the predicate for the statement concerning omissions—that participation in a JCE need not be significant—was overruled by the Appeals Chamber in the *Brđanin* decision, which expressly held that such participation must be significant.<sup>968</sup>
- c. And thirdly, the indictment in the *Kvočka* case charged a different form of joint criminal enterprise than charged against General Ojdanić in this case. In *Kvočka*, only the second form of JCE—the “systemic” form (applicable to prison camps) was charged. This form of JCE, which is not alleged in General Ojdanić's case, has different elements than the first and third forms of JCE (basic and extended forms) applicable in our case. For example, there is no requirement of an agreement for the systemic form of JCE, since the “system” must itself be criminal.<sup>969</sup>

435. While in light of the *Brđanin* decision, it is not clear that even an accused in a systemic JCE could incur liability for omissions, there may be a valid reason for making a distinction between participating in a systemic JCE by omission and participation in a basic or extended JCE by omission. In the former, the accused, by necessity, has to play an integral role in the system which is criminal in and of itself and thus even a passive

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<sup>967</sup> *Kvočka* AJ, para.332-33.

<sup>968</sup> *Brđanin* AJ, para.430.

<sup>969</sup> *Kvočka* AJ, para.118-19; *Krnojelac* AJ, para.97.

role in such a system may attract liability. In the latter, the accused can be part of a legitimate system and it is his positive acts which must determine his contribution to the JCE. Failure to require positive acts could convert JCE liability into mere conspiracy liability—which the framers of the ICTY Statute specifically declined to adopt except for genocide.

436. The *Kvočka* language concerning omissions has not been applied to other subsequent JCE cases. In fact, in the *Babić* decision, involving a basic form of JCE, the Appeals Chamber characterised participation in a joint criminal enterprise as requiring that the accused “performs some acts that in some way are directed to the furtherance of the common design.”<sup>970</sup> Notably, no mention was made of “omissions.”

437. In the *Brđanin* judgement, the Trial Chamber held that to incur liability under joint criminal enterprise liability, an accused is “required to take action in contribution of the implementation of the common plan” and that the Prosecution “must at least establish that the accused took action in furtherance of the common plan.” The Trial Chamber contrasted these tests with “mere membership” in a criminal enterprise<sup>971</sup> and cited post-World War II authority holding that an accused must be the “cog in the wheel of events leading up to the result which in fact occurred.”<sup>972</sup> It is submitted that the entire approach of the Trial Chamber in *Brđanin*, was that it is not possible to participate in a joint criminal enterprise via an omission. More concisely, a cog in a wheel must at least turn.

438. Two Trial Chambers of the ICTR have also held that conspiracy—a close cousin of joint criminal enterprise—cannot be committed by omission.<sup>973</sup>

439. The expansion of joint criminal enterprise liability to those who participated by omission is, in the Defence’s submission, another serious and dangerous step in the

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<sup>970</sup> *Babić* AJ, para.38.

<sup>971</sup> *Brđanin* TJ, para.263.

<sup>972</sup> See *Brđanin* AJ, footnote 909 citing the view of the Judge Advocate in Trial of Feurstein and others, Proceedings of a War Crimes Trial held at Hamburg (4-24 August 1948), judgment of 24 August 1948.

<sup>973</sup> *Bizimungu* Decision, para.23; *Ndindiliyimana* para.14.

jurisprudence of international criminal law. The Defence has been vigilant in protesting against expansion of new theories which snare innocent people in the wide net of joint criminal enterprise.<sup>974</sup> Though easy to employ against yesterday's enemies, it may not be so easy to defend when turned around and used against tomorrow's friends. If General Ojdanić can be held liable for crimes in Kosovo by omission, it would not be so difficult for other Tribunals, or States with universal jurisdiction, to hold President Bush liable for crimes in Iraq and Afghanistan, President Olmert liable for crimes in Gaza, or President Putin liable for crimes in Chechnya on that same theory.

440. Therefore, this Trial Chamber is requested to hold that the element of significant participation in a joint criminal enterprise cannot be satisfied by an omission.

441. Should the Trial Chamber determine that an omission can form the basis of the *actus reus* of joint criminal enterprise liability, the Prosecution's case against General Ojdanić must fail in any event. No case has ever held that the mens rea for joint criminal enterprise can be based upon an omission. In fact, the Appeals Chamber and one ICTR Trial Chamber has required positive acts, such as presence at the scene, to infer an intention to promote the joint criminal enterprise or underlying crime.<sup>975</sup>

b) The duty to prevent or punish crimes cannot be the basis of Article 7(1) liability by omission

442. Where liability has been found based upon an omission, it has always been required that the accused have been under a legal duty to act. The Trial Chamber, itself, recognized this requirement in its Rule 98 *bis* decision, citing the judgements of the Appeals Chamber in *Blaskić* and *Galić*.<sup>976</sup>

<sup>974</sup> *General Dragoljub Ojdanić's Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise* (29 November 2002); *General Ojdanić's Preliminary Motion Challenging Jurisdiction: Indirect Co-perpetration* (7 October 2005).

<sup>975</sup> *Orić* AJ, para.43-45; *Blaskić* AJ, para.667; *Vasiljević* AJ, para.131; *Mpambara* TJ, para.24.

<sup>976</sup> Tr.12776-7; *Blaskić* AJ, para.668; *Galić* AJ, para.175.

443. This case presents the novel question of whether that duty can be the duty to prevent or punish crimes. The Prosecution has not pointed to any other operative duty that General Ojdanić is accused of failing to perform.
444. In *Blaskić*, the operative duty was the duty imposed by the Geneva Conventions to care for persons held as POWs.<sup>977</sup> It was not his duty to prevent and punish crimes as a superior.
445. The Appeals Chamber went on to hold that the distinction between Article 7(1) and Article 7(3) liability “may be seen, inter alia, in the degree of concrete influence of the superior over the crime in which his subordinates participate: if the superior’s intentional omission to prevent a crime takes place at a time when the crime has already become more concrete or currently occurs, his responsibility would also fall under Article 7(1) of the Statute.”<sup>978</sup>
446. In *Prosecutor v. Mpambara*, a Bourgmestre was charged with crimes under Article 6(1) of the ICTR Statute. The Prosecution did not allege that Mpambara was responsible under Article 6(3) of the ICTR Statute, yet argued that Mpambara was responsible under Article 6(1) for participating in a joint criminal enterprise by failing to prevent or punish crimes committed by others.<sup>979</sup> The case therefore offers vital guidance on the relationship between Article 7(3) and 7(1) of the ICTY Statute.
447. The Trial Chamber in *Mpambara* resoundingly rejected the Prosecution’s approach. It held that “liability for failing to discharge a duty to prevent or punish is a species of liability distinct from omissions which prove aiding and abetting or joint criminal enterprise.”<sup>980</sup> The Trial Chamber held that the “circumstances in which such a duty [to prevent or punish] has been recognized in international criminal law are limited

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<sup>977</sup> *Blaskić* AJ, para.668.

<sup>978</sup> *Blaskić* AJ, para.664; *Mrkšić* TJ, para.555.

<sup>979</sup> *Mpambara* TJ, para.7.

<sup>980</sup> *Mpambara* TJ, para.27.

indeed.”<sup>981</sup> The Trial Chamber stated that the duty to prevent or punish crimes arises in a “fundamentally different context” from joint criminal enterprise liability.<sup>982</sup>

448. The Trial Chamber concluded that the Prosecution’s argument “conflated” different modes of liability and failed to recognize the “important distinction” between a failure to prevent or punish the criminal conduct of others and participation in a joint criminal enterprise.<sup>983</sup> The Trial Chamber said that it emphatically rejected such approach: “failure to prevent or punish a crime cannot be characterised as a form of commission of that same crime.”<sup>984</sup> Mpambara was acquitted of all charges.

449. It is submitted that the approach the Trial Chamber took in *Mpambara* is supported by an aspect of the Appeals Chamber judgement in *Čelebici*. The Trial Chamber in that case had found that civilians had been detained in a camp in contravention of Articles 42 and 43 of Geneva IV. The Trial Chamber found that two of the accused did not, however, exercise superior responsibility over the camp in question. Neither did the Trial Chamber find the accused responsible of this count on the basis of Article 7(1). The Prosecution appealed this issue, arguing that the Trial Chamber had incorrectly considered that acquittal under Article 7(3) necessarily meant that the accused were not in a position to affect the continued detention of the civilians in the camp.

450. The Appeals Chamber in *Čelebici* did not agree with the Prosecution’s characterization of the Trial Chamber’s reasoning. Nonetheless, the Appeals Chamber addressed the substance of the Prosecution’s appeal, and the approach of the Appeals Chamber to the question of whether Article 7(3) could form a basis for responsibility under 7(1) is binding:

“Such a legal interpretation is clearly incorrect, as it entwines two types of liability, liability under Article 7(1) and liability under Article 7(3). As emphasized by the Secretary General’s report [submitted at the establishment of the Tribunal], the two

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<sup>981</sup> *Mpambara* TJ, para.26.

<sup>982</sup> *Mpambara* TJ, para.25.

<sup>983</sup> *Mpambara* TJ, para.37.

<sup>984</sup> *Mpambara* TJ, para.39.

liabilities are different in nature. Liability under Article 7(1) applies to direct perpetrators and to accomplices. Article 7(3) applies to persons exercising command or superior responsibility. As has already been acknowledged by the Appeals Chamber in another context, these principles are quite separate and neither is dependent in law upon the other.”<sup>985</sup>

451. Further (albeit limited) authority distinguishing superior responsibility from responsibility under Article 7(1) is offered by the Appeals Chamber judgment in *Ntagerura et al.* This case involved, among others, the former Prefet of Cyangugu Prefecture. The Trial Chamber acquitted the accused on all counts under both Article 6(1) and 6(3) liability. Joint criminal enterprise liability was not considered. The Prosecution appealed, arguing that Prefet Bagambiki was criminally responsible under Article 6(1) of the ICTR Statute because he had failed to prevent or to punish the perpetrators of killings and acts of violence.<sup>986</sup> The Prosecution appeal failed for a number of reasons, including a failure to set out which possibilities were open to the accused to fulfil any alleged duty to prevent or punish crimes.<sup>987</sup>

452. Academic comment also notes the fundamental distinction between Article 7(1) and Article 7(3). Ambos, following a comprehensive review of the nature of superior responsibility and joint criminal enterprise liability, concludes:

“As the analysis of JCE and command responsibility shows, the two doctrines differ fundamentally in their conceptual structure. The most striking difference is possibly that JCE requires a positive act or contribution to the enterprise while for command responsibility an omission suffices. From this perspective the doctrines are mutually exclusive: a person either contributes to a criminal result by a positive act or omits to prevent a criminal result from happening. Both at the same time seem to be logically impossible.”<sup>988</sup>

453. This commentary supports the view that participation in a JCE cannot be by omission, and the view that omissions under Article 7(1) must be based upon duties other than a superior’s duty to prevent or punish crimes. Absent such a distinction, Article 7(1) and 7(3) would be redundant in the case of a superior who fails to prevent or punish crimes of his subordinates. If such a redundancy exists, liability under Article

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<sup>985</sup> *Čelebici* AJ, para.338.

<sup>986</sup> *Ntagerura* AJ, para.331.

<sup>987</sup> *Ntagerura* AJ, para.335.

<sup>988</sup> Ambos, p.179-180.

7(1) could not be found, as the duty to prevent or punish crimes under Article 7(3) of the Statute constitutes *lex specialis* and therefore displaces any the general methods of participation under Article 7(1).

## 2. Superior Responsibility

### a) General Ojdanić did not have effective control over Serbian Ministry of Interior Police

454. The Trial Chamber has heard evidence of crimes in Kosovo committed by members of the Serbian Ministry of Interior police (“MUP”). Because General Ojdanić did not have effective control over the MUP, he cannot be held responsible under Article 7(3) for these crimes.

455. The first requirement for Article 7(3) responsibility is that the accused had “effective control” over the perpetrators of the crimes.<sup>989</sup> Effective control may be exercised by persons having either *de jure* or *de facto* authority. There has been no evidence led in this case from which it can be inferred that General Ojdanić had *de facto* authority over the MUP.

456. It is also undisputed that General Ojdanić, as Chief of the General Staff of the Army, did not have *de jure* authority over the police force of the Ministry of Interior of the Republic of Serbia in peacetime. However, the issue of his *de jure* authority over the MUP during the war must begin with an interpretation of Article 17 of the Law on Defence, which provides as follows:

“In case of an imminent threat of war, a state of war or a state of emergency, units and organs of Internal Affairs can be used to carry out combat assignments, i.e., engage in combat or offer armed resistance. In carrying out their combat assignments, these units and organs shall be subordinate to the officer of the Armed Forces of Yugoslavia who is commanding combat operations.”<sup>990</sup>

457. General Ojdanić contends that this law did not give him *de jure* authority over the MUP. The law simply provided for limited supervision of MUP units during combat

<sup>989</sup> Čelebici AJ, para.197; Hadžihasanović AJ, para.20.

<sup>990</sup> Exh.P985.

operations by the Army commander on the ground. On 8 April 1999 the General Staff requested an interpretation of Article 17 of the Law on Defence from the Ministry of Justice.<sup>991</sup> The advice received was that while the law was unclear, given the significance of the matter subordination of internal affairs to the VJ officer commanding combat operations could occur (on an operational level) by a decision issued by the Chief of Yugoslav Army General Staff, or an officer of the Yugoslav Army authorised by him.<sup>992</sup>

458. On 12 April 1999 General Ojdanić issued a supplement to his Directive of 9 April 1999, providing that,

“Forces of the MUP and civilian defence shall be placed under the Command of the 3rd Army during the operation and they shall be used exclusively by your decision.”<sup>993</sup>

459. On 18 April 1999, President Milošević issued another order that pursuant to Article 17 of the Law on Defence, units and organs of the MUP were to be re-subordinated to the VJ officer “planning, organizing and commanding combat operations.”<sup>994</sup> General Ojdanić then issued an order on 19 April 1999 re-subordinating “internal affairs units and organs” to General Pavković in his zones of responsibility.<sup>995</sup>

460. Any purported *de jure* subordination at an operational level for combat operations did not entail subordination of the MUP to the VJ at the level of the General Staff.<sup>996</sup> For example, the Law on Defence did not subject MUP personnel to the military justice system for crimes committed in combat, nor did it provide for disciplinary authority to the Army for other misbehaviour by MUP members. Those matters remained firmly and unequivocally the responsibility of the Serbian Minister of Interior.<sup>997</sup>

461. However, even if the language of Article 17 is held to have conferred *de jure* authority upon General Ojdanić, the evidence is overwhelming that the law was not

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<sup>991</sup> Exh.3D1086.

<sup>992</sup> Exh.3D1087, p.3- 4.

<sup>993</sup> Exh.P1483, p.2.

<sup>994</sup> Exh.3D670.

<sup>995</sup> Exh.P1460.

<sup>996</sup> Exh.P2600, para.46.

<sup>997</sup> Exh.3D1116, p.118-119.

respected and the operation of Article 17 never conferred such authority on General Ojdanić. As the Appeals Chamber has recognized, “de jure power is not synonymous with effective control. In fact, the former may not in itself amount to the latter.”<sup>998</sup> The Appeals Chamber has also rejected any presumption that *de jure* authority entails effective control.<sup>999</sup> In this case, multiple attempts were made to enforce Article 17, to no avail.

462. Testimony of the Prosecution’s own witnesses demonstrated that the subordination of MUP never took place:

- a. Prosecution witness Ljubinko Cvetić was head of the MUP for Kosovo Mitrovica and was in Kosovo until 16 April 1999. His evidence was that the units and bodies of the Ministry of the Interior were not subordinated to the VJ during this time.<sup>1000</sup>
- b. Prosecution witness General Vasiljević testified that the MUP was never subordinated to the VJ.<sup>1001</sup> The first problem was that the Minister of the Interior did not pass on the above orders relating to re-subordination.<sup>1002</sup> Vasiljević’s evidence was that he informed General Ojdanić about this, who further informed President Milošević. Milošević told Ojdanić “that the MUP would be confronted about this, but that in any event, he should not to be too concerned as the subordination order had not been issued as a result of problems in cooperation between the MUP and the Army in Kosovo but, rather, because of problems with the MUP in Montenegro.”<sup>1003</sup> Even as late as 16 May 1999, during a meeting between Pavković, Ojdanić and others, there was reference to the fact that re-subordination had never been effected.<sup>1004</sup>

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<sup>998</sup> *Halilović* AJ, para.85.

<sup>999</sup> *Orić* AJ, para.91-2; *Hadžihasanović* AJ, para.21.

<sup>1000</sup> Tr.8140.

<sup>1001</sup> Exh.P2600, para.45.

<sup>1002</sup> Exh.P2589, p.15993.

<sup>1003</sup> Exh.P2600, para 45.

<sup>1004</sup> Tr.8723.

463. The Trial Chamber's own witness, Milan Djaković, had this to say about the reaction of MUP General Djordjevic when presented with the resubordination order:

“Well, the reaction of General Djordjevic, well, I have to say exactly what happened. He said, what do you mean, Ojdanić? Who is he going to command? Those were his words. We were all taken a bit by surprise, and practically they, the members of the MUP, still did not accept that the army would command practically in the entire zone or in the area of Kosovo. In a way, they remained on the basis of coordination as before, or someone – or everyone carried out their own activities independently in a way.”<sup>1005</sup>

464. In addition a large number of defence witnesses gave evidence demonstrating that Article 17 was never implemented:

- a. General Simić testified that the war planning map at the Operations Room of the VJ command post did not include details of the location of MUP units.<sup>1006</sup>
- b. Colonel Ivković testified that no reports from the MUP were ever received at the Supreme Command Staff.<sup>1007</sup>
- c. General Gajić testified that General Ojdanić sent a copy of the Geneva Conventions to the MUP “for information” rather than as an order, which he said demonstrated that the MUP was not subordinated to the VJ.<sup>1008</sup>
- d. General Ćurčin testified that Stojilkovic, the Minister of the Interior, was not part of the VJ Chain of Command and it was impossible for General Ojdanić to command the MUP via such a route.<sup>1009</sup>
- e. General Kosovac, Deputy Chief of the Recruitment and Conscription Department of the General Staff, testified that not a single unit of the MUP was ever part of the establishment of the VJ either in theory or practice. Kosovac explained that

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<sup>1005</sup> Tr.26495-96.

<sup>1006</sup> Tr.15591.

<sup>1007</sup> Tr.16533.

<sup>1008</sup> Exh.3D1084, para.162; Exh.P1944.

<sup>1009</sup> Exh.3D670; Tr.16985.

the VJ and the MUP had entirely different command systems, recruitment systems, purposes, goals, and logistics methods.<sup>1010</sup>

- f. General Pantelić worked in the Logistics Sector of the General Staff. He testified that the MUP was never subordinated to the VJ General Staff and that the MUP never featured in VJ logistics plans “in any shape or form”.<sup>1011</sup>
- g. Colonel Vlajković, General Ojdanić’s Chief of Office, testified that he did not know of any institutional contact between General Ojdanić and the MUP. His office neither sent nor received any kind of report or order to or from the MUP.<sup>1012</sup>
- h. General Lazarević testified about the relationship between the VJ and the MUP: “throughout the war it was always coordination and no – not re-subordination.”<sup>1013</sup>
- i. General Radinović’s expert evidence was that General Ojdanić did not have either formal or actual control competence over the forces of the MUP.<sup>1014</sup>

465. Contemporaneous documentary evidence also demonstrates that the MUP was not subordinated to the General Staff. A Report dated 29 May 1999 submitted to General Ojdanić following an inspection conducted of the Priština Corps Command and other units said:

“There is no single command over all the forces in the zone of responsibility. All contacts with the units of the MUP/ Ministry of the Interior/ are established by agreement, which is often disobeyed, especially at the lower levels.”<sup>1015</sup>

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<sup>1010</sup> Tr.15816.

<sup>1011</sup> Exh.3D1113, para.29.

<sup>1012</sup> Exh.3D1112, para.25.

<sup>1013</sup> Tr.18177.

<sup>1014</sup> Exh.3D1116, p.118-19.

<sup>1015</sup> Exh.3D692, para.11.

466. A document sent from the 3<sup>rd</sup> Army to the Priština Corps as late as 3 June 1999 demonstrates that the MUP had not yet been subordinated: it is included as a task to be completed.<sup>1016</sup>
467. These facts demonstrate that General Ojdanić never had the ability or authority to prevent or punish MUP crimes. As the Appeals Chamber has stated:
- “In determining questions of responsibility, it is necessary to look to effective exercise of power or control and not to formal titles...In general, the possession of de jure power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power prima facie results in effective control unless proof to the contrary is produced.”<sup>1017</sup>
468. Even when a superior is found to have de jure authority over his subordinates, the Prosecution still has to prove beyond reasonable doubt that this superior exercised effective control over his subordinates, unless the accused does not challenge having exercised such control.<sup>1018</sup> In this case, General Ojdanić absolutely makes that challenge.
469. The facts of the recent Appeals Chamber judgement in the *Hadžihasanović* case are strikingly similar to those in General Ojdanić’s case. There, the Prosecution alleged that the accused had effective control over an “El Mujahedin detachment” which conducted joint operations with the 3<sup>rd</sup> Corps of the Bosnian Army, of which General Hadžihasanović was Chief of Staff.
470. As in this case, at least three orders were issued re-subordinating the El Mujahedin detachment to the 3<sup>rd</sup> Corps. However, the Appeals Chamber held that such orders did not establish that re-subordination had in fact occurred.<sup>1019</sup>

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<sup>1016</sup> Exh.3D700, p.3, item6.

<sup>1017</sup> *Čelebici* AJ, para.197.

<sup>1018</sup> *Hadžihasanović* AJ, para.21.

<sup>1019</sup> *Hadžihasanović* AJ, para.199-200.

471. As in this case, the El Mujahedin detachment conducted joint operations with the Bosnian Army. The Appeals Chamber held that such cooperation did not equate with control.<sup>1020</sup>

472. As in this case, the Bosnian Army derived some benefit from the actions of the El Mujahedin. However, the Appeals Chamber held that “even if Hadžihasanović benefited militarily from the El Mujahedin detachment, his responsibility as a superior under Article 7(3) of the Statute would be eventually triggered only upon a showing that the members of the El Mujahedin detachment were his subordinates.”<sup>1021</sup>

473. When considering all of these factors, the Appeals Chamber found that no reasonable trier of fact could have concluded that it was established beyond reasonable doubt that Hadžihasanović had effective control over the El Mujahedin detachment.<sup>1022</sup> The same conclusion is compelled when analyzing the relationship between General Ojdanić and the MUP.

474. Similarly, a comparison with the *Blaskić* case also supports the conclusion that General Ojdanić can not be held to have had effective control over the MUP.

475. In *Blaskić*, both the Trial Chamber and Appeals Chamber found that the accused, a military commander, had *de jure* authority over the Military Police, whose members had committed crimes in Ahmici.<sup>1023</sup> However, the evidence also showed that the Military Police had not, in fact, obeyed Blaskić’s authority.<sup>1024</sup> The Appeals Chamber held that the accused lacked effective control over the military units responsible for the commission of crimes, even when they were nominally attached to his command.<sup>1025</sup> The same situation existed with respect to General Ojdanić and the Serbian MUP.

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<sup>1020</sup> *Hadžihasanović* AJ, para.209-10.

<sup>1021</sup> *Hadžihasanović* AJ, para.213.

<sup>1022</sup> *Hadžihasanović* AJ, para.231.

<sup>1023</sup> *Blaskić* AJ, para.381.

<sup>1024</sup> *Blaskić* AJ, para.399.

<sup>1025</sup> *Blaskić* AJ, para.431,610.

476. Finally, the principle that *de jure* authority alone may not lead to the imposition of command responsibility was firmly established by the Appeals Chamber in the *Blagojević* case, where it affirmed the Trial Chamber's finding that although Blagojević had *de jure* authority over Momir Nikolić, who was assigned to his brigade, he lacked effective control over his crimes.<sup>1026</sup> Therefore, even if the Trial Chamber were to find that General Ojdanić had *de jure* authority over the MUP, there is no evidence upon which it could be found that he had effective control over their crimes.

477. For all of the above reasons, the Trial Chamber should conclude that General Ojdanić cannot be held responsible under Article 7(3) for crimes committed by the Serbian MUP.

478. In addition, the Prosecution has failed to sufficiently identify the perpetrators of the crimes in Kosovo as persons who were subordinates of General Ojdanić. This same failure recently led to the reversal of the convictions of Nasser Orić by the Appeals Chamber. Where the perpetrators cannot be said to have been subordinates of the accused, liability under Article 7(3) is not established.<sup>1027</sup> Therefore, General Ojdanić cannot be held responsible under Article 7(3) for crimes committed by unknown or insufficiently identified perpetrators.

b) General Ojdanić cannot be liable for a subordinate's failure to prevent or punish

479. To the extent that crimes were committed by members of the Yugoslavian Army, the perpetrators were soldiers (Level One) who belonged to a company, and were responsible to the company commander (Level Two). The company commander was responsible to the commander of the battalion (Level Three). The battalion commander was responsible to the commander of the brigade (Level Four). The brigade commander was responsible for the commander of the corps (Level Five) The corps commander was responsible to the commander of the Army. (Level Six). The Army commander was

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<sup>1026</sup> *Blagojević* AJ, para.302.

<sup>1027</sup> *Orić* AJ, para.35.

responsible to the Chief of the General Staff (Level Seven), who was himself responsible to the Supreme Commander (Level Eight).

480. The Prosecution's case can be illustrated by the following syllogism: if B has effective control over A, and C has effective control over B, and D has effective control over C, and E has effective control over D, and F has effective control over E, and G has effective control over F, then G must also have effective control over A.

481. The proper application of this principle clearly depends on the strength of each link of effective control, and for each link the chamber must determine whether, on the facts of the case, each superior in the chain actually possessed real powers of control over the relevant subordinate. Only where such powers exist at every level at the relevant time can the accused be said to exercise effective control over subordinates, through, for example, his material ability to issue orders to his immediate subordinates that those subordinates will heed and have the material ability to implement.<sup>1028</sup>

482. Therefore, in order to find that General Ojdanić had effective control over the perpetrator, the Trial Chamber must be convinced that every link in this chain was intact during the time that the crimes were committed. Given the concealment of these crimes from hierarchical superiors, as evidenced by the failure to include them in the combat reports, the Prosecution has failed in its burden to prove effective control of G (General Ojdanić) over A (the perpetrator).

483. The Prosecution has also sought to hold General Ojdanić liable on a theory of "double Article 7(3)" liability. Under this theory, it contends that General Ojdanić can be liable for the failure of General Pavković to prevent and punish crimes.<sup>1029</sup>

484. This theory is contrary to the plain language of Article 7(3) itself, which provides that:

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<sup>1028</sup> Boas, Bischoff, & Reid, p.251; *Kajelijeli* AJ, para.86; *Kordić* AJ, para.897.

<sup>1029</sup> Tr.12636.

“The fact that any of the acts referred to in articles 2 to 5 of the present Statute was **committed** by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”<sup>1030</sup>

485. In a Pre-Trial decision in the *Hadžihasanović* case, the Trial Chamber held “Article 7(3) is clear in its wording and intent” and rejected an interpretation of that Article that would have allowed an accused to be liable for failing to prevent or punish the “planning,” rather than the “commission” of an offence.<sup>1031</sup>

486. However, in the *Blagojević* case, the Appeals Chamber held that the term “committed” in Article 7(3) should be given its broad meaning and interpreted it to include the other forms of liability in Article 7(1), including “aiding and abetting.”<sup>1032</sup>

487. The Appeals Chamber in *Orić* reiterated that position.<sup>1033</sup> While it can now be said that the term “committed” applies to subordinates who plan, instigate, order, or otherwise aid and abet a crime, no court has expanded the term to also include a subordinate who failed to prevent or punish a crime.

488. In their book on forms of liability, three former ICTY legal officers have observed that an accused cannot be held liable for failure to punish a subordinate’s failure to prevent or punish.<sup>1034</sup> In *Orić*, the Appeals Chamber specifically pointed out that “the Trial Chamber, in its legal findings, did not consider whether a superior could possibly be held responsible under Article 7(3) in relation to his subordinate’s criminal responsibility under the same article.”<sup>1035</sup>

489. Therefore, as a matter of law, the Trial Chamber must repel the Prosecution’s efforts to impose “double Article 7(3) liability” on General Ojdanić.

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<sup>1030</sup> Statute, Article 7(3). (emphasis added)

<sup>1031</sup> *Prosecutor v Hadžihasanović et al*, No. IT-01-47-PT, *Decision on Joint Challenge to Jurisdiction* (12 November 2002) at para.209.

<sup>1032</sup> *Blagojević* AJ, para.282.

<sup>1033</sup> *Orić* AJ, para.21.

<sup>1034</sup> Boas, Bischoff, & Reid, p.248.

<sup>1035</sup> *Orić* AJ, para.39.

c) General Ojdanić's knowledge of crimes must be evaluated considering the place, time and nature of the crime which was committed

490. The evidence has shown that the vast majority of the crimes charged in the indictment were committed by persons who were not active members of the VJ, and that any crimes committed by VJ members were by persons at least six levels on the chain of command below General Ojdanić and hundreds of kilometres away from him. Nevertheless, if the Trial Chamber concludes that some of the crimes alleged in the indictment were committed by persons over whom General Ojdanić had “effective control,” it must go on to consider the second element of superior responsibility—“knowledge.”

491. In order to satisfy the knowledge requirement of Article 7(3), the Prosecution must prove beyond a reasonable doubt that General Ojdanić had actual knowledge that his subordinates were committing or about to commit crimes within the jurisdiction of the Tribunal or that he had in his possession information sufficiently alarming to justify the need for additional investigation in order to determine whether such crimes had been or were about to be committed by his subordinates.<sup>1036</sup>

492. The Appeals Chamber in *Orić* has emphasised that it is not enough to know that crimes are occurring in an area, the Prosecution must prove beyond a reasonable doubt that the crimes were committed by his subordinates.<sup>1037</sup> General Ojdanić never had such knowledge.

493. For the accused to be deemed to have “reason to know” of subordinate crimes on the basis that his subordinates committed crimes in the past, the crimes that he is charged with failing to prevent or punish must be of similar nature to those past crimes and there must be a specific reason to expect that crimes will be committed again.<sup>1038</sup> In *Strugar* the Trial Chamber rejected the proposition that because a group of subordinates had committed crimes in the past a superior necessarily knows that they will commit crimes

<sup>1036</sup> *Hadžihasanović* AJ, para.28.

<sup>1037</sup> *Orić* AJ, para.59.

<sup>1038</sup> *Hadžihasanović* TJ, para.156,159,164; *Orić* TJ, para.323.

in the future. It was for this reason that the accused was only found to have the requisite knowledge from 0700 on 6 December 1991 that a subordinate would shell civilian areas of Dubrovnik, despite a finding that similar attacks had been committed by forces under his command in October and November 1991.<sup>1039</sup> Further, it is clear that any alleged crimes must have been committed by the same identifiable group of subordinates and not, for example, by subordinates belonging to some other battalion or brigade also under the accused's effective control.<sup>1040</sup> While it has alleged "disproportionate use of force" in 1998 (before General Ojdanić became Chief of Staff), the Prosecution has completely failed to establish that the types of crimes alleged in the indictment had been committed before 1999, or that an identifiable group of subordinates had committed any crimes in 1998.

494. The more remote the accused is from the perpetrator, both geographically and within the chain of command, the less likely he is to have actual or imputed knowledge of the crime. Hence, the Trial Chamber in the *Halilović* case observed that "the more distant the superior was from the scene of the crimes, the more evidence which may be necessary to prove that he had actual knowledge of them."<sup>1041</sup>

495. The failure to punish and the failure to prevent also involve different crimes committed at different times: the failure to punish concerns past crimes committed by subordinates; whereas the failure to prevent concerns future crimes by subordinates. They represent two distinct legal obligations.<sup>1042</sup>

496. The failure to prevent and the failure to punish are not only legally distinct, but are factually distinct in terms of the type of knowledge that is involved for each basis of superior responsibility. Knowledge of a crime after the fact does not give rise to liability for failure to prevent that crime, but may give rise to a duty to punish it.<sup>1043</sup>

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<sup>1039</sup> *Strugar* TJ, para.415-9,446.

<sup>1040</sup> *Hadžihasanović* TJ, para.116,169; Boas, Bischoff, & Reid, p.220.

<sup>1041</sup> *Halilović* TJ, para.66; *Aleksovski* TJ, para.80.

<sup>1042</sup> *Hadžihasanović* AJ, para.259.

<sup>1043</sup> *Hadžihasanović* AJ, para.260.

497. Therefore, the Trial Chamber must look closely at **when** General Ojdanić acquired knowledge of the crimes alleged in the indictment.

498. All of the crimes alleged in the indictment occurred before early May, 1999, with the exception of those committed in late May 1999 in Kačanik municipality.<sup>1044</sup> A review of the combat reports and other information available to General Ojdanić shows that none of the crimes alleged in the indictment were ever reported to General Ojdanić. Therefore, he never had actual knowledge of those crimes.

499. With respect to information on crimes in general, as discussed above, it is the Defence submission that until 13 May 1999, there was no information available to General Ojdanić that gave him knowledge of crimes being committed by VJ members in Kosovo or would have provided a reason for him to avail himself of further knowledge. General Ćurčin testified that “the 3<sup>rd</sup> Army Command never reported in a security report on incidents involving the alleged persecution of the Albanian civilian population, deportation, ethnic cleansing, large-scale looting, torching and organized destruction of property or the excessive use of force.”<sup>1045</sup>

500. Therefore, General Ojdanić cannot be found to have had sufficient actual or “imputed” knowledge of crimes committed before that time to be liable for failing to prevent them.

501. As for crimes committed after General Ojdanić acquired general knowledge of killings in Kosovo, the evidence shows that he took more than reasonable and necessary steps to prevent them—going all the way up the chain of command to President Milošević. With respect to the duty to punish, the evidence likewise shows that General Ojdanić took reasonable and necessary steps through the military justice system to punish those subordinates who had committed crimes in Kosovo.

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<sup>1044</sup> Paragraph 72(k)(iv), Paragraph 75 (j), (k)(iii) and (iv). No conviction can be entered as a result of the allegations in paragraph 75(j) relating to Dubrava Prison. *Decision on Application of Rule 73 bis* (11 July 2006).

<sup>1045</sup> Exh.3D1121, para.22.

502. The Trial Chamber must also look closely at **what** crimes General Ojdanić acquired knowledge of.

503. It is important to distinguish between knowledge of the deportation/forcible transfer charged in Counts 1 and 2 and knowledge of the killings charged in Counts 3 and 4. With respect to the deportation and forcible transfers, the evidence shows that while General Ojdanić was aware of the movement of the population from Kosovo, he had no knowledge that this was the result of crimes being committed by VJ soldiers. In fact, the evidence is that he was informed and believed that the movement of the population was the result of NATO bombing and the KLA's intentional efforts to provoke the international community into action by creating a humanitarian crisis.<sup>1046</sup>

504. A superior has a duty to make inquiries when sufficiently alarming information about criminal conduct of his subordinates comes to his attention. General Ojdanić fulfilled this duty whenever he received information about possible crimes. A classic example of this involves the January, 1999 incident at Račak. After Ambassador Walker held his famous press conference in Račak, General Ojdanić ordered an investigation into the involvement of the Army in that incident.<sup>1047</sup> It was reported to him that the Army had no involvement in the deaths at Račak.<sup>1048</sup>

505. Therefore, an examination of the knowledge requirement for Article 7(3) liability shows that General Ojdanić lacked the requisite knowledge of the crimes charged in the indictment.

d) General Ojdanić fulfilled his duty to take necessary and reasonable measures to prevent or punish crimes in Kosovo

506. Should the Trial Chamber conclude that crimes were committed in Kosovo by persons over whom General Ojdanić had "effective control," and that General Ojdanić had "knowledge" of the commission of those crimes, the Trial Chamber must go on to

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<sup>1046</sup> See, for example, the Collegium discussion of 9 April 1999 (Exh.P929) discussed above at para.263(j).

<sup>1047</sup> Exh.P939, p.31.

<sup>1048</sup> Exh.3D559, p.21.

consider whether the Prosecution has proven beyond a reasonable doubt that General Ojdanić failed to take reasonable and necessary measures to prevent and punish those crimes.

(1) A Case for Deference

507. General Ojdanić contends that the Trial Chamber's evaluation of the measures he took to prevent or punish crimes should not be an exercise in second-guessing or microscoping. Instead, the Trial Chamber should accord significant deference to the judgement exercised by General Ojdanić during wartime conditions.

508. The United States Supreme Court has recognized a doctrine of judicial deference to decisions of military commanders for many years. In *Gilligan*, the court stated:

“[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.”<sup>1049</sup>

509. This principle has been followed in many decisions of the United States Supreme Court in areas such as involuntary drafting of conscripts, free speech rights of soldiers, homosexuality in the Army, and military justice procedures.<sup>1050</sup>

510. If a commander is given such deference by the judiciary when deciding such issues, even in peacetime, surely he is entitled to the same or greater deference when his wartime decisions concerning preventing or punishing crimes are analyzed by this Tribunal. It is easy for the judges of the Trial Chamber, sitting in their comfortable, air-conditioned courtroom in The Netherlands to imagine many things that could have been done better. But General Ojdanić was in a bunker below the ground, occupied 24/7 with protecting the lives of his soldiers and countrymen from 23,614 bombs which were dropped on Yugoslavia by NATO during that period.

511. The Trial Chamber itself benefits from great deference to its own factual decisions, carefully drafted with the help of its professional staff, in the calm of its

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<sup>1049</sup> *Gilligan* p.11.

<sup>1050</sup> *Parker* p.743-44; *Rostker* p.66-68; *Goldman* p.507-08.

private chambers. The Appeals Chamber, when evaluating those decisions, does not engage in second-guessing, but provides a deferential standard of review to those decisions, recognizing that those “on the ground” are entitled to have their judgements respected, unless no reasonable person could have come to the same conclusion.<sup>1051</sup>

512. There is no reason not to employ a similar deference to the decisions of military commanders.

513. Such deference was given to German World War II commanders during the Nuremberg prosecutions—proceedings considered less imbued with rights for the accused than those conducted at this Tribunal. In the *Hostage Case*, the Court was called upon to judge a military commander who had engaged in scorched-earth tactics which involved devastation of an area approximately the size of Denmark and which left, according to the indictment, some 61,000 civilians starving and without shelter at the onset of winter in Scandinavia. Nevertheless, the Court held that:

“There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal ...

We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time...the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act.”<sup>1052</sup>

514. This same deference was also given to NATO when the Office of the Prosecutor conducted a review to determine if an investigation should be conducted into NATO crimes committed in Kosovo. In the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, it was noted that opinions may differ on the reasonableness of some of the acts committed by NATO, but that deference must be given to the military decisions.<sup>1053</sup>

<sup>1051</sup> *Hadžihasanović* AJ, para.10-12.

<sup>1052</sup> *Wilhelm* p.68-69.

<sup>1053</sup> ICTY Final Report, para.50.

Its conclusion was that although some of the decisions were “debatable,” not even the opening of an investigation was warranted.

515. The stakes for General Ojdanić are much higher. He is facing a significant prison term for decisions he made under the most difficult of circumstances. Therefore, when evaluating the efforts he made to prevent and punish crimes, it is respectfully suggested that the Trial Chamber must do so with the same measure of deference given to American military commanders by their own courts, Nazi military commanders by the Allied courts, and NATO military commanders by the Office of the Prosecutor.

(2) The Duties of a Top Commander to Prevent and Punish

516. The trial record is replete with evidence of efforts General Ojdanić made before, during, and after the war in Kosovo to prevent and punish crimes.

517. For example, he took measures for (1) the training seminar on international and humanitarian law in 1998;<sup>1054</sup> (2) the most salient provisions of the international laws of war being provided to every soldier;<sup>1055</sup> (3) good faith orders in regards to VJ reporting;<sup>1056</sup> (4) orders further ensuring compliance with International Humanitarian Law;<sup>1057</sup> and (5) between March and the end of May 1999, teams of the GS VJ, and during the state of war, the SVK, carried out a total of seven (7) team tours and inspections of the subordinate units and installations of the VJ.<sup>1058</sup>

518. Furthermore, upon learning of problems in Kosovo, he took specific steps to combat problem areas within the VJ. For instance, due to insufficient reporting, General

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<sup>1054</sup> Exh.3D1121, para.31.

<sup>1055</sup> Tr.16647-8. Exh.3D988.

<sup>1056</sup> *The need for accurate and verified reports* (Exh.P1469 – 25 March 1999); *The need for interim combat reports* (Exh.4D200 – 11 April 1999); *The requirement to report all important developments in the zone of responsibility* (Exh.P1744 – 15 April 1999); *Reports containing extraordinary events must be accompanied by commander’s signature* (Exh.P1914 – 2 May 1999).

<sup>1057</sup> *Treat captured enemy combatants humanely and according to accepted norms* (Exh.P1475 – 2 April 1999); *Stipulations of IHL to be fully implemented* (Exh.P1486 – 16 April 1999); *delivery of rules of conduct to combatants, as well as IHL handbook to commanders in the PrK* (Exh.3D488 – 19 April 1999); *mobilization of military courts with reminder to obey IHL* (Exh.P1941 – 30 May 1999). See also, 3D1116, p.153-7.

<sup>1058</sup> Exh.3D1116, p.156.

Farkaš was sent by the Chief of the General Staff to Kosovo in early May to find out where there were problems, and to remedy said problems.<sup>1059</sup> When General Ojdanić received the Louise Arbour letter on 2 May 1999, Vljaković testified that he immediately reacted and ordered the strategic groups to be prepared in relation to the request of the Prosecutor.<sup>1060</sup>

519. In regards to the military judicial system, General Ojdanić noted the slow progress and encouraged steps be taken to remedy problems in the resolution of criminal cases.<sup>1061</sup> When General Ojdanić was informed of the indications of widespread crimes in KiM on 13 May 1999 by Generals Farkaš and Vasiljević, he reacted immediately by: (1) informing his superior, Mr. Milošević about what he had just learned;<sup>1062</sup> (2) calling Pavković to Belgrade to report in person;<sup>1063</sup> (3) suggesting a mixed joint state commission to establish what was going on in KiM;<sup>1064</sup> and (4) ordering Farkaš to form an inspection team to visit Kosovo.<sup>1065</sup>

520. The issue before the Trial Chamber on this prong of Article 7(3), then, is whether the Prosecution has proven beyond a reasonable doubt that General Ojdanić's efforts did not meet the threshold of "necessary and reasonable" measures.

521. The Appeals Chamber has held that "necessary" measures are the measures appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent or punish) and "reasonable" measures are those reasonably falling within the material powers of the superior. What constitutes "necessary and reasonable" measures to fulfil a commander's duty is not a matter of substantive law but of evidence.<sup>1066</sup>

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<sup>1059</sup> Tr.16292.

<sup>1060</sup> Exh.3D1112, para.15.

<sup>1061</sup> Exh.3D723, p.4; Exh.3D598, p.4, #7; Exh.3D600, p.5, para.6.

<sup>1062</sup> Tr.8748.

<sup>1063</sup> Tr.8748.

<sup>1064</sup> Tr.8783.

<sup>1065</sup> Tr.16300.

<sup>1066</sup> *Halilović* AJ, para.63; *Orić* AJ, para.177.

522. The nature of the measures required of a superior depends, in part, on the proximity of the relationship between the superior and perpetrator. A superior witnessing criminal conduct is expected to act immediately to prevent and punish that conduct, while a superior at the top of a lengthy chain of command learning of crimes in his office through reports submitted up the chain of command has different responsibilities. What the duty to prevent entails in a particular case will depend on the superior's material ability to intervene in a specific situation.<sup>1067</sup>

523. This was seen in the *Hadžihasanović* case, where the Appeals Chamber held that a superior need not dispense punishment personally and may discharge his duty to punish by reporting the matter to the competent authorities. In that case, the reporting of the crimes to the municipal public prosecutor, in conjunction with the disciplinary sanctions imposed by the military discipline organs constituted necessary and reasonable measures to punish the perpetrators.<sup>1068</sup>

524. In the *Boškoski* case, the Trial Chamber held that where reports were made to the appropriate authorities, the failure of those authorities to conduct a serious investigation could not be attributed to the accused (a government minister). He had discharged his duty to punish by having the matter reported to the competent authorities. Therefore, he could not be held criminally responsible pursuant to Article 7(3).<sup>1069</sup>

525. International law permits commanders to delegate tasks and duties to others in relation to their general obligation to prevent and punish crimes of subordinates. Commanders are, therefore, not required to personally involve themselves in the process of preventing the commission of a criminal offence by subordinates - neither are they expected to investigate allegations of crimes themselves; nor are they expected to keep informed of all steps and measures taken in that preventative or investigatory process.<sup>1070</sup>

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<sup>1067</sup> *Halilović* AJ, para.63, fn.163.

<sup>1068</sup> *Hadžihasanović* AJ, para.154.

<sup>1069</sup> *Boškoski* TJ, para.536

<sup>1070</sup> See *e.g.* Commentary to Article 87, Additional Protocol I to the Geneva Conventions, para.3563, where it is noted that, although the commander has certain duties under the laws of war, "this does not mean that he must do everything himself".

526. Where the task and responsibility of preventing or investigating allegations of crimes has been distributed or allocated further down the chain of command, that delegation may suffice to discharge the general duty of a commander to prevent and punish crimes of subordinates. In such a situation, unless the commander has information suggesting that the investigative (or preventive) structure that is in place is malfunctioning, he would be entitled to assume that the mechanism put in place is capable of preventing or punishing those crimes. Only where he becomes aware of grave malfunctioning in the chain of command would he be required to intervene.<sup>1071</sup>
527. Likewise, at General Ojdanić's level, where a military justice system existed and was in place, it would have been unreasonable, and indeed illegal, for him to have intervened in any specific case to insist that the suspected perpetrator be punished. Instead, his particular competence was to take steps to insure that the military justice system had the resources and authority to do its work. Indeed, the concern shown and steps taken by General Ojdanić to upgrade the military justice system in the midst of the NATO bombing and Kosovo war was nothing short of remarkable.
528. In the Tokyo War Crimes trials, it was established that a senior commander cannot be expected to be intimately familiar with all the day-to-day operations of his subordinate units. Rather, it is his responsibility to establish systems that will ensure law of war compliance and then provide command oversight of those systems.<sup>1072</sup> In General Ojdanić's case, the evidence has shown that he was particularly vigilant in establishing, maintaining, and upgrading systems for sensitizing soldiers against committing crimes and punishing those who did.
529. In the *Blaskić* case, the Appeals Chamber held that where the commander had requested an investigation of the crimes, his duty to take reasonable and necessary

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<sup>1071</sup> *Ford*.

<sup>1072</sup> 101 THE TOKYO MAJOR WAR CRIMES TRIAL: THE JUDGMENT, SEPARATE OPINIONS, PROCEEDINGS IN CHAMBERS, APPEALS AND REVIEWS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST WITH AN AUTHORITATIVE COMMENTARY AND COMPREHENSIVE GUIDE 48,444(R. John Pritchard ed., 1981).*Ibid.* at 48,444-48,445.

measures had been fulfilled.<sup>1073</sup> In General Ojdanić's case, every time he encountered information about crimes, he insisted that they be investigated by the appropriate authorities. He even recommended the creation of a special State Commission to investigate crimes in Kosovo.

530. General Ojdanić established the military judicial system at the beginning of the war, and further stayed well-informed of its activities on a regular basis. This is evidenced by the fact that from the beginning of the war until the end (78 total days) the work and status of military judicial organs and/or criminal charges and related sentencing are reported on 63 out of 78 days during this period.<sup>1074</sup>

531. Further, in a 12 May report, Radomir Gojović stated that the initial volume and complexity of tasks facing military judicial organs was too great, but after adjustments the military judicial organs had become fully operational.<sup>1075</sup> On 1 June 1999, Lakić Đorović's report to the Military Prosecutor of the of 3<sup>rd</sup> Army Command states that between the date of establishment and 31 May 1999, 419 criminal reports involving 461 individuals were received.<sup>1076</sup> Item #2 on page 1 reads: "*All these criminal reports have been dealt with.*"<sup>1077</sup> Lastly, when testifying, Farkaš recalled his 8 June contribution to the General Staff briefing stating, "...the inspecting organs that I sent found out that over 90 percent, 95 percent of these criminal acts were prosecuted."<sup>1078</sup>

532. In light of the above, it is clear that General Ojdanić's duty to punish criminal behaviour was fulfilled. There was most certainly no "atmosphere of impunity," and based on the information available to him General Ojdanić could only conclude that the military judicial system was working according to plan. In his 6 September 1999 report, Gojović concluded, "that the courts in those specific circumstances, within a relatively short space of time – that is, two, two and a half months – worked very efficiently,

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<sup>1073</sup> *Blaskić* AJ, para.420.

<sup>1074</sup> See Annex G.

<sup>1075</sup> Exh.P2826.

<sup>1076</sup> 3D534, p.1.

<sup>1077</sup> Exh.3D534.

<sup>1078</sup> Tr.16304.

managing to deal with a great number of cases, a great number of cases were initiated and a high percentage of them were completed in those circumstances which were very difficult.”<sup>1079</sup>

533. While the ultimate result of specific prosecutions may not have been satisfactory in terms of the numbers of persons prosecuted or the length of the sentences, those results did not manifest themselves until after General Ojdanić was no longer Chief of Staff. A commander can only be held to be responsible for those acts which are within his material possibility.<sup>1080</sup>

534. The Appeals Chamber has held that a military commander or civilian superior may only be held responsible where he consciously fails to discharge his duties as a superior, either by deliberately failing to perform them or by culpably or wilfully disregarding them.<sup>1081</sup> A commander who, despite his best efforts, was unable to prevent or punish crimes could not therefore be regarded as criminally liable.<sup>1082</sup> The evidence at this trial has shown that while Chief of Staff, General Ojdanić was consistently concerned that crimes in Kosovo be prevented and punished, and took all necessary and reasonable measures, within his material possibility, to see that was accomplished.

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<sup>1079</sup> Tr.16681-2; Exh.3D986.

<sup>1080</sup> *Blagojević* TJ, para.793; *Strugar* TJ, para.373; *Halilović* TJ, para.72; *Limaj* TJ, para.526-27.

<sup>1081</sup> *Bagilishema* AJ, para.35.

<sup>1082</sup> *Mettraux* p.308.

## V. SENTENCING

535. Despite the Defence's absolute belief that the Prosecution has failed to prove General Ojdanić's guilt, the following submissions are included as a precaution in the event that the Trial Chamber finds General Ojdanić guilty of some or all of the offences charged in the Amended Indictment.

### A. Sentencing Principles

536. The provisions of the Tribunal's Statute and Rules of Procedure which relate to sentencing are as follows:

#### **Article 24 of the Statute Penalties**

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

#### **Rule 101 Penalties**

- (A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.
- (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:
  - (i) any aggravating circumstances;
  - (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
  - (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
  - (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.
- (C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

537. The Appeals Chamber has held that when imposing a sentence, the following factors should be considered:

- (i) the gravity of the offences or the totality of the conduct;
- (ii) individual circumstances of the convicted person, including aggravating and mitigating circumstances;
- (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
- (iv) the credit to be given for time spent in detention pending the Chamber's judgment; and
- (v) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served.<sup>1083</sup>

#### **B. Equality before the law**

538. It is an important principle that sentences of like individuals in like cases should be comparable.<sup>1084</sup> Public confidence in the integrity of the administration of criminal justice depends, at least in part, on consistency of punishment. A sentence must not be capricious or excessive, meaning that it should not be out of reasonable proportion with the sentences passed in similar circumstances for the same offences.<sup>1085</sup> While not bound by patterns of sentencing, the Trial Chamber must consider previous examples to ensure that it does not impose a sentence whose unjustified disparity with other similar cases may erode public confidence in the integrity of the Tribunal's administration of criminal justice.<sup>1086</sup>

539. It is noted that there are inherent limits to this approach because "any given case contains a multitude of variables, ranging from the number and type of crimes

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<sup>1083</sup> *Blaskić* AJ, para.679.

<sup>1084</sup> *Kvočka* AJ, para.681.

<sup>1085</sup> *Dragan Nikolić* AJ, para.16&39; *Babić* AJ, para.33.

<sup>1086</sup> *Čelebici* AJ, para.757.

committed to the personal circumstances of the individual.”<sup>1087</sup> Where a Trial Chamber determines that the level of participation or mitigating factors are different, a different sentence is justified.<sup>1088</sup> Nonetheless, the Trial Chamber is invited to consider three cases in particular:

- a. First, in *Prosecutor v Babić*, the accused was convicted of participating in a joint criminal enterprise to expel non-Serbs from Krajina and his superior (political) position was found to be an aggravating factor. The sentence imposed was 13 years which was affirmed on appeal.
- b. Secondly, in *Prosecutor v Blaskić*, the accused was a colonel in the Croatian Defence Council (HVO) and was convicted on the basis of both Article 7(1) for persecutions and Article 7(3) for other crimes. The sentence imposed following appeal was 9 years.
- c. Thirdly, in *Prosecutor v Hadžihasanović*, an accused was the Chief of the Supreme Command Staff of Bosnia and Herzegovina and was convicted of murder and wanton destruction under Article 7(3). The sentence imposed following appeal was 3½ years.

### C. The gravity of the offence

540. If General Ojdanić is convicted of any of the counts in the Amended Indictment, the Trial Chamber must then assess the gravity of the crime. The gravity of the offence is the primary consideration for the Trial Chamber in assessing the appropriate sentence.<sup>1089</sup>

541. To assess the gravity of a crime for the purposes of sentencing, the Trial Chamber must consider the totality of the assessed criminal conduct of an accused and give due

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<sup>1087</sup> *Kvočka* AJ, para.681.

<sup>1088</sup> *Momir Nikolić* AJ, para.47; *Musema* AJ, para.387.

<sup>1089</sup> *Čelebici* AJ, Para.731; *Kupreškić* AJ, para.442; *Blaskić* AJ, para. 683.

consideration to the particular circumstances of the case as well as the form and degree of participation of the accused in the crime.<sup>1090</sup> Any conviction entered against General Ojdanić by the Trial Chamber would involve a grave and serious crime. Nonetheless, the Trial Chamber is invited to consider the particular facts of any conviction: the Trial Chamber must consider the underlying conduct and specific role played by General Ojdanić in the commission of any crime.<sup>1091</sup> The Trial Chamber in *Blagojević and Jokic* summarised the position:

“Despite the enormity of the crime base that underlies this case, the Trial Chamber must remember that in this case, as in all cases before the Tribunal, it is called upon to determine a sentence for two individuals, based solely on their particular conduct and circumstances.”<sup>1092</sup>

542. If the Trial Chamber considers that General Ojdanić participated in a joint criminal enterprise to expel ethnic Albanians from Kosovo and had the requisite *mens rea*, the Trial Chamber is nonetheless obligated to consider the means by which General Ojdanić participated. The Appeals Chamber has consistently held that the “degree of participation” in crimes is relevant to the gravity of the offence.<sup>1093</sup>

543. In *Prosecutor v Babić*, a political leader pleaded guilty to persecution through a joint criminal enterprise to remove the non-Serb population from Krajina, Croatia. The Appeals Chamber found that “secondary” or “indirect” participation in a joint criminal enterprise relative to the conduct of other individuals may result in the imposition of a lower sentence.<sup>1094</sup>

544. The Defence submits that even according to the Prosecution’s own case theory, General Ojdanić did not play a “major role” in any joint criminal enterprise.<sup>1095</sup> For example, never was it alleged that General Ojdanić was a member of the Joint

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<sup>1090</sup> *Kordić* AJ, para.1061; *Blaskić* AJ, para.683; *Kupreškić* TJ, para.852; *Čelebici* AJ, para.731.

<sup>1091</sup> *Blagojević* TJ, para.833.

<sup>1092</sup> *Blagojević* TJ, para.815.

<sup>1093</sup> *Babić* AJ, at para.88 and authorities cited therein.

<sup>1094</sup> *Babić* AJ, para.40. See also *Krstić* AJ, para.254.

<sup>1095</sup> *Blagojević* TJ, para.835-6.

Command- the means by which the Prosecution has argued that the joint criminal enterprise was implemented.<sup>1096</sup>

545. If the Trial Chamber considers that General Ojdanić did not participate in a joint criminal enterprise but nonetheless considers him criminally responsible under Article 7(1), the Trial Chamber may consider that the crime is less grave and merits a more lenient sentence. Aiding and abetting is a form of responsibility which has been held to warrant lower responsibility than others under Article 7(1) of the Statute.<sup>1097</sup>

546. If the Trial Chamber considers that Article 7(3) better characterises General Ojdanić's responsibility than Article 7(1), the Trial Chamber is obligated to consider the particular conduct in failing to prevent or punish crimes.<sup>1098</sup> In this regard, the Trial Chamber is invited to consider the steps General Ojdanić did take to investigate and prioritise the prosecution of breaches of international humanitarian law. Further, responsibility under Article 7(3) is considered as less grave than responsibility under Article 7(1).<sup>1099</sup>

#### **D. Aggravating factors**

547. Only aggravating factors which are pleaded in the Amended Indictment can be considered for the purposes of sentencing.<sup>1100</sup> The Prosecution must have proved the existence of any aggravating factor beyond reasonable doubt.<sup>1101</sup> A factor is not aggravating if it forms an element of the actual crime or is taken into account in assessing gravity.<sup>1102</sup> Only circumstances directly related to the commission of the offence may be regarded as aggravating.<sup>1103</sup> Finally, even if an aggravating factor is

<sup>1096</sup> For example, see the Prosecution's submissions during the 98 *bis* hearing, Tr.12660.

<sup>1097</sup> *Krstic* AJ, para.268; *Vasiljević* AJ, para.181.

<sup>1098</sup> *Čelebici* AJ, para.732.

<sup>1099</sup> *Strugar* TJ, para.462-463.

<sup>1100</sup> *Hadžihasanović* TJ, para.2069; *Kunarac* TJ, para.850; *Simba* AJ, para.82.

<sup>1101</sup> *Čelebici* AJ, para.763; *Kajelijeli* Appeals Chamber, para.294.

<sup>1102</sup> *Blaskić* AJ, para.693; *Simba* TJ, para.438; *Kordić* AJ, para.1089; *Galić* AJ, para.408; *Deronjić* AJ, para.106; *Momir Nikolic* AJ, para.58.

<sup>1103</sup> *Orić* TJ, para.731.

established, the Trial Chamber has the discretion to attach to it limited weight given the particular circumstances of General Ojdanić's case.<sup>1104</sup>

1. Superior Authority is not necessarily an aggravating factor

548. An accused's superior position can be considered an aggravating factor in relation to a conviction under Article 7(1).<sup>1105</sup> A superior position is not, however, always an aggravating factor. In *Prosecutor v Hadžihasanović*, the Prosecution argued that there was a "general principle of sentencing" that a superior command attracts greater responsibility. The Appeals Chamber rejected this argument.<sup>1106</sup> The Appeals Chamber has consistently emphasised that "a high rank in the military or political field does not, in itself, merit a harsher sentence."<sup>1107</sup>

549. In *Prosecutor v Nindabahizi*, the Appeals Chamber held that the accused's position in the Interim Government was not itself an aggravating factor, but abuse of that position was an aggravating factor.<sup>1108</sup> In *Prosecutor v Kristić*, the Trial Chamber held that a high rank in the military did not, in itself, lead to a harsher sentence. Rather the question is whether a person "wrongly exercises power" so as to deserve a harsher sentence.<sup>1109</sup> Therefore, in *Prosecutor v Babić*, when convicting the accused under Article 7(1) the Trial Chamber thoroughly considered the accused's behaviour as a leader, including that he had made inflammatory speeches, before considering that his leadership position constituted an aggravating circumstance to a conviction under Article 7(1).<sup>1110</sup>

550. Therefore, the "mere fact" that General Ojdanić was Chief of General Staff does not constitute an aggravating factor.<sup>1111</sup> Rather, the question the Trial Chamber must consider is whether General Ojdanić abused the power available to him: "what matters is

<sup>1104</sup> *Hadžihasanović* TJ, para.2069; *Čelebici* AJ, para.777.

<sup>1105</sup> *Blaskić* AJ, para.91.

<sup>1106</sup> *Hadžihasanović* AJ, para.320.

<sup>1107</sup> *Deronjić* AJ, para.67; *Hadžihasanović* Appeals Chamber, para.320; *Stakić* AJ, para.411; *Babić* AJ, para.80.

<sup>1108</sup> *Nindabahizi* AJ, para.136.

<sup>1109</sup> *Krstić* TJ, para.701.

<sup>1110</sup> *Babić* AJ, para.81.

<sup>1111</sup> *Deronjić* TJ, para.194-5.

not the position of authority taken alone, but that position coupled with the manner in which the authority is exercised.”<sup>1112</sup>

551. The significance of this submission is dependent upon the findings of the Trial Chamber. For example, the Defence concedes that if the Trial Chamber finds that General Ojdanić is responsible for ordering crimes under Article 7(1), his superior position is likely to be considered an aggravating factor. Conversely, if the Trial Chamber finds that aiding and abetting better characterises General Ojdanić’s responsibility under Article 7(1), the Defence submit that it is open to the Trial Chamber to find that General Ojdanić did not abuse the powers bestowed in his office and that his superior position should not, therefore, be considered to be an aggravating circumstance when determining sentence. Indeed, it is open to the Trial Chamber to find that General Ojdanić’s superior position meant that he was remote from the crimes committed in Kosovo such that his position in the chain of command is a mitigating factor rather than an aggravating factor.<sup>1113</sup>

## **E. Mitigating Circumstances**

552. The Defence needs only to demonstrate mitigating factors on the balance of probabilities.<sup>1114</sup> In light of relevant authorities, the Trial Chamber is invited to consider the following mitigating factors in determining any sentence.

### **1. Specific Mitigating Factors**

553. General Ojdanić became Chief of General Staff on 27 November 1998 at a time when his country faced a severe and increasing threat from a terrorist organisation operating across the majority of Kosovo. The Trial Chamber is invited to recall the evidence it heard of General Ojdanić’s cooperation with the international observer missions present in Kosovo, together with his consistent and persistent calls for a

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<sup>1112</sup> *Babić* AJ, para.80.

<sup>1113</sup> See *Strugar* TJ, para.464 considering that remoteness from crimes is a mitigating factor.

<sup>1114</sup> *Blaskić* AJ, para.697; *Čelebici* AJ, para.590; *Babić* AJ, para.43.

peaceful resolution to the conflict. The Appeals Chamber has held that attempts to further peace should be considered as a mitigating factor.<sup>1115</sup>

554. Efforts by an accused to try and enforce rules of international humanitarian law have been considered to be a mitigating factor.<sup>1116</sup> The Trial Chamber is invited to recall General Ojdanić's work throughout 1998 as well as during 1999 to emphasise the importance of international humanitarian law as well as improve the military justice system so that perpetrators of crimes would be prosecuted. General Krga's evidence was that in his time at the General Staff from 14 January 1999 and throughout the war General Ojdanić insisted on the need to strictly adhere to the provisions of international humanitarian law.<sup>1117</sup> General Ćurčin's evidence was that General Ojdanić paid special attention to the implementation of international humanitarian law by issuing orders and reminders.<sup>1118</sup> Colonel Radoičić's evidence was that General Ojdanić always insisted that the provisions of humanitarian law be observed.<sup>1119</sup> The Trial Chamber also has before it large numbers of orders issued by General Ojdanić insisting that the provisions of international humanitarian law be obeyed.

555. Even if the Trial Chamber were to consider that such steps are insufficient to avoid liability under either Article 7(1) or Article 7(3), it is submitted that the Trial Chamber should account for such positive action when determining sentence.

556. Acts of non-discrimination, especially in the midst of ongoing fighting, have been held to merit consideration as a mitigating factor even if an accused is convicted of crimes - like persecution - which carry an element of discriminatory intent.<sup>1120</sup> In light of this, the Trial Chamber is invited to recall General Ojdanić's attempts to recruit ethnic Albanians to the VJ, including after the NATO bombing had begun.

557. Shortly after NATO attacked the FRY, and while facing intense battles with the

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<sup>1115</sup> *Babić* AJ, para.59

<sup>1116</sup> *Hadžihasanović* TJ, para.2080.

<sup>1117</sup> Exh.3D1120, para.20.

<sup>1118</sup> Exh.3D1121, para.32.

<sup>1119</sup> Exh.3D1111, para.13.

<sup>1120</sup> *Blagojević* TJ, para.854

KLA, on 31 March 1999 General Ojdanić ordered that a special military territorial detachment be formed where the officers as well as the soldiers would be ethnic Albanians.<sup>1121</sup> General Kosovac testified that the purpose of this order was to establish a single unit where both officers and soldiers would be ethnic Albanians, so as to try and increase the trust of the Albanian population in the VJ.<sup>1122</sup>

558. The motivation behind General Ojdanić's order was not segregation or separation. Rather, it was a further attempt - after others had failed - to increase the recruitment of ethnic Albanians into the VJ. Moreover, this attempt was plainly serious and *bona fide*; two features of the order itself make that clear. First, the order sets a deadline of 10 April 1999 for a report on the establishment of the detachment. Secondly, the order specifies that a named individual, Colonel Vladimir Ristić, be responsible for organising and coordinating the establishment of the detachment. It is submitted that these are not the features of a token gesture. Rather, this is the language of a concerted effort to address a difficult issue.

559. There is further evidence which indicates the seriousness of this attempt to recruit ethnic Albanians into the ranks of the VJ. General Ojdanić raised the issue with the Supreme Command Staff during the Daily Briefing of 1 April 1999.<sup>1123</sup> Colonel Pešić, a Prosecution witness, testified that he received the order and that a sufficient number of uniforms and weapons were provided for the purpose of forming the unit.<sup>1124</sup> Again, these steps reveal a serious and concerted effort to address a difficult issue.

560. In the end, however, the attempt to form an Albanian unit within the VJ proved unsuccessful. Colonel Pešić described how he tried to motivate ethnic Albanians to join the fight against the KLA; he explained how he visited the predominantly Albanian village of Dobrovo in Kosovo Polje and that despite massive unemployment problems there he was unsuccessful because ethnic Albanians feared extremists within their own

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<sup>1121</sup> Exh.P1471.

<sup>1122</sup> Tr.15815.

<sup>1123</sup> Exh.3D719, p.3.

<sup>1124</sup> Tr.7250. Exh.P2502, para.11.

community.<sup>1125</sup> General Kosovac testified that the General Staff received feedback that the attempt to form the unit had been unsuccessful.<sup>1126</sup>

561. The Trial Chamber is invited to recall that practical difficulty in exercising authority to prevent or punish crimes has been considered a mitigating factor.<sup>1127</sup> The Trial Chamber is reminded of General Ojdanić's attempts to raise the issue of crimes with President Milošević during the meeting of 17 May 1999. The Trial Chamber is reminded that General Ojdanić took the initiative to send an investigative mission to Kosovo consisting of General Vasiljević - a Prosecution witness - and General Gajić.

## 2. Personal Mitigating Factors

### a) Voluntary surrender

562. Voluntary surrender to the Tribunal is a mitigating factor.<sup>1128</sup> This is despite the possibility that surrender to the Tribunal could be described as an obligation.<sup>1129</sup> Indeed, voluntary surrender has been called a "significant" mitigating factor, including in circumstances of a delayed surrender.<sup>1130</sup> Even where an Accused was already incarcerated, surrender to the Tribunal was held to be a mitigating circumstance, although the existing incarceration impacted upon the weight ascribed to surrender.<sup>1131</sup>

563. It is submitted that General Ojdanić's surrender to the Tribunal was voluntary and should be considered a significant mitigating factor. In April 2002, General Ojdanić became the first official from Serbia to surrender to the Tribunal after passage of the law on cooperation. The US State Department applauded General Ojdanić's "courageous decision and his show of leadership" and indicated a wish that "others would follow."<sup>1132</sup>

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<sup>1125</sup> Tr.7250-1. Exh.P2502, para.11&13.

<sup>1126</sup> Tr.15815.

<sup>1127</sup> *Rugambarara* TJ, para.47.

<sup>1128</sup> *Blaskić* AJ, para.701.

<sup>1129</sup> *Mrkšić* TJ, para.698.

<sup>1130</sup> *Blaskić* AJ, para.700 and *Blaskić* TJ, para.776.

<sup>1131</sup> *Kvočka* AJ, para.709-713.

<sup>1132</sup> Exh.3D1149.

564. This raises a further point in mitigation. In *Prosecutor v Simić et al*, the Trial Chamber in noting that delayed surrender to the Tribunal is nevertheless a mitigating factor also noted that the accused, Miroslav Tadić, was one of the first persons to voluntarily surrender to the custody of the Tribunal and that Simo Zaric was one of the first accused to surrender from Republika Srpska.<sup>1133</sup> Similarly, with regard to the Kosovo conflict, it is submitted that General Ojdanić's example of surrender should count as a mitigating factor in determining sentence.

b) No prior criminal record and evidence of good character

565. The lack of a prior criminal record is a mitigating factor.<sup>1134</sup> General Ojdanić does not have any prior convictions and the Trial Chamber is invited to consider this as a mitigating factor when determining sentence.

566. An accused's good character has been found to be a mitigating factor.<sup>1135</sup> In *Prosecutor v Muvunyi*, the Trial Chamber held that the fact the accused had spent most his life working for the defence of his country and that there was no evidence that the accused had previously discriminated on the basis of ethnicity was evidence of good character to be considered when determining sentence.<sup>1136</sup> The same applies to General Ojdanić.

567. It is a significant feature of this case that not a single witness has had a bad thing to say about General Ojdanić. In fact, many Prosecution witnesses have given evidence attesting to General Ojdanić's qualities as a soldier and human being. General Vasiljević's evidence was that General Ojdanić was a man of good character, not the kind of person who would simply blame subordinates for problems.<sup>1137</sup> General

<sup>1133</sup> *Simić* TJ, para.1097&1110.

<sup>1134</sup> *Blaskić* AJ, para.779; *Hadžihasanović* TJ, paras2078&2089; *Serugendo* TJ, para.65; *Nzabrinda* TJ, para.92; *Rugambarara* TJ, para.43; *Kordić* AJ, para.1090.

<sup>1135</sup> *Erdemović* Second Sentencing Judgement, para,16(i); *Kupreškić* AJ, para.459, *Miodrag Jokic*, TJ, para.90-1,103; *Blaskić* AJ, para.706; *Nzabrinda* TJ, para.92; although see *Babić* AJ, para.51; *Stakić* AJ, para.406.

<sup>1136</sup> *Muvunyi* TJ, para.543.

<sup>1137</sup> Tr.8849.

Vasiljević testified that he is not aware of a single instance when General Ojdanić exceeded the powers he had under the law.<sup>1138</sup>

568. Zlatomir Pešić was Commander of the Priština Military District and testified for the Prosecution. He described how he had served under General Ojdanić in the late 1980s where there were officers and soldiers of ethnic Albanian origin in the brigade that General Ojdanić then commanded and that there was no discrimination against them.<sup>1139</sup>

569. Dušan Lončar was the liaison for Federal Commission for Cooperation with the OSCE Kosovo Verification Commission and testified for the Prosecution. His evidence was that he had known General Ojdanić from 1961 and that he could only say the very best about him. He described how General Ojdanić's many awards and commendations attest to his qualities and good work.<sup>1140</sup>

570. The Trial Chamber is invited to recall the evidence of General Drewienkiewicz, who wrote to General Ojdanić shortly after his appointment as Chief of the General Staff and described his attitude to the KVM as "correct."<sup>1141</sup>

571. Colonel Vlajković was General Ojdanić's Chief of Office and described Ojdanić as a man of exceptional professional abilities who was principled and achieved the position of Chief of Staff because of his professional, moral and human characteristics.<sup>1142</sup>

572. General Pantelić's evidence was that during the war General Ojdanić was resolute that the civilian population should be treated with "utmost humaneness, protectiveness and tutelage, regardless of their religion of [sic] ethnicity."<sup>1143</sup>

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<sup>1138</sup> Tr.8901.

<sup>1139</sup> Tr.7313.

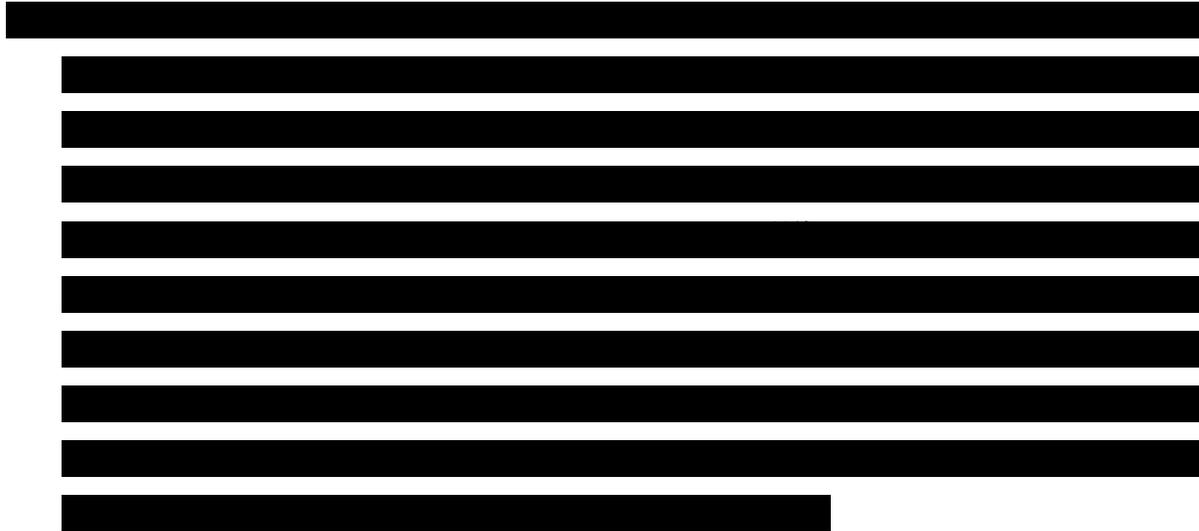
<sup>1140</sup> Tr.7685; Exh.3D1116, p.69-72.

<sup>1141</sup> Tr.7923.

<sup>1142</sup> Tr.16059; Exh.3D1112, para.5.

<sup>1143</sup> Exh.3D1113, para.32.

573. Colonel Jovanović's evidence was that General Ojdanić was a professional, tolerant, open and direct man.<sup>1144</sup> Jovanović's evidence was that General Ojdanić never showed any prejudice towards ethnic Albanians.<sup>1145</sup>



c) Conduct of an accused during trial

575. The conduct of an accused during trial<sup>1151</sup> and in detention<sup>1152</sup> can be a mitigating factor. Similarly, compliance with the conditions of any provisional release has been held to be a mitigating factor.<sup>1153</sup>

576. General Ojdanić has attended and participated in - despite deteriorating health - every day of these proceedings. The Commanding Officer of the UNDU has provided a letter verifying General Ojdanić's exemplary behaviour during his nearly five years in detention.<sup>1154</sup> General Ojdanić has been on provisional release on four occasions during

<sup>1144</sup> Tr.14896.

<sup>1145</sup> Tr.14899.

<sup>1146</sup> Exh.3D1150.

<sup>1147</sup> Exh.3D1151.

<sup>1148</sup> Exh.3D1150, p.2.

<sup>1149</sup> Exh.3D1151, p.2.

<sup>1150</sup> Exh.3D1151, p.2.

<sup>1151</sup> *Blaskić* AJ, para.728.

<sup>1152</sup> *Kordić* AJ, para.1053.

<sup>1153</sup> *Plavsic* TJ, para.109; *Hadžihasanović* TJ, para.2078; *Strugar* TJ, para.472.

<sup>1154</sup> Exh.3D1153.

these proceedings.<sup>1155</sup> On each occasion, General Ojdanić fully complied with the terms of his provisional release.

d) Personal circumstances

[REDACTED]

[REDACTED]

[REDACTED]

<sup>1155</sup> In addition, on 10 July 2008 the Trial Chamber granted General Ojdanić provisional release for a fifth time. August 2008

<sup>1156</sup> *Kunarac* TJ, para.363&508; *Čelebici* AJ, para.788.

<sup>1157</sup> *Blaskić* TJ, para.779; *Vasiljević* TJ, para.300. *Bisengimana* TJ, para. 143; *Nzabrinda* TJ, para.81; *Rugambarara*, TJ, para.39.

<sup>1158</sup> *Krajišnik* TJ, para.1164.

<sup>1159</sup> Exh.3D1150 & Exh.3D1151.

<sup>1160</sup> *Kunarac* AJ, para.362; *Krnojelac* AJ, para.251; *Jokic* AJ, para.49; *Strugar* TJ, para.469.

<sup>1161</sup> *Plavsic*, TJ, para.95-106.

<sup>1162</sup> *Babić* AJ, para.43.

<sup>1163</sup> *Limaj* TJ, para.732.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

#### **F. Cumulative Convictions**

580. Where a number of convictions are entered, the Trial Chamber has discretion to impose concurrent sentences, consecutive sentences or a single sentence.<sup>1166</sup> The sentence must reflect the totality of the criminal conduct of an accused.<sup>1167</sup> If the Trial Chamber finds that the same facts support cumulative convictions under Articles 3 and 5 of the Statute, the Trial Chamber should take this into account when exercising its discretion to impose a sentence. In short, an Accused should not be prejudiced by the Indictment including a number of different charges based upon the same factual allegations and so any sentences for different charges based upon the same facts should be expressed to run concurrently or, alternatively, a single sentence may be imposed reflecting the total conduct of General Ojdanić.

#### **G. Conclusions on sentencing**

581. General Dragoljub Ojdanić has been shown to be a man of principle and high integrity, with a lifetime of good character and devotion to his country. He is now in poor health. If the Trial Chamber finds him guilty, it should temper its punishment with mercy.

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<sup>1164</sup> *Strugar* TJ, para.469.

<sup>1165</sup> Exh.3D1152.

<sup>1166</sup> Rule 87(C) of the Rules of Procedure.

<sup>1167</sup> *Blaskić* AJ, para.723.

## VI. CONCLUSIONS

582. Crimes were committed in Kosovo in 1999, there is no doubt about that. But the evidence has shown that, far from the complicit actor alleged in the Amended Indictment, General Ojdanić did not desire the expulsion of ethnic Albanians from Kosovo, and tried his best to prevent and punish crimes against civilians. His conduct, under the most difficult of circumstances, was exemplary.

583. On the basis of the weakness of the evidence brought against General Ojdanić and the strength of the analysis presented here, the Trial Chamber is invited to enter a verdict of not guilty on all counts in the Amended Indictment.

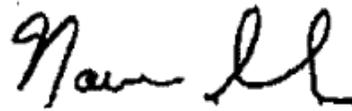
Respectfully submitted this 15<sup>th</sup> day of July 2008

Word Count: 69,778

Counsel for General Ojdanić



Tomislav Višnjić



Norman Sepenuk

**VII. ANNEXES**

<b>Annex A</b>	<b>Table of Collegiums of the General Staff</b>
<b>Annex B</b>	<b>Table of Daily Briefings of the Supreme Command Staff</b>
<b>Annex C</b>	<b>Table of 3<sup>rd</sup> Army Combat Reports to the Supreme Command Staff</b>
<b>Annex D</b>	<b>Table of Supreme Command Staff Combat Reports</b>
<b>Annex E</b>	<b>Table of Security Administration Briefings</b>
<b>Annex F</b>	<b>Table of the document coding scheme of the 3<sup>rd</sup> Army and Exhibit P1459</b>
<b>Annex G</b>	<b>Table of reports of the work of military judicial organs</b>
<b>Annex H</b>	<b>Table of authorities and abbreviations</b>

**A. Collegiums of the General Staff**

Date	Exhibit Number
26-Sep-97	3D1074
12-Dec-97	3D1075
15-Dec-97	3D1076
10-Apr-98	3D657
17-Apr-98	3D658
4-May-98	3D659
8-Jun-98	3D666
22-Jun-98	P923
29-Jun-98	P927
20-Jul-98	P922
23-Oct-98	3D645
26-Oct-98	3D646
28-Oct-98	P926
30-Oct-98	2D389
3-Nov-98	3D663
6-Nov-98	3D664
27-Nov-98	P925
3-Dec-98	3D557
10-Dec-98	3D484
14-Dec-98	3D485
17-Dec-98	3D494
24-Dec-98	P924
30-Dec-98	P928
6-Jan-99	3D558
14-Jan-99	P936
21-Jan-99	P939
28-Jan-99	3D559
1-Feb-99	P930
2-Feb-99	P931
4-Feb-99	P932
11-Feb-99	P934
18-Feb-99	P937
21-Feb-99	P940
25-Feb-99	P941
4-Mar-99	P933
11-Mar-99	P935
18-Mar-99	P938
9-Apr-99	P929

**B. Daily Briefings**

<b>Date</b>	<b>Exhibit Number</b>	<b>Status</b>	<b>Pages within Exhibit 3D1125 (the book of briefings)</b>
3/24	3D578	EXH	1 – 5
3/25	3D579	EXH	5 – 8
3/26	3D580	EXH	8 – 13
3/28	3D581	EXH	14 – 17
3/29	3D582	EXH	18 – 25
3/30	3D583	EXH	26 – 31
3/31	3D584	EXH	31 – 36
4/1	3D719	EXH	37 – 39
4/2		N/A	40 – 44
4/3	3D721	EXH	45 – 49
4/4	3D722	EXH	50 – 53
4/5	3D723	EXH	54 – 58
4/6	3D724	EXH	59 – 62
4/7	3D639	EXH	63 – 66
4/8	3D725	EXH	67 – 71
4/11	3D728	EXH	72 – 77
4/12	3D729	EXH	78 – 81
4/13	3D730	EXH	82 – 85
4/14	3D585	EXH	86 – 89
4/15	3D586	EXH	90 – 93
4/16	3D587	EXH	94 – 98
4/17	3D588	EXH	99 – 102
4/18	3D589	EXH	103 – 106
4/19	3D590	EXH	107 – 110
4/21	3D591	EXH	111 – 114
4/22	3D592	EXH	115 – 119
4/23	3D593	EXH	120 – 123
4/24	3D594	EXH	123 – 127
4/25	3D595	EXH	128 – 130
4/26	3D596	EXH	131 – 134
4/27	3D597	EXH	135 – 138
4/28	3D598	EXH	139 – 142
4/29	3D599	EXH	143 – 145
4/30	3D600	EXH	146 – 150
5/1	3D601	EXH	151 – 154

5/2	3D602	EXH	155 – 158
5/3	3D603	EXH	159 – 161
5/4	3D604	EXH	162 – 165
5/5	3D605	EXH	166 – 169
5/6	3D606	EXH	170 – 173
5/7	3D607	EXH	174 – 177
5/8	3D608	EXH	178 – 181
5/9	3D609	EXH	182 – 185
5/10	3D610	EXH	186 – 189
5/11	3D611	EXH	190 – 193
5/12	3D612	EXH	194 – 197
5/13	3D613	EXH	198 – 201
5/14	3D614	EXH	202 – 205
5/15	3D615	EXH	206 – 209
5/16	3D616	EXH	210 – 214
5/17	3D617	EXH	215 – 218
5/18	3D618	EXH	219 – 222
5/19	3D619	EXH	223 – 227
5/20	3D620	EXH	228 – 231
5/21	3D621	EXH	232 – 235
5/22	3D622	EXH	236 – 239
5/23	3D623	EXH	240 – 242
5/24	3D624	EXH	243 – 245
5/25	3D625	EXH	246 – 248
5/26	3D626	EXH	249 – 252
5/27	3D627	EXH	253 – 255
5/28	3D628	EXH	256 – 259
5/29	3D629	EXH	260 – 262
5/30	3D630	EXH	263 – 265
5/31	3D631	EXH	266 – 268
6/1	3D632	EXH	269 – 271
6/2	3D633	EXH	272 – 274
6/3	3D634	EXH	275
6/4	3D635	EXH	276 – 278
6/5	3D636	EXH	279 – 281
6/6	3D637	EXH	282 – 286
6/7	3D638	EXH	287 – 290
6/8	3D493	EXH	291 – 296
6/9		N/A	297 - 299

### C. 3<sup>rd</sup> Army Combat Reports

Date	Exhibit Number
29-May-98	4D96
20-Jun-98	4D129
23-Jun-98	4D130
09-Aug-98	4D141
17-Oct-98	4D81
26-Mar-99	4D272
27-Mar-99	3D1126
29-Mar-99	2D1127
30-Mar-99	4D307
31-Mar-99	4D273
01-Apr-99	4D274
02-Apr-99	4D275
02-Apr-99	4D278
03-Apr-99	4D276
04-Apr-99	3D1128
05-Apr-99	4D409
07-Apr-99	3D1129
15-Apr-99	4D280
24-Apr-99	4D281
25-Apr-99	4D312
26-Apr-99	4D282
26-Apr-99	4D283
27-Apr-99	4D284
30-Apr-99	4D285
01-May-99	4D286
02-May-99	4D123
04-May-99	4D287
05-May-99	4D288
10-May-99	4D315
12-May-99	4D290
13-May-99	4D316
14-May-99	4D291
16-May-99	4D317
17-May-99	4D292
21-May-99	4D269
22-May-99	4D270
23-May-99	4D271

24-May-99	4D309
27-May-99	4D264
28-May-99	4D260
30-May-99	4D265
31-May-99	4D266
03-Jun-99	4D318

**D. Supreme Command Staff Combat Reports**

<b>Date</b>	<b>Exhibit Number</b>
25-Mar-99	3D799
26-Mar-99	3D800
27-Mar-99	3D801
28-Mar-99	3D802
29-Mar-99	3D803
30-Mar-99	3D804
31-Mar-99	3D805
1-Apr-99	3D806
2-Apr-99	3D807
3-Apr-99	3D808
4-Apr-99	3D809
5-Apr-99	3D810
6-Apr-99	3D811
7-Apr-99	3D812
8-Apr-99	3D813
9-Apr-99	3D814
10-Apr-99	3D815
11-Apr-99	3D816
12-Apr-99	3D817
13-Apr-99	3D818
14-Apr-99	3D819
15-Apr-99	3D820
16-Apr-99	3D821
17-Apr-99	3D822
18-Apr-99	3D823
19-Apr-99	3D824
20-Apr-99	3D825
21-Apr-99	3D826
22-Apr-99	3D827
23-Apr-99	3D828
24-Apr-99	3D829
25-Apr-99	3D830
26-Apr-99	3D831
27-Apr-99	3D832
28-Apr-99	3D833
29-Apr-99	3D834
30-Apr-99	3D835
1-May-99	3D836
2-May-99	3D837
3-May-99	3D838
4-May-99	3D839
5-May-99	3D840
6-May-99	3D841
7-May-99	3D842
8-May-99	3D843

9-May-99	3D844
10-May-99	3D845
11-May-99	3D846
12-May-99	3D847
13-May-99	3D848
14-May-99	3D849
15-May-99	3D850
16-May-99	3D851
17-May-99	3D852
18-May-99	3D853
19-May-99	3D854
20-May-99	3D855
21-May-99	3D856
22-May-99	3D857
23-May-99	3D858
24-May-99	3D859
25-May-99	3D860
26-May-99	3D861
27-May-99	3D862
28-May-99	3D863
29-May-99	3D864
30-May-99	3D865
31-May-99	3D866
1-Jun-99	3D867
2-Jun-99	3D868
3-Jun-99	3D869
4-Jun-99	3D870
5-Jun-99	3D871
6-Jun-99	3D872
7-Jun-99	3D873
8-Jun-99	3D874
9-Jun-99	3D875

## E. Security Administration Reports

<b>Date</b>	<b>Exhibit Number</b>	<b>From</b>	<b>To</b>
17-Apr-98	3D991	PrK Security	VJ GS Security & 3rd Army Security
23-May-98	3D992	3rd Army Security	VJ GS Security
31-May-98	3D993	PrK Security	VJ GS Security & 3rd Army Security
10-Jun-98	3D994	PrK Security	VJ GS Security & 3rd Army Security
11-Jun-98	3D995	PrK Security	VJ GS Security & 3rd Army Security
12-Jun-98	3D996	PrK Security	VJ GS Security & 3rd Army Security
13-Jun-98	3D997	PrK Security	VJ GS Security & 3rd Army Security
16-Jun-98	3D998	PrK Security	VJ GS Security & 3rd Army Security
17-Jul-98	3D999	PrK Security	VJ GS Security & 3rd Army Security
21-Jul-98	3D1000	2nd Army Security	VJ GS Security
01-Aug-98	3D1001	PrK Security	VJ GS Security & 3rd Army Security
09-Aug-98	3D1002	PrK Security	VJ GS Security & 3rd Army Security
11-Aug-98	3D1003	Military Prosecutor	VJ GS Security
21-Aug-98	3D1004	PrK Security	VJ GS Security & 3rd Army Security
08-Oct-98	3D1005	PrK Security	VJ GS Security & 3rd Army Security
14-Oct-98	3D1006	VJ GS Security	3rd Army Security
14-Oct-98	3D1007	3rd Army Security	PrK Security
15-Oct-98	3D1008	PrK Security	VJ GS Security & 3rd Army Security
20-Oct-98	3D1009	PrK Security	VJ GS Security & 3rd Army Security
22-Oct-98	3D1010	PrK Security	VJ GS Security & 3rd Army Security
23-Oct-98	3D1111	PrK Security	VJ GS Security & 3rd Army Security
27-Oct-98	3D1012	PrK Security	VJ GS Security & 3rd Army Security
28-Oct-98	3D1013	PrK Security	VJ GS Security & 3rd Army Security
29-Oct-98	3D1014	PrK Security	VJ GS Security & 3rd Army Security
04-Nov-98	3D1015	PrK Security	VJ GS Security & 3rd Army Security
05-Nov-98	3D1016	PrK Security	VJ GS Security & 3rd Army Security
06-Nov-98	3D1017	PrK Security	VJ GS Security & 3rd Army Security
08-Nov-98	3D1018	PrK Security	VJ GS Security & 3rd Army Security
10-Nov-98	3D1019	PrK Security	VJ GS Security & 3rd Army Security
11-Nov-98	3D1020	PrK Security	VJ GS Security & 3rd Army Security
17-Nov-98	3D1021	PrK Security	VJ GS Security & 3rd Army Security
20-Nov-98	3D1022	PrK Security	VJ GS Security & 3rd Army Security
21-Nov-98	3D1023	PrK Security	VJ GS Security & 3rd Army Security
27-Nov-98	3D1024	PrK Security	VJ GS Security & 3rd Army Security
06-Dec-98	3D1025	3rd Army Security	VJ GS Security
06-Dec-98	3D1026	PrK Security	VJ GS Security & 3rd Army Security
09-Dec-98	3D1027	PrK Security	VJ GS Security & 3rd Army Security
11-Dec-98	3D1028	PrK Security	VJ GS Security & 3rd Army Security
15-Dec-98	3D1029	PrK Security	VJ GS Security & 3rd Army Security
15-Dec-98	3D1030	PrK Security	VJ GS Security & 3rd Army Security
16-Dec-98	3D1031	PrK Security	VJ GS Security & 3rd Army Security
18-Dec-98	3D1032	PrK Security	VJ GS Security & 3rd Army Security
19-Dec-98	3D1033	PrK Security	VJ GS Security & 3rd Army Security

22-Dec-98	3D1034	PrK Security	VJ GS Security & 3rd Army Security
24-Dec-98	3D1035	PrK Security	VJ GS Security & 3rd Army Security
26-Dec-98	3D1036	PrK Security	VJ GS Security & 3rd Army Security
28-Dec-98	3D1037	PrK Security	VJ GS Security & 3rd Army Security
29-Dec-98	3D1038	PrK Security	VJ GS Security & 3rd Army Security
09-Jan-99	3D1039	PrK Security	VJ GS Security & 3rd Army Security
13-Jan-99	3D1040	PrK Security	VJ GS Security & 3rd Army Security
19-Jan-99	3D1041	PrK Security	VJ GS Security & 3rd Army Security
20-Jan-99	3D1042	PrK Security	VJ GS Security & 3rd Army Security
21-Jan-99	3D1043	PrK Security	VJ GS Security & 3rd Army Security
26-Jan-99	3D1044	PrK Security	VJ GS Security & 3rd Army Security
22-Feb-99	3D1045	14th Counter Intel Group	VJ GS Security & 3rd Army Security
25-Feb-99	3D1046	14th Counter Intel Group	VJ GS Security & 3rd Army Security
04-Mar-99	3D1047	3rd Army Security	VJ GS Security
02-Mar-99	3D1048	3rd Army Security	VJ GS Security
05-Mar-99	3D1049	14th Counter Intel Group	VJ GS Security & 3rd Army Security
05-Mar-99	3D1050	3rd Army Security	VJ GS Security
06-Mar-99	3D1051	3rd Army Security	VJ GS Security
13-Mar-99	3D1052	3rd Army Security	VJ GS Security
16-Mar-99	3D1053	3rd Army Security	VJ GS Security
22-Mar-99	3D1054	3rd Army Security	VJ GS Security
13-May-99	3D1055	SVK Security Report on Medic Boca	
21-Jun-99	3D1056	3rd Army Security	VJ GS Security
25-Jun-99	3D1057	3rd Army Security	VJ GS Security & 3rd Army Security
25-Jun-99	3D1058	3rd Army Security	VJ GS Security & 3rd Army Security
25-Jun-99	3D1059	3rd Army Security	VJ GS Security & 3rd Army Security
09-Jul-99	3D1060	3rd Army Security	VJ GS Security & 3rd Army Security
14-Jul-99	3D1061	3rd Army Security	VJ GS Security
03-Aug-99	3D1062	VJ GS Security	3rd Army Security
Aug-99	3D1063	VJ GS Security	3rd Army Security
18-Nov-99	3D1064	VJ GS Security	VJ GS Intelligence

## F. Document Coding Scheme of the 3<sup>rd</sup> Army and Exhibit P1459

This Annex is a table of all 3<sup>rd</sup> Army documents excerpted from Exhibit 6D1130-the“Overview of VJ Archives for 1998 and 1999.” Of a total of 437 documents, only one document has a sub-sub-number.<sup>1168</sup> The overwhelming majority of VJ documents that are listed follow the numbering format of “xxx-xx/x.” This example of the numbering format has a sub-number (which is the digit after the “/”), but not a sub-sub-number. Additionally, a more basic numbering scheme is present in the format of “xxx-xx.” These two formats are contrasted with the unique numbering format which appears for Exhibit P1459/3D1106 - the 3<sup>rd</sup> Army Report of 25 May 1999 (no. 872-94/1-2).

Exhibit P1459/3D1106 is listed in row 72 from the 1999 portion of the Overview in **bold font**. The Ojdanić Defence invites the Trial Chamber to compare the numbering format of this document with all others. Exhibit P1459/3D1106 is the only VJ document to contain a sub-sub-number in its numbering format (which is the “2” after the “1-”). This suggests that whoever entered it was unfamiliar with standard practice

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<sup>1168</sup> Exh.6D1130. See item # 72 specifically. [See also, Transcript of 21 September 2007 @ 16116-8.]

No.	Document					Content of the Document	Archives		
	Type	Command	Level	No.	Date		Box	Bundle	No.
1	2	3	4	5	6	7	8	9	10
<b>1998</b>									
3	Order	3rd Army	Strictly Confidential	168-35	24-Apr-98	Due to the complicated situations on the DG/State Bordertowears the RA (republic of Albania) and in order to create conditions for the security organs to carry out their duties efficiently, an order (5 items) to use MRUD/Directional fragmentation mine ion the section of ambush locations. Increased Security measures.	016	21317/99	32
4	Order	3rd Army	Strictly Confidential	168-39	25-Apr-98	In order to undertake measures to secure the state border effectively an order to continue reinforcing front line and in depth security in 8 items	016	21317/99	
14	Order	3rd Army	Strictly Confidential	168-41	28-Apr-98	Due to the extremely complicated situation in KiM and Pinja District, order form PrK and NK/Ni Corps/ to continue securing the state border towards RA (Republic Albania) and RM Republic of Macedonia and undertaking other measures in the depth. (in 4 items)	016	21317/99	33
152	Order	3rd Army	Strictly Confidential	168-162	22-Jul-98	Since the SRJ/FRY president has given permission for the implementation of the Second Phase Plan to begin, the 3rd Army Commander requests the PrK commander to forward the plan of the indirect and direct engagement of PrK forces on the blockade of Junik and Jasi villages.	016	21317/99	160
173	Order	3rd Army	Strictly Confidential	01-57	31-Jul-98	Order to analyze the 1st and the 2nd stages of anti terrorist combat in KiM- the 3rd Army Commander to the PrK Commander Personally	016	21317/99	147
174	Order	3rd Army	Strictly Confidential	6034-27/1	31-Jul-98	Securing Communication, a two item order on breaking up a terrorist formation in the Smonica Village sector on 3 August	016	21317/99	149

182	Order	3rd Army	Strictly Confidential	168-180	1-Aug-98	The 3rd Army commander bans the use of PrK units for the 3rd stage of operations in KiM	016	21317/99	
187	Order	3rd Army IKM	Strictly Confidential	6034-61/1	7-Aug-98	Further engagement of Army Forces in KiM, an order of the 3rd Army Commander consisting of eight times, of which item 2 and especially item 7 deserve attention (open conflict with the PrK Commander)	016	21317/99	177
216	Order	3rd Army IKM	Strictly Confidential	168-208	8-Sep-98	The resubordination of the 3rd bVP to the PrK Command (eleven items)	016	21317/99	221
264	Order	3rd Army IKM	Strictly Confidential	168-284	13-Oct-98	Questions to the Corps Commander Personally for a written statement about the incident at the DG in which v1k/ Sergeant 1srt Class/ STAMENKOVI allowed illegal border crossings.	016	21317/99	321
<b>1999</b>									
1	Order	3rd Army	Strictly Confidential	250-38	19-Feb-99	Previous order fro dispersion of command, units and material and technical equipment (due to possible complication and deterioration of military-security situation in the zone of the 3rd Army , order in 7items with specified tasks for the units).	Out	Archives	-
2	Order	3rd Army	Strictly Confidential	250-39	19-Feb-99	Plan to elevate combat readiness of PrK-detailed Plan with dates, locations, times and units that are engaged.	Out	Archives	-
3	Order	3rd Army	Strictly Confidential	63-1	25-Feb-99	Surveillance and estimation and development of situation in their zones, at in adjacent areas and surroundings - for the purpose of undertaking adequate measures to reinforce combat readiness (order in 7 items)	Out	Archives	-
4	Order	3rd Army	Strictly Confidential	46-100	12-Mar-99	Reaching of an agreement with privates-brief information on the situation in the country, and then try to keep the privates of March 98 contingent in the units and if possible reach an agreement with them	Out	Archives	-
5	Order	3rd Army IKM	Strictly Confidential	872-10/3	11-Mar-99	Preparation order to bring the units to a higher level of combat readiness and preparations to carry out mobilization of	1292	21848/99	10/3

						part of the unit			
6	Proposal	3rd Army IKM	Strictly Confidential	872-10/4	11-Mar- 99	Mobilization and engagement of part of Army units, proposal to Yugoslav Army General Staff	1292	21848/99	10/4
7	Order	3rd Army IKM	Strictly Confidential	872-10/6	13-Mar- 99	Order to mobilize part of the forces and their further engagement.	1292	21848/99	10/6
8	Order	3rd Army IKM	Strictly Confidential	872-10/7	13-Mar- 99	Undertaking of anti-electronic protective measures and protecting the secrecy of verbal messages and announcements through crypto data protection documents, for the purpose of preventing total blockade and neutralizing the commanding and communication system in the 3rd Army.	1292	21848/99	10/7
9	Request	3rd Army	Strictly Confidential	872-10/8	13-Mar- 99	VJ General Staff to the Artillery Administration that due to complication of the security situation in KiM part of the Mixed Artillery Brigade forces of the 1st Army should be subordinated by the 3rd Army	1292	21848/99	10/8
10	Proposal	3rd Army	Strictly Confidential	872-16/1	13-Mar- 99	organization of coordination with the 2nd Army in the wider region of Mokra Gora and Rugovska Klisura Gorge, in accordance with the agreement between the 2nd Army Commander and PrK - addressed to the VJ General Staff	1292	21848/99	16
11	Order	3rd Army IKM	Strictly Confidential	872-17/1	14-Mar- 99	Order to carry out tasks from the contents of Engineer Support on fortification and camouflage- for the purpose of maximal protection of personnel equipment and material, advancing fortification from the second level to the third, using camouflage measures.	1292	21848/99	18
12	Plan	3rd Army IKM	Strictly Confidential	872-17/2	14-Mar- 99	Bringing in the 252nd Armored Brigade and 1st Mixed Artillery Brigade and re-subordination to the 3rd Army (detailed elaboration of measures and activities by place and time).	1292	21848/99	18/1

13	Order	3rd Army	Strictly Confidential	250-137	17-Mar-99	Re-subordination and engagement of the Reconnaissance Sabotage Battalion of the 72 Special brigade - to the PrK Command to execute special reconnaissance sabotage operations (order in 5 items).	Out	Archives	-
14	Proposal	3rd Army IKM	Strictly Confidential	872-22/1	20-Mar-99	o the VJ General Staff to form a Tactical Group (TG-252) out of the 252nd Armored Brigade for the purpose of efficiently commanding units re-subordinated to PrK.	1292	21848/99	23
15	Warning	3rd Army IKM	Strictly Confidential	872-22/3	20-Mar-99	Undertaking measures in order to avoid incidents along the border with RM and RA due to possible air strikes and the infiltration of larger sabotage and terrorist forces from Albania.	1292	21848/99	23/3
16	Order	3rd Army	Strictly Confidential	872-23/1	20-Mar-99	In accordance with the developing situation and for the purpose of protecting personnel and equipment , relocation of non-troop reserves of war material in the 201st and 202nd logistics bases.	1292	21848/99	24/2
17	Order	3rd Army IKM	Strictly Confidential	872-10/11	23-Mar-99	Taking over the Fagot/anti-tank rocket launcher/ squad in Gnjilane garrison after completion of personnel training.	1292	21848	10/11
18	Order	3rd Army	Strictly Confidential	250-159	23-Mar-99	Order Regarding the bombing of FRY (detailed tasks for units in 7 items).	Out	Archives	-
19	Information	3rd Army	Strictly Confidential	250-160	23-Mar-99	Data on possible targets of air strikes (according to intelligence data, concrete targets by garrisons.)	Out	Archives	-
20	Command	3rd Command for IKM	Strictly Confidential	455-73	24-Mar-99	Command to support MUP forces in breaking up and destroying [iptar terrorist forces in Drenica region (13 items without a Decision Map)	Out	Archives	-
21	Report	3rd Army IKM	Strictly Confidential	872-32/1	25-Mar-99	To the VJ Chief of General Staff on operations and consequences of air strikes by NATO forces on 24 March (details on all facilities that were hit that night).	1292	21848/99	29
22	Order	3rd Army IKM	Strictly Confidential	872-33/1	25-Mar-99	Due to intensified reconnaissance activities of NATO forces on directions that to KiM, for the purpose of preventing surprises, emphasis on visual observation and surveillance of airspace.	1292	21848/99	30

23	Order	3rd Army IKM	Strictly Confidential	872-33/2	25-Mar- 99	Order to search premises where representatives of the OSCE Mission stayed, considering that bombing markers were found in the Gnjilane region to guide enemy aviation	1292	21848/99	30/2
24	Order	3rd Army IKM	Strictly Confidential	872-36/1	25-Mar- 99	For intensive engagement of reconnaissance organs in the directions that lead to KiM considering the possible use of NATO airplanes to fight against armored mechanized forces.	1292	21848/99	34
25	Order	3rd Army IKM	Strictly Confidential	872-37/1	25-Mar- 99	Undertaking protective measures due to air strikes (after 2000 hrs quickly move units to other combat positions)	1292	21848/99	35
26	Order	3rd Army	Strictly Confidential	250-165	25-Mar- 99	Order to relocate from current positions, regions, /?mobilization assembly point/ and re-deployment premises- since mass and frequent air strikes are expected and for the purpose of more efficient protection of personnel and equipment (6 items).	Out	Archives	-
27	Order	3rd Army	Strictly Confidential	250-166	26-Mar- 99	Undertaking urgent measures to protect units from air operations- based on information that NATO will begin with mass strikes (tasks for the units in 6 items).	Out	Archives	-
28	Order	3rd Army IKM	Strictly Confidential	872-38/1	26 March 199	Due to intensified NATO operations, a strategic task for all commands and units is to maintain manpower/!/s/, combat and other equipment, morale and unity, prevent Panic and desertion, etc.	1292	21848/99	36
29	Order	3rd Army IKM	Strictly Confidential	872-40/1	27-Mar- 99	Order to begin the organization and material preparations of the 2111th Armored Brigade (without the 2nd Armored Battalion), for re-subordination to the 211th Armored Brigade in podujevo region.	1292	21848/99	38
30	Order	3rd Army IKM	Strictly Confidential	872-40/2	27-Mar- 99	For the purpose of immediate preparations to defend the PrK area of responsibility, order to re-subordinate: 66th Military territorial detachment ([trica), 62nd Military territorial detachment (Kosovska Kamenica) and 68th Military territorial	1292	21848/99	38/2

						detachment (Gora).			
31	Order	3rd Army IKM	Strictly Confidential	872-41/1	27-Mar-99	For the purpose of preventing losses undertake protective measures, with emphasis on loose deployment, and camouflaging , and protecting units from air operations with cluster bombs.	1292	21848/99	39
32	Order	3rd Army IKM	Strictly Confidential	872-42/1	29-Mar-99	Stepping up the fortification of armored and mechanized equipment in the deployment and defense regions and reduce movements to the night, due to the fact that NATO has at its disposal airplanes with laser guided anti-air rockets.	1292	21848/99	40
33	Warning	3rd Army IKM	Strictly Confidential	872-42/1	27-Mar-99	Conduct of part of LRS/expansion unknown/ - military-territorial units in KiM region show signs of indiscipline and misconduct towards the property and civilians of [iptar nationality, thus these measures should be undertaken.	1292	21848/99	40/2
34	Order	3rd Army IKM	Strictly Confidential	872-45/1	29-Mar-99	To the Commanders of NK and PrK in relation to creating conditions on the level of anti-aircraft defense, for LUNA Worker's Battalion, and the ORKAN bSVLR/ expansion unknown/ and the KO[AVA SVLR/expansion unknown/ as well as logistics security.	1292	21848/99	45
35	Order	3rd Army IKM	Strictly Confidential	872-48/1	20-Mar-99	Due to extensive reconnaissance and discovery of the deployment of our forces by using reconnaissance aviation AWACS, electronic reconnaissance and the insertion of bombing markers, continue to search for the bombing markers and other measures.	1292	21848/99	45
36	Order	3rd Army IKM	Strictly Confidential	872-49/2	30-Mar-99	To the Chief of the Supreme Command Staff that on 30 March 1999 the action will begin to destroy the remaining [iptar terrorist forces in Mali{evo region and will last 2-3 days. Attached is the Decision Map	1292	21848/99	46

						of PrK Commander (out of archive).			
37	Report	3rd Army IKM	Strictly Confidential	872-50/1	31-Mar- 99	For the purpose of raising the effectiveness of air defense, estimate flight direction of enemy aircraft and their targets and in accordance with that organize anti-aircraft defense more successfully, especially from the direction of Bulgaria and BH.	1292	21848/99	47
38	Order	3rd Army IKM	Strictly Confidential	872-51/1	1-Apr-99	Due to failure to carry out the order of taking measures on REO/expansion unknown/ and anti-aircraft protection during which serious were suffered, warning for the commanders to carry out the ordered anti-aircraft protection measures when electronic reconnaissance, interference, misleading and anti-electronic operations are used by the enemy.	1292	21848/99	48
39	Warning	3rd Army	Strictly Confidential	250-185	1-Apr-99	Order for the corps, brigade and regiment commanders to create smoke where important fortifications are located - in 5 items.	Out	Archives	-
40	Order	3rd Army	Strictly Confidential	3110-31	2-Apr-99	Order to mobilize - for the purpose of securing the necessary level of combat readiness of part of the Army's command and units and order (8 items) of the Chief of the Supreme Command Staff for some units to be partly mobilized.	Out	Archives	-
41	Order	3rd Army	Strictly Confidential	872-53/1	2-Apr-99	Due to NATO operations against bridges in the FRY territory ,have local units within the Engineer Regiments ready to cross water and other natural obstacles in the zone of responsibility.	1292	21848/99	49
42	Warning	3rd Army	Strictly Confidential	872-55/1	2-Apr-99	Due to the fact that despite all the warnings and orders in relation to the functioning of the command system and undertaking of air defense measures many weaknesses are still present (details on 15 of them follows)	1292	21848/99	51

43	Order	3rd Army	Strictly Confidential	872-60/1	3-Apr-99	Due to possible NATO ground aggression and for the purpose of undertaking measures to organize defense, commanders are to prepare and bring a Decision for protection against aggression in the FRY and in their zone of operations which will be approved on 5 April 1999.	1292	21848/99	55
44	Warning	3rd Army	Strictly Confidential	872-61/2	3-Apr-99	Undertaking anti-aircraft protective measures (in subsequent operations it is expected that there will be greater engagement of American OA-15 aircraft which are intended for operations on armored and mechanized equipment-equipped with a 30mm gun and carrying about 8 tonnes of modern bombs and rockets....)	1292	21848/99	55/2
45	Information	3rd Army	Strictly Confidential	872-60/2	4-Apr-99	Who will be present during the approval of the Decisions of the commanders of subordinated units in the meeting at the hotel "Radan" in Prolom Banja, at 0900 hrs on 5 April 1999.	1292	21848/99	55/3
46	Order	3rd Army	Strictly Confidential	872-66/1	4-Apr-99	Due to the deterioration of the political-security situation in the PrK zone and pursuant to the Art. 11 of the Law on Defense of FRY, checkpoints are being set up in the directions that lead to KiM(attached examples of Permission to move).	1292	21848/99	169
47	Order	3rd Army	Strictly Confidential	872-73/1	6-Apr-99	Undertaking measures to defend the FRY against aggression- tasks to estimate possible engagement of air-ground NATO forces and also 24 very detailed tasks for the command and units.	1292	21848/99	63
48	Order	3rd Army	Strictly Confidential	872-73/2	9-Apr-99	order to undertake measures to protect personnel , combat equipment and facilities of special importance, (in 9 elaborated items with brief information.)	1292	21848/99	63/2

49	Order	3rd Army	Strictly Confidential	872-73/3	9-Apr-99	Due to the indicated need and for the purpose of adequate firing support to NK/Ni{Corps/forces for anti-airborne combat, order to resubordinate 10 128 mm Oganj self-propelled multiple rocket launcher/?battalion/ (in 3 items)	1292	21848/99	63/3
50	Order	3rd Army	Strictly Confidential	250-206	9-Apr-99	Protection from chemical warfare 9order in 5 items).	Out	Archives	-
51	Report	3rd Army	Strictly Confidential	872-76/1	10-Apr-99	The beginning of the aggression frm the Republic of Albania on the part of the DG/state border/ from the Morina border post to the Ko{ are border post, a 10-kilometer from (a preliminary, detailed report on the course of combat operations and the consequences).	1292	21848/99	66
52	Order	3rd Army	Strictly Confidential	872-76/2	10-Apr-99	Tasks for the logistics organ of the 3rd A, to urgently provide a certain number of doctors as well as a large quantity of medical supplies, due to the increased number of injured persons.	1292	21848/99	66/2
53	Report	3rd Army	Strictly Confidential	872-77/2	11-Apr-99	New, supplemented report on the aggression from the Republic of Albania in the direction of the Ko{ are border post, forwarded to the N[/Chief of Staff/ of the VK/ Supreme Command/.	1292	21848/99	67
54	Order	3rd Army	Strictly Confidential	3522-1	12-Apr-99	For the purpose of defending the bridges and tunnels in the Grdeli~ka klisura gorge using the PVO/Anti-Aircraft Defense/ lard/Light Artillery Rocket Battalion/ of the 135th pbr/Infantry Brigade/and the [ilo mixed PVO battalion, organize their defense from further attacks from the air.	1292	21848/99	11
55	Order	3rd Army IKM	Strictly Confidential	872-79/1	13-Apr-99	Setting up a commission to inform the citizens of Istok Municipality in connection with the unauthorized solving of problems on the territory of the municipality by responsible persons (president of the commission-- major general Milan / AKOVI)	1292	21848/99	69

56	Report	3rd Army IKM	Strictly Confidential	872-79/2	14-Apr- 99	The Commission has established that there are no detention camps on the territory of Istok municipality. It has also provided documents to show that the main problem is the unauthorized and criminal behaviour of the OUP (Department of the Interior) Chief, and the conflict b/w him and individuals in the municipality.	1292	21848/99	69/2
57	Warning	3rd Army	Strictly Confidential	3574-2	14-Apr- 99	Abandoning facilities at peacetime locations despite repeated orders to abandon peacetime locations and disperse RMR (strategic war reserves) some units failed to carry out this assignment (followed by measure to be taken in order to solve this problem	1292	21847/99	24
58	Order	3rd Army	Strictly Confidential	3596-1	15-Apr- 99	Undertaking security measure in units since inspections carried out until now have established a number of omissions ( a list of typical examples followed by eight extensive items)	1292	21847/99	31
59	Warning	3rd Army IKM	Strictly Confidential	872-84/1	15-Apr- 99	undertaking effective measures to secure combat operations form aggression against the SRJ (seven elaborate items)	1292	21847/99	73
60	Proposal	3rd Army IKM	Strictly Confidential	872-85/1	15-Apr- 99	Appointing persons to appropriate posts in the defense administration (proposal for Lieutenant General Lj. Velikovi and Lieutenant General M. Bojovi	1292	21848/99	74
61	Order	3rd Army IKM	Strictly Confidential	872-86/1	16-Apr- 99	Firing system replenishment (thoroughly described tasks (15 items)	1292	21848/99	75
62	Order	3rd Army IKM	Strictly Confidential	872-87/1	16-Apr- 99	Artillery order no.1 (for the PrK command, the NK/NI Corps) the 203rd mabr (mixed Artillery Brigade) the commander of the ARG (army Rocket Group) AAG (Army Artillery Group), AGVBR (Multiple Rocket Launcher Army Group) and the AGVBR-2 and AGVBR-3	1292	21847/99	76

63	Warning	3rd Army	Strictly Confidential	3650-2	17-Apr-99	Die to failure to observe the law and international regulations (criminal behaviour and so on) a warning to units to fully implement all provisions of the international laws of war during combat operations and other obligations described in five more items	1292	21848/99	44/2
64	Order	3rd Army IKM	Strictly Confidential	872-90/1	17-Apr-99	Inspection of the elimination of the established shortcomings and of the organization of the firing system (inspection of units within the range of the Prizren (akovica road on 18 and 19 April 1999)	1292	21848/99	78
65	Report	3rd Army IKM	Strictly Confidential	872-90/2	20-Apr-99	Report on eh inspection of an visits to the 549th and the 125th mtbr (achievements and failings)	1292	21848/99	78/2
66	Order	3rd Army IKM	Strictly Confidential	872-90/3	20-Apr-99	Securing a civilian motor vehicle from the 549th mtbr and the Priština Vok (military district) fro the needs of the 3rd Army IKM	1292	21848/99	78/3
67	Request	3rd Army IKM	Strictly Confidential	872-90/4	21-Apr-99	Vehicle registration to the logistics organ of the 3rd Army	1292	21848/99	78/4
68	Order	3rd Army IKM	Strictly Confidential	872-91/1	18-Apr-99	Bringing the system of security measures to a higher level due to the discovered shortcomings, measurers regulated in 13 items	1292	21848/99	79
69	Order	3rd Army IKM	Strictly Confidential	872-92/1	19-Apr-99	Order on taking care of refugees. Due to NATO air strikes there is increased movement of the civilian population and measures are prescribed for its protection, consisting of nine specific items	1292	21848/99	80
70	Order	3rd Army IKM	Strictly Confidential	872-94/1	20-Apr-99	Order on resubordinating units and organs of the interior to the PrK and NK Commands (pursuant to the (VK (Supreme Command Staff) order) consisting of three items	1292	21848/99	81

72	Report	3rd Army IKM	Strictly Confidential	872-94/1-2	25-May- 99	<b>Report from the 3rd army commander to the (VK chief on failure to implement the orders of MUP commands and units on resubordination to the PrK and NK commands (mentioning numerous instances of abuse by MUP members and some MUP units, including even crimes against the civilian population.</b>	1292	21848/99	81/3
74	Request	3rd Army IKM	Strictly Confidential	872-97/1	21-Apr	Report on the eh breaking up of [TS Shiptar forces by the MUP in the Rugoslaska Klisure Gorge Sector. In this connection it is necessary to solve through the VJ General Staff the issue of engaging some of the forces of the 2nd army for coordinated operation]	1292	21848/99	82
75	Information	3rd Army IKM	Strictly Confidential	872-99/2	20-Apr- 99	Available operative information on the eh current disposition of NATO forces in the Republic of Macedonia (in great detail and very specific) submitted to the NK Commander	1292	21848/99	84
77	Order	3rd Army	Strictly Confidential	3876-2	24-Apr- 99	Measures to minimize the consequences of attacks form the air, as the aggressor used modern weapons in his operations. Focus on fortification and camouflage	1292	21848/99	84/2
78	Information	3rd Army IKM	Strictly Confidential	872-103/1	25-Apr- 99	Information on the eh AH-64 Apache helicopter (its purpose, characteristics, weapons, etc. As well as weapons and tactics to be used against it and special motives for its destruction	1292	Archives	-
79	Proposal	3rd Army	Strictly Confidential	3774-4	25-Apr- 99	Engaging a part of the Command of the 72nd Special Brigade, and the 63rd Parachute Brigade, a brief report on engaging these units in combat operations and a proposal for further measures.	1292	21847/99	63/3
80	Report	3rd Army	Strictly Confidential	3906-4	26-Apr- 99	To the VK Staff on the incident of 22 April 1999 on the state boarder with the Republic of Macedonia (when ARM-- Army of the Republic of Macedonia officers and solders entered a Anti personnel mine field	1292	21847/99	81/4

81	order	3rd Army	Strictly Confidential	3918-1	26-Apr-99	Granting leave to conscripts engaged in RJ (war units) in order to create conditions for doing farm work (regulated in nine items)	1292	21847/99	85
82	Order	3rd Army IKM	Strictly Confidential	872-111/1	27-Apr-99	For the purpose of eliminating established weaknesses and omissions and raising the level of combat readiness by all parameters (followed by assignments described in 20 items)	1292	21848/99	89
83	Order	3rd Army	Strictly Confidential	4112-2	30-Apr-99	Since a large number of VJ members frequently move around armed and in uniforms outside the area of responsibility of their units, behaving in an unsoldierly manner and compromising the reputation of the VH an order consisting of five items	1292	21847/99	112/2
84	Order	3rd Army	Strictly Confidential	4204-1	5-May-99	Engaging military territorial units on securing communications and facilities since MUP forces are engaged in other assignments (order in five items)	1292	12847/99	119
85	Warning	3rd Army IKM	Strictly Confidential	872-116/1	5-May-99	Warning on taking security measures. Despite several orders, some of the units have not done anything to this end--- a warning consisting of one paragraph, to rectify omissions in that respect	1292	12848/99	92
86	Order	3rd Army IKM	Strictly Confidential	872-116/2	5-May-99	Commanding at the Mixed Rocket Artillery Battalion (relocate the Mrad KM Command Post from the current sector to the Suvy Do Village sector and incorporate it into the Kovava LRS expansion unknown etc	1292	12848/99	92/2
87	Order	3rd Army IKM	Strictly Confidential	872-116/3	8-May-99	Changing the redeployment area of the LUNA-M Rocket Division during the night b/w 8 and 9 May relocate the rd to the sector of Suvojnica, Dugojnica and Makatica Villages.	1292	12848/99	92/3
88	Order	3rd Army IKM	Strictly Confidential	872-120/1	7-May-99	Take measures to receive the 3rd Army Commander who is visiting some PrK commands and units as planned (a detailed order, including other information of importance for the implementation of the activity)	1292	12848/99	93

89	Order	3rd Army IKM	Strictly Confidential	872-121/1	7-May-99	For the purposes of eliminating weaknesses in 3rd Army units and pursuant to the VJ VK order-- an order consisting of 25 very concise items on taking measure in order to solve the problem	1292	12848/99	94
90	Order	3rd Army	Strictly Confidential	4234-2	7-May-99	Preventing unusual incidents during the handling and use of personal weapons-- tasks regulated in seven items.	1292	21847/99	124/2
91	Order	3rd Army IKM	Strictly Confidential	872-123/1	8-May-99	Taking measures to reinforce the VOJ air surveillance and warning system-- tasks described in great detail in six items, with appropriate information about relevant problems	1292	21848/99	96
92	order	3rd Army IKM	Strictly Confidential	872-125/1	8-May-99	Engaging VJ and MUP forces for the combat control of territory, for the purpose of preventing further activities of the (TS and completely destroying armed TG (terrorist groups) in the eh are of responsibility of the PrK), tasks consisting of ten items with clearly defined duties.	1292	21848/99	97
93	Proposal	3rd Army	Strictly Confidential	3804-6	9-May-99	Coordinating the activities of the Commands of the PrK, and the PK (expansion unknown) of the 2nd Army a proposal forwarded to the 2nd Army Command-- The Rugovska Klisure gorge area, a proposal to hold a working meeting PE as printed)	1292	21847/99	72/5
94	Order	3rd Army IKM	Strictly Confidential	872-126/1	9-May-99	Due to the massive consumption of fuel and the improvement of the protection of relocated strategic war reserves, and order consisting of five items	1292	21848/99	98
95	Warning	3rd Army IKM	Strictly Confidential	872-127/1	9-May-99	procedure with seized and confiscated material supplies (MS) in order to secure the issued supplies and the proper use of seized and confiscated MS for designated purposes (five items)	1292	21848/99	99
96	Warning	3rd Army IKM	Strictly Confidential	872-128/1	9-May-99	Taking measures of engineering support to combat operations in order to ensure the necessary level of protection of personnel and MS and minimize the consequences of	1292	21848/99	100

						NATO air strikes (a repeated warning and an Order consisting of four items)			
97	Report	3rd Army IKM	Strictly Confidential	872-128/3	10-May- 99	Problems affecting the combat readiness of the 7th pbr (infantry Brigade) and the 37th mtbr--- shortage of personnel and logistical problems	1292	21848/99	100/3
98	Order	3rd Army	Strictly Confidential	4284-2	10-May- 99	Due to frequent (TS attacks on VJ members in KiM, and especially frequent attacks from ambushes on individual vehicles or groups of vehicles, an Order to prevent transportation and the leaving for the implementation of assignments w/o through preparations	1292	21847/99	131/2
99	Order	3rd Army IKM	Strictly Confidential	872-129/1	10-May- 99	Four item order on carrying out camouflage assignments for the purpose of minimizing losses caused by air strikes and protecting personnel and MTS equipment and material (building fake bridges, camouflaging personnel, etc)	1292	21848/99	101
100	Order	3rd Army IKM	Strictly Confidential	872-129/2	10-May- 99	Engaging engineering reserves of the armies on carrying out engineering supervising tasks in the area of the armies-- - relocating the engineering reserves in the Priština- Lipljan sector and so on	1292	21848/99	101/2
101	Order	3rd Army	Strictly Confidential	4280-2	10-May- 99	Minimizing the consequences of NATO air strikes -- A brief report on the destruction of a Gvozdika (self propelled howitzer) and two tanks in the Uroevac sector and the tasks of units, consisting of three items for the purpose of protection and Mimi zing the consequences	1292	21847/99	267
102	Report	3rd Army IKM	Strictly Confidential	872-137/1	13-May- 99	Interim report to the VK staff on the disobedience of the 3rd company of the 3rd battalion of the 125th mtbr (about 80 soldiers) in the general Koare sector -- a detailed two page report written by the 3rd Army Commander personally.	1292	21848/99	109

103	Order	3rd Army	Strictly Confidential	4424-2	13-May-99	Following NATO attacks on schools in which VJ units and commands are accommodated and for the purpose of protecting personnel and MS, an order to relocate.	1292	21847/99	150/2
104	Report	3rd Army	Strictly Confidential	4438-2	13-May-99	Report to the VK Staff on volunteers (from 26 March to 12 May 1999, a total of 2,502 volunteers applied, including 63 citizens; other information is also included)	1292	21847/99	151/3
105	Order	3rd Army IKM	Strictly Confidential	872-139/1	15-May-99	Pursuant to a [V]korder and for the purpose of the more effective engagement of PVO/Anti Aircraft Defence/ARJ/Artillery and Rock Units/, a six item order on resubordinating batteries from the 492nd PVO arp/Artillery Rocket Regiment	1292	21848/99	111/2
106	Report	3rd Army IKM	Strictly Confidential	872-139/2	15-May-99	Report to the VK Staff on resubordinating Strela 1 and 40mm L-70 anti aircraft gun/ batteries from the 492nd PVO arp - problems and proposed solutions	1292	21848/99	111
107	Order	3rd Army	Strictly Confidential	872-141/1	15-May-99	Taking measures due to the increased number of establishment and non establishment units in Kosovo Polje, instances of breach of discipline and unsoldierly conduct, a four item order on regulating these problems	1292	21848/99	113
108	Order	3rd Army	Strictly Confidential	4488-3	16-May-99	Resubordinating PVO Arj- Pursuant to a VK staff order and for the purpose of increasing the effectiveness of the PrK PVO (the resubordination of batteries form the 2nd A, the 1st Army, and the RV/Air Force/ and PVO	1292	21847/99	163
109	Order	3rd Army IKM	Strictly Confidential	4518-2	18-May-99	Coordinated action and cooperation of officers in carrying out tasks-- due to the problem of insufficient coordination and cooperation especially in carrying out tasks in the PVO system, a four item order on regulating these issues on the operative level	1292	21847/99	169/2

110	Order	3rd Army	Strictly Confidential	4626-1	18-May-99	Measures to improve the operation of the service in the Ni garrison in war conditions -- a nine item order for the purpose of eliminating the established instances of negative behaviour and improving the overall state of order, work, discipline and security	1292	21847/99	180
111	Proposal	3rd Army IKM	Strictly Confidential	872-148/1	21-May-99	Proposal to the VK staff for the stabilization of the state of morale and the overall combat readiness of some PrK units and the prevention of desertion -- eight concrete measures	1292	21848/99	120
113	Order	3rd Army IKM	Strictly Confidential	872-148/3	22-May-99	Taking measures to consolidate the 7th and the 354th pbr -- an eight item order for the purpose of consolidating the situation in these brigades to prevent any negative influence on other army units as soon as possible (very specific and appropriate for the problem)	1292	21848/99	120/3
114	Information	3rd Army IKM	Strictly Confidential	872-154/1	23-May-99	Report on a conversation with citizens in Raka-- information on the place and those present, the reactions of citizens, the calming of the situation, and a detailed proposal for measures (on the level of the UK/ expansion unknown/ and the 2nd arming, the PrK and the 3rd army, and the VK) followed by a remark that state organs are performing poorly	1292	21848/99	125
115	order	3rd Army IKM	Strictly Confidential	872-156/1	23-May-99	Measures to improve order and discipline and increase the level of combat readiness-- based on discovered omissions and for the purpose of ensuring the ordered level of order and discipline, a ten item order with detailed explanation of the procedure to be implemented by commands and units in order to solve the problems	1292	21848/99	126
116	order	3rd Army IKM	Strictly Confidential	872-157/1	25-May-99	Missing person record-- a ten item order with detailed instructions of work on this issue for the purpose of taking measures to find missing and abducted persons in areas	1292	21848/99	127

						of responsibility.			
117	order	3rd Army IKM	Strictly Confidential	872-160/1	28-May- 99	For the purpose of preventing the destruction of the remaining bridges, flyovers and viaducts in the area of responsibility of the 3rd Army -- a five item order on continuing the camouflage these facilities and engaging engineering reserves and construction resources.	1292	21847/99	210
118	order	3rd Army IKM	Strictly Confidential	872-161/1	28-May- 99	for the purpose of setting up additional obstacles by making contact fuse/bombs/ of FAB-100/3 and FAB250-4 aircraft bombs, a nine item order on setting additional obstacles with aircraft bombs, a nine item order on setting additional obstacles with aircraft bombs in the defense zone of the brigades of the first echelon of the PrK and the NK towards the RA and the RM (detailed)	1292	21848/99	131
119	Request	3rd Army IKM	Strictly Confidential	872-161/2	28-May- 99	in order to carry out a planned task of setting additional obstacles, a request to the VK staff to replenish the 3rd army with 150 aircraft bombs, FAB 100-3 or FAB 250-4	1292	21848/99	131/2
120	Order	3rd Army IKM	Strictly Confidential	872-161/4	31-May- 99	Supplementary order to Priština Corps Units on the Takeover of FAB 100-3 aircraft bombs	1292	21848/99	131/3
122	Order	3rd Army IKM	Strictly Confidential	872-164/2	30-May- 99	Preparations for defense against a NATO ground operation -- an order with the aim of ensuring full readiness of the PrK with reinforcement for defense against a ground operation (seven items with a detailed description of tasks)	1292	21848/99	133/2
123	Warning	3rd Army IKM	Strictly Confidential	872-169/2	31-May- 99	Omissions in securing communications -- a warning in view of the fact that [TS have stepped up terrorist attacks on vehicles, firing infantry weapons and laying PT/Anti Tank/Mines into asphalt surfaces (the warning further mentions operations axes	1292	21848/99	138

						and latest information including measures)			
124	Order	3rd Army IKM	Strictly Confidential	872-169/2	1-Jun-99	A two item order to commanders in connection with the above	1292	21848/99	138/2
125	Request	3rd Army IKM	Strictly Confidential	872-172/3	4-Jun-99	Solving the problems affecting the combat readiness of the PrK-- a report to the VK staff on the problems, with item 1 pointing to the problem of "MUP forces not being resubordinated to VJ commands", the problem of their privileged position and other issues.	1292	21848/99	141
126	Order	3rd Army IKM	Strictly Confidential	872-181/1	8-Jun-99	Taking over and transporting construction material from the territory of KiM- an order for the purpose of creating favorable conditions for repairing infrastructure facilities in the 3rd Army	1292	21848/99	148
127	Proposal	3rd Army IKM	Strictly Confidential	5284-1	8-Jun-99	Discharging soldiers recruited in march and June 1998, a proposal to the VK staff in order to retain the largest possible number of Serbs, Montenegrins and other citizens loyal to Serbia in KiM.	1292	21847/99	225
128	Proposal	3rd Army IKM	Strictly Confidential	872-184/1	9-Jun-99	Proposal to the Chief of the [VJ/Staff of the Yugoslav Army/for measures to protect citizens and prevent a mass exodus from KiM, with a brief report on the situation and a specific proposal consisting of five items (especially regarding the arrival of state organs etc)	1292	21848/99	151
129	Order	3rd Army IKM	Strictly Confidential	872-188/2	10-Jun-99	ban for all units on opening fire from any type of weapons, in order to prevent them from providing any reason for a continuation of bombing-- an order consisting of four specific items, based on the Military Technical Agreement	1292	21848/99	155/2

130	Order	3rd Army IKM	Strictly Confidential	872-188/3	11-Jun-99	Taking away ammunition form units pulling out of KiM-- an order due to weakness observed in connection with t march of units, for the purpose of eliminating any kind of undisciplined behaviour and preventing possible consequences (eight items)	1292	21848/99	155/3
131	Order	3rd Army IKM	Strictly Confidential	872-189/2	10-Jun-99	Relocating 3rd army units form Kosovo Methohija - a 21 item order with a detailed explanation regarding all issues for the purpose of the prompt organization and safe implementation of the relocation (three plans attached)	1292	21848/99	156
132	Order	3rd Army IKM	Strictly Confidential	872-189/3	10-Jun-99	Detailed explanation of the above mentioned order regarding the Luna, Koava, Orkan and Oganj Rocket systems	1292	21848/99	156/2
133	Order	3rd Army IKM	Strictly Confidential	872-189/4	10-Jun-99	Return of the engineering reserves of the 3rd army from the territory of KiM (a detailed explanation of the pull out plan)	1292	21848/99	156/3
134	Order	3rd Army IKM	Strictly Confidential	872-189/5	10-Jun-99	Order for some Brigades on assigning a liaison officer and a translator (for communication with KFOR)	1292	21848/99	156/4
135	Order	3rd Army IKM	Strictly Confidential	872-189/6	10-Jun-99	Setting up an office for liaison with KFOR (the Grand Hotel, Priština)	1292	21848/99	156/5
136	Order	3rd Army IKM	Strictly Confidential	872-189/7	10-Jun-99	Setting up operational checkpoints to control the implementation of the Plan on the relocation of VJ commands, units and institutions form the territory of KiM (four in all)	1292	21848/99	156/6
137	Order	3rd Army IKM	Strictly Confidential	872-189/8	11-Jun-99	Three item order on preventing the abuse of weapons, MES/Mines and explosives, and other UbS/War material/By units and individuals and the taking away of ammunition	1292	21848/99	156/7
138	Order	3rd Army IKM	Strictly Confidential	872-189/8	11-Jun-99	Security measures and organization of traffic-- an order due to the needs of the planned relocation of PRK units form KiM (four items)	1292	21848/99	156/8
139	Order	3rd Army IKM	Strictly Confidential	872-191/1	10-Jun-99	Demobilization of the RJ/War Units/ of Ni Corps from 11 to 20 June 1999.	1292	21848/99	158

140	Order	3rd Army IKM	Strictly Confidential	872-192/1	10-Jun- 99	Ban in opening fire from PVO ARJ, because of the ordered relocation and the commitments made with regard to the UN forces (KFOR) five items	1292	21848/99	159
141	Order	3rd Army	Strictly Confidential	5300-3	11-Jun- 99	Explaining the Military Technical Agreement to all units in order to ensure strict adherence to the provisions of this document (three items)	1292	21847/99	227/3
142	Report	3rd Army IKM	Strictly Confidential	872-198/1	13-Jun- 99	Interim report on the eh situation in KiM-- a description of the developments in Prizren and Suva Reka with a report on measures taken	1292	21848/99	164
143	Order	3rd Army	Strictly Confidential	5372-2	13-Jun- 99	Order on full cooperation with and the correct treatment of the UN international security force (three items)	1292	21847/99	240/2
144	Warning	3rd Army IKM	Strictly Confidential	872-26/3	13-Jun- 99	Taking measures to protect personnel and TMS/Equipment and material/ from [TS attacks (the warning mentions an example form Metohija, followed by assignments consisting of four items)]	1292	21847/99	245
145	Order	3rd Army IKM	Strictly Confidential	2523-1	18-Jun- 99	Repairing facilities in the Ni garrison (three items)	1292	21847/99	12
146	Order	3rd Army	Strictly Confidential	5618-1	28-Jun- 99	revocation of all orders issued during the imminent threat of war or the state of war referring the resubordination of commands and units, the functioning of the duty operations service, working hours, the security of facilities and so on	1292	21847/99	262
147	Map	3rd Army	Strictly Confidential	NN	Mar-99	Plan for engaging the forces of the 3rd army on breaking up [TS and on defense form the aggression (a copy)	1292	21847/99	-

**G. Reports on the work of the military judicial organs**

The work and status of military judicial organs and/or criminal charges and related sentencing are reported on 63 out of 78 days during this period .

<b>Day</b>	<b>Date</b>	<b><u>SVK Combat Report</u></b>	<b><u>GS Daily Briefing</u></b>	<b><u>3rd Army Combat Report</u></b>	<b><u>PrK Combat Report</u></b>
1	24-Mar-99				
2	25-Mar-99				
3	26-Mar-99	<i>(3D800, Page 5, §6)</i> “Mobilization of wartime courts and offices of prosecutors” is a focus of activity for the following day.”		<i>(4D272, Page 8, § 8)</i> Next-day priorities “-to continue with the mobilization of wartime courts and prosecutor’s offices”	
4	27-Mar-99				
5	28-Mar-99				
6	29-Mar-99	<i>(3D803, Page 4, §4, ¶5)</i> “Setting up of military courts and military prosecutor’s offices is under way in all strategic and operational forces.”	<i>(3D582, Page 3, ¶9)</i> “The procedure for appointment of judges to courts martial is underway. Action will be taken against all those who failed to respond.” <i>(Page 6, ¶s 12-13)</i> “The start of the work of military courts has been delayed. Trial have to be conducted as summary procedures for...this or that has been convicted to such and such number of years. We have been given this right. Reports on the courts, court activity. /as written/ The government has declared a state of war, what are the obligations of VoK /Military Districts/, conduct trials		

			<p>immediately. /as written/.”          [Ojdanić] (<i>Page 7, ¶6</i>)          “Make an announcement about the mobilization and work of military courts. Members of the public and individuals must know that this is a state of war. Everything depends on our resourcefulness.” [Obradović]</p>		
7	30-Mar-99	<p>(3D804, §2.2–2.3) “Present manning level of wartime prosecutors is 88 persons, or 76.52% of the wartime establishment... The present manning level of wartime military courts is 188 persons, or 86.63%... On 27 and 28 March 1999 the Chief of Legal Administration of the VJ GS inspected and visited wartime judicial organs in the 3<sup>rd</sup> Army and determined that the organs have been formed, started to work and that they are ready with regards to personnel and expertise to carry out tasks within their competence.”</p>			

8	31-Mar-99		<p><i>(4D273, Page 2, ¶6)</i> “Military Prosecutor Offices received 62 criminal reports: 46 for crimes under Article 214 of the FRY /Federal Republic of Yugoslavia/ KZ /Criminal Code/, three for crimes under Article 203 of the FRY KZ, two for crimes under Article 223 of the FRY KZ, one for crimes under Article 217 of the FRY KZ, one for crimes under Article 125 of the FRY KZ, two for crimes under Article 206 of the FRY KZ, one for crimes under Article 219 of the FRY KZ, three for crimes under Article 168 of the FRY KZ, two for crimes under Article 165 of the FRY KZ and one for crimes under Article 67 of the FRY KZ. With regard to these indictments, the prosecutor filed 31 requests to open investigations.” <i>(Page 3, §5)</i> “There were individual cases of robbery and other crimes during combat operations, but these are being successfully suppressed by command measures.”</p>	
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9	1-Apr-99		<p><i>(4D274, Page 2, §2.1, ¶3)</i>  “Offices of the Military Prosecutor are processing 29 criminal reports: five for the crime of failure to respond to a call-up under Article 217 of the KZ /Criminal Code/ and Article 214 of the FRY KZ and one for failure to fulfill material requirements. The Prosecutor has filed 21 requests to open investigation under Article 21 of the FRY KZ. The courts are processing one request to open investigation for the crime under Article 214 of the FRY KZ and one person was detained for allegedly having committed the same crime. Five persons are being detained.” <i>(Page 3, § 5)</i> “In the PrK zone, isolated cases of attempted theft and similar criminal activity have been registered but the security, military police and command organs have undertaken measures and are dealing with the problem successfully.”</p>	
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10	2-Apr-99		<p><i>(4D275, Page 2, §3.1, ¶3)</i>  “Military Prosecutor’s Offices received 13 criminal complaints, filed 17 investigation requests and issued five indictments. By 12:00 hrs on 2 April, courts of first instance conducts 15 on-site investigations, detained nine individuals, filed 72 investigation requests and charged five individuals. Of all the investigation requests received 78 are related to the criminal offence of failing to respond to a mobilization call and avoiding military service, while the rest refer to other criminal offences.” (4D278, Page 3, §5) “Security situation in the zone of responsibility of the Priština Corps is stable. Crime is still present in some units. A total of seven criminal complaints have been filed yesterday against military conscripts, three because of unauthorized abandonment of position and two because of theft.”</p>	
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11	3-Apr-99			<p><i>(4D276, Page 2, ¶1)</i> “Military Prosecutor’s Offices have received 32 criminal complaints (failure to respond to mobilization calls – 17, unauthorized abandonment of post – two, other KD /criminal offences/ - 13), and have submitted nine requests for investigation (commissioned officers – 1, privates – eight). One private has been charged with the criminal offence of unauthorized abandonment of post.” <i>(Page 2-3, §5, ¶2)</i></p> <p>“Isolated incidents of attempted robbery and other criminal offences have been registered during combat operations and successfully prevented from reoccurring by OBs /security departments/ and measures of command.”</p>
12	4-Apr-99			
13	5-Apr-99	<p><i>(3D810, Page 3, §2.3, ¶3 )</i></p> <p>“Wartime military courts and prosecutors from the 2<sup>nd</sup> Army have filed 124 criminal reports, 75 requests for investigations and 10 orders for investigation. The President of the Supreme Military Court and the Supreme Military Prosecutor are visiting wartime military courts and military prosecutors from the 2<sup>nd</sup> Army as planned.”</p>	<p><i>(3D723, Page 2, §6, ¶1)</i> “The functioning and manning levels in the judiciary organs are improving. The worst situation is in the 1<sup>st</sup> Army, but we expect a certain improvement there too.” [Colonel General Matović] <i>(Page 4, ¶s 10-11)</i> “I’m not satisfied with the Sector, the Legal Administration of Morale /as printed/ must immediately respond to imperfections in some solutions, legal regulations and measures rendered. I</p>	<p><i>(4D409, Page 2, ¶6 )</i> “Military Prosecutor’s Offices received 49 criminal reports for processing (four pof /non-commissioned officers/, four soldiers and 41 CL /civilians/ outside the VJ /Yugoslav Army/). There are 41 for the KD /crime/ of failure to respond to call-up (civilians outside the VJ); four for absence without leave (soldiers) and four for other crimes. Military prosecutor’s offices submitted 31 requests for investigations (29 against</p>

			request that a minimal number of measures be rendered and announced to the Yugoslav public. Unusual incidents that occurred outside of combat – they should undergo the same procedure as in peacetime. Measures against perpetrators should be undertaken immediately. Colonel Ivković must immediately right up a warning. All losses must be analysed from the perspective of command errors.” [Ojdanić]	civilians outside the VJ due to failure to respond to call-up and against two soldiers for the crime of absence without leave).”	
14	6-Apr-99				
15	7-Apr-99		<i>(3D639, Page 2, §7, ¶4)</i> “Trials have started in the 1 <sup>st</sup> A and 3 <sup>rd</sup> A.” [Colonel General Matović]		
16	8-Apr-99				
17	9-Apr-99				
18	10-Apr-99				
19	11-Apr-99		<i>(3D728, Page 2, ¶18)</i> “Response by judicial organs has been 100 percent, 40 men were sentenced.” [Colonel General Matović]		
20	12-Apr-99		<i>(3D729, Page 2, ¶10)</i> “number of criminal reports increasing” [Matović]		
21	13-Apr-99	<i>(3D818, Page 5, §4, ¶3)</i> “A negative effect of the observed omissions and weaknesses (stealing technical goods from abandoned Šiptar houses and cases of unauthorized absence and desertion from units by some members of the reserve force) on the state of morale		<i>(4D121, Page 3, ¶13)</i> The report contained a section which included criminal activity that had been referred to the military prosecutor's office. Six criminal reports, five requests for investigation, seven indictments, one non-	<i>(P2004, Page 3, §5, ¶2)</i> “Yesterday, the OB /Intelligence and Security/ of the PrK and the VP /Military Police/, in order to /? Investigate/ criminal liability, sent 8 criminal reports to the investigating judge at the

		of units is successfully neutralized by providing regular information, conducting direct morale and psychological preparations of units, and taking adequate legal measures promptly.”		commissioned officers, three privates, and three serving civilians.	Military Court in Priština, against one officer, three non-commissioned officers and four v/o /conscripts/.”
22	14-Apr-99				<i>(4D172, Page 3, §5)</i> “/In the past 24 hours/ the security organs and the Military Police submitted eight criminal reports for criminal activity to the investigating judge of the Military Court in Priština. The criminal reports were filed against: 2 /Šiptar terrorists/ for terrorism and serial killings, two non-commissioned officers for misappropriation of vehicles and three privates for theft.”
23	15-Apr-99		<i>(3D586 Page 2, §9, ¶2)</i> “The work of judicial organs.” [Matović] <i>(Page 3, ¶1.2)</i> “Crime – regulate all issues; inform commands and commanders to prevent these occurrences.” [Ojdanić]	<i>(4D280, Page 2, § 2.1, ¶ 11)</i> “Military prosecutor’s offices received 69 reports (privates – eight, civilians working for the VJ – 61), filed one request for investigation (a private) and indicted six persons (privates – five, civilians working for the VJ – one). First-instance courts detained four persons, received a total of 26 requests for investigations, conducted two on-site investigations and passed sentences in 11 cases.”	

24	16-Apr-99		<i>(3D587, Page 2, §8, ¶1)</i> “...Judicial organs are working according to plan. The sentences imposed range from one month to 10 years of imprisonment.” [Matović]		<i>(5D214, Page 2, §5)</i> “A total of seven KP /criminal complaints/ have been filed during the day. Criminal complaints against one officer and seven military conscripts were filed for the crime of theft. The perpetrators of the said crimes have been handed over to the investigative judge of the Priština Military Court.”
25	17-Apr-99				<i>(6D1310, Page 2, §5, ¶2)</i> “Four /handwritten: 3/ KPs /criminal reports/ were filed during the day (three conscripts and <del>one terrorist</del> ). The KPs were filed for the following crimes: three crimes of theft and one crime of terrorism.”
26	18-Apr-99				<i>(5D215, Page 2, §5)</i> “During the day, three KP /criminal complaints/ were filed against three military conscripts for the crime of theft.”
27	19-Apr-99				
28	20-Apr-99				
29	21-Apr-99				<i>(5D216, Page 2, §5)</i> “Five KP /criminal reports/ (three thefts, 2 escapes from the unit) were brought today against v/o /conscripts/ for crimes: 3 for theft and 2 for deserting the unit.”
30	22-Apr-99		<i>(3D592, Page 3, ¶12)</i> “Printing of Instructions on the International Law of War.” [Lieutenant General Terzić] <i>(Page 4, ¶14)</i> “The judiciary must be more efficient, and		

			especially for the RM /Navy/.” [Ojdanić]	
31	23-Apr-99		<i>(3D593, Page 2, ¶29)</i> “Documents on coordinating OFS /organization and establishment/ courts.” [Colonel General Matović]	<i>(P1939)</i> This reports lists a few instances of crimes (robbery, aggravated theft, desertion, etc.) but nothing in terms of widespread war crimes.
32	24-Apr-99			<i>(4D281, Page 2, ¶4)</i> “Military prosecutor’s offices submitted 11 requests to open investigation to the courts (9 privates and 2 CL /civilians/ outside the VJ) and brought charges against 7 persons (3 non-commissioned officers and 4 privates). First-Instance Courts ordered custody for two persons, conducted on-site investigations, received 16 requests to open investigation and 18 indictments and rendered judgments in 10 cases.” <i>(Page 2, §5)</i> “In the zone of combat operations, there have been attempts to plunder civilian property despite preventive measures undertaken by command organs and severe punishments pronounced by criminal prosecution organs. Military Police units are successfully carrying out tasks within their ambit.”

33	25-Apr-99		<p><i>(3D595, Page 2, ¶10)</i> “Courts are working more efficiently.” [Matović]</p>	<p><i>(4D282, Page 2, ¶1)</i> “Military prosecutor’s offices submitted 21 requests to open investigation to the courts (1 officer, 13 privates, 7 CL /civilians/ outside the VJ /Yugoslav Army/), brought charges against 11 persons (1 officer, 5 privates and 5 CL outside the VJ), while First-Instance Courts ordered custody for 18 persons, conducted 2 on-site investigations, received 25 requests to open investigation and 9 indictments and rendered judgments in 12 cases.”</p>	
34	26-Apr-99			<p><i>(4D283, Page 2, ¶3)</i> “Military Prosecutor’s Offices received 11 criminal reports to work on, (soldiers – 9, and CL /civilians/ outside the VJ – 2), submitted 24 requests to conduct investigations (non-commissioned officers – 1, soldiers – 21 and CL outside the VJ – 3), while first instance courts remanded four people in custody, carried out two on-site investigations, received 15 request to conduct investigations and 24 indictments.”</p>	

35	27-Apr-99			<p><i>(4D284, Page 2, ¶9)</i> “Military prosecutors are processing 89 criminal reports (3 pof /non-commissioned officers/; 59 privates; 2 CL in VJ /civilians employed by the army/; and 25 CL outside the VJ /civilians contracted to provide services to the army/). They issued 11 indictments (privates). First-instance courts detained 8 persons; carried out 1 on-site investigation; received 38 requests for investigation; and 10 indictments; and adjudicated 3 cases.”</p>	<p><i>(4D104, page 3, ¶1)</i> “During the day, six criminal reports were filed for KD /crimes/ committed – three against soldiers for desertion of units, and three against v/o /military conscripts/ for theft.”</p>
36	28-Apr-99		<p><i>(3D598, Page 2, §8, ¶1)</i> “...The work of judicial bodies is being carried out according to plan, and all legal measures are being taken.”</p>		
37	29-Apr-99		<p><i>(3D599, Page 2, §8, ¶2)</i> “...Judicial organs are continuing to work according to plan.”</p>	<p><i>(4D122, Page 2, ¶8)</i> Reported that the military prosecutor's offices received 116 criminal reports. Three officers, 34 privates, and 79 outside VJ civilians contracted to provide services to the army. Two requests for investigation, an officer and a private. Indictments against eight privates. Four persons detained, eight requests for investigation, ten indictments, and seven adjudicated cases.</p>	

38	30-Apr-99		<p><i>(3D600, Page 2, ¶14)</i>  “Prosecutors are working well, but the courts are lagging behind in their work.”  [Colonel General Matović]  <i>(Page 5, ¶6)</i> “The work of courts is quite slow. A solution must be found. It is good that the Chief of Legal Administration has gone to check the situation.”  [Ojdanić]</p>	<p><i>(4D285, Page 2, ¶5)</i> “The Military Prosecutor’s Officer received 59 requests to conduct investigations (against two non-commissioned officers, 40 privates and 17 CL /civilians/ working for the VJ /Yugoslav Army/), brought charges against 64 persons (one non-commissioned officer, eight privates and 55 CL working for the VJ). First Instance Courts ordered custody for 15 persons, received 30 requests to open investigation and 61 indictments, rendered judgments in five cases and conducted one on-site investigation.”</p>	<p><i>(6D1468, page 2, §5, ¶3)</i>  “During the day a total of 32 KP /criminal reports/ were submitted against three officers, 24 soldiers and three civilians for 22 desertions, nine thefts, and one failure to carry out orders.”</p>
39	1-May-99		<p><i>(3D601, Page 2, ¶21)</i>  “Judicial organs continue to work.” [Matović]</p>	<p><i>(4D286, Page 2, ¶1)</i> “Military Prosecutors’ Offices received 66 request to conduct investigations (soldiers – 13, CL /civilians/ outside the VJ-53), indicted 18 people (soldiers – 17 and CL outside the VJ – 1), while first-instance courts remanded 6 people in custody, received 85 requests to conduct investigations and 19 indictments, rendered judgments in five cases and carried out one on-site investigation.”</p>	<p><i>(5D220, Page 2, §5)</i> “A total of 15 KP /criminal complaints/ have been filed during the day; reasons for filing are unknown.”</p>

40	2-May-99		<p>(3D602, Page 2, ¶22) “The work of judicial bodies is improving.” [Matović]</p>	<p>(4D512, Page 5, ¶12) “On 1 and 2 May 1999, security organs of the 3<sup>rd</sup> Army Military Police filed 48 KP /criminal reports/ with the military prosecutor’s office: 2 against officers, 2 against non-commissioned officers, MUP reservists, 28 against conscripts and 2 against soldiers. The criminal reports were filed for the following crimes: 25 for desertion, 3 for murder, 17 for aggravated theft, 1 for failure to carry out an order and 2 for causing public danger.”</p>	<p>(P2830, Page 2, ¶4) “The military prosecutor of the PrK Command has received criminal reports concerning 297 persons, of which 95 indictment cases have been submitted to the Military Court, while investigations of 109 persons have been requested. Of the total number of persons reported, 22 were officers, 30 were non-commissioned officers, 227 soldiers, 15 civilians and 3 unidentified persons. Regarding the work of the Military Court of the PrK Command, a total of 129 investigations have been brought to completion, resulting in criminal charges against 106 persons. The Military Court has processed 89 cases in the investigation phase and 76 cases of indictment. To date, the investigating judges of the Military Court, in cooperation with forensic personnel from the military police, have carried out 38 onsite investigations. Of the total number of persons brought in for questioning, 65 have been remanded in custody for periods from 3 up to 30 days.”</p>
41	3-May-99				

42	4-May-99		<p><i>(3D604, Page 2, ¶13)</i>  “...Report on the work of judicial organs in the VJ. The number of measures imposed indicates the effectiveness of the work of the judicial organs.” [Matović]</p>	
43	5-May-99		<p><i>(3D605, Page 2, §8, ¶3)</i>  “Activities of judicial organs are intensive and going according to plan.” [Matović]</p>	<p><i>(4D288, Page 3, ¶7)</i> “Military prosecutor offices received 35 criminal reports (against 1 officer, 6 non-commissioned officers and 28 privates), submitted 50 requests to open investigations to the appropriate courts (1 officer, 5 non-commissioned officers, 44 privates) and charged 5 privates. First-instance courts received 12 requests to open investigations and four indictments, rendered judgments in 8 cases and carried out three on-site investigations.”</p>
44	6-May-99		<p><i>(3D606, Page 2, §8, ¶s 3-4)</i>  “Judicial organs are working according to plan; 560 criminal sanctions have been imposed. The inspection and control of the work of military judicial organs in the deployment areas is under way.” [Colonel General Matović]</p>	
45	7-May-99		<p><i>(3D607, Page 2, §8, ¶s 3-4)</i>  “The work of judicial organs has been examined. We think that it should be examined every fortnight...The judicial organs have continued to</p>	

			pronounce sentences.” [Colonel General Matović] <i>(Page 4, #7)</i> “I agree that the work of judicial organs be examined once a fortnight.” [Ojdanić]		
46	8-May-99				
47	9-May-99		<i>(3D609, Page 2, ¶14)</i> “Judicial organs are working intensively...” [Colonel General Matović]		
48	10-May-99			<i>(4D315, Page 3, ¶8)</i> “The Military Prosecutor’s Office received 18 criminal reports (1 non-commissioned officer, 17 soldiers), sent 13 requests for conducting investigations to the competent courts (for 1 non-commissioned officer and 12 civilians outside the army), and indicted ten (9 soldiers and 1 civilian outside the army). First-instance courts received 12 requests for conducting investigations and 9 indictments, carried out one investigation and detained 8 persons.”	
49	11-May-99				
50	12-May-99	<i>(P2826, § 2.3)</i> This report stated that the initial volume and complexity of tasks facing military judicial organs was too great, but after adjustments the military judicial organs have become fully operational	<i>(3D612, Page 2, §8, ¶2)</i> “The work of the military prosecutors has increased. The number of sentences has increased.” [Colonel General Matović] <i>(Page 4, #11)</i> “In the work of judicial organs, in examining the work, keep on socially engaged persons /as printed/...Prevent crimes by straightforward elimination of	<i>(4D290, Page 3, ¶5)</i> “Military Prosecutor Offices received 38 criminal reports (/against/ two officers, two NCOs, 29 privates and five civilians outside the VJ), filed 57 requests to competent courts to open an investigation (one officer, 34 privates and two civilians outside the VJ) and filed eight indictments (one	

			perpetrators.” [Ojdanić]	officer, five privates and two civilians outside the VJ). First-instance courts received 45 requests to open an investigation and 20 indictments, conducted three on-site investigations, remanded one person in custody, and rendered judgments in 12 cases.”	
51	13-May-99		<i>(3D613, Page 2, §9, ¶3-4)</i> “The judicial organs are working according to plan. The judicial organs examined the sentences” [Colonel General Matović]	<i>(4D316, Page 2, ¶6)</i> “The Military Prosecutor’s Office received 30 criminal reports (non-commissioned officers – 1; soldiers – 26, civilians outside the Yugoslav Army – 3); they submitted to competent courts 25 requests for conducting investigations (non-commissioned officers – 2, soldiers – 18, and civilians outside the Yugoslav Army – 5; and indicted 8 (soldiers – 5 and civilians outside the army – 3). First instance courts accepted 29 requests for conducting investigations and 9 indictments, carried out one investigation and passed judgments in 22 cases.”	
52	14-May-99		<i>(3D614, Page 2, §8, ¶2)</i> “Judicial organs working according to plan.” [Matović]	<i>(4D291, Page 3, ¶4)</i> “Military Prosecutor’s offices received 59 criminal reports (/against/ soldiers – 27 and civilians outside the VJ – 32), filed 17 requests to competent courts to open an investigation (soldiers – 6 and civilian outside the VJ – 11) and six indictments (soldiers – 5 and	

				civilians outside the VJ – 1). Courts received five requests to open an investigation and /issued/ eight indictments, remanded 12 persons in custody and rendered judgments in 20 cases.”	
53	15-May-99		(3D615, Page 2, §9, ¶4) “The work of judicial organs is going according to plan.” [Matović]		
54	16-May-99		(3D616, Page 2, §7, ¶6) “A report has been made on the work of the judicial organs.” [Matović]	(4D317, Page 3, ¶5) “The Military Prosecutor’s Office received 23 criminal reports (officers – 4 and soldiers – 19), it submitted 7 requests for conducting investigations to the competent courts (soldiers – 7); and it indicted 15 (officers – 2, soldiers – 12, civilians outside the Yugoslav Army – 1). First Instance Courts passed judgment on 17 cases.”	
55	17-May-99	(3D582, Page 7, §4, ¶2) “The priority tasks being undertaken by command organs at all levels,” include, “measures against the perpetrators of disciplinary and criminal offences...”		(4D292, Page 3, ¶3) “Military prosecutor’s offices received 27 criminal reports (/against/ soldiers – 25, civilians outside the VJ – 2), filed 18 requests to competent courts to open an investigations (soldiers – 18) and 13 indictments (soldiers – 13). First-instance courts rendered judgments in seven cases, remanded seven persons in custody, conducted one on-site investigation, received 11 requests to open an investigation and /issued/	

				seven indictments.”	
56	18-May-99		<i>(3D618, Page 3, §15, #3)</i> “Security organs of the 3 <sup>rd</sup> Army are to work on uncovering possible crimes and documenting them. The perpetrator must be identified, and responsibility assumed.” [Ojdanić]		
57	19-May-99		<i>(3D620, Page 2, §8, ¶6)</i> “Work by the judicial organs is going according to plan.” [Colonel General Matović]		
58	20-May-99				
59	21-May-99		<i>(3D621, Page 2, §8, ¶4)</i> “Judicial organs are continuing with their work.” [Matović] <i>(Page 3, ¶1)</i> “The 3 <sup>rd</sup> Army Command is requesting that RJ /?war units/ be mobilized, that a general reserve be guaranteed and that the work of the military judicial organs be stepped up.” [Colonel General Matović] <i>(Page 5, ¶14)</i> “Consider if the number of military courts is sufficient in view of the number of criminal reports.” [Ojdanić]	<i>(4D269, Page 3, ¶3)</i> “Military prosecutor’s offices admitted 122 criminal reports (officers – 8, non-commissioned officers – 1 and soldiers – 103), submitted to the competent courts 18 requests for an investigation to be conducted (soldiers – 11 and civilians outside the VJ /Yugoslav Army/ - 7), laid charges against 9 (officers – 1, soldiers – 7, and civilians outside the VJ – 7). Courts of first instance have rendered judgments in 8 cases, remanded 3 persons in custody and received 10 requests for conducting an investigation	

				and 3 indictments.” <i>(Page 4, §5, ¶2)</i> “On 19 May around 1800 hours, 3 conscripts from the 3/37 <sup>th</sup> mtbr, while leaving their unit without permission and in a drunken state, killed 2 Šiptars in Kosovo Polje. All three have been handed over to the military court in Priština. Military police units are successfully discharging tasks from their sphere of competence.”	
60	22-May-99		<i>(3D622, Page 2, §8, ¶1)</i> “291 persons were punished for desertion. Of those, all were given a prison sentence the length of which was conditioned by the gravity of the crime (six months = five years). We are currently carrying out an analysis of the work of the courts based on types of crimes submitted. I am asking for a deadline extension of seven days. Judicial organs are working according to plan.” <i>(Page 3, #'s 8 &amp; 12)</i> “What has been sent to the units so far about the application of the provisions of the criminal law. Write a short report on this problem...Write a warning concerning the slow processing of criminal reports.” [Ojdanić]	<i>(4D270, Page 3, ¶3)</i> “Military Prosecutor’s Offices received four criminal complaints (non-commissioned officers – one, privates – two, civilians outside the ranks of the VJ /Yugoslav Army/ - one), filed eight requests for investigation with the competent courts (private – four, civilians outside the ranks of the VJ – four) and charged three people (non-commissioned officers – 1, privates – two). Courts of first instance passed judgments in 10 cases, issued detention orders for two individuals, and received nine investigation requests and six indictments.”	

61	23-May-99		<p><i>(3D623, Page 2, §8, ¶1)</i>  “Reports submitted on the work of judicial organs.”  [Matović]</p>	<p><i>(4D271, Page 3, ¶9)</i> “Military prosecutor’s offices received 12 criminal reports (1 officer; 1 non-commissioned officer; 7 privates and 3 CL /civilians/ outside the VJ /Yugoslav Army/), submitted 14 requests to the courts to open investigations (2 officers; 2 non-commissioned officers; 8 privates; and 2 CL outside the VJ). Courts of first instance ordered detention for one person, received 26 requests to launch an investigation and two indictments.”</p>
62	24-May-99		<p><i>(3D624, Page 2, ¶16)</i>  “Supplement the information on the work of the courts and send it to units.” [Major General Nickolic]</p>	<p><i>(4D309, Page 3, ¶8)</i> “Military Prosecutor’s Offices received 18 criminal reports, submitted 8 request for conducting investigations to the competent courts and laid charges against 15 persons. During the day, first-instance courts handed down rulings in 3 cases, remanded in custody 9 persons, received 8 requests for conducting investigations, 9 indictments and conducted 2 on-site investigations.”</p>
63	25-May-99		<p><i>(3D625, Page 2, §8, ¶2)</i>  “Judicial organs are working according to established plan and pace.” [Nikolić]</p>	
64	26-May-99	<p><i>(3D861, Page 12, ¶5)</i> “The organs of military justice have pronounced 1,305 penal sentences (eight more).”</p>		

65	27-May-99	<i>(3D862, Page 9, ¶6)</i> “The Head of the Department for Judicial Affairs of the Supreme Command Staff completed a tour and inspection of military courts and the Prosecutor’s Office based in Podgorica, during which he instructed judges and prosecutors on how to resolve criminal complaints more efficiently.”	<i>(3D627, Page 2, §8, ¶2)</i> “Courts which do not function properly should be called to the Advisory Board.” [Colonel General Matović]	<i>(4D264, Page 3, ¶11)</i> “Military prosecutor’s offices received 59 criminal reports, filed 57 requests to open an investigation and 53 indictments. First-instance courts rendered judgments in five cases, remanded 45 persons in custody, received 58 requests to open an investigation and 60 indictments.”
66	28-May-99	<i>(3D863, Page 7, §3.3)</i> “A total of 8,963 criminal complaints have been filed. A total of 4,524 individuals have been charged.” [1 <sup>st</sup> Appearance of “Work of Judicial Authorities,” as a section in SVK report. <i>(Page 11-12)</i> “Military judicial organs have pronounced 1,399 criminal punishments (41 more than the previous day).”	<i>(3D628, Page 2, §’s 9 &amp; 10)</i> “9. Presentation by the President of the Military Supreme Court - Presenting the number of investigations initiated and cases completed by the pronouncement of a judgment. In most cases the judges are from the reserve. 10. Presentation by the Supreme Military Prosecutor – Familiarisation with the number and the structure of crimes for which criminal reports have been filed.”	<i>(4D260, Page 3, ¶14)</i> “Military prosecutor’s offices received 110 KP /criminal reports/, submitted 28 requests to open investigations and brought charges against 21 persons. Courts of first instance passed judgments in nine cases, took into custody 12 persons, received nine requests to open investigations and brought charges against 15 persons.”
67	29-May-99	<i>(3D864, Page 7, §3.3)</i> “A total of 9,296 criminal complaints have been filed, 4,697 individuals have been charged, and 1,441 criminal punishments have been pronounced (42 more than the previous day).”	<i>(3D629, Pages 2-3, §’s 14 &amp; 15)</i> “14. Supreme Military Prosecutor – A summary of charges brought for desertion and other crimes. 15. President of the Supreme Military Court: - Analysis of the work of military courts and a summary of judgments per category of crime. – I propose that commands allow v/o /conscripts/ to attend trials in order to enable the	

			pronouncing of judgments.”	
68	30-May-99	<i>(3D865, Page 8, §3.3)</i> “A total of 9,439 criminal complaints have been filed, 4,767 individuals have been charged, and 1,519 criminal punishments have been pronounced (78 more than the previous day).”	<i>(3D630, Pages 2, §8, ¶s 2-3)</i> “The activities of judicial organs are going according to plan. Charges were brought against 4,868 persons in the VJ /Yugoslav Army/.” [Matović]	
69	31-May-99	<i>(3D866, Page 8, §3.3)</i> “A total of 9,633 criminal reports were submitted. Indictments were brought against 4,868 persons. 1,517 sentences were passed (52 more than on the previous day).”	<i>(3D631, Page 3, §8, ¶1)</i> “Trying military conscripts in units has been regulated by an order.” [Colonel General Matović]	<i>(4D266, Page 3, §2.1)</i> “Military prosecutor’s offices received 196 criminal reports, 20 requests to open an investigation and filed 60 indictments. Courts rendered judgments in 13 cases, remanded 10 persons in custody, conducted one on-site investigation, received 26 requests to open an investigation and /issued/ 27 indictments.” <i>(Page 5, §5)</i> “Of the 22 conscripts from the 7 <sup>th</sup> pbr who were handed over to the Military Court at the 3 <sup>rd</sup> Army Command, three were convicted and sent to a unit in Kosovo and Metohija at their own request, indictments were filed against 10 and investigation is under way against the others.”

70	1-Jun-99	<i>(3D867, Page 8, §3.3)</i> “A total of 9,720 criminal reports were filed. Charges were brought against 4,925 persons. 1,611 criminal punishments were pronounced (40 more than the previous day).”	<i>(3D632, Page 3, ¶1)</i> “Military judicial organs have continued to work.”	<i>(3D534)</i> Đorović’s Performance Report to Military Prosecutor of 3 <sup>rd</sup> Army Command states that between the date of establishment and 31 May 1999, 419 criminal reports involving 461 individuals were received. Item #2 on page 1 reads: “ <i>All these criminal reports have been dealt with.</i> ” This report, as others, listed offences such as desertion, failure to respond to call-up for duty, robbery, etc., but no mass war crimes against humanity.
71	2-Jun-99	<i>(3D868, Page 8, §3.3)</i> “A total of 9,969 criminal reports were filed. Charges were brought against 5,021 persons. 1,635 criminal punishments were pronounced (24 more than the previous day).”	<i>(3D633 Page 2, §8, ¶3)</i> “The work of military judicial organs is ongoing.”	
72	3-Jun-99	<i>(3D869, Page 7, §3.3)</i> “A total of 10,104 criminal reports have been filed and 5,134 people have been charged. Some 1,714 criminal sanctions have been handed down (79 more than the previous day).”		<i>(4D318, Page 2, §2.1)</i> “The Military Prosecutor’s Office has received 17 criminal reports, 19 requests for conducting investigations, and has indicted 61 persons. First-instance courts have passed judgment on 16 cases, have carried out one investigation, and received 6 requests for conducting investigations and indictments for 62 persons, and have detained 6 persons.”
73	4-Jun-99	<i>(3D870, Page 7, §3.3)</i> “A total of 10,222 criminal reports were submitted. Indictments were brought against 5,245 persons.		

		1,782 sentences were passed (68 more than on the previous day)."			
74	5-Jun-99	(3D871, Page 7, §3.3) "A total of 10,296 criminal reports were filed. Charges were brought against 5,319 persons. 1,849 criminal punishments were pronounced (67 more than the previous day)."			
75	6-Jun-99	(3D872, Page 6, § 3.3) "A total of 10,388 criminal reports have been filed and 5,360 people have been charged. A total of 1,895 criminal sanctions have been handed down (46 more than the previous day)."			
76	7-Jun-99	(3D873, Page 6, § 3.3) "10,615 criminal reports were filed, 5,441 persons were charged and 1,971 sentences were passed (76 more than the previous day)."	(3D638, Page 4, §'s 13 & 14) "13. Military Prosecutor, Major General Obrencevic: - So far, we have moved the following: 40% - 2 <sup>nd</sup> Army, 32% - 1 <sup>st</sup> Army, 29% - 3 <sup>rd</sup> Army, and about 2% for the RV and PVO and the Navy. - The accused have the same ratio, 67% were accused of failure to respond, 23% of desertion and 4% of property crime. - In the past seven days, from 31 May to 6 June, there were 1,237 reports to the 3 <sup>rd</sup> Army - 47% (585) - 200 persons to the 1 <sup>st</sup> Army Prosecutor. Desertion rose to number one, followed by failure to respond. Organised and group desertions are on the rise, as is property crime. 14. President of the Supreme Military Court: - Military		

			<p>courts: 264 on-site investigations. – 4,338 requests submitted, 2,343 (54%) solved, 1,995 (45%) still open. 1<sup>st</sup> Army 690, 2<sup>nd</sup> Army 707, 3<sup>rd</sup> Army 524, RV and PVO 75 and Navy 62. – 487 I /?first? degree sentences delivered in these seven days. We think this is good. Problems are yet to come once the war is over.”</p>		
77	8-Jun-99	<p>(3D874, Page 8, § 3.3) “10,781 criminal reports were filed. 5,482 persons were charged. 2,024 sentences were passed (53 more than the previous day).”</p>			
78	9-Jun-99	<p>(3D875, Page 8, § 3.3) “A total of 10,967 criminal reports were submitted. Indictments were brought against 5,592 persons. 2,058 sentences were passed (34 more than on the previous day).”</p>			

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Wilhelm

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