THE INTERNATIONAL CRIMINAL TRIBUNAL FOR

THE FORMER YUGOSLAVIA

Case No. IT-05-88-T

IN THE TRIAL CHAMBER

Before: **Judge Carmel A. Agius, Presiding**
Judge O-Gon-Kwon
Judge Kimberley Prost
Judge Øle Bjørn-Støle, Reserve Judge

Registrar: **Mr. John Hocking**

Date: **28 July 2010**

THE PROSECUTOR

v.

VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

PUBLIC

DEFENDANT, LJUBISA BEARA'S NOTICE OF FILING A PUBLIC REDACTED VERSION OF THE BEARA FINAL TRIAL BRIEF

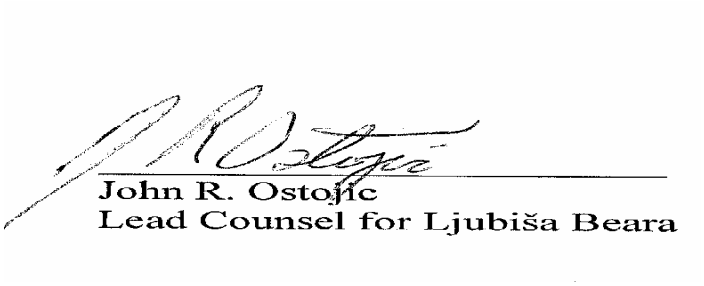
The Office of the Prosecution:
Mr. Peter McCloskey

Counsel of the Accused:
Zoran Živanović and Mira Tapušković for Vujadin Popović
John Ostojic for Ljubiša Beara
Jelena Nikolić and Stephane Bourgon for Drago Nikolić
Christopher Gosnell and Tatjana Cmeric for Ljubomir Borovčanin
Natacha Fauveau-Ivanović and Nenad Petrušić for Radivoje Miletić
Dragan Krgović and David Josse, QC for Milan Gvero
Peter Haynes, QC and Simon Davis for Vinko Pandurević

Pursuant to the Trial Chamber's Order on Outstanding Documents Marked for Identification and on Public Redacted Versions of the Final Trial Briefs (3 June 2010), the Defense for Ljubisa Beara hereby files a public redacted version of its Final Trial Brief as Annex A to the present notice. The Pandurevic Final Trial Brief was originally filed confidentially on 30 July 2009.

Respectfully submitted on 28 July 2010

Lead Counsel for Mr. Ljubisa Beara,



Word count: 210

ANNEX A

PUBLIC

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Case No. IT-05-88-T

IN THE TRIAL CHAMBER

Before: **Judge Carmel A. Agius, Presiding**
Judge O-Gon-Kwon
Judge Kimberley Prost
Judge Øle Bjørn-Støle, Reserve Judge

Registrar: **Mr. John Hocking**

Date: **30 July 2009**

THE PROSECUTOR

v.

VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

PUBLIC

DEFENDANT, LJUBISA BEARA'S FINAL TRIAL BRIEF

The Office of the Prosecution:
Mr. Peter McCloskey

Counsel of the Accused:
Zoran Živanović and Mira Tapušković for Vujadin Popović
John Ostojic and Predrag Nikolic for Ljubiša Beara
Jelena Nikolić and Stephane Bourgon for Drago Nikolić
Aleksander Lazarević and Christopher Gosnell for Ljubomir Borovčanin
Natacha Fauveau-Ivanović and Nenad Petrušić for Radivoje Miletić
Dragan Krgović and David Josse for Milan Gvero
Peter Haynes and Simon Davis for Vinko Pandurević

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

THE PROSECUTION
v.
VUJADIN POPOVIC
LJUBISA BEARA
DRAGO NIKOLIC
LJUBOMIR BOROVCANIN
RADIVOJE MILETIC
MILAN GVERO
VINKO PANDUREVIC

Case No. IT-05-88-T

LJUBISA BEARA'S FINAL TRIAL BRIEF

The Accused, Ljubisa Beara, by and through his attorneys, John R. Ostojic and Predrag Nikolic, respectfully requests and moves this Honorable Trial Chamber for and order and judgment of acquittal, and further submits, pursuant to Rule 86 of the Rules of Procedure and Evidence, his Final Trial Brief, and in support thereof, states as follows.

Introduction

1. The Beara Defense hereby respectfully submits that the Prosecution did not meet its burden of proof and failed to establish that Ljubisa Beara is guilty of any of the crimes alleged pursuant to any of the modes of criminal liability as asserted in the Indictment and that he should be acquitted of all charges in the interest of justice. The Beara Defense submits its Final brief and incorporates herein its 98bis oral argument and subsequent closing argument establishing that Ljubisa Beara is not guilty of the crimes charged.

2. On 14 July 2006[1] the Prosecution commenced its circumstantial case against Ljubisa Beara and after approximately 251 days of inconsistent, contradictory and

[1] See Trancript of Trial Proceedings dated 14 July 2006;

misplaced testimony premised upon speculation, conjecture and hearsay, concluded its evidence and formally rested its case-in-chief on 6 February 2008.[2]

3. During the period of 14 July 2006 through 6 February 2008 the Prosecution called 141 witnesses and introduced thousands of exhibits as documentary evidence in futile attempt to link Beara to the tragic crimes that occurred in Srebrenica July 1995.

4. On 10 July 2008, Beara commenced its Defense case and concluded the same on 11 September 2008. The Prosecution offered no rebuttal evidence to Beara's defense witnesses and documents.

5. The Prosecution has with little success, weaved half-truth, distorted and contradictory statements based on biased witnesses with unauthenticated and unreliable documents in a futile attempt to establish that Beara was purportedly involve in the crime alleged in the Indictment. It is respectfully submitted that the Prosecution failed to meet its burden of proof beyond a reasonable doubt.

Overview of the Indictment

6. On 4 August 2006, the office of the Prosecution (hereinafter referred to as the Prosecution) filed its Indictment pursuant to the Trial Chamber's Decision on further Amendments and challenges to the Indictment and motion seeking leave to make additional minor corrections.[3]

7. The Prosecution in its Indictment charged Ljubisa Beara with 8 Counts of criminal conduct as follows: Count 1 Genocide; Count 2 Conspiracy to commit Genocide; Count 3 Extermination as a crime against humanity; Count 4 Murder as a crime against humanity; Count 5 Murder as a violation of the laws or customs of war; Count 6 Persecution as a crime against humanity; Count 7 Forcible Transfer as a crime against humanity; and Count 8 Deportation as a crime against humanity. Ljubisa Beara is charged solely pursuant to Article 7/1 of the Statute of the Tribunal for having purportedly committed, planned, instigated, ordered and otherwise aided

[2] See Trancript of Trial Proceedings dated 6 February 2008;
[3] Indictment Popovic et al, IT-05-88-T, 4 Aug 2006;

and abetted in the planning, preparation and execution of the crimes charged.[4] No allegation and no evidence were tendered for any purported command responsibility, namely Article 7/3 of the statute.

The Prosecution failed to prove the allegations as reflected in the indictment

8. The Prosecution did not prove that Ljubisa Beara had knowledge of any purported plan to murder the able bodied man from Srebrenica and further failed to establish that he had any knowledge relating to the purported plan to forcibly remove the Muslim populations of Srebrenica and Zepa from their respective enclaves. During the Trial the Prosecution failed to establish that Ljubisa Beara possessed the necessary criminal intent and state of mind required to commit the individual crimes charged. The evidence presented at trial did not prove that Ljubisa Beara acted in accordance with the aforementioned plans or that he significantly assisted and facilitated the commission of those crimes.

9. Further, it was not proven beyond reasonable doubt that Ljubisa Beara participated in either of the two Joint Criminal Enterprises as alleged by the Prosecution namely that he committed acts in furtherance of the Joint Criminal Enterprise to kill able bodied men[5] and that he committed acts in furtherance of the Joint Criminal Enterprise to forcibly transfer the populations of Srebrenica and Zepa.[6]

10. It is further submitted that the Prosecution was not able to prove the whereabouts of Ljubisa Beara in the relevant period with any certainty and the evidence tendered through the Prosecution's witnesses were inherently inconsistent, contradictory and misplaced all the while being premised upon speculation, conjecture and hearsay.

11. Hence, the Prosecution has not proven beyond reasonable doubt that Ljubisa Beara organized and assisted in the gathering, detention, transportation and execution

[4] Indictment, para.88;
[5] Indictment, para.40;
[6] Indictment, para.78;

of Muslim men (along the road).[7] Ljubisa Beara did not, as alleged by the Prosecution, supervise, facilitate and oversee the transportation of Muslim men from Potocari to Bratunac and from there to various detention centers in the Zvornik area (schools at Orahovac, Petkovci, Rocevic and Kula and Pilica cultural centre) on 13-16 July and did not oversee and supervise their summary execution.[8] It is further submitted that any participation of Ljubisa Beara in Radoslav Krstic's efforts to capture Muslim men fleeing from the Zepa enclave was not criminal in any sense.[9] The Prosecution did not prove that Ljubisa Beara was given authority and did not have the responsibility for handling prisoners to ensure their safety and welfare.[10]

Ljubisa Beara's background, education and professional experience reflects his non-discriminatory state of mind and thus is relevant to the specific intent crimes alleged

12. The Defense respectfully submits that the background of Ljubisa Beara is very relevant in determing gulit in this case and suggests that given his unique biography the evidence does not warrant a conviction. Beara's biography is significant insofar as he was never promoted from his original military rank. Specifically Beara is charged with crimes requiring special and discriminatory intent. It is respectfully submitted that the Prosecution was not able to prove that Beara had any such special or discriminatory intent and never expressed any such intent during his military career towards members of other national groups.

Ljubisa Beara's service in the JNA and his general attitude towards non Serb national groups refutes any evidence of criminal intent

13. During the Trial, Beara's developments as life long officer in the JNA service were facts elicited by the certain defense witnesses. As reflected from the evidence, Beara was born in Sarajevo and before the commencement of the civil war in the former Yugoslavia he served in Split, Croatia in the security sector of the Military Command of 8th Naval District.[11] He was the assistant chief of the security

[7] Indictment, para.40 (i);
[8] Indictment, para.40 (ii);
[9] Indictment, para.40 (iii);
[10] Indictment, para.40 (iv);
[11] Mikajlo Mitrovic, T25040;

department of the naval district and pursuant to the laws in force he was also a deputy chief.[12] When the conflict in Croatian escalated and when all JNA units withdrew from the Croatia Naval District Beara was transferred to Montenegro.[13]

14. At the time, the security department of the naval district reflected the multi-ethnic composition of the then state-state.[14] From the evidence adduced during the trial the Honorable Trial Chamber learned that Ljubisa Beara, has never shown any discriminatory intent towards other ethnic groups[15] and was in favor of preserving the multi-ethnic composition within the JNA.[16] Contrary to the evidence the Prosecution tried in vain to adduce during the trial, it was nonetheless established that during Beara's long tenure in Croatia he acted without prejudice towards his colleagues whether they were of Muslim, Croat, Serbian or Albanian origin.[17] It was further revealed that during the blockade of the Split military barracks Ljubisa Beara acted in the same nondiscriminatory fashion in trying to save his colleagues families regardless of their nationality.[18] Mr. Milan Alajica confirmed that Beara intervened with EU observers when Lieutenant Senad Burzic was wounded by Croat forces and was allowed to be transferred initially to the Split hospital and from there to military medical academy (VMA) in Belgrade.[19] Following the departure of Lieutenant Burzic it was Beara's suggestion that members of his former unit, deployed in Kumbor, Montenegro, assist and contribute so that Burzic could buy a new prosthesis for Burzic's leg which was amputated.[20] Further, during the start of the conflict in Croatia, Ljubisa Beara also insisted with EU observers that the mistreatment and harassment of Alajica Ana, the wife of Alajica Bosko, be prevented.[21] Ljubisa Beara's assistance and mind set was exemplified wherein he helped help the wife who was a Croat by nationality despite the fact that at the very same time his own family was attacked and harassed by Croat paramilitary forces.[22]

[12] ibid, T25041;
[13] 2D PW19, T25623;
[14] Mikajlo Mitrovic. T25042;
[15] 2D PW19, T25635;
[16] 2D PW19, T25628;
[17] 2D655; 92 bis statement of Tokic Mirsad, page 1; also see Milan Alajica, T24811;
[18] Milan Alajica, T24807;
[19] Milan Alajica, T24809;
[20] Milan Alajica, T24812;
[21] 2D665, 92 bis statement of Alajica Bosko, page 1;
[22] 2D665, 92 bis statement of Alajica Bosko, page 1;

15. Beara's nondiscriminatory acts continued when, during the month of May 1992, while still stationed in Kumbor, Ljubisa Beara sent Milan Alajica to Bratunac in order to assist the family of one of his subordinates who was of Muslim nationality, namely Nermin Jusic.[23] Mr. Alajica testified that they managed to find Jusic's mother, brother and sister on the Serbia side of the Drina.[24] This witness together with Jusic nevertheless crossed the Drina in order to find Jusic's mother and family in order to save their lives.[25] Witness Alajica testified that Beara did this out of his own sense of duty and initiated the whole operation.[26]

16. Following the withdrawal of the JNA from Croatia while Beara was stationed in Kumbor, Montenegro[27] one other event may be of interest to the Honorable Trial Chamber in assessing Beara's alleged criminal responsibility. While in Montenegro, Beara was involved in an event wherein two volunteers of the Serbian Radical Party stole military property and harassed the personnel, were subsequently killed while being apprehended.[28] Beara was charged and subsequently tried before the military court for incitement to murder under article 39, para.2 clause 6 of the Criminal Code of Montenegro.[29] In addition to Beara, one of the members of the military police charged with the murder of those two Serbian nationalistic volunteers was, Ermin Omeragic[30] who is a Muslim by nationality.

17. During the foregoing military trial, according to the Judge in that criminal proceeding, members of the Serbian Radical Party were planning to take revenge on Ljubisa Beara.[31] Beara was harassed through the media by the Serbian Radical Party and was accused, not just for the killing of those paramilitary men but also, for allegedly killing of thousands of Muslim civilians and the kidnapping of people from the train.[32] Beara became a target of the Radical Party and was considered a non-Serb or enemy of the Serbs.

---

[23] Milan Alajica, T24813-14;
[24] ibid, T24816;
[25] ibid, T24816;
[26] ibid, T24816;
[27] 2D PW19, T25623;
[28] 2D PW19, T25628; also see 2D652, 92 bis statement of Rajko Jelusic, page 1;
[29] ibid;
[30] ibid;
[31] 2D652, 92 bis statement of Rajko Jelusic, page 2;
[32] Sredoje Simic, T12425;

18. As a result of these criminal charges and political harassment Ljubisa Beara was forced to leave Serbia proper and enlist in the VRS.

Ljubisa Beara's service in the VRS comported with and was consistent with his life long commitment of treating all citizens fairly and without discriminatory intent

19. Ljubisa Beara was not one of the founding officers that established the VRS on 11 May 1992 but arrived several months later,[33] in an inferior position capacity from the one he previously held. This fact alone further reflects that Beara was not in the inner circle of close associates to General Ratko Mladic, Commander of the VRS.

20. It is respectfully emphasized that even after Beara joined the VRS Main Staff his conduct attitude and behavior towards people of different nationalities remained the same. This un-contradicted fact was adduced by witness Binenfeld when he testified that Ljubisa Beara was involved in negotiations and the organization for the safe passage of a convoy with people from Sarajevo in 1992.[34] It was also uncontested that Beara did not have any prejudice towards any ethnic group, including the Jewish community and Muslims, because it was well known that Muslims were also on board the buses.[35] This was further corroborated by a member of Croatia's intelligence sector who unequivocally stated that Beara acted professionally (and without discriminatory intent) during this evacuation of Jewish families (and other non-Serbs).[36] To the extent possible, Beara's non-discriminatory conduct continued throughout the war as reflected in November 1995 when in the Celebic village it was agreed with non-Serbs that there should be a prisoner exchange and when the Croats found out that the VRS would be represented by Ljubisa Beara, in their words, they were certain that their security will be provided.[37]

21. It was not proven beyond reasonable doubt that Beara had any significant influence at the Main Staff. While serving the JNA in Croatia he was candidate for a

[33] Manojlo Milovanovic, T12152-12153;
[34] Jakov Binnenfeld, T25555-7;
[35] Jakov Binnenfeld, T25552;
[36] 2D656, 92 bis statement Zarko Keza, page 2;
[37] ibid;

higher position in Socialist Federative Republic of Yugoslavia, namely for the position of chief of the security service in the Secretariat for National Defense.[38] It was established during the Trial that while in the VRS Beara was never promoted to a rank of General, unlike other officers.[39]

22. In addition to having no influence in the VRS, Beara was far from being a purported trusted confident of President Karadzic as falsely depicted by Miroslav Deronjic.[40] It was well know that Mr. Karadzic did not trust the security services of the former Yugoslavia and was suspected of organizing his own intelligence groups in order to off set and disrupt the VRS official intelligence and security structures.[41] Ljubisa Beara was actually one of the officers who were envisaged and considered for retirement following the Sanski Most assembly session.[42]

23. The hard-line nationalistic groups in the RS commonly called people such as Beara a "communist" or typical non-Serb JNA officer. Beara's Yugoslav affiliation probably stemmed since the time when he was the Commander of Guards of former Yugoslav President Josip Broz Tito in Brioni.[43] It is general knowledge that in Tito's era it would not be possible to hold such position if a person developed or showed any signs of nationalist orientation, especially Serb orientation. Beara was against the break-up of the Former Yugoslavia and was very disappointed when it occurred.[44] Those veteran JNA officers were brought up and were inherently in favor of tolerance, what was called "Brotherhood and Unity" in former Yugoslavia, and had all taken an oath to defend all the ethnic groups.[45] The evidence reflected that the units that came from Split, among whom was Beara and more specifically the unit of the military police, consisted of a multiethnic composition which actually came to Montenegro still believing in the same slogan.[46]

[38] 2D653, 92 bis statement Stojan Cvijanovic, page 1;
[39] P3178, ERN05057651;
[40] P3139; also see Decision on Prosecution Motion for admission of evidence pursuant to rule 92 quarter, dated 21 April 2008;
[41] 2D660, 92 bis statement Ivan Fricer, page 4;
[42] Manojlo Milovanovic, T12256;
[43] 2D664, 92 bis statement of Nada Beara, page 1;
[44] 2D664,92 bis statement of Nada Beara, page 1;
[45] Branimir Grulovic, T23762;
[46] 2D PW19, T25625;

24. In light of his background and beliefs, Beara's type of old professional officers, that were called "commies", were the opposite of the new chetnik officers that were trusted by the SDS political elite of RS at that time.[47] Beara's name was commonly connected with his assumed guilt for the death of two Serbian volunteers belonging to the Serbian Radical party as proof that he does not like "caucades" and beards.[48] Witness Trifkovic also testified that Beara personally mentioned by the then Nikola Koljevic's chief of staff Zdravko Miovcic who spoke at the beginning of 1995, that Ljubisa Beara was considered as someone who does not trust foreign Serbs.[49] As an example Zametica, Prica and the witness himself were mentioned, but Mr. Miovcic stated to the witness not to worry about Ljubisa Beara because "he doesn't count much around here, meaning Pale".[50] Beara's influence was considered not merely minimal but, non existent.

25. This type of attitude towards the former JNA officers was shared by the President of RS Radovan Karadzic and the people around him who advocated hard line nationalist policies[51] and that is the reason why politicians did not trust those officers.[52] Mr. Karadzic was commonly heard referring to these officers as "commie bastards", "komunjare" or red plaque when speaking about the top leadership of Bosnian Serb army.[53] This attitude according to some of the witnesses escalated at the time of the aforementioned Assembly session in Sanski Most when the political leaders interpreted VRS leaders' actions as an attack on their positions.[54]

26. Witnesses testified that such former JNA officers to which Beara belonged, were targeted and forced to retired, like generals Grujic and Vlaisavljevic in 2nd KK, towards the end of 1994.[55]

27. It is respectfully submitted that this mistrust and antagonism from Serb nationalists is sufficient proof to refute the Prosecution's allegations that Beara was

[47] Branimir Grulovic, T23761;
[48] Srdja Trifkovic, T25219; (caucades is Serb nationalistc coat of arms) ;
[49] ibid, T25223;
[50] ibid, T25223-4;
[51] Branimir Grulovic, T23762;
[52] ibid T23761;
[53] Srdja Trifkovic, T25221;
[54] Srdja Trifkovic, T25222-3;
[55] Branimir Grulovic, T23763-64;

Karadzic's trusted man and that he was involved in some kind of purported clandestine operation involving Srebrenica.

28. Due to the type of work Beara was performing he was disliked and not trusted by most officers working under the Main Staff and also by the Corps and Brigade commanders because his duties included gathering information against such commanders in order to protect the entire military body from informants and potential traitors.[56] One aspect of Beara's job was to investigate and report about officers that were conducting actions in violation of the rules and making unlawful profit or fulfilling their own interest at the expense of the VRS. Other security officers were even physically targeted because of their work[57] and being in the Main Staff made his position the target of others.

29. Another aspect of the security work was viewed with antagonism by the civilian structures, namely SDS officials. The position of the VRS was that those structures or individuals who were politically connected were failing to prevent internal smuggling in order to line the pockets of various SDS power brokers.[58]

30. It was established that Beara was not known to the local Serbs, political or military, and did not have any specific knowledge about the Eastern Bosnia area to which he came quite fortuitously. Witnesses either never herd of him or never met him prior to the events in July 1995.

31. It was likewise established through numerous witnesses that due to Beara's long tenure in Croatia, Beara spoke with a distinct Croatian or more specifically with a Dalmatian accent.[59] Witness Mrkovic who knew and worked with Beara said that Beara had a strong Dalmatian accent which was clearly noticeable and peculiar.[60] Similarly witness Grulovic testified that he was present when Beara called his mother on day who was residing in Split and that Beara called her "Nona" which was a

[56] 2D659, 92 bis statement Vojno Dragutinovic, page 2;
[57] 2D659, 92 bis statement Vojno Dragutinovic, page 3;
[58] Srdja Trifkovic, T2521;
[59] Milan Kerkez, T24944; also see 2D PW19, T25625-6, also see Sredoje Simic, T12427; also see 2D551, Slobodan Remetic linguistic Analyses of Intercepts to be connected to the Name of Ljubisa Beara, pages14 and 27;
[60] Ljuban Mrkovic, T24309;

typical word from the Dalmatian dialect.[61] Likewise witness Kerkez testified that in the circle of his son's friends Beara was called "Pape". [62] It is respectfully submitted that because of his name and because he spoke like a Croat, some officers of the VRS thought Beara was a Croat by ethnicity.[63] Given that Beara`s surname was not of Serbian origin it did not contribute to his popularity among local Serbian MUP and VRS officials, especially in a time of devastating civil war when most everyone distrusted anyone remotely who was not a Serb.

32. Beara's upbringing, residence, name and his unusual accent were one of the reasons he could not remain in Montenegro when he was initially transferred from Split[64] and made fun of him.[65] According to witness 2D PW19 his dialect was one of the reasons Beara was targeted after the killing of two Serbian paramilitaries in Montenegro.[66] It is rather plain that given Beara`s name and accent he would not be openly accepted by the local Bratunac and Zvornik officials who knew each other from childhood and would be the easiest person to shift their responsibility and involvement to him for the horrific events that unfolded in the Srebrenica enclave.[67]

33. Beara acted professionally throughout his career[68] was viewed as a highly professional officer by others[69] and never acted in violation of legal regulations and rules of service.[70] During the trial evidence was heard that even when he had the legal authority to use force Beara tried to avoid using it in order to prevent further escalation to the conflict.[71]

34. Despite the fact that he had a high position before the war in the Former Yugoslavia Beara never used his position for his personal gain or even for the sake of

[61] Branimir Grulovic, T23780 and also see 23783;
[62] Milan Kerkez, T24944;
[63] Mikajlo Mitrovic, T25047;
[64] 2D PW19, T25626;
[65] ibid, T25633;
[66] 2D PW19, T25628;
[67] See the section of the Brief that analyze the Bratunac Local officials witnesses;
[68] 2D PW19, T25633 and T25635;
[69] 2D PW19, T25633; Mikajlo Mitrovic T25042; also see 2D652, 92 bis statement Rajko Jelusic, page 2; also see 2D665, 92 bis statement of Alajica Bosko, page 2;
[70] Mikajlo Mitrovic, T25054; 2D658 92 bis statement Makivic Slobodan, page 4; also see 2D653, 92 bis statement Cvijanovic Stojan, page 4;
[71] Mikajlo Mitrovic, T25044;

his own children.[72] Beara was a patter familias type of person[73] loving and carrying for his family and friends. Witnesses testified that his mother was living in Split during the war which was at that time also raging in Croatia,[74] and one described the emotional conversation he witnessed between Beara and his mother.[75] This witness also made the conclusion that the Croats probably could hear the conversation and that Beara was not afraid for his mother despite the fact that Croats knew that he was in the Serb army.[76] Becoming familiar with Beara's behavior during the war in Croatia that was discussed previously, Beara had no reason to fear for his mother`s life because he was still respected as a professional, who conducted himself in a nondiscriminatory manner.

Lack of discriminatory intent

35. As reflected above Beara has never displayed discriminatory characteristics during his service in the JNA where he had many subordinates of non Serb nationalities under his authority.[77] It was undisputed that Beara never differentiated between people according to their ethnicity.[78] The Honorable Trial Chamber had an opportunity to hear that Beara was crying during the conversation in 1995 of a young Muslim soldier Kikanovic when he spoke with his parents in Tuzla persuading them he is not killed but was actually alive and well.[79]

36. The Prosecution showed P3510 an exhibit type signed by Ljubisa Beara in which the word "balije" was used in order to refute the Defense evidence that Beara did not have discriminatory intent.[80] It should be noted that in this document the author is referring to the word "balije" for those Muslims belonging to the secret group in Switzerland who had the aim of secret and silent liquidation of Serbs.[81] It should not be generalized that this type of expression was used in relation to all

[72] 2D661, 92 bis statement Dragan Beara, page 1;
[73] 2D662, 92 bis statement Marina Beara, page 1;
[74] Branimir Grulovic, T23780;
[75] ibid;
[76] ibid;
[77] 2D PW19, T25635; see also 2D655, 92 bis statement Tokic Mirsad, page 1;
[78] 2D PW19, T25640;
[79] Branimir Grulovic, T23781-82;
[80] P3510;
[81] P3510;

Muslims. Furthermore, in Beara's interview given to the "Svedok" newspaper, Beara was using the term "Muslims" and not the derogatory term "balija" when talking about the Muslim inhabitants of BiH.[82] In addition the witness Simic stated that during the interview Beara never used any derogatory terms towards Muslims or Croats.[83]

37. Respectfully, in the Defense submission the Honorable Trial Chamber consider and give full weight to the testimony of 2D PW19, a Muslim by nationality[84] who because of his constant presence around Beara in the Military Command in the Naval district was in the best position to get an insight into Beara's attitude and mind-set towards non Serbs.[85] 2D PW19 was tasked to protect Beara's family, his wife and son Branko, since the spring of 1991.[86]

38. The relationship between witness 2D PW19 and Beara could be best seen from the fact that 2D PW19 referred to Beara as "Uncle".[87] This witness described Beara as his father and the relationship with him "as the highest authority that was fair to him".[88]

39. When asked whether he ever observed whether Beara had any nationalistic ideology 2D PW19 responded that he had never heard an ugly word from him or from his wife[89], and that if Beara had any kind of nationalistic tendencies he would not have protected his wife Nada and little Branko.[90] He further stated that Beara grew up in the communist period, and that he absolutely did not differentiate between people according to their ethnicity.[91]

40. As stated by 2D PW19 it is very difficult to comprehend Beara would trust the lives of his wife and youngest son in the hands of a Muslim if he had any

[82] P480;
[83] Sredoje Simic, T12422;
[84] 2D PW19, T25621;
[85] 2D PW19 T25621 also 25633;
[86] 2D PW19, T25620;
[87] 2D PW19, T25624;
[88] ibid, T25624;
[89] ibid, T25634;
[90] ibid, T25634;
[91] ibid, T25640;

discriminatory intent or dislike towards Muslims as the Prosecution is seeking to portray.

41. Ljubisa Beara and his wife Nada raised their children to respect and work together with other nationalities.[92] His son Dragan always lived with and respected people of different ethnic origins, including the Hungarian nationality.[93] The evidence was uncontested that Ljubisa Beara was not the type of person that the Prosecution was trying to depict him as being in July 1995.

Undisputed context of events

42. It is respectfully submitted that the Honorable Trial Chamber should, in order to have a proper context, take into account the creation of the enclave, agreements on the cease of fire and the fact that demilitarization of the enclave was never accomplished. Moreover, it will be shown that the Prosecution is manipulating facts out of context and are offering certain facts which are not the only reasonable inferences or conclusions available from the evidence.

43. It is respectfully submitted that the 28th division of ABiH in the Srebrenica enclave was not demilitarized as agreed and because of numerous ABiH sabotage incursions from the enclave into the Serb held territories the VRS and more particularly the Drina Corps was tied around the enclave. The Defense contends that the relevance of this is not only that the enclave was a legitimate target but that the military action in July and the preparations for that action were not in any way different from many VRS actions before July 1995. The Prosecution concedes that the attack was not criminal and thus brought no charges as a result thereof.

44. It was the Prosecution case that the Strategic goals and Directive 7[94] were the beginning of the criminal plan to forcibly transfer the Muslim population. The Beara Defense contends that the military actions similar to the one that began in July 1995 were conducted in 1993, even with more intensity in 1994 and throughout 1995 and were not a criminal plan to forcibly transfer the Muslim population.

[92] 2D PW19, T25634; also see 2D664, 92 bis statement Nada Beara, page 2;
[93] 2D661, 92 bis statement Dragan Beara, page 2;
[94] P5; directive 7, dated 8 March 1995;

45. The 28th Division of the ABIH had several military tasks it sought to accomplish from within the enclave. Those tasks encompassed attacks from the enclave in order to tie the Serbian forces around the enclave so that they cannot be used on other fronts, such as the Sarajevo front.[95]

46. These ABiH attacks were a constant military threat to the Drina Corps and the Serb civilians living near or around the enclaves since 1993. There are numerous Drina Corps orders in 1993 that were based on the Main Staff orders that among other tasks envisaged preventing the expansion of enemy forces from the enclaves Srebrenica and Zepa and prevention of their connection[96] and prevention of sabotage activities by setting ambushes.[97]

47. Following these efforts, in November and December 1993 the VRS had obtained new intelligence information that the ABiH was preparing to send sabotage groups from Zepa and Gorazde to conduct further operations against the surrounding Serbs villages.[98] These documents clearly establish that the VRS was actually forced to keep its forces around the enclaves.

48. The situation in 1994 reflects a further development of the ABiH military goals. During 1994, disregarding the obligation not to conduct any military actions, Muslim forces continued conducting attacks from the enclave and the Drina Corps was forced to issue additional orders to its subordinated units for organizing ambushes and preventing passage of the forces from the enclave with the Muslim forces who were at the front[99] and further sending reports to subordinated units warning them that the Muslim forces will continue to infiltrate IG /reconnaissance groups/ and DTG

[95] 6D77, ABiH 28th Division, dated 29 June 1995, signed by Ramiz Becirovic; also see 5D227, 285th IBibr, dated 28 June 1995; also see 5D3, 28th Division Command, report dated 30 June 1995;
[96] 5D1028, Drina Corps order, 7 July 1993;
[97] 5D1264, Visegrad TG order, 12 Nov 1993; also see 5D1029; Main Staff order, 14 Nov 1993;
[98] 5D1265, Visegrad TG, 3 Dec 1993; also see 5D1226, Visegrad TG, 12 Dec 1993;
[99] 5D1245, Drina Corps order, 19 Jun 1994; also see 5D1224, Drina Corps order, 6 sep 1994; also see 5D1035, Drina Corps report, 8 sep 1994; also see 5D1040, Drina Corps order, 15 Nov 1994; also see 5D1225, Drina Corps order, 24 Nov 1994; also see 5D1042, Drina Corps order, 13 Dec 1994; 6D26; 1st Zepa Light Brigade, dated 15 December 1994 (report on killing of five Chetniks);

/sabotage and terrorist groups/.[100] The ABiH incursions were so problematic that in August 1994 President Karadzic was compelled to issue an order to the MUP forces seeking to prevent ABiH sabotage groups causing further civilian casualties.[101]

49. However, despite these efforts from the VRS, as reflected from the documents a continuation of the sabotage actions in 1994 persisted[102] and Serb forces simply failed to accomplish the given tasks. Thus, as a result of these ABiH sabotage actions in November and December 1994 one of the Drina Corps' primary tasks was to complete the closing off the Srebrenica enclave.[103]

50. Essentially at the beginning of 1995 the relation with respect to the enclaves was no different then the 1994, because the Drina Corps subordinated units did not manage to close off the enclave.[104] At the end of February, the ABiH forces from the Srebrenica enclave once again attacked the Milici brigade positions which resulted in both civilian and military casualties.[105] The Main Staff was forced once again to issue additional orders which included the prevention of communication between the enclaves and Tuzla and Kladanj.[106] The Intelligence organ of the Drina Corps was constantly warning about the ABiH plans to connect forces from Kladanj to the Srebrenica and Zepa enclaves, and further learned that in April 1995 Naser Oric was in Sarajevo involved in planning an attack that was supposed to be initiated from Srebrenica.[107]

[100] 5D1038; Drina Corps regular combat report, 17 Oct 1994; also see 5D1037; Drina Corps regular combat report, 10 Oct 1994; also see 6D187, ABiH plan, 9 Nov 1994 (planed combat actions in order to create a permanent free corridoer involving both Srebrenica and Zepa armed forces);
[101] 5D1176, President order, 1 Aug 1994;
[102] 5D1249, Drina Corps order, 27 Jun 1994; also see 5D1036, Drina Corps daily report, 10 sep 1994; also see 5D1041, Drina Corps warning, 3 Dec 1994;
[103] 5D988, Drina Corps work plan for November 1994; 5D989, Drina Corps work plan for December 1994; also see 5D996, Skelani battalion work plan for December 1994;
[104] 5D990, Drina Corps work plan for February 1995; 5D992, Drina Corps work plan for April 1995; also see Skelani battalion work plan for February 1995;
[105] 5D1054, Drina Corps regular combat report, 27 Feb 1995;
[106] 5D1213, Main Staff order, dated 30 March 1995; 5D1055, Main Staff order, 28 Feb 1995; 5D1057, Drina Corps order, 1 Mar 1995;
[107] 5D1064, Drina Corps intelligence department information, 11 Apr 1995; also see 5D1065, information from 13 Apr 1995 where the VRS forces anticipated that attack from Kladanj to connect with forces in enclaves will commence on 20 Apr 1995;

51. In May 1995 the Muslim enemy group from within the enclave set up an ambush in the Podravno sector and killed 5 Serbian soldiers.[108] In June the Drina Corps was still issuing orders to the Milici brigade to prevent ABiH groups from moving between Srebrenica and Zepa enclaves.[109] However, the Milici brigade was again not able to defend against the ABiH forces from within the enclave and on 21 June the platoon commander of the Milici brigade was killed.[110] These ABIH attacks were followed by subsequent attacks in which there were both civilian and military casualties on 23 June[111] and on 26 June.[112]

52. The foregoing attacks culminated when the ABiH forces launched an assault from within the enclave on the Serbian villages, including Visnjica which was 5km from the enclave.[113] During this attack, as with the previous attacks by the ABiH forces Serb civilians were killed and their houses burned as it was acknowledged and confirmed in the ABiH military report.[114] Based on the report of the 285th IBibr it can be seen that the sabotage groups from Zepa were attacking Serbs settlements including Visnjica and killed approximately 40 "Chetniks" and wounded dozens.[115]

53. Immediately prior to the Krivaja 95 attack the situation was unchanged for VRS forces around the enclaves and their response remained the same. The Drina Corps order from 5 July 1995 acknowledged that a corridor was established between Srebrenica and Zepa through which the ABiH sabotage groups can attack the VRS forces from the rear.[116]

54. The attacks and sabotage actions conducted by the ABiH from within the enclave and the crimes committed during the three year period were well known to Dutchbat as confirmed by Egbers and Duijn.[117] Further, Koster testified that he

[108] 5D1079, Drina Corps interim combat report, 27 May 1995;
[109] 5D1075, Drina Corps order, 4 Jun 1995;
[110] 5D1097, Drina Corps regular combat report, 21 Jun 1995;
[111] 5D1099, Bircanska brigade regular combat report, 26 June 1995;
[112] 5D1100, Drina Corps regular combat report, 26 June 1995;
[113] Krstic Trial Judgment, para.567;
[114] 6D179, 2nd Corps Command, 27 Jun 1995; also see 5D3, 28th Division Command, report dated 30 June 1995; also see Decision on Prosecution Motion for judicial Notice of Adjudicated Facts with Annex, fact 67;
[115] 5D227; 285th IBIbr report, dated 28 June 1995;
[116] 5D1105, Drina Corps order, 5 Jul 1995; also see P3025, Bratunac brigade order, dated 5 July 1995;
[117] Landert Van Duijn, T2375; also see Bernardus Egbers, T2840;

received reports that Muslims opened fired from the enclave towards Serbian positions.[118]

Demilitarization of the enclave

55. It is respectfully submitted that neither Srebrenica nor Zepa enclaves were ever demilitarized and that ABiH forces continued to operate within the enclaves despite the signed agreements on demilitarization. It is further submitted that this fact is significant for several reasons including that the enclaves in fact were not safe havens as they should have been and hence did not meet the sub standard of distinct entity criterion applied in the Krstic Judgment while reaching the conclusion that a substantial part of the group was targeted in Srebrenica. Although the Prosecution stipulated during the Trial that the enclaves were not in fact demilitarized however, in the submission of the Defense it is nonetheless relevant to show how well known it was and the degree that the ABiH forces in the enclaves were armed and equipped. It is submitted further that a substantial part of the arms and ammunition reaching the hands of Muslim 28th Division were supplied through the UNHCR and UNPROFOR humanitarian convoys. The Appeal Chamber in Krstic without the benefit of the foregoing facts erred when finding the Srebrenica Muslims "vulnerability and defenselessness in the face of Serb military forces". From the cursory review of the evidence it was obvious that the overwhelming presence of the 28th Division of the ABiH was common knowledge to the Muslim population in Srebrenica as well as to International community dealing with the Srebrenica enclave.

56. It is respectfully submitted that by establishing the foregoing the status of a safe haven cannot be used to show that Srebrenica was a distinct entity because it was obvious to all parties including VRS forces, ABiH, International forces and the population in Srebrenica that Srebrenica was not in fact a safe haven in any practical or real sense.

[118] Eelco Koster, T3096;

Strength of the 28th Division and its constant arming

57. The issue of smuggling weapons for the ABiH and for the enclaves by UNCHR humanitarian convoys was known in April 1993 before the enclaves were proclaimed.[119] In that instance 30.000 rounds of ammunition were found in a UHNCR convoy.[120] Manojlo Milovanovic testified that despite the fact that UNPROFOR in 1993 informed the Serb side that Srebrenica was disarmed, that military installations had been converted into civilian facilities and that any soldiers that had been left behind in Srebrenica were disarmed 28th Infantry Division came into being in Srebrenica was not accurate or true.[121] The former Chief of Staff also testified that such transportation of arms occurred in all the enclaves, that in Bihac 5th Muslim Corp grew to size of 22.000 soldiers, that in Zepa a brigade with the strength of 1200 was formed and that in Gorazde the 81st Infantry division was formed with the strength of 6.000 to 6.500 men.[122] For the former Chief of Staff it was only logical that violations were occurring with in the supply line and delivery of humanitarian aid. Milovanovic claims that weapons and ammunitions could not reach enclaves except through the combat disposition of the UNPROFOR, on humanitarian convoys.[123]

58. There were numerous ABiH documents proving that a vast amount of weapons and ammunition were reaching both Zepa[124] and Srebrenica[125] enclaves. From the overview of the weapons delivered in May[126] and summary performed after the fall of Srebrenica it is plain that the 28th Division and Zepa Brigade were armed as if the enclaves were never demilitarized.[127] One of the ways weapons were brought into the enclave was by helicopter flights. In February 1995 the Command of the Drina Corps informed the Main Staff that after midnight a helicopter was observed flying from the direction of Sarajevo to Zepa and that around 5 AM two helicopters

[119] 5D390, notes UNPROFOR high level meeting in Belgrade, April 1993;
[120] ibid, page 2;
[121] Manojlo Milovanovic, T12280;
[122] Manojlo Milovanovic, T12280-81;
[123] Manojlo Milovanovic, T12281;
[124] 6D53, Zepa light Brigade, report dated 3 Jan 1995; also see 6D55, Zepa light Brigade, report dated 9 Feb 1995; also see 6D59, Zepa light Brigade, report dated 14 Feb 1995; also see 6D63, ABiH report dated 20 Feb 1995; also see 6D67, ABiH information dated 27 Apr 1995; also see 6D95, 285 Brigade information dated 30 Apr 1995; also see 6D96, ABiH information dated 4 Jan 1995;
[125] 6D58, Army Staff information, dated 13 Feb 1995; 6D61, Command of the 8th OG, report dated 17 Feb 1995; also see 6D64, Command of the 8th OG, report dated 25 Feb 1995; also see 6D65, ABiH order dated 4 Mar 1995; also see 6D66, ABiH information dated 21 Apr 1995;
[126] 4D5, speech at the Assembly, 30 July 1996;
[127] 4D13, ABiH interim report, 13 July 1995;

were seen going from Srebrenica to Zepa where they landed and after ten minutes returned to Srebenica.[128]

59. Manojlo Milovanovic recalled that in 1994 there was an operation of supplying humanitarian aid by air under the code name "parachute".[129] However, he testified that such deliveries being dropped from high altitude sometimes because of the wind found its way into territory controlled by the VRS and that they found munitions for a machine gun, 12.7 millimeters in the flour sacks.[130] Documents were presented that even enemy troops were infiltrated into the protected zones by helicopters.[131] Dutchbat witnesses testified that they were aware of the smuggling of weapons in the enclave and of the helicopter flights in and out of the enclave.[132]

60. Humanitarian aid was used to a large extent for the needs of 28th Division and this was confirmed by the documents issued by ABiH forces in Srebrenica. In June 1995 Defense secretariat department in Srebrenica Municipality submitted the records of donations to the BH Army to the Tuzla Defense Secretariat.[133] This document includes the list of the quantities of food, material and technical equipment and fuel. It is noted that all the quantities have been separated out of the humanitarian aid contingent which arrived through UNHCR, while some of the food was obtained from the Dutch Battalion.[134] UN and Dutchbat were aware of the fact that part of the goods delivered through the UNHCR was always taken by the 28th Division.[135]

61. It is undisputed that fuel could be used for military purposes. Unsurprisingly fuel was also the type of resource that was smuggled by the 28th Division and also type of goods that was given to the 28th Division by the International organizations. In September 1993, the Main Staff was warning subordinate units to pay attention that fuel from tanks of humanitarian organizations is not left in Muslim territories.[136] As

[128] 5D1051, Drina Corps report 16 Feb 1995; also see 6D62, AbiH report dated 20 feb 1995 ;
[129] Manojlo Milovanovic, T12281;
[130] ibid;
[131] 5D1239, Main Staff order 14 Nov 1993;
[132] Pieter Boering, T1910;
[133] 5D955;
[134] 5D955;
[135] Robert Franken, T2538;
[136] 5D374, Main Staff order, 30 Sep 1993;

far as Zepa is concerned it is plain that UNPROFOR knew that fuel was given to the Zepa Brigade considering that they were selling and trading it.[137]

62. The suspicion that fuel was given and sold to ABiH was always present because of the large amounts that were requested to enter the enclave.[138] Manojlo Milovanovic testified that he thought that at the beginning fuel was sold at the black market as a criminal activity of individuals that would go into enclave with full tank and empty the tank of a certain amount of fuel.[139] He said that the VRS erred when notifying UNPROFOR about that because it gave UNPROFOR an idea how to supply fuel on a wider scale.[140] The entire fuel delivery system for the ABiH whole thing later culminated when it was discovered that certain vehicles tanks had a double bottom and in Milovanovic's opinion this already amounted to organized crime.[141]

63. The foregoing situation was known to the UNPROFOR battalion residing in the enclave that was tasked to demilitarize Muslim forces.[142] Witness Koster confirmed that since June one could see more and more armed Muslim fighters in Srebrenica and some wearing civilian clothing and some uniforms, such as army coats or army shirts.[143] By that time Duchbat was no longer able to fulfill the policy requirements for a demilitarized zone, meaning there were so many Muslim fighters armed within the enclave that UN soldiers were incapable of disarming the ABiH forces.[144] It was also known to the UN forces that houses were used as military facilities and for military purposes by Muslim units[145] yet they did not have authority to search those houses.[146] Witness Egbers testified that a Muslim told him that they went out of the enclave, killed BSA soldiers and took their weapons back to the enclave.[147] The same knowledge was possessed by the UN in relation to Zepa, as

[137] Meho Dzebo, T9619; also see 6D72, 1 Birac infantry brigade, dated 12 May 1995;
[138] 5D1276, intercept conversation 3 Jan 1995;
[139] Manojlo Milovanovic, T12282;
[140] ibid, T12282-3;
[141] ibid, T12283;
[142] See 5D502 and 5D503, agreements dated 17 Apr 1993 and 8 May 1993; also see testimonies of Eelco Koster, T3067; Pieter Boering, T1869;
[143] Eelco Koster, T3058-9;
[144] Eelco Koster, T3067;
[145] Eelko Koster, T3100;
[146] Peter Boering, T2181;
[147] Bernardus Egbers, T2840; Robert Franken, T2442;

Edward Joseph testified that he knew that Zepa was not demilitarized despite the agreement.[148]

64. Dutchbat witnesses testified about the Bandera triangle that existed inside the enclave, that the Muslims even took as hostages a large group of Dutchbat soldiers[149] and that they did not dare go there[150] and hence logically did know how many soldiers or weapons were kept there.[151]

65. The fact that the enclaves were not demilitarized was known to the Muslim community in those respective areas which was confirmed during the Trial by witnesses personally[152] as well as the fact that the arms were subsequently brought in the Zepa by the helicopters.[153] Also significant is that the Muslim population was aware that UNPROFOR forces knew that the arming of ABiH army was being done by helicopters.[154]

66. It is also undisputed that the ABiH used the signed ceasefire and the creation of the safe haven to arm itself and Prosecution witness Richard Butler testified that VRS was well aware of that fact.[155] The fact that the UN was also aware of the ABiH's disregard to the agreement may be seen from the report of Mr. Akashi to Mr. Annan from 1 March 1995 stating that despite the cessation of hostility agreement on 31 December 1994 ABiH obstructed in various ways UNPROFOR.[156]

67. It is respectfully submitted that it was the result of these attacks from within the enclave and the casualties sustained to the civilians that prompted the VRS to separate Srebrenica and Zepa and not because of the third strategic goal (elimination of the Drina river as a border) as claimed by the Prosecution. Thus the Prosecution did not prove beyond a reasonable doubt that the VRS had any criminal intent in seeking to separate the enclave.

---

[148] Edward Joseph, T14265-6;
[149] Eelco Koster, T3118;
[150] Peter Boering, T1884 and T1910;
[151] Robert Franken, T2604;
[152] Meho Dzebo, T9599; Hamdija Torlak, T9722;
[153] Meho Dzebo, T9603; Hamdija Torlak, T9783;
[154] Hamdija Torlak, T9827-8;
[155] Richard Butler, T20529;
[156] 5D729;

68. Ljubisa Beara as a chief of security performing tasks under the security sector jurisdiction. This "consisted of information gathering about conditions in military units and in the field and about foreign-inspired activities insofar as that was possible", while "the main thrust was security in VRS units and institutions".[157] More specifically counter intelligence work was the main trust of security.[158]

69. Ljubisa Beara by virtue of his jurisdiction was not involved in the Krivaja 95 military actions on the field. Several witnesses confirmed this indirectly when they testified that they saw Ljubisa Beara mostly far from where the military operations were actually taking place.[159] The Honorable Trial Chamber must be satisfied beyond a reasonable doubt that the involvement of each accused, including Ljubisa Beara, was performed with criminal intent and with knowledge about the premeditated criminal plan and further that such involvement was not done solely to participate in legal military actions as conducted in many instances before July 1995.

[157] 2D653, 92 bis statement of Stojan Cvijanovic, page 2; 2D658 92 bis statement Makivic Slobodan, page 2;
[158] 2D659, 92 bis statement of Vojno Dragutinovic, page 2; also see 2D660, 92 bis statement of Ivan Fricer, page 1;
[159] Branimir Grulovic, T23775;

The Prosecution's theory as to the mode of liability via Joint Criminal Enterprise fails to establish with any certainty that Beara was a participant in the purported JCE at any time

70. Ljubisa Beara is charged with crimes underlining both the first and third (extended) form of Joint Criminal Enterprise (hereinafter "JCE").

71. The elements of JCE were initially defined in the Tadic Appeal Chamber Judgment.[160] The Appeal Chamber's found that the actus rea elements are the same for all three forms of JCE.[161] These three actus reus elements are: 1] a plurality of persons, 2] the existence of a common purpose (or plan) which amounts to or involves the commission of a crime provided for in the Statute, and 3] the participation of the accused in this common purpose.[162]

72. The mental state requirement for all three forms of JCE requires the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group.[163]

73. The Prosecution alleges that in the evening hours of 11 July and during the morning of 12 July 1995 a plan to forcibly transport the Muslim population from Potocari was developed.[164]

74. Based on the previous Judgments relating to Srebrenica the Trial and Appeal Chambers in those cases accepted certain events to reach the conclusion that there was in existence a JCE to forcibly transfer the Muslim population from Srebrenica.

75. It is respectfully submitted that it is critical for consideration and review the events leading up to the three Hotel Fontana meetings in which Mladic as well as

[160] First mentioning of the common criminal purpose and the liability that flows out of it, was in Delalic Trial Chamber Judgment but the elements were not enumerated by the Chamber, and by the language of the judges this was first type of what after Tadic judgment became JCE type of liability, see Delalic Trial Chamber Judgment, para.328,
[161] see Tadic Appeal Chamber Judgment, para.227, also see Vasiljevic Appeal Chamber Judgment, para.100, (25 Feb 2004), also Brdjanin Appeal Chamber Judgment, para.364, (3 Apr 2007),
[162] ibid.,
[163] see Tadic Appeal Chamber judgment, para.228;
[164] Indictment para.27;

other were present[165] that was held after the Serbs troops entered Srebrenica. The significance of these meetings for the previous Chambers stemmed from the fact that the fate of the civilian population from Srebrenica was discussed at these meetings.[166] Presence in Potocari was also one of the indicia required to establish that one must have known of the appalling conditions facing the Bosnian Muslim refugees and the general mistreatment inflicted by VRS soldiers on that day.[167]

76. In order to analyze whether criminal responsibility may be proven against Ljubisa Beara under JCE evidence that was adduced during the Trial in relation to Ljubisa Beara reveals that no credible evidence was presented to establish or infer that Beara had shared the intent of others or that he participated either in the purported JCE to forcibly transfer the Muslim population or in the JCE to kill the able bodied men.

Ljubisa Beara's whereabouts during the relevant events

77. It is respectfully submitted that although physical presence is not a pre-condition in order to incur criminal responsibility under JCE, Beara's whereabouts are relevant for such a determination. It should be noted further that certain Prosecution witnesses were plainly erroneous, inaccurate vague, inconsistent and incomplete while testifying in reference to the purported dates of the alleged encounters with Beara and thus are unreliable and should be given no weight.

The Defense witnesses gave credible evidence of Beara's whereabouts in the relevant period which were corroborated by independent documents

78. Despite the Prosecution's allegations and the witnesses they called, which were vague, inconsistent, untruthful and self serving, the defense, on the other hand, established Beara's whereabouts with credible witnesses and reliable documents in order to refute and dispute as well as contradict the Prosecutions unfounded allegations.

[165] P1194, video of second Fontana meeting; P1195, video of third Fontana meeting;
[166] Krstic Trial Chamber Judgment, para.339;
[167] Krstic Trial Chamber Judgment, para.465 and 354;

79. The first Defense witness that testified concerning Beara's whereabouts in the relevant period was Branimir Grulovic.[168] Mr. Grulovic testified that he saw Beara in the zone of the 2KK, in western Bosnia, more specifically at their Forward Command Post during the time that Srebrenica fell (11 July).[169] Grulovic who was a reporter for Reuters recalled specifically speaking with Beara and requesting him to confirm the fall of Srebrenica.[170]

80. It is respectfully submitted that Beara was not involved and had no knowledge of the preparatory plans and military operations involving Srebrenica. It is further submitted that Beara acknowledged during the Interview with the Svedok newspaper that at some point after the operations, for a brief period, he saw that buses were leaving from the direction of Srebrenica.[171]

81. In addition, the Beara Defense called several witnesses to testify about Ljubisa Beara whereabouts on 13 and 14 July 1995. Witness Mira Cekic testified that she saw Mr. Ljubisa Beara on the evening of 13 July 1995 when after phone conversation between Beara and her late husband, Toma, they agreed to go out together for dinner[172]in a restaurant called "Cuburska Lipa".[173] Ms. Cekic testified that her late husband and Beara talked over that phone that day around noon when Beara came.[174] During that dinner Ms. Cekic was informed by Nada Beara that her "old man is having his birthday tomorrow".[175] Cekic also stated that the next day the Beara family organized a lunch at their flat in Kosovska, Belgrade and following the luncheon that Nada and Ljubisa Beara came to her home.[176]

82. Both Mira Cekic and Svetlana Gavrilovic further testified about the party held at the apartment of Cekic in Belgrade. In attendance beside Beara and his wife Nada,

[168] See testimony of Branimir Grulovic on 22 July 2008;
[169] Branimir Grulovic, T23769; 23777;
[170] ibid;
[171] P480;
[172] Mira Cekic, T24832-33;
[173] ibid, T24847;
[174] ibid, T24850;
[175] ibid, T24833;
[176] ibid, T24851;

were Svetlana Gavrilovic and her late husband Djordje, Mira Bozinovic (maiden Cekic) her late husband Toma and others.[177]

83. Svetlana Gavrilovic testified before the Court that she attended that party in Cekic's flat in Sumatovacka street in Belgrade on 14 July 1995.[178] Gavrilovic recall's remembers that this birthday celebration was in 1995 because she wanted to celebrate with her husband their silver wedding anniversary that year considering they got married in January 1970.[179] During the evening they also mentioned their intention to have a journey with Orient Express train for their anniversary, and a joke was made by Toma Bozinovic that they should go to the recently opened restaurant that looks like a carriage of the Orient Express train and imagine they are sitting in the actual train.[180] Gavrilovic had also another reason to remember 14 July as it is "Bastille Day" and she teased her husband about that because he has completed his secondary school in France thus 14 July is his youth holiday.[181] Gavrilovic testified that during the dinner she made a comment how Beara is handsome and how his wife managed to keep such a handsome man for herself for so many years.[182] That prompted them to start talking about their marriages and the trip Svetlana and her husband were planning for their 25th silver anniversary.[183]

84. The Prosecution during its cross-examination tried to confuse Ms. Cekic by presenting false evidence that purportedly the restaurant in the shape of carriage of Orient Express was not opened until 1998 in Belgrade.[184] The Prosecution presented information relating to a Balkan Express restaurant in Zemun[185] even though the witness Gavrilovic specifically said that during the party the restaurant they were referring to was in Novi Beograd.[186] Despite this misrepresentation of facts by the Prosecution, Ms. Cekic stood by what she recalled in relation to the dates of the Beara party.[187] It was ultimately shown that the restaurant discussed during the dinner party

[177] Svetlana Gavrilovic, T24762; also see Mira Cekic, T24835;
[178] Svetlana Gavrilovic, T24761-62;
[179] ibid;
[180] ibid, T24762-63;
[181] ibid, T 24775;
[182] ibid, T 24771 and T24777;
[183] ibid, T24777;
[184] Mira Cekic, T24855, also see P3629;
[185] Mira Cekic, T24853; also see P3629;
[186] Svetlana Gavrilovic, T24762;
[187] Mira Cekic, T24857;

existed in Novi Beograd in 1995 and furthermore pictures of that restaurant were shown to the Honorable Trial Chamber.[188]

85. Hence, Prosecution failed to disprove or rebut the evidence adduced from these witnesses. The testimony of Svetlana Gavrilovic and Mira Cekic was reliable in regard of their memory and the basis they offered to remember the year and the date of Beara birthday. Mira Cekic affirmed she did not previously know the date of Beara's birthday[189] but she was told by Nada Beara on the day before the actual birthday when they had a party at her home.[190] The reasons given by Gavrilovic as to why she remembered she saw Beara during his 1995 celebration of his birthday are credible. Cekic remembered that same year Beara was present at her birthday on 16 May 1995[191] and she remembered it was 1995 because it was the first year they did not have money to go on vacation and it was the year when her husband Toma lost his company.[192]

86. It is respectfully submitted that Nada Beara's spontaneous utterance while speaking to Gavrilovic and Cekic as to Beara's birthday further corroborates the testimony of both witnesses.

87. Both Gavrilovic's and Cekic's testimony were further corroborated by the testimony of witness Milan Kerkez, a friend from childhood of Branko Beara, Ljubisa Beara's son.[193] Kerkez testified that he took a summer vacation with Branko Beara and three other friends in Petrovac, Montenegro between 16 and 31 July 1995 before his and Branko's handball preparations for next season commenced.[194] Mr. Kerkez testified that he stopped by Beara's apartment in Kosovska Street in Belgrade on the 14 th of July at approximately 14.00h.[195] He explained that he came because Branko invited him and other friends and told them that he now has money for the trip because until the last day before their trip which was 14 of July, he was not sure

[188] Mira Cekic, T24867; also see P3649 and 2D600;
[189] Mira Cekic, T24885;
[190] Mira Cekic, T24886;
[191] Mira Cekic, T24885;
[192] Mira Cekic, T24835;
[193] Milan Kerkez, T24908;
[194] Milan Kerkez, T24909;
[195] ibid, T24911;

whether he will be able to go.[196] Upon entering the apartment Kerkez saw Branko's parents, Nada and. Ljubisa Beara and he also saw some other people, older people, to which he waved said hello and went into Branko's room.[197] Mr. Kerkez asked Branko how come his father was home and Branko replied he was here because it was his birthday and that is how he got the money for the trip.[198] Kerkez was certain these events happen on 14 July for several reasons, first because it was the last day before the trip and after Branko informed him he has the money he called lady in Petrovac to secure the fifth bed for Branko and he also remembers that it was Friday but they did not go out to the town as they would usually do because they agreed to save the money for the upcoming vacation.[199]

88. The testimony of Mr. Kerkez was not attacked by the Prosecution's cross examination. Pictures of that vacation with five teenagers among whom one was Branko Beara and Milan Kerkez were shown to the Honorable Trial Chamber.[200] Mr. Kerkez described to the court how the pictures were made during this vacation and explained when and where he developed them.[201] Kerkez also had a vivid memory of how some of those pictures were made like the one in which fingers of Branko could be seen because he was taking the picture while swimming in the sea.[202] Mr. Kerkez also remembered that when the five of them went to that vacation that they were preparing their own meals and tidied their room.[203] He also remembered that Branko Beara liked to have a sleep in so every morning he would throw grapes at him to wake him up.[204] His memory of the dates is credible and reliable because he remembers that they did not know whether Branko will go with them to the vacation until the very last day and because Branko joined them he ended up on the bunk bed.[205] Further Kerkez is certain as to date they came back because he and Branko were playing handball and had to be in Belgrade on 1 August, not just that year but every year.[206] Regarding the dates he stated fairly logical that he remembers them being back from vacation on

[196] ibid, T24910;
[197] ibid, T24912 also see 24954;
[198] ibid, T24912;
[199] ibid, T24914 also T24947;
[200] 2DIC213 on T24916;
[201] Milan Kerkez, T24921;
[202] Milan Kerkez, T24920;
[203] ibid, T24926;
[204] ibid;
[205] ibid, T24926;
[206] ibid, T24929;

Sunday after exactly two weeks of vacation because he wanted to take a rest and start his practice on Monday.[207]

89. It is respectfully submitted that Kerkez's testimony should be accepted in full. Mr. Kerkez's recollection as the organizer of the whole trip and that is the reason why he remembers events like the communication with the lady in Petrovac on the sea who was the landlady and other details of the trip.[208] Furthermore it is logical for him to remember that Branko was there and that he had trouble finding the money until his father Ljubisa Beara came because next summer Branko did not go to vacation with the rest of them.[209] He also remembered that they used to call Branko's dad "Pape" because he spent a lot of time in Dalmatia and it is a common nickname there.[210] He further testified that along with money Branko's father brought him tin cans and Branko brought that to the vacation instead of fresh food and he kept offering that to others even though they did not want to eat it.[211] Mr. Kerkez also remembered that Vukasin would tease Branko that "Pape" brought him money.[212]

90. Finally, Mr. Kerkez testimony is consistent with the testimony of Svetlana Gavrilovic regarding the 14 July get-together organized in Beara's apartment for Beara's birthday. Mr. Kerkez said that he saw Beara and some older people in the apartment.[213] Ms. Gavrilovic consistently testified that Nada Beara told her that they will organize a lunch in their flat before the dinner in Mira Cekic's apartment.[214]

91. It is respectfully submitted that the testimony of the foregoing witnesses is further corroborated by independent documents that were maintained and kept during the events at issue. One of those documents is a war diary made by Bob Djurdjevic covering the events between 5 and 31 July 1995.[215] In this diary Bob Djurdjevic described events and meetings he had during that time and it is respectfully submitted

[207] ibid, T24940;
[208] ibid, T24929 also see T24951;
[209] ibid, T24940;
[210] ibid, T24944;
[211] ibid, T24944;
[212] ibid;
[213] ibid, T24912;
[214] ibid, T24851;
[215] 2D531;

that of particular interest should be his entries for 13 and 14 July 1995.[216] The second date, wherein an obvious mistake is made with respect to the actual date entry it is undisputed that Djurdjevic at that point in his diary was describing what he witnessed on 14 July 1995.[217]

91. It should be noted that in Mr. Djurdjevic's diary entry for 13 July 1995 he describs his trip to the Republic of Srpska from Serbia by a driver named Milos Tomovic.[218] Milos Tomovic was the sole personal driver of Mr. Ljubisa Beara at the time and not as mistakenly believed by Bob Djurdjevic the driver of Zdravko Tolimir.[219] In light of the previous testimony confirming that Beara was in Belgrade on 13 July of particular significance was the comment made by Milos Tomovic recorded by Bob Djurdjevic in his diary.[220] According to Djurdjevic's diary when he stopped on the Bosnian side of the Drina, military police guards informed driver Tomovic that he cannot use the road via Kasaba and Konjevic Polje because it is closed to which Tomovic replied that such was not the case when he came through there this morning.[221]

92. Being Ljubisa Beara's personal driver and having in mind witnesses testifying as to being with Beara on 13 and 14 July 1995 it is logical to conclude that Tomovic would have driven Beara to Belgrade on that morning when he was stopped together with Djurdjevic on 13 July 1995 by military police.

93. In addition, witness Srdja Trifkovic indirectly confirmed these documents testifying that he was at Pale in July 1995 as reflected in the Djodjevic diary.[222] Namely, Trifkovic testified that he saw briefly Mr. Robert Bob Djurdjevic in Zametica's office in July 1995.[223] Witness's account of this encounter and his recollection of it is logically sound due to the fact that witness described his encounter with Mr. Djurdjevic as not being particularly friendly encounter.[224]

[216] 2D531, pages 18 and 31;
[217] 2D531, page 31;
[218] 2D531, page 18;
[219] 2D531, page 18;
[220] 2D531, page 19;
[221] 2D531, page 19;
[222] Srdja Trifkovic, T25215;
[223] Srdja Trifkovic, T25225;
[224] Srdja Trifkovic, T25225;

94. As far as witness Trifkovic's duration of stay at Pale is concerned according to his testimony he was there from the evening of 12 July until the early morning of 16 July 1995.[225] The dates given by Mr. Trifkovic were also further confirmed by the Radovan Karadzic appointment calendar where Mr. Trifkovic's name can be found both on 13 and 14 July 1995.[226] Trifkovic affirmed as accurate the Djurdjevic diary entries according to which on 13 July 1995 he had a meeting with President Karadzic and on 14 July he had a meeting with Jovan Zametica from 23.05 until 00.35.[227]

95. It is obvious from Bob Djurdjevic diary; Karadzic appointment calendar and Mr. Trifkovic testimony that facts contained in them at least as far as events happening on 13 and 14 July 1995 are accurately reflected and thus reliable.

96. It is respectfully submitted that the events described on 13 and 14 July 1995 by three independent different sources should be given full weight and indirectly confirms further defense witnesses as to the whereabouts of Beara.

97. Another witness offering evidence concerning Ljubisa Beara's whereabouts was Ljuban Mrkovic who, during the relevant time period was working in the security organ at the aircraft manufacturing plant Orao.[228] Mrkovic met Beara at the end 1992 and he remembered that Beara visited the Orao plant very often, between 10 and 20 times through 1995.[229] Mr. Mrkovic testified that Beara would also from time to time attend monthly meetings with security organs in the Sarajevo Romania Corps.[230]

98. Mrkovic remembered that Beara attended one of those meetings at the beginning of July, more precisely on 5 July in Ilijas[231] which is west of Sarajevo[232]. At that meeting the military and political situation in the Republic of Srpska and the Sarajevo theatre was discussed and Beara was present at the meeting.[233] Mrkovic was

[225] Srdja Trifkovic, T25227;
[226] P2905; also see
[227] Srdja Trifkovic, T25231;
[228] Ljuban Mrkovic, T24266;
[229] Ljuban Mrkovic, T24279;
[230] Ljuban Mrkovic, T24280;
[231] ibid,
[232] ibid, T24281;
[233] ibid, T24284;

not sure but he thought that Beara visited the Orao plant at that instance when he was at the Ilijas brigade.[234]

99. Mrkovic further recognized his own voice on an intercept conversation between him and an unknown participant that took place on 10 July1995.[235] In that conversation Mr. Mrkovic was informing a third party that "Beara came and stayed with us for three or four days".[236] From this intercept and meeting in Ilijas on 5 July Mrkovic reasonably concluded that at that time Beara came and stayed until the 8th or 9th of July.[237] Mrkovic could not independently remember the very conversation but believes that he participated in this conversation after hearing his voice.[238]

100. Mrkovic said that Beara probably left for Krajina after this visit because that was his usual pattern after visiting the Sarajevo Romania Corps.[239] When asked specifically, witness said that he thinks that Beara stated during their meeting that he was heading towards Krajina, although he was not sure whether he actually went there.[240]

101. Mrkovic's testimony regarding Beara's frequent visits to the Orao factory was collaborated with another intercept conversation from 5 June 1995 where he again recognized himself as a participant and the nickname "Mrki" as his nickname at that time.[241] Other participants in this intercept are Beara and Tolimir and at one point Beara is informing Tolimir that he is "here at Mrki's".[242] Mr. Mrkovic said that here at Mrki's must mean that Beara was actually sitting in his office in Rajlovac.[243]

[234] ibid, T24286;
[235] 2D557; also see T24292;
[236] ibid, T24296;
[237] ibid, T24299;
[238] ibid; T24298;
[239] ibid, T24299;
[240] ibid, T24300;
[241] ibid, T24306;
[242] ibid, T24305;
[243] ibid, T24306;

102. The testimony of Mr. Mrkovic and the whereabouts of Beara in this period were not disputed by the Prosecution who did not cross examine this witness in relation to Beara whereabouts.[244]

103. Beara's whereabouts in the second half of July were the subject of the testimony of witness Mikajlo Mitrovic. Witness Mitrovic was an acquaintance with Beara since the time they served in 8th Naval district in Split.[245] At that time Beara was his second superior but witness meet Beara for the first time in 1985.[246] Mr. Mitrovic remembers that Beara visited him at the 2KK (Krajina Corps) headquarters prior to the fall of Glamoc and Grahovo on the western front at or on 27 or 28 July 1995.[247]

104. Beara was present in the 2KK in relation to the counterintelligence issues that witness Mitrovic had to resolve and was present when Mr. Mitrovic reported about the situation to his commander.[248] It is respectfully submitted that the Prosecution did not contest or dispute this evidence.

[244] ibid, T24311-12;
[245] Mikajlo Mitrovic, T25041;
[246] ibid, T25040;
[247] ibid, T25058;
[248] ibid, T25061;

The Prosecution evidence as to the whereabouts of Ljubisa Beara at the relevant times are erroneous, inaccurate, vague inconsistent and incomplete and thus should be rejected

105. It is respectfully submitted that the whereabouts of Ljubisa Beara on 13 and 14 July were untruthfully portrayed by the group of small but close-knit local civilian officials and friends who stayed in close contact after the events. It will be shown that Deronjic's testimony was premeditated construction full of previous lies by his own admission and that he and his associates, because of their own involvement, had a strong motive to shift the responsibility to somebody else, in this case Ljubisa Beara.

106. It is respectfully submitted that the testimony of Miroslav Deronjic admitted pursuant to Rule 92 quarter of the Rules of procedure and evidence should be not given any weight inasmuch as Beara's fundamental right to cross examine was denied thus rendering the proceedings against Beara as unfair. Nevertheless the Beara Defense submits that even upon analyzing such testimony the Court respectfully should reject Deronjic's evidence as not credible. The first person to falsely accused Beara was the highest and most powerful of them all, and was the president of the local SDS and president of regional SDS, Mr. Miroslav Deronjic. Deronjic's false testimony about the purported meeting with Ljubisa Beara on 13 July 1995 was later adopted and shaped by Deronjic's closest associates although many were not actually present at such a purported meeting and never previously offered such evidence.

107. It is respectfully submitted that Deronjic statement was unfortunately admitted under 92 quarter rule of the Rules of the Procedure and Evidence as were the statements of B161, Ljubo Bojanovic and Milan Maric.[249] The Honorable Trial Chamber however did note that its decision on admissibility must be distinguished from a determination as to weight to such evidence.[250]

[249] P3139; also see Decision on Prosecution Motion for admission of evidence pursuant to rule 92 quarter, dated 21 April 2008;
[250] ibid, page 16;

108. In Deronjic's testimony in Blagojevic and Jokic case, among other things, he claimed that he had a conversation with the President of RS on the evening of 13 July 1995 when Karadzic told him that a man with further instructions will come.[251]

109. Deronjic claimed that Beara came to his office in the evening between the 13 and 14 July and that Beara purportedly stated that he been ordered to kill the prisoners.[252] He testified that Beara told him that he has orders from the top.[253] Deronjic according to his testimony after having heard this put two and two together[254] because of his previous conversation with President Karadzic. According to Deronjic he responded to Beara that he does not have such orders[255] and that there is not going to be any killings.[256] During 14 July some unknown person allegedly informed him that Beara is searching for the brick factory in order to put some prisoners there, and that after a confrontation Deronjic told Beara that there will be no detention and no killings in Bratunac.[257] Deronjic also met with President Karadzic on 14 July on Pale and claims he informed Mr. President what Beara had told him about the prisoners.[258]

The Prosecution witnesses, without substantiation and corroboration, were influenced by persons culpable for the crimes and thus had the motive to distort and fabricate the facts

110. Witness PW161 a local civilian official at the time of the events referenced in the Indictment was [REDACTED].[259] PW161 claimed that he was called on the phone to report to the SDS premises where Beara waited him.[260] PW161 also stated that he thinks he saw Beara day or two days prior to that, by the Hotel Fontana and that he thinks one another time in the hotel.[261] Allegedly when PW161 went to the SDS

[251] Blagojevic et al case, IT-02-60-T, 19 January 2004, P3139, page 292;
[252] P3139, page 88;
[253] P3139, page 298;
[254] P3139, page 299;
[255] P3139, page 298;
[256] P3139, page 136;
[257] P3139, page 137;
[258] P3139, page 88;
[259] PW161, T9358;
[260] PW161, T9362;
[261] PW161, T9362;

offices he saw two unknown military policemen who let him in Mr. Deronjic's office where allegedly Beara was with yet two other unknown VRS officers.[262]

111. With respect to the date when this allegedly occurred PW161 stated it was the same day of the Kravica killings, July 13.[263] However, it should be noted that several days prior to his testimony the witness informed the Prosecution that he saw Beara a day after the killing in Kravica but that he amended that statement later.[264]

112. Purportedly Beara asked PW161 what kind of machinery he had[265] and told him it has to be sent to Milici to bury dead people and that there will be a lot of dead need to be buried.[266] Witness purportedly asked why should they go to another municipality and whether Beara called Rajko Dukic upon which Beara cursed him and Rajko Dukic and said that witness will await his further order and that he is free to go.[267] PW161 further testified that during the night he got another call with further instructions and that Beara told him to go with the military policemen to a location where a grave needs to be dug out.[268] Allegedly PW161 went with the policemen to Glogova near Kravica where he noted a location where a grave had to be dug out.[269]

113. The next morning, PW161 went to Glogova where they were unable to dig graves with the loader excavator and he explained that to Beara, who promised that a backhoe excavator would come from the Brigade.[270] According to PW161 the excavator arrived from the direction of Kravica, it was brought on a truck and it was operated by Rade Djurkovic.[271] PW161 testified that the bodies that were put in those graves came from Kravica, Konjevic Polje and Bratunac.[272]

[262] PW161, T9365-6;
[263] PW161, T9446;
[264] PW161, T9446;
[265] PW161, T9367;
[266] PW 161, T9368-9;
[267] PW161, T9369;
[268] PW161, T9369-70;
[269] PW161, T9370;
[270] PW161, T9371;
[271] PW161, T9371;
[272] PW161, T9372;

114. PW161 admitted he was at the site of the grave all three days while the bodies were being buried and that RAD company and the civilian protection were involved in digging the graves in Glogova.[273]

115. Another local civilian official, PW162 testified that he was called by the secretary of the Serbian Democratic party (SDS) on 14 July around 9.30h to come to the office because a man was waiting to see him.[274] According to the witness when he came in the SDS offices the person sitting with the secretary was introduced as Beara, who thereafter allegedly asked the witness to come into the other offices to talk with some people.[275] According to the witness those two unknown officers asked him what kind of machinery was available in the municipality and asked him if they can put the ULT at their disposal and he replied that he can and called director of the brickworks [REDACTED].[276] PW162 testified that the person who introduced himself as Beara did not enter the room while the witness spoke with the two unknown officers and did not inquire about the conversation when the witness walked out of the office.[277]

116. It is respectfully submitted that witness PW162 actually did not recognize Ljubisa Beara as the person he allegedly saw and spoke on 14 July 1995 in the SDS offices. [REDACTED] [278] [279] [280]

117. The third witness that was supposed to corroborate Deronjic's self-serving untruthful story was Ljubisav Simic the president of the Bratunac municipality during the crimes charged in the Indictment.[281] Simic testified in the Blagojevic case that on 13 July 1995 in SDS offices he saw a senior officer he knew was called Beara.[282] In preparation for giving testimony in the present case witness Simic stated that at the time of the events he did not know who the officer was and further before the Honorable Trial Chamber stated that somebody told him later that it was probably

[273] PW161, T9391;
[274] PW162, T9230;
[275] PW162, T9231;
[276] PW162, T9232-3;
[277] PW162, T9233-4;
[278] PW162, T9267;
[279] PW162, T9267;
[280] PW162, T9268;
[281] 4D606, page 3;
[282] 4D606, page 30;

Beara.[283] When asked to describe this senior officer, Simic explained that even though he usually has a very good visual memory because he was angry at the time, he was not able to see anything characteristic to describe that officer.[284]

118. Ljubisav Simic saw pictures of Ljubisa Beara on television but he was not able to recognize him as being the officer he saw in the SDS office on 13 July.[285]

119. The fourth and final witness the Prosecution seeks to utilize to corroborate Deronjic is Celanovic again a local official, who claims that he met Ljubisa Beara in Bratunac on possibly two occasions. Celanovic testified that he purportedly recognized Beara among the group of 3-4 officers in the Command yard of Bratunac Brigade.[286] When Celanovic was asked whether he saw Popovic he said that he thinks he saw "him and Beara one evening".[287] Witness further testified that he possibly saw Beara twice "either on the 12 in the evening or Monday in the morning".[288] Witness claimed he was not certain "as the Prosecution said he was bad with dates in previous testimony"[289] but he thinks that first time was either in the evening on 12 July or in the morning of 13 July.[290]

120. It is respectfully submitted that in order to properly analyze these four civilian witnesses it is also necessary to examine, in part, the testimony of Momir Nikolic. The motive of these persons to shift the responsibility to others is rather plain given their involvement.

121. In order to reach a plea agreement Momir Nikolic even placed himself at the imagined meeting between Deronjic and Beara even though Mr. Deronjic who was the writer of this tale did not envision a role for Mr. Nikolic.

[283] Ljubisav Simic, T27238-9;
[284] Ljubisav Simic, T27239-40;
[285] Ljubisav Simic, T27366;
[286] Zlatan Celanovic, T6654-5;
[287] Zlatan Celanovic, T6654;
[288] Zlatan Celanovic, T6628;
[289] Zlatan Celanovic, T6627;
[290] Zlatan Celanovic, T6628-9;

122. According to Mr. Nikolic's statement of facts and his testimony he allegedly meet Ljubisa Beara standing alone in the center of Bratunac where he was told to convey the message to Drago Nikolic that men from Bratunac who had been separated and housed in the facilities in Bratunac would be transferred to Zvornik and executed.[291] Not surprisingly there was no witness to this purported encounter even though Mr. Nikolic said that Bratunac is a small town with one main road.[292]

123. After conveying this purported message to Drago Nikolic, Momir Nikolic came back to Bratunac and allegedly reported back to Beara who summoned him to the meeting at the SDS offices of Mr. Deronjic.[293] Mr. Nikolic was not in the same office as Deronjic but was allegedly in a small room with the door opened next to the office were Deronjic, Beara and Vasic were present.[294] According to Momir Nikolic, Deronjic and Beara started arguing about whether the prisoners should stay in Bratunac.[295]

No weight should be given to Miroslav Deronjic's 92 quater statement

124. It is respectfully submitted that none of the evidence offered through Deronjic should be given any weight. The testimony of Miroslav Deronjic was previously analyzed by several different Trial Chambers and each found his testimony to be unreliable.

125. On May 30 2004 when determining Deronjic's sentence the Trial Chamber noted discrepancies between Deronjic's testimony and the Indictment and Factual basis.[296] The Trial Chamber found "reviewing in greater detail the Indictment the Factual Basis, the Deronjic Testimony, all of his prior testimonies and statements, and in particular his witness statement of 25 November 2003, the Trial Chamber came to the conclusion that on a *prima facie* basis there were substantial material discrepancies".[297] The Trial Chamber was forced to note that although it was not its

[291] Momir Nikolic, T32937-8;
[292] Momir Nikolic, T33185;
[293] Momir Nikolic, T32939;
[294] Momir Nikolic, T32939;
[295] Momir Nikolic, T32941-2;
[296] Deronjic Sentencing Judgment, para.35, 30 Mar 2004;
[297] ibid, para.35;

duty "to access the evidence in other proceedings before this Tribunal where Miroslav Deronjic acted as a witness …", "However, the Trial Chamber recalls that the Accused himself acknowledged that he had provided partly untruthful statements in his prior interviews with the Prosecution."[298]

126. It is respectfully submitted that despite this strong conclusion by the Trial Chamber an even closer examination of Deronjic's testimony clearly reveals that he is an unreliable witness whose testimony should be rejected in its entirety. During Deronjic's testimony before the Blagojevic Trial Chamber it is difficult to number the times Deronjic admitted that his previous statements were deliberately not true[299], that his statements were not fully correct[300], that some of the details in his previous statements cannot be taken as true[301], that he gave false information[302], that he tried to provide accurate information about things that he thought would not establish link to him[303], that he was not truthful before.[304]

127. Deronjic's testimony in relevant parts was not corroborated by any documentary evidence. For example, the intercept conversation on 13 July 20.10h between Deronjic and President Karadzic reveals no mention of Karadzic sending a messenger or any evidence that would corroborate Mr. Deronjic's testimony in regard to Ljubisa Beara.[305] It is submitted that this document shows that Deronjic's testimony regarding Ljubisa Beara and the purported meeting they had on 13 July 1995 is a complete fabrication on his part.

128. The Honorable Judge Schomburg had a slightly different opinion during Deronjic's sentencing and thought that Deronjic deserved a sentence of no less than twenty years of imprisonment.[306] Judge Schomburg concluded that the "forensic value of his statements and testimonies is extremely limited…",[307] and that he cannot attach

[298] ibid, para.252;
[299] P3139, page 5;
[300] P3139, page 52;
[301] P3139, page 54;
[302] P3139, page 73;
[303] P3139, page 178-9;
[304] P3139, page 292;
[305] P1149;
[306] Dissenting opinion of Judge Schombug, para.2;
[307] ibid, para.15;

any mitigating weight to such an unsound mixture of truth and lies, creating more confusion than assistance in the Tribunal's search for the truth.[308]

129. Finally, Judge Schomburg asked the question "why Miroslav Deronjic was not indicted as a co-perpetrator in the joint criminal enterprise leading to the horrific massacre at Srebrenica in 1995. It transpires on a *prima facie* basis that there should be enough reason to indict Miroslav Deronjić for his participation in that massacre…"[309] A question that to this day the Prosecution conveniently refuses to answer.

130. Similarly, while reaching its decision in the Krstic case it was noted "Further, the Appeals Chamber is hesitant to base any decision on Mr. Deronjić's testimony without having corroborating evidence. The discrepancies in the evidence given by Mr. Deronjić and the ambiguities surrounding some of the statements he made, particularly with respect to his sighting of Krstić at Hotel Fontana, caution the Appeals Chamber against relying on his evidence alone…"[310]

131. It is respectfully submitted that the Honorable Trial Chamber should not give any weight to the Deronjic statements when assessing the criminal responsibility of Beara. Moreover, reliance on evidence that was not subject to the accused fundamental right to cross examination would result in a miscarriage if justice.

The local authorities in Bratunac were motivated due to their own criminal culpability and mischaracterized, distorted and manipulated the evidence in order to avoid being indicted

132. When discussing the general relations between the VRS and the SDS it can be said that the relationship had deteriorated by March of 1995 and that the Army believed that people from the SDS were actually out to assassinate their key leadership figures.[311] Although the general attitude of hatred shared by Radovan

[308] ibid, para.16;
[309] ibid, para.9;
[310] Krstic Appeal Chamber Judgment, para.94, 19 Apr 2004;
[311] Richard Butler, T20285;

Karadzic towards the former JNA officers was previously pointed out in this brief[312] however, it is further submitted that the SDS local branch shared President's views and was very powerful to implement any measures offered by the President.

133. Local authorities and members of the SDS in Bratunac[313] were familiar with each other and maintained long lasting friendships. Witnesses PW161 and PW162 as confirmed by PW162, were friends before the war, during the war and are still friends and peers.[314] Similarly PW161 while describing his relationship with Miroslav Deronjic stated "we were members of the same party, we socialized, we cooperated".[315] [REDACTED].[316]

134. Further, Ljubisav Simic testified that he was a school friend with Miroslav Deronjic, since the elementary school, and that they socialized after returning to Bratunac following University.[317] Ljubisav Simic acknowledged that he knew Davidovic as a citizen of Bratunac that he dealt with him often when Davidovic became the president of the executive board at the assembly,[318] and that it was actually the Simic who proposed Davidovic to be appointed the president of the executive board.[319] Similarly with respect to Dragan Mirkovic, Simic used the phrase that in defense's submission is critical, namely he said that Mirkovic is "also a citizen of ours", and that he knew him before the war.[320]

135. This phrase "also a citizen of ours" is in the defense submission indicative that the local civilian officials aside from being involved in the crimes were long time friends and had a specific sense of belonging. Ljubisav Simic is from Bratunac[321] and is presently teaching at the secondary school center in Bratunac.[322] Witness Celanovic

[312] see section "Who is Ljubisa Beara";
[313] Ljubisav Simic, T27211;
[314] PW162, T9258;
[315] PW161, T9404;
[316] PW161, T9405;
[317] Ljubisav Simic, T27209;
[318] Ljubisav Simic, T27209-10;
[319] Ljubisav Simic, T27211;
[320] Ljubisav Simic, T27210;
[321] 4D606, 92 qua statement of Ljubisav Simic, page 2;
[322] 4D606, page 3;

was born in Bratunac and still lives there today.[323] These witnesses still maintain a close bond and have collaborated with each other before, during and after the war.

136. [REDACTED] [324]

137. It is respectfully submitted that most of the witnesses testifying before the Honorable Trial Chamber testified untruthfully regarding Ljubisa Beara's alleged whereabouts on 13 and 14 July 1995. These witnesses where the local civilian officials from Bratunac who were members of the SDS and were motivated by seeking to evade their own personal involvement in the crimes.

The Prosecution evidence, when scrutinized closely, reveals that certain witnesses were influenced by others and thus erroneously shaped their testimony against Ljubisa Beara

138. The indictment against Ljubisa Beara in the defense submission was in most part based upon Deronjic's false testimony. However, during the cross examination of Miroslav Deronjic in the Blagojevic case, it became clear his portrayal and recollection of events was fanciful. In the Blagojevic case, Deronjic admitted that in preparation for his interview with the Prosecution on 21 October 1999 he consulted or "used some friendly connections" to recreate a chronology of the events[325]. Unsurprisingly, at least for the Beara Defense, Mr. Deronjic cited as his friends: [REDACTED] as well as a number of other people in Srebrenica.[326] Deronjic also admitted that these were his close assistants during the events which unfolded involving Srebrenica.[327]

139. During the Blagojevic testimony Deronjic acknowledged that if the Prosecution required corroboration, his friends would vouch for his chronology of the events.[328] It is submitted that Deronjic and his close associates agreed to shift the responsibility for the crimes that occurred from Deronjic and local civilian officials to Beara.

[323] Zlatan Celanovic, T6625;
[324] PW162, T9320;
[325] P3139, page 119-20;
[326] P3139, page 121;
[327] P3139, page 121;
[328] P3139, page 124;

140. Deronjic admitted during his testimony in Blagojevic that Ljubisa Simic did not remember the chronology of Beara's purported presence.[329] It is submitted that he talked to Simic in order to synchronize their future statements so they could, as Deronjic offered to the Prosecution, vouch for his own chronology of events.

141. Ljubisav Simic seeking to further perpetrate the untruthful portrayal of events claimed that he was told by somebody that the senior officer he saw on 13 July 1995 in the SDS premises was probably Beara[330], but he could not remember who told him that.[331] [REDACTED] [332]

142. It is respectfully submitted that Simic is not a credible witness. When Ljubisav Simic was initially asked whether Miroslav Deronjic discussed Beara with him he responded that he did not.[333] It was only after Simic was reminded about his testimony before the Bosnian Court wherein he admitted that Deronjic did talk with him about purportedly seeing Ljubisa Beara during the night and that Deronjic recalled that Simic was asleep in front of Deronjic office.[334] The testimony of Mr. Simic on this particular subject was rather confusing but the witness ultimately confirmed that he did not have or participated in a meeting with Mr. Deronjic on the night on 13th July 1995.[335] Further, during the questioning by the Honorable Judge Kwon, Mr. Simic admitted that he actually also talked with Deronjic about the Kravica murders.[336]

143. It is respectfully submitted that it is important to emphasize when certain information and testimony relating to Ljubisa Beara became available and at what specific time these witnesses mention Ljubisa Beara. Mr. Deronjic's first statement to the Prosecution's investigators was given on 16 December 1997 and these purported sightings or meetings with Beara were not mentioned.[337] It is respectfully submitted

[329] P3139, page 363;
[330] Ljubisav Simic, T27238-9; also see T27241;
[331] Ljubisav Simic, T27240;
[332] Ljubisav Simic, T27254;
[333] Ljubisav Simic, T27242;
[334] Ljubisav Simic, T27242-6;
[335] Ljubisav Simic, T27245;
[336] Ljubisav Simic, T27334-5;
[337] P3139, page 17;

that Deronjic or any other witnesses did not mention Beara during their preliminary interviews and only subsequently created these imaginary encounters.

144. [REDACTED] [338]

145. [REDACTED] [339] [340]

146. [REDACTED] [341] [342]

147. [REDACTED] [343]

[338] PW162, T9256;
[339] PW162, T9292;
[340] P3139, page 121;
[341] Momir Nikolic, T33137;
[342] Momir Nikolic, T33139;
[343] PW162, T9268-9;

The evidence clearly establishes that the local civilian authorities were involved in the crimes committed and shifted their responsibility to avoid being indicted

148. The role of the civilian authorities of Bratunac was much greater then they were willing to admit. At the time of the events on 11 July 1995 Mr. Deronjic was appointed as a civilian commissioner of Srebrenica by the President Karadzic.[344] [REDACTED] [345] [346] It was Mr. Deronjic who on 17 July authored the contract given to the Muslim civilians to sign where he stated that the transfer was done according to the Geneva conventions.[347]

149. The involvement of Miroslav Deronjic in crimes both in 1992 and the crimes committed in Srebrenica in 1995 is a notorious fact, as previously recognized by the ICTY. However, he was not the only civilian official deeply involved in the crimes perpetrated in July 1995.

150. As described by PW161 his involvement in the 1995 burials was not the first time he was involved in burials of Bosnian Muslims in Bratunac. He was also involved in the burials of Bosnian Muslims in 1992,[348] and more accurately he was in charge of digging the actual graves.[349] [REDACTED] [350] [351]

151. It can be viewed that PW161's motive to implicate Beara would be to simply avoid his own criminal responsibility. It is also perhaps worth noting that the Prosecution requested that this witness should be warned before his testimony pursuant to Rule 90.[352]

152. The testimony of the PW162 who was at the relevant time [REDACTED] [353] is further evidence which clearly shows that the civilian authorities of Bratunac were deeply involved in the decision of what will happen to the Muslim population from

[344] 1D690;
[345] PW162, T9260;
[346] PW162, T9262-3;
[347] P3139, page.83; also see P453, statement dated 17 July 1995;
[348] PW161, T9397;
[349] PW161, T9398;
[350] PW161, T9400;
[351] PW161, T9401;
[352] PW161, T9352;
[353] PW162, T9183;

Potocari and thereafter. PW162 testified [REDACTED] on 11 July 1995 after he saw General Mladic at Pribicevac.[354] PW162 also said that he saw [REDACTED] [355] [REDACTED] [356] The degree of influence that the local officials had on the events that were unfolding in Srebrenica can be seen from the fact that General Mladic asked PW162 what to do with the Muslim population from Srebrenica. The same question General Mladic asked of [REDACTED] and [REDACTED] [357] The involvement of local civilian officials was clear by virtue of the fact that [REDACTED] were present at the meeting at the Hotel Fontana held at 10.00 when the faith of the Muslim population was discussed.[358]

153. That day, upon returning to Bratunac, witness PW162 was again with other local officials namely witness PW161 and testified how they observed many buses with the Muslim men on board and allegedly gave them water.[359] Witness PW161 specifically recalled that he was with witness PW162 in his office on that occasion,[360] and saw [REDACTED] in Bratunac that same evening.[361] [REDACTED] [362] [363]

154. PW162 testified that on 14 July 1995 [REDACTED] told him about the Kravica murders.[364] Although PW162 testified he was shocked when hearing this[365] he later stated that when he was asked for construction machines by two unknown officers he assumed that machines were needed for Kravica[366] and assured that the machines will be delivered.[367]

155. It is respectfully submitted PW161's veracity was tested during the cross examination relating to the Kravica events. Upon being confronted that he was actually on the Kravica compound immediately after the 13 July incident he denied

[354] PW162, T9188;
[355] PW162, T9194-5;
[356] PW162, T9198;
[357] PW162, T9201
[358] PW162, T9203;
[359] PW162, T9214;
[360] PW161, T9494;
[361] PW162, T9216;
[362] PW162, T9217;
[363] PW162, T9217;
[364] PW162, T9229;
[365] PW162, T9229;
[366] PW162, T9235;
[367] PW162, T9235;

the same but acknowledged he was there 5 or 6 days after this event.[368] PW161's explanation should not be accepted by the Honorable Trial Court since it was contradicted by four different people: Momir Nikolic, Ljupko Ilic, Luka Markovic and Jovan Nikolic.[369] Witness PW161 merely replied when confronted with this evidence that they are not telling the truth.[370]

156. As previously stated Momir Nikolic is crucial in understanding the plan devised by Deronjic and his close associates. Momir Nikolic testified that he was ready to falsely admit that he ordered the executions in Sandici and in the warehouse in Kravica in order to secure a reduced sentence.[371] Momir Nikolic explained that he did this because at one point the whole plea agreement came into question and that he was "very keen to reach that agreement because I had no other way out".[372]

157. A significant amount of time passed and both Nikolic and Deronjic had many contacts and the opportunity to discuss and devise their scheme before they entered into their plea agreements. In addition Momir Nikolic and Deronjic were not just close friends but were brothers in law.[373]

158. Deronjic and Nikolic knew each other when they were in positions of subordination to each other. At one time Momir Nikolic was superior in position to Deronjic, being the commander of the TO while Deronjic was a plain foot soldier.[374] It is respectfully submitted that this is significant because it occurred during the time of the 1992 Glogova crimes to which Deronjic plead guilty before the Tribunal.[375] It is undisputed that the situation between these two changed completely during the time of Srebrenica and that Deronjic became one of the most powerful men in Bratunac. Both of them were deeply involved in the crimes and were ready to do whatever it takes to reach a plea agreement in order to avoid complete responsibility.

[368] PW161, T9410;
[369] PW161, T9409-10;
[370] PW161, T9409;
[371] P4485; also see Momir Nikolic T33091;
[372] Momir Nikolic, T33091;
[373] Momir Nikolic, T33083-4;
[374] P3139, page 226;
[375] P3139, page 225;

159. During his testimony in the present proceedings, Momir Nikolic, angry at the sentence imposed, finally acknowledged the actual involvement of local civilian officials and he stated that "the civilian authorities played a special and central role in the planning, decision-making, and organization of the forces - of the forced relocation of the civilians from Potocari to the Muslim-controlled territory Kladanj".[376] Nikolic further specified the persons that played a central role included Miroslav Deronjic, Srbislav Davidovic, Ljubisav Simic, Miodrag Josipovic and Dragomir Vasic. The last two persons were included by Momir Nikolic because, in his opinion, Deronjic had them under his control and regulated everything concerning the engagement of the military police, with Miodrag Josipovic.[377]

160. Upon inquiry relating to the involvement of witness PW161 and the claim that he was ordered by Beara to bury people in Glogova, Momir Nikolic affirmed that he informed the Prosecution during one of their meetings that "Beara had nothing to do with the burials of the bodies at Glogova and PW161 lied about it".[378] Nikolic confirmed that he was told by PW161 that civilian bodies, the civilian government requested him to provide a vehicle so that the dead bodies of the Muslims could be buried during the night.[379] Momir Nikolic further confirmed that PW161 admitted that he was personally in charge of transporting the bodies and digging the graves[380], and that it was PW161 who informed him that between 80 and 100 Muslims were killed in Bratunac during the night of the 13th July 1995.[381]

161. It is respectfully submitted that Momir Nikolic's admission that it was actually PW161 who was in charge of civilian resources used in these burials is further confirmed by the explanation given by witness PW161 when he admitted that nobody told him to collect the bodies in the hangar of Vuk Karadzic school.[382]

162. It was revealed that Miroslav Deronjic at one moment confronted Momir Nikolic personally at the UNDU and demanded an explanation from Momir Nikolic

[376] Momir Nikolic, T33195;
[377] Momir Nikolic, T33196;
[378] Momir Nikolic, T33128;
[379] Momir Nikolic, T33135;
[380] Momir Nikolic, T33136;
[381] Momir Nikolic, T33137;
[382] PW161, T9431;

as to why he was untruthfully claiming that he was present at the alleged meeting with Beara.[383] Deronjic stated that he viewed that meeting as an important issue[384] and it is submitted that for Deronjic it was of utmost importance considering that he completely invented purported meeting and tried to control how he would corroborate the same. Nevertheless, according to Deronjic, Momir Nikolic confessed that he was not at the meeting on 13 July. Deronjic further reaffirmed that Nikolic was not at the meeting.[385]

163. When confronted with Deronjic's statement, Nikolic said that he purportedly does not recall that conversation with Deronjic or anything to that effect.[386] It is respectfully submitted that Momir Nikolic's lack of recall is a convenient excuse and should be rejected.

164. It is respectfully submitted that other meeting between the local officials clearly shows that they were responsible directly for the Bosnian Muslim prisoners. Specifically the meeting between PW161, PW162 and Miroslav Deronjic[387] should be considered by the Honorable Trial Chamber as proof of knowledge about the crimes and the opportunity to further manipulate the truth about the events in Srebrenica.

165. During the relevant time period, it is respectfully submitted that Deronjic also had several meetings with other important persons namely Dragomir Vasic who at the time was the Chief of the CJB in Zvornik.[388]

166. Witness 2DPW19 testified that it was the local authorities who organized the crimes against non Serbs in Bratunac in 1992. He knew it was the local nationalists that organized the paramilitary groups and in his opinion it was the same perpetrators, the same program, the same system that were responsible for the events in July 1995.[389]

[383] P3139, page 329;
[384] P3139, page 329;
[385] P3139, page 331;
[386] Momir Nikolic, T33188;
[387] PW 161, T9364; also T9459;
[388] P59; Zvornik CJB report no.277/95, 12 July 1995;
[389] 2D PW19, T25630-31;

Beara's alleged whereabouts on 14 July 1995

167. Witness Egbers testified that he purportedly saw and indirectly talked with Ljubisa Beara on the morning of 14 July when Ljubisa Beara allegedly arrived at Nova Kasaba.[390] Specifically regarding the date Egbers acknowledged that he was escorting his second convoy to Kladanj on 13 July[391] and that on his way back from Kladanj he was stopped by VRS soldiers and brought to a school near Nova Kasaba.[392] Egbers spent the whole night in that school.[393] According to Egbers the interpreter purportedly informed him that the person who appeared at the school in the morning was Beara.[394] Egbers stated that he went to a parking place after the interpreter told him Beara would arrive, that he saw a luxurious car arriving, saluted to a person and then gave that person a written complaint regarding the events from previous day.[395]

168. Egbers described the individual he encountered as a tall man with grey hair, in a camouflage suit wearing a colonel's rank. Egbers's testimony and his alleged encounter with purportedly Beara near the Nova Kasaba School is, in Defense submission, erroneous and imprecise.

169. It is respectfully submitted that there is significant uncertainty with Mr. Egbers' recognition of individuals and thus his recollection is unreliable. Egbers testified that he also saw a Colonel in a black uniform when he was escorting the second convoy to Kladanj.[396] However he could not remember that person's face and explained that he was with him for only five minutes.[397] Egbers also testified that the Colonel in the black uniform that he saw drove in a luxurious car[398] and when asked about him he said "the only thing I know now and I knew then – he was in a black uniform."[399] He could not recall how tall the person in the black uniform was or that

[390] Bernardus Egbers, T2776;
[391] Bernardus Egbers, T2753;
[392] Bernardus Egbers, T2757;
[393] Bernardus Egbers, T2761;
[394] Bernardus Egbers, T2776;
[395] Bernardus Egbers, T2776;
[396] Bernardus Egbers, T2807;
[397] Bernardus Egbers, T2808;
[398] Bernardus Egbers, T2809;
[399] Bernardus Egbers, T2808;

color of his hair.[400] When asked whether the luxurious car was similar the Opel Omega he affirmed that it was.[401]

170. It is respectfully submitted that Egbers recollection and identity of Beara as being the person he met at Nova Kasaba was unduly influenced by inappropriate Prosecution tactics. Egbers was shown during an interview in 2000 a short video depicting some celebration which according to the Prosecution reflects Beara walking behind Gen Mladic.[402] The Prosecution acknowledged that the Beara Defence was never given the non-distorted video allegedly of the same event as shown to Egbers.[403] It is respectfully submitted that Egbers required to view the video 7 - 8 times before he finally was purportedly able to identify Beara as the person he claimed to have met. at the school at Nova Kasaba in July 1995.[404] It is respectfully submitted Egbers could not recognize with any certainty whether the man on the video was the alleged person he saw in front of the Nova Kasaba School on 14 July 1995 and required to view the video 7 to 8 times before purportedly "finally" recognizing Beara.

171. Mr. Egbers's testimony about the physical appearance of the person he met in Nova Kasaba is undisputedly not very clear. However, it is also interesting to note that Mr. Egbers cannot be characterized as being very good in describing and evaluating physical characteristics of people he saw at that time. As already mentioned he could not describe any of the physical characteristics of the alleged Colonel in black uniform he saw a day earlier.[405] In addition while testing Egber's ability to describe the physical characteristics of persons he allegedly met, such as, Zoran Malinic, Egbers described Malinic's hair as dark with white pieces of hair and he explained that at the time he thought it was white but it could have been grey.[406] Egbers acknowledged that in a previous statement given in October 1995 he recalled that Malinic had blond curls.[407] Similarly, when asked how tall Gen Mladic was he

[400] Bernardus Egbers, T2815;
[401] Bernardus Egbers, T2809;
[402] P2025;
[403] Bernardus Egbers, T2771;
[404] P2D21; witness statement 30 April 2000;
[405] look previous discussion;
[406] Bernardus Egbers, T2783-84;
[407] Bernardus Egbers, T2799-80;

said 20 or 30 centimeters shorter then he was but when asked whether that was 158 or 168 he responded that he does not know.[408]

172. While analyzing Egbers testimony it is significant to note that he said that he was told by the interpreter, Nebojsa, that the person he gave his complaint letter to was Beara.[409] Egbers testified that the person he alleged is Beara never introduced himself and stated that "he didn't speak English very well at that time, but he mentioned his name. And the interpreter, he translated everything in English to me, and he told me that he was Beara."[410] However, Egbers previously stated "I told him who I was, and he told me who he was" but subsequently stated "there was no conversation in English between Beara and me at that time".[411] It is respectfully submitted that given the chaotic situation and keeping in mind that Egbers said that the person he met hardly spoke a word[412] it is not unreasonable to conclude that the person Egbers met may have uttered something in the sense "I am here in Beara's name".

173. Finally, it is respectfully submitted that Egber's purported recognition of Beara is tainted with procedural errors caused by the Prosecution. Further, the Prosecution failed to meet its burden of proof that allegedly Beara was at Nova Kasaba and offered no corroborating witnesses of persons who were present during the purported encounter with Beara such as Malinic, Nebojsa the interpreter or Egber's college Theo Lutke for obvious reasons. Without proper recognition the conclusion that Mr. Ljubisa Beara was at Nova Kasaba on 14 July 1995 cannot be based on Mr. Egbers testimony.

174. Milorad Bircakovic was another Prosecution witness that purportedly albeit indirectly knew the whereabouts of Ljubisa Beara on 14 July 1995.[413] Bircakovic testified that he purportedly went to the IKM to Zvornik pick up Drago Nikolic in

[408] Bernardus Egbers, T2785;
[409] Bernardus Egbers, T2820;
[410] Bernardus Egbers, T2821;
[411] Bernardus Egbers, T2821;
[412] 2D20; also see Bernardus Egbers, T2827;
[413] Milorad Bircakovic, T11014;

order to bring him back to the Zvornik Brigade for an alleged meeting with Beara and Popovic.[414]

175. Bircakovic actually never saw Ljubisa Beara and Nikolic did not say anything about the alleged meeting or the order given.[415] According to Bircakovic, Nikolic told him to drive him to Vidikovac hotel, near Zvornik and when they arrived buses with prisoners on board were present.[416]

176. In order to weight Bircakovic's testimony he was shown the vehicle work log for Opel Record that reflects he was less than truthful and that on 14 July an entry exists that Bircakovic drove 5 people and not purportedly one person he sheepishly explained that the travel orders were not kept accurately.[417] Similarly when confronted that the vehicle log does not contain an entry that he went from Standard to IKM and back he again stated that the travel orders do not reflect the reality of where the vehicle went and how it went.[418] It is respectfully submitted that the Honorable Trial Chamber should dismiss Bircakovic's evidence as it is inconsistent with documentary evidence and based on suspect recollection.

177. Next the Prosecution offered Marko Milosevic who was the deputy commander of the 6th Battalion of the Zvornik brigade[419] relating to the purported sighting of Beara on 14 July 1995.

178. Milosevic testified that in the morning of 14 July 1995 he received a message from the duty officer of the Brigade that some imprisoned Muslims would be brought to the elementary school in Petkovci and that they would be accompanied by security.[420] Once his commander Ostoja Stanisic returned, Milosevic informed him about the message[421] and later that afternoon Stanisic told the witness to go to school in Petkovci find Beara and convey the message to him.[422] Milosevic allegedly came to

[414] Milorad Bircakovic, T11013-4;
[415] Milorad Bircakovic, T11015;
[416] Milorad Bircakovic, T11017;
[417] Milorad Bircakovic, T11111; also see P296, vehicle work loges, page 4;
[418] Milorad Bircakovic, T11052-3 also see T11112;
[419] Marko Milosevic, T13299;
[420] Marko Milosevic, T13301;
[421] Marko Milosevic, T13301;
[422] Marko Milosevic, T13303;

the crossroads of the roads leading to the school where he asked Drago Nikolic whether there is anybody by the name of Beara and Nikolic pointed to a person.[423]

179. According to Milosevic he approached this person and they greeted each other and Milosevic conveyed the message that he should contact the brigade.[424] The point of the purported meeting was the crossroads of the main road leading to Petkovci where the road forks off to the elementary school which is some 70 to 80 meters away from the school.[425] The person that was pointed at as Beara did not say a thing to Milosevic when he purportedly conveyed the message.[426]

180. Finally, Milosevic testified that he informed Stanisic that he the delivered message and Stanisic purportedly conveyed this information to the brigade.[427] However, Beara did not come to the battalion command post in Petkovci while witness Milosevic was there.[428]

181. Witness Milosevic testified that this was the first time he heard the name Beara and that he did not know who he was.[429] He also stated that no rank was mentioned and that he believes that Stanisic just identified Beara by name.[430]

182. It is respectfully submitted that Milosevic and Stanisic untruthfully created this scenario. As reflected in the duty officer notebook of the Zvornik Brigade there is no notation or confirmation which would corroborate that the alleged meeting occurred or that the purported message was ever conveyed to Beara.[431] This fact would have to be noted considering that according to the testimony of Mr. Milosevic the brigade was informed of this by Mr. Ostoja Stanisic.[432] However, this was not noted anywhere in the duty officer notebook and the reason for this is the fact that

[423] Marko Milosevic, T13303;
[424] Marko Milosevic, T13303;
[425] Marko Milosevic, T13304;
[426] Marko Milosevic, T13305;
[427] Marko Milosevic, T13306;
[428] Marko Milosevic, T13306;
[429] Marko Milosevic, T13302;
[430] Marko Milosevic, T13302;
[431] P377;
[432] Marko Milosevic, T13306; and Ostoja Stanisic, T11650;

Milosevic could not have delivered the message to Beara because Beara was in Belgrade at that particular time.[433]

183. In addition to the foregoing the testimony of Stanisic and Milosevic is suspect and unreliable. Ostoja Stanisic and Marko Milosevic were driving together for two and a half hours to Banja Luke before giving their first statement to the Prosecution's office.[434] Milosevic said that he does not remember what they talked about but that they did not discuss the 14 July events.[435] It is respectfully submitted that such a proposition is illogical and reveals Milosevic's lack of credibility.

184. Milosevic and Stanisic's tale is inconsistent considering that Stanisic although affirming that the two drove together on 14 March 2002 to Banja Luka where both of them had interviews with the Prosecution's office also said that they have meet before to discuss the events of July 1995.[436] Unlike Milosevic who denied this fact Stanisic under oath testified that two of them meet to jog each other's memory.[437]

185. It is suggested that Stanisic had the motive as Dragan Obrenovic to implicate Beara because it is know to the Prosecution that Stanisic was involved in crimes committed in Petkovci School. As explained by Stanisic he sent a lorry upon a civilian request so the dead bodies could be cleared from the school[438], or as explained by Milosevic he had send members of his battalion to clean up the new school in Petkovci after the crimes were committed.[439]

186. Stanisic did admit that Obrenovic influenced him before his first interview with the Prosecution that he should not talk to the Prosecution about the cleaning operation at the school.[440] Stanisic stated that it was his opinion that the reason Obrenovic sought to impede the truth was not to implicate the brigade and the command[441] and later affirmed that Obrenovic told him this is the reason.[442]

[433] see previous analyzes on Beara whereabouts;
[434] Marko Milosevic, T13314;
[435] Marko Milosevic, T13313;
[436] Ostoja Stanisic, T11634;
[437] ibid, T11634;
[438] Ostoja Stanisic, T11610-1;
[439] Marko Milosevic, T13333-4;
[440] Ostoja Stanisic, T11617-8;
[441] Ostoja Stanisic, T11636;

187. [REDACTED][443]

188. [REDACTED] [444]

189. [REDACTED] [445]

190. [REDACTED] [446] [447]

191. [REDACTED] [448] [449] [450] [451]

192. [REDACTED] [452] [453] [454]

193. [REDACTED] [455] [456] [457] [458] [459] [460]

194. [REDACTED] [461] [462]

195. [REDACTED] [463] [464]

196. [REDACTED] [465] [466] [467] [468]

---

[442] Ostoja Stanisic, T11639;
[443] PW168, T17015; also see Prosecution response to request for provisional release 3D214;
[444] PW168, T16925;
[445] PW168, T15937-8;
[446] PW168, T15939;
[447] PW168, T15939;
[448] PW168, T15933;
[449] PW168, T15930;
[450] PW168, T15934;
[451] PW168, T15937;
[452] PW168, T15938;
[453] PW168,T17029;
[454] PW168, T15942-47;
[455] PW168, T15825;
[456] PW168, T16826;
[457] PW168, T16828;
[458] PW168, T16829;
[459] PW168, T16830-31;
[460] PW168, T16834;
[461] PW168, T16831;
[462] PW168, T16831;
[463] PW168, T16863;
[464] PW168, T15995-6; also see P1158a;

197. [REDACTED] [469] [470] [471] [472]

198. [REDACTED] [473] [474] [475] [476]

199. [REDACTED] [477]

200. [REDACTED] [478] [479] [480]

201. Shifting the blame for killing of prisoners to the security section was logical and feasible when no other plausible truthful defense existed for those culpable. The Prosecution has previously on record rejected such a defenses being untruthful inaccurate and baseless.

202. Interestingly Vinko Pandurevic's knowledge about the alleged involvement of security in the plan to kill able bodied men is based primarily on the information he obtained from Dragan Obrenovic. Despite this the accused Pandurevic "decided" to dispute certain events as described by [REDACTED]. However, by doing this Pandurevic was tailoring the events in order to avoid personal involvement and knowledge of the crimes.

203. [REDACTED] [481] [482] [483] [484]

---

[465] PW168, T16718; also see T16724;
[466] PW168, T16719, also see T16726;
[467] PW168, T16719; also see T16725;
[468] 1D432, also see PW168, T16727;
[469] PW168, T16723 and T16856;
[470] PW168, T16857;
[471] PW168, T16857-8;
[472] PW168, T16877;
[473] P377, PW168, T16864;
[474] PW168, T16864-5;
[475] PW168, T16864;
[476] PW168, T16872-3;
[477] PW168, T16874;
[478] PW168, T17081;
[479] PW168, T17081;
[480] PW168, T17083;
[481] Vinko Pandurevic, T30896 and T31365;
[482] P1102D;
[483] PW168, T15986;

204. [REDACTED] Essentially Pandurevic ignores the principle of unity of command and adopted the failed defense of Krstic, Commander of the Drina Corps, his immediate subordinate and the failed defense Blagojevic, Commander of the Bratunac Brigade a parallel level commander. Furthermore, although Pandurevic relies, in part, on the testimony of [REDACTED], he dismisses any evidence offered by PW169 which infers or establishes his own responsibility.

205. [REDACTED] [485] [486]

206. It is respectfully submitted that Pandurevic initially acknowledged that he was indeed informed of the prisoners and executions on 15 July when he meet with the Prosecution investigator Gilleece in October 2001. It was at that time that Pandurevic reported to Gilleece that he received information "from the Chief of Staff that a number of prisoners of war were put in Zvornik municipality…"[487]

207. Pandurevic reliance on witnesses who are conveniently reconstructing events to diminish their role or evade responsibility and are unwilling or unable to testify reveals the transparency of his defense. It is respectfully submitted that Pandurevic's reliance on Dragan Jokic who refused to testify and Ljubo Bojanovic who is deceased is misplaced.

208. It is further respectfully submitted that Pandurevic's reliance on Jokic and Bojanovic was not only chosen carefully because of their unavailability but also due to the fact that no credible witnesses would support Pandurevic's theory of defense. Nevertheless should the Honorable Trial Chamber accept such evidence no weight should be given to these claims inasmuch as through Pandurevic's admission why they were not fully credible. Pandurevic testified that Jokic was a man overpowered with the newly arisen complicated situation and was not able to convey the real

[484] PW168, T16472;
[485] PW168, T15879;
[486] PW168, T15879; also see T16539;
[487] 7D1154, Investigative notes of an interview with Milenko Zivanovic and Vinko Pandurevic, dated 2 October 2001;

picture of events,[488] but that he was not retarded.[489] Bojanovic was described as "an old man who was occasionally drunk but was not an alcoholic"[490], "that he could hardly control himself in terms of when he chose to have one"[491] that he was reliable when he was in right state of mind, and when on a specific mission, he could sometimes be reliable"[492] and that he was reliable source depending whether he was sober[493].

209. [REDACTED] However, this was not Muminovic's opinion who said in an interview to the Prosecution that he spoke to Pandurevic on 15 July and that both Pandurevic and Obrenovic were aware of the murders outside of the column.[494]

210. [REDACTED] [495] Pandurevic was also placed in Orahovac by Muminovic who said that he thought that he was "in Orahovac near Lazete".[496]

211. [REDACTED] [497] [498] Pandurevic's denial is predictable given his involvement in the crimes considering that in the tactical intercept discussion between Vuk, Ikar, Pavle it is noted that "Pavle" said to Vuk that "if something happen to them (captured Serbian policemen) all others will be finished. It'll be 100 for one. … We'll kill them in the woods. … Tell him that all of them should surrender in Orahovac."[499] The killings were not a clandestine operation operated by others but by members of the Zvornik Brigade.

212. Pandurevic testified that he knew that soldier Tesic and policeman Jankovic were captured by the Muslims and that he asked Muminovic to exchange them.[500] However, when asked about this tactical intercept and the reference of "Pavle", Pandurevic explained that "Pavle" could be someone from the MUP and that the

[488] Vinko Pandurevic, T31825;
[489] Vinko Pandurevic, T31828;
[490] Vinko Pandurevic, T31828;
[491] Vinko Pandurevic, T31826;
[492] Vinko Pandurevic, T31825;
[493] Vinko Pandurevic, T31828;
[494] 2D636, page 4; also see Vinko Pandurevic, T31908;
[495] PW168, T15902; also see T16591; Vinko Pandurevic, T31369;
[496] 2D635; also see Vinko Pandurevic, T31903;
[497] PW168, T17124;
[498] PW168, T17126;
[499] P2232, page 13-14;
[500] Vinko Pandurevic, T31035;

unknown MUP person is passing instructions to Dusko Vukotic, "Vuk", not to negotiate.[501] When Pandurevic was asked why would a person from the MUP give instruction to the member of the Zvornik Brigade he explained "…they were in contact. Maybe this man thought that was a better approach."[502] Pandurevic's explanation defies logic and commons sense.

213. [REDACTED] [503] There would be no other logical explanation to reference Orahovac unless one knew what was occurring there.

214. [REDACTED] [504] [505]

215. Finally in an attempt to formulate a defense Pandurevic claimed that he let the Muslim column pass into the Muslim territory even though they did not manage to break his lines.[506] Pandurevic testified that in the morning of 16 July 1995 he was not opening fire from his artillery on the forces of the 2nd Corps because he "wanted to save as many lives as possible".[507] He also tried to present that his decision attracted a lot of attention on 16 July even from the President of the Republic.[508]

216. Pandurevic's recollection of the rationale for opening the military lines to allow the column to pass was contested by several witnesses. These witnesses in essence believed Pandurevic opened the way to avoid defeat and not for humanitarian reasons. [REDACTED] [509] Moreover, Jevdjevic testified that Obrenovic even tried to use his friendship with him in order to somehow persuade gen. Krstic as to the seriousness of the situation in Zvornik in relation to the column of the 28th.[510]

217. Finally, one of the persons who knew what the situation on Baljkovica was is Semso Muminovic, the Muslim commander that was negotiating with Mr.

[501] Vinko Pandurevic, T31928;
[502] Vinko Pandurevic, T31928;
[503] PW168, T17126;
[504] PW168, T15908;
[505] Vinko Pandurevic, T31128 and T31370;
[506] Vinko Pandurevic, T31029-30;
[507] Vinko Pandurevic, T31033-4;
[508] Vinko Pandurevic, T31085;
[509] PW168, T15876;
[510] Milenko Jevdjevic, T29615;

Pandurevic. Muminovic completely contested Pandurevic's version of events and said that the Bosnian Muslims broke through the defense lines on 16 July in the morning and that was the reason for opening of the corridor and not at all as claimed by Pandurevic humanitarian.[511] Muminovic during his interview with the Prosecution stated that on 16 July he broke the frontline in Baljkovica, seized Obrenovic's forward command post and Battalion Command and destroyed the firing position's of the VRS mortars and capture Dragan Tesic. After that according to Muminovic, Pandurevic was forced to negotiate the ceasefire.[512] Pandurevic also had to disagree with the testimony of Lazar Ristic the Commander of the 4th infantry Battalion who testified that they were out of ammunition, that they were unable to defend themselves and that they pulled back towards Rijeka. Pandurevic's explanation was that 4th Battalion did not withdraw or run out of ammunition but that it was only one group that was with Ristic.[513]

218. It is respectfully submitted that Pandurevic in order to avoid being inconsistent and contradictory with his own reports that he sent to the superior command claimed the reports although written spontaneously and proximately to the unfolding events were not truthful. Pandurevic testified that in his report dated 16 July he portrayed the situation as more dramatic than it really was so that the Corps command would understand his action for opening the corridor.[514] He reiterated that the report was false and that the enemy did not manage to take three of his trenches but that he repelled all attacks and freed up the trenches themselves[515], that his forces were not actually surrounded in Baljkovica area[516] and that he did not open the corridor only for civilians as stated in report but for everybody.[517] Pandurevic furthermore stated that part of the report where he wrote that he considers "that the Krivaja 95 Operation is not complete as long as a single enemy soldier or civilian remains behind the front line" was actually "slap on the wrist for the Command" because the aim of the operation has changed.[518]

[511] 2D635, also see Vinko Pandurevic, T31900-1;
[512] 2D637, page 7; also see Vinko Pandurevic, T31914;
[513] Vinko Pandurevic, T31943;
[514] Vinko Pandurevic, T31059; also see P330;
[515] Vinko Pandurevic, T31057-8; also see P330;
[516] Vinko Pandurevic, T31058; also see P330;
[517] Vinko Pandurevic, T31059; also see P330;
[518] Vinko Pandurevic, T31061; also see P330;

Beara's alleged whereabouts after15 july 1995

219. As it was previously shown on 15 July 1995 Ljubisa Beara returned from Belgrade where he spent time with his friends celebrating his birthday. The Prosecution called some witnesses to testify about the events on 15 July.

220. Witness Rajko Babic testified that he talked to one high ranking officer that the people were addressing as a Lieutenant Colonel or Colonel on 15 July near the Pilica School.[519] He described him as having blond hair that was receding and parted to one side to cover that receding hairline, that he was rather tall and strong. The person wore camouflage uniform with his sleeves rolled up.[520] Babic also said that the person was neatly shaved[521] and that he wore no spectacles.[522]

221. Babic initially testified that upon talking to this high ranking officer he thought that Muslims should be taken to Tuzla to be exchanged.[523]

222. Babic further testified that the high ranking officer did not have any patches on his uniform.[524] Babic was also showed pictures by the Prosecution on 13 and 14 September and he did recognize the person he saw.[525] It is plain that this means that Babic did not recognized Beara and therefore Beara is not the person he is refereeing to. From the description given by Babic a reasonable trier of fact cannot conclude beyond reasonable doubt that Colonel he allegedly meet near the Pilica school was Ljubisa Beara because that would be pure guesswork that is not supported by any solid evidence.

223. [REDACTED] [526] [527] [528] testified that on an unknown date he met in the barracks of the Zvornik Brigade person who introduced himself as Beara.[529] However,

[519] Rajko Babic, T10237;
[520] Rajko Babic, T10240;
[521] Rajko Babic, T10241;
[522] Rajko Babic, T10247;
[523] Rajko Babic, T10238;
[524] Rajko Babic, T10237;
[525] Rajko Babic, T10247-8;
[526] PW104, T7936;
[527] PW104, T7935;
[528] PW104, T7937;

witness PW104 also testified that he saw on television when Beara was departing for Hague and that he "did not resemble the person who introduced himself as such and who held that briefing at the Zvornik Brigade barracks.[530] It is submitted that the person that purportedly introduced himself as Beara was not the same Ljubisa Beara accused in the present case.

224. According to PW104 the person who introduced himself as Beara gave a monologue that they have a lot of prisoners who are hard to control, that they are at various locations in the Zvornik municipality and that they have to get rid of them and that what they expect assistance from the Zvornik municipality.[531] When asked whether that person who introduced himself as Beara said how they are planning to get rid of them PW104 answered "no".[532] Asked for the second time witness said "in other words, in burying the bodies".[533] PW104 explained that it was his understanding that the assistance was supposed to involve municipal utility companies.[534]

225. It is respectfully submitted that PW104 testimony is not credible and thus not reliable and no weight should be given to it. It is plainly unimaginable that PW104 is able to recall person who introduced himself as Beara but cannot remember which officers of Zvornik Brigade were present,[535] or even how many persons were present.[536] PW104's failure to remember any Zvornik officers despite having had regular contacts with them in his office defies common sense.[537]

226. What can be seen from these short unsubstantiated facts is that the Prosecution did not prove beyond a reasonable doubt that Ljubisa Beara was involved in the specific executions, and that he organized what turns out to be members of the Zvornik Brigade who were implicated in alleged executions.

---

[529] PW104, T7941;
[530] PW104, T8015;
[531] PW104, T7942;
[532] PW104, T7942;
[533] PW104, T7944;
[534] PW104, T8013;
[535] PW104, T7941;
[536] PW104, T8012;
[537] PW104, T7940;

227. [REDACTED] [538]

228. Finally with respect to Pandurevic, he stated that he did not know the contents of Deronjic's testimony before his arrival at the Detention unit[539] and that he was unaware of Momir Nikolic's statement of fact's until the same time.[540] It is respectfully Pandurevic very carefully followed the proceedings in the Hague and was actively preparing his defense long before he was indicted and transferred to the Hague.[541] Pandurevic actually met and talked to Obrenovic in Belgrade after Obrenovic gave his first statement to the Prosecution[542] and engaged Mr. Mijatovic to find Muminovic's telephone number after which he talked to him.[543] Pandurevic also obtained in mid 2001 the Prosecution's unpublished military expert report.[544] Although Pandurevic claim that he was not aware of the Krstic Judgment it is undisputed that he knew about the baseless and unsubstantiated Krstic defense strategy, to shift responsibility to the security branch considering that he saw and personally met with Krstic defense team several times during the Krstic Trial.[545]

[538] PW168, T17094;
[539] VInko Pandurevic, T32371;
[540] Vinko Pandurevic, T32392;
[541] Vinko Pandurevic, T31778;
[542] Vinko Pandurevic, T31329 and T31776;
[543] Vinko Pandurevic, T31778 and T31905;
[544] Vinko Pandurevic, T31263;
[545] Vinko Pandurevic, T31776;

Identification by Prosecution witnesses is biased and should be given no weight

229. Dr. Willem A. Wagenaar, a memory and legal psychology expert, has also weighed in on the matter of these purported recognitions and identifications of Ljubisa Beara and found that even if the witness's recollections and statements thereof are taken as true, the error and inherent bias that was created in the identification process by the Prosecution has destroyed the witness testimony. In other words even if the witnesses believe they are telling the truth about what they saw, the way in which the Prosecution went about getting statements about the Beara sightings has now so influenced the witnesses that their statements should no longer be considered.

230. In Mr. Wagenaar's report and testimony he explained the differences between identification and recognition. Identification is used when identifying an unfamiliar person such as a person the witness has never seen before.[546] After the incident the witness is then asked to produce a description and describe details of the alleged perpetrator. This is done with the hope that the police will have, or have in the future, a person of interest who matches the description and can then be placed in a multi-person line up test.[547] In the instant case there are twelve witnesses claiming to have or possibly have seen Beara in or around Srebrenica shortly after the days of the siege. Nine of these witnesses fall into this identification category "identification".[548]

231. Recognition is what is known when the witness claims to see a person with which they are already familiar.[549] This case is easier for the witness's memory as they have to only remember who they claim they saw and where, and not remember specific details about that particular person and his personal characteristic. These claims are tested by truthfulness of the claim, the depth of the familiarization, and with a test to the conditions in which the alleged perpetrator was seen and recognized, as a lineup test in this case is useless.

[546] 2D574, Wagenaar Report page 2; Wagenaar T25308;
[547] 2D574, page 2;
[548] 2D574, page 10;
[549] 2D574, page 2, Wagenaar T25308;

232. Many problems arise in this case with witness identification in general, even before one looks at the witnesses themselves. For instance the problem of unconscious transference can occur. According to Mr. Wagenaar, unconscious transference can occur if the witness had actually seen the accused before, for instance on a billboard or in a public place. If the witness does not realize that he saw this person at this particular place he may, when looking at a picture or line up realize only that the person looks familiar and add in thoughts to the effect that that is who he saw at the scene of the crime without realizing he is in fact incorrect.[550] Beara was a public figure, as evidenced by the fact that the Prosecution has a video of him in a parade. Whether it is him or not matters little when looking at the fact that he held a high enough stature in the Bosnian strata as to be recognized and seen before by others. Furthermore, if in fact one of the witnesses had seen Beara in a parade or otherwise in the past there is also this problem of transference where the very fact that the face is more familiar to a witness, even subconsciously, will affect the future identification.

233. Mr. Wagenaar set forth a number of well known rules which should be followed if an identification line up is to be considered proper and avoid bias. He stated that these rules are know around the world and are very consistent across countries and legal systems. Further, these rules should be well known to anyone working in the field such as investigators, Prosecutions, lawyers and judges alike.[551] Mr. Wagenaar summarized these rules taken from the "PACE Rules," into ten-rule basic set, similar to those published by Wagenaar and Loftus (1990).[552] The ten rules will be briefly laid out below:

Rule 1: The witness should have never seen the alleged perpetrator before, whether in person or through any other form of media, television, magazines and the like; this would have them look more familiar than others in a line up, leading to bias;

Rule 2: After the sighting in question the witness should not have seen the alleged perpetrator again, either in person or through a form of media; this would allow them to look more familiar in a line-up, leading to bias;

[550] Wagenaar T25318;
[551] 2D574, page 3;
[552] 2D574, pages 3-4;

Rule 3: The suspect and all other in the line-up should fit the witness's description; for example, even if the suspect rarely wears a beard but the witness claimed he was wearing one, he must also wear one in the line-up;

Rule 4: The foils in the line up must be matched to the description given by the witness, the foils' identity must be recorded and a Doob & Kirshenbaum test must be done where mock witness who match closely the ethnicity, age, sex etc of the witness are brought in and given a short description of the crime. If a disproportionate number pick the suspect then the test is in some way biased;

Rule 5: The witness must be properly instructed, and these instructions must be recorded such as "Do you recognize any of these people *as the person you described as*…?" All responses must be precisely recorded but only ones of certainty are acceptable;

Rule 6: During the test no suggestions of any kind may be made and the test should be administered by an investigator who is not involved in the case, who knows little about the case and who does not know who the suspect is. This is known as a double-blind procedure;

Rule 7: All identification attempts must be recorded as well as the attempts that did not lead to positive identification;

Rule 8: Witnesses must not be allowed to transfer any information about the line-ups to other potential witnesses. Witnesses should be kept apart from one another as long as possible;

Rule 9: Live line-ups are good in that they allow the witness to see not only faces but height, build, posture, ways of movement, etc. but are difficult to arrange and the suspect may act in a suspicious way or draw attention to him or herself inadvertently. Alternatives include video line-ups where a Doob & Kirshenbaum test can first be administered. Still photographs showing the entire body can also be used but have the drawback of showing no element of movement, and finally face only shots can be used though this is less helpful for its lack of height and weight characteristics;

Rule 10: In-Court identification cannot be considered a proper identification test. These tests, also called "dock identification," lack all the safeguards mentioned above and are highly suggestive.[553]

[553] 2D574, pages 3-6;

234. Mr. Wagenaar warns that if any of these rules are broken there tends to be a higher level of response by the witness leading to a larger number of false positives. Another result may be that the witness knows who the suspect is, leading to more cases where an innocent suspect is prosecuted and thus allowing the true perpetrator to go free.[554] Finally, Mr. Wagenaar notes that a violation of these rules will hardly ever make the test safer as these rules were designed specifically to increase the safety of the line-up test.[555]

235. Mr. Wagenaar's general thoughts on the twelve purported witnesses were stated in his report and thorough testimony. He found that of the twelve he studied nine had not seen Beara before purported encounter and were therefore good candidates for a line-up test.[556] He notes that two of these, witness 162 and Mr. Peric may have seen Beara after the alleged sighting and would thus not be good candidates for a line-up test.[557] There were therefore seven prime candidates for a line-up test: Babic, Mr. Erdemovic, PW 165, Major Boering, Mr. Egbers, Milosevic, and PW 104. Mr. Wagenaar states the he found no indication as to why it was impossible, undesirable or unnecessary for such a well known test as this to take place and that this a was logical time to invoke such as test as some sightings were done in questionable environments such as from behind, in poor lighting, or from a distance.[558] Indeed three witnesses were not even sure themselves that they had met Beara, only that they had met a high ranking officer with a certain appearance.[559]

236. Three of these seven witnesses who could have been properly tested were not, but were subjected to some form of identification test, whether with photographs or video, but according to Mr. Wagenaar, "[t]hese identification techniques are to be classified as highly suggestive and utterly unreliable."[560] This method used by the Prosecution violated the previously mentioned rules 3, 4, 5, 6, 8, and 9. Of these three

[554] 2D574, page 7;
[555] 2D574, page 7;
[556] 2D574, page 10;
[557] 2D574, page 10;
[558] 2D574, page 10;
[559] 2D574, page 10;
[560] 2D574, page 10;

witnesses, Babic's result was a negative while witness Mr. Erdemovic and Mr. Egbers were uncertain.[561]

237. For the three witnesses who were already familiar with Beara a line-up test could have been useful to prove the truthfulness of the claims of familiarity and to disprove any mistake. This was not done, nor was a test set up to mimic the actual environment of the alleged sighting, which would seek to prove or disprove the likelihood of an accurate recognition in such a setting. Without a proper line-up the three witnesses may be mistaken or may be lying.[562]

238. The general physical descriptions that the witnesses noted were "in terms of: grayish hair, getting a bit bald in the front or at the back, no facial hair, tall, heavy set, in uniform, between 45-60 years old."[563] Too many people meet this global description and without a line-up test, these descriptions, about Beara, could never prove that the witnesses saw Beara.[564]

239. Mr. Wagenaar testified on a few witnesses' identifications individually and others in more of a general sense. To begin, Mr. Wagenaar described the errors that were made in the identification techniques used with Mr. Egbers, a Dutch soldier who claimed to have met Beara on a previous occasion but stated that he was not really paying attention at the time and that he saw him for only a few minutes.[565] According to Mr. Wagenaar this was an ideal situation to apply a photograph identification test to test his familiarity.[566] Mr. Egbers, however was not given such a test. He was shown a short video of an actual event, there were no foils, persons who fit the description that Mr. Egbers would have given, and it is not clear what instructions were given.[567] These instructions are also important because according to Mr. Wagenaar if the subject is *not* told not to guess, the risk of error rises alarmingly.[568] This is essentially a violation of Rule 5, which the witness must be properly instructed

[561] 2D574, page 10;
[562] 2D574, page 11;
[563] 2D574, page 11;
[564] 2D574, page 11;
[565] Wagenaar T25322;
[566] Wagenaar T25322;
[567] Wagenaar T25323;
[568] Wagenaar T25326;

and any and all responses must be recorded as to eliminate ambiguity and uncertainty in the witness's statements.[569] In any case Mr. Wagenaar made clear that this type of video examination was no substitute for a proper lineup identification test and was not really sure why it was done and what purpose it served.[570]

240. It is not clear that Mr. Egbers ever even gave a description of the person he claimed he saw that would allow the Prosecution to gather appropriate foils as his description was vague and global in nature.[571] This is a violation of Rule 3, where all the subjects in a line up must meet the description that the witness should have given.[572] This follows closely with the violation of Rule 4, which states that all the foils must closely match the description that was given.[573] Clearly no foils were chosen using this method. What does seem clear is that now it is likely that under such conditions that go against most rules of proper photo identification, Mr. Egbers statements have been biased to a high degree and even further statements have the high probability of being biased through unconscious transference.

241. Mr. Egbers also stated that the sighting in question happened at a distance of 50 meters which is much further than the distance of 20 meters that Mr. Wagenaar finds to be an acceptable distance for identification and recognition.[574]

242. Another flaw in Mr. Egbers' identification was that he was shown the particular video seven or eight times but the reason for this was unknown. It makes a difference as to bias. If the Prosecution told Mr. Egbers to watch it that many times before commenting, or if he couldn't recognize anyone and was told to watch it again, or asked to watch it over and over suggests uncertainty and thus unreliability in identification. All these things can influence in one way or another, what the witness thought he saw and what the witness thinks he is supposed to say to investigators.[575] Essentially Mr. Egbers was presented with a suggestive video, and only one video at

[569] 2D574, page 5, Wagenaar T25325;
[570] Wagenaar T25323;
[571] Wagenaar T25328;
[572] Wagenaar Report p.4, Wagenaar T25328;
[573] Wagenaar Report p.5, Wagenaar T25328;
[574] Wagenaar T25363;
[575] Wagenaar T25325;

that, where only one person in the video seemed to fit the very general description given. This will lead to bias.

243. Bircakovic, is another witness who the Prosecution claimed to have been familiar with Beara before the sighting in question. Closer examination, however, reveals that Bircakovic said that he may have seen him.[576] Mr. Wagenaar stated some reasons for this possible confusion, calling it a logical problem. Was it that Bircakovic was actually not as familiar with Beara as he thought or was he quite familiar with him but had poor viewing conditions with which to see Beara.[577] Both cases question the witness's evidence.

244. Mr. Erdemovic was also shown a highly suggestive picture, one in which there was one older officer surrounded by younger soldiers and though he could not say for certain that this was the person he saw, nevertheless the mere fact of showing this picture which is assumed to be that of Beara has now biased the chance for the Prosecution to use any further identification techniques or statements by Mr. Erdemovic.[578]

245. Mr. Wagenaar also points out that PW 161 who, like Mr. Egbers and Bircakovic, is a case of recognition as they claim to have previously met Beara before the sighting in question. This, however, is another unreliable situation. Although PW 161 claimed to have met Beara a number of times, he never reported nor remembered Beara wearing glasses.[579] This is odd because not only is Beara never without his glasses, the glasses themselves are particularly prominent. According to Mr. Wagenaar this is a surprising thing for a witness not to remember and raises doubts about what really happened and who PW 161 actually met.[580]

246. Furthermore with regards to the glasses Beara wore, five witnesses: PW165, PW104, Mr. Celanovic, Bircakovic, and Mr. Egbers neglected to mention in the affirmative that they saw Beara with glasses or that he was not continually wearing

[576] Wagenaar T25339;
[577] Wagenaar T25339;
[578] Wagenaar T25331;
[579] Wagenaar T25346;
[580] Wagenaar T25346;

glasses.[581] This is not normal for Beara to be without his glasses and for the witnesses to state that they did not see the glasses brings into question the authenticity of the statements and, according to Mr. Wagenaar, would be quite surprising for them all to forget this fact, thus it is a significant factor.[582] Mr. Celanovic's claim to be familiar with Beara is also suspicious as he neglected to mention that Beara wears glasses. According to Mr. Wagenaar, this lack of describing these very noticeable glasses is just another reason that a proper line-up test should have been held by the Prosecution.[583]

247. The Prosecution has attempted to validate and justify PW165 by saying he was adamant about not seeing Beara's face and only seeing him from behind,[584] though he also stated that he could not be sure of who he was seeing because he was only told by an unknown person that Beara was going to be at that particular location. Prosecution states that a line-up test is impossible since he claims to only have seen, if he saw at all, Beara from the back.[585] This begs the question as to why such a sighting is even being considered as evidence if the witness was not sure who he saw, had no way of identifying this person since he had only seen him from the back, had never before seen Beara.

248. The Prosecution then continues to find reasons why line-up tests may not have been used, but in any case a line up test would most certainly been better at identifying someone than using a biased video or others such methods without the use of foils, a double blind procedure or the Doob & Kirshenbaum technique. Furthermore the Prosecution seems to base its cross-examinations on the idea that most of the twelve witnesses that Mr. Wagenaar examined should not have been put to a line-up test. Whether or not one accepts this, ultimately the Prosecution itself created, quite haphazardly, its own form of identification tests which in the very best circumstances, would always produce biased and suggestive results and would be far inferior to a line-up tests. By claiming that the line-up tests were infeasible, the Prosecution is also saying that their identification test, though more crude than a

[581] Wagenaar T25354;
[582] Wagenaar T25354;
[583] 2D574, page 11;
[584] Wagenaar T25411;
[585] Wagenaar T25413;

proper line-up test, were also infeasible, and cannot be relied upon. In other words, the rules that Mr. Wagenaar espoused were not simply for line-up tests, but for identification tests in general, and the best way not to violate any of these rules is through a line-up test.

249. With the passage of time and the fact that purported witnesses may have seen the wanted posters placed in Bosnia-Herzegovina and Serbia, thus possibly violating rule 2, the fact remains that the Prosecution, by creating biased and leading identification tests of its own, rendered the witness identification tainted, and therefore useless as a tool of evidence. As such the Prosecution has denied the accused and the Court what may have been very probative and useful pieces of information.[586]

ICTY Jurisprudence on identification

250. Despite the inconsistencies and violations of well established identification techniques the testimony of witnesses offered by the Prosecution as to the whereabouts of Beara do not even comport with the prevailing jurisprudence. Namely from previous jurisprudence it can be seen that the Trial Chamber in Krstic was not satisfied that Krstic was in Potocari on 13 July despite the testimony of two witnesses, "DA", because he was unable to identify precisely the dates and Kingory, who testified that Krstic was still around in Potocari on 13 July considering that he gave no further details about his observation that day.[587]

251. It is respectfully submitted that in order to render a criminal conviction it requires greater scrutiny to reach a conclusive conclusion about Ljubisa Beara purported presence at certain places.

[586] Wagenaar T25510;
[587] Krstic Trial Chamber Judgment, para.356;

The Intercept evidence from the BiH Army purportedly captured is inherently flawed and should be given no weight

252. During the course of the Trial several types of intercepted conversation were introduced into evidence. The vast majority of them were allegedly intercepted by Muslim intercept operators working from [REDACTED] while to a lesser extent intercepts obtained from Croatian Government were introduced as evidence.[588]

253. The intercept conversations were the subject of the Honorable Trial Chamber's decision with respect to admissibility.[589] The issue which will be addressed is what if any weight should be given to the evidence identified as intercepts. Richard Butler perhaps best illustrated the lack of worthiness and reliance one should place on this type of evidence because of the potential for abuse and stated it is certain that individuals within 2nd Corps many of whom had lost relatives as a result of Srebrenica would certainly have motive to want to enhance the evidence.[590]

254. The Prosecution has tried in vain to use the purported ABiH notebooks in order to establish, among other things, state of mind and physical presence at certain places of persons whose conversations were purportedly captured. Although the Prosecution fails to address other independent intercepts it ignores the vast inherent flaws with respect to ABiH intercepts.

255. Richard Butler stated that the first intercept that he reviewed which reflects Ljubisa Beara's presence is on 13 July.[591] However, his argument and basis were flawed for a number or reasons.

256. Butler's conclusion was disputed by the testimony of Milenko Jevdjevic and Velo Pajic who were most familiar with the VRS communication system at that time.

[588] obtained by the Prosecution by the Croatian Government Office for Cooperation with ICTY and ICC as a response to the OTP's RFA 496;
[589] See Decision on admissibility of Intercept conversations;
[590] Richard Butler, T19696;
[591] Richard Butler, T20236;

Milenko Jevdjevic was at the time the commander of the signal battalion in the Drina Corps.[592]

257. Both witnesses testified that the VRS had technical capabilities to connect a person calling basically from any location in the world. Milenko Jevdjevic with his experience stated before the Honorable Trial Chamber that based solely on the RRU1 frequency found on the Muslim intercepts no one can know from which location the call made.[593] Jevdjevic confirmed this based on his knowledge on the network of communication set up by VRS, and he further explained that there were several points from which the signal could be transferred to other places within the network.[594]

258. Jevdjevic testified that if somebody would call Bratunac he could be connected through the Bratunac switchboard to the the forward command post in Pribicevac.[595] Jevdjevic also acknowledged that a call could have also been made from Belgrade or anywhere else in the world to a post office Telecom number which ended up at the switchboard in the Bratunac Brigade and from there the communications man would be able to connect that person to Pribicevac.[596] Jevdjevic also confirmed that if such a conversation was intercepted it would be impossible to know from where the incoming call to Bratunac actually came.[597] The foregoing was likewise confirmed through the testimony of the accused Pandurevic when he stated that in September 1995 while he was purportedly in Budva, Montenegro he called the Zvornik Brigade switchboard, and thus could have been transferred to any Brigade and Corps.[598] Similarly as reflected during Pandurevic's testimony, Pandurevic called the Zvornik Brigade and was connected to General Krstic even though he was not at the Zvornik Command but rather at his friend's apartment while General Krstic thought that he is talking from Zvornik Brigade Command.[599]

[592] Milenko Jevdjevic, T29497;
[593] Milenko Jevdjevic, T29651;
[594] Milenko Jevdjevic, T29635-6 and T29652;
[595] Milenko Jevdjevic, T29654;
[596] Milenko Jevdjevic, T29654-5;
[597] Milenko Jevdjevic, T29654;
[598] Vinko Pandurevic, T31225;
[599] Vinko Pandurevic, T31227;

259. Similarly, Mr. Velo Pajic who worked in the 67th Communication regiment of the Main Staff of the VRS gave evidence in this regard.[600] Mr. Pajic testified that the three digit numbers that were used in the communication network at that time could have been technically transferred or moved to other locations.[601] With the respect to the Main Staff number 155 he explained that he knows that that number was reconnected to four different locations.[602] He also confirmed that such three digit numbers could be dialed by anyone on an automatic phone.[603] Hence, from the testimony of Mr. Velo Pajic the only conclusion that could be made is that the VRS had the technical capability to transfer a number without a person calling being aware where the person answering the number is actually located.

260. Mr. Jevdjevic further confirmed the possibility that a conversation may be intercepted on both the RRU1 and RRU800 frequencies if several surveillance groups existed.[604] From previous analysis it is obvious that such conversation even if accepted that it was intercepted from different points was conducted through several network points which makes establishing the whereabouts of the participants even more impossible based on frequencies.

261. Prosecution expert Richard Butler conceded that he did not know the capacities of the local switchboards.[605] Butler said that he would have liked to have a better understanding how the switchboard worked but nevertheless was of the opinion that it purportedly a not critical information[606] Namely, Butler claims that he concluded that Beara was in the Zvornik Brigade headquarters because of the intercept conversation dated 15 July where Beara allegedly said that Zivanovic can call him on local 139.[607] Butler makes an assumption that 139 is the number of Drago Nikolic or security office of Zvornik Brigade and also assumes that Beara is located in that office.[608] However, when Jevdjevic's, Pajic's and Pandurevic's testimony is taken

[600] Velo Pajic, T28761;
[601] Velo Pajic, T28780-1;
[602] Velo Pajic, T28861;
[603] Velo Pajic, T28853;
[604] Milenko Jevdjevic, T29658;
[605] Richard Butler, T20268;
[606] Richard Butler, T20268;
[607] P1177;
[608] Richard Butler, T20269;

into account it is plain that Butler assumptions are wrong and certainly not the only reasonable inference.

262. It is respectfully submitted that no weight should be give to the ABiH purported Muslim intercepts inasmuch as the Prosecution's lead military analyst doubted their authenticity. Butler acknowledged that he was familiar with the statement from Mr. Ruez indicating that the intercepts were not immediately given to the Prosecution when requested.[609] Butler confirmed that he saw the ABiH response from July 1996[610] during his ongoing investigation and stated that the fact that the intercepts were not delivered immediately was the reason he was not prepared to fully accept the broader body of intercepts at face value.[611] Butler acknowledged that such a delayed response raised doubts that the materials were yet to be made and that fact was his primary concern.[612]

263. Moreover, the purported intercepts are unreliable because of glaring inherent flaws. Inherent flaws in the intercept operator's work were common at both [REDACTED] facilities. Most of the Intercept operators that were transcribing the conversation did not have any previous experience or training as to how to perform this task.[613]

264. Even accepting that those operators who were radio amateurs such as witnesses PW157[614] and PW133[615] had enough knowledge to properly utilize the equipment, it is respectfully submitted they did not have sufficient experience or training in listening to such intercepted conversations, and accurately transcribing and reporting their content.

265. When addressing the accuracy of the alleged intercept conversations many factors must be considered. Initially the quality of the sound was poor and dependant on the direction in which the antennas were pointed, whether the phones and antennas

[609] 1D12 and also Richard Butler, T20105;
[610] 1D221;
[611] Richard Butler, T20123;
[612] Richard Butler, T20107;
[613] PW152, T6342; PW150, T6270;
[614] PW157, T7164;
[615] PW133, T5455;

of the participants were facing the operator's location, the make of the antenna and the weather.[616]

266. As explained by the witnesses it was hard to achieve accuracy and many reasons were cited for the same.[617] One of the reasons was that at that point in time there was a lot of electrical discharge in the air there was a lot of crackling, a lot of noise. The Second reason was that the tapes they were using were old and when rerecorded the hum on the tape would be louder. The third reason was that the section of the tape would be damaged so it would be very hard to transcribe the words. The fourth reason would be the weather, because it was windy and the wind would often turn the antenna. The fifth reason would be when the telephones would change their direction so parts of the telephone signals would be overshadowed by the hill. The sixth reason would be direction of antennas from the VRS side and the direction of the antenna intercept operators use to intercept conversation and when they would not be in good position they would receive.[618] Witness concluded that those were the reason he can remember and that there were many reasons.[619]

267. The methodology of the work as described by the operators was very confusing and resulted as the potential source of many mistakes. Witness PW152 testified that he did not note that the conversation was not recorded from the beginning.[620] It was not possible to know by reading the notebooks that what was written was not the entire conversations.[621] In one instance PW152 conversation went between calling a participant Lieutenant Colonel and Colonel Cerovic, stating that the tape was of poor quality[622] which begs the question that if the tape were of such poor quality to have difficulty understanding individual words, how could a person be properly identified. Nor was PW154 sure that he wrote dates into the notebooks.[623] These are problems with the methodology in general since everyone seemed to have their own way of going about the transcription work.

[616] PW133, T5456;
[617] PW133, T5507;
[618] PW133, T5507;
[619] PW133, T5508;
[620] PW152, T6352;
[621] PW152, T6352;
[622] PW152, T6352;
[623] PW154, T8329; also see PW157, T7227-8 ;

268. To start with it is very hard to draw a common conclusion as to what was the methodology as far as noting the times of the purported intercepts conversations. Witness PW133 testified that there was a rule that when the intercept is typed into the computer the date was required to be recorded, but also said that there was no rule in respect to dating of conversations in the notebooks themselves.[624] This likely means that unless a particular message was input immediately into the computer the actual date and time of a transcription would be left up to the recollection of the particular transcriber.

269. Witness PW 133 testified that he use to put date if he was the last one to record something before the new shift came in, for example if it was 10.00 p.m. or 12.00 p.m.[625] However, when showed the page containing entry 16 July 1995 of the intercept notebook witness affirmed that he noted down the time at noon of that date.[626] Finally, to answer whether he put the date at the beginning of the conversation witness answered that sometimes he would write it down and sometimes he would not.[627] Witness PW123 also testified that he would sometimes note down the date and sometimes not[628] whereas PW149 claimed that it was the practice to note down the date and time[629] but noted that the dates were at times entered by the operator and at times by the commander.[630] This is contrary to what is claimed by PW136 who claimed that it was not a problem for the notebooks to be written in a non sequential order because the date was always written[631] though there can be no question that notebooks written in such a haphazard way are surely less reliable than those written in a more professional manner.

270. Witness PW133's testimony is especially troubling in that while the witness stated that often times he would not transcribe what he found not to be important he nevertheless claimed to remember an introduction between Beara and Mr. Krstic

[624] PW133, T5504-5;
[625] PW133, T5525;
[626] P2336, page 15, also PW133, T5528;
[627] PW133, T5562;
[628] PW123, T5892;
[629] PW149, T6039;
[630] PW149, T6050;
[631] PW136, T6237;

though did not think this introduction was important enough to transcribe. Furthermore, on numerous occasions PW133 stated, understandably, that because so much time had elapsed between the transcribing of the tapes in 1995 and his given testimony of 2006 that he remembered few if any details of specific conversations, even of those important ones which in 1995 he felt the need to transcribe and enter into his notebook and computer. It is respectfully submitted that the Court cannot accept the PW133's claim that he independently remembered an introduction between Beara and Mr. Krstic with such clarity even though at the time of its recording he found to be not even important enough to transcribe in the first place? It seems rather unlikely that PW133 was actually able to recall the supposed introduction as clearly as he claimed.

271. As far as the chain of custody is concerned not even the operators themselves were certain where the intercepts were sent[632] and some pages turned up missing.[633]

272. Another flaw in the operators work was that some of them were omitting words and phrases they felt were not important and that there omission purportedly did not change the meaning of the sentence.[634] This was proven when the audio tape of one of PW133's conversation was played to him where he noted many words he did not feel important and did not find its place in his notes.[635] One such sentence was "Not a single one must be left alive" because in PW133's opinion it was the same as "Don't leave a single one alive".[636]

273. Whether one agrees that these two sentences share the same meaning the duty of a intercept transcriber is to transcribe each and every word as accurately as possible without regard to his or her opinion of its significance. While a lack of such accuracy may be acceptable during the fog of war, or at such a cursory listen, it is less acceptable when being used as evidence in a criminal trial where specific times, places, names and actions are of utmost importance, not simply general ideas of what an interceptor operator took a particular conversation to mean.

[632] PW123, T5915;
[633] PW158, T8385;
[634] PW133, T5489;
[635] PW133, T5490-2;
[636] PW133, T5491-2;

Voice recognition of participants

274. Another significant flaw in the intercept operators' methodology is that the operators were basically guessing who the participant's in the conversation were, what were the case in a vast majority of intercept conversations. PW148 was not able to remember how he identified Krstic as his name was not spoken and the witness did not testify that he remembered the voice, suggesting he was guessing.[637] Witness PW147 testified that they did not use to mark where they would allegedly recognize who is the participant in the conversation.[638] This very witness said that he does not know how he came up with that name Trivic as a participant in intercept conversation P1237.[639] Witness PW150 claimed that they would not note down the name but the question mark if they were not sure about the identity of the speaker.[640] However, on the intercept marked P1341c after the name Cerovic it was noted that it was an assumption.[641]

275. Witness PW123 testified that even though the word "Palma" could not be heard on the audio of the purported conversation he said that the Palma switchboard operator could be heard before the tape turned on and that he noted that down on a piece of paper.[642] This piece of paper, however, is no longer in existence, it being an "internal thing."[643] However, witness also explained that they would be taping several conversations at the same time[644] which may lead to of mixing up of the alleged participants. [REDACTED] [645]

276. Identification of Beara as a participant in certain intercept conversations by voice recognition is disingenuous and respectfully disputed. The ability of the intercept operators to recognize Beara voice can be analyzed utilizing the ABiH report

[637] PW148, T6252;
[638] PW147, T6331;
[639] PW147, T6330;
[640] PW150, T6277;
[641] P1341c; also PW150, T6280;
[642] PW123, T5900;
[643] PW123, T5900;
[644] PW123, T5900;
[645] PW123, T5881;

dated 7 July 1996.[646] This report discussed the VRS forces that were involved in Srebrenica operation and names of command level participants that were involved.[647] The material that according to this report was allegedly in existence was (EI) electronic information about the involvement in Srebrenica operation.[648]

277. The report identifies 22 names of persons that were in the chain of command during the Srebrenica operation and the name of Ljubisa Beara is not among those.[649] Several intercept conversations were cited in support of the allegations that those persons were involved in conquering Srebrenica and ethnic cleansing of this area.[650]

278. It is obvious that if in 1996 Beara was not a know figure in order to be listed among other individuals who participated in the 1995 actions, it is difficult to imagine how his name found its way into the specific intercept subsequently.

279. As far as the alleged possibility to recognize the participants in the alleged intercept conversations it is worth noting at the beginning that both operators and Prosecution experts confirmed that at relevant times there were no dossiers of VRS officers available.[651] For example, PW133 stated that he knew well the voice of Beara but out of more than 200 notebooks that were reviewed, Beara is noted by the intercept operator as being involved in only two conversations.[652] The lack of content makes it difficult to believe that one officer would be so well recognized since his voice was heard so rarely.

280. Witness PW133 purportedly recognized the original notebook and the conversation marked P1179b between Colonel Ljubo Beara and General Krstic.[653] PW133 claimed that he was able to recognize the voice of Ljubisa Beara, because they would hear him frequently and they could recognize his voice modulation.[654] However, when asked to describe something distinctive about Ljubisa Beara's voice

[646] 1D221;
[647] 1D221;
[648] 1D221;
[649] 1D221, page.2;
[650] 1D221, pages 4 and 5;
[651] Richard Butler, T20227; PW133, T5545;
[652] PW133, T5570;
[653] PW133, T5468; and P1179b;
[654] PW133, T5476, also T5494;

he was not able to do so.[655] This seems odd because PW133 was able to name specific characteristics that were attributable to Mr. Krstic's voice, saying that he had a "very powerful, resonant voice."[656] These may be considered the voice modulations to which PW133 was referring earlier that he was able to decipher, but what is suspect was his inability to pick up the Croatian accent with which Beara speaks to this day. To one experienced in discerning voice characteristics, it seems that one of the first things to notice about a voice is the accent, especially one who spoke with a Croatian accent when nearly all his peers spoke with a Serbian accent.

281. PW133 mentioned for the first time that he was able to recognize the voice of Ljubisa Beara when he came to the Hague to testify in the present case.[657] When confronted the witness testified that he definitely told Stefanie Frease in 1999 that he was familiar with Beara's voice. However, when defense stated that there was no such information in Ms. Frease's information reports the witness "tried to explained "then I guess several years later, some other recollections come to the surface, or somebody tells me something, and well, I can't really explain that."[658] The witness could not remember whether he was asked about Beara's voice when he testified in the Krstic and Blagojevic cases.[659] PW133 by his own admission was never played any tape with the purported conversation of a participant that was allegedly Ljubisa Beara.[660]

282. Being presented with his testimony in the Blagojevic case where he said in relation to this intercept that they would always recognized Krstic's voice because he had very powerful, resonant voice while he did not mention recognizing Beara's voice[661] witness replied that this conversation was familiar and that he is sure that on the switchboard his name was mentioned which was not transcribed because it was purportedly not relevant according to the witness.[662] Unfortunately for the witness this turned out to be one more inconsistency in his testimony because in Stefanie Frease

[655] PW133, T5476-7;
[656] PW133, T5555;
[657] PW133, T5495;
[658] PW133, T5496;
[659] PW133, T5498;
[660] PW133, T5511;
[661] PW133, T5555;
[662] PW133, T5556-7;

information's report it was noted that the witness was shown and could not remember this particular intercept.[663]

283. Significantly PW133 was also confronted on cross with the fact that in the notebooks related to him there was no other entry involving Ljubisa Beara which he ultimately conceded.[664] PW133 also affirmed that he was not shown by the Prosecution any other intercept conversations which purport to involve Beara.[665] In other words, there were no conversation transcribed by PW133 which identified Beara, indeed there were only two conversations which PW133 documented as having Beara as a participant, far too few to be able to recognize one voice. Finally, PW133 stated that he does remember who Ljubisa Beara was[666] but nevertheless maintained that he could recognize Beara's voice.[667]

284. PW133 again tried to provide an explanation claiming that Beara's voice was known to him because he would listen to him from the tape a lot of times and also from other conversations, unimportant ones.[668] PW133 further explained that the tape he referred to was the tape containing specific conversation's which was of bad quality and that is why they have to listen to it over and over.[669] However, PW133 confirmed that unimportant conversations were not played over again through the tape.[670]

285. The methodology behind the purported conversations which supposedly involve Beara which were transcribed by PW132 leaves much to be desired. Firstly, it is suspicious that through the course of listening and re-listening to the conversation in question, the operators were not able with much veracity to positively identify the speaker as Beara, evidenced by the fact that the conversation was listened to and the transcript notations edited and reedited repeatedly by a number of dots, questions marks and circles[671] to the point that this particular conversation was the most

[663] 2D1D70, also see PW133, T5559;
[664] PW133, T5532;
[665] PW133, T5532;
[666] PW133, T5566;
[667] PW133, T5570;
[668] PW133, T5596;
[669] PW133, T5599;
[670] PW133, T5599;
[671] PW132, T4456;

corrected and edited of any transcribed by PW132.[672] Secondly, the witness never wrote Beara's name in the transcription but apparently felt that a series of cryptic letters would suffice. The problem arises because PW132 states that notations on the top of intercept such as "Priority" and "Urgent" would be added by others who would read the transcripts then decide which was passed to their Headquarters first. These same individuals are the ones who also attached the name Beara to the transcript though they had never actually listened to the voice on the tape. In short, it is highly suspect that his name was attached to these documents when the proper identification and notation of Beara was not done by PW132 before he passed it on to those who came next in his chain of command.[673] This becomes no less troublesome with the fact that in all of PW132's intercepts, this is the first and only time in which he happens to pass over the chain of command.[674]

286. Moreover, this particular transcript of July 14, 1995 had in "excess of 15 changes, modifications, additions or alterations."[675] According to PW132 no intercept had had as many changes, modifications, additions or alterations and one reason for this was that the tape was of poor quality and captured "a lot of noise." [676] These numerous changes runs contrary to the practice PW158, as a commander, told his subordinates to do. Never make assumptions.[677]

287. A final difficult with PW132's identification techniques, while indentifying Beara, is evidenced in the conversations that do not have to do with the voice itself but the knowledge of the speaker. In one instance Beara was attributed to a conversation in which the speaker who is purported to be Beara, being head of security for the Main Staff, did not know what was the 155 extension in the Main Staff.[678]

[672] PW132, T4457;
[673] PW132, T4457;
[674] PW132, T4457;
[675] PW132, T4457;
[676] PW132, T4459;
[677] PW158, T8358;
[678] PW132, T4473;

288. As common with other intercept operators errors were exposed with witnesses P136's work. Namely PW136 neglected to sign the transcription[679] as his methodology and procedure requires, again calling into question, at least at some level the attention to detail that was used when taking the intercepted transcriptions.

289. PW136 claimed to know Beara's voice well despite having very few actual recorded conversations purportedly dealing with Beara. In PW136's case there was only one such conversation.[680] PW136 could further not remember any unusual or distinctive traits of Beara's voice with which to be able to identify him.[681]

290. Similarly with PW 157 there are difficulties in the methodology used. In one intercept PW157 makes an identification of a participant only through voice recognition when this person addressed another commander while the supposed voice of Beara was never addressed.[682] Further, this witness neglected to sign a number of his transcripts while signing others,[683] calling into question his reliability in general. Perhaps this was due to sleep deprivation and exhaustion because of to too few operators allowing the senses of PW157 to be dulled. As PW132 stated, "[w]e worked around the clock. People were exhausted."[684]

291. PW 157 then claimed that he would have been able to recognize each and every participant in the conversations that came through his station.[685] Although on its face this seems more than unlikely, by insisting on such a claim speaks to the truthfulness of the witness in general.

292. It is respectfully submitted that PW166 is likewise not credible. PW166 claim that his unit never gave reports to the security unit was contradicted with a report that had "Security Service, SB Tuzla" printed on it.[686] The report was written by PW166's unit.[687]

[679] PW136, T6222;
[680] PW136, T6224;
[681] PW136, T6224;
[682] PW157, T7171;
[683] PW157, T7175;
[684] PW132, T4482;
[685] PW157, T7222;
[686] PW166, T10699;
[687] PW166, T10699;

293. It is respectfully submitted that without further corroborative evidence the alleged recognition of the participants in the purported intercept conversation cannot be utilized as conclusive proof that certain persons actually took part in the specific conversation.

Analysis of intercept conversations made by Prosecution's experts

294. It is respectfully submitted that Butler's reports and opinions are deficient considering that he did not review other relevant materials. Namely, Butler testified that he never had at his disposal intercept materials obtained from other countries.[688] This obviously includes intercept conversations obtained by Croatian Government among which there is intercept involving Beara and his state of mind.

295. Butler also confirmed that he did not do a comprehensive review of all the documents from the ABiH Army[689]. Further, Butler affirmed that he also never had a chance to review the Main Staff documents.[690] Butler acknowledged that the lack of information can lead to a potentially biased conclusion.[691]

296. Similarly the testimony of the Prosecution's other expert, Stefanie Frease, who purportedly tried to authenticate the intercept notebooks and conversations, should be rejected. Stefanie Frease is a former employee of the Prosecution working there from April 1995 to July of 2000,[692] and in July of 1995 was sent to Tuzla to begin preliminary investigations for the Prosecution.[693] During her work for the Office of the Prosecution she was part of a team that located and later began to acquire, in March of 1998,[694] a series of notebooks purportedly used by the radio intercept operators in the summer of 1995.

297. It is respectfully submitted that Ms. Frease' was simply not qualified to conduct the investigation she was put in charge of, an investigation of such size,

[688] Richard Butler, T20179;
[689] Richard Butler, T20180;
[690] Richard Butler, T20184;
[691] Richard Butler, T20158;
[692] Frease T6086;
[693] Frease T6087;
[694] Frease T6087;

scope, depth, and complexity. Ms. Frease admits that she is neither an expert in criminology nor an investigator and does not have any experience or training in handling evidence in criminal proceedings.[695] Furthermore she had no experience or training in inventorying evidence, and no experience or training with respect to chain of custody of potential evidence.[696]

298. Ms. Frease lack of experience and training is glaring one in respect when she did not inquire about the whereabouts of the notebooks from the time they were purportedly written to the time they were "found" by the team.[697] As a way to find them credible, Ms. Frease stated that no notebook was missing. Furthermore, Ms. Frease never investigated nor sought the help of an expert in handwriting, paper, or ink analysis to attempt an independent assessment of the age of the notebooks.[698] The intercept operators claimed that often their superiors would make additional modifications and changes to the notebooks and an independent analyst would have helped verify the veracity of these claims. Further, such an expert may have been able to verify the claims through handwriting analysis that the operators would go over their own work and make further modifications themselves instead of the possibility that the notebooks were modified by another person at another time and for other, non military reasons.[699] Finally Ms. Frease did not have an expert even research to see if these particular types of notebooks were even on the market, or available during the years of their purported use[700] nor did she investigate the bar code to ascertain the age of the notebooks or if the notebooks had barcodes in the first place.[701] It is troubling that with respect to the intercept from 15th of July at about 9:55 to 10:00 only internal authentication was done. In other words three notebooks matched one another but no outside verification was done leaving the great possibility that the notebooks could have been fraudulently created or changed to match one another.[702]

[695] Frease T7880;
[696] Frease T7880;
[697] Frease T7881;
[698] Frease T8051;
[699] Frease T8055;
[700] Frease T8051;
[701] Frease T8053;
[702] Frease T8050;

299. Moreover, Ms. Frease failed to further inquire as to why a participant in an intercepted conversation marked as P1164 changed the entries from "B" to "Be" seemingly changing the identity of the participant at a later time.[703] This is a material change that should have been further investigated.

300. Ms. Frease was not trained or experienced in handling evidence. When asked, Ms. Frease noted that she was had not read the 1997 San Antonio Report of the Oversight Committee, nor had she been advised of or practiced the "double up down chain of custody system and form"[704] and has not heard of it as of the time of her testimony.[705]

301. There was certainly motive and opportunity for someone to create these notebooks on their own, whether in whole or through later changes and modifications, and assure that their contents aligned with the other notebooks. There has simply not been a proper handling of the investigation of the notebooks to be able to rely upon them.

302. With respect to the specific intercepts there exists a methodology that could be employed when analyzing the intercept conversations. In order to identify the participant in a conversation with certainty only two methods should be accepted. First if the participant compromises himself that is, introduces himself or secondly if the other participant identifies the speaker by addressing him by his full name during the conversation.[706]

303. The Prosecution alleges that the first conversation captured which purport to include Beara is P1130c between allegedly Zoka, Beara and Lucic on 13 July at 10.15h. Remetic who relied on the manuscript of the conversations as more reliable concluded that the participant did not introduce himself as Beara considering that in the manuscript there was no mention of the word "speaking" that could be found in the English version of this intercept.[707]

[703] Frease T8090; also see PIC41; PIC42; PIC43;
[704] Frease T7885;
[705] Frease T7885;
[706] 2D551, Slobodan Remetic linguistic Analyses of Intercepts to be connected to the Name of Ljubisa Beara,page 15;
[707] Slobodan Remetic, T24631; also see PW124, T5820;

304. The content of intercept conversation P1164 where allegedly Jokic is asking Beara to call 155 as previously shown was altered and instead of "B" letters "Be" were inserted. The Prosecution is attempting to link this conversation with the entry in duty officer logbook P377. However, there is no logical explanation considering that the person who is purportedly Beara did not know whose number 155 is assigned to and even the Prosecution expert Richard Butler could not explain what he called a little anomaly because he said that he believed that Colonel Beara would have known what the number of the Main Staff operation office was.[708] It is submitted that this intercept was inaccurately transcribed and that Beara was not involved in this conversation.

305. The Prosecution is desperately seeking to connect several intercept conversations that were allegedly captured on 15 July. The first one is P1177 from 09.52h where allegedly Beara asked for Zivanovic and told him to call him on local 139. Next is P1178 where allegedly Beara and Zivanovic are speaking. As it was previously stated operator PW157 purportedly recognized the voice of Ljubisa Beara considering that no identification was performed in this or the previous conversation.

306. This purported conversation is suspect in that the participant whose voice is allegedly recognized as Beara's does not even know who to call or where the number is located.[709]

307. The purported intercept conversation between allegedly Beara and Krstic was according to the Prosecution intercepted from three different operators in different locations and at different times. Intercept P1179a starts at 09.55h, P1179j starts at 09.57h and P1179b starts at 10.00, all of them allegedly on 15 July. With respect to the intercept starting at 10.00h the participant who is purportedly identified as Ljubisa Beara does not introduce himself and was not compromised by the other participants, rather only three references to a rather common name "Ljubo" can be found.[710]

[708] Richard Butler, T20606-7;
[709] P1178;
[710] P1179b;

308. According to the defense expert Mr. Remetic the intercept at 10.00 resembles Beara's manner of speaking today out of those three versions[711] but not significantly to be able to allow him to attribute this conversation to Ljubisa Beara.[712]

309. The intercepted conversation P1147 is in the opinion of the Prosecution related to another conversation namely P1179 where Indjic's men are mentioned.[713] When confronted with the possibility that men referred in this intercept is the infantry company sent from 1st Krajina Corps Butler acknowledged that this report was not available to him when he was doing his analyses[714] but nevertheless he said that 30 men in P1179 are asked for two or three days while there was no information that reinforcements from Krajina were asked for two or three days.[715] However, from the face of the document it can be seen that Butlers analysis is not sound considering that the document starts "based on an agreement" and while the document is dated 15 July based on an agreement could mean that the agreement was reached in the preceding days.[716] Thus, the explanation offered by Butler for not linking intercept P1179 with document P2754[717] is not persuasive enough to conclude beyond reasonable doubt that participants in conversation P1179 are actually talking about men who are supposed to participate in execution of Muslim men.

310. The Prosecution also claims two intercepts allegedly noted on 16 July as being related to Ljubisa Beara. The conversation P1187b at 11.11h is between an unknown participant and Cerovic in which Beara is purportedly added to the call in the middle of the conversation. Butler interprets this intercept and the use of word "triage". Butler claims that the word "triage" does not mean triage in medical terms considering that the only medical triage can be related to the prisoners admitted in Milici.[718] However, when one examines the intercept from the same date, 16 July at 19.48h marked as P1200 one could see that the participants in that conversation discuss sick persons and their transportation concluding that selection and triage will

[711] 2D551, page.20;
[712] Slobodan Remetic, T24652;
[713] Richard Butler, T20265;
[714] Richard Butler, T20264;
[715] Richard Butler, T20264;
[716] P2754, GSVRS report dated 15 July 1995;
[717] P2754;
[718] Richard Butler, T20002; see Prosecution opening statement, T513;

be done to see who goes to Belgrade or Tuzla.[719] It is respectfully submitted that the word triage on the 16 July intercept relates to the type of selection customarily utilized when discussing the sick and wounded and thus prosecution's conclusions that this word relates to executions is not the most reasonable conclusion from the evidence.

311. It should also be noted that it was not Beara that used the word triage in this conversation.[720] However, also significant is that in this intercept Cerovic is allegedly saying that Trkulja was there and that he was looking for Beara[721] but when Trkulja testified about this he said that he was very surprised when he saw this intercept because he never asked to see or talk to Beara.[722]

312. The Prosecution claims that the intercept is purportedly proof that Beara was in the Zvornik brigade zone or more particularly in the brigade on the 16 July when this conversation allegedly took place.[723] It is respectfully submitted given the flaws and numerous reasonable interpretations contained therein as well as technical possibilities of the VRS switchboards operations that the Honorable Trial Chamber cannot accept the Prosecution's theory.

313. In the Krstic Judgment in relation to this same intercept it was stated that the reference to "triage" remains the unexplained aspect of the conversation,[724] and Butler agreed that during the Krstic Trial he thought that term triage had multiple possible explanations.[725] Butler further acknowledged that officers of VRS used different meanings when talking about the term triage and that what [REDACTED] meant by that term was separation of civilians and soldiers.[726]

314. It is respectfully submitted that the Prosecution's attempts to attribute certain conversations to Beara because of a reference to the common first name "Ljubo" is

[719] P1200;
[720] P1187; also see Slobodan Remetic, T24626-7;
[721] P1187;
[722] Nedeljko Trkulja, T15133;
[723] Prosecution opening statement, T512;
[724] Krstic Trial Judgment, para.247;
[725] Richard Butler, T20271;
[726] Richard Butler, T20278;

misplaced when compared with other conversations that referenced simply the first name "Ljubo" yet the Prosecution concedes that it is not Beara. Specifically the purported intercepted on 23 July at 08.05h, P1310 and intercept P1328 on 25 July at 07.09h have the reference to the name "Ljubo" but cannot be attributed to Beara beyond reasonable doubt.

The linguistic evidence adduced at the Trial clearly establishes that Ljubisa Beara was not a participant in the intercepted conversations as alleged by the Prosecution

315. It is respectfully submitted that most of the intercept operators claimed that they were transcribing verbatim what they were hearing. Witness PW147 testified that the operators "sought to have intercepts as authentic as possible, to record precisely what they were able to hear well …"[727] and "to record and transcribe the things we heard as authentically as we could".[728]

316. In light of the foregoing practice it was possible for the Defense linguistic expert to analyze several intercept conversations and evaluate whether they matched someone who spoke with a South Cakavian – Ikavian dialect spoken primarily in Split, as was the case with Ljubisa Beara.[729] Defense linguistic expert based his conclusion in part after meeting observing and analyzing Ljubisa Beara in UNDU on two occasions, on 7 and 8 April 2008[730] as well as from Bera's background and biography.[731] The Defense expert furthermore opined that Beara maintained the close bond with Ikavian dialect and but that he regards Ekavian (Serbian dialect) as foreign and has a hostile attitude towards it.[732] It was previously established through various witnesses that Beara spoke with a Dalmatian dialect at the time of the events as reflected in the Indictment.[733]

[727] PW147, T6329;
[728] PW147, T6329;
[729] 2D551, Slobodan Remetic linguistic Analyses of Intercepts to be connected to the Name of Ljubisa Beara, pages14 and 27; alse see Slobodan Remetic, T24565-6;
[730] 2D551, page.27; also see Slobodan Remetic, T24571 and T24578;
[731] 2D551, pages 8 -9; also see Slobodan Remetic, T24569;
[732] 2D551, page.29;
[733] See part of the brief "Ljubisa Beara's service in the VRS comported with and was consistent with his life long commitment of treating all citizens equally and without discriminatory intent";

317. Mr. Remetic stated that a person dialect cannot be hidden, and that it is very difficult, almost impossible, to hide one's dialectological origin.[734] Remetic's methodology consisted of several steps, first being whether Beara was identified in the conversation and second examining the relationship between the language of the manuscripts and the dialect spoken in the areas where Ljubisa Beara grew up and professionally served.[735]

318. Remetic analyzed 18 transcripts of intercept conversations that were given to him by the Defense of Ljubisa Beara.[736] It should be stressed that Remetic also listened to audio tapes of other intercepted conversations and examined several additional intercepts involving Beara. Based on the foregoing as well as well as the interviews with Beara in the UNDU Remetic found several instances of phrases consistent with the western and Split variant of the Croatian language spoken by Beara. Remetic concluded that based upon reasonable degree of certainty Beara's dialect was reflected as is consistent with his speech pattern in intercept conversation dated 13 Aug 1995, marked as 2D587,[737] as well as the transcript of the conversation conducted with Ljubisa Beara in the UNDU on 11 October 2004 marked as 2D594[738].

319. With respect to the 18 intercepts conversations analyzed, Remetic concluded that "a comparison of the language of the alleged intercepts and Beara's current manner of speech has brought to the surface the diametric opposition".[739]

320. Remetic acknowledged that with respect to the intercepted dated 13 July at 10.15h marked as P1130c only one word is consistent with the dialect used in costal areas.[740] The word "sjor" is consistent with a Dalmatian dialect. In addition Remetic specifically noted the words "burazer" and "buraz" as possible being used in western areas but noted are used commonly in Serbia as well.[741] It is respectfully submitted

[734] Slobodan Remetic, T24550;
[735] 2D551, pages.15;
[736] 2D551, pages 10-11;
[737] Slobodan Remetic, T24646; also see 2D587;
[738] Slobodan Remetic, T24647-9; also see 2D594;
[739] Slobodan Remetic, T24556 also see T24571-2 and T24595;
[740] 2D551, pages.17 and 26; also see Slobodan Remetic, T24649;
[741] 2D551, pages.13;

that relying on one word out of 18 intercepts as the Prosecution seeks to do is grossly insufficient and therefore no weight should be attached to it.

321. With respect to intercept P1378 Remetic opined that the language used is consistent with Beara's speech today[742] and is characteristic of the western variant of the Croatian literary language.[743]

322. Remetic further concluded that in light of the prevalent use of both western and eastern variants of the same language within the examined intercepts it is difficult to accept that all or most of the transcripts as alleged by the Prosecution can reasonable be attributed to the same person.[744]

323. It is respectfully submitted that based upon the foregoing and the Prosecution's failure or refusal to consult with a linguistic expert, the Prosecution did not to meet its burden of proof that any of the purported intercept conversations can be attributed to Beara.

The Prosecution claims that intercepts which references "Ljubo" may be attributed to Beara are misplaced

324. In addition to the foregoing one of the tasks of the linguistic expert Mr. Remetic was to give the meaning and origin of the first name Ljubo.[745] Remetic found that "Ljubo" is primarily hypocoristic of several Serbian names and listed 22 different variants of the name. In addition, Remetic found that Ljubo may also be used as a full name in some areas.[746] Finally, Remetic also found that it is not uncommon among Serbs to give male children hypocoristic with a root such as mil-, drag-, ljub- as an endearment, which means that "Ljubo" could be hypocoristic of any male name.[747]

325. Moreover, the use of the first name "Ljubo" may be attributed to several individuals that were involved in Srebrenica and the surrounding events.

[742] 2D551, page.22; also see Slobodan Remetic, T24596;
[743] Slobodan Remetic, T24599;
[744] 2D551, page.27;
[745] 2D551, page.9;
[746] 2D551, page.9;
[747] 2D551, pages 9-10;

326. It is respectfully submitted that one of the first persons to enter Srebrenica in July 1995 was Major Ljubo Eric, who was in command of the 2nd combat group 2nd Romanija Mechanized Brigade.[748] As Major Ljubo was commanding part of the troops it is reasonable to conclude that he was a participant or was referenced in some of the intercept conversations.

327. Furthermore, from a review of the evidence, it can be determined that in the Zvornik Brigade there was a person identified as Ljubo Sobot who was the assistant Drina Corps commander for logistics.[749] Based on upon his position being a commander of a combat group in Krivaja 95 operation[750] it is reasonable to conclude that he was a participant or was referenced in some of the intercept conversations. Likewise, another person involved in July 1995 events was Ljubo Rakic. Ljubo Rakic was the Drina Corps Chief of informatics and testified before the Honorable Trial Chamber regarding some of the intercepts he participated in.[751]

328. In addition to those three persons whose first name or derivative is "Ljubo" another person who was involved in events in July 1995 is Ljubo Bojanovic. Ljubo Bojanovic who is deceased was in the sector for morale, religious and legal affairs in Zvornik Brigade, and testified in a previous case before the Tribunal.[752] It respectfully submitted that it is undisputed that Ljubo Bojanovic was in the Zvornik Brigade and was actually performing the duty of an operative duty officer on several specific dates in July 1995.

329. According to the testimony of Vinko Pandurevic the reference to "Ljubo" in the duty officer notebook purportedly on 13 July 1995 is probably a reference to Ljubo Bojanovic.[753] Likewise, the reference to "Ljubo" in the tactical intercept book for 13 July 1995 is presumably according to Pandurevic again a reference to Ljubo

[748] Mirko Trivic, T11800; also see Vinko Pandurevic, T30880;
[749] 4D87;
[750] Vinko Pandurevic, T31843;
[751] Ljubo Rakic testified on 16 June 2008;
[752] P3135;
[753] Vinko Pandurevic, T31895; also see P377 (ERN ending in 5741);

Bojanovic.[754] Finally a reference to "Ljubo" in the intercept conversation dated 23 July at 0805 is according to the Prosecution a reference to Ljubo Bojanovic.[755]

330. Vinko Pandurevic unwillingly confirmed that he knew several people that could be referred to as "Ljubo" in the Zvornik Brigade at the relevant times, during July 1995. He acknowledged Ljubislav Strbac who was the assistant of the Chief of Staff for organization, mobilization and personnel affairs.[756] He also acknowledged that Obrenovic's driver at relevant time was named Ljubomir Danojlovic.[757]

331. The identity of persons captured on purported intercept who may be refer to as "Ljubo" is not limited to the Army but may reasonably be expanded to the civilian authorities who were deeply involved in the organization and transportation of the population from Srebrenica. One of those civilian authorities was Ljubisav Simic, the president of Bratunac Municipality.[758]

332. It is respectfully submitted that the Prosecution failed to prove beyond a reasonable doubt that the intercepts which reference the first name "Ljubo" should be attributed to Beara.

The Prosecution's interpretation of the meaning of specific words in the purported intercepts ignores other reasonable inference and is simply wrong

333. The Prosecution seeks to interpret certain words in the intercepts such as "parcels" in order to show criminal intent. However, it is respectfully submitted that the Prosecution was not able to prove whether this word was a code generally accepted in the relevant time period. Although the Krstic Trial Chamber found that the word "parcels" was a code for Bosnian Muslims and that the word "distribute" was a code for killing them[759] in the instant case such a conclusion respectfully cannot be made.

[754] Vinko Pandurevic, T31920-1; also see P2321 (last ERN ending in 8949);
[755] P1310; also see prosecution Motion dated 1 May 2007 conceding this;
[756] Vinko Pandurevic, T31842;
[757] Vinko Pandurevic, T31843;
[758] testified on 22 and 23 October 2008;
[759] Krstic Trial Judgment paras.383 and 384;

334. Several witnesses testified in this case with respect to the word "parcel". [REDACTED] [760] Likewise witness Ljubo Rakic was asked to give his explanation as to the word "parcel" that was used twice in the Duty officer log book, P377, on the page ERN02935765.[761] Examining the word in its proper context after the first reference to "parcel" the entry "in 1 hour 30 is coming" can be found in the duty officer logbook.[762] Rakic testified that parcel referenced the units that were summoned to help the Zvornik Brigade[763] and that this was done according to the order of Drina Corps issued on 16 July who were supposed to arrive from the Bratunac Brigade.[764]

335. Rakic's testimony is corroborated in the duty officer book at ERN02935767 where an entry was made that from Vlasenica 30 soldiers arrived.[765] With respect to the second reference to the word "parcel" on the page ERN02935768 there is a also a reference that about 100 people from Banja Luka are supposed to arrive around 21.00h.[766] Rakic also interpreted the entry on the page ERN02935769 "Message from Zlatar that a parcel set off from Badem. Half an hour ago, it was reported at 2015, reported at IKM." as being a reference to the same 100 people from Bratunac that were late.[767] This is also corroborated on the very next page where there is a reference to another 30 soldiers that came from Bratunac at 21.00h.[768]

336. During the Trial one intercept was introduced relating to Zepa in which allegedly one of the participants is Ljubisa Beara.[769] Within that intercept it should be noted that term parcels is also used. From this intercept it can be seen that the word parcel has at least two different meanings. This can be concluded from the sentence "small parcels go first and the big ones are left for the end", this reference could only reasonably imply small and big groups of people.[770]

[760] PW168, T16017-8;
[761] P377, BCS ERN page 02935765;
[762] Ibid;
[763] Ljubo Rakic, T22198-9;
[764] 1D1167, Drins Corps order, dated 16 July 1995;
[765] P377, BCS ERN page 02935767;
[766] P377, BCS ERN page 02935768;
[767] Rakic, T22206;
[768] P377, BCS ERN page 02935770;
[769] P1380a;
[770] ibid

337. Namely from the foregoing intercept it can be seen that one of the participants is expressing the intention that there were no criminal plans but that the request was to be filed with the ICRC in order to escort them so they can be exchanged.[771]

338. It is respectfully submitted, given that there are different interpretations and meanings of the word "parcel" the Honorable Trial Chamber cannot find beyond reasonable doubt that this word was used as a reference to Muslim prisoners that were supposed to be executed.

The Prosecution's reliance on certain documentary evidence is unreasonable given its lack of authenticity

339. It is respectfully submitted that the Prosecution's reliance on the Zvornik Brigade duty officer book (P377) as being authentic and credible is misplaced. It is further submitted that even if this document is authentic, the lack of proper chain of custody and the undisputed alterations and additions that were made as well as entries that were made by unknown persons renders this document unreliable and thus should not be used as proof of criminal responsibility for any of the accused in present case.

340. [REDACTED] [772] [773]

341. [REDACTED] [774] two handwriting experts gave testimony with respect to the authenticity of the document.

342. The Prosecution's expert Kathryn Barr prepared five reports[775] and the defence expert Ljubomir Gogic prepared one.[776] The specific pages that were analyzed by the Prosecution experts were from page ERN 02935743 to ERN 02935753 and cover only a few days in July 1995. Ms. Barr found strong but not conclusive evidence that Dragan Jokic wrote most of the text from page ERN-5744 to

[771] ibid, page 2;
[772] PW168, T15962;
[773] PW168, T15963;
[774] P377, BCS ERN page (02935738 and 02935744), also see PW168, T15968 and T15971;
[775] P2844, P2845, P2846, P2847, P2848,
[776] 2D582, Ljubomir Gogic Analysis of handwriting on photocopied pages of 'Duty operations log'; (defense expert analyzed pages from ERN02935741 to ERN02935753 with the exception of page ERN02935743);

page ERN5753.[777] During her testimony Ms. Barr was confronted with her tick sheet that she made while making her first expert report and she admitted there were letters that were not a match which she conveniently did not specifically reference in her report. She admitted that letter "b" was not a match, while for letter "e" she did not have a sample to compare it with.[778]

343. The Prosecution's expert did not offer her opinion as to who wrote the rest of the text which in her opinion was not written by Dragan Jokic but she only stated that the entries were not written by three specific individuals. [779] She stated that she does not know who or when those entries were written and that she does not know whether entries were added at a later stage.[780] Further, Ms. Barr could not offer her opinion how many different writers made entries on the 10 pages she analyzed.[781]

344. Ms. Barr was asked to expand the reasons for her findings relating to Dragan Jokic's writing.[782] In that second report she stated that the fact that the original writings and the specimen writings were written in BCS, created a minor limiting factor in her examination.[783] Even though Barr found few characters that are not that well matched she reiterated her previous opinion that there is strong, but not conclusive evidence that Jokic wrote the analyzed entries.[784]

345. Upon additional review after receiving additional samples of Jokic writing Ms. Barr opined that there are still features that differ between the specimen and questioned writings.[785] The difficulty with her opinion is she fails to give adequate consideration to those features that do not match beside as put by expert "for example the A, the H…" are "relative proportion of dots with circular diacritics".[786] Essentially, this means that there were more diacritics in the questioned writings than

[777] P2846, para.5.3, report dated 16 July 2003;
[778] Kathryn Barr, T13274-5;
[779] P2845, Prosecution expert found that relevant pages were not written by Trbic, see page 16, and that they were not written by Drago Nikolic, page 9 and 10; and not written by Ljubisav Strbac, page 14;
[780] Kathryn Barr, T13247;
[781] Kathryn Barr, T13248;
[782] P2847, introduction, report dated 22 August 2003;
[783] P2847, para.1;
[784] P2847, para.6;
[785] P2848, para.2.5, report dated 27 Jan 2004;
[786] P2848, para.2.4;

in the specimen writings.[787] It is difficult to comprehend that a person can change his handwriting to such an extent to stop writing the diacritics over the letters. The more reasonable conclusion is that Prosecution expert erred when giving her opinion and that without a concrete opinion it is reasonably to suggest that it cannot be ruled out that another person with a similar style of writing was responsible.[788]

346. Additionally, Ms. Barr admitted that when preparing her third report in relation to Mr. Jokic he actually reproduced all 10 pages of the book she was evaluating[789] and again it is logical that if someone's handwriting is to be matched, having the complete specimen text would be a perfect opportunity to do that although Ms. Barr was still not able to conclude that it was Mr. Jokic's without doubt. Furthermore Ms. Barr admitted that the purported writing of Mr. Jokic in P377 is scribbled while his writing in the IKM logbook was neater.[790] This is significant considering that in her other reports Ms. Barr was able to find that there is conclusive evidence that certain people wrote specific entries.[791]

347. The Defense expert agreed that three different persons (he marked them as scriptors a, b and c) have written the majority of text on the relevant pages with the exception of several specific entries that were made by some other unknown scriptors.[792]

348. It should be noted that the entries which related to Ljubisa Beara on page ERN5742 were written by an unknown scriptor c.[793]

349. In addition, Gogic also analyzed whether the entries on the relevant pages where written asynchronously (separately) or synchronously.[794] Gogic explained that asynchronously means that the previous position of the hand of the writer has to be repositioned to make next separate writing.[795] After performing his analysis Gogic

[787] ibid; also see Kathryn Barr, T13208, T13219 and T13225;
[788] P2848, range of opinion;
[789] Kathryn Barr, T13227;
[790] Kathryn Barr, T13214;
[791] P2845;
[792] 2D582;
[793] 2D582, page.7,
[794] 2D582, page.8;
[795] Ljubomir Gogic, T25573-4;

found that even though most entries were made by three persons several of those entries relating to Beara were not made synchronously.

350. More specifically Gogic found that the last paragraph on page ERN5742 was created at the separate time then the content of the note reflected in the preceding paragraph.[796] Another example of a separate entry by an unknown scriptor is the entry where numbers "583959" were entered.[797] Likewise cite a third example again related to Beara, where the entry "od Beara" is made separately in relation to the entry "Da se javi Mani Djukici", as well as the entry "9.00 Beara dolazi" which was made separately in relation to the previous entries.[798]

351. Basically the Prosecution's expert agreed that the writings may have been added at a later date considering that she testified that regarding the nature of analyzed entries in P377 they are "lots of short entries and not written all at one point, at one time".[799] Prosecution's expert also did not use any specialized lighting equipment to detect any alterations and impressions on P377,[800] nor did she utilize any ink comparison.[801] On the other hand, the defense expert did conduct analyses of absorptive and luminescent characteristics of the examined pages.[802] Gogic testified regarding certain alterations on the text and concluded that they were done in ink with identical absorptive and luminescent characteristics to the content preceding the alterations.[803] Based upon that conclusion it is plain that it is not possible to establish when such alterations were made if made with ink with identical absorptive and luminescent characteristics. The same conclusion can be reached as to the asynchronously made entries on relevant pages as identified by Mr. Gogic.

352. There are many entries made separately by unknown and unidentified scriptors that relate to the word "Beara". Both Defense and Prosecution experts opined that those could have been made at some later time.

[796] 2D582, page.8;
[797] 2D582, page.9;
[798] 2D582, page,9;
[799] Kathryn Batt, T13212 also T13233;
[800] Kathryn Barr, T13197;
[801] Kathryn Barr, T13198;
[802] 2D582, page.10;
[803] 2D582, page.5;

353. Finally, in light of the aforementioned it is respectfully submitted that the evidence the Prosecution relies upon, such as the duty officer book, which has missing pages, that was in possession of an accused that had motive to alter the entries to shift his role and responsibility, and whose entries were made by unknown persons possibly after the fact, should not be used as evidence in criminal proceedings as it is unreliable.

354. With respect to entries that may refer to Beara which were not analyzed by either the Prosecution or Defense expert, it is respectfully submitted that those entries are inconsistent, incomplete and un-corroborative and thus should not be considered. Furthermore, these entries do not establish with any certainty that Beara was ever present in the Zvornik Brigade but merely reference his purported anticipated arrival. At no time was there an entry which confirmed that Beara was present at the Zvornik Brigade or a specific entry that confirms that a purported message was conveyed to Beara.

The Prosecution failed to establish that Ljubisa Beara significantly participated or substantially contributed in the alleged JCE

355. The threshold of participation is in the Defense submission something that is not clear from the recent jurisprudence. The Appeal Chamber in Kvocka found that substantial participation is not a legal requirement for the existence of JCE:

> "The Appeals Chamber notes that, in general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise. In practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose."[804]

356. It seems that according to the current practice the standard for participation in JCE is "significant participation". The Brdjanin Appeal Chamber Judgment stated:

> "Where the principal perpetrator is not shown to belong to the JCE, the trier of fact must further establish that the crime can be imputed to at least one member of the joint criminal enterprise, and that this member – when using the principal perpetrator – acted in accordance with the common plan. In establishing these elements, the Chamber must, among other things: identify the plurality of persons belonging to the JCE (even if it is not necessary to identify by name each of the persons involved); specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims); make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise; and characterize the contribution of the accused in this common plan. On this last point, the Appeals Chamber observes that, although the contribution need not be necessary or substantial, it should *at least be a*

[804] see Kvocka Appeal Chamber Judgment, para.97,

significant contribution to the crimes for which the accused is to be found responsible."[805]

The evidence adduced during Trial supports a finding that Ljubisa Beara did not participate or contribute in either JCE alleged by the Prosecution

357. The Defense will initially analyze the facts relating to participation that were inferred in previous Judgments in Krstic and Blagojevic that have dealt with the same JCE to forcibly transfer the Muslim population from Srebrenica. Thereafter, the defense will distinguish the potential participation of others in the alleged JCE with Ljubisa Beara's purported participation and show that Beara did not participate in the JCE to forcibly transfer the Muslim population or alternatively that his level of participation does not reach the threshold established in previous ICTY jurisprudence.

358. Regarding Krstic's participation in the forcible transfer of the civilians from Potocari the Trial Chamber in Krstic pointed to the facts that he: "along with others played a significant role in the organization of the transportation of the civilians from Potocari", and "ordered the procurement of buses and their subsequent departure carrying the civilians from Potocari" "personally inquired about the number of buses already en route", "ordered the securing of the road from Luke to Kladanj up to the tunnel where the people on the buses were to disembark"[806] The Trial Chamber found that General Krstic was a key participant in the forcible transfer, working in close co-operation with other military officials of the VRS Main Staff and the Drina Corps.[807] The Judges also pointed to the participation of the Drina Corps personnel in organizing the buses,[808] their presence in Potocari on 12 and 13 July during transportation of the civilians[809], and there involvement in organizing and monitoring transportation[810].

359. Similarly, when finding Blagojevic's participation in the JCE to forcibly transfer women and children from Srebrenica, the Trial Chamber relied on the facts

[805] Radosav Brdjanin Appeal Judgment, para.430;
[806] see Krstic Trial Chamber Judgment, at para.608,
[807] ibid., at para.612,
[808] ibid., at para.136, 138,
[809] ibid., at para.143,
[810] ibid., at para.155,

that "the elements of the Bratunac Brigade were involved before the attack in blocking humanitarian supplies and convoys from entering the Srebrenica enclave at Zuti Most"; and "in sniping and shelling of the Srebrenica enclave in the months before the enclave was attacked".[811] The Trial Chamber also stated that Blagojevic "authored the order to begin combat activities on 5 July and tasked his subordinate commanders and units to carry out this order".[812] Further, Momir Nikolic a Blagojevic subordinate was involved in "co-ordination of the transport of the women, children and elderly, the separations of the men and their temporary transport and detention" and "members of the Bratunac Brigade Military Police took part in the separation process".[813] Finally the Chamber noted that two buses mobilized by the Bratunac Brigade were used in Potocari for the transport of Bosnian Muslim from the Srebrenica enclave[814], while the "Bratunac Brigade Military Police were ensuring the passage of the trucks carrying refugees from Potocari through Bratunac".[815]

360. The Defense submits that unlike Krstic's and Blagojevic's significant and substantial role in the forcible transfer, evidence presented with respect to Ljubisa Beara cannot support the conclusion that he participated to any extent in the JCE.

361. It is respectfully submitted that Ljubisa Beara's position was inherently different then the position of Krstic who had jurisdiction as a commander over the Drina Corps. Ljubisa Beara did not command and control subordinate soldiers and he did not have any authority over the members of the Drina Corps or the civilian police.

Ljubisa Beara did not participate in the JCE to forcibly transfer the Muslim population from Srebrenica and therefore cannot be found guilty under Article 7/1 of the Statute

362. It is respectfully submitted that the Prosecution did not prove their allegations beyond a reasonable doubt that Ljubisa Beara was given authority for organizing, co-ordinating and facilitating the detention, transportation, summary execution and burial

[811] Blagojevic Trial Chamber Judgment, paras 138-139;
[812] Blagojevic Trial Chamber Judgment, para.140;
[813] ibid at paras 172-173,
[814] ibid at para.180,
[815] ibid at para.186,

of Muslim victims.[816] Moreover the evidence reflects that Ljubisa Beara did not have sufficient contact with persons referenced in para.27 of the Indictment.

363. The Defense will compare and contrast the criminal responsibility of those previously convicted participants of the events in Potocari which plainly reveals that Ljubisa Beara did not participate in any way to the forcible transfer of the Muslim population.

364. Following the issuance of the 2 July Krivaja order several meetings were held.[817] Although no criminal intent or involvement in JCE can be concluded from these meetings the fact that Ljubisa Beara was not present reveals that he was not involved in any sense in organization of the attack on Srebrenica that commenced on 6 July.

365. There was no evidence that Ljubisa Beara entered Srebrenica when other high officers did, nor was he present when Gen Mladic met with General Krstic when they surveyed Srebrenica town.[818]

366. Presence at various meetings was cited as a proof of Krstic knowledge of the refuges and the conditions facing the refugees in Potocari.[819] Attendance at the Hotel Fontana meetings on 11 and 12 July 1995 supported a finding that Krstic was fully appraised of the catastrophic humanitarian situation confronting the Bosnian Muslim refugees in Potocari.[820]

367. There is simply no evidence that Beara participated in any of these meetings. During the Trial, videos of the Hotel Fontana meetings were played and it was clear that Ljubisa Beara was not present at these meetings.[821] Further a MUP report from one of the meetings lists the people who were present at the meeting and does not reference or mention Ljubisa Beara.[822] Independent witnesses that were present in the

[816] Indictment para.27;
[817] Blagojevic Trial Judgment, paras.122-123;
[818] See video P2047; also see Blagojevic Trial Chamber Judgment, para.133;
[819] Krstic Trial Chamber Judgment, para.340;
[820] ibid at para.343;
[821] P1194, video of second Fontana meeting; P1195, video of third Fontana meeting;
[822] P3040, CJB Zvornik no.278/05, 12.07.1995;

Hotel Fontana confirmed that Beara were not seen in Fontana Hotel or in Bratunac during these events[823] and the witnesses that were present at these meetings confirmed that he was not in the Hotel Fontana.[824]

368. Likewise, Ljubisa Beara was not present at the meeting that occurred either on 11 or 12 July 1995 in the Bratunac Brigade command and that was affirmed by all participants to this meeting that gave testimony before the Honorable Trial Chamber.[825]

369. Furthermore, the lack of presence in the relevant meetings or in Srebrenica/Potocari was confirmed by the Prosecution's expert Richard Butler, who stated that he was not aware of any evidence with respect to intercepts or sightings that place Beara on the ground, with the exception of one Dutch officer who placed him on the ground prior to the 13th.[826] Butler further stated that he is not aware of any military documents or video footage that places Beara in Srebrenica.[827] When asked the same question in relation to Potocari Butler affirmed that Ljubisa Beara did not participate in any of the three meetings in Hotel Fontana.[828] This was also confirmed by Mr. Kingori who was actively involved in the events in Potocari and who testified that to he never meet someone with the name Beara and that the name Beara was not familiar to him in July 1995.[829] The undisputed fact that Beara was not in Potocari or on the road leading to Potocari was also confirmed by VRS witnesses.[830]

370. Finally, when asked whether he reviewed and examined any documentary evidence that could indicate whether Beara was in any way involved with any of the process with respect to the evacuation or the movement of the people from either Srebrenica or Potocari, Butler affirmed that he has not.[831]

[823] Pieter Boerring, T2124;
[824] PW162, T9271;
[825] Mirko Trivic, T11974-8; see Milenko Jevdjevic, T29920-5; Pieter Boering, T2124; Svetozar Kosoric, T33777;
[826] Richard Butler, T20230;
[827] Richard Butler, T20231;
[828] Richard Butler, T20232;
[829] Joseph Kingori, T19528;
[830] Zeljko Kerkez, T24092; Svetozar Kosoric, T33777;
[831] Richard Butler, T20242;

371. Butler mentioned that he is aware of records from Hotel Fontana that room were paid by the Bratunac brigade for some VRS officers during this period but he was not sure whether Beara was among those officers.[832] However, a document with Beara's name on it was produced during the Trial after Butler's testimony but was only a reservation and not confirmation of attendance.[833]

372. It is respectfully submitted that this newly produced evidence is unreliable and should not be accepted by the Honorable Trial Chamber as conclusive proof of Beara's purported presence in Hotel Fontana. It is respectfully submitted that several glaring deficiencies and inconsistencies within the document exists which renders it grossly unreliable and without basis. Initially the document is post dated 25 July 1995 which is after the time for which purported approval was given.

373. Furthermore, the aforementioned document is not a receipt or bill which would reveal that the room was occupied and paid for after being used. The document only reflects that it was perhaps contemplated for Beara to be in Bratunac at this time but does not establish that he actually was in Bratunac.

374. Thus, it is respectfully submitted that Richard Butler's testimony and the documentary evidence which shows that Beara was not present when the alleged forcible transfer was planed and committed is sufficient proof that Ljubisa Beara was not involved and did not participate in the JCE to forcibly transfer the civilian population from Srebrenica.

375. Richard Butler's testimony was also corroborated by witness 2DPW19 who also testified that he spoke with [REDACTED] [834] [REDACTED] [835] [836]

376. Furthermore, no evidence was adduced during the Trial that Beara had any subsequent knowledge as to what was discussed, planned or agreed to during the the

[832] Richard Butler, T20233;
[833] P3573; Military post Bratunac, dated 25 July 1995;
[834] [REDACTED];
[835] [REDACTED];
[836] [REDACTED]

Hotel Fontana meetings nor about the situation with the civilian population in Potocari.

377. Furthermore, it was not proven by the Prosecution that Ljubisa Beara was present in Potocari or Srebrenica at the relevant time.[837] Hence, it is submitted that there is no evidence that Beara in any way participated and advance the JCE to forcibly transfer Muslim population from Potocari.

378. Ljubisa Beara was also not present at the meeting in the Bratunac headquarters at the morning of 12 July 1995.[838] During this meeting Generals Mladic and Krstic had met with the police[839] but the same cannot be said for Beara and in Defense submission this is one more fact speaking to the conclusion that he was not involved in JCE to forcibly transfer Muslim population from Srebrenica.

379. The Prosecution did not adduce any evidence that Beara had knowledge about the meetings that were held up to and through 12 July 1995 or that Beara contributed to the decisions that were made despite his absence. It is respectfully submitted that no documents were found since non exist that Beara was asked by anybody to assist, in procuring buses, organization of transport, securing of the civilian population, securing of the roads, procurement of food or water and any kind of advice. Further, no documents were produced to establish that Beara was ever informed about the foregoing.

[837] Mirko Trivic, T12004;
[838] P59; also see Richard Butler T19814 on the issue that the meeting was held;
[839] P59;

MUP involvement in forcible transfer

380. It was established in previous Judgments that when dealing with the issue of forcible transfer, the civilian police played significant role in the separation of able bodied men before the busing of women and children in Potocari.[840] The Trial Chamber in Krstic found that it was unable to conclude that the MUP units present in the Drina Corps zone of responsibility were subordinated to the Drina Corps during July 1995.[841]

381. As reflected by the uncontested evidence, the Zvornik CJB report dated 12 July 1995 contains relevant information that the evacuation of the civilian population of Srebrenica is underway.[842] In the same report Vasic is informing MUP that he ordered closing of the roads Drinjaca – Han pogled and Karakaj – Vlasenica.[843] Also relevant is the report dated 13 July from the Zvornik CJB (public security centre) when Mladic informed the MUP of the Republic of Srpska that the VRS is continuing operations towards Zepa and leaving all the other work to the MUP.[844] The MUP report clearly and unambiguously defines the independent role of MUP and highlits the following specific goals: 1) evacuation of the remaining civilian population from Srebrenica for what 10 tons of fuel is needed and 2) killing of about 8.000 Muslim soldiers that were blocked in the woods near Konjevic Polje.[845]

382. The additional document depicting the role of MUP in the blocking the Muslim men along the road on 13 July 1995 is the information report from the Zvornik CJB. In this report Vasic is reporting that the conflict between the 1st PJP and the large enemy group wherein the enemy suffered heavy losses.[846] It is respectfully submitted that MUP's involvement was clearly independent and not directed by the military as clearly reported on 13 July 1995 where Vasic states that they: "have no

[840] See Krstic Trial Judgment;
[841] Krstic Trial Chamber Judgment, para.289;
[842] P60, Zvornik CJB report no.281/95, 12 July 1995;
[843] P60, Zvornik CJB report no.281/95, 12 July 1995;
[844] P886, Zvornik CJB report no.283/95, 13 July 1995;
[845] P886, Zvornik CJB report no.283/95, 13 July 1995;
[846] P62; Zvornik CJB report no.282/95, 13 July 1995;

cooperation or assistance from the VRS units in sealing off and destroying the large number of enemy soldiers" and that "MUP is working alone in this operation…"[847]

Relation between the civilian MUP and security organs of the VRS and more specifically Ljubisa Beara

383. Richard Butler who had access to all relevant materials suggested that even on the general level the relation between the VRS and the MUP were being acrimonious in the period relevant to the present case, namely before July 1995.[848]

384. Relations between the MUP and the security section of the VRS in 1994 and 1995 were at their lowest point, there was a lot of antagonism between MUP members and the military members and in the opinion of witness working at that time in the security organs that antagonism was created by the then-politics of the SDS.[849] Because of that antagonism the normal flow of information had been interrupted between the intelligence and security organs and the MUP organs.[850] A separate line of communication and information with respect to what was happening in Bosnia was used to ensure that the information that the President was receiving from the army or from other political sources was, in fact, accurate.[851] More specifically members of state security wrongly accused active officers of the VRS of lack of information about the situation at the frontline and supplied wrong information on that subject.[852]

385. The consternation between MUP and specifically Ljubisa Beara can be seen from the comments made by the members of the security organs in 1993 in Geneva when according to witness Trifkovic Beara was mentioned as a Titoist communist officer who they did not expect to be named as chief of security in a new army for a new Serbian state.[853]

386. There was no evidence adduced during the trial that Ljubisa Beara had any contact with the MUP officials during the alleged forcible transfer. It is respectfully

[847] P62; Zvornik CJB report no.282/95,13 July 1995;
[848] Richard Butler, T20286;
[849] Mikajlo Mitrovic, T25059;
[850] Mikajlo Mitrovic, T25059;
[851] Richard Butler, T19842;
[852] Mikajlo Mitrovic, T25059;
[853] Srdja Trifkovic, T25219-20;

submitted that Beara cannot be held responsible under the JCE type of responsibility without any evidence showing his knowledge regarding the acts of MUP personnel or without proof that his acts furthered the acts of MUP personnel (his participation in their actions).

Ljubisa Beara did not participate in the JCE to forcibly transfer the Muslim population from Zepa and therefore cannot be found guilty under Article 7/1 of the Statute

387. During the course of the Trial no evidence was adduced by the Prosecution that could point to any type of criminal responsibility of Ljubisa Beara for the events in Zepa. Despite the fact that Beara is charged with JCE to forcibly transfer the Muslim population from Zepa[854] as well as deportation of Bosnian Muslim men from Zepa to Serbia[855] none of the JCE elements were proven beyond reasonable doubt.

388. Many witnesses were heard on the issue of Zepa and it was established that other members of the Main Staff were seen in Zepa, but not a single witness claimed to have seen Ljubisa Beara.[856]

389. Richard Butler testified in relation to Ljubisa Beara's whereabouts that from the intercept conversations and document Beara was not visible in the period relevant to the Zepa operation, namely between 17 and 31 July 1995.[857] Butler also confirmed that he did not find any evidence that Beara was in Zepa while the transportation of civilian population was being conducted.[858]

390. The only evidence in relation to Ljubisa Beara and the deportation claims relating to Zepa are purported intercept conversations after the alleged forcible transfer was completed where Beara is an alleged participant. It is respectfully submitted, that these intercepts are likewise unreliable and should be rejected.

[854] Indictment para.49;
[855] Indictment, para.84;
[856] See testimonies of Richard Smith, Thomas Dibb, Hamdija Torlak, also see 2D657, 92 bis statement of Vladimir Divljak;
[857] Richard Butler, T20213;
[858] Richard Butler, T20217;

391. However, if the Honorable Trial Chamber finds that Beara is one of the participants in the intercept conversations it respectfully cannot find Ljubisa Beara guilty based on such intercepts because they relate to events after the date of the alleged crimes.

392. The first intercept is purportedly captured on 1 August 1995 at 1001h between three individuals. Jevtic from Serbia, Stevo and Ljubisa Beara from the Main Staff of VRS.[859] The conversation seemingly deals with the Muslims who are crossing the Drina into the Republic of Serbia. Steva is informing Jevtic that Ljubisa Beara will call and it seems that Beara is connected. Clearly Beara is saying that they will try to do something and when they get prisoners they will call the International Committee of the Red Cross (MKCK). The only inference that can be reasonably concluded from this conversation is that there is no criminal intent on the part of Ljubisa Beara considering that he is clearly stating that MKCK will be called which is the legal and proper manner in which to proceed.

393. The second intercept is purportedly captured on the same day but at 2245h and according to the intercept operator one of the participants is Ljubisa Beara although the only reference is to an unknown Ljubo who did not introduce himself and was not identified by name.[860] As previously analyzed it is submitted that the Honorable Trial Chamber cannot conclude beyond reasonable doubt that a reference to "Ljubo" is a reference to Ljubisa Beara.

394. Nevertheless, in this second intercept the participants are seemingly talking about Muslims that are crossing the Drina into the Republic of Serbia. Once again the participant that is allegedly identified as Ljubisa Beara is saying that "International Committee of the Red Cross (MKCK) should be requested to escort them (probably Muslims) to us and that they can be exchanged here, as written in the contract." The person is further stating "we had no plans to kill them, the motherfuckers, but to exchange them."[861] The person is also saying "let them register them". It is again obvious that this person does not have criminal intent towards the Muslims mentioned in the conversation.

[859] P1378a;
[860] P1380a;
[861] ibid, page 2;

395. It is respectfully submitted that Richard Butler testified relating to content of these intercepts and opined he does not see anything improper within the intercepted conversation from a military analytical standpoint.[862]

The Prosecution failed to meet its burden of proof with respect to the subjective elements of JCE

396. With respect to the first category of joint criminal enterprise it must be shown that the accused and the other participants in the joint criminal enterprise intended that the crime at issue be committed.[863] Where the criminal object consists of a crime requiring specific intent, the Prosecution must prove not only that the accused shared with others the general intent to commit the underlying offence but also that he shared with the other JCE members the specific intent required of the crime.[864]

397. The *mens rea* which must be possessed by a participant in the JCE is no different from the *mens rea* which must be possessed by a person committing a crime on his or her own.[865] Inferences of such intent must be the only reasonable inference on the evidence.[866] It is not enough that one participates in the JCE but that one does so intentionally.

398. There were many acts that have been attributed to Blagojevic as to his participation[867] yet there was not enough evidence for the Honorable Trial Chamber to conclude that he shared the intent of the JCE to forcibly transfer women and children out of Srebrenica.[868] Although the Prosecution established was that Blagojevic "knew of the assistance rendered by members of his brigade, and that the acts undertaken by them assisted in the commission of forcible transfer"[869] it was not proven that he personally had the intent required for this crime. This finding was affirmed by the Appeal Chamber that held that "Blagojevic's failure to intervene, at least with respect

[862] Richard Butler, T20224;
[863] Tadic Appeal Chamber Judgment, para.228; also see Stakic Appeal Chamber Judgment, para.65;
[864] Kvocka Appeal Chamber Judgment, para.110;
[865] see Mpambara Trial Chamber Judgment, para.38, (11 Sep 2006),
[866] see Brdjanin Appeal Chamber Judgment, para.429,
[867] see supra notes 230-233;
[868] see Blagojevic Trial Chamber Judgment, para.712,
[869] ibid., at para.758,

to the participation of Bratunac Brigade resources, to prevent the forcible transfer operation might suggest that he had the intent to carry it out. However, it does not necessarily compel such a conclusion."[870]

399. Similarly in Krstic the intent to further common criminal design (forcible transfer) was inferred from Krstic extensive participation in it.[871]

> "The Trial Chamber finds that General Krstic subscribed to the creation of a humanitarian crisis as a prelude to the forcible transfer of the Bosnian Muslim civilians. This is the only plausible inference that can be drawn from his active participation in the holding and transfer operation at Potocari and from his total declination to attempt any effort to alleviate that crisis despite his on the scene presence."[872]

400. As previously stated the Prosecution was not able to establish that Ljubisa Beara was in Potocari or Srebrenica before or during the preparation of the population transfer. Hence, it is respectfully submitted that the Honorable Trial Chamber cannot conclude that Ljubisa Beara was aware of the appalling conditions in Potocari. It is further submitted that based on the evidence it cannot be concluded that Ljubisa Beara had the intent to further the common criminal design (forcible transfer).

401. In light of the fact that Ljubisa Beara was not in Potocari and was not aware of the crimes that were committed in Potocari including the transfer of civilian population, the Honorable Trial Chamber respectfully cannot find beyond reasonable doubt that Beara had the necessary intent to further such criminal activities or to contribute to the JCE in any way.

402. In light of the lack of evidence of Beara's participation or knowledge relating to the forcible transfer in Potocari a reasonable conclusion must be that it was not proven beyond reasonable doubt that Beara intended to commit the crime of forcible transfer. It is respectfully submitted that the only conclusion upon review of evidence

[870] see Blagojevic Appeal Chamber Judgment, para.273,
[871] see Krstic Trial Chamber Judgment, para.615,
[872] ibid

must be that Ljubisa Beara is not responsible for the JCE to forcibly transfer the Muslim population from Srebrenica or Zepa.

Ljubisa Beara did not participated in the JCE to kill able bodied men from Srebrenica

Ljubisa Beara was not present or involved in specific executions

403. The Prosecution unsuccessfully tried to prove that Ljubisa Beara was a member in the JCE to kill able bodied Muslim men alleging, without basis, that he was given authority for organizing, coordinating and facilitating the detention, transportation, summary execution and burials of the Muslim victims.[873]

404. It is respectfully submitted that contrary to the Prosecution's allegations it was not proven beyond reasonable doubt that Beara was present or criminally involved in the specific mass executions described in para.30 of the Indictment.

405. Although the Prosecution tried to link Ljubisa Beara to various execution sites using some very imprecise and vague evidence it nonetheless failed to meet its burden to prove that Ljubisa Beara was present or was in any way involved in the specific execution of Muslim prisoners.

Jadar River (allegedly on 13 July)[874]

406. Witness PW112 testified how he was imprisoned by the police in dark blue camouflage uniforms,[875] how he was brought to the shed guarded by the soldiers in camouflage uniforms where he was interrogated but not beaten and given something to eat and drink.[876] PW112 further described how he and 15 other men were taken by four Serbs soldiers to the Jadar river bank where they were shot at, while witness fortunately survived.[877] Witness PW112 recognized one of the executioners as

[873] Indictment, para.27;
[874] Indictment, para.30.2;
[875] PW112, T3203;
[876] PW112, T3203-4;
[877] PW112, T3205-6;

[REDACTED] [878] There was no evidence adduced that Ljubisa Beara was aware of the events which are alleged at the Jadar river.

Cerska and Kravica warehouse (allegedly on 13 July)[879]

407. Cerska and Kravica warehouse killings as will be submitted by the Defense in light of new evidence cannot be taken as part of the organized mass executions and as such killings that were perpetrated on those places cannot be taken as an inference of the existence of genocidal intent.[880] In this section it should nevertheless be stressed that the Prosecution did not prove who the perpetrators of the Cerska killings are[881], while at the same time it was not shown by single piece of evidence that Ljubisa Beara had any connection with the perpetrators of the killings at Kravica.

Sandici (allegedly on 13 July)[882]

408. Witness PW113 described the Sandici meadow and that according to him there was 2000 people were present and those younger then 1980 were permitted to leave.[883] Witness PW110 testified that they were given water[884] and that there was no physical abuse of the prisoners.[885]

409. Witness PW110 testified that at one moment gen. Mladic came to the meadow where the prisoners were held and told them that they will be exchanged.[886]

410. It is respectfully submitted that there is no evidence that Ljubisa Beara was aware of the prisoners being held at Sandici meadow, or that he was present at the meadow at any time.

---

[878] PW112, T3215;
[879] Indictment, para.30.3 and 30.4;
[880] See part of the brief "The Prosecution failed to prove that genocidal intent existed prior to July 13 as alleged and further failed to prove that the killings which occurred on July 13, were perpetrated with genocidal intent";
[881] See P686, Richard Butler Revised Narrative report, page.59;
[882] Indictment, para.30.4.1;
[883] PW113, T3329;
[884] PW110, T660;
[885] PW110, T662;
[886] PW110, T661-2;

Orahovac (allegedly on 13/14 July)[887]

411. The Prosecution alleges that prisoners were transferred to the Zvornik area, in the school in Orahovac in late evening of 13 July and during the 14 July.[888] Witness Bircakovic a military policemen in the Zvornik Brigade testified how the buses with prisoners arrived at Orahovac and that prisoners were partly in military uniforms and partly in civilian clothes.[889] Witness affirmed that at that point his company commander Jasikovac was the only officer on site.[890] Witness entered the school at one moment to give some water to the prisoners and explained that next morning their replacement consisting out of 30-40 soldiers in military uniforms arrived.[891] Bircakovic affirmed that he saw officers of the Zvornik brigade[892] and he stated that he saw a "Puh" military vehicle that day but that he did not see who was inside.[893] However, when presented with the possibility that Mladic visited the School he said that it was possible that he was in the "Puh".[894]

412. Witness PW101 testified at length as who he saw at the school in Orahovac and he never mentioned seeing Ljubisa Beara or described anyone like him.[895] PW142 a Zvornik military policeman[896] described the arrival of buses with prisoners in Orahovac that was escorted by civilian policemen.[897] He also said that there was a large group of Serbian civilians that were hostile towards the prisoners and that they were controlling that crowd[898] while PW143 explained that civilians wanted to take revenge against the prisoners because of their own loses.[899] PW142 mentioned some senior officers as being present but did not describe them which obviously could not be reasonably accepted as an inference in any sense that among them was Ljubisa

[887] Indictment, para.30.6;
[888] Indictment, para.30.6;
[889] Stanoje Bircakovic, T10746;
[890] Stanoje Bircakovic, T10746; also see PW143, T6532;
[891] Stanoje Bircakovic, T10747;
[892] Stanoje Bircakovic, T10748;
[893] Stanoje Bircakovic, T10753;
[894] Stanoje Bircakovic, T10768-9;
[895] PW101, T7564-5, also T7573,
[896] PW142, T6478;
[897] PW142, T6489;
[898] PW142, T6490-1; also see PW143, T6547;
[899] PW143, T6547;

Beara.[900] Among the officers mentioned by witness Tanasko Tanic at school in Orahovac there was no mention-of Ljubisa Beara.[901]

413. Bircakovic testified that at one moment he saw prisoners boarding into trucks and driving off which lasted until the evening.[902] Witness concluded that based on the burst of fire that he heard that the prisoners were being executed.[903] Witness PW101 was also present at the execution site where the prisoners were driven and he described a lieutenant-colonel being there giving orders to the soldiers in the execution squad[904] but from the description he gave it is obvious that it could not be Ljubisa Beara.[905]

414. It is respectfully submitted that the only evidence where Ljubisa Beara was mentioned by name regarding the school in Orahovac in the period of killings is the interview of Nada Stojanovic that was admitted again pursuant 92quater rule. In her interview with the Prosecution she stated "I know when we arrived to school, that there was one grey haired officer from Vlasenica, which I didn't know from before"[906] and she identified this officer as a Lieutenant Colonel.[907] Although Stojanović was unable to initially identify this "grey haired officer," towards the end of the interview, when the Legal Officer for the Prosecution mentions the name Beara, Stojanović states that "I think, as you mentioned Beara, I think that the grey haired guy I mentioned was actually Beara."[908]

415. From her interview it is obvious that Ms. Stojanovic speculated that the person she saw was Beara which cannot be used as a proof sufficient to be considered beyond reasonable doubt. Further the Prosecution, in their motion, concede that the

[900] PW142, T6492;
[901] Tanasko Tanic, T10337;
[902] Stanoje Bircakovic, T10754;
[903] Stanoje Bircakovic, T10754; also see PW143, T6541;
[904] PW101, T7581-2;
[905] PW101, T7586;
[906] Stojanović Interview, p. 28 of the interview attached to the Nikolić Motion.
[907] *Ibid*., p. 27.
[908] *Ibid*., p. 39.

fact that Ms. Stojanovic was on their 65ter list does not indicate that the Stojanovic interview is reliable.[909]

Rocevic (allegedly on 14/15 July)[910]

416. Witness PW165 who was member of Zvornik military police[911] gave evidence regarding his presence at the check point close to the Rocevic School in Zvornik where he and his colleagues prevented Serb's civilians from entering the school and taking revenge on the Muslims that were held there.[912] PW165 testified that he did not enter the school and near the school there were VRS soldiers unknown to him while he thought that prisoners in the school were Muslims from Srebrenica.[913] Further, witness Acimovic testified that in front of the school around 20p.m. he saw unknown soldiers[914] witness Bircakovic said that he saw 20 to 30 VRS soldiers in front of Rocevic School and that he assumed they were from Zvornik Brigade.[915] Witness PW165 mentioned that at the check point that day he only saw one officer and identified him as Trbic.[916]

417. Acimovic testified that the second time he came to the Rocevic school he managed to convince the soldiers that were guarding the prisoners to distribute water.[917] When he got back to his battalion around 2a.m. he purportedly receives twice in 45 minutes a coded telegram that a platoon of soldiers should be detached to execute the prisoners.[918] Acimovic testified that in the morning he left around 10 to go to the school and that he saw dozens of corpses in front of the school bathroom and described with whom he purportedly talked too and did not testify about seeing Ljubisa Beara.[919] Veljko Ivanovic described how the prisoners were boarded into the

[909] Prosecution response to motion on behalf of Drago Nikolic seeking admission of evidence pursuant to Rule 92quater, 5 November 2008;
[910] Indictment, para.30.8.1;
[911] PW165, T9905;
[912] PW165, T9922;
[913] PW165, T9912;
[914] Srecko Acimovic, T12936;
[915] Stanoje Bircakovic, T10761;
[916] PW165, T9960;
[917] Srecko Acimovic, T12936;
[918] Srecko Acimovic, T12945 and T12947;
[919] Srecko Acimovic, T12958-61;

Mercedes truck he drove to the school[920] and that Dragan Jovic drove the truck.[921] When asked who he saw at the school Ivanovic did not mentioned Ljubisa Beara[922] and further when he described what he saw at the execution site he did not describe anybody that could be Ljubisa Beara.[923]

418. Witness Dragan Jovic was present both at the Rocevic School together with Acimovic and later at the execution site where the prisoners were taken and did not testified about seeing Ljubisa Beara.[924] The same can be said for witness PW142 who was present at Rocevic School when prisoners were there and when they were put into buses he likewise never mentioned officer like Beara being there.[925]

419. Finally, Ljubisa Beara's name in relation to the Rocevic School was only mentioned by Mile Janjic but in the context of a negative command[926] and because apparently he was not there as he should have been. Mr. Janjic first described who he saw at the school, his colleagues from military police from Bratunac brigade, members of Bratunac Brigade.[927] Then witness mentioned that some 10 days later when the situation calmed down they (policemen) negatively reacted because they were being left without command cadre.[928] Beara's name was also mentioned in that context for being distanced from the soldiers.[929] Janjic finally testified that he saw Beara in front of the brigade command but only after things quieted down, after the events in Rocevic.[930]

Petkovci School and Dam near Petkovci (allegedly on 14/15 July)[931]

420. Witness PW113 described that prisoners were being killed at the school where they were held and that they were being shot at inside the school while some of the

[920] Veljko Ivanovic, T18177;
[921] Veljko Ivanovic, T18178;
[922] Veljko Ivanovic, T18183-4;
[923] Veljko Ivanovic, T18192-3;
[924] Dragan Jovic,T18053-57 also see T18065-67;
[925] PW142, T6500-6505;
[926] Mile Janjic, T17959;
[927] Mile Janjic, T17951;
[928] Mile Janjic, T17958;
[929] Mile Janjic, T17958-9;
[930] Mile Janjic, T17961-2;
[931] Indictment, para.30.7 and 30.8;

prisoners were taken outside after which he would hear the burst of fire and they concluded that they were being killed.[932] Witness also said that there were dead bodies outside the school while he was walking towards the truck.[933] It is submitted that allegations made by Marko Milosevic and Ostoja Stanisic in relation to Ljubisa Beara's presence near the Petkovci School were calculated to shift their own personal responsibility considering the killings were occurring at least in the presence of their subordinate soldiers.[934]

Kula School (allegedly on 14/15 July)[935]

421. Rajko Babic read an entry in the duty officer log book about a telegram entitled "From the command of the Zvornik Brigade to the 1st Battalion."[936] The telegram informed the 1st Battalion that on 14 July 1995, between 100 to 200 men will arrive from Srebrenica and the telegram also ordered the Battalion to prepare the gym in the Kula School for the arrival of these men, as they will spend the night at the school prior to being exchanged in Tuzla on 15 July 1995.[937]

422. Witness Slavko Peric assistant commander in 1st Battalion[938], testified that on the 14 July at the time he returned from his home to the Kula School prisoners that were brought by the buses were already in the gym of the schools.[939] Rajko Babic testified that on 14 July in addition to the 12 1st Battalion members at the school, there were an additional three to five unidentified soldiers[940] and the soldier who issued the orders with respect to the prisoners was part of this unidentified group.[941] Babic never determined where these soldiers came from.[942]

[932] PW113, T3331;
[933] PW113, T3332;
[934] See part of the brief relating to Beara's whereabouts;
[935] Indictment, para.30.9;
[936] Rajko Babic, T10216;
[937] Rajko Babic, T10216;
[938] Slavko Peric, T11371;
[939] Slavko Peric, T11381-2;
[940] Rajko Babic, T10223;
[941] Rajko Babic, T10227;
[942] Rajko Babic, T10223;

423. Slavko Peric said they had information that the prisoners will spend the night and that in the morning would be exchanged.[943] Slavko Peric testified that on the 16 July at around 12:00 hours, two officers arrived at the school, followed by a van containing a dozen soldiers and an empty bus.[944] He saw the unidentified soldiers load the prisoners on the bus and drive them away[945] and he did not know initially where the bus was going.[946] PERIĆ states that one bus was involved in the operation[947] and that as the bus returned to the school a second and third time to load more prisoners he could hear gun shots in the distance which led him to conclude that the bus wasn't taking the prisoners very far away.[948]

424. Slavko Peric described one of those two officers as "tall, going bald"[949] but he said that he saw those men for the first and last time in his life and did not know who they were.[950] Peric also conceded that previously he described one officer as being quite strongly built, quite bulky, with grey hair[951] and acknowledged that he previously named Beara and Popovic in the statement to the Prosecution. However, while under oath Peric confirmed that although they bore some resemblance to the officers he saw at the School he cannot with certainty identify and confirm their presence.[952] Finally, Peric was never shown any pictures by the Prosecution prior to testifying and never with the reasonable degree of certainty identified Ljubisa Beara as the officer he saw at the Kula School.[953]

425. Rajko Babic's testimony was analyzed previously in this brief regarding seeing an officer on 15 July and it should be stressed again that this witness unlike Peric was shown pictures but was unable to recognize them the officer he saw at the school and nevertheless categorically stated that the officer he saw did not wear spectacles.[954] Even when taken together the testimony of Babic and Peric cannot be

[943] Slavko Peric, T11391;
[944] Slavko Peric, T11409;
[945] Slavko Peric, T11415;
[946] Slavko Peric, T11416;
[947] Slavko Peric, T11416;
[948] Slavko Peric, T11416;
[949] Slavko Peric, T11411;
[950] Slavko Peric, T11413;
[951] Slavko Peric, T11413;
[952] Slavko Peric, T11414 also see T11429;
[953] Slavko Peric, T11437-8;
[954] Rajko Babic, T10247-8;

accepted to reach the conclusion regarding Ljubisa Beara's purported presence at Kula School because neither of them have properly identified Beara with certainty as the officer they saw at the school. Finally, Babic's clear recollection that the officer he saw at the School did not wear glasses excludes the possibility that it was Beara.

Branjevo farm and Pilica cultural hall (allegedly on 16 July)[955]

426. Prisoners from the Kula School were taken from there to the Branjevo dam. Mr. Erdemovic testified in present case about his trip on the 16 July with several other members of 10 Sabotage detachment to the Zvornik headquarters[956] and involvement in execution on Branjevo farm. Erdemovic mentioned in his testimony that in Zvornik headquarters and on Branjevo farm he saw a lieutenant-colonel who was quite tall, corpulent, grayish hair wearing a uniform of the Army of Republika Srpska and was accompanied two military policemen.[957] Mr. Erdemovic said that he did not believe that the lieutenant-colonel was wearing glasses.[958] Mr. Erdemovic with other members that were with him followed the lieutenant-colonel and two military policemen that were driving the olive green "Opel Cadet" to the Branjevo farm.[959]

427. At the farm lieutenant-colonel talked with the Brano Gojkovic after which Brano told the witness that buses with civilians from Srebrenica would be coming and that were to be killed that day.[960] Witness Erdemovic described the killings of the Muslims that in the afternoon a group of VRS soldiers unknown to him came, abused the prisoners and killed the prisoners from the last bus.[961] Mr. Erdemovic testified that towards the end of the day a lieutenant-colonel returned to Branjevo farm and said that in Pilica cultural hall there were 500 people from Srebrenica who are trying to escape and that they should go and execute them.[962]

[955] Indictment, para.30.11 and 30.12;
[956] Drazen Erdemovic, T10964-5;
[957] Drazen Erdemovic, T10966;
[958] Drazen Erdemovic, T10966;
[959] Drazen Erdemovic, T10968-9;
[960] Drazen Erdemovic, T109670-71;
[961] Drazen Erdemovic, T109674-5;
[962] Drazen Erdemovic, T10982;

428. Mr. Erdemovic testified that they left for Pilica and while in a coffee bar that they could hear firing and explosions from the direction of the hall.[963] After that the soldier from Bratunac whom Mr. Erdemovic recognized came into the bar and said to the lieutenant-colonel and Brano Gojkovic that "everything is finished".[964]

429. The testimony of Mr. Erdemovic is significant and in the defense submission it proves that Ljubisa Beara was not present at the Branjevo farm and Pilica considering that Erdemovic had clearly testified about the involvement of lieutenant-colonel who was not wearing glasses which could not be Ljubisa Beara. Furthermore, the Prosecution entered into a stipulation with the defense that Mr. Erdemovic did not recognized any person when showed picture ERN04652890 which clearly contain Ljubisa Beara and that he could not identify any of the five men in the photograph as the lieutenant Colonel he observed on 16 July on Branjevo or Pilica.[965]

430. As a second stipulation it was agreed that the person Erdemovic claimed he recognized on a BBC and Srna video broadcast as the lieutenant colonel he saw on 16 July, was not Ljubisa Beara.[966]

431. With respect to the 10th Sabotage Detachment Erdemovic affirmed that the authority over it rested with Petar Salapura.[967] In addition other members of this detachment specifically Dragan Todorovic testified that he was not aware that Ljubisa Beara had any contact with the 10th Sabotage Detachment in 1995.[968]

432. With respect to the remaining allegations of purported executions it is respectfully submitted that the Prosecution failed to meet their burden of proof and clearly failed to link Beara to any of the purported executions to Beara.

Ljubisa Beara did not have the specific intent required for the crime of genocide

[963] Drazen Erdemovic, T10984;
[964] Drazen Erdemovic, T10985-6;
[965] P3657, pages 2, 3 and 10;
[966] P3657, pages 3and 4;
[967] Drazen Erdemovic, T10934;
[968] Dragan Todorovic, T13997;

433. It is respectfully submitted that on 13 July Beara did not have the specific intent to commit the crime of genocide or to kill the able bodied men that were gathered in Bratunac.

434. The lack of intent to execute prisoners on 13 July can be seen from other evidence such as the intercept conversation allegedly captured on 13 July at 09.10h where the participants were inquiring what to do with the wounded prisoners.[969]

435. In addition another intercept from 13 July directly contradicts and refutes the Prosecution's allegation that Ljubisa Beara had the criminal intent to participate, support or in any other sense contribute to the executions of Muslim men. On 13 July 1995 at 11.25h it was noted that Ljubisa Beara is sending some transportation in order that the Muslim prisoners be transferred to a internationally known and accepted prisoner or war camp, namely Batkovic.[970] From this entry it is further clear that the intent to kill Muslim men was not known or shared by Ljubisa Beara. With respect to the treatment of prisoners in Batkovic camp there was never a complaint either by ICRC or Tuzla canton commission for exchange.[971] This intercept is important also because the term "selection" is mentioned and that such a process, which is legal, should be done in order to segregate war criminals and ordinary soldiers.[972] This term as a synonym to the term "triage" and does not have any criminal meaning and is certainly not remotely related to the execution of prisoners.

436. According to witness Celanovic, Beara asked him whether he had information on the people who are suspected of torching Serbian villages and killing civilians.[973] Celanovic mentioned a book where crimes against Serbs and perpetrators were listed and Beara told him to check the IDs of prisoners in order to see whether they are among the prisoners.[974] It is obvious that this is the selection that Beara had in mind and if Celanovic even spoke with Beara, exchange between them disputes Prosecution interpretation of "triage".

---

[969] P1126;
[970] 2D642; Intercept conversation received from Croatia Government office for cooperation with the ICTY and ICC;
[971] Ljubomir Mitrovic, T23649; also see 2D654, 92 bis statement Djoko Pajic;
[972] 2D642;
[973] Zlatan Celanovic, T6631;
[974] Zlatan Celanovic, T6631-2;

437. Moreover, witnesses, like witness PW138 testified that their understanding while participating in the events where that the prisoners where transferred to Zvornik and that the only plan was to exchange them all for all.[975] Celanovic testified that the bus drivers he talked to in Bratunac told him that orders were given that prisoners will be transported in Kladanj the next morning after the reorganization of buses.[976]

438. Furthermore, Ljubisa Beara was nowhere to be found on 13 July except for Deronjic's tale about meeting him. Even if he was in contact with somebody on 13 July before he had left for Belgrade at that moment the intent to execute the able bodied men did not exist and may only have been contemplated after the Kravica warehouse execution was reported.[977]

439. Even witnesses that were motivated to support Mr. Deronjic and his attempt to shift responsibility to Beara explained that on 13 July there was no intent to kill able bodied men.

440. It is respectfully submitted that the Prosecution did not prove beyond reasonable doubt that on 13 July Beara had the intent to kill able bodied men which consisted with other documentary evidence, such as the intercept dated 13 July in which Beara notes that Muslim prisoners should be transported to Batkovic camp.[978] It can be concluded that it was instructed that 1300 prisoners should be transported to Batkovic camp and that preparations should be carried out.[979] However, something unforeseen and unpredicted happened which was the reason those expected prisoners have not reached Batkovic camp.[980] With respect to the prisoners at Nova Kasaba Subotic testified that prisoners from Nova Kasaba were handed over in Bratunac to the authority of the civilian police.[981]

[975] PW138, T3882;
[976] Zlatan Celanovic, T6693-4;
[977] See genocide part of the brief "The Prosecution failed to prove that genocidal intent existed prior to July 13 as alleged and further failed to prove that the killings which occurred on July 13, were perpetrated with genocidal intent";
[978] 7D2D642, obtained from the Croatian authorities;
[979] Ljubomir Mitrovic, T23641;
[980] Ljubomir Mitrovic, T23666;
[981] Bojan Subotic, T25009 ;

441. In the Defense submission the Prosecution did not prove that Ljubisa Beara was organizing the forcible transfer or deportation of Muslim men. Based on the aforementioned evidence the only reasonable conclusion that can be reached is that Ljubisa Beara knew that the Muslim prisoners should be transported to Kladanj. According to Celanovic, Beara told him that it is not safe to transport the prisoners because there were many people in buses but that after buses were reorganized they should be transported to Kladanj.[982] Celanovic did not say that Beara was ordering anybody in Bratunac or organizing anything but only testified that Beara was observing what was happening in Bratunac[983] and supposedly he was alone both times he allegedly saw Beara.[984] In any case, Celanovic affirmed that Beara did not use any derogatory remarks against the Muslims.[985]

442. It is respectfully submitted that if the evidence shows any intent of Ljubisa Beara in relation to the Muslim prisoners this intent was not criminal. If Beara's intent was criminal as alleged by the Prosecution it is not logical that those prisoners were supposed to be transported to either Batkovici or to Kladanj as reflected in the captured intercept where the participants did not know they were being listed to as well as the testimony of Celanovic who unequivocally confirmed that the information Beara had was that the prisoners were going to be exchanged.

443. Upon closer examination of the documentary evidence it can be seen that the Prosecution timeline of events is not corroborated. As reflected through the intercept that was captured between Mr. Deronjic and Karadzic on 13 July at 20.10h it was Deronjic and the civilian personnel who were responsible for the housing, transportation and ultimate fate of Bosnian Muslim prisoners.[986]

444. The plan between Deronjic and Vasic that emerged in the evening of 13 July is logical because the police were involved in the first mass execution that occurred at the Kravice warehouse. Furthermore, it was Vasic and his civilian police that were

[982] Zlatan Celanovic, T6641;
[983] Zlatan Celanovic, T6640-3;
[984] Zlatan Celanovic, T6691;
[985] Zlatan Celanovic, T6683;
[986] P1149;

engaged in capturing prisoners from the 13 July[987] and it was Vasic from whom Deronjic received information that he has reported to President Karadzic. Likewise, it was Vasic who reported that he was engaged in killing of 8000 Muslims in Konjevic Polje and that this job is being done solely by MUP.[988]

445. Although the testimony of several witnesses has been deemed unreliable if the Honorable Trial Court nevertheless accepts them as credible it nonetheless does not prove beyond a reasonable doubt that Beara was involved in the killings. Specifically, even if it is accepted that Beara was in Bratunac there are other more reasonable inferences why he would be there aside the one suggested by the Prosecution.

Ljubisa Beara did not have contacts with other alleged members of the JCE

446. The Prosecution recognizing the lack of presence of Beara at various sites alternatively alleges that Beara organized the killings along the Bratunac Konjevic Polje Milici road[989], and oversaw and supervised summary executions in Zvornik area.[990] It is respectfully submitted that the only conceivable manner in which the Prosecution may advance such a theory is through the principle of subordination. However, such a theory was never alleged and clearly never proven.

There was no separate chain of command or responsibility by the security branch for the prisoners of war

447. In VRS Main Staff unlike the former JNA[991] a single Sector for intelligence and security was formed and in that sector there were two administrations, the intelligence administration and the security administration.[992]

448. The VRS used the Rules of Service of the JNA that envisaged: "The security organ is directly subordinate to the commanding officer of the command, unit, institution or staff of the armed forces in whose strength it is placed in the

[987] P886, CJB Zvornik, information dated
[988] P886;
[989] Indictment, para.40 (a) (i);
[990] Indictment, para. 40 (a) (ii);
[991] Richard Butler, T20806;
[992] Manojlo Milovanovic, T12326; also see Vinko Pandurevic, T30772;

establishment, and it is responsible to that officer for his work…".[993] Witness Mikajlo Mitrovic who worked in the security organs of the VRS as a chief of security of the 2KK interpreted this article as security organs being directly subordinated to the commanding officer of the command unit.[994] Mitrovic's understanding was also that security organs were not independent but that they were initially accountable to their commander and secondly to their superior officer from the security service.[995]

449. As it was concluded previously by more than one Trial Chamber, a parallel chain of command did not exist in the VRS during the alleged commission of crimes in Srebrenica. As concluded by the Trial Chamber in Krstic "Drina Corps Command continued to exercise command competencies in relation to its subordinate Brigades and that this command role was not suspended as a result of the involvement of the VRS Main Staff, or the security organs, in the Srebrenica follow-up activity."[996]

450. This conclusion was reached by the Trial Chamber while reviewing the evidence relating to the Drina Corps that was the subject of the Chamber's analysis relating to specific criminal responsibility. However, as far as the involvement of security organs is concerned, their involvement and more specifically Ljubisa Beara's involvement must be reached after careful review of the new evidence adduced in the present case.

451. It is submitted that both the Drina Corps and especially the Zvornik brigade Commanders were in control of their respective subordinate units at the time when the executions of the captured Muslim men occured.

452. The Defense of Pandurevic in order to shift his responsibility claimed, as did Krstic and Blagojevic that members of the security branch, more specifically a Colonel from the Main Staff took over the command over the Zvornik Brigade soldiers around the schools where the prisoners were held.[997] This meritless theory was constructed to shift the responsibility from Obrenovic who at a certain point was

[993] P407, para.16, Rules of Service of Security Organs in the Armed Forces of the Socialist Federative Republic of Yugoslavia;
[994] Mikajlo Mitrovic, T25048-49; also see [REDACTED];
[995] ibid, T25049-50;
[996] Krstic Trial Judgment, para.276;
[997] Vinko Pandurevic, T30740;

acting Commander of the Zvornik Brigade and the actual Commander Vinko Pandurevic who was informed about the prisoners as reflected in his reports sooner than he was willing to admit.

453. In advancing this theory the Pandurevic Defense made a lot of use of the Main Staff Instruction issued in October 1994.[998] The instruction envisaged that VRS security and intelligence organs work on intelligence and counter-intelligence issues make up about 80% of their total engagement.[999] This Instruction was specifically used by Mr. Pandurevic in order to advance the theory that guarding and killing the prisoners were part of those 80% of their engagement for which he was not aware because of its counterintelligence nature which is independent.[1000] Mr. Pandurevic's theory is based on the assumption that commander had no right to inspect and was not aware of the mail related to the counterintelligence work reported to the security sector along the functional line.[1001] Mr. Pandurevic claimed that he was not aware when his assistant for security was involved in counterintelligence work.[1002]

454. It is not disputed that security organs are responsible for counter intelligence work[1003] and that there were certain limitations in regards to having everyone reviewing their mail and correspondence.[1004] Counterintelligence duties are duties that the security organ is responsible for ex officio and such duties are perform autonomously and without special order.[1005]

455. However, even the Instruction in para.2 restates the aforementioned Rules of Service on Security organs that envisaged that security organs are directly commanded by the commander of the unit or institution of which they form part.[1006]

[998] P2741, Instruction on command and control over the security and intelligence organs of the VRS, 24 Oct 1994;
[999] ibid, para.1;
[1000] ibid, para.2;
[1001] P2417, para.4; Vinko Pandurevic, T30783; also see PW168, T16232-3; also see 3D396, Petar Vuga expert report, page 10;
[1002] Vinko Pandurevic, T30779;
[1003] 3D396, Petar Vuga expert report, page 9; also see Petar Vuga, T23069;
[1004] Petar Vuga, T23079 and T23099-100;
[1005] 3D396, Petar Vuga expert report, page 10;
[1006] ibid, para.2;

The Defense expert Vuga testified that the aforementioned Instruction was in line with the rules defining duties of security organs.[1007]

456. While interpreting the Instruction's para.2 and the term "full independence in the implementation of intelligence and counter-intelligence tasks", [REDACTED] [1008] When asked about para.2 of the Instruction and whether authorization, analogous to the authority of State Security Department, given to security and intelligence organ were new and additional powers, Richard Butler disagreed.[1009] The Defense expert Vuga was also of the same opinion and testified that para.2 does not redefine security independence beyond the framework of the rules of service.[1010]

457. Pandurevic desperately tried to prove that functional relationships exist along the security line can and be a command relationship. [REDACTED] [1011]

458. Furthermore, perhaps the weakest part of the Pandurevic theory is that the killings of prisoners that occurred in Zvornik were committed by the counterintelligence officers. [REDACTED] [1012] The Defense expert on security listed the tasks that fall within state security and counterintelligence duties and dealing exclusively with prisoners is not among those tasks.[1013]

459. [REDACTED] [1014] [REDACTED] [1015] [1016] Prosecution expert Butler agrees with this and he made it pretty clear stating "issues dealing with prisoners of war are not a counter-intelligence function. They are a command function."[1017] [REDACTED] [1018]

[1007] Petar Vuga, T23100-1;
[1008] PW168, T16214-5;
[1009] Richard Butler, T20809;
[1010] Petar Vuga, T23097;
[1011] PW168, T16161;
[1012] PW168, T15771;
[1013] 3D396, Petar Vuga expert report, page 10;
[1014] PW168, T16230;
[1015] P2741, para.7;
[1016] PW168, T16230-1;
[1017] Richard Butler, T20953;
[1018] PW168, T16690;

460. Likewise, Mr. Pandurevic, in order to avoid his own criminal responsibility, advanced the alternative theory that the security branch and more specifically Beara was given the special task by Mladic to deal with prisoners of war, and was given units and assets for the execution of this task.[1019] Mr. Pandurevic while seeking to explain this theory accepted that there was no parallel chain of command or any chain of command within the security organ.[1020] Nevertheless, Pandurevic further claimed that Beara had the possibility to command the men engaged in the task because he was the most senior officer on the ground.[1021] In regard to the Petkovci School, Pandurevic asserted that all the men engaged around the school in dealing with prisoners of war were directly subordinated to Beara.[1022] Pandurevic's baseless and self supporting claim defies logic and ignores any and all well established military doctrines on command and the principle of unity of command. The scenario offered by Pandurevic would result in military chaos wherein the purported intervention by others would render every unit disabled and worthless.

461. As previously discussed the motive for Mr. Pandurevic to advance such a theory is obvious considering that he was the Commander of the Brigade in whose responsibility Petkovci and other schools were located, and his soldiers were involved or knew of the executions. Richard Butler testified that the brigade commander has an exclusive right of command and testified that individuals outside the formation even if they are higher-ranking individuals, do not have the authority to interfere with that particular commander's right to command his own brigades.[1023] Defense military expert on the security issues confirmed that this was dictated by the highest military principle of unity of command.[1024]

462. It is undisputed that at no time was the Zvornik Brigade without a commander. Even if Mr. Pandurevic's testimony is accepted that he was not the commander of Zvornik Brigade from 10 to 15 July 1995 he accepted that Dragan Obrenovic was

[1019] Vinko Pandurevic, T31415;
[1020] Vinko Pandurevic, T31415;
[1021] Vinko Pandurevic, T31416;
[1022] Vinko Pandurevic, T31416;
[1023] Richard Butler, T19619 and T30756-7;
[1024] 3D396, Petar Vuga expert report, page 12;

acting as commander during that period and that Obrenovic was not absent from the Brigade at any time.[1025]

463. The Prosecution expert Richard Butler does not agree with Mr. Pandurevic's theory and even though he left opened the possibility that the officer from a superior unit in theory could have approached an ordinary soldier and give them some orders Butler testified that it is probable that the soldier would not react to this.[1026] Further, Butler testified that this is even less likely when dealing with professional soldiers and especially when dealing with officers like Majors Jokic or Captains Milosevic and Jasikovac.[1027] This was also confirmed by experienced officers like Mirko Trivic who said that if somebody from the superior command was to carry out something illegal in coordination with an organ of the command in his brigade he would not allow such a thing to happen and would take measures against the officers involved.[1028]

464. Mr. Pandurevic's speculative theory and baseless claim was also exposed when he admitted that he did not see any document and did not hear or know of any testimony under oath that Beara was given such a specific task from Mladic.[1029]

465. It is respectfully submitted that several documents are relevant in order to analyze whether there was relation between security organ and the prisoners of war during the Srebrenica operation. Pandurevic gave his version of events when he read the Krivaja 95 order and its paragraph 10(B) as giving responsibility to the security organs and military police.[1030] Paragraph 10(B), states that the "Security organs and military police will indicate the areas for gathering and securing prisoners of war and war booty".[1031] The Defense expert Vuga was of the opinion that it was not the task of security organs to determine the areas of collection of prisoners of war as envisaged in P107 because this was not consistent with its functional purpose.[1032] Similarly Vuga explained that war booty is something within the purview of the logistic's organ.[1033]

[1025] Vinko Pandurevic, T31960;
[1026] Richard Butler, T20829 and T20831;
[1027] Richard Butler, T20830;
[1028] Mirko Trivic, T12035-7;
[1029] Vinko Pandurevic, T32465;
[1030] P107; also see Vinko Pandurevic, T32365;
[1031] P107, para.10(B);
[1032] Petar Vuga, T23197;
[1033] Petar Vuga, T23198;

466. Mr. Pandurevic did not comment on the portion of the order envisaged that in treating the prisoners of war and the civilian population strict adherence to Geneva Conventions is also ordered.[1034] This kind of an order is completely in compliance with international law and directly contrary to the purported plan given to the security sector to execute prisoners that Pandurevic was trying to prove without any corroborative evidence.

467. Additionally during the Trial a different version of the Krivaja 95 operation order was shown in which para.10 (B) has been crossed out and where it was written by hand that "'Area for collection of prisoners of war, and the war booty is the area of Pribicevac".[1035] This document was found in the Bratunac brigade and it implies that a correction to the original order was communicated to the Bratunac Brigade where probably Momir Nikolic made this correction in the order. Thus, security had no role whatsoever.

468. On the other hand, Mr. Pandurevic, in order to support his claim that he did not have any obligation towards the prisoners held at the Zvornik schools, is shifting responsibility to those who brought the prisoners there.[1036] In doing this he ignored orders given to the Zvornik Brigade by the Drina Corps Command and to him personally by the Commander of Drina Corps Krstic. Mr. Pandurevic insisted that the orders regarding the prisoners issued on 13 July that actually contains an order to capture prisoners and nothing to do with those already captured.[1037] Pandurevic when confronted with the adjudicated facts that both Krstic and Mladic had information about the captured prisoners on the 13 July maintained that they supposedly did not inform him about that when they met.[1038]

469. Mr. Pandurevic while analyzing the wording of the Main Staff and related Drina Corps order[1039] relating to the prisoners which states "put captured and disarmed Muslims in suitable buildings that can be secured by small forces and

[1034] P107;
[1035] 1D382;
[1036] Vinko Pandurevic, T31801;
[1037] Vinko Pandurevic, T31802;
[1038] Vinko Pandurevic, T31468-9;
[1039] P117;

immediately inform the superior command" continues to be in denial and responded that he was not acting pursuant to this order.[1040] Persistently and quite incredibly Pandurevic insisted that the Krstic order he received on 15 July also had to do with capturing Bosnian Muslims but purportedly nothing to do with the prisoners in Zvornik.[1041] However, it is obvious from his own interim combat report from 15 July that he had authority over prisoners held in the Zvornik area. He informed the Drina Corps that an additional burden for them is the large number of prisoners distributed throughout schools in the brigade area and that if no one takes responsibility for them he will be forced to let them go.[1042]

The authority over the military police rests with the Commander

470. The Military police units and the Service Regulations of the SFRY Armed Forces Military Police envisaged that: The officer in charge of the military unit and institution within whose establishment the military police unit is placed or to which it is attached commands and controls the unit.[1043]

471. One of the tasks performed by the military police during wartime is to "take part in providing security for prisoners of war in prisoners of war camps".[1044] Military police participate in securing POWs at the stations for the collection of POWs and POW camps and while they are being escorted, and secures only certain categories of POWs.[1045] It should be noted that in relation to the duties and tasks relating to the prisoners of war military police is defined as participants in duties and tasks that some other organs of the Army commands and units are responsible for.[1046] The Rules of Corps of Ground Forces prescribe that security organs have the role in specialist control over military police and propose its use within the limits of its authority.[1047] The Defense expert in his report again explained the duties the security organ is

[1040] Vinko Pandurevic, T31819;
[1041] Vinko Pandurevic, T31850;
[1042] P329, Zvornik Brigade interim combat report;
[1043] P707, Art.12, Service Regulations of the SFRY Armed Forces Military Police;
[1044] 3D396, Petar Vuga expert report, page 19;
[1045] 3D276, Instructions on the Application of the Rules of Service of the Military Police of the Armed Forces of the SFRY; also see P707, item 57;
[1046] 3D396, Petar Vuga expert report, page 23;
[1047] 7DP412, Rule of Corps of Ground Forces (provisional), item 74;

responsible for, although plainly the command organs are responsible in which the security organ only participates.[1048]

472. The Defense military expert found that there are direct or indirect prescribed obligations of the security sector with regard to prisoners of war.[1049] He also stated that only the commander of the unit in which a military police unit is placed has the right to command the military police – the right to make a decision on the use of the military police.[1050] From the Defense expert report it can be seen that the Security sector may have certain contacts with prisoners of war, however such contacts are attenuated and go through the military police units. Security organ provide specialist advice and recommendations on the use of military police unit and the commander is not obliged to accept any proposal from the security organ.[1051]

473. Witnesses that have applied these rules during the relevant time explained them as meaning that the security organ would make a proposal but that it was up to a commander of a unit to issue the order to the commander of the military police unit.[1052] Further, it was stated that the authority of the security organs over military police was mostly based on their obligation to make sure that units of military police were manned by professionals, to provide military education and to make sure that those units are equipped with all means that are indispensable for the work of a military police unit.[1053]

474. The Defense expert emphasized that when the military police unit is engaged in carrying out tasks outside the their prescribed scope of work and competence, the security organ is not competent, nor can it be considered qualified for exercising specialist control over the military police.[1054] The Defence expert concluded that the commander may not transfer to the security organ his responsibility for decisions and consequences of decisions issued pursuant to his authorization.[1055]

[1048] 3D396, Petar Vuga expert report, page 9; also see Petar Vuga, T23057;
[1049] 3D396, Petar Vuga expert report, page 11;
[1050] 3D396, Petar Vuga expert report, page 12; also see 2D653, 92 bis statement Stojan Cvijanovic, page.4; 2D658 92 bis statement Makivic Slobodan, page 2;
[1051] 3D396, Petar Vuga expert report, page 12;
[1052] Mikajlo Mitrovic, T25052;
[1053] ibid, T25055-6;
[1054] 3D396, Petar Vuga expert report, page 16;
[1055] 3D396, Petar Vuga expert report, page 17;

475. In more general terms it was stated by the Chief of Staff of the VRS, Manojlo Milovanovic that prisoners of war in general were interviewed and interrogated by the intelligence and security sector while their accommodation and their security is in the hands of the administration for logistics.[1056] Furthermore, Milovanovic stated that the role of the chief of security is to advise the commander on the use and the combat readiness of the military police.[1057]

476. [REDACTED] [1058] [1059] [1060]

477. With respect to the 10th sabotage detachment it is undisputed and as stated by Milovanovic that this detachment was subordinated not to security but to intelligence sector of the Main Staff and ultimately to Gen Tolimir.[1061]

478. The Prosecution did not prove beyond reasonable doubt any of the acts of alleged participation of Ljubisa Beara in the JCE to kill Muslim able bodied man. It is submitted that there was no proof of Ljubisa Beara's direct participation in the JCE to kill able bodied men and his participation could not be inferred in any JCE.

[1056] Manojlo Milovanovic, T12366;
[1057] ibid, T12394;
[1058] PW168, T16239;
[1059] PW168, T16240;
[1060] PW168, T16706;
[1061] Manojlo Milovanovic, T12166;

Joint Criminal Enterprise III

479. The Prosecution alleged but failed to prove that it was foreseeable to Ljubisa Beara that individual criminal acts such as individual opportunistic killings and persecutory acts during the Joint Criminal Enterprise to forcibly transfer and deport the populations of the Srebrenica and Zepa enclaves[1062] would occur thereby creating responsibility for those acts under the third form of JCE. It was alleged that the opportunistic killings were committed in four separate and distinct incidents in Potocari, in four different unforeseen and unpredictable incidents in Bratunac, the Kravica supermarket and the Petkovci School.[1063]

480. The objective elements (actus reus) of the third form of the JCE are the same for all three forms of JCE.[1064] Three elements applicable to the third form of JCE are: first: a plurality of persons, second: the existence of a common purpose (or plan) which amounts to or involves the commission of a crime provided for in the Statute, and third: the participation of the accused in this common purpose.[1065]

481. However, with respect to the third form of JCE for crimes other then those agreed upon in the common plan, the Prosecution is required to prove an additional mens rea element. Criminal responsibility arises only if (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.[1066]

482. Willingly taking the risk is interpreted to require reckless type of fault (mental state) or dolus eventualis, meaning that ordinary negligence would not suffice.[1067]

[1062] Indictment, para.83;
[1063] Indictment, paras.31.1 to 31.4;
[1064] see Tadic Appeal Chamber Judgment, para.227, also see Vasiljevic Appeal Chamber Judgment, para.100, (25 Feb 2004), also Brdjanin Appeal Chamber Judgment, para.364, (3 Apr 2007),
[1065] ibid.,
[1066] see Tadic Appeal Chamber Judgment, para.228;
[1067] ibid., at para.220,

The Prosecution failed to prove Ljubisa Beara's responsibility pursuant to JCE III

483. Krstic was found liable for murders, rapes, beatings and abuses committed against the refugees at Potocari because those crimes were the natural and foreseeable consequences of the ethnic cleansing campaign.[1068] The Trial Chamber found that

> "…given the circumstances at the time the plan was formed, General Krstic must have been aware that an outbreak of these crimes would be inevitable given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection. In fact, on 12 July, the VRS organised and implemented the transportation of the women, children and elderly outside the enclave; General Krstic was himself on the scene and exposed to firsthand knowledge that the refugees were being mistreated by VRS or other armed forces."[1069]

484. It is respectfully submitted that a similar finding with respect to Ljubisa Beara is not warranted based on the evidence considering that he was not aware nor could he have foreseen any of the persecutory acts as alleged by the Prosecution.

485. As previously submitted, it was not proven that Ljubisa Beara was present or in any way involved in the Bratunac, Kravica or the Petkovci School during relevant times when the alleged opportunistic killings were committed.

486. The same acts as alleged in the present Indictment were plead and decided in the Blagojevic and Jokic case when Blagojevic was found guilty for opportunistic killings. The Trial Chamber in Blagojevic found that he:

> "…had the knowledge that the action of members of his brigade assisted in the commission of murder in the town of Bratunac, the Trial Chamber recalls that Colonel Blagojević was present in Bratunac town between 12 and 14 July. On

[1068] See Krstic Trial Chamber Judgment, para.616;
[1069] Ibid;

> these days, where shooting is reported to have been heard throughout the night, Colonel Blagojević was at the brigade headquarters and slept at his apartment located close to the Vuk Karadžić school.2195 He was aware of the situation in Bratunac town, including the conditions under which the men in Bratunac town were being detained.2196 The Trial Chamber finds that based on these factors, the only reasonable inference that can be made is that Colonel Blagojević knew that members of the Bratunac Brigade gave practical assistance to the murder of men in Bratunac town."

487. It is respectfully submitted that should the Honorable Trial Chamber find the testimony of Momir Nikolic and the local civilian official credible that it was nevertheless not proven that Ljubisa Beara had the knowledge of the murders committed in Bratunac.

488. Even the witness who allegedly claimed being in Bratunac with Ljubisa Beara, Celanovic did not testify that he knew at that time of the murders and further denied that he saw any murders in Bratunac.[1070]

489. [REDACTED] [1071] It is respectfully submitted that such evidence is speculative at best and should not be relied upon.

490. Similarly as previously discussed witnesses Marko Milosevic and Ostoja Stanisic testified untruthfully about the purported whereabouts of Beara near the Petkovci School.

[1070] Zlatan Celanovic, T6674;
[1071] PW138, T3805;

Aiding and Abetting

491. To establish aiding and abetting, it must be proven beyond a reasonable doubt that the aider and abettor:

i) carried out acts which consisted of practical assistance, encouragement or moral support which had a substantial effect upon the commission by the principal of the crime and

ii) was aware of the essential elements of the crime which was ultimately committed by the principal.[1072]

492. The Mens rea element of aiding and abetting requires that the aider and abettor know (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender.[1073]

The evidence adduced at Trial clearly established that Beara did not carry out acts which consisted of practical assistance, encouragement or moral support which had a substantial effect upon the commission of crimes by others

493. It is respectfully submitted that the Prosecution failed to prove beyond a reasonable doubt that Beara provided any assistance, encouragement or support which substantially affected the crimes perpetrated by others. The evidence, both viva voce and documentary, reveals that as the Prosecution asserted in the Blagojevic case that indeed Beara was an "empty vessel" with no power or authority to influence or change the course of events.[1074] Further, it is respectfully submitted that the Prosecution failed to establish any evidence that would be contrary to its prior admission relating to Beara's non involvement or non participation and lack of assistance, encouragement and support.

[1072] Aleksovski Appeal Chamber Judgment, para.162;
[1073] Krstic Trial Chamber Judgment citing Aleksovski Appeal Chamber Judgment, para.162; also see Tadic Appeal Chamber Judgment, para.229; also see Kunarac Trial Chamber Judgement, para.392;
[1074] See Prosecution Opening Statement, page.401;

The evidence adduced at Trial clearly established that Beara was not aware that the crimes were being committed

494. Similarly, a detailed review of the evidence adduced at the Trial reveals that Beara did not know and was not aware of the crimes that were being perpetrated. Moreover, the Defense submits that the Prosecution failed to produce any evidence which may establish Beara's knowledge during the time the crimes were being committed.

495. It is respectfully submitted that the Prosecution failed to prove beyond reasonable doubt that Ljubisa Beara is responsible for any type of responsibility envisaged in article 7/1 of the Statute. The Prosecution failed to prove that alleged acts of Ljubisa Beara meet the threshold required by the objective elements of 7/1 and furthermore there was no evidence presented to the Honorable Trial Chamber that Ljubisa Beara possessed the required mens rea for any of the type of responsibility envisaged by the article 7/1 of the Statute as charged in the Indictment.

496. In light of the foregoing it is respectfully submitted that the Prosecution did not prove its allegation in the Indictment that Ljubisa Beara:

- organized and assisted in the gathering together, detention, transportation and execution of Muslim men (along the road);
- supervised, facilitated and oversaw the transportation of Muslim men from Potocari to Bratunac and from there to detention centers in the Zvornik area (schools at Orahovac, Petkovci, Rocevic and Kula and Pilica cultural centre) 13-16 July and oversaw and supervised their summary execution;
- participated in the effort by Krstic to capture Muslim men fleeing from Zepa enclave over Drina to Serbia;
- as Chief of Security of the Main Staff and by authority vested in him by Mladic he had responsibility for handling prisoners and to ensure their safety and welfare. He failed to do so.[1075]

497. Thus, an order and judgment of acquittal is warranted.

[1075] Indictment, para.40;

The Prosecution failed to prove its allegation in Count 1 Genocide and Count 2 Complicity to Commit Genocide

498. The evidence adduce during trial does not prove that elements of the charged crimes are fulfilled. Genocide is defined in the article 4 of the Statute as:

> 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national ethnical, racial or religious group as such:
> a) killing members of the group;
> b) causing serious bodily or mental harm to members of the group; …
> 3. The following acts shall be punishable:
> a) genocide;
> b) conspiracy to commit genocide;[1076] …

499. Killing in subparagraph 4(2)(a) must be intentional but not necessarily premeditated.[1077]

500. Causing serious bodily or mental harm in subparagraph 4(2)(b) is defined in the ICTY jurisprudence to mean: acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury.[1078] The Trial Chamber in Krstic stated:

> "serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life. In subscribing to the above case-law, the Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury".[1079]

[1076] Statute of the ICTY, Art.4;
[1077] Stakic Trial Judgment, para.515; see also Kayishema and Ruzindana Appeal Judgment, para.151; Akayesu Trial Judgment, paras 500-501;
[1078] Stakic Trial Chamber Judgment, para.516;
[1079] Krstic Trial Chamber Judgment, para.513;

501. The mens rea elements of genocide requires that an accused must have special intent to destroy, in whole or in part, a national, ethnical, racial or religious group.[1080]

502. The level of intent is the dolus speciallis or "special intent".[1081]

503. The term "in such" was interpreted in jurisprudence as an element that makes genocide an exceptionally grave crime which is distinct from other serious crimes – such as persecution where the perpetrator selects his victims because of their membership in a specific community, but does not necessarily seek to destroy the community as a distinct entity.[1082] The Appeals Chamber in Stakic found that the term "as such" has "great significance, for it shows that the offence requires intent to destroy a collection of people who have a particular group identity".[1083]

504. The term "in whole or in part" was interpreted in jurisprudence that the genocide can specifically target a small geographical zone.[1084] The Krstic Trial Judgment found that: "the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it."[1085]

505. As a prerequisite to find one liable for genocide or complicity to commit genocide, the Tribunal found that the Prosecution must prove beyond reasonable doubt that genocide actually occurred.[1086]

506. Similarly as it was interpreted by the International Court of Justice that the Genocide convention looked "to safeguard the very existence of certain human groups and … to confirm and endorse the most elementary principles of morality".[1087]

[1080] ICTY Statute, at Art.4(2);
[1081] Jelisic Appeal Chamber Judgment, paras 45-46;
[1082] Krstic Trial Judgment, para.553; also see Jelisic Trial Judgment, para.79;
[1083] Stakic Appeal Judgment, para.20;
[1084] Jelisic Trial Judgment, para.83; also see Akayesu Trial Judgment, para.675;
[1085] Krstic Trial Judgment, para.590;
[1086] Stakic Trial Chamber Judgment, para.534 and 561;
[1087] Cited by Trial Chamber in Krstic, para.552,

507. In the instant case new evidence relevant to the issue of whether genocide was committed in Srebrenica was presented. Thus, fresh consideration is respectfully required.

508. Such new evidence concerns the actual number of killed men, the scientific method employed to reach that number and the manner in which individuals died. Other types of evidence presented in the present case for the first time are the VRS documents created during the fall of Srebrenica enclave addressing the movement of the Muslim column and the vigorous fighting between the column and VRS and MUP units. Similarly, facts and opinions emerged in the present case that has undermined the authenticity of the scientific reports on the number of dead and cause of death. For example William Haglund acknowledged as true that in Krstic case he was asked whether two junior colleagues criticized his work to which he responded[1088] even though he knew that the number of colleagues is higher and that one of those colleagues describing his work as "sloppy" was Clyde Snow one of the pioneers in the field.[1089] Furthermore, at the time of his testimony in Krstic William Haglund was not confronted with the fact that his scientific methodology was set aside in the ICTR case Prosecution v. Georges Rutaganda,[1090] which was later affirmed by the ICTR Appeal Chamber.[1091]

509. It is also clear that some relevant evidence to the genocide issue adduced in the Krstic Trial was not presented to the Honorable Trial Chamber in the present case. It is most respectfully submitted that in the light of the foregoing the existence of genocide both as a factual and legal issue must be revisited in this case.

The Prosecution failed to meet its burden of proof with respect to the actual number of Muslim men that were killed

510. As will be further discussed, the number of Muslim men killed is a critical task in order to establish whether genocidal intent to destroy protected group or part of that group existed. Further, the number of killed must be established since the

[1088] William Haglund, T8943;
[1089] William Haglund, T8915;
[1090] Georges Rutaganda ICTR Trial Judgment, 6 Dec 1999;
[1091] William Haglund, T8922; and Georges Rutaganda ICTR Appeal Judgment, 26 May 2003;

Prosecution alleged that a substantial part of the group was destroyed. Based on the foregoing it is respectfully submitted that the number of Muslim men killed must be established as precisely as possible and beyond reasonable doubt. It is submitted that the Prosecution did not prove beyond reasonable doubt the number of Muslim men killed despite its efforts using several different expert scientific methods.

Number of missing persons

511. Prosecution expert Helge Brunborg was working for several years trying to establish what the number of missing persons is and has written several expert reports.[1092] The last number of missing is allegedly 7166 persons (hereinafter Brunborg list).[1093]

512. It is respectfully submitted that the number reached by Brunborg is based on methodologically unsound methods and as stated by the defense expert Ms. Radovanovic produced a margin of error range between 30 to 100 per cent.[1094] It is submitted that the sources used by the Prosecution expert are methodologically inconsistent and contain significant errors.[1095] Radovanovic explained that a large per cent of the empty fields on the Red Cross list that should have contained important data such as date of birth, or date of death is highly significant to match data and for the final result.[1096]

513. The method used by the Prosecution to mach persons on different lists such as the 1991 census and voters list made after 1995 represents 71 keys containing different elements. Defense expert Radovanovic testified that depending on the elements in those keys, by using each one you can match almost everybody.[1097] This is especially true in the cases of several keys that are very loose and as the second defense expert testified, using such keys increases the possibility that one would find

[1092] See P571, report dated 12 Feb 2000; P2410, dated 12 Apr 2004; P2412 dated 25 Aug 2004; also see P2414, report dated 16 Nov 2005;
[1093] P2414, report dated 16 Nov 2005;
[1094] Svetlana Radovanovic, T24325;
[1095] Svetlana Radovanovic, T24326-7; also see 3D398, page.12, report dated 1 Mar 2008;
[1096] Svetlana Radovanovic, T24406-7;
[1097] Svetlana Radovanovic, T24339;

certain individuals on the 1991 census list.[1098] The second defense expert Mr. Kovacevic added that 71 keys are so extensive that there is almost no person on the list of missing persons or in any other list that could not be found in the 1991 census if these keys are applied.[1099]

514. Moreover, even with such loose keys, when the process of matching performed by Brunborg was reexamined by Mr. Kovacevic, he could not match 57 people from the Brunborg list which shows that the Prosecution number is inaccurate from this aspect also.[1100] Mr. Kovacevic compared the list of missing with the list of voters which was not done by Helge Brunborg[1101] and discovered that 678 persons from the Brunborg's missing list could not be matched with voter's registers.[1102]

515. Mr. Kovacevic provided his opinion that the figure of 3000 is indicative according to several criteria.[1103] Similarly Kovacevic's analysis using a proper methodology resulted in numbers of dead or missing lower than 3000 using six different methodologies: 1) by matching Brunborg list of missing persons with census data with the criterion of first and last name and year of birth, 2) by with the list of killed soldiers of the army, 3) by deducting the number of alive soldiers from the list of soldiers in Srebrenica, 4) by deducting the number of displaced persons from Srebrenica from the population of Srebrenica, 5) by deducting the persons who died before July 1995 from the list of identified persons, and 6) by matching the Brunborg list with the list of identified person.[1104]

516. Likewise, Defense expert Ms. Radovanovic listed several other methodological errors by Brunborg in reaching the abovementioned number of missing persons. Initially Radovanovic explained that Brunborg erred after matching 87 per cent of the people from his list with the census and questioned why he did not excluded the remaining 13 per cent. Radovanovic said that it was a mistake that

[1098] Milorad Kovacevic, T22660 also T22663; also see 1D1129, Kovacevic report, dated 30 Apr 2008, para.14, also chart 1 page.4;
[1099] Milorad Kovacevic, T22710;
[1100] Milorad Kovacevic, T22665; also see 1D1129, Kovacevic report, dated 30 Apr 2008, para.14;
[1101] Milorad Kovacevic, T22664;
[1102] Milorad Kovacevic, T22685; also see 1D1129, Kovacevic report, dated 30 Apr 2008, para.27;
[1103] Milorad Kovacevic, T22686;
[1104] Milorad Kovacevic, T22686-7;

Brunborg distributed those 13 per cent to a certain degree in the Srebrenica municipality, among others.[1105]

517. The next error in the Prosecution methodology, according to Ms. Radovanovic, is that they narrowed the area of BiH when they were searching whether somebody who was listed in 1991 census existed in the voters list instead of researching the whole Bosnia.[1106] Considering that people from Srebrenica could have registered to vote in different municipalities a significant number of people were overlooked.[1107] Ms. Radovanovic found 12.000 people formerly from the Srebrenica municipality have registered to vote in other municipalities and 2000 registered to vote abroad.[1108]

518. The Defense expert Ms. Radovanovic was also of the opinion that there cannot be a demographic study if the area for which you are collecting data is not defined and further argues that Brunborg never defined what the actual territory of Srebrenica was.[1109]

519. Another methodological problem with the Brunborg list is that the rations of deaths per age group were calculated without confining the date to the same time period.[1110] Namely, the proportion of a given age group in 1995 is sought in the same age group in 1991 and above, thus the defense expert submits that the Prosecution results do not take into account the total male population (age between 0 and 9 which is a third of total Muslim population is excluded) and lumps together the missing and the dead.[1111] After applying the proper methodology the defense expert found that the percentage of deaths of men in total for five municipalities is not 14.1% as claimed by Prosecution but 6.2% and that percentage of deaths in the Srebrenica municipality is not 33.9% but 11.9%.[1112]

[1105] Svetlana Radovanovic, T24364, also see T24403-4 also see T24497-8;
[1106] Svetlana Radovanovic, T24337;
[1107] Svetlana Radovanovic, T24338; also see 3D398, page.17;
[1108] Svetlana Radovanovic, T24338;
[1109] Svetlana Radovanovic, T24366;
[1110] 3D398, page.32;
[1111] 3D398, page.32;
[1112] 3D398, page.32, table.7; also see Svetlana Radovanovic, T24379;

520. Finally, Ms. Radovanovic criticized the Prosecution for failure to use several sources that were available to them which would result in more reliable data on the number of missing persons.[1113] Ms. Radovanovic established that when matching the database of the BiH army with the Brunborg's list, she found 3277 overlaps and if the Prosecution's broad key were to be employed the result would be around 5000 persons.[1114] Similarly, Ms. Radovanovic used database of death (DEM2T) and by matching names with randomly selected letters with Brunborg list she found examples of people whose place of death is not connected to Srebrenica.[1115]

521. Ms. Radovanovic also discussed the 137 individuals she found in the ABiH list as being killed before July 1995 that appear on Brunborg list[1116] and noted that 142 certificates of death were tampered, that date of death was erased and that such certificates were send to the ICTY subsequently.[1117]

522. The Prosecution subsequently tried to match the Brunborg list with the Military records of the BiH army and demographer Ewa Tabeau found using what she calls direct approach (and what Ms. Radovanovic calls key approach) 4.964 ABiH matched from the original data and an additional 98 matches from other obtained records which comprised about 70% of the Brunborg list.[1118]

523. The second Prosecution demographer Ms. Ewa Tabeau compared the Brunborg list with the ICMP list of identified persons and found 3.837 entries overlapping on these lists.[1119] It should be noted that when the defense expert compared these two list (at that time on the list of identified individuals there was 2054 names) with the persons whose last name begins with the letter A and B the defense expert found 50 entries with the same first, last and father's name but

[1113] Svetlana Radovanovic, T24389;
[1114] 3D398, page.22; also see 3D398a, also see Svetlana Radovanovic, T24348;
[1115] 3D398, page.23; also see Svetlana Radovanovic, T24359;
[1116] 3D398c; also see 1D1368; for the examples of individuals that are still on the list of identified persons introduced by Dusan Janc see 1D1362, 1D1363,
[1117] Svetlana Radovanovic, T24502-3 and T24516-7;
[1118] 3D457, Internal memorandum from Ewa Tabeau to Peter McCloskey: ABiH Military Records Overlapping with 2005 OTP List of Srebrenica Missing, with Annexes 1,2 and 3;
[1119] P3159, Report titled Srebrenica Missing: The 2007 Progress Report on the DNA-Based Identification by ICMP, by E. Tabeau and A. Hetland, dated 11 January 2008, with Annexes I and II;

different dates of birth.[1120] It is respectfully submitted that the results obtained through comparing the two lists have methodological and technical errors[1121] and thus could not be used as proof beyond reasonable doubt as to the number of individual killed. Similarly errors and deficiencies exists in the ICMP (DNA) identification methodology.

DNA identification

524. The second number used by the Prosecution based on the DNA analyses is 4.263[1122] that were updated recently by the Prosecution's investigator Dusan Janc to 5358 identified individuals.[1123]

525. In his 2007 report, Dean Manning asserts that the "ICMP's DNA analyses of the human remains provides a much more accurate indication of the number of individuals located within the graves"[1124] than does the anthropological determination of MNI. For this reason, "the result of this DNA analysis are … used in preference to the previously used anthropological MNI."[1125]

526. The defense primarily asserts that no conclusion by the Trial Court should be made based on the DNA results considering that the defense were not given an adequate opportunity to check the trust worthiness of the DNA profiles because electropherograms necessary for such review were not disclosed in a complete by the ICMP and the Prosecution.[1126] A Defense expert testified that such electropherograms must be made available to the parties and that such practice exists before the US courts as well as courts in Serbia.[1127]

[1120] 3D398, page.19;
[1121] See 3D398, page.31;
[1122] P2993, page 1, Manning Summary of Forensic Evidence Exhumation of Mass Graves 2007;
[1123] P4490, page 5, report dated 13 Mar 2009;
[1124] P2993, page 3, Manning Summary of Forensic Evidence Exhumation of Mass Graves 2007;
[1125] P2993, page 2, Manning Summary of Forensic Evidence Exhumation of Mass Graves 2007;
[1126] Oliver Stojkovic, T22986; (Mr. Stojkovic explained that "Electropherograms are, in fact, electronic documents containing information on all the established signals based on electrophoresis of the then-DNA molecules based on the specific biological trace provided or the specific reference sample provided.";
[1127] Oliver Stojkovic, T22986;

527. It is respectfully submitted by that the DNA results specific to the Srebrenica case were not proven beyond a reasonably doubt. During the testimony of Dr. Komar new articles in the field of DNA were introduced that dispute the sole use of DNA samples as a method of identification of individuals.[1128] Dr. Komar agreed that the articles showed instances where DNA identification was not accurate and agreed that this occurs because of the exhumation process where you have co-mingling of multiple individuals in the bag.[1129]

528. Dr. Komar has also agree with the plea from the American Academy of Forensic Sciences that DNA analysis should not be the only way of identifying individuals and that anthropological and pathological components must be included in the identification process.[1130] It is significant to note that this is specifically the process used by Dean Manning in compiling his report, namely as put by Dr Komar that "he has a preference to the DNA samples versus the anthropological scientific analysis that had been done up to that date in 2007". [1131] More problematic this preference was done by Mr. Manning who is from his education as being a investigator not competent to reach this conclusion.[1132]

529. Further, Mr. Manning after making this kind of decision went further and has again increased the numbers of dead by introducing unique profiles of DNA profiles that have not been associated with specific individuals and included them in the ultimate collection or calculation of the MNI raising the number by 758 of the total number of people associated with Srebrenica.[1133] Dr. Komar disputed that those "unique" profiles that Manning used and testified that they were not at all unique because they matched between two and four people.[1134]

530. Dr. Komar also formulated the revised list of individuals[1135] which was based on the ICMP raw materials from which Dean Manning compile his list of persons,[1136]

[1128] 2D540;
[1129] Debra Komar, T23943;
[1130] Debra Komar, T23945;
[1131] Debra Komar, 23929;
[1132] 2D541, Dean Manning CV;
[1133] Debra Komar, T23953 and T23960; also see P2993, ERN06148657;
[1134] Debra Komar, T23953-4;
[1135] 2D543, Dr. Komar's Redacted ICMP Excel Database Spreadsheet;
[1136] P3002;

and testified that 473 individuals from that list have multiple identification matches.[1137] This does not mean that those individuals or DNA profiles were counted more than once but shows that those profiles were not unique even when compared to the Srebrenica samples.

531. In addition Baraybar could not confirm that DNA samples were taken for every complete body and body part, and also that taking of samples from feet and hands "is quite difficult". [1138]

532. Dr. Komar opined that Mr. Parsons's is making unfair assumptions when he is equating matching rate with collection rate.[1139] Dr. Komar further explained that Mr. Parsons assumption that collection rate has a same per cent as calculated per cent of matching rate is a false assumption.[1140]

533. It is respectfully submitted that the DNA evidentiary offering by the Prosecution is suspect for two core reasons. First, the confidentiality of the DNA data impairs independent review and, more importantly, without independent review the DNA conclusions may be prone to inaccuracy or bias.

534. Currently, the DNA evidence submitted by the Prosecution is conducted by the International Commission for Missing Persons ("ICMP"). However, the Prosecution introduced this vital information through Investigator Manning and not the specific scientists who made the purported identifications.[1141]This is significant because Investigator Manning cannot testify concerning either the methods or the analysis utilized by the ICMP, let alone the accuracy of the conclusions. In spite of this, he testified and offered into evidence his summaries labeling the ICMP identifications as undisputable fact of victim identity. Conversely, the ICMP's offerings of proof are limited.

[1137] Debra Komar, T23958;
[1138] Jose Baraybar, TT8828;
[1139] Debra Komar, T23969; also see P3005;
[1140] Debra Komar, T23970;
[1141] Debra Komar, T23920; *see also* Ex. 2D534

535. The actual disclosure by the ICMP is, at best, minimal but, in reality, an insurmountable obstacle to outside review of the purported evidence. As of late, the ICMP has only disclosed four types of documentation concerning the Srebrenica DNA identifications: (1) A letter entitled, "ICMP Statement on Estimated Number of Persons Missing as a Result of the Srebrenica Killings of July 1995, as of November 30, 2007"[1142]; (2) An Excel database describing "raw data" of purported matches[1143]; (3) A single match report[1144]; and (4) Standard Operating Procedures for various calculations.[1145]

536. The inclusive and exhaustive review of these materials will not give an independent expert, let alone a layman like Investigator Manning, any indication of the individual accuracy of each match (except in the single instance where the match report was released by the ICMP).

537. The Excel "raw database," disclosed under seal to the Beara Defense Team, only indicates when the ICMP believes a scientifically sufficient match occurred and not how the supposed match was calculated. Without every individual match report for each purported DNA match, a serious gap of vital information concerning the accuracy of the identification is created.

538. The lack of independent review of the ICMP's released data leaves critical questions unproven concerning such issues as: the statistical percentage of identification; which relatives were utilized to calculate the percentage; and whether the tested DNA sample was degraded.

539. Without this basic information, any finding of proof the Honorable Trial Chamber bases on the DNA evidence should remain suspect until at least a complete disclosure by ICMP occurs.

[1142] Ex. P3005;
[1143] Ex. P3002;
[1144] Ex. P3479;
[1145] *See* Ex. P3206; Ex. P3202; Ex. P3185; Ex. P3204; Ex. P191; Ex. P3194; Ex. P3192; Ex. P3475; Ex. P3190; Ex. P3193; Ex. P3174; Ex. P3219; Ex. P3195; Ex. P3208; Ex. P3224; Ex. P3217; Ex. P3207; Ex. P3216; P3209;

540. Because the ICMP has not fully disclosed specific information concerning individual DNA matches, the potential for inaccuracy and bias should be taken into account by the Honorable Trial Chamber before it considers the Prosecution's evidence of un-reviewable DNA identification as adequate proof of group identity.

541. The first area where the ICMP data may be inaccurate is the calculated percentage indicating an individual victim match. The ICMP DNA identification method uses statistical probabilities to indicate a match. At times, like with the single match report released by the ICMP, this statistical probability is incredibly high.[1146] However, this may not be the case with all purported matches and some experts believe other match reports would not come close to that incredible range of precision.[1147]

542. Furthermore, the potential for inaccuracy of the statistical probability is increased if the actual number of Srebrenica victims is lower than the data range utilized by the ICMP in calculating the statistical probability.

543. The ICMP's Standard Operating Procedures indicate that the initial range to calculate the probability of a match was 8,000[1148] and it later amended this number to 7,000.[1149] The acuteness of the number used to calculate the probability of a match is significant because individual statistical matches are based on this certain parameter.[1150] If the actual number of victims exhumed from the Srebrenica area mass graves was in reality much lower, say 3,000 or even 5,000, some of the ICMP's statistical identifications may fall below the scientifically acceptable level of a match.

544. This potential for inaccuracy can be exacerbated if bias is introduced into the calculations. Undoubtedly, no scientist purports to be bias but, at times, bias may creep into respective scientific conclusions.

[1146] *See* Ex. P3479
[1147] Debra Komar, T24023;
[1148] Ex. P3191;
[1149] Ex. P3224;
[1150] Debra Komar, T23965 and T23971-2;

545. As an example, the ICTY, unfortunately, has seen the effect of bias within the methods, analysis and conclusions of some anthropologist and pathologist reports.[1151] During an investigation by an independent committee experts testified that artifacts were discarded and death records were changed.[1152]

546. Additionally, Dr. Komar, a forensic anthropologist who has previously conducted exhumations for the Prosecution, testified that she personally witnessed the influence by the Prosecution over experts in the field.[1153]

547. Finally, employees of the ICMP have spoken out about the ICMP's conduct.[1154] Former ICMP employees have repeatedly made requests to the ICMP to reevaluate its methods to ensure the accuracy of their findings.[1155] Also, the former ICMP employees' articles highlight the very real possibility that remains are being returned to wrong families or contain bodies of more than one individual.[1156] Full disclosure of the DNA evidence to ensure the conclusions are accurate is necessary.

548. In sum, though the ICMP scientists may not have been maliciously motivated in their calculations, there is no way to substantiate their conclusions accuracy. Until the ICMP fully discloses its match reports, its data should not be considered sufficient proof—beyond a reasonable doubt—that a unified group existed.

Minimal Number of Individuals

549. The third way of establishing the number of killed was done by the Prosecution's forensic experts by establishing minimal number of bones that could be related to single individual. In addition to MNI Jose Pablo Baraybar introduced a Minimum Minimal Number of Individuals (MMNI) as a method and concluded that

[1151] *See* Ex. 2D70. (However, the committee did concluded that "[a]ny prosecution of war crimes in Yugoslavia w[ould] be on firm scientific grounds". Yet, the committee's own report indicates that respected experts in the field disagreed. For instance, Dr. Clyde Snow and Anthropologist David del Pino reported "sloppy science" and the failure to preserve all artifacts. Additionally, the committee admitted its report did not address either personal or personnel problems that were reported).
[1152] See id. (see comments by Dr. Clyde Snow, Archeologist Patrick Meyers, Anthropologist Dorothy Gallagher and Anthropologist David del Pino);
[1153] Debra Komar, T24001; (24 July 2008);
[1154] *See* Ex. 2D538; Ex. 2D539; Ex. 2D540;
[1155] *See id.*
[1156] *See id.*

2.541 individuals were exhumed from the mass graves from 1996 to 2001.[1157] Even though Baraybar's report will be analyzed together with other reports that are using only MNI it should be noted that defense expert Debra Komar testified that MMNI as a method does not have acceptance in anthropological community as MNI does.[1158] Despite the fact that the Indictment and the missing persons record cites to a number of approximately 7-8.000 persons, Ruez stated in 2007 that probably 96% of the graves had been exhumed.[1159]

550. Although the MNI is supposed to represent the absolute lowest number of individuals that were located in the mass graves, this minimal number does not take into consideration that errors in the calculation may have resulted in an overestimation which must be corrected by the Honorable Trial Chamber. A reliable Minimum Number of Individuals (MNI) depends primarily on accurate age determination. According to Baraybar, who was responsible for determining the MNI, "the calculation of the minimal number of individuals at the end of the day, assuming that this is a site, takes place by looking at the highest number in each of the age ranges".[1160] For this reason, an accurate age determination is important in ensuring that nobody is counted more than once.[1161]

551. An inaccurate aging of body parts may result in a single body being counted more than once. Because Baraybar used age estimations, to determine the MNI it should be stressed that such age estimations according to Dr. Komar, is not very accurate[1162] and thus is an overestimate. One of the examples of this overestimation is when where two portions of the same body separated during removal from a primary to a secondary grave are aged differently. If those body parts are catalogued into different age categories, then the single body counts as two individuals. This may occur where body parts are found that do not consist of bones that can be used to determine age. In such an instance, Baraybar stated that the person was put in a 25+ age category so long as nothing was determined to be in the process of fusion.[1163] If

[1157] P2477, page.7;
[1158] Debra Komar, T23916;
[1159] Richard Wright, T7495;
[1160] P2474, Jose Baraybar testimony in Krstic case, T3797 (29 May 2000);
[1161] Jose Baraybar, T8866;
[1162] Debra Comar, T23909-10;
[1163] Jose Baraybar, T8844;

the rest of the body is found somewhere else then it will consist of bones that can be accurately used for aging. If during that aging process, the body is determined to be younger than 25 then the body will count as two individuals in the calculation of MNI, instead of one.[1164] Also problematic is the gap between the age of 21 and 25 since Baraybar stated that, "most processes regarding the fusion of some parts of the bone to another part of the bone end on average at age 21, on average."[1165] If we take that the process of fusion which typically stops at age 21, it seems that to remain accurate, Baraybar should have grouped bones that were not in the process of fusion in a 21+ category as opposed to the 25+ category that he used.

552. According to Baraybar's and Comar's testimony there are three elements that seem of paramount importance to an accurate age determination. Those elements are well-preserved remains; know gender and a population-specific age study.

553. The first element is problematic in this specific case since most of the bodies were in skeletal from and torn up when reburied. According to Dr. Komar, the remains that are in poor condition act as a restrain for an accurate determination of skeletal age. This differential availability of elements may necessitate some anthropologists resorting to unfamiliar aging methods. This is particularly the case in secondary sites where the remains are increasingly fragmented. Jose Baraybar also acknowledged the fact that well-preserved remains are key to making an accurate age determination when he stated that "age is extremely influenced by the preservation of the remains. In other words, if I have only a fragment of a body, if I have a body part, my assessment, as age goes, will be very limited."[1166]

554. The integrity of remains in secondary graves is even more troublesome because the remains have been dug up, moved, and relocated all while exposed to unfamiliar and corrosive elements. According to Baraybar, the integrity of such remains depends on the damage to bodies caused by heavy machinery while

[1164] Debra Comar, T23909-10;
[1165] Jose Barayber testimony in Krstic case, T3847, (30 May 2000);
[1166] P2474, Jose Baraybar testimony in Krstic case, T3792, (29 May 2000);

tampering with the primary graves and the degree of preservation of the bodies at the time of tampering.[1167]

555. During his testimony, Baraybar stated that "the more fragmentary the remains are, you have the possibility, yes, that one individual from the eight to 12 could be placed in the 13 to 17 or the 15 to 24. Yes, it is possible.[1168] Therefore, given the poorly preserved remains, due to exposure to the elements over the course of several years, may lead to a misclassification of age, which in turn may lead to an overestimation of the MNI and to improper identification.

556. Gender as the second element is important to the calculation of MNI because an accurate age determination is dependant on whether an individual is male or female. Dr. Komar testified as to the accuracy, with which sex may be determined,[1169] however, this leaves hundreds of bodies for which sex was indeterminate. According to Dean Manning's report, the sex for 253 bodies and body parts could not be determined during the exhumations which took place from 1996 to 2001.[1170] Baraybar also testified that it was not possible to determine the sex in approximately ten percent of the cases and that "whenever the pelvic bones were not present, sex was not ascertained."[1171] Moreover, Baraybar agreed that the MNI count consisted of numerous bones for which neither the sex nor the age could be determined with accuracy.[1172] Dr. Komar had the same opinion and testified that there is no accepted anthropological method to determine sex or age from certain bones like a "sternum" which is mentioned in Baraybar December 1999 report.[1173] Dr. Komar further stated in relation to two Baraybar reports that it remains unclear how the connection is made between how age is established and how the MNI is calculated.[1174]

557. Third element was population specific age study. The application of North American skeletal samples, used in conjunction with the Suchey-Brooks method for

[1167] P2477, page 3; Jose Baraybar, report;
[1168] Jose Baraybar, T8868;
[1169] Debra Komar, T23910;
[1170] Jose Baraybar, T8833;
[1171] Jose Baraybar, testimony in Krstic case, T3790, (29 May 2000);
[1172] Jose Baraybar, T8842-3;
[1173] Debra Komar, T23905-8; also see P559;
[1174] Debra Komar, T23912-4;

age estimations, may have also contributed to the error rate in determining MNI. According to Baraybar they have chosen two robust techniques derived from a forensic population and specifically tested in a Bosnian forensic population in order to get the age estimates that are applicable to the population they were working on.[1175]

558. The fact is that age ranges were changed after the 1999 Bosnian report. Considering that 1996 was already presented as a report the observations were left while the changes were made regarding to the age ranges in order to make them more accurate, more close to reality.[1176] Because the Bosnian-specific study has broader age ranges than the North American-specific study, reasonable doubt exists that when the figures from 1996 were merged with those from subsequent reports that the date was misinterpreted or misconstructed. For example, according to the North American application of Suchey-Brooks, all hipbones aged between 15 and 23 should be placed into the same age category, However, according to the Balkans study, all hipbones aged between 13 and 25 should be placed into the same category. Because the numbers are not more specific it is essential that the 1996 report either be reworked so as to conform with the Balkans study or for the MNI calculation to be based on the same bone for all age categories.

559. Dr. Komar also opined on Dr. Wright's methodology on MNI employed in his 12 May 1999 report.[1177] Dr. Komar noticed that Wright stated that there were no conditions in the field and no attempts to actually analyze or understand the remains as they were being removed.[1178] It was her opinion that the number of individuals Wright was offering at that stage was more a statement of the number of body bags that were removed.[1179] Further, Dr. Komar stated that Dr. Wright, within the context of his report, gives a vague and insufficient definition of how determination was made as to what constitute a body.[1180]

560. Further as far as Dr. Wright report is concerned the Defense submits that his method of using average number of MNI from the graves that were exhumed to make

[1175] P2474, Jose Baraybar testimony in Krstic case, T3790-1, (29 May 2000);
[1176] P2474, Jose Baraybar testimony in Krstic case, T3890, (30 May 2000);
[1177] P666, page 32, Exhumation in Eastern Bosnia in 1998, Report to ICTY (12 May 1999);
[1178] Debra Komar, 23893;
[1179] Debra Komar, 23893;
[1180] Debra Komar, T23895;

a claim as to the number of MNI in unexcavated graves is methodologically very unsound.[1181] This was also the position of Defense expert Dr. Komar who testified that Wright's attempt to extrapolate his conclusion about the MNI across a number of graves which according to Professor Wright's own admission, in subsequent years did not yield bodies, is fundamentally flawed.[1182] She defined his attempt as a pure arithmetic statement.[1183]

561. The Defense submits that this kind of assessment is not just scientifically unfounded but is not even logically based. This is particularly true given the time which elapsed since Dr. Wright's report and the fact that Dr. Wright assumptions were not subsequently substantiated by the evidence. The position of the Defense is that Dr. Wright's MNI was not proven beyond reasonable doubt and cannot be used in reaching a conclusion about criminal responsibility of any accused.

562. Reviewing the Prosecutions experts reports it can be seen that different Prosecution's experts employed three different methodologies to establish MNI.[1184] One methodology was employed by Baraybar, the second one by Mr. Wright and the third one by Mr. Haglund.[1185] It is submitted that employment of three different methodologies could have lead to increasing or decreasing of the MNI. Defense position is that in criminal case conclusion in favor of the accused must be made, namely that actual MNI is lower then the one argued by the Prosecution.

The number of killed with purportedly genocidal intent is over inflated because the very large number of Muslim men killed during legitimate combat engagement are included in the overall number of killed

563. The defense submits that, as previously shown the numbers claimed by the Prosecution by using three different criteria such as missing person, DNA identification and MNI forensic number of bodies are gained by unsound methodology and that those numbers cannot be taken as established beyond

[1181] P666, page 32, Exhumation in Eastern Bosnia in 1998, Report to ICTY (12 May 1999);
[1182] Debra Komar, T23896;
[1183] Debra Komar, T23895;
[1184] Debra Komar, T23999;
[1185] See Baraybar reports P559 and P2477; also see P666, page 32, Exhumation in Eastern Bosnia in 1998, Report to ICTY (12 May 1999); also see P622, page 62-63, Haglund report, Forensic Investigation of the Pilica (Branjevo farm);

reasonable doubt. The defense further submits that even if the Court accepts those erroneous numbers it will be further shown that this number cannot be used to infer genocidal intent because it includes the large number of killed in legitimate combat engagement, as well as unknown number of suicides and number of Muslims killed by Muslims and not the Serbs. However, during the testimony of the Prosecution's expert Butler it was established that it was never the goal to establish the number of killed in column during combat activities.[1186]

564. It is undisputed that the column of Muslim men was legitimate military target.[1187] The column was formed upon orders from the military and civilian authorities and it headed towards Tuzla upon an order of Ramiz Becirovic.[1188] The column had armed people in the front and the back of the column,[1189] while according to some Muslim witnesses "those with weapons were interspersed among those unarmed".[1190] Nevertheless, the Prosecution expert Richard Butler conceded that the entire Muslim column, regardless of the civilian presence, was a legitimate military target[1191] and defining legitimate combat engagement as engagement falling within the confines of internationally established Law's of War[1192] and stated that the combat engagements between the Muslim column and VRS forces since 12 July 1995 were legitimate military combat engagements.[1193]

565. Thus being a legitimate military target the killings that occurred in the fighting between the column and Serb forces cannot be characterized as being done with any purported specific intent to commit genocide.

566. The Prosecution expert admitted that he did not try to establish how many combat engagements with the column undertook during July 1995.[1194] During the presentation of evidence in this case the vast majority of credible evidence showed

[1186] Richard Butler, T20248;
[1187] Richard Butler, T also see T3382, (Lead Prosecution agree that the column was a military column);
[1188] Mevludin Oric, T1049-50;
[1189] PW113, T3328;
[1190] PW112, T3201;
[1191] Richard Butler, T20245;
[1192] Richard Butler, T20218;
[1193] Richard Butler, T20244;
[1194] Richard Butler, T20244;

that since the column of Muslims that was formed in Susnjari[1195] started to move towards Tuzla the column was engaged in heavy fighting through the entire route.

567. Several Muslims that were eyewitnesses testified that in Jaglici there was several killed by the mortar shell, witness said that he saw bodies all along the road and that "There were ambushes all the way, and every 50 meters or so I saw bodies"[1196]. Ambush near the village Buljim in the early morning (8.00h) of 12 July was described by witness PW139 who said that "near a stream at the base of the hill Buljim" where he encountered the first ambush in which approximately 30 Muslims were killed[1197]and at least 45 injured.[1198]

568. Witness Mevludin Oric recalled that the biggest ambush engaged the column on 12 July 1995 in village Kamenica in Bratunac municipality. Witness explained that the second half of the column sat down to rest and that is when shooting started. Witness said "there was shelling, there were rifle burst, … when everything was over, I believe that over a hundred people had been killed in that place".[1199] Witness continued and explained that "a lot of people fled towards Siljkovici and Kravica, straight into the arms of the Chetniks who waited for them in Kravica and Sekovici because they were not familiar with the terrain, with the route. I believe that at least 500 people fell victim as a result of that"[1200]. Other witnesses explained that while they were fleeing jumping over dead bodies.[1201]

569. Witness PW106 testified that in the evening of 12 July "As night fell on the 12th of July, the first part of the column tried to cross an asphalt road, but at that moment, it seemed to me that a huge tree fell, and shelling started from all sides. We came under heavy artillery fire."[1202] Ambush near the asphalt road was confirmed by the witness PW139. Witness explained that they were waiting before attempting to cross the asphalt road and that at 19.30h an explosion occurred near them and they

[1195] Mevludin Oric, T871,
[1196] Mevludin Oric, T876;
[1197] PW139, T3664;
[1198] P2288, para 5, PW139 statement dated 28 May 2000;
[1199] Mevludin Oric, T877; also see PW106, T3955; also PW112, T3202 , also see P2272 Transcript of testimony from Prosecutor v. Radislav KRSTIC, Case No. IT-98-33-T, 23 May 2000;
[1200] ibid; witness corrected the transcript on page 879 and explained he said Siljkovici and not Sekovici;
[1201] PW113, T3349;
[1202] PW106, T3957;

came under fire from all direction.[1203] According to the witness in the first Kamenica ambush "between 500 and 1000 people were killed".[1204]

570. However, surviving this ambush was not the end of the 12 July fighting and PW139 confirmed that he fortunately survived ambushes near the asphalt road on the 12 July but further stated that this one was one out of four or five different ambushes on 12 July near the village of Kamenica.[1205]

571. Witness explained that soon after regrouping he was carrying wounded people on stretcher he came under direct fire by people with M53 firearms and that everybody but him were killed.[1206] When, asked how many people were with him on that occasion witness said that he thinks "there were eight of us altogether".[1207] Witness joined another group of people but soon they were attacked again and approximately 200 people died again.[1208] Finally, around midnight the group was shelled again.[1209] This was confirmed by the witness PW113 who said that during the night of 12 July there was also fire on the column, and witness saw dead bodies in the morning.[1210]

572. Witness PW139 mentioned that one of these ambushes occured "over this meadow, where we reached the ambush again."[1211] Witness Oric also testified that after the big ambush near Kamenica they collected the wounded and carried them across the meadow. When they got to the middle of the meadow witness said they were "fired upon from all sides…", "we left the wounded behind. Many people were killed on the meadow, the people who were trying to carry the wounded".[1212] After all this group of Muslim men of approximately 300 people among which was the witness reached the river and witness explained that one moment Chetniks yelled "Don't run

[1203] P2288, para.5, PW139 statement;
[1204] PW139, T3665;
[1205] PW139, T3727 and T3739;
[1206] PW139, T3665; also see P2288, para.5, PW139 statement;
[1207] PW139, T3731;
[1208] PW139, T3665;
[1209] P2288, para.5, PW139 statement;
[1210] PW113, T3328;
[1211] PW139, T3738;
[1212] Mevludin Oric, T880-881;

away - surrender." And then they started shooting. They started shooting with the artillery weapons, with the anti-aircraft guns. There was chaos."[1213]

573. All this fighting and killing happened on 12 July 1995. However, the fighting and the ambushes did not end that day. As explained by the witness PW139, from the 11 July until the date he was capture on 18 or 19 July he experienced ambushes and the gunfire each and every day.[1214]

574. During the 13 July fighting the same intensity continued. Witness PW106 testified that the group in which he was part of, tried to cross the asphalt road on 13 July and that again APC opened fire on the place where they were.[1215] It is hard to say whether witness PW139 was at the same spot but he testified that on 13 July he was part of the group that tried to cross and asphalt road that time near Sandici and that "near a clearing close to the road, another ambush ensued and another 200 people were killed".[1216] The group tried to cross the road again after walking three more kilometers and they again came under fire.[1217]

575. Witness PW139 also testified that he survived two more ambushes, first in the vicinity of Pervani and the second near the school near the school in Konjevic Polje where according to the witness "the group was fired upon and many were killed".[1218] He explained that on 15 July they tried to cross the asphalt road near Snagovo but again came under fire and retreated.[1219] Next day on 16 July when he finally managed to cross the asphalt road he saw that two more people were killed after which his group continued towards Baljkovica.[1220]

576. Muslim witnesses also testified not only that they witnessed combat casualties personally but also that one could see dead bodies of killed people scattered throughout the woods. Witness PW111 testified that on 14 July he found hundreds of

[1213] ibid, T882;
[1214] PW139, T3740;
[1215] PW106, T3957;
[1216] PW139, T3665;
[1217] ibid, T3665; witness with his group cross the same road twice;
[1218] ibid, T3666;
[1219] PW139, T3667;
[1220] PW139, T3667;

dead people killed by shells, automatic weapons.[1221] Dead bodies, along the way to Tuzla was also seen by witness PW139, who testified he saw 35 bodies near the asphalt road,[1222]probably of the people who had probably tried to cross earlier.[1223] He also stated that when he reached area of Baljkovica "There were bodies everywhere" and the he "saw perhaps about 100 to 150".[1224]

577. Written evidence was also adduced during trial that put into doubt previous conclusion in Krstic that more than 7000 Muslims were killed in executions. Interim combat report of 1 zpbr, dated 15 July 1995, reports that since then several hundreds of Muslims are liquidated.[1225]

578. In addition to the legitimate ambushes, even stronger fighting occurred in the Zvornik brigade zone when the column took its final step to connect with the 2nd Corps of the ABiH. During the fighting the Zvornik brigade had many casualties because its units were confronted with thousands of Muslims trying to break through and reach the Muslim territory. The number of casualties sustained by the Muslims in this break through can be concluded from the intercept of the conversation allegedly captured on 18 July 1995 at 13.10h.[1226] Conclusion can be made that from those 5000 Muslims mentioned by the participants' a large number was killed. In another intercept concerning the same break through it is mentioned that Pandurevic said that there is hundreds of Muslim that were killed.[1227]

579. The interim combat report of the 1st zpbr dated 18 July reports that heavy losses were inflicted to the Muslims that are trying to break through to Tuzla.[1228]

580. Several Muslim witnesses also explained to the Honorable Trial Chamber that in addition to those killed Muslims in Serb's ambushes there was a lot of wounded

[1221] PW111, T7010;
[1222] PW139, T3666;
[1223] P2288, para.7, PW139 statement;
[1224] PW139, T3725;
[1225] P329;
[1226] P1248;
[1227] P1212;
[1228] P334;

Muslim man that were left behind[1229]. Witness PW139 testified when explaining the big ambush near Kamenica that "There were many who were seriously wounded, who couldn't get up, who couldn't move. You could see that they were still alive but they were almost 99 per cent dead people".[1230] Witness further explained "you would carried them…, however long you could. Then there were new ambushes. And then people who were carrying these people too got wounded or killed. So that this number of wounded and killed grew".[1231] Unfortunately, he came across very seriously wounded people witness concluded that "quite simply the person could count them as dead".[1232]

581. Witness PW111 testified that on 14 July he also found many killed in the forest and three wounded Muslims, after three days they left in the forest with the handgun and the grenade.[1233] Without any further evidence it is only reasonable to conclude that those wounded man fell to their wounds considering they were left in the forest.

582. The number of Muslim casualties in Srebrenica was tried to be establish in the Krstic case, and the Trial Chamber found that there is a "possibility that a percentage of the bodies in the gravesites examined may have been of men killed in combat"[1234]. From the evidence presented in this case and cited above the only reasonable conclusion is that a large number of Muslim men killed in fierce combat between the column and Serb forces that lasted for several days and nights.

583. As stated by witness PW139 as result of the legitimate engagement it was his opinion that at least 1.500 Muslims were killed on the way from Srebrenica to Tuzla.[1235] The only reasonable conclusion is that this number is perhaps higher considering that this figure is based on witness' personal knowledge while he also testified that other parts of the column also experienced similar ambushes.[1236] The

[1229] PW113, T3328 ("As the column moved forward on the 12th, it was shelled, throughout the day and there were increasingly more injured people who were crying for help but were left in the woods");
[1230] PW139, T3729;
[1231] PW139, T3729-3730;
[1232] PW139, T3743;
[1233] PW111, T7010;
[1234] Krstic Trial Chamber Judgment, para.77, 2 August 2001;
[1235] PW139, T3743;
[1236] PW139, T3741;

Prosecution expert said that the number between 1000 and 2000 people from the column killed in combat engagements sounds reasonable.[1237] It is respectfully submitted that the BiH casualties from the legitimate combat engagement was larger.

584. As reflected in the UNPFROFOR situation report dated 17 July 1995 it can be seen that the estimates in the time of the events which are most reliable, was that 3.000 of Muslim men were killed by the mines and BSA (Bosnian Serb Army) engagement.[1238]

585. Every other conclusion diminishing that number is unfair and strongly affects any conclusion on genocide having in mind that number of killed group members is the basis for establishing both objective and subjective elements of genocide. However, such killings must be done with specific genocidal intent and because killings of Muslim men described in this section are done in legitimate combat and not with required specific intent to destroy the group or part of the group, they must be carefully and systematically excluded from the overall number of killed.

586. If the Honorable Trial Chamber is not persuaded by the Prosecution that the number of killed in combat with the Muslim column is significantly less then 1500 it is submitted that it must revisit the previous findings on genocide with respect to Srebrenica. It is respectfully submitted based on the Muslim witnesses and relevant documents it can be concluded that the number of killed in legitimate combat engagement was 3000 or perhaps more. In any event it is respectfully submitted if reasonable doubt exists that the number of killed in combat is a substantial part of the alleged number of deceased Muslim men mentioned in the Krstic Judgment, a conviction for genocide cannot stand.

An unknown number of Muslim men were killed by landmines, committed suicides or were killed by friendly fire

587. Prosecution expert Dusan Janc testified that there was no investigation conducted to determine the number of casualties as a result of land mines, suicide or

[1237] Richard Butler, T20251;
[1238] 1D374, page 2;

combat engagement except for the Glogova site.[1239] It was undisputed that minefields existed particularly at the confrontation lines between the Zvornik Infantry Brigade and the ABiH 2nd Corps close to Tuzla. Richard Butler also testified that he heard of uncharted minefields that the VRS units placed along areas they thought were used by the ABiH for was smuggling in weapons.[1240] Even though Butler is not aware whether somebody in the Prosecution office conducted the analysis as to how many Muslims from the column died as a result of landmines, from witnesses statement describing the events, it is only logical to conclude that in such chaos there were unknown number of landmine related casualties.

588. In addition to the legitimate casualties sustained during the clash between the Muslim column and VRS and MUP forces the Honorable Trial Chamber heard evidence that a number of Muslims within the column were not killed by the Serb forces but by Muslim soldiers.

589. Witnesses testified that people in the column committed suicide because they did not want to give themselves up.[1241] Witness PW113 further explained that most of those suicides were done with hand grenades.[1242] Witness PW110 confirmed that "one killed himself with a grenade, and the other shot himself in the temple…"[1243] Such evidence was further collaborated by testimony of other Muslim witnesses who were carrying hand grenades with them while walking through the wood with the column.[1244]

590. Witness PW113 also testified in his previous statement that "On that day, people started quarrelling amongst each other and killing each other. Some wanted to surrender, the others didn't." Witness however changed this statement before the Court and said that he did not see anybody actually kill somebody else[1245]. It is submitted that the witness' memory of the events was better when giving his previous statement and that he changed his testimony when confronted with what he deemed to

[1239] Dusan Janc, T33601;
[1240] Richard Butler, T20247;
[1241] PW113, T3342;
[1242] PW113, T3345;
[1243] PW110, T797-8;
[1244] Mevludin Oric, T875; also see PW112, T3201;
[1245] PW113, T3345;

be favorable evidence for the defense. When the witness was tendered his previous statement the witness became non responsive and argumentative which was observed by the Honorable Trial Chamber and prompted the witness to admonish the witness not to argue with counsel for the Accused.[1246]

591. Moreover, the previous statement of the witness is substantiated by other evidence. In an another intercept captured on 13 July 1995 at 09.10 two unknown participants were talking about the Muslims in the column and stated that "they are killing themselves. They're putting hand grenades under them."[1247] Similarly an intercept conversation between unknown participants on 09.11h one of the participants said that he saw with his own eyes that the Muslims are killing each other.[1248] Subsequently on 13 July, around 14.45h in an intercepted conversation between unknown participants they were describing the situation with the Muslim column and reported that "it is a madhouse. Some of them want to surrender, some won't, then they are shooting among them and our guys are capturing them". [1249]

592. Witness PW139 specifically testified that around midnight of 12 July and morning of 13 July he saw one Muslim killing another and that the person killed two -- four more people .[1250] He also mentioned that in this period he saw suicides committed by people that were in the column.[1251]

593. Members of the Serb forces also testified that they saw bodies of the Muslims who had killed themselves or killed each other. Witness Bojan Subotic said that several Muslim prisoners escorted him into the woods while conducting a search of the terrain and that he "came to the place where many dead Muslims killed in the fighting amongst themselves as well as one Muslim who was hanged."[1252] It was the witness' impression that there were 500 bodies that were the result of their in-fighting.[1253] Mico Gavric testified that in the area of Kamenica when conducting a

[1246] PW113, T3346;
[1247] P1126;
[1248] P1127;
[1249] P1138;
[1250] PW139, T3733-3734;
[1251] PW139, T3665;
[1252] Bojan Subotic, T25017;
[1253] ibid, T25108;

search of terrain he saw a large group of corpses, in his estimate several hundred dead people.[1254] Mr. Gavric observed that many of them killed themselves by activating hand grenades.[1255]

594. The defense does not take any position as to the exact number of Muslims that have committed suicide or were killed by other Muslims in order to stop parts of the column to surrender to Serb forces. Furthermore Mr. Janc admitted that where the description in pathology reports records wound to the skull one cannot exclude the possibility that such individual died as a result of suicide.[1256]

595. It is upon the Prosecution to prove that number of killed in this way is not relevant number that could affect judgment on genocide. Prosecution was obliged to show that such number is not high enough to affect the finding that number of executed able bodied man can amount to fulfillment of objective element of genocide. Realistic and corroborative evidence was cited by the Defense and it will be further shown that Prosecution's experts were not able to exclude this number from the number of executed Muslims.

Forensic reports do not prove the number of killed alleged by the Prosecution or that the substantial number were not killed in combat

596. During the Prosecution case several Prosecution's experts produced evidence relating to the mass graves and the bodies found in those mass graves[1257]. Such witnesses also produced numerous experts' reports offered by the Prosecution as a proof of the charges in the Indictment.[1258] However, the Prosecution did not prove with these reports that the mass graves do not contained only Muslims purportedly executed.

597. One of the main witnesses for the Prosecution on this issue was John Clark who offered his reasons why he opines that bodies in the mass graves did not belong

[1254] Mico Gavric, T26490-1;
[1255] Mico Gavric, T26491;
[1256] Dusan Janc, T33603;
[1257] Helge Brunborg, Richard Write, Jose Baraybar, William Haglund, Thomas Parsons, John Clark, Freddy Peccerelli, Ewa Tabeau;
[1258] expert anthropology reports: P559; Ex. P560; Ex. P561; Ex. P666; Ex. P665; Ex. P674; Ex. P2477; Ex. P622; Ex. P639; Ex. P640; Ex. P642; Ex. P643; Ex. P644; Ex. P645' Ex. P646; Ex. P647;

to the people killed in combat. Mr. Clark's main argument is that they did not find military clothing.[1259] However, when one analyze the evidence it is obvious that Clark opinion is flawed. PW113 testified that a very low number of men had uniforms,[1260] that in July 1995, while witness Oric stated that 28th Division did not have enough uniforms for all the soldiers in its strength[1261] and that even though he had grenades he wore civilian clothes.[1262] There were also witnesses that belong to the army units like PW111 that wore civilian clothes during the breakthrough[1263] while PW112 confirmed that many armed men in the column were in civilian clothes.[1264] PW111 also admitted that as a member of 282nd Brigade never wore a uniform before the fall of the enclave and that many members of the BiH army wore civilian clothes.[1265] This fact was also confirmed by other witnesses who were members of the armed forces like Mr. Oric who confirmed that they were wearing civilian clothes since 1992 up to 1995 and the moment he was captured because they did not have enough camouflage uniforms to go around,[1266] while witness PW156 said that maybe 10 per cent had uniforms and that almost all of them were in civilian clothes.[1267]

598. Furthermore, Clark's basis regarding the lack of military clothing is not sound considering the circumstances in which the 28th Division of ABiH operated. The fact that the ABiH soldiers did not wear uniforms was also true even before the commencement of the breakthrough by the column and a number of Duthbat soldiers testified on this issue. Witness Koster testified that starting from mid-June of 1995, he saw more and more armed Muslim fighters every time he went to Srebrenica and they wore either uniform, partial uniform or civilian clothing.[1268]

599. Witness Johannes Rutten recalled in particular that one ABiH member was not wearing a uniform during the fighting around Srebrenica and that he would

[1259] John Clark, T7342;
[1260] PW113, T3358 (witness said that he think his father was formally in army but that he did not have uniform);
[1261] Mevludin Oric, T1058;
[1262] Mevludin Oric, T875:
[1263] PW111, T7010, T7017; (witness testified that he found camouflage uniform when he found dead people in the forest, meaning that previously he wore civilian clothes);
[1264] PW112, T3259;
[1265] PW111, T7144-5;
[1266] Mevludin Oric, T1094;
[1267] PW156, T7140;
[1268] Eelko Koster, T3058-9;

characterize him as a soldier who had put on civilian clothing.[1269] Egbers said that the Muslim soldiers that threw a grenade on his vehicle on the 8 July were wearing Ukraine uniforms and civilian clothes[1270], he saw armed men without uniforms during the fall of enclave.[1271] It was also the commander of the 28th Division who testified that he wore civilian clothing "just like my neighbors. We did not have a factory, a manufacturing factory that would produce military clothes",[1272] furthermore he said that he "wore civilian clothes from 1992 up to 1995."[1273]

600. It is only reasonably to conclude that a greater number of Bosnian fighters took their uniforms off when they started the breakthrough. The motive behind this is obvious, such fighters wanted to be perceived as civilians and not as combatants if caught by the VRS forces.

601. The next argument given by Clark as to whether the graves contained bodies of those killed in combat engagements was that there were a number of young and elderly men.[1274] [REDACTED] [1275]

602. Relying upon the victim's age by Clark to show that they probably were not killed in combat can also be disputed with the order for General mobilization in Srebrenica municipality to immediately mobilize all able bodied citizens from 16 to 60 years of age.[1276]

603. Clark also gave his view that if bodies found in the mass graves belonged to the victims fallen in combat he would have expected more wounded man, with bandages or signs of previous injuries.[1277] The defense previously referenced evidence showing that most of the men that were wounded in the column were left behind, and in most cases probably died from their wounds.[1278] From that evidence it is plain that

[1269] Johannes Rutten, T4831-2;
[1270] Bernardus Egbers, T2792;
[1271] Bernardus Egbers, T2862;
[1272] Case IT 03-68, Naser Oric testimony, T1094, (22 October 2004);
[1273] ibid;
[1274] John Clark, T7343;
[1275] PW111, T7145;
[1276] 7D57;
[1277] John Clark, T7343-7345;
[1278] see text accompanying footnotes 62-65;

there was no time to treat the wounded because everybody tried to save themselves. The statement of witness PW139 who said that he knew about the technique of making a stretcher but that there was simply no time to use it, obviously goes directly against Clark conclusion.[1279]

604. Also several Muslim witnesses testified that the wounded Muslims were simply left behind.[1280] Witness PW106 testified that on the 12 July medical personnel receive the order to return and tend to the dead and wounded because the end of the column came under heavy shelling but that he could not go back due to the heavy shelling.[1281]

605. Clark was not aware of the factual scenario that occured with the column and was not aware of the ambushes the column was engaged.[1282]

606. Clark also claimed the fact that "the majority of shots killing these men came from behind" to support his view that the graves did not include bodies from those who died in legitimate combat engagement.[1283] However, it seems that Clark withdrew this claim when asked by Defense where he thinks injuries would be sustained if people are running away from the soldiers who ambushed them, he replied "Generally, you would expect them in – shots to the back".[1284] Once again this is precisely the scenario explained by the Muslim survivors who witnessed ambushes. Moreover, any conclusion that the bodies exhumed in the graves were not killed in combat is precluded by the fact that it was not possible to conclude at what distance were the shooter fired. Mr. Clark acknowledged that it was not possible to assess whether they were shot from long or short range.[1285]

607. Considering the type of fighting described by the Muslim fighters it is obvious that it is not logical to exclude that persons shot from behind can belong to the men killed or wounded during combat engagements.

[1279] PW139, T3731;
[1280] Mevludin Oric, T880-881; PW111, T7010;
[1281] PW106, T3955;
[1282] John Clark, T7393;
[1283] John Clark, T7343;
[1284] John Clark, T7394-7395;
[1285] John Clark, T7367;

608. Finally, John Clark argued that in three graves they found substantial number of men with blindfolds and ligatures,[1286] that cannot have belonged to man fallen in combat. Those graves were Kozluk, Lazete and to a lesser extent in the Glogova grave. In Krstic Judgment it was concluded that "the results of the forensic investigations suggest that the majority of bodies exhumed were not killed in combat".[1287] As the proof of such conclusion it was stated that 448 blindfolds were found at ten separate sites, and 423 ligatures at 13 separate sites.[1288] The Defense respectfully accepts this evidence and acknowledges that person with blindfolds and ligatures were regrettably killed with criminal intent.

609. On the other hand there are also graves where the type of wounds speaks to the conclusion that bodies belonged to the men that were killed in combat. Such graves are: Nova Kasaba 1999, Ravnice, Zeleni Jadar 6, Glogova 1, Glogova 2.

610. When asked about the grave Nova Kasaba 1999[1289] Mr. Clark confirmed that from the bodies discovered in that grave none had blindfolds and apart from one possible, none had ligatures binding their wrists.[1290] Clark explained that one possible ligatures was their interpretation and that it was probably a bit of cloth lying loosely with the body.[1291] Finally, when asked about the possibility that bodies in this grave belong to the people killed in combat he replied it is possible.[1292] The Defense respectfully submits that the bodies in Nova Kasaba grave were all the result of combat engagements or alternatively that the Prosecution did not prove beyond reasonable doubt that those buried in Nova Kasaba where killed with criminal intent.

611. Similarly when the grave Nova Kasaba was discussed Mr. Clark again confirmed that he is not in a position to exclude that the victims in that grave died in combat.[1293] Grave in Nova Kasaba did not contain blindfolds or ligatures.[1294]

[1286] John Clark, T7343;
[1287] Krstic Trial Chamber Judgment, para.75, 2 August 2001;
[1288] ibid,
[1289] containing NK04, NK06, NK07, NK08;
[1290] John Clark, T7353;
[1291] ibid,
[1292] ibid, T7355;
[1293] John Clark, T7368;
[1294] P575, page 17;

612. Similarly the graves at Ravnice and Zeleni Jadar revealed that the bodied buried where those that died in combat engagement. In Mr. Clark's reports it can be seen that bodies found in Ravnice had signs of burning on clothes.[1295] Witness confirmed that this is often secondary consequence of shrapnel and grenade injuries,[1296] and again confirmed that he cannot exclude the possibility that victims from Ravnice died as a result of combat.[1297] Ravnice contained 187 individuals,[1298] none of which were found with ligatures or blindfolds.[1299] In addition there was a very random pattern of firing and the bodies were not buried.[1300]

613. The factual evidence supports this scenario, while Muslim column was moving from the Susnjari in the direction of Tuzla. The route would have very likely taken soldiers through the area of Ravnice where the column may have been attacked or ambushed.

614. Zeleni Jadar consists of seven secondary gravesites. As far as bodies found in Zeleni Jadar not only were some injuries interpreted as a result of shrapnel but the shrapnel were also found in some of the bodies.[1301] Witness again affirmed that killing in combat is one of the possible theories that can explain such injuries.[1302]

615. Furthermore, it is submitted that the gravesite at Glogova 1 (with the exception of Grave L) are likely the result of a combat.[1303] According to Clarks's report the random distribution of shots to certain areas of the body as well as the direction of fire was similar to those at Ravnice.[1304] Again there was no bindings or ligatures found on or near the bodies, which indicates that the individuals in the graves could have been killed in combat.[1305] In accordance with Clark's analysis that

[1295] P2446;
[1296] John Clark, T7370;
[1297] ibid, T7371; also see Fredy Peccerelly, T8764;
[1298] P2993, page 7, Dean Manning Summary of Forensic Evidence; also see P4490, page.8, Janc report that 203 individuals were identified;
[1299] P2994, pages 8 and 9;
[1300] P2446, pages7 and 11; also see Fredy Peccerelly, T8764;
[1301] John Clark, T7372; also see P2446, page.27;
[1302] ibid;
[1303] P2446, pages 13 and 14;
[1304] P2446, page 15;
[1305] P2446, page 13;

shrapnel and bomb injuries are common in combat situation, there was in fact evidence of burning and shrapnel in the site.[1306] Richard Wright noted in his report on Glogova 1 that there were some live rounds in a jacket and an empty machine gun ammunition belt found among the bodies.[1307] This type of evidence plainly shows these persons were not captured and did not surrender but were engaged in combat.

616. Two of the undisturbed graves at Glogova 2, which consist of at least 8 graves, showed a great deal of evidence of charring and burning, which is a strong indication of a combat situation. In GL05, 47 of 73 bodies has clothing showing signs of charring and 22 cases showed evidence of charring on the bones.[1308] In GL07, approximately a quarter of the cases showed evidence of burning.[1309]

617. Defense expert Dusan Dunjic, after reviewing the Nova Kasaba autopsy reports, found that the time of death cannot be establish with certainty and that the injuries according to international classifications are injuries sustained in combat operations.[1310] As far as the Pilica site Dr. Dunjic examined 52 cases[1311] and found that Mr. Haglund's descriptions were superficial and as such prevented verification but noted Haglund's conclusions about gunshot wounds were in some cases without any argumentation.[1312] Dr. Dunjic's report on Zeleni Jadar 5 was based on his review of 20 out of 150 cases[1313] and he found that numerous shrapnel injuries existed which indicated an armed conflict, while the existence of the projectiles in the bodies and bones without any traces of gunpowder indicate that the wounds were inflicted from a distance.[1314] Dunjic, further states that charred clothing on some of the remains can confirm burning which is present in shell blasts while the distribution and localization of injuries indicate injuries occurring in armed conflict.[1315] Similarly in relation to Ravnice, where 175 bodies and 324 body parts were found on the surface, Dr. Dunjic

[1306] P2128, John Clark testimony in Krstic case, T3940, (31 May 2000);
[1307] P674, page 17;
[1308] P2475, page 12; Report on Excavations at Glogova 2, Bosnia and Hercegovina 1999-2001;
[1309] ibid, at page 4;
[1310] 1D1070, page.64, Dunjic report dated Apr 2008;
[1311] Dusan Dunjic, T22863;
[1312] 1D1070, page.91,
[1313] Dusan Dunjic, T22870;
[1314] 1D1070, page.103,
[1315] 1D1070, page.104,

found that description of injuries such as gunshot is superficial and incomplete and as such cannot confirm the existence of injuries caused by projectiles.[1316]

618. It is respectfully submitted that the number of killed in combat within the Muslim column is not based solely on Muslim witness's estimations but also on the basis that such fierce fighting could not be ended without an enormous number of causalities. This conclusion must be reached keeping in mind the description given by those witnesses who mentioned hundreds of killed in different places in forest and tens of clashes with the Serbian forces.

Cause and manner of death

619. It is respectfully submitted in order to determine whether the victims whose bodies were found in the mass graves were executed or killed in combat, the cause of death plays an important part in such analysis. It was not disputed during trial that in some cases it was not even possible to establish the cause of death. Likewise, in a number of cases cause of death was based on assumptions. It is respectfully submitted that in criminal proceedings these kind of uncertain conclusions do not fulfill the burden of proof requirement of the Prosecution. In addition, where the cause of death is provided by the experts employed by the Prosecution, as being generally gunshot wounds such evidence does not prove beyond reasonable doubt that such victims were executed.

620. The cause of death recorded by the pathologists was commonly based on general assumptions due to the fact that the bodies were severely fragmented and/or decomposed. One of the main pathologists John Clark chief pathologist for the mortuary operations[1317] testified that in a number of cases they were unable to come to a conclusion as to the cause of death so they left it as unascertained.[1318]

621. While discussing the Nova Kasaba gravesite, Clark stated that, "there were a number of individuals in which we actually found no injuries whatsoever on the body,

[1316] 1D1070, page.122,
[1317] John Clark, T7334;
[1318] John Clark, T7342;

no fractures, no nothing, and that included some bodies which were well preserved. They could have died in other ways, including natural cause…,.[1319] Because it is not possible to determine whether an individual was dead or alive at the point of being shot, it is not possible to determine that an individual was or was not actually killed at the gravesite.[1320]

622. Clark affirmed that the main problem in establishing deaths was that the bodies had been dead for some considerable time. Considering that pathologists are looking how people died and are generally looking at the sort tissue on the bodya difficulty was that bodies in this specific case, in large number, were reduced to skeletons. Clark stated that in such circumstances they were reduced to any interpretation of damage to skeleton.[1321]

623. On the other hand, in every report written by Haglund, he recorded homicide as the manner of death for all individuals in the graves, even those individuals whose cause of death was undetermined.[1322] He reasoned in his report that "considering circumstances of the scene and burial, manner of death is considered homicide for all individuals".[1323] Haglund's failure to consider any other possibility is indicative of his prejudice and the influence the Prosecution had over his work.

624. Assumptions and interpretations may be acceptable to a certain degree for pathology and anthropology reports but it is not sufficient as bases of proof in criminal proceedings. Numerous cases required assumptions in order to determine the cause of death of individuals in the graves. Because the cause of death is not based solely on concrete evidence but rather on pure assumptions, alternative plausible, logical and likely causes of death suggested previously in this brief must be considered by the Honorable Trial Chamber.

[1319] P2128, John Clark, testimony in Krstic case, T3964; (31 May 2000);
[1320] P2474, Jose Baraybar testimony in Krstic case, T3863; (30 May 2000);
[1321] ibid, T7345; also see P2128, John Clark testimony in Krstic, T3922 (30 May 2000) (Clark testified that due to the difficult state in which the bodies were located, it was necessary for the pathologists to make assumptions regarding the cause of death in order to complete their reports);
[1322] P616, page 49; (report of Lazete 2); also see P611, page 51, (report on Cerska); P622, page 50 (report on Pilica);
[1323] P616, page 70;

Dating of graves and Decedents

625. It was explained by the anthropologists that it was not possible to make an accurate assessment of the date of death for individuals found within the mass grave.

626. As stated by Haglund in his forensic report on Pilica "it is unreliable to estimate the time since death of buried individuals recovered from a mass due to the stabilizing effect of the grave environment on preservation of the remains, and the interaction of a multitude of facts which affect the rate of decomposition…".[1324] Peccerely testified that his "observations of (Ravnice), that site or any other site, were not to the extent of trying to link the bodies to a specific event.[1325]

627. In Wright's report for Glogova 1, he remarks that "the state of preservation of the bodies varies from skeletonised to virtually fully fleshed. These differences in state of preservation are not to be taken as indicating different periods of burial. In all cases the skeletonised individuals are those isolated from the main mass of bodies or those that lie on the bodies. Those that are near the surface, or isolated from the main mass, are exposed to oxygen and therefore the accelerated rate of decay. Had the explanation been different periods of burials, then it would have to be the case that skeletonised bodies lay below the more fully fleshed bodies. This is not the case."[1326]

628. This comment in Wright's report virtually eliminates the possibility that bodies were buried at different times. However, this conclusion excludes a number of logical possibilities that would consider that the bodies had been buried at different times. Wright's conclusion that if the bodies had been buried at different times then those bodies on top would be more fully fleshed, ignores his preceding statements that numerous bodies were isolated from the main mass of bodies, which is why they were skeletonised whereas the others were more fleshed. It is likely that if bodies were buried at the separate time then they would not have been buried with the main mass of bodies. This report also fails to consider that the bodies may have been buried after they had skeletonised, which would explain why the bodies on top of the main mass

[1324] P622, page 67;
[1325] Freddy Peccerelli, T8764;
[1326] P674; page 15;

of bodies were not more fully fleshed that those beneath them. There are a number of possibilities that Richard Wright did not consider in his report, which raises the question of his bias.

629. It is respectfully submitted that given that a number of the graves located had been tampered with, robbed, or relocated, it is probable that additional and unrelated bodies to the events in July 1995 were placed in the graves. Since the Prosecution was not able to show any reliable method for determining the date of death, it is impossible to eliminate this as a possibility. Bodies may have been added to the mass graves for a number of reasons, including burying bodies of those killed in combat for sanitation purposes.

630. Prosecution's witnesses were not able to exclude such possibility. To start with Mr. Clark did not exclude the possibility of bodies being brought from other graves and subsequently placed in the mass graves.[1327] Haglund also testified that it was possible that additional bodies were brought later to the grave and buried there.[1328]

DNA connections between the mass graves and execution sites

631. In his recent report Prosecution's investigator Dusan Janc made a list of connections based on the DNA links between the primary and secondary mass graves connected to five largest mass execution sites.[1329] It should be noted that the investigator found only a limited number of connections for 4931 identified persons[1330] and could not exclude the possibility that bodies without DNA connections were not transferred from primary to secondary grave but buried in the secondary grave for the first time.[1331]

[1327] P2128, John Clark testimony in Krstic, T3952; (31 May 2000);
[1328] P2150, William Haglund testimony in Krstic, T3765; (29 May 2000);
[1329] P4490, annex A;
[1330] P4490, annex A;
[1331] Dusan Janc, T33543-4;

632. It is submitted that based on such a limited number of DNA connections that were in some cases, as stated by Mr. Janc, illogical[1332] any conclusion about the place and time of the killings could not be determined.

633. Although aerial imagery were used to give a general time frame during which the mass graves were dug, there is no such evidence that can be used to prove the individuals in the grave also died or were killed during the same time frame because as explained by Dusan Janc, aerial photographs do not exist for every day.[1333] This fact refutes the proposition that people found in the same grave were killed in the same incident.

634. The casualties suffered during the legitimate combat engagement are also reflected in the map created by Janc.[1334] During cross examination Janc was confronted with the statement of a Muslim witness that observed many dead bodies and many wounded and estimated that he saw 2 to 3.000 bodies.[1335] Mr. Janc acknowledged that the area described in this witness statement belonged to the Pobudje area.[1336] Janc was also shown statements where Muslim witnesses said they saw 500 dead bodies[1337] and a statement from a witness who said that Muslims who did not want to surrender committed suicide with hand grenades.[1338] Janc subsequently marked the map which shows the proximity of the areas where the legitimate combat engagements occurred (Pobudje, Udrc, Snagovo, Orahovac and Baljkovica) and the locations of the mass graves.[1339]

635. It is submitted that because of this proximity Mr. Janc's speculation that bodies of those killed in combat are matching the number of surface remains that were found, 957 cases (648 individuals identified)[1340] is not the only reasonable or logical conclusion. In one instance Janc excluded 14 individuals found in the Kozluk location that should have been included as surface remains with the explanation that they were

[1332] Dusan Janc, T33392-5;
[1333] Dusan Janc, T33664;
[1334] P2110;
[1335] Dusan Janc, T33597; also see 2D669;
[1336] Dusan Janc, T33597;
[1337] 2D702;
[1338] 2D667;
[1339] 2DIC00252; also see Dusan Janc, T33611-5;
[1340] Dusan Janc, T33549; also see P4490, annex B;

outside the area where the column was passing and thus did not die as a result of combat.[1341] Yet on the other hand he is simply disregarding the proximity of the combat clashes with the column and the mass graves and concluding that the number of killed in combat should be related only to surface remains and not the mass graves regardless of the proximity of those mass graves.[1342]

636. During the Trial the possibility existed that not all of the bodies found in Zeleni Jadar and Glogova are bodies of those killed in the Kravica warehouse as stated by Richard Wright.[1343] The possibility existed that the bodies of those killed in combat on 12 July were brought and buried at the same place with the victims of Kravica killing and there is no scientific way to exclude such a possibility. Witness PW161 actually testified that the employees of the public utilities company did gather bodies from the woods[1344] and confirmed that in the Glogova grave, bodies found when searching Ravni Buljim, Kamenica and Pobudje were also buried there.[1345] This testimony along with the previously discussed possibility that the majority of persons found in the mass graves died of combat related wounds reasonably leads to the conclusion that a large number of bodies found in the mass graves resulted from the casualties in legitimate military engagements with the Muslim column.

637. It was conceded by the Prosecution investigator that the pathology reports do not exclude the possibility that the numbers Mr. Janc gave in his report are inflated and include individuals who died as a result of sustaining injuries from land-mines, self-inflicted wounds, and/or injuries from legitimate combat engagements.[1346]

638. Although the Prosecution denies that it influenced the exhumations or data presented in the final autopsy reports, it cannot be ignored that the Prosecution had the duty of briefing the experts as the job they were to conduct, and oversaw the operations and its progress, and was acknowledged in many final reports. These reports however, included the statements that the "finalization of cause and manner of death, as well as editing of final autopsy reports, was facilitated by ICTY legal

[1341] Dusan Janc, T33551;
[1342] Dusan Janc, T33594;
[1343] Richard Wright, T7440-1,
[1344] PW161, T9556;
[1345] PW161, T9538;
[1346] Dusan Janc, T33626;

advisor, Peter McCloskey".[1347] In several reports that refer to this similar statement instead of the word "facilitated", they used the wording "occurred under the direction of".[1348] Furthermore, in the Branjevo Farm report, it is explained that, "all evidence (exclusive of DNA samples), including ballistic evidence and evidence of restraints, as well as items critical to identification, was reviewed by ICTY investigators in order to determine which items were to be retained and which were appropriate to be released to the Bosnian authorities.[1349] The amount of authority, exercised in the collection of evidence and the opinions reached by the Prosecution overtly overstepped the appropriate boundaries and respectfully tainted the evidence collected by the experts.

639. Further influence by the Prosecution was revealed during the investigation of Haglund by the Oversight Committee. In this report, William Haglund was criticized by fellow academia for playing to the press, which may have jeopardized the investigation. In response to this accusation, Haglund stated that he was "asked to give press briefings regularly by the Office of the Prosecution."[1350] In one instance Haglund permitted the press to take pictures of an individual with bound wrists, which he stated was "not something we would normally do. We're not in the United States and Canada, we're in a – a very high internationally high profile case, and it was something that the Prosecution's office felt should be made public. And these graves, and that's what they wanted to do and that's what I did."[1351]

Flaws related to personal errors of experts

640. Haglund was the chief pathologist when the work began at the Bosnia graves. As already mentioned Haglund's work was rejected in the Rutaganda case because his fieldwork and his reports were replete with many errors and could not be dependable or reliable.[1352] Trial Chamber wrote that on the basis of the testimony of Dr. Kathleen Reich, a forensic anthropologist, called by the Defense as an expert witness, the Trial

[1347] P616, page ix (report of Lazete 2); also see P611, page ix (report on Cerska); P622, page 2, (Forensic Investigation of the Pilica (Branjevo farm)…); P621, page viii, (report on Nova Kasaba);
[1348] P622, Volume 2, page.69; also see P611, page.58;
[1349] P622, Volume 2, page.24;
[1350] William Haglund, T8965;
[1351] William Haglund, T8966;
[1352] Rutaganda Trial Chamber Judgment, (6 Dec 1999);

Chamber is not satisfied that the scientific method used by Professor Haglund is such to allow the Chamber to rely on his finding in the determination of the case.[1353]

641. As a result of the numerous professional complaints filed against Haglund, a committee was formed for the purpose of evaluating Haglund's work and providing recommendations in a Report to the oversight Committee. Among the many complaints addressed in the report were comments that Haglund dictated too much speed in exhumation, that results were commingled, failure to associate body parts,[1354] he compromised the integrity of the sites by allowing the press to take photos,[1355] he established no clear chain of command,[1356] and he instructed that clothing be discarded even though some of the clothing contained identification[1357]. Furthermore, it was a common opinion that "the scientific integrity of the exhumations had been jeopardize because Dr.Haglund spent too much time playing up to the news media and driving around the countryside."[1358]

642. In addition to the flaws from the work of Haglund, there were also problems with a member of his staff, Kirschner, who changed the cause and manner of death in cases without approval and discarded work sheets from autopsy reports in which he made such changes.[1359]

643. When confronted in court with these critiques of his work, Haglund did not say that people who criticized his work were necessarily wrong. He said that Patrick Mayer's comment that Haglund's behavior was reprehensible was not necessarily wrong, but that "people can have different perceptions. They can be right …"[1360] Haglund also agreed with the findings of the Oversight Committee, which included criticism of the administration and logistic of which Haglund was in charge.[1361] In fact, Haglund agreed with the statement that, "there were no plan of operation. There

[1353] ibid, para.257;
[1354] 2D70, page 5, San Antonio Report of the Oversight Committee;
[1355] ibid, pages 5 and 7,
[1356] ibid, page 7;
[1357] ibid, page 5;
[1358] ibid, page 7;
[1359] ibid, page 5 and 10;
[1360] William Haglund, T8939-40;
[1361] William Haglund, T8946-7;

was apparent disagreement as to the primary purpose of the mission … There was no clear concept of the chain of responsibility.[1362]

644. When asked about the conclusion of the Committee that there were problems with the protection of bones, Haglund initially replied that he does not know what that refers to.[1363] However, considering that on the seminar "Crimes of war" he admitted that often he would not have anything to cover the graves with,[1364] which he affirmed while testifying.[1365]

645. Further evidence on Haglund's lack of thoroughness and reliability is that Fredi Peccerelli was authorized to reexamined Lazete 2 after it was determined that Haglund had done an insufficient job. Haglund had both underestimated the size of the grave and left 830 artefacts at the site. When asked if Peccerelli, as a practicing forensic anthropologist, would ever discard artefacts in such a manner, he replied that he would not "because they're considered evidence and they could also … contribute to the identification of the victims."[1366]

646. Clyde Show, who is internationally known for his work in physical anthropology, called Haglund's work "sloppy science".[1367]

647. The Conclusions reached by William Haglund are unreliable as a result of his own failures as noted by others and thus should not be used in a criminal proceeding.

Flaws relating to artifacts found in mass graves

648. Previous discussion showed that procedure with artifacts is particularly important in order to reach valid conclusions about the victims that can be used in criminal proceedings. One issue related to the artifacts is the question of clothing found in mass graves. This question is important because of the legal question whether the victims were civilians or not.

[1362] William Haglund, T8946-7;
[1363] William Haglund, T8961;
[1364] 2D73, page 4;
[1365] William Haglund, T8971;
[1366] Freddy Peccerelly, T8777-8;
[1367] 2D70, page 5, San Antonio Report of the Oversight Committee;

649. During the excavation of the Cancari Road 3 gravesite the items located were separated into two categories. The first category contained items that were retained, while the second category contained items which purportedly were of no value for identity or evidentiary purposes and so the items were returned to the grave and buried after a photo was taken.[1368] This practice conflicted with all known as well as international exhumation procedures, which stated that isolated items of clothing were to be collected in a general bag.[1369] For example, Wright testified that the clothes of an 8year old and bones of a 12 year old were located, but considered to be unrelated to the events. Because of his failure to keep all recovered items, Wright could not recollect whether or not the clothes and bones were kept as evidence.[1370] Additionally, Wright states that the final decision on artifacts and whether some clothes was of military type, was to be made by individuals at the morgue once things were cleaned.[1371] It defies any and all forensic scientific practice that Wright deemed artifacts irrelevant to the excavation and disposed them despite although he testified he had done an incomplete job and left it to be completed at the morgue.[1372]

650. Wright also excavated in 2000, the Kozluk and Glogova graves. In his testimony, he stated that his review of the artifacts was "only a cursory examination of artifacts found in the graves",[1373] and was "incomplete because I know that the investigators will be doing a through and complete job later". However, he was unaware whether such further review took place.[1374] With respect to the Kozluk site was that "most of the natural materials have been destroyed by the weathering process because these bodies were quite close to the surface."[1375] Due to the shallow burial and the effects of the weathering process, it is noteworthy that Wright notes in his 1998 excavation of Kozluk that some bodies found at the surface still "had flesh and

[1368] Richard Wright, T7452,
[1369] P666, page 14, Exhumation in Eastern Bosnia in 1998, Report to ICTY (12 May 1999);
[1370] Richard Wright, T7453;
[1371] Richard Wright, T7491;
[1372] Richard Wright, T7452, T7486; also see P666, page 3, Exhumation in Eastern Bosnia in 1998, Report to ICTY (12 May 1999) ("It was not the primary purpose of the exhumation program to study the bodies and associated evidence. That study was done subsequently by the staff of the morgue and the ICTY investigators");
[1373] Richard Wright, T7488;
[1374] Richard Wright, T7486;
[1375] P2162, Richard Wright testimony in Krstic, T3685; (26 May 2000);

tissue holding the bones together. They were clearly not very old."[1376] Wright did not specify what he meant by "not very old," but it is possible that flesh and tissue would not still be present if the bodies had been buried in 1995 since they were exposed to the elements of nature.

651. During the excavation of Zeleni Jadar 6, numerous artifacts were disposed of in the course of examination. In the mass grave there were 38 bodies, 356 body parts and 552 artifacts recovered. However, of the 552 artifacts, only 276 were retained.[1377] Although there is a list of artifacts that were recovered, the report does not mention which of those artifacts were not retained. This fact is highly important for both the identification of victims and for the purpose of interpreting whether or not Zeleni Jadar 6 grave was a result of the combat situation, particularly since 138 ballistic artifacts were recovered among the original 552 artifacts.[1378]

652. Similarly Cancari Road 3, the Pilica site contained clothing items that were disposed of because they were not directly associated with a body. According to Haglund, who conducted this exhumations, the clothing items "were searched for documents which could provide leads to tentative identification, but were not inventoried or collected from the grave."[1379]

653. Disposing of the artifacts from relevant graves is important to the determination of whether the victims at the site or the site itself were related to combat situation. When such artifacts were disposed of it reasonable doubt exists that such artifacts would have spoken to the conclusion that victims died as a result of combat situation. Furthermore, artifacts were also important for establishing the membership of the victims to a particular group.

[1376] P2162, Richard Wright testimony in Krstic, T3699; (26 May 2000);
[1377] P2476, page 9 (ERN X0167681), Report on the Excavations at the Site Zeleni Jadar 6, Bosnia and Hercegovina 2001;
[1378] ibid, at page 10 (ERN X0167682);
[1379] P622, page 18, (Forensic Investigation of the Pilica (Branjevo farm)…);

The Prosecution did not prove that the bodies found in the mass graves belonged to the Muslims as part of a protected group

Group requirement

654. Initially, when the ICTR addressed whether specific victims were part of the previously determined protected classification, it held that "Hutus" could not be considered victims of the Rwandan 1994 genocide committed against the "Tutsi" protected group.[1380]However, in later cases, the ICTR stated that, not only, victims who belonged to the protected group could be considered victims of genocide, but also, those who were perceived by the perpetrator as belonging to the protected group.[1381] Therefore, according to the ICTR, the determination whether a specific victim is considered part of the protected classification may be made solely on a subjective basis—the perception of the accused perpetrator toward the victim.

655. The ICTY has, also, used a subjective method when determining whether the victims are indeed part of the protected group.[1382] Like the ICTR, references to perpetrator intent or perceptions classify victims subjectively.[1383] But, the *Blagojevic* Trial Chamber recognized that subjective factors alone were not sufficient and stated "the correct determination of relevant protected group has to be made on a case-by-case basis, consulting both objective and subjective criteria."[1384]

656. In *Blagojevic*, the objective evidence relied on by the Trial Chamber to justify its finding of a unified group was the scientific conclusions of identity and religious affiliation by experts and investigators.[1385] Both the *Blagojevic* and *Kristic* Trial Chambers held that the scientific evidence supporting identity and religious affiliation

[1380] *See Akayesu*, ICTR-96-4, Judgment, 712 (acts committed against a Hutu victim cannot "constitute a crime of genocide against the Tutsi group").
[1381] *See Prosecutor v. Bagliishema*, ICTR-95-1A, Judgment, 61, 65 (7 June 2001) (Accused acquitted); *Prosecutor v. Ndindabahizi*, ICTR-01-71, Judgment, 466-9 (15 July 2004); *Prosecutor v. Kajelijeli*, ICTR-98-44A, Judgment, 813 (1 December 2003.)
[1382] *See Krstic*, IT-98-33-T, Judgment, 557.
[1383] *See id*.554-68.
[1384] See IT-02-60-T, Judgment, 667.
[1385] *See id*. 671;

of the mass grave victims was sufficient to categorize the victims as part of the protected group.[1386]

657. Unfortunately, the underlying scientific basis of these objective judicial determinations of group identity is not scientifically sound. Therefore, the Honorable Trial Chamber should not rely on the objective support offered by the *Blagojevic* and *Kristic* Trial Chambers as sufficient proof of victim group identity. In contrast, the Honorable Trial Chamber should consider the genocide acquittal in *Jelisic* based on the failure of the Prosecution to prove the victims were part of a unified group.[1387]

Whether it was proven that all the victims were part of the Muslim group

658. Since the Prosecution must satisfy the group requirement in order to prove genocide, a Trial Chamber convicting individuals for genocide related crimes, should adequately explain its basis for finding the existence of a unified victim group.

659. As indicated above, so far only two cases litigated at the ICTY have resulted in genocide convictions.[1388] Both cases involve the events that occurred in the Srebrenica area during the mid-1990s.[1389] But, the *Blagojevic* and *Krstic* Trial Chambers' explanations relating to the group requirement of genocide lack detail and were founded on evidence that is scientifically questionable.[1390]

660. To its credit, the *Blagojevic* Trial Chamber had an extensive factual analysis concerning the purported genocidal events.[1391] However, when rationalizing its conviction for genocide the *Blagojevic* Trial Chamber never expressly detailed exactly what evidence it relied on to determine the bodies found in the mass graves were of Bosnian Muslims affiliation.[1392]The *Blagojevic* Trial Chamber briefly referenced certain artifacts found within the graves as indicating Muslim affiliation[1393]

[1386] *See Blagojevic*, IT-02-60-T, Judgment, 354; *Kristic*, IT-98-33-T, Judgment, 71-9, 202, 222.
[1387] *See* IT-95-10-T, Judgment, 107-8 (finding that the OTP failed to establish beyond a reasonable doubt that the accused perpetrated crimes against a unified group) (emphasis added);
[1388] *See Blagojevic*, IT-02-60-T, Judgment; *Krstic*, IT-98-33-T, Judgment;
[1389] *See id*
[1390] *See id*
[1391] *See* IT-02-60-T, Judgment, 92-390;
[1392] *See id*;
[1393] *See id*. 354;

but, as discussed below, these isolated artifacts should not be considered adequate proof of Bosnian Muslim group affiliation.

661. More troublesome is the *Krstic* Trial Chamber's broad generalizations that certain graves contained all Bosnian Muslim victims.[1394] The Trial Chamber never explained its basis for this sweeping characterization and, instead, referenced Mr. Manning's Anthropological Summaries as sufficient evidence of Bosnian Muslim affiliation.[1395] As explained later, Mr. Manning's Anthropological Summaries are not based on scientifically sufficient evidence.

662. As mentioned previously, the required existence of a protected group sets genocide apart from other crimes.[1396] However, the articulated methods introduced by the Prosecution and relied on by the *Blagojevic* and *Krstic* Trial Chambers fails to meet scientifically acceptable standards, let alone, establish the group identity of the Srebrenica area victims.

663. In order to factually satisfy the group requirement of the genocide statute, the Prosecution utilized two methods in its presentation of the evidence against the Accused Beara. As referenced by the *Blagojevic* and *Krstic* Trial Chambers, the Prosecution attempted to define the victim group through an "anthropological" analysis of artifacts exhumed from the Srebrenica area mass graves. Additionally, or alternatively, the Prosecution offered proof of victim DNA identification coupled with a 1991 Bosnian Census comparison to determine the overall identity of the victim group.

"Anthropological" artifacts collected and the analysis conducted is incomplete and faulty"

664. The Prosecution introduced a copious amount of evidence concerning the forensic anthropology and pathology of exhumed bodies from the Srebrenica area.[1397]

[1394] *See Krstic*, IT-98-33-T, Judgment, 71-9, 202, 222;
[1395] *See id.* 202, 222 (at the time of judgment the *Krstic* Trial Chamber only had two of Manning Anthropology Summaries to reference);
[1396] *See Jelisic*, IT-95-10-T, Judgment, 66;
[1397] *See* Expert Anthropology Reports and Manning Anthropology Summaries (Cites above).

This evidence outlines the methods, analysis and conclusions utilized by each respective expert concerning topics such as: (1) estimations of the Minimum Number of Individuals ("MNI"), (2) sex determinations, and (3) age-at-death calculations.[1398] However, these same reports fail to dedicate a scientifically acceptable amount of attention to the determination of the group identity of these victims.[1399]

665. In an effort to categorize the Srebrenica victims into a group, the Manning Anthropology Summaries, relying on the Expert Anthropology Reports, reference certain artifacts that Manning claims are sufficient to indicate "Religious Affiliation" of all the victims.[1400] These reports fail to satisfy the group requirement of genocide for two main reasons: (1) they lack adequate scientific study regarding the significance of recovered items; and (2) it is scientifically unacceptable to incorporate the supposedly religious significance of these artifacts to the entire victim group.

Lack of Scientific Study Regarding the Significance of Recovered Items

666. A paramount scientific concern regarding the artifacts recovered from the Srebrenica mass graves is the lack of adequate analysis and scientific proof justifying the label of certain artifacts as religious. Furthermore, even if a specific artifact has a religious significance, the specific religion has not been adequately assessed either.

667. First, the Expert Anthropology Reports and the Manning Anthropology Summaries fail to reference a standard or protocol that makes clear the analysis, interpretation and inclusion of the suggested artifacts into a religious category.[1401]

668. The failure to assign a standard or protocol becomes significant because certain items are labeled as specifically associated with a precise religion but there is no indication how that determination was made. For example, in the Manning Anthropology Summaries, a string of beads is simply ascribed to be evidence of Muslim affiliation.[1402] This categorization neglects to consider other, equally

[1398] *See id.*
[1399] *See id. See also* Ex. 2D534: Expert Witness Report of Dr. Debra Komar;
[1400] *See* Manning Anthropology Summaries;
[1401] *See* Manning Anthropology Summaries;
[1402] *See* Manning Anthropology Summaries;

reasonable, interpretations of the evidence such as the beads were of either Christian or Buddhist affiliation.[1403]

669. Overall the Expert Anthropology Reports understand the necessity to include standards or protocols. Indeed, for other scientific conclusions (MNI calculations and Sex determinations) exact methods are articulated.[1404] The failure to indicate an acceptable method in the determination of group identity seriously taints, if not wholly discredits, the group identity conclusions made from these artifacts.

670. A further scientific deficiency of the religious characterization of the recovered artifacts is the failure of the scientists and investigators to fully evaluate the available evidence.[1405]

671. For example, artifact "CR03 B 458.2" is described in Annex C of Manning's Summary of 16 May 2000 as "paper with Arabic text."[1406] No known attempt by scientists or investigators has been made to translate this text or even confirm that the script is Arabic. However, there is no hesitation by ICTY investigators to assign a specific religious significance to the text.[1407]

672. More disturbing is the blatant violation of a fundamental tenant of scientific analysis by the experts—the preservation of specific items that support certain hypothesis and disposal of other significant evidence.[1408] For example, in the Manning Anthropology Summaries the only "associated materials" retained are arguably only supportive of finding the victims were either of the Muslim faith or related to Srebrenica.[1409] However, other artifacts that did not represent either the Muslim faith or a Srebrenica affiliation were neither retained nor reported by experts though it is highly unlikely that other artifacts were nonexistent.[1410]

[1403] *See* Ex. 2D534;
[1404] *See* Expert Anthropology Reports;
[1405] *See* Ex. 2D534;
[1406] *See* Ex. P649;
[1407] *See* Manning Anthropology Summaries
[1408] *See* 2D70 (comments by Dr. Clyde Snow and Anthropologist David del Pino);
[1409] Manning Anthropology Summaries;
[1410] *See* 2D70;

673. Finally, the descriptions of the artifacts actually retained are wholly inadequate to fully interpret their religious significance.[1411] For instance, the labeling of an item as a "religious artifact" without elaborating on the specific attributes of the item falls far short of accepted scientific standards.[1412] Descriptions, such as these, should not be accepted as fact without a scientifically sufficient showing that adequate protocols and standards were implemented.

674. In sum, the Honorable Trial Chamber should not take these religious artifact determinations as proof, beyond a reasonable doubt, that the victims were a part of a unified victim group.

Religious Extrapolation to the Entire Victims Group

675. According to recognized experts in the anthropological field "the extrapolation of identity based on isolated pieces of material culture associated with a few individuals to all individuals has no basis or precedent in scientific study."[1413] However, this is exactly what was done in the Manning Anthropology Summaries.[1414]

676. According to the Manning Anthropology Summaries, a combined reference of approximately eighty-six (86)[1415] "religious affiliation" artifacts is sufficient to indicate the identity of the total victim group as Bosnian Muslim.[1416] When comparing the number of artifacts found to the claimed number of Srebrenica area victims, an extremely small percentage is revealed.

677. As an example, the Manning Anthropology Summary of 16 May 2000 references 63 total items of supposed religious affiliation, and even if the Honorable Trial Chamber accepts the premise that the investigators accurately identified these items, the artifacts represent a possible religious affiliation of only 0.0334% of the

[1411] Ex. 2D534;
[1412] *See* Ex. P649;
[1413] Ex. 2D534;
[1414] *See* Manning Anthropology Summaries;
[1415] *See* Manning Anthropology Summaries (the exact number of purportedly religious artifacts is unknown because in Ex. P2994 Dean Manning listed that religiously significant artifacts were found but he did not mention now many or what exactly).
[1416] *See Krstic*, IT-98-33-T, Judgment, 237;

articulated recovered population.[1417] In Mr. Wrights report it was stated that it is not the primary purpose of the exhumation to study the bodies and associated evidence[1418]and in the opinion of Defense expert Debra Komar, Mr. Wright made an assessment and categorized the victims based on what he has seen.[1419] Dr. Komar also put into doubt Mr. Lawrence's identification of prayer beads because of lack of reference when interpreting symbols of religious affiliation.[1420] As far as Mr. Wright and Baraybar listing of artifacts, Dr. Komar stated that listing only certain artifacts as cherry picking.[1421] After reviewing the reports it was opinion of Dr. Komar that there has not been sufficient or adequate work on establishing social group identity to make any kind of definite conclusion and that considering the weight it carries has not received sufficient scientific scrutiny.[1422] Dr. Komar also testified that proper methodology, protocols and standards when establishing social group identity do exist and provided the bibliography of the methods established in the past.[1423]The Honorable Trial Chamber should not consider these limited artifacts as satisfactory proof of group identification.

678. Because the anthropological evidence purporting to attach a group affiliation to all Srebrenica area victims seriously conflicts with even the minimal scientific standards, the Honorable Trial Chamber should respectfully pause to consider whether the Prosecution fulfilled its burden to prove that the victims of the Srebrenica incidents were, beyond a reasonable doubt, a part of a unified group, let alone all Bosnian Muslims.

Determining group identity by comparing DNA identification with the 1991 Bosnian census is scientifically defective or based on undisclosed evidence

679. Likewise the second method the Prosecution submits to purportedly prove the group requirement of the genocide statute is the personal identification of victims and the comparison of these findings with demographical evidence. As stated previously

[1417] *See* Ex. P649;
[1418] P666, page ERN00848217, also ERN00848241;
[1419] Debra Komar, T23989;
[1420] Debra Komar, T24039; also see P645;
[1421] Debra Komar, T24040;
[1422] Debra Komar, T23985 and T23988;
[1423] Debra Komar, T23995; also see 2D544;

the Prosecution failed to established or prove this necessary requirement of the genocide statute inasmuch as the DNA and Demographic evidence was flowed and deficient.

The community of Bosnian Muslims in Srebrenica, as existent on July 11, 1995, does not meet the geographical distinct entity criterion applied in Krstic

680. The Trial Chamber in *Krstic* in recognizing the geographical criterion in determining whether genocide has been committed noted that "the intent to destroy a group, even if only in part, means seeking *to destroy a distinct part of the group* ...."[1424] It was satisfied that this benchmark was met because the evidence produced showed that the "VRS forces sought to eliminate all of the Bosnian Muslims in Srebrenica *as a community*".[1425] Thus the Srebrenica community was perceived as a distinct part of the whole. Even the Appeals Chamber when reviewing this finding although acknowledging that the group in question was not comprised of "only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region"[1426] continued to refer to the group as the "Muslim community of Srebrenica".[1427] The Defense argues that the Trial Chamber erred when applying the geographic criteria to the situation at hand as, and as rightly observed by the Appeals Chamber, the population residing in Srebrenica at the time of the events encompassed not only members of the Srebrenica community but also refugees from other areas in the region which sought shelter within the enclave. In that respect it draws the Chamber's attention to the dictum of the Trial Chamber in *Stakic* in relation to the geographic criteria: "[t]he Trial Chamber is aware that this approach might distort the definition of genocide if it is not applied with caution."[1428]

681. Nehemiah Robertson in his Commentary of the Genocide Convention noted that part of the group could represent a part residing in a given country, within a region or within a single community "provided the number is substantial enough".[1429] Also, the Commission of Experts chaired by Professor Bassiouni spoke of "regional

[1424] Prosecutor v. Krstic, IT-98-33-T, Trial Chamber Judgment (2001), para.590;
[1425] Ibid., para 594
[1426] Prosecutor v. Krstic, IT-98-33-A, Appeals Chamber Judgment (2004), para.15;
[1427] Ibid.
[1428] Prosecutor v. Stakic, IT-97-24-T, Trial Chamber Judgment (2003), para.523;
[1429] Robertson N., The Genocide Convention – Its Origins and Interpretation, pp. 17-18

existence" of a part of a group when providing its interpretation of the "in part" element of the definition of genocide:

> "Furthermore, a given group can be defined on the basis of its regional existence, as opposed to a broader and all-inclusive concept encompassing all the members of that group who may be in different regions or areas. For example, all Muslims in Bosnia-Herzegovina could be considered a protected group. One could also define the group as all Muslims in a given area of Bosnia-Herzegovina, such as Prijedor, if the intent of the perpetrator is the elimination of that narrower group... For example, all Bosnians in Sarajevo, irrespective of ethnicity or religion, could constitute a protected group."[1430]

682. From a sociological standpoint the word community stands for a "group of people with a commonality or sometimes a complex net of overlapping commonalities, often - but not always - in proximity with one another with some degree of continuity over time. They often have some organization and leaders." "Traditionally a "community" has been defined as a group of interacting people living in a common location. The word is often used to refer to a group that is organised around common values and social cohesion within a shared geographical location, generally in social units larger than a household. "[1431]

683. As noted, communities located in certain geographical areas require certain ties among their members as well as a certain degree of permanency. As the Trial Chamber in *Krstic* itself rightfully noted an "accumulation of isolated individuals within it"[1432] would not do precisely because of the degree of impact that acts taken against community members would have on a particular community as a whole as opposed to its impact on an accumulation of isolated individuals, even if they were to share membership in any of the protected groups under the Genocide Convention. Moreover, "…the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the

[1430] M. Cherif Bassiouni, 'The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia', (1994) 5 *Criminal Law Forum* 279, pp. 323-324
[1431] Community at Wikipedia, Available at:< http://en.wikipedia.org/wiki/Community#Gemeinschaft_and_Gesellschaft>
[1432] Prosecutor v. Krstic, IT-98-33-T, Trial Chamber Judgment (2001), para.590;

intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue.".[1433] This was precisely the rationale behind the Trial Chamber's dictum when it stated that:

> "The Bosnian Serb forces could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group *would have a lasting impact upon the entire group*. Their death precluded any effective attempt by the Bosnian Muslims to recapture the territory. Furthermore, the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society, an impact the Chamber has previously described in detail. The Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica. Intent by the Bosnian Serb forces to target the *Bosnian Muslims of Srebrenica* as a group is further evidenced by their destroying homes of Bosnian Muslims in Srebrenica and Potocari and the principal mosque in Srebrenica soon after the attack."[1434]

684. The acts taken against members of a particular geographically located community must have brought into question its survival and this must have been precisely what the perpetrator was aiming for.

685. Other judgments and decisions which have dealt with events which took place in specific geographical regions follow the same rationale – the impact of action taken on the particular geographically located community. This is visible in the *Nikolic* Trial Chamber Decision on Review of the indictment pursuant to Rule 61 where the Trial Chamber looked at the events which took place in Vlasenica municipality and,

[1433] Ibid.
[1434] Ibid., para.595;

importantly, to its members, and their impact on that particular community as a whole.[1435]

686. Following *Nikolic* the Trial Chamber in *Jelisic* also focused on the impact of the events which occurred in Brcko on the "Muslim population of Brcko".[1436] The Trial Chamber here stated that:

> "It is not therefore possible to conclude beyond all reasonable doubt that the choice of victims arose from a precise logic to destroy the most representative figures of the Muslim community in Brcko *to the point of threatening the survival of that community*"[1437]

687. Similarly, the *community* criterion is also visible in the *Sikirica* case, both in the Prosecution's submissions:

> "According to the Prosecution, the evidence supports a finding that a specifically targeted part of the group included the leadership of *Prijedor's Bosnian Muslims and non- Serbs*, including members of the group that were involved in the defence of the non -Serbs in Prijedor."[1438]

as well as the subsequent examination of facts made by the Trial Chamber:

> "According to the 1991 census, the Prijedor municipality had a total population of 112,543: 49,351 (43.9%) identified themselves as Muslims; 47,581 (42.3%) identified themselves as Serbs; and 6,316 (5.6%) identified themselves as Croats. The Chamber will, therefore, examine the evidence in order to ascertain the number of Bosnian Muslims and Bosnian Croats in Prijedor as a whole who were victims within the terms of Article 4(2) (a), (b), and (c). This involves the examination of evidence as to those who were victims both within and outside the Keraterm camp."[1439]

[1435] Prosecutor v. Nikolic, Decision on Review of the indictment pursuant to Rule 61, IT-94-2-R61, Decision of Trial Chamber I, 20 September 1995, para 27, and Trial Chamber Judgment (2003), paras 50-67;
[1436] Prosecutor v. Jelisic, IT-95-10, Trial Chamber Judgment (1999), para.88;
[1437] Ibid., para.93;
[1438] Prosecutor v. Sikirica, IT-95-8, Trial Chamber Judgment (2001), para 33
[1439] Ibid. para.69;

…

"For the purpose of determining the number of victims within the terms of Article 4(2)(a), (b) and (c), one is, therefore, left with a number of approximately 1000-1400 Muslims out of a total of 49,351 in the Prijedor municipality. This would represent between 2% and 2.8% of the Muslims in the Prijedor municipality and would hardly qualify as a "reasonably substantial" part of the Bosnian Muslim group in Prijedor. It also needs to be borne in mind that not all the detainees at Keraterm were Muslims."[1440]

688. In this case the Trial Chamber at the outset underlined that: "[w]hether the group belongs to a country or a region or a single community, it is clear that *it must belong* to a geographic area, limited though it may be".[1441]

689. The only situation which departs from the *community* criterion in the geographic sense, and one which has been cited by the Trial Chamber in *Krstic,* is the 1982 massacre of Palestinian refugees located in camps in Sabra and Shatila, The General Assembly of the United Nations had characterized the attack on the refugee camps as "an act of genocide".[1442] Although valuable for other scenarios that might one day subject to judicial assessment its weight today should be judged with care from at least two reasons. One is that the characterization was made by a political, not a judicial body. It is hence uncertain whether any court would determine that the circumstances of the case in question meet the standards of genocide. Secondly, as noted by Shabas, even the "circumstances surrounding the adoption of the Sabra and Shatila resolution, and the lack of unanimity, argue against drawing definite conclusions".[1443]

690. The same conclusion as to the judicial reliance on the *community* criterion can also be reached when one reviews assessments made by various chambers on whether genocide was committed by eliminating or harming a "significant part" of a given protected group. As already noted above, in both *Jelisic* and *Sikirica* the Chambers deals with the impact of the acts taken against significant members of Brcko and

[1440] Ibid., para.72;
[1441] Ibid., para.68;
[1442] UN Doc. GA 37/123 D;
[1443] Fisher and McDonald, *Yearbook of International Humanitarian Law,* p.146;

Prijedor community on those particular communities, not beyond those communities. In Jelisic the Trial Chamber concluded that: "[i]t is not therefore possible to conclude beyond all reasonable doubt that the choice of victims arose from a precise logic to destroy the most representative figures of the Muslim community in Brcko to the point of threatening the survival of *that community*"[1444] The Trial Chamber in *Sikirica* used the similar dictum and stated: "With regard to the situation outside the Keraterm camp, no evidence has been led to show that the disappearance of those who were targeted by Bosnian Serbs would have a significant impact on the survival of the *population in Prijedor to which they belonged* by reason of their leadership status or for any other reason".[1445] Essentially the Trial Chamber in *Krstic* also took this approach when assessing the significance of the crimes committed against military age men on the Srebrenica community.[1446]

691. Despite the fact that both the Trial and the Appeals Chamber in *Krstic* confirmed a valid criteria – that of geographically located part of the group – it however respectfully erred in applying them to the facts of this case. As the Trail Chamber in *Sikirica* indirectly warned, it is necessary that any assessment of the impact of acts committed is always made in relation to a correctly determined whole or a part of a protected group.[1447] In case before us, one has to distinguish the Srebrenica community as such, one which existed in the given geographic area for a certain period of time and whose members shared, among other things, a certain degree of cohesion, common values and ties, from the community of Srebrenica after the influx of refugees from other parts of the region. As acknowledged by the Chambers in *Krstic*:

> "The pre-war Muslim population of the municipality of Srebrenica was 27,000. By January 1993, four months before the UN Security Council declared Srebrenica to be a safe area, its population swelled to about 50,000 – 60,000, due to the influx of refugees from nearby regions. Between 8,000 and

[1444] Prosecutor v. Jelisic, IT-95-10, Trial Chamber Judgment (1999), para.93;
[1445] Prosecutor v. Sikirica, IT-95-8, Trial Chamber Judgment (2001), para.82;
[1446] Prosecutor v. Krstic, IT-98-33-T, Trial Chamber Judgment (2001), para.595;
[1447] Prosecutor v. Sikirica, IT-95-8, Trial Chamber Judgment (2001), para.68"… the proper basis for comparison is between those Bosnian Muslims or Bosnian Croats who were victims within the terms of Article 4(2)(a), (b) or (c), and those groups as a whole in the Prijedor municipality. The comparison should not be between Bosnian Muslims and Bosnian Croats who were victims within the terms of Article 4(2)(a), (b) or (c) while detained in the Keraterm camp and the total number that constituted those groups in Keraterm"

> 9,000 of those who found shelter in Srebrenica were subsequently evacuated in March."[1448]

692. This in the moment in time when the geographically located and significant part criterion were being applied in order to assess whether genocide took place in Srebrenica the situation at hand significantly differed from any other situation in which these criteria were directly or indirectly used. While in other cases cited above the respective Chambers made their assessments by looking at the impact of crimes committed against members of a protected group belonging to a particular geographically located community on that particular part of the protected group, the Chambers in Krstic went beyond a such comparable part of the group by assessing the impact of crimes committed against Bosnian Muslims from Srebrenica, but also other parts of Eastern Bosnia, to the Bosnian Muslim community **of Srebrenica** under the auspices of the *discrete entity* criteria. Respectfully this seems to have been an unjustified extension of the geographically limited community (i.e. distinct entity) criterion.

693. At the same time, it is very difficult to argue that the Accused thought that individuals residing in Srebrenica at the time belonged to the Srebrenica community. As the evidence show, the Accused had knowledge that individuals from other areas of the region had found refuge in Srebrenica, which was declared a safe area, at the time. He could not have thus viewed residents of Srebrenica at the time of the events specified by the indictment as, in the words of the Trial Chamber in Krstic, a "*distinct entity* which must be eliminated as such" (emphasis added).

694. The problem with applying the criteria used to the facts of the case is also in that it is very difficult, if not impossible, to distinguish victims originally belonging to the Srebrenica community from those who did not in order to correctly assess the impact of the events that took place on that particular geographically located part of the group. This would on the other hand not be correct from a moral standpoint as it would debase the sacrifice endured by families and communities of all the victims. The only logical step that can be taken under the circumstances is to change the

[1448] Prosecutor v. Krstic, IT-98-33-A, Appeals Chamber Judgment (2004), footnote.26;

standpoint from which the events taken in Srebrenica would be evaluated – to make the assessment from the perspective of the entire group, i.e. that of Bosnian Muslims. In that case the Prosecution would need to show that the events which took place in Srebrenica meet the substantial part criterion. As noted by the ICJ in the *Bosnia* case "Establishing the "group" requirement will not always depend on the substantiality requirement alone although *it is an essential starting point*"[1449]

695. It is respectfully submitted that the facts of the instant case do not provide support for the conclusion that the events in Srebrenica satisfy the "substantial part" of the group.

The substantial part of the group criteria is not proven beyond reasonable doubt

696. As shown in the previous section the Chambers of the Tribunal erred in differentiating the community in Srebrenica in the time frame covered by the Indictment as a geographically located *distinct entity*, one which would satisfy the "substantial part" criterion based on that characterization.[1450] It would thus be necessary to show that the population of Srebrenica at the time of the events covered by the indictment satisfies the substantial part criterion without at the same time relying on the geographic factor. At the same time, it would also be necessary for the Prosecution to prove that based on new facts pertaining to the killing of military aged man and alleged deportations from the enclave it is possible to infer intent to destroy a substantial part of the Bosnian Muslim group. The Defense argues that that crimes committed in and around Srebrenica do not qualify as facts inferring intent to destroy a substantial part of the Bosnian Muslim group.

Intent to destroy a "substantial part" of the group

[1449] International Court of Justice, *Case Concerning Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia)*, Judgment, para.200;
[1450] "Conversely, the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area" (para.590, Prosecutor v. Krstic, IT-98-33-T, Trial Chamber Judgment (2001)).

697. Early commentators of the Genocide Convention are unequivocal in stating that the "in part" wording of the Convention refers to intent to destroy such a part of a group whose annihilation would seriously affect the protected group as a whole. According to Robertson:

> "the intent to destroy a multitude of persons of the same group must be classified as Genocide even if these persons constitute only a part of the group either within a country or within a region or within a single community, provided the number is substantial enough because the aim of the Convention is to deal with action against *large numbers, not individuals* even if they happen to possess the same characteristics**.**[1451]

698. Similarly, Raphael Lemkin stated that **"***the destruction must be of such a kind as to affect the entirety*."[1452] while in his Report the Special Rapporteur Benjamin Whitaker concluded that:

> ""In part" would seem to imply a *reasonably significant number, relative to the total of the group as a whole*, or else a significant section of a group such as its leadership .On the other hand, it has been urged that, given the mens rea of such intent, the Convention should be interpreted as applying to cases of "individual genocide", where a single person was a victim of any of such acts, though strictly even such a minimalist interpretation requires evidence of more than one victim, since the plural is used consistently throughout Article II (a) to (e). *In order that the gravity of the concept of genocide should not be devalued or diluted by the inflation of cases as a result of too broad an interpretation, the present Special Rapporteur suggests that considerations of both of proportionate scale and of total numbers are relevant***.** Other attacks

[1451] Robertson N., The Genocide Convention – Its Origins and Interpretation, pp. 17-18;
[1452] Letter from Raphael Lemkin to Dr. Kalijarvi, Senate Foreign Relations Committee, in 2 Executive Sessions of the Foreign Relations Committee 370 (1976);

and killings do, of course, remain heinous crimes, even if they fall outside the definition of genocide."[1453]

699. Also according to the early U.S. Government understanding of the wording of article II of the Convention, expressed by its representatives in the Foreign Relations Commission, "the words 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such … means the intent to destroy national, ethnical, racial, or religious group by the acts specified in article II in a manner as to affect a substantial part of the group concerned".[1454] The "'substantial' part means a part of a group of such *numerical significance that the destruction or loss would cause the destruction of the group as a viable entity*".[1455]

700. Expressions such as "large numbers", "relatively significant numbers" or "group of such numerical significance" have been associated with the term "intention to destroy … in part, a group", as stipulated by the Genocide Convention. What also unequivocally stems out of the proposed commentaries is that such numbers would have to be viewed, as explained by Whitaker, "*relative to the total of the group as a whole*"[1456]

701. Although, as established in the *Akayesu* Judgment, genocide could be committed by "any one of the acts" enumerated under article 2(2) of the Convention provided that they had been committed with the requisite intent, the importance of numbers of actual victims comes into play is in inferring the existence of genocidal intent. As highlighted by Shabas "[t]he greater the number of real victims, the more logical the conclusion that the intent was to destroy the group 'in whole or in part'".[1457].

[1453] Benjamin Whitaker, Whitaker Report: Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned: Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, U.N. Doc. E/CN.4/Sub.2/1985/6, 29-30 (1985), para 29
[1454] S. Exec. Rep. No. 23, 94th Cong., 2nd Sess. 6, 18 (1976) cited in Leblanc, The Intent to Destroy Groups in the Genocide Convention: the Proposed U.S. Understanding, p. 371.
[1455] Ibid., p. 380;
[1456] Benjamin Whitaker, Whitaker Report: Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned: Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, U.N. Doc. E/CN.4/Sub.2/1985/6, 29-30 (1985), para 29
[1457] Shabas, W.A., An Introduction to the International Criminal Court, 2nd ed., Cambridge University Press, 2004, p. 39;

702. The significance of applying the "substantial part" criterion in determining whether intent to destroy a "part" of a group existed was recently underlined by the International Court of Justice (hereinafter "the ICJ") in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia) (hereinafter "the *Bosnia case"*) wherein it was stated:

> "In terms of that question of law, the Court refers to three matters relevant to the determination of "part" of the "group" for the purposes of Article II. In the first place, the intent must be to destroy at least a substantial part of the particular group. *That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole.* That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and by the Commentary of the ILC to its Articles in the draft Code of Crimes against the Peace and Security of Mankind (e.g. *Krstić*, IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 8-11 and the cases of *Kayishema*, *Byilishema*, and *Semanza* there referred to; and *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 45, para. 8 of the Commentary to Article 17).
>
> …
>
> Establishing the "group" requirement will not always depend on the substantiality requirement alone although *it is an essential starting point*."[1458]

703. As noted by the ICJ the Tribunals have to date followed the "substantial part" criterion frequently, whether it be individually or together with other criteria such as the significance of group members and the geographic location criteria or factors. For example, following the above cited commentaries of the "in part" wording of the Convention, the Trial Chamber in *Kayishema in Ruzindana* concluded that in determining the existence of intent to destroy a "part" of a group:

[1458] International Court of Justice, *Case Concerning Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia)*, Judgment, paras 198 & 200;

> "… both proportionate scale and total number are relevant.
>
> The Trial Chamber opines, therefore, that "in part" requires the intention to destroy a *considerable number of individuals who are part of the group*. Individuals must be targeted due to their membership of the group to satisfy this definition."[1459]

704. In determining whether genocidal intent existed on the part of the Accused the Honorable Trial Chamber, in addition to looking at the existence of a genocidal plan in Rwanda, the methodology used, the "persistent pattern of conduct," and the weapons used in the massacres, also took into account the scope of actual destruction attributable to the acts and omissions of the Accused. It concluded that "[t]he number of Tutsis killed in the massacres, for which Kayishema is responsible, either individually or as a superior, provides evidence of Kayishema's intent" based on the fact that:.

> "… *enormous* number of Tutsis were killed in each of the four crime sites. In the Complex, the number of Tutsis killed was estimated to be about 8,000; there were between 8,000 and 27,000 Tutsis massacred at the Stadium; and, at Mubuga Church between 4,000 and 5,500 Tutsi were massacred. The number killed in Bisesero is more difficult to estimate, however, evidence suggests that the number of those who perished was well into the tens of thousands."[1460]

705. The rationale followed in *Kayishema and Ruzindana* was reiterated in *Baglishema* and *Semanza* cases. The Trial Chamber in *Baglishema* explained its position by stating that it:

> "… agreed with the statement of the International Law Commission, that 'the intention must be to destroy the group as such, meaning as a separate and distinct entity, and not merely some individuals because of their membership in particular group.' Although the destruction sought need not be directed at

[1459] Prosecutor v. Kayishema and Ruzindana, ICTR-95-1-T, Judgment (1999), para 96 & 97;
[1460] Ibid. para.531;

every member of the targeted group, the Chamber considers that the intention to destroy must target at least a substantial part of the group".[1461]

706. Following the jurisprudence of the ICTR on substantial part and commentaries of the Convention the Trial Chamber of the ICTY in *Jelisic* case also emphasized the link between the rationale of the Genocide Convention and the substantiality criterion in stating that:

> "*Given the goal of the Convention to deal with mass crimes, it is widely acknowledged that the intention to destroy must target at least a substantial part of the group*. The Tribunal for Rwanda appears to go even further by demanding that the accused have the intention of destroying a "considerable" number of individual members of a group. In a letter addressed to the United States Senate during the debate on Article II of the Convention on genocide, Raphaël Lemkin explained in the same way that the intent to destroy "in part" must be interpreted as an desire for destruction which 'must be of a substantial nature […] so as to affect the entirety'. A targeted part of a group would be classed as substantial either because the intent sought to harm a large majority of the group in question or the most representative members of the targeted community. … Genocidal intent may therefore be manifest in two forms. It may consist of desiring the extermination of *a very large number* of the members of the group, in which case it would constitute an intention to destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such. This would then constitute an intention to destroy the group "selectively".[1462]"

707. The Chamber however never went into discussion about practical aspects of the substantial part criterion. Subsequent decisions of the ICTY shed more light in this respect.

[1461] Prosecutor v. Baglishema, ICTR-95-1A-T, Judgment (2001), para.64;
[1462] Prosecutor v. Jelisic, IT-95-10, Trial Chamber Judgment (1999), para.82;

708. For example, in *Sikirica* the Trial Chamber examined the evidence before it pertaining to crimes committed in Prijedor municipality by relying both on substantial and significant part criterion. In that respect the Chamber observed that:

> "*This part of the definition calls for evidence of an intention to destroy a reasonably substantial number relative to the total population of the group***.** According to this definition, if that criterion is not met, the *mens rea* may yet be established by evidence of an intention to destroy a significant section of the group, such as its leadership. While the Chamber does not reject that aspect of the definition, which sees the two elements as being alternative, there may be situations in which the inference as to the intent can not be drawn on the basis of the evidence in relation to each element in isolation, but when the evidence in relation to each is viewed as a whole, it would be perfectly proper to draw the inference."[1463]

709. When examining the facts of the case from the "substantial part" standpoint the Chamber was not able to find that the number of actual victims of the two protected groups, Bosnian Muslims and Bosnia Croats of Prijedor municipality, when viewed in relation to the total number of group members residing in the given municipality had satisfied this criterion:

> "For the purpose of determining the number of victims within the terms of Article 4(2)(a), (b) and (c), one is, therefore, left with a number of approximately 1000-1400 Muslims out of a total of 49,351 in the Prijedor municipality. This would represent between 2% and 2.8% of the Muslims in the Prijedor municipality and would hardly qualify as a "reasonably substantial" part of the Bosnian Muslim group in Prijedor.
>
> …
>
> On the whole, the number of Bosnian Muslims and Bosnian Croats detained in the Keraterm camp, and who were victims within the terms of Article 4(2)(a), (b), and (c), is negligible."[1464]

[1463] Prosecutor v. Sikirica, IT-95-8, Trial Chamber Judgment (2001), para.65;
[1464] Ibid, paras 72 & 74;

710. While, as noted above, in *Sikirica* the Trial Chamber dealt with the events which took place in one municipality and crimes committed against members of that municipality the Trial Chamber in *Brdjanin* dealt with this issue on a somewhat larger scale, by looking at crimes committed against members of two protected groups, that of Bosnian Muslims and Bosnian Croats, within a number of municipalities. In Brdjanin the Chamber primarily assessed the fact whether the total number of residents of targeted communities belonging to Bosnian Muslim and Bosnian Croat group represented substantial parts of the whole population of those two groups residing in the territory of Bosnia and Herzegovina:

> "The Prosecution submits that the Bosnian Muslims and Bosnian Croats of the ARK were the parts of these groups targeted for destruction, that they are "substantial" parts, and therefore that the intent to destroy these parts falls under the definition of genocide. In considering this submission, the Trial Chamber must answer the question "how much of a group a perpetrator must intend to destroy in order to meet the legal requirements of genocide".
>
> …
>
> The Trial Chamber finds that there is sufficient evidence that the targeted parts of the groups were the Bosnian Muslims and Bosnian Croats of the ARK. For the purposes of analyzing whether the requirement of substantiality is satisfied, since it is difficult to precisely determine which municipalities belonged to the ARK at any given time, it suffices that the Trial Chamber is satisfied that all thirteen municipalities addressed in the Indictment and referred to as the relevant ARK municipalities belonged to the ARK at any given time. *According to the 1991 census, there were 2,162,426 Bosnian Muslims and 795,745 Bosnian Croats in BiH. Of these, 233,128 Bosnian Muslims and 63,314 Bosnian Croats lived in the relevant ARK municipalities. Numerically speaking, the Bosnian Muslims and Bosnian Croats of the relevant ARK municipalities, on their own, constituted a substantial part, both intrinsically and in relation to the overall Bosnian Muslim and Bosnian Croat groups in BiH*. The requirement of substantiality is satisfied, at a minimum, by the relevant ARK municipalities, and it is therefore unnecessary to inquire further into other relevant factors such as the prominence of the targeted parts

> within the groups. The Trial Chamber is satisfied that, in targeting the Bosnian Muslims and Bosnian Croats of the ARK, the perpetrators intended to target at least substantial parts of the protected groups."[1465]

711. The Brdjanin Chamber then went on to examine whether it was possible to infer the existence of intent to destroy such a substantial part of the group from the actual destruction of its members. As in *Sikirica* the Brdjanin Chamber here was also not able to conclude that the given extent of destruction suggested the existence of genocidal intent on the part of the accused:

> "The proper basis for comparison would be between those Bosnian Muslims or Bosnian Croats who were victims within the terms of Article 4(2)(a), (b) or (c), and the populations of those groups in the whole ARK. However, since the Prosecution has lead evidence of underlying acts only for some municipalities, the Trial Chamber has looked at the number of Bosnian Muslims and Bosnian Croats in the relevant ARK municipalities, excluding Čelinac and Šipovo. *The number of Bosnian Muslims and Bosnian Croats who were victims within the terms of Article 4(2)(a), (b) or (c) as such and of itself does not allow the Trial Chamber to legitimately draw the inference that the underlying acts were motivated by genocidal intent.* Still, this does not necessarily negate the inference that there was intent to destroy in part the Bosnian Muslim and Bosnian Croat groups. However, in the Trial Chamber's view, when considering that fact along with other aspects of the evidence, the intent to destroy parts of the Bosnian Muslims and Bosnian Croats is not the only reasonable inference that may be drawn from the evidence."[1466]

712. In the *Krstic* case both the Trial and the Appeals Chamber were satisfied that the Srebrenica enclave met the substantial part requirement. The finding was based on a number of factors: geographical location of the part of the group, the size of the group, its strategic position, its significance in the eyes of Bosnian Muslims as a "safe area", as well as the fact that only that particular group was in the area of control of

[1465] Prosecutor v. Brdjanin, IT-99-36, Trial Chamber Judgment (2004), paras 964 & 967;
[1466] Ibid. para.974;

the alleged perpetrators. This was explained by the Appeals Chamber in the following manner:

> "In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia. This conclusion comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people. This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region. Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size. As the Trial Chamber explained, Srebrenica (and the surrounding Central Podrinje region) were of immense strategic importance to the Bosnian Serb leadership. Without Srebrenica, the ethnically Serb state of Republica Srpska they sought to create would remain divided into two disconnected parts, and its access to Serbia proper would be disrupted. The capture and ethnic purification of Srebrenica would therefore severely undermine the military efforts of the Bosnian Muslim state to ensure its viability, a consequence the Muslim leadership fully realized and strove to prevent. Control over the Srebrenica region was consequently essential to the goal of some Bosnian Serb leaders of forming a viable political entity in Bosnia, as well as to the continued survival of the Bosnian Muslim people. Because most of the Muslim inhabitants of the region had, by 1995, sought refuge within the Srebrenica enclave, the elimination of that enclave would have accomplished the goal of purifying the entire region of its Muslim population.
>
> In addition, Srebrenica was important due to its prominence in the eyes of both the Bosnian Muslims and the international community. The town of Srebrenica was the most visible of the "safe areas" established by the UN Security Council in Bosnia. By 1995 it had received significant attention in the

> international media. In its resolution declaring Srebrenica a safe area, the Security Council announced that it "should be free from armed attack or any other hostile act." This guarantee of protection was re-affirmed by the commander of the UN Protection Force in Bosnia (UNPROFOR) and reinforced with the deployment of UN troops. The elimination of the Muslim population of Srebrenica, despite the assurances given by the international community, would serve as a potent example to all Bosnian Muslims of their vulnerability and defenselessness in the face of Serb military forces. The fate of the Bosnian Muslims of Srebrenica would be emblematic of that of all Bosnian Muslims.
>
> Finally, the ambit of the genocidal enterprise in this case was limited to the area of Srebrenica. While the authority of the VRS Main Staff extended throughout Bosnia, the authority of the Bosnian Serb forces charged with the take-over of Srebrenica did not extend beyond the Central Podrinje region. From the perspective of the Bosnian Serb forces alleged to have had genocidal intent in this case, the Muslims of Srebrenica were the only part of the Bosnian Muslim group within their area of control."[1467]

713. The first factor – i.e. the "distinct" character of the Srebrenica community based on the geographic location criterion has already been dealt in the preceding section. As explained earlier in this submission, the composition of the community of Srebrenica at the time of the events could not meet the "distinct entity" criterion set by the Trial Chamber in Krstic since it was more an accumulation of representatives of various geographically located Muslim communities than a distinct geographically located entity. This criterion thus respectfully cannot be used in support of the claim that the Bosnian Muslim community of Srebrenica represented the substantial part of the protected group.

714. The second, and the most crucial factor, - the size of the attacked group also speaks against the conclusion that the Srebrenica community represented a substantial part of the protected group of Bosnian Muslims. As can be seen from authoritative

[1467] Prosecutor v. Krstic, IT-98-33-A, Appeals Chamber Judgment (2004), paras 15-17;

interpretations of the Convention, scholarly opinion and court practice to date "substantial part" requires very large or large, considerable, significant numbers relative to the total of the protected group. This goes in line with the spirit of the Convention which is intended to deal with large scale atrocities, as highlighted by Lempkin and reinforced by the ICTY Trial Chamber in *Jelisic*.

715. According to the 1991 census the Muslim community of Bosnia and Herzegovina had 2,162,426.[1468] The estimates provided by the Prosecution and the Defense in the *Krstic* case, indicate that the Muslim community of Srebrenica at the time of the events covered by the Indictment was comprised of approximately 40,000 which effectively made around 2 percent of the entire protected group. As noted by the *Krstic* Appeals Chamber the Srebrenica Muslim community "constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time".[1469] This figure cannot in any way meet the requirement of substantiality. In *Sikirica* a comparable number, in this case of actual victims, was characterized by the Trial Chamber as "hardly qualify[ing] as a 'reasonably substantial' part" and as "negligible".[1470] In Brdjanin the substantiality criterion was met however with significantly higher percentages when viewed in relation to the whole than that of Srebrenica population - populations of targeted municipalities had made up approximately 9 and 11 percent of entire protected groups of Bosnian Croats and Bosnian Muslims respectively. In and of itself community of Srebrenica does not represent a substantial part of the protected group within the meaning of the Genocide Convention. Accordingly, following the dictum of the ICJ in *Bosnia* case where the substantiality criterion has been characterized as the "an essential starting point."[1471] it can be concluded that in this case this essential starting point was not satisfied.

716. Invocation of the third factor – the strategic significance of the enclave due to its location – is also challenged due to the fact that it indicates goals and intentions

[1468] See "Croatian National Statistics Depot, Population of Bosnia and Herzegovina, Permanent Population by Etnicities in Municipalities; Census of 1971, 1981 and 1991" cited in Prisecutor v. Brdjanin, Trial Chamber Judgment, footnote no. 2439
[1469] Prosecutor v. Krstic, IT-98-33-A, Appeals Chamber Judgment (2004), para.15;
[1470] Prosecutor v. Sikirica, IT-95-8, Trial Chamber Judgment (2001), paras 72 and 73;
[1471] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para.200;

which do not necessarily correspond to those required for genocide, particularly in the circumstances of this case. As stated by Robertson in his commentary of the Convention: "[t]he main characteristic of genocide is its object: the act must be directed at the destruction of a group. … [T]herefore, acts resulting in such destruction but committed without such an intent would not fall under this definition".[1472] Genocide thus has to primarily be about the destruction of a group, a fact highlighted in every court decision and every scholarly and expert paper dealing with genocide. If one looks at the overview of facts which were taken into account by the Tribunals to date in determining the existence of genocide, provided by the Prosecution in its Pre -Trial Brief, one can see that there is no mention of this factor.[1473]

717. Such and similar agendas have been associated to date with ethnic cleansing. While discussing about the relation between the two concepts Schabas notes that:

> "Both, of course, may share the same goal, which is to eliminate the persecuted group from a given area. While the material acts performed to commit crimes may often resemble each other, they have two quite different specific intents. One is intended to displace a population, the other to destroy it. The issue is one of intent and it is logically inconceivable that the two agendas coexist"[1474]

718. In *Brdjanin*, for example, the Trial Chamber was not able to find that the crimes committed with a goal to ethnically purify a certain area of strategic importance to Serbs in Bosnia and Herzegovina from non-Serb groups were at the same time an indication of intent to destroy the two groups. The Chamber stated that:

> " … 'The project of an ethnically homogenous state formulated against the backdrop of mixed populations necessarily envisages the exclusion of any group not identified with the Serbian one'. The exclusion was to be achieved by the use of force and fear against any such group. In addition, there are

[1472] Robertson N., The Genocide Convention – Its Origins and Interpretation, pp. 17-18;
[1473] P. 116, Prosecutor's Pre-Trial brief pursuant to the Rule 65 *ter*
[1474] Schabas, W., Genocide in international law, Cambridge University Press, 2000, p.200

> obvious similarities between a genocidal policy and the policy commonly known as ethnic cleansing. The underlying criminal acts for each may often be the same. For the reasons stated above, however, it is not possible to conclude from the evidence that this potential materialised in the territory of the ARK in the period relevant to the Indictment. While the Trial Chamber is satisfied that the Strategic Plan was to link Serb-populated areas in BiH together, to gain control over these areas and to create a separate Bosnian Serb state, from which most non-Serbs would be permanently removed, and that force and fear were used to implement it, it is not possible to conclude from the evidence actually brought forth in the instant case that there was an intention to do so by destroying the Bosnian Muslim and Bosnian Croat groups of the ARK. …".[1475]

719. In contrast to Shabas the Trial Chamber noted at the end that it would be possible that in a similar scenario same and similar acts could be committed with the intent to destroy a certain group. [1476] Its decision however shows that it would not be the only possible inference that could be drawn.

720. It is respectfully submitted that the fact that Serb forces allegedly perceived Srebrenica as being a crucial link in unifying Serbian occupied territories in this region of Bosnia and Herzegovina or as a *tool* to "severely undermine … military effort" of the enemy cannot automatically be taken as a fact in support of a claim that Srebrenica represented a substantial part of the protected group. Even more so it cannot be a factor that can or should be able to make up for the absence of the basic requirement of the "substantiality criterion", i.e. a significant percentage of group members whose destruction could jeopardize the survival of the entire group.

721. In deciding that Srebrenica represented a substantial part of the protected group of Bosnian Muslims both the Trial and Appeal Chambers in *Krstic* also relied on Srebrenica's position of an internationally recognized safe area. The Appeals Chamber raised an argument that the status of the enclave and destruction of the Srebrenica Muslims would have a symbolic meaning as it would indicate this group's

[1475] Prosecutor v. Brdjanin, IT – 99-36- T, Trial Chamber Judgment (2004), para.981;
[1476] Ibid.

"vulnerability and defenselessness in the face of Serb military forces". The starting assumption of this factor is however wrong. Srebrenica never became a safe area in the manner intended by parties affording it with such a status. In 1993 an Agreement was signed between representatives of the Serbian and the Bosnian side, in the presence of a representative of UN forces in the field, which envisaged, among other things, that:

> "The demilitarization of Srebrenica will be complete within 72 hours of the arrival of the UNPROFOR company in Srebrenica (1100 hours 18 April 1993; if they arrive later this will be changed). All weapons, ammunition, mines, explosives and combat supplies (except medicines) inside Srebrenica will be submitted/handed over to UNPROFOR under the supervision of three officers from each side with control carried out by UNPROFOR. No armed persons or units except UNPROFOR will remain within the city once the demilitarization process is complete. Responsibility for the demilitarization process remains with UNPROFOR."[1477]

722. Numerous ABiH documents show that although agreed to the enclave was never fully demilitarized. In the section "Demilitarization of the enclave" it was shown that incredible amounts of weapons and ammunition found their way into the enclaves, that weapons were brought in even by helicopters, that UNPROFOR and UNHCR convoys were even smuggling the ammunition and fuel for the ABiH forces in enclaves and finally that Muslim population was aware that the enclaves were not demilitarized.[1478]

723. The last factor relied upon by the Trial and Appeal Chambers in Krstic was dealt with recently by the ICJ in the *Bosnia* case. Although acknowledging the significance of the "criterion of opportunity", i.e. the scope of the protected group accessible to the accused, the Court warned that it cannot be readily used to outweigh a requirement for substantiality:

[1477] 5D503, para.4;
[1478] See "Demilitarization of the enclave" part of this brief;

> "The area of the perpetrator's activity and control are to be considered. As the ICTY Appeals Chamber has said, and indeed as the Respondent accepts, the opportunity available to the perpetrators is significant (*Krstić*, IT-98-33-A, Judgment, 19 April 2004, para. 13). This criterion of opportunity must however be weighed against the first and essential factor of substantiality. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber has indeed indicated the need for caution, lest this approach might distort the definition of genocide (*Stakić*, IT-97-24-T, Judgment, 31 July 2003, para. 523). Likewise, the International Law Commission stated that "the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group." (ILC Draft Code of Crimes, supra note 55, at 89; see also infra Part III.C)."[1479]

724. This is true for the case at hand. As with all other factors dealt with previously this factor was also used by the Trial and Appeal Chambers in Krstic to counterbalance the fact that the targeted Srebrenica population did not meet the "substantial part" criterion. Moreover, the conclusion reached by the Appeals Chamber that: "[f]rom the perspective of the Bosnian Serb forces alleged to have had genocidal intent in this case, the Muslims of Srebrenica were the only part of the Bosnian Muslim group within their area of control"[1480] is factually incorrect.

725. It is respectfully submitted that the geographical location criterion could not have been used in relation to Srebrenica as, at the time of the events covered by the Indictment, its composition did not allow for drawing a conclusion that it represented a community (i.e. *distinct entity*) made up of representatives of a certain protected group located in a given geographical region. It is respectfully submitted that Srebrenica also never met the "substantial part" requirement as the population residing in the enclave represented, in the words of the Krstic Appelas Chamber, "a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time". Without this crucial requirement being met other factors called upon by the

[1479] Para 199, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007

[1480] Para 17, Prosecutor v. *Krstic*, IT – 98-33, Appeals Chamber Judgment (2004)

Chambers (strategic location, status of a safe area and the "opportunity" criterion) should respectfully never have been used in an attempt to support the conclusion that Srebrenica met the substantiality criterion.

Killings of able bodied men was not perpetrated with specific genocidal intent to destroy the group in whole or in part

726. It is respectfully submitted that the alleged genocide in Srebrenica will be disputed by advancing one additional argument. The Krstic Appeal Chamber expressed their view that VRS forces, and more specifically some members of the VRS Main Staff had genocidal intent to destroy all the Bosnian Muslims of Srebrenica.[1481]

727. However, it will be shown here that there is additional explanation as to why only Muslim men that were captured were killed. Such explanation more logically explains the intent of the Bosnian Serbs and opposes the complicated allegation that genocidal intent existed among the alleged members of the JCE.

728. For the crime of genocide motives for killings is not important if the intent behind the motive is to destroy group or part of the group. However, the intent of killing of Muslim able bodied men could also be the self preservation of the Republic of Srpska. This is not strictly an argument that Muslim men were eliminated as a perceived potential military threat.

729. In light of new evidence, mostly VRS documents that were not used and perhaps not even available in previous trials one can see the level of fear to which VRS was facing in the second half of July 1995. It is submitted that the fear that the VRS will be militarily overrun by the ABiH, and that the whole Republic of Srpska might cease to exist was the incentive for making a sudden decision to eliminate the Muslim soldiers captured and held far behind VRS lines.

730. It is undisputed that the VRS was militarily surprised by the 28th Division breakthrough from the Drina Corps encirclement. Many documents were shown

[1481] Krstic Appeal Chamber Judgment, para.19;

during trial pointing to the fact that the VRS had no clue as to where the column was on 12 July. Being completely surprised by the column axes of withdrawal the town of Zvornik was left to the 28th Division almost without a defence.

731. In such circumstances the VRS had to act quickly. The Zvornik brigade commander Pandurevic was called to come back and prevent the fall of Zvornik.[1482] He found himself in very difficult situation, just one day later his brigade even though strengthen with Legenda and one of the most elite units of the VRS suffered great losses. Documents speak as to how strong the Muslim attack was, intercept conversation from 16 July where one of the participants is Pandurevic describes that the Muslims forces took two self propelled guns from the Zvornik brigade, that the road is cut off and that they cannot get the wounded soldiers out.[1483] The VRS lines were simply overrun and the Zvornik Brigade commander at one moment was forced to open the corridor in order to save his Brigade and the town of Zvornik.

732. From the other side of the Zvornik lines the 2nd Corps of ABiH was breaking the VRS lines in frontal attacks in which the 24th Division was involved pursuant to order dated 13 July.[1484] Similarly VRS intelligence was that Naser Oric already broke the VRS lines. Intercept from 15 July 1995 at 08.55h mentions that Naser Oric is coming from the direction of Krizevic to meet 28th Division that is coming from Srebrenica. The information was that he managed to breach the lines.[1485] Already previously surprised it was only reasonable for the VRS forces to try whatever they could in order to protect the whole Podrinje area.

733. At that time there were no forces to help the Drina Corps, most of their troops were engaged in Zepa and were already weakened when Pandurevic left with his forces. The situation in Zepa was only unwrapping at that time, soldiers of the Zepa brigade did not surrender until the end of July.

[1482] 3D318, Drina Corps Command information, dated 15.07.1995; also see 1D698; also P1178;
[1483] P1183;
[1484] 5D303; order to attack, dated 13 July 1995;
[1485] P1172; also see P201; also P200; also P1173;

734. However, the situation on other fronts was not better but at some fronts even worse if that was possible.[1486] It was already mentioned that VRS forces were engaged around Sarajevo and that two battalions from Drina Corps were sent as reinforcement, which reflects how difficult the military situation was. The VRS Main Staff had intelligence information that Muslim forces were preparing an overall attack on all fronts and that Muslims made an agreement with the Croat forces. By the 27 July 1995 population from Grahovo and Glamoc already withdrew because of these threats.[1487] On 31 July Gen Mladic informed Gen Smith that 50.000 Serbian refugees are retreating due to the HVO attack.[1488]

735. The Appeal Chamber in the Krstic discussed the potential military threat from captured Muslim men. The Appeal Chamber noted that "the Trial Chamber found that, in executing the captured Bosnian Muslim men, the VRS did not differentiate between men of military status and civilians".[1489] The Appeals Chamber concluded that "though civilians undoubtedly are capable of bearing arms, they do not constitute the same kind of military threat as professional soldiers. The Trial Chamber was therefore justified in drawing the inference that, by killing the civilian prisoners, the VRS did not intend only to eliminate them as a military danger".[1490]

736. However, the real military threat was not those captured Muslim men the real threat was the possibility of those prisoners joining the 2nd Corps and 28th Division. The release of a couple thousand Muslim men belonging to the 28th Division that would join forces with 2nd Corps of ABiH would mean even stronger forces that the VRS would be facing. An even worse situation would be if the 2nd Corps breached the VRS lines as it was able to do and releasing all those able bodied Muslim man behind VRS lines. Such joined forces in the Zvornik area would be a strong enough force to take Crna Rijeka Command Post, and the whole Podrinje area.

737. What makes this fear of VRS even more apparent is that scenario as the one described here was substantiated by consequences that have occurred just couple a

[1486] Ljubo Obradovic, T28269; also see 5D1215;
[1487] P3905; Main Staff report;
[1488] P2947;
[1489] citing Krstic Trial Chamber Judgment, paras 574, 594;
[1490] Krstic Appeal Chamber Judgment, para.26;

days after Srebrenica events. First Glamoc and Grahovo and later Krajina had fallen. This happened even though most of the VRS forces around the enclaves were not tied to the enclaves and if the situation in Podrinje was more serious (with 28th Division and all imprisoned Muslim men fighting) defeat of Podrinje area would be only the beginning of the end for the VRS. The civilian population would be forced to withdraw from the territory, which would mean the end of Republic of Srpska.

738. Protection of the VRS and the Republic of Srpska were at stake, the decision was made in rush, without too much contemplating because national interest of RS was in impediment. This further shows that the killings were not done with specific intent to destroy the Bosnian Muslim group but for completely different reason and this is why only able bodied men were killed and not the other members of the population.

The Prosecution failed to prove that genocidal intent existed prior to July 13 as alleged and further failed to prove that the killings which occurred on July 13, were perpetrated with genocidal intent

739. The Prosecution alleges that the large scale and systematic murder of Muslim men began on 13 July 1995.[1491] With such claim the Prosecution implies that murders on 13 July because of their scale were committed with the special genocidal intent. However, as it will be shown evidence adduced during the Trial undoubtedly refutes such a conclusion.

Cerska

740. The conclusion that the special genocidal intent did not existed on the 13 July, as alleged by the Prosecution can be firstly proven by analyzing the forensic evidence in relation to the Cerska grave. Initially the Prosecution alleged the Cerska killings, according to the Indictment, occurred in the early afternoon hours of 13 July when allegedly 150 persons were killed.[1492] However, after additional review it was established by the Prosecution investigator Mr. Dusan Janc that out of 142 allegedly

[1491] Indictment, para.30;
[1492] Indictment, para.30(3);

identified individuals in Cerska grave[1493] at least 10 individuals identified in the Cerska mass grave may have been captured after 13 July and in some cases as late as 17 July.[1494] This new fact is in addition to two cases identified originally by Mr. Haglund.[1495]

741. When asked about his comment about the time of death of these persons found in Cerska, Mr. Janc replied that either these individuals were killed later, not on the 13th, or that the Cerska killing or execution took place later.[1496] What should be stressed once again even though this argument was strongly emphasized earlier when the number of killed was discussed, is that Mr. Haglund's conclusion on the Cerska site was that the victims were executed on site[1497] while on the other hand he said that Cerska was a primary undisturbed grave.[1498]

742. This new evidence about the time of death of certain persons found in Cerska clearly shows that the conclusions made by Prosecution experts are pure guesswork and based on erroneous assumptions. It is obvious now that the 150 bodies found in Cerska were, not killed on 13 July or that they were not killed at the same time or place nor that they were buried on the 13 July. However, what perhaps may be significant is that the conclusions made by Haglund that were also done by others experts on the questions when persons were killed or whether they were killed at the same time as well as place were they were killed were pure speculation. As previously referenced the bodies of the killed during the legal combat engagements were brought and buried with other victims who died as a result of executions. As seen from Mr. Haglund's report and the Cerska grave example such conclusions are not only pure subjective speculation but also erroneous conclusions.

743. With respect to Cerska and the date of the killings, newly obtained facts about time of death could obviously point to two different and important conclusions that were admitted by the Prosecution's investigator Mr. Dusan Janc. The first conclusion

[1493] P4490, Janc report, page.2;
[1494] Dusan Janc, T33528, also see 1D1391; (numbers are Cerska 20, Cerska 30, Cerska 32, Cerska 36, Cerska 51, Cerska 65, Cerska 66, Cerska 83, Cerska 101, and Cerska 116.");
[1495] Dusan Janc, T33529; (Haglund listed Cerska 12 and Cerska 82);
[1496] Dusan Janc, T33529;
[1497] P611, Haglund report on Cerska, page.66;
[1498] William Haglund, T8910; also see Dusan Janc, T33392;

is that the Prosecution obviously did not establish beyond reasonable doubt how many people were killed on 13 July in Cerska, if any. This further points to the conclusion that the Prosecution did not prove that the killing in Cerska were large and systematic and that as such could lead one to infer the existence of genocidal intent.

744. The second conclusion stemming from the fact that it is not established beyond reasonable doubt when and how many killings were perpetrated on 13 July, if any, is that the Prosecution did not prove its claim that from the Cerska execution due to its systematic nature one could infer that the perpetrators or organizers were acting with genocidal intent.

745. In view of this new evidence it is obvious that Prosecution's claim related to the Cerska executions is not proven and as such undercuts the relevant part of the Indictment in several ways.

Kravica warehouse

746. If genocidal intent could have been inferred from two large and systematic executions, Cerska and Kravica, the inference respectfully should be completely different if the Cerska execution is deleted from the equation. It is respectfully submitted, that the Honorable Trial Chamber must fully take into consideration how the execution at Kravica started before it can conclude that from these two executions one could infer genocidal intent as suggested by the Prosecution.

747. Namely when one analyze the evidence related to the Kravica warehouse and the killings that were perpetrated there it is submitted that those killings were neither planned nor could one make the inference that the killings would have happened if the one Serb guard were not killed and the other wounded by the Muslim prisoners in an attempt to break free.

748. Essentially during the Trial witnesses testified that the killings of prisoners started after Muslims prisoners that were held in the warehouse tried to overpower the

Serbian guards and take their rifles.[1499] During this incident one member of the Skelani Platoon, Krsto Dragicevic, Krle, was according to some witnesses killed by the Muslims,[1500] while Rade Cuturic aka Oficir was only wounded while grabbing the barrel of the machine during the struggle with the Muslims.[1501]

749. The Honorable Trial Chamber was presented with the hearsay evidence from PW161 who heard this story from the policemen with burned hands, namely "Oficir" who told him that actually the Muslim did grab a rifle from Serbian policemen and killed him and that he burned his hands by holding the rifle.[1502] Witness PW170 and Dusko Jevic also testified that they heard that this is how the events in Kravica developed.[1503]

750. Witness Djukanovic testified as to what he observed around Kravica warehouse and at one moment he was ordered to bring water and commented when he brought a bucket of water to one of the guards who had a rifle on his shoulder that he should watch out because somebody might snatch it away from him or kill him.[1504] Five minutes after that he heard two short bursts of fire and somebody told him that this "special" guard got killed and one of the others got wounded.[1505] Djukanovic testified after that, he heard shooting from the front part of the hangar that lasted about 15 minutes and that he heard explosions.[1506] Finally Djukanovic said that later he saw piles of bodies next to the corner of the hangar.[1507]

751. This sequence of events was not disputed by the Muslim survivors. Witness PW111 testified that at one moment he heard shootings from outside and that he saw firing towards the forest.[1508] PW111 testified that Serb guards were agitated because the Muslims attacked the warehouse.[1509] Witness said that at one moment it seemed to

[1499] PW160, T8624;
[1500] Predrag Celic, T13481; also see Predrag Celic who testified that he heard that "Krle" was wounded, T13577;
[1501] Predrag Celic, T13842;
[1502] PW161, T9364;
[1503] PW170, T17855; also see Dusko Jevic, T8624;
[1504] Milos Djukanovic, T11766;
[1505] Milos Djukanovic, T11767;
[1506] Milos Djukanovic, T11768;
[1507] Milos Djukanovic, T11770-1;
[1508] PW111, T6993;
[1509] PW111, T6994;

him that Serbs will start shooting but that one of soldiers prevented this.[1510] However, witness testimony was not clear because he then repeated that Serbs became angry after which they start shooting what went on for about half an hour.[1511] [REDACTED] [1512]

752. Considering that witness confirmed that he was the first one to enter the warehouse[1513] and the possibility that he was not able to see what is happening at the entrance his interpretation how the killings started does not necessarily comport with the previously described version of how the shooting started. Namely, in the scenario if some of the Muslim prisoners manage to take the automatic rifle that would happen fast and it was hard for others in the warehouse to realize what is happening. The same can be said for the testimony of witness PW156 who testified that when the last prisoner entered the warehouse a Serb cursed him and after the Muslim responded that he does not have anywhere to sit the Serb "fired a burst of fire and that knocked him down and then there was a burst of fire, all kinds of weapons."[1514] The witness confirmed that he just bend his head in the corner[1515] which shows that he was not close to the entrance and that his version how the shooting started does not dispute the one suggested previously by Serb witnesses.

753. It is clear that the Muslims that were in the warehouse were being fired upon by the Serb guards but from the facts as to how this incident started it is obvious that the killings were not a plan of the type alleged by the Prosecution namely a genocidal plan. It is respectfully submitted that if the Honorable Trial Chamber finds that the incident started as analyzed here then it cannot be proven beyond reasonable doubt that the intent of the Serb guards was to destroy Srebrenica Muslim but rather that their intent to kill was isolated by the behavior of the Muslim prisoners and by the fear that Muslim prisoners will overpowered and kill them.

754. As explained by the Appeal Chamber the "opportunistic killings" by their very nature provide a very limited basis for inferring genocidal intent. Rather, as the

[1510] PW111, T6994;
[1511] PW111, T6995;
[1512] PW111, T7065;
[1513] PW111, T7056;
[1514] PW156, T7095;
[1515] PW156, T7095;

Appeals Chamber determined in the *Krstic* Appeal Judgement, these culpable acts simply assist in placing the mass killings in their proper context.[1516]

755. It is respectfully submitted that if the previous analysis is accepted there is no other factual evidence from which the existence of the genocidal intent could be inferred on 13 July 1995. Namely, neither in the previous judgments nor in the present trial was there a proof of an oral or written plan on the 13 July and that is why the conclusion regarding genocidal intent was always reached based on factual inferences such as large and systematic killings. Defense submits that in light of the aforementioned such inferences could not be made for 13 July 1995.

756. Furthermore, the Defense submits that in such a case in addition to the large number of killings committed in combat engagement with the column, killings in Cerska and Kravica warehouse must be excluded from the overall number of killed. Considering that those killings were not committed with genocidal intent those killings cannot be considered in the total number of killed in evaluating whether genocide occurred.

[1516] Blagojevic Appeal Chamber Judgment, para.123, citing Krstic Appeal Chamber Judgment, para.33;

Crimes against Humanity

757. According to Article 5 of the ICTY Statute crimes against humanity imply crimes enumerated under this article "when committed in armed conflict, whether international or internal in character, and directed against any civilian population". The overarching requirements of crimes against humanity are thus that murder, extermination, deportation or any other crime listed are committed in armed conflict and that the intended target is civilian population.

758. The first requirement - that of the existence of an "armed conflict"- requires only that an armed conflict is taking place "at the relevant time and place".[1517] An armed conflict is understood to continue beyond the cessation of hostilities, until a general conclusion of peace is reached, or, in the case of internal conflicts, a peaceful settlement is achieved.[1518]

759. In addition to that crimes against humanity also require that the following elements are met in relation to any of the crimes listed therein:

- there must be an attack;
- the attack must be widespread or systematic;
- the attack must be directed against a civilian population;
- the acts of the perpetrator must be part of the attack;
- the perpetrator must know that there is a widespread or systematic attack directed against a civilian population and that his or her acts are part of that attack.[1519]

1. *Attack*

760. In Tadic the Appeals Chamber highlighted that the term "attack" used in the definition cannot be equated with "armed conflict" as the later only refers to a setting in which the actual attack on a civilian population takes place[1520]. The attack could

[1517] Prosecutor v. Tadic, IT-94-1 Appeals Chamber Judgment (1999), para 249
[1518] Prosecutor v. Krajisnik, IT-00-39, Trial Chamber Judgment (2006), para 702
[1519] See, for example, Prosecutor v. Kunarac et al. IT – 93-23 & 23/1, Appeals Chamber Judgment (2002), para 85, Prosecutor v. Blaskic, IT-95-14, Appeals Chamber Judgment, para. 124
[1520] Prosecutor v. Tadic, IT-94-1 Appeals Chamber Judgment (1999), para 251

precede, outlast, or continue during the armed conflict, but it need not be a part of it.[1521] For this reason it is only required that there be a nexus between the acts with which a perpetrator is charged of and the attack against a civilian population, not with the armed conflict.[1522] Attack against the civilian population of the alleged assailant cannot be used as an exculpatory circumstance depriving the attack of an illegal character.[1523] Attack is understood to imply, *inter alia,* use of armed force, mistreatment of civilians, burning of houses and religious sites and forcible evictions.[1524]

2. *Widespread or systematic character of the attack*

761. This element of extermination as crime against humanity requires that the attack be widespread or systematic. Widespread character implies "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims."[1525] It does not however require an existence of plan or a policy as a distinct element.[1526] "A crime may be widespread or committed on a large-scale by 'the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude'"[1527] On the other hand, systematic character connotes "the organized nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes – that is the non accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence."[1528] Systematic character does not imply a requirement that an attack be directed at the entire population of a given territory.[1529] Widespread or systematic character are the required qualities of the attack against civilian population while the alleged acts do not have to widespread or systematic in their own right but do have to "take place in the relevant context".[1530]

[1521] Prosecutor v. Kunarac, IT – 93-23 & 23/1, Appeals Chamber Judgment (2001), para 86 calling upon Tadic Appeals Chamber Judgment (1999), para 251
[1522] Prosecutor v. Tadic, IT-94-1 Appeals Chamber Judgment (1999), para 251
[1523] Prosecutor v. Kupresic, IT-95-16, Trial Chamber Judgment (2000), para 765
[1524] See, for example, Prosecutor v. Naletic et al. IT –98-34, Trail Chamber Judgment (2003), paras 238&239, Prosecutor v. Krnojelac, IT – 97-25, Trail Chamber Judgment (2002), para 61.
[1525] Prosecutor v. Akayesu, ICTR-96-4-T, Judgment (1998), para 580
[1526] Prosecutor v. Kunarac et al, IT – 93-23 & 23/1, Appeals Chamber Judgment (2002), paras 98&101
[1527] Prosecutor v. Blaskic, IT-95-14-T, Trial Chamber Judgnent (2000), para 206
[1528] Prosecutor v. Kunarac et al., IT – 93-23 & 23/1-T, Trial Chamber Judgment (2001), para 429
[1529] Prosecutor v. Stakic, IT-97-24-A. Appeals Chamber Judgment (2006), para 247
[1530] Prosecutor v. Kunarac et al., IT – 93-23 & 23/1-T, Trial Chamber Judgment (2001), para 431

3. *The attack must be directed against a civilian population*

762. This element encompasses two sub-elements both of which have to be met in a case in question. The first refers to the direction of an attack while the second poses a requirement regarding the character of the object against whom the attack is directed.

763. As stated by the Appeals Chamber in *Kunarac* the phrase "directed against" requires "*that the civilian population which is subjected to the attack must be the primary rather than an incidental target of the attack*".[1531] This could be deduced from a number of factors such as "…the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war".[1532]

764. This position was reaffirmed in, *inter alia*, *Naletic* where the Appeals Chamber stated that:

"[t]he term "population" in the meaning of Article 5 of the Statute does not imply that the entire population of a geographical entity in which an attack is taking place must be subject to the attack. *The element is fulfilled if it can be shown that a sufficient number of individuals were targeted in the course of an attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian population, and not only against a limited number of individuals who were randomly selected.*"[1533]

765. In addition to being the "primary" rather than and "incidental" target the group being attacked has to be of a civilian character. According to Protocol I of the Geneva Conventions civilian are persons who do not belong to armed forces, volunteer corps, resistance movement or have not otherwise acquired a status of a combatant.[1534]

[1531] Prosecutor v. Kunarac, IT – 93-23 & 23/1-A, Appeals Chamber Judgment (2002), para 92
[1532] Prosecutor v. Kunarac, IT – 93-23 & 23/1-A, Appeals Chamber Judgment (2002), para 91
[1533] Prosecutor v. Naletic, IT –98-34-A, Appeals Chamber Judgment (2006), para 235
[1534] Art 50 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

4. *The acts of the perpetrator must be part of the attack*

766. As explained in Kunarac et al. this element of crimes against humanity requires that the "acts of the accused must be part of the "attack" against the civilian population, but they need not be committed in the midst of that attack. A crime which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack".[1535] It cannot however be an "isolated act",[1536] that is an act which is "…so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack".[1537]

5. *Knowledge requirement*

767. The final common element of crimes against humanity requires that in addition to the specific mental state required for each crime listed under Article 5 the perpetrator must also know that there is a widespread or systematic attack directed against a civilian population and that his or her acts are part of that attack.[1538] It is not however required that the perpetrator must share the purpose or the goal of the attack against a civilian population.[1539] It is equally irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim since it is only required that the attack be directed against a targeted population, and not the acts of the accused. [1540]

[1535] Prosecutor v. Kunarac et al., IT – 93-23 & 23/1, Appeals Chamber Judgment (2002), paras 96& 100
[1536] Prosecutor v. Kupresic, IT-95-16, Trial Chamber Judgment (2000), para 550
[1537] Prosecutor v. Kunarac et al., IT – 93-23 & 23/1, Appeals Chamber Judgment (2002), para 100
[1538] Prosecutor v. Blaskic, IT-95-14, Appeals Chamber Judgment (2004), para 124
[1539] Prosecutor v. Kunarac et al., IT – 93-23 & 23/1, Appeals Chamber Judgment (2002), para 103
[1540] Ibid.

Count 3 Extermination

768. The practice of the Tribunals to date is unequivocal in regards to the following elements of extermination:

- the attack must be directed against civilian population;[1541]
- extermination includes mass killings or the creation of conditions of life that lead to the mass killing of others, through … act(s) or omission(s);[1542]
- it has to take place as a part of a widespread or systematic attack against civilian population;
- the perpetrator must have acted with intent;[1543]

769. Although a discriminatory intent has been associated with acts qualified as extermination in the ICTR jurisprudence the Trial Chamber in *Krstic* took the view that it is not a necessary requirement for extermination.[1544] Civilian population could thus be attacked without the attack being on any of the listed (national, political, ethnic, racial or religious) or other grounds in order for the attack to qualify as being extermination. However the four elements established by the jurisprudence of the Tribunals have to be fulfilled in each given case. Listed elements have to be fulfilled cumulatively.

1. *Attack directed against a civilian population*

[1541] See Prosecutor v. Kunarac, IT – 93-23 & 23/1-A, Appeals Chamber Judgment (2002), para.92;
[1542] See Prosecutor v. Vasiljevic, IT – 98-32-T , Trial Chamber Judgment (2002), para.229, "The material element of extermination consists of any one *act or combination of acts which contributes to the killing of a large number of individuals (actus reus)*" also see Prosecutor v. *Kayishema and Ruzindana,* ICTR-95-1-T, Judgment (1999), para.144, "*[t]he actor participates in the mass killing of others or in the creation of conditions of life that lead to the mass killing of others, through his act(s) or omission(s)***;**
[1543] See Prosecutor v. *Kayishema and Ruzindana,* ICTR-95-1-T, Judgment (1999), para.144, "having intended the killing, or being reckless, or grossly negligent as to whether the killing would result and;" "being aware that his act(s) or omission(s) forms part of a mass killing event;" also see See Prosecutor v. Vasiljevic, IT – 98-32-T , Trial Chamber Judgment (2002), para.229, "The offender must intend to kill, to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission is likely to cause death, or otherwise intends to participate in the elimination of a number of individuals, in the knowledge that his action is part of a vast murderous enterprise *in which a large number of individuals are systematically marked for killing or killed* (*mens rea*)."
[1544] Prosecutor v. Krstic, IT-98-33-T, Trial Chamber Judgment (2001), para 500;

770. As with all other crimes enumerated under Article 5 of the ICTY Statute extermination requires that the acts of the accused are part of an attack directed against a civilian population. It has been noted in the introductory section to crimes against humanity that this element requires both that an attack is *directed against* a protected target group and that the protected target group in this case is *civilian* in character. "Directed against" implies that civilians are primary, not an incidental target of the attack**.**[1545]

771. Having in mind the facts of the case the Defense will at this point further elaborate on the second sub-element, i.e. a requirement that the targeted group are civilians. Purely civilian targets do not pose an issue in meeting the said requirement. However, in respect to the presence of combatants, persons *hors de combat,* former resistance movement members and soldiers not under arms at the time of the attack more liberal and more restrained views could be encountered within the judgments of the Tribunals. For example, in *Naletic* the Appeals Chamber stated that: "[t]he population against whom the attack is directed is considered civilian if it is predominantly civilian. This means not only that the definition of civilian population includes individuals who may at one time have performed acts of resistance and persons *hors de combat* but also that the presence of a number of non-civilians cannot refute the predominantly civilian character of a population."[1546] Accordingly, former combatants and persons *hors de combat* could be qualified as civilians while for a group to be characterized as civilian presence of only "a number" of acting combatants would be acceptable. This position followed the position initially taken by the Trial Chamber in *Akayesu*.[1547]

772. *Blaskic* Trial Chamber on this subject stated that "it can be concluded that the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population" and that assessments of the victims standing have to be made by looking at the time when the crimes are committed rather than relying upon his general status.[1548]

[1545] Prosecutor v. Kunarac, IT – 93-23 & 23/1-A, Appeals Chamber Judgment (2002), para.92;
[1546] Prosecutor v. Naletic, IT –98-34-A, Appeals Chamber Judgment (2006), para.235;
[1547] Prosecutor v. Akayesu, ICTR-96-4-T, Trial Chamber Judgment (1998), para.582;
[1548] Prosecutor v. Blaskic, IT-95-14-T, Trial Chamber Judgment, (2000), para.214;

773. However, the Appeals Chamber overruled the Trial Chamber's judgment in respect to the assessment of a victim's status and the characterization of a group in which combatants are present by analyzing ICRC Commentary and concluded that: "in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined."[1549]

774. This position was confirmed by the Appeals Chamber Judgments in *Martic* and most recently in *Slivancanin and Mrksic*. As for the status of persons *hors de combat,* the court in *Mrksic* clearly stated that taking into consideration customary law existing at the time of the commission of the crimes "Under Article 5 of the Statute, a person *hors de combat* may thus be the victim of an act amounting to a crime against humanity, provided that all other necessary conditions are met, in particular that the act in question is part of a widespread or systematic attack against any civilian population."[1550] In all other instances, persons *hors de combat* as well as combatants are not covered by Article 5 of the ICTY Statute.[1551]

775. The Defense argues that the Trial Chamber in Krstic and subsequently the Appeal Chamber erred when finding that the crime of extermination crime was committed at Srebrenica and at the same time citing small number of killings in Potocari, screening process in Potocari and opportunistic killings along the road.[1552] Trial Chamber must make a difference between two operations, 1) operation of attacking the enclave and evacuation of civilians from Potocari and 2) operation of destroying military column that refused to surrender after VRS was sure civilians were evacuated. It is submitted, as it was also agreed by the Prosecution, that the second operation were directed at the Muslim column that was primarily military and not civilian in character. At the time of the engagement with the column VRS forces and UNPROFOR knew that the 28th Division of the ABiH was not in Potocari. VRS army and their officers estimated that in the enclave there were several thousands of Muslim soldiers.[1553] The 28th Division chose to fight and break through the Serbian

[1549] Prosecutor v. Blaskic, IT IT-95-14-T, Appeals Chamber Judgment, (2004), paras113-115;
[1550] Prosecutor v. Martic, IT – 95-11-A, Appeals Chamber Judgment, (2008), para.313;
[1551] Prosecutor v. Mrksic et al., IT – 95-13/1-A, Appeals Chamber Judgment, (2009), para.35;
[1552] Prosecutor v. Krstic, IT-98-33-T, Trial Chamber Judgment (2001), paras504 & 505
[1553] Mirko Trivic, T11848; also see Ljubo Rakic, T22209;

position to reach Tuzla and Kladanj and they left the civilians behind in Potocari in order to accomplish this and this was know to the VRS.

776. As it was shown in the genocide part of this brief firm belief of the VRS that they are fighting military column is supported by the fact that there was almost no women found among the dead bodies.[1554] Even if there were a certain number of civilians they were incidental and not the primary casualties and as such do not fulfill the "Directed against" threshold.[1555] Finally conclusion that the column was overwhelmingly military can be seen from the fact that it managed in larger part to break through despite the VRS efforts. Hence, killings of Muslim men during the engagement with the military column and alleged subsequent killings cannot be defined as attack against civilian population.

777. The Defense thus argues that this element of extermination as crime against humanity is not met in this case because: 1) civilian population was not the primary target of the attacks; 2) the object of the attack did not have a civilian character as it included in most part members of the armed forces, and members of militias or volunteer corps; and that 3) *hors de combat* cannot in this case be covered by Article 5 of the Statute as there was no nexus between the acts in question and the widespread or systematic attacks on civilian population.

2.1 The mass scale (killings) requirement

778. Jurisprudence on extermination to date firmly established that attacks on the civilian population must involve large-scale killings for such attacks to be qualified as extermination. As noted in Akayesu **"**Extermination . . . requires an element of mass destruction which is not required for murder".[1556] According to the International Law Commission mass destruction is an element that makes extermination "closely related" to genocide. [1557] Practice of the ICTY to date concurs with this position. For

[1554] See Prosecutor v. Krstic, IT-98-33-T, Trial Chamber Judgment (2001), paras504;
[1555] Prosecutor v. Kunarac, IT – 93-23 & 23/1-A, Appeals Chamber Judgment (2002), para.92;
[1556] Prosecutor v. Akayesu, ICTR-96-4-T, Trial Chamber Judgment (1998), para.591;
[1557] *Report of the International Law Commission on the work of its 48th session, 6 May - 26 July 1996*, Official Documents of the United Nations General Assembly's 51st session, Supplement no. 10 (A/51/10);
Article 18, p. 118

example, the Trial Chamber in Krstic noted that "the definition should be read as meaning the destruction of a numerically significant part of the population concerned".[1558]

779. Also, similarly to genocide there is no numerical threshold associated with the mass destruction requirement. This was expressly underlined in *Ntakirutimana*[1559] *and Stakic*[1560] case. The "mass destruction" requirement would thus need to be determined in light of the facts of each individual case.

780. Accordingly both Tribunals to date have taken a unified stand that extermination is, in the words of the *Krstic* Trial Chamber is "calculated to bring about the destruction of a numerically significant part of the population",[1561] despite the fact that the findings related to the scope of actual destruction needed to establish that the crime of extermination was committed would differ in each given case. And although extermination might not require "intent to kill thousands"[1562] significant number of victims would need to be involved in order to meet the *massive scale* requirement, a fact that would have to be assessed based on the facts of this case.

781. It is submitted that the *Krstic* the Trial Chamber erred when found that this requirement was fulfilled and that crime of extermination was committed at Srebrenica relying on the same finding of facts it relied upon in respect to the substantial part requirement of genocide [1563] Defense submits that as analyzed in the genocide part of this brief the Prosecution did not prove beyond reasonable doubt how many of the killed Muslim men were killed during the lawful combat between the VRS forces and Muslim column. Such killings were not done with illegal intent as

[1558] Prosecutor v. Krstic, IT- 98-33-T, Trial Chamber Judgment (2001), para.502; it should be noted that definition of extermination in the ICC Rome Statute and allows the conclusion that extermination would be considered as having been committed even if acts have been taken in order to "bring about the destruction of a *part of the* group" (Article 7, point 2(b) of the Rome Statute of the International Criminal Court) however this was not accepted by the ICTY Trial Chambers as found by Krstic Trial Chamber Judgment para.502: "In accordance with the principle that where there is a plausible difference of interpretation or application, the position which most favors the accused should be adopted, the Chamber determines that, for the purpose of this case, the definition should be read as meaning the destruction of a numerically significant part of the population concerned."; also see Prosecutor v. Vasiljevic, IT – 98-32-T, Trial Chamber Judgment (2002), para.227;
[1559] Prosecutor v. *Ntakirutimana*, IT – 96-10 & 96-17, Trial Chamber Judgment ($$$), para.556;
[1560] See Prosecutor v. *Stakic*, IT-97-24-T, Trial Chamber Judgment (2003), para.640;
[1561] Prosecutor v. Krstic, IT-98-33-T, Trial Chamber Judgment (2001), Para.503;
[1562] Prosecutor v. Stakic, IT-97-24-A, Appeals Judgment (2006), para.261;
[1563] Prosecutor v. Krstic, IT-98-33-T, Trial Chamber Judgment (2001), paras504 & 505;

required by the crime of extermination and as such cannot be taken as a basis for the crime of extermination.

782. Given the new information presented by the Defense in this case in relation to the uncertainty of the actual scope of the alleged killings that could, without doubt, be attributable to the activities of the VRS Army in the enclave as oppose to those during the engagement with the military column, as well as uncertainty regarding the civilian status of victims, the Defense further submits that the mass destruction requirement cannot be established beyond reasonable doubt in this case. And as highlighted by the Trial Chamber in *Krajisnik*: "the Chamber may only take into account those specific killings which were proven beyond a reasonable doubt", while others have to be excluded from the assessment.[1564]

2.2 through acts or omissions

783. According to the, *inter alia*, Trial Chamber in *Niyitegeka* "the material element of extermination "consists of any one act or combination of acts which contributes to the killing of a large number of individuals."[1565]. This would mean that "[t]he actor participates in the mass killing of others or in the creation of conditions of life that lead to the mass killing of others, through his act(s) or omission(s)".[1566] Participation undoubtedly implies direct act of killing. However, this is not the only possible scenario according to the jurisprudence of the Tribunals.[1567]

784. For example, the Trail Chamber in Ndindabahizi case found that extermination can be committed "less directly than murder, …by participation in measures intended to bring about the deaths of a large number of individuals, but without actually committing a killing of any person**"[1568]** such as distributing weapons, transporting attackers and speaking words of encouragement**.** Words of encouragement would, according to the Trial Chamber in *Brdjanin* have to be

[1564] Prosecutor v. Krajisnik, IT-00-39-T, Trial Chamber Judgment (2006), para.717;
[1565] Prosecutor v. *Niyitegeka*, ICTR-96-14-T, Trial Chamber Judgment (2003), para.450;
[1566] Prosecutor v. *Kayishema and Ruzindana*, ICTR-95-1-T, Trial Chamber Judgment (1999), para;144;
[1567] Prosecutor v. Rutaganda, Trial Chamber Judgment, para 84: "Further, this act or omission includes, but is not limited to the direct act of killing. It can be any act or omission, or cumulative acts or omissions, that cause the death of the targeted group of individuals.";
[1568] Prosecutor v. *Ndindabahizi*, IT-01-71-A, Appeals Chamber Judgment (2007), para.479;

"specific enough to constitute instructions … to the physical perpetrators to commit any of the killings charged".[1569]

785. According to the Trial Chamber in *Kayishema and Ruzindana* "[e]xtermination includes not only the implementation of mass killing or the creation of conditions of life that leads to mass killing, but also the planning thereof. In this event, the Prosecution must prove a nexus between the planning and the actual killing."[1570] For example, in *Brdjanin* the accused was not found guilty on extermination charges because: a) there was no evidence in support of the Prosecution's argument that he "*ordered or instigated* the commission of the crimes of extermination"[1571]; and b) the nexus between his established acts (public utterances) and the subsequent killings was not established.[1572]

786. As can be seen from the facts of this case the Ljubisa Beara cannot be said to have directly participated in the killings of any civilians. The evidence presented by the Defense elsewhere in this brief also speaks against a conclusion that Beara indirectly caused the death of a large number of civilians through his acts or omissions. And as highlighted in relation to the joint criminal enterprise, it was not proven beyond a reasonable doubt that Beara have participated in any alleged planning of killings or creation of conditions of life that would lead to the death of civilians. The Defense thus argues that this sub-element of extermination is also not fulfilled in case of Ljubisa Beara.

3. part of a widespread or systematic attack against civilian population

787. In addition to previous requirements, acts alleged by the Prosecution in the Indictment also have to satisfy requirement to have been part of a widespread or systematic attack against civilian population. As noted earlier widespread character implies "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims."[1573]

[1569] Prosecutor v. Brdjanin, IT-99-36, Trial Chamber Judgment (2004), para.468;
[1570] Prosecutor v. *Kayishema and Ruzindana*, ICTR-95-1-T, Trial Chamber Judgment (1999), para.146;
[1571] Prosecutor v. Brdjanin, IT-99-36, Trial Chamber Judgment (2004), para.467;
[1572] Prosecutor v. Brdjanin, IT-99-36, Trial Chamber Judgment (2004), para.468;
[1573] Prosecutor v. Akayesu, ICTR-96-4-T, Judgment (1998), para.580;

Systematic, on the other hand, involves a certain level of organization and "improbability of their random occurrence".[1574] Although the attack, not the acts themselves, has to be widespread or systematic it is required that there is a nexus between the alleged acts and the attack.[1575]

788. The Defense argues that such a nexus does not exist in this case. It has been stated on numerous occasions throughout this brief the acts with which the Accused is being charged with in the context of extermination charges were not directed against civilian population but against armed forces residing in the enclave that continued their attacks shielded under the safe area status of Srebrenica and that tried to break through in a military column formation.

789. At the time when engagement with the column started evacuation of the population of Srebrenica was over so the attack on the column could not in any sense be understood as a part of a widespread and systematic attack against civilian population. Even if the Honorable Trial Chamber found that attack on the Srebrenica enclave and the events in Potocari were widespread or systematic the attack against a civilian population it must clearly separate that attack from the attack on the military column that was done with different intent. In that case eventual killings in Potocari or along the road while the civilian population was present could eventually be analyzed in order to show extermination but that cannot be the case with the killings committed during legitimate combat engagement with the military column nor for that matter for the alleged subsequent killings of prisoners because they were not committed as part of the attack against civilian population. At that time evacuation of the civilians from Potocari was over and the VRS forces were blatantly aware that they could not have been fighting with the civilians in the woods. It is submitted that the second operation of engaging the Muslim military column was not a systematic attack against civilian population because there were no civilians. Column was overwhelmingly military in nature and attack on it, unique as it is, does not have sufficient nexus with what happened in Potocari in order to be considered as part of the action in Potocari that was completed.

[1574] Prosecutor v. Kunarac et al., IT – 93-23 & 23/1-T, Trial Chamber Judgment (2001), para.429;
[1575] Prosecutor v. Kunarac et al., IT – 93-23 & 23/1-T, Trial Chamber Judgment (2001), para.431;

790. As the Appeals Chamber in Sljivancanin et al. recently concluded the fact that acts were perpetrated "with an understanding" that they were being taken against armed forces distances such acts from any widespread or systematic attack against a civilian population at the same time to the extent that the required nexus would be non-existent.[1576] The same rule applies also here. For that reason the Defense argues that this element of the crime of extermination is also not satisfied.

4. Mens rea requirement

791. Jurisprudence of both Tribunals has to date in large supported the stand that extermination can be committed only with intent. This has been initially stated in Akayesu where the Trial Chamber of the ICTR defined, among other "essential elements" of extermination the fact that the "*the act or omission was unlawful and intentional*."[1577]

792. The lower degre of mens rea that the perpetrator can be only "*reckless or grossly negligent* as to whether the killing would result," as extended by the Trial Chamber in *Kayishema and Ruzindana*[1578] was not relied by the ICTY Trial Chamber that has in almost of all of its judgments covering extermination, sought proof that the alleged crimes were committed with intent. In *Stakic* the Chamber was explicit in rejecting the *Kayishema and Ruzindana* precedent by saying that the threshold for the *mens rea* cannot be lower than the intent required for murder as a crime against humanity (i.e. *dolus directus* or *dolus eventualis*).[1579] This approach was reaffirmed by various chambers of this Tribunal in cases including *Vasiljevic,*[1580] *Brdjanin*[1581] and *Krajisnik*[1582].

[1576] Prosecutor v. Sljivancanin et al. IT – 95-13/1-A, Appeals Chamber Judgment (2009), paras42 & 43;
[1577] Prosecutor v. Akayesu, ICTR-96-4-T, Judgment (1998), para.592;
[1578] Prosecutor v. *Kayishema and Ruzindana,* ICTR-95-1-T, Judgment (1999), para.144; reaffirmed later in Prosecutor v. *Bagilishema,* ICTR-95-1A-T, Judgment (2001), para.89;
[1579] Prosecutor v. Stakic, IT-97-24-T, Trial Chamber Judgment (2003), para.642; also see Prosecutor v. Krstic, IT-98-33-T, Trial Chamber Judgment (2001), para.495;
[1580] Prosecutor v. Vasiljevic, IT – 98-32-T , Trial Chamber Judgment (2002), para.229;
[1581] Prosecutor v. Brdjanin, IT-99-36-T, Trial Chamber Judgment (2004), para.395;
[1582] Prosecutor v. Krajisnik, IT-00-39-T, Trial Chamber Judgment (2006), para.716;

793. The knowledge of the context in whish his acts took place requirement as a separate element of mental state requirement introduced in *Blaskic* and *Vasiljevic* cases[1583] was however subsequently rejected by the Trial Chamber in *Brdjanin*[1584] and by Appeal Chamber in Stakic case stating that knowledge of a "vast scheme of collective murder" is not an element required for extermination, a crime against humanity.[1585]

794. Bearing in mind the above-stated the extermination as a crime against humanity requires the accused to act intentionally, i.e. either with *dolus directus* or *dolus eventualis*. The Defense first submits that it was not proven beyond a reasonable doubt that Ljubisa Beara was present at specific execution sites and accordingly it was not proven that he was aware of that the crimes were being committed.

795. The Defense further contends that the evidence presented before this Honorable Trial Chamber with respect to any alleged acts or omissions of Ljubisa Beara do not show that he "intend[ed] to kill, to inflict grievous bodily harm, or to inflict serious injury … or otherwise intend[ed] to participate in the elimination of a number of individuals"[1586].

[1583] Prosecutor v. Vasiljevic, IT – 98-32-T , Trial Chamber Judgment (2002), para,228; also see Prosecutor v. Blaskic, IT-95-14-T, Trial Chamber Judgment, (2000), para.251, knowledge of the context in whish his acts took place, i.e. the widespread or systematic attack against a civilian population, and knowledge that the perpetrator's acts are a part of such an attack;
[1584] Prosecutor v. Brdjanin, IT-99-36-T, Trial Chamber Judgment, (2004), para.394;
[1585] Prosecutor v. Stakic, IT-97-24-A, Appeals Chamber Judgment (2006), paras258 and 259;
[1586] Prosecutor v. Vasiljevic, IT – 98-32-T , Trial Chamber Judgment (2002), para. 229;

Count 4 and 5 Murder under Articles 3 and 5 of the Statute

796. General requirements under Article 5 were discussed previously. The general requirement under Article 3 is that a state of armed conflict existed at the time the crime was committed and that the alleged crime was connected with the armed conflict.[1587] Four further jurisdictional requirements that must be fulfilled are 1) the violation must constitute an infringement of a rule of international humanitarian law, 2) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met, 3) the violation must be serious, that is to say that it must constitute a breach of a rule protecting important values and the breach must involve grave consequences for the victim, and 4) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[1588]

797. Objective elements of murder are the same under both Article 3 and 5:

1. The victim is dead;

2. The death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and

3. The accused intended to kill the victim or wilfully cause serious bodily harm which he should reasonably have known might lead to death.[1589]

798. In addition, Article 3 requires the proof of the victim being a person who was taking no active part in the hostilities at the time of his death.[1590]

[1587] Tadic Jurisdiction decision, paras 67 – 7-;
[1588] Tadic Jurisdiction Decision, para. 94. See also Kunarac et al. Appeal Judgement, para. 66; Aleksovski Appeal Judgement, para. 20;
[1589] Kvocka Appeal Judgment, para.261; also *see Celebici* Appeal Judgement, paras 422-423; *Celebici* Trial Judgement, paras424-439; *Blaskic* Trial Judgement, para. 217; *Kupreskic* Trial Judgement, paras 560-561; *Kordic* Trial Judgement, paras 235-236; *Krstic* Trial Judgement, para. 485; *Kvocka* Trial Judgement, para. 132; *Krnojelac* Trial Judgement, para. 324; *Vasiljevic* Trial Judgement, para. 205; *Naletilic* Trial Judgement, para. 248; *Stakic* Trial Judgement, para. 747 with reference to paras 631, 584-587. For ICTR jurisprudence, *see Kayishema* Trial Judgement, para. 140; *Prosecutor v.Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgement, 7 June 2001 ("*Bagilishema* Trial Judgement"), para. 84-85; see Brdjanin para.381;
[1590] Lukic Trial Judgment, para. 903; Strugar Trial Judgement, para. 236. See also Delalic et al. Appeal Judgement, para. 423; Naletilic and Martinovic Trial Judgement, para. 248 (footnote 660);

799. As discussed in the genocide and extermination part of this brief it is respectfully submitted that it was not proven beyond reasonable doubt what the number of Muslim casualties were that were killed in legitimate combat engagements and as such they respectfully cannot be victims under Articles 3 and 5 of the Statute. Furthermore, with regard to Article 3 it was not proven that the victims were not taking active part in the hostilities at the time of their death.

800. It is respectfully submitted that no evidence was adduced during this Trial to establish that Beara had the necessary intent to kill as required pursuant to Article 3 and 5 of the Statute.

Count 6 Persecution

801. The crime of persecution consists of an act or omission which:

(a) discriminates in fact and denies a fundamental human right laid down in international law; and
(b) is carried out with the intention to discriminate on one of the listed grounds, namely politics, race, or religion.[1591]

802. Acts listed under the other sub-headings of Article 5 of the Statute or provided for elsewhere in the Statute, as well as acts not explicitly mentioned in the Statute, may qualify as underlying acts of persecution.[1592] Prosecution claimed in their Indictment that persecution was perpetrated through the acts of murder, cruel and inhumane treatment, destruction of personal property and forcible transfer. Murder was dealt and the forcible transfer as one of the acts of persecution will be dealt supra.[1593]

Cruel and inhuman treatment

[1591] *Krnojelac* Appeal Judgement, para. 185;
[1592] *Tadić* Trial Judgement, paras 700, 702-3; *Kupreškić et al.* Trial Judgement, paras 605, 614; Krajisnik Trial Judgment, para.735;
[1593] Indictment, Count 6, Persecution; also see Krstic Trial Chamber Judgment, para.533;

803. Paragraph 48 (b) of the Indictment charges accused with persecution through "cruel and inhumane treatment of Bosnian Muslim civilians, including murder and sever beatings at Potocari and in detention facilities in Bratunac and Zvornik".[1594]

804. The crime of cruel or inhumane treatment requires proof of an act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.[1595] It must be shown that the perpetrator had the intention to inflict serious mental or physical suffering or injury, or to commit a serious attack on the human dignity of the victim, or that he or she knew that the act or omission was likely to cause serious mental or physical suffering or injury, or a serious attack on human dignity, and was reckless as to that result.[1596]

805. In some previous Judgments conclusions were made that events in Potocari have constituted the crime of Persecution.[1597] Defense once again respectfully reiterates that a final determination about the crime charged must be made in this specific case again. Furthermore, many of the facts used previously to support a conclusion about the existence of persecution were not proven beyond reasonable doubt in present case. Some of the facts established in the Blagojevic Judgment were: Many of the refugees that came to Potocari were injured[1598]; dead babies in Potocari compound[1599]; 11 people among whom were children died in Potocari compound[1600]; houses in Potocari were set on fire during the night of 11 July[1601]; sniper fire during the night and firing at houses[1602]; in the early morning VRS soldiers with dogs systematically cleansed the houses by throwing hand grenades into civilian houses[1603]; the VRS soldiers were cursing at the Bosnian Muslims calling them names and saying that they would be slaughtered[1604]; stabbing to death of a baby, taking away of a girl from her family[1605]; the VRS soldier cut of the Muslims across the bridge of his nose

[1594] Indictment, para.48 (b);
[1595] *Čelebići* Appeal Judgement, paras 424, 426;
[1596] *Krnojelac* Trial Judgement, para.132;
[1597] Krstic Trial Chamber Judgment, para.538;
[1598] Blagojevic Trial Judgment, para.147, footnote 483;
[1599] Blagojevic Trial Judgment, para.147, footnote 490;
[1600] Blagojevic Trial Judgment, para.147, footnote 491;
[1601] Blagojevic Trial Judgment, para.162, footnote 556;
[1602] Blagojevic Trial Judgment, para.162, footnote 557; (witness Camila Omanovic);
[1603] Blagojevic Trial Judgment, para.163, footnote 558;
[1604] Blagojevic Trial Judgment, para.164, footnote 564;
[1605] Blagojevic Trial Judgment, para.166, footnotes 575 and 576;

with an implement that resembled scissors[1606]; evening and night of 12 July was night of horror because of rumors about murders and women being raped[1607]; taking of men during the night, while shouting and firing their weapons, screams of men could be heard as if he was being tortured[1608]; on two separate location in Potocari 9 bodies were found[1609]; unarmed civilian was shoot by VRS at the distance of 100-150 meters from the crowd in Potocari[1610]; twenty or thirty bodies lying in the field behind the Express Bus Company compound[1611]; on 12 July, five or six dead people at the creek behind the Bus Compound[1612]; on 13 July, stream about ten meters away from the Express Bus Compound bodies of six women and five men[1613]; near the Express Bus compound man hanging from a piece of chain from a tree.[1614] It is respectfully submitted that not all of these underlining acts were proven beyond reasonable doubt in the present case.

806. With regard to the underlying acts of persecution that were violent in nature as found by the Blagojevic Trial Chamber it is respectfully submitted that the Beara analysis on this issue is reflected in the subsequent section and is incorporated by reference as if fully set out herein. the forcible transfer analysis.

807. As regards to the mens rea requirements for the crime of persecution the evidence, with no exception, consistently and unequivocally establishes that Ljubisa Beara did not posses the necessary discriminatory intent to be found culpable of crimes against humanity, particularly or specifically persecution. As shown previously witnesses testified that he never gave discriminatory statements against any ethnic group, namely Bosnian Muslims and Bosnian Croats.[1615]

[1606] Blagojevic Trial Judgment, para.166, footnote 577;
[1607] Blagojevic Trial Judgment, para.167, footnote 580;
[1608] Blagojevic Trial Judgment, para.167, footnote 581-587;
[1609] Blagojevic Trial Judgment, para.194-195;
[1610] Blagojevic Trial Judgment, para.197;
[1611] Blagojevic Trial Judgment, para.199;
[1612] Blagojevic Trial Judgment, para.200;
[1613] Blagojevic Trial Judgment, para.201;
[1614] Blagojevic Trial Judgment, para.202;
[1615] See Lack of discriminatory intent section of the Brief

Count 7 Forcible Transfers from Srebrenica and Zepa

808. It is respectfully submitted that not a single piece of evidence was adduced by the Prosecution during the Trial that Ljubisa Beara was involved in the forcible transfer of the Muslim population from the Srebrenica and Zepa enclaves.

809. Forcible transfer falls under the residual category of Crimes against humanity captioned "other acts".[1616] In order to prove culpability herein the alleged acts and/or omissions of displacement would have to satisfy three tiers of requirements in order for them to qualify as a crime against humanity of forced transfer. Primarily, alleged crimes would have to meet all common elements of crimes against humanity elaborated in the introductory part to this section. In addition to this, in order for any conduct including forcible transfer to be categorized under point (i) of Art. 5 of the ICTY Statute it would also have to fulfill the following requirements:

> "(a) the conduct must cause serious mental or physical suffering to the victim or constitute a serious attack upon human dignity;
> (b) the conduct must be of equal gravity to the conduct enumerated in Article 5; and
> (c) the physical perpetrator must have performed the act or omission deliberately;
> (d) with the intent to inflict serious physical or mental harm upon the victim or commit a serious attack upon human dignity or with the knowledge that his act or omission would probably cause serious physical or mental harm to the victim or constitute a serious attack upon human dignity."[1617]

810. As noted under point (b) in order for specific acts of forcible removal to amount to "other inhumane acts" it has to be proven beyond reasonable doubt that they are of a similar seriousness as other enumerated crimes against humanity.[1618]

[1616] See Prosecutor v. Stakic, IT-97-24-A, Appeals Judgment (2006), para 317; Prosecutor v.Blagojević, IT-02-60, Trial Chamber Judgement (2005), para. 629; Prosecutor v. Kupresic et al., IT-95-16-T, Trial Chamber Judgment, (2000), para.566;
[1617] Prosecutor v. Milutinovic et al., IT – 05-87, Trial Chamber Judgment (2009), para.170;
[1618] See Prosecutor v. Blagojević, IT-02-60, Trial Chamber Judgment (2005), para. 626; Prosecutor v. *Galic*, IT – 98-26, Trial Judgement (2003), para. 152; Prosecutor v. Vasiljevic, IT – 98-32-T , Trial Chamber Judgment (2002), para. 234; Prosecutor v. Krnojelac, IT – 97-25, Trial Chamber Judgment,

This requirement should be evaluated "in light of all factual circumstances, including the nature of the act or omission, the context within which it occurred, the individual circumstances of the victim as well as the physical and mental effects on the victim".[1619]

811. Furthermore, as a third step, the Prosecution has the burden to prove:

a) population was forcibly displaced;

b) from the area in which they were lawfully present; and

c) without grounds permitted under international law.**[1620]**

812. The Trial Chamber in *Blagojevic* distinguished evacuation it in the following manner:

> "Evacuation to ensure the security of the population is authorized when the area in which the population is located is in danger as a result of "military operations" or "intense bombing"".[1621]

813. However, in contrast to deportation, forcible transfer requires that the population is dislocated within national boundaries.[1622]

814. The perpetrator must act with intent to displace a population, in this case within national borders. Intent to permanently displace is also not a requirement here.[1623]

815. The Defense respectfully submits that the facts of this case do not support a conviction for forced transfer for the following reasons: a) the lawful residence requirement, as understood by jurisprudence and implied by drafters of the Geneva Conventions and Additional Protocols was not satisfied in this case; b) both security

---

para. 130; and Prosecutor v. Kayishema and Ruzindana, ICTR-95-1-T, Judgment (1999), paras 151 & 154;

[1619] Prosecutor v. Martic, IT – 95-11, Trial Chamber Judgment (2007), para.84;

[1620] Prosecutor v. Brdjanin, IT-99-36, Trial Chamber Judgment (2004), para.540, *citing among others, Blaskic* Trial Judgment, para. 234; *Krnojelac* Appeals Judgment, para.222;

[1621] Prosecutor v.Blagojević, IT-02-60, Trial Chamber Judgement (2005), para.593;

[1622] See Prosecutor v. Krstic, IT-98-33-T, Trial Chamber Judgment (2001), para.521; *Krnojelac* Trial Judgment, paras. 474 & 476; *Krnojelac* Appeals Judgment, paras. 218, 222–224; *Simic et al.* Trial Judgment, para. 129; *Brdjanin* Trial Judgment, para. 540; *Blagojević* Trial Judgment, para.595;

[1623] Stakic Appeals Judgment, para.317;

reasons and military necessity warranted relocation of civilians from both Srebrenica and Zepa; and c) Ljubisa Beara did not possess the required intent to inflict serious physical or mental harm upon the victim or commit a serious attack upon human dignity, required for acts falling under Art 5(i), did not act with intent to forcibly transfer the civilian population.

Population was not forcibly displaced from Srebrenica

816. In previous judgments it was found that forcible transfer occurred in Srebrenica because the movement was not voluntary.[1624]

817. However, during the present trial numerous documents were presented that disputed the finding in those prior related cases. Essentially, in the instant case it was revealed that the civilian population in Srebrenica wanted to leave the enclave even before the VRS attack in July 1995, that they were prevented in that by the ABiH leadership and that there was a conflict between the municipal organs and the military organs that affected the conditions in the enclave and the position of the civilian population.

818. Specifically by way of example the Head of UNPROFOR civilian affairs had information that Muslims refugees that were in Srebrenica were of the opinion, even by the end of 1994, that they were being held in Srebrenica against their will.[1625]

819. Similarly as far as the humanitarian aid and the conditions in the enclave were concerned it was shown that there was a conflict between municipal organs who wanted to control the distribution of aid and the ABiH military organs that wanted to control the municipality.[1626] Conclusion was that there is involvement in organized crime and black marketeering of both sides and that material interest are in the background of the conflict.[1627]

[1624] Krstic Trial Chamber Judgment, para.145-149 and para.530;
[1625] 5D509, report from the meeting, dated 9 December 1994;
[1626] 5D509, page 4;
[1627] Ibid; also see Peter Boering, T2038;

820. It is respectfully submitted that these conflicts deteriorated the position of the civilian population of the situation in every sense, like for example the housing issue in 1994 when the occupancy in homes was not permitted without rent being paid to the municipality.[1628]

821. Disregarding the will of the civilian population as reflected in the ABiH document orders were given to army to take all the necessary measures in order to prevent members of the army as well as civilians to leave Srebrenica and Zepa.[1629]

822. On 5 July 1995 it was ordered again that "under no circumstances is a single inhabitant allowed to move away from the demilitarized zone".[1630] From these orders it is reasonably inferred that the intent existed among the civilian population to leave the enclave.

823. Also in the 12 July report the UNHCR and UNPF were planning the evacuation of the civilian population the previous day but again the Bosnian government authorities were not accepting movement of any people out of the enclave other than in the case of medical emergency.[1631]

824. While determining whether the civilian population voluntary accepted the evacuation from the enclave their status should be considered. The large number of people in Srebrenica was refugees and not the local inhabitants and as reflected in UN documents this number went up to 80%-85% of Srebrenica population as recorded at 8 July 1995[1632] or 80 to 90% of the population to be displaced person in the 11 July.[1633] Further in UN 11 July report it was noted that UNCHR staff reported that virtually everyone in the enclave wishes to leave.[1634] Respectfully, the independent UN evidence should be considered in light of the seriousness of the charges and claims asserted.

[1628] Ibid;
[1629] 5D244; dated 27 May 1995; in relation to Zepa see 6D39, dated 26 May 1995; also see 6D97, Srebrenica 8th operation group command dated 30 Jan 1995;
[1630] 5D496; document ensuring conditions in the Srebrenica demilitarized zone;
[1631] 1D35, page 1, para.5;
[1632] Joseph Kingori, T19533-4; also see P493, UNMO rep, dated 8 July 1995;
[1633] 5D50, UN report, dated 11 july 1995, page 2;
[1634] 5D50, page 2;

825. It was confirmed by Mr. Franken that moving of the population to Potocari was a temporary measure and that the population could stay there for a short period.[1635] In addition other Dutchbat witnesses testified that once the population found themselves in Potocari there was no other solution but to evacuate them.[1636] It was noted by the UNHCR that an agreement will be solicited from the Bosnian Serbs to allow all residents of Srebrenica, including all men to leave for Tuzla if they so wish.[1637] Accordingly both VRS witness[1638] and Dutchbat witness testified that the civilian population rushed to the buses when they arrived and were not forced into the buses.[1639] Koster testified that no refugee ever told him that they want to stay in Potocari.[1640] In light of the foregoing it is submitted that the evidence does not support the crime of forcible transfer.

826. Humanitarian Crisis in Potocari between 11–13 July 1995 was cited as the proof of forcible transfer.[1641] Also crimes committed in Potocari like the setting houses on fire,[1642] intimidating the Muslim population,[1643] killings,[1644] terror,[1645] rapes[1646] were offered as examples of intimidating the population to leave. However, in the present case evidence was not adduced at all in relation to the vast majority of crimes cited in previous Judgments that allegedly occurred in Potocari. It is submitted that in absence of the foregoing findings this Honorable Trial Chamber is not compelled to follow the prior judgment and should respectfully find that the prosecution failed to prove its case.

827. Evidence was not clear as to what happened during the night of 12 July. Witness Groenewegen testified that there were no VRS forces where he was during the night between the 12 and 13 July[1647] and that he only heard about suicides that

[1635] Robert Franken, T2648-9;
[1636] Landert Van Duijn, T2380;
[1637] 5D50, page 2;
[1638] PW138, T3809;
[1639] Landert Van Duijn, T2381;
[1640] Eelco Koster, T3114;
[1641] Krstic Trial Chamber Judgment, para.38;
[1642] Krstic Trial Chamber Judgment, para.41;
[1643] Krstic Trial Chamber Judgment, para.42;
[1644] Krstic Trial Chamber Judgment, para.43
[1645] Krstic Trial Chamber Judgment, para.44;
[1646] Krstic Trial Chamber Judgment, para.45;
[1647] Paul Groenewegen, T2985; also see Eelco Koster, T3105;

happened in the base.[1648] Van Duijn testified that Koster told him that during the night Muslims were injuring themselves in the hope that if they are injured or wounded they would get better treatment and would be transported to the Red Cross.[1649] Duijn also testified that there was a lot of panic because people "thought something is happening".[1650]

828. The Prosecution offered limited evidence with respect to crime in Potocari which were not substantiated such as the woman who was injured on 10 July and later subsumed to injuries.[1651] However, Mr. Koster was not certain whether that woman died and whether her injury was actually inflicted by shrapnel.[1652] Likewise testimony was heard that a civilian was killed on the 12 July by the Serb soldier[1653] but there was no evidence as to the perpetrator or victim. It is submitted that this was an isolated event and that the reasons for this extensive measure might have been suspicion that the men was armed and prevention of escalation of the conflict because of the presence of large number of unarmed individuals. From the facts adduced at the trial it is plain that any killing, were not done with the intent to terrorize the civilian population because Groenewegen only stated that it was possible that civilian crowd saw the execution[1654] which is the reason why this incident should not be taken as a proof that this was done with the intent to terrorized population.

829. It should be noted that some of the Dutchbat witnesses testified that they helped civilians board the buses[1655] which certainly effect the population who observed at to believe it was indeed an evacuation.

830. In relation to killings during relevant times NIOD report made note that Dutchbat soldier shoot a man because he thought he will fire at the APC he was guarding.[1656] Members of the Dutchbat testified that they saw[1657] or that they heard[1658]

[1648] Paul Groenewegen, T2985-6;
[1649] Landert Van Duijn, T2299;
[1650] Landert Van Duijn, T2299;
[1651] Eelco Koster, T3036;
[1652] Eelco Koster, T3036;
[1653] Paul Groenewegen, T2963-4;
[1654] Paul Groenewegen, T2989-90;
[1655] Landert Van Duijn, T2290;
[1656] 5D81, page 1;
[1657] PW114, T3146-7; Eelco Koster, T3026;

of 9 bodies lying near the stream behind the white building but the witnesses said that they do not know identity of these people,[1659] who killed them,[1660] when they were killed,[1661] or whether they were moved[1662], but some of the [REDACTED] regardless of all that managed to testify that they are civilians from Srebrenica because they are in civilian clothes and according to him if you are attacking you are not in civilian clothes.[1663] That this kind of assumption is another example of the subjectivity of [REDACTED] considering that the reasoning goes against both the logic and the facts of the case.

831. There was testimony from Dutchbat witnesses that they did not see the mistreatment by the Serbs in Potocari[1664] and also there was evidence from Serb witnesses to this effect.[1665]

832. Those statements of Dutchbat witnesses were inconsistent as to certain facts relating to the evacuation. Groenewegen stated that evacuation only started when VRS troops came[1666] while Duijn was actually the one who was doing this before the VRS soldiers came without any repercussions.[1667]

833. With the respect to the bombing of Srebrenica and Potocari the evidence in the present case again was not as clear as reflected from the adjudicated facts. For example witnesses testified that they did not see that the VRS fired on civilian objects.[1668] Despite the testimony about shelling along the road when the population was walking towards Potocari there was no victims,[1669]which puts into doubt the allegation that bombings were focused on the civilian population. Kingori further testified about number of artillery and mortar round being fired[1670] but then trying to

[1658] Landert Van Duijn, T2306;
[1659] PW114, T3163;
[1660] PW114, T3164;
[1661] PW114, T3164;
[1662] Eelco Koster, T3116;
[1663] PW114, T3164;
[1664] Landert Van Duijn, T2380;
[1665] Dragoslav Trisic, T27073;
[1666] Paul Groenewegen, T2986;
[1667] Landert Van Duijn, T2319;
[1668] Paul Groenewegen, T3001;
[1669] Bernardus Egbers, T2882;
[1670] Joseph Kingori, T19178, T19188, T19191; T19233; T19288;

explain how there was not more damage he explained it was luck.[1671] On the other hand Serbian witnesses disputed that large number of shells landing on Srebrenica and Potocari by the lack of such serious damage.[1672]

Population was not forcibly displaced from Zepa

834. It is respectfully submitted that Zepa fell on the 24 July and the transfer of population continued until 27 July 1995.[1673] The situation with respect the status of refuges in Zepa was identical to one described in relation to Srebrenica. According to Muslim sources 65% of all the population were refugees in Zepa and they made demands to be evacuated[1674], while response as with Srebrenica was to prevent Army members and civilians from leaving with all measures.[1675]

835. It is respectfully submitted witnesses who testified how the transfer of civilian population from Zepa was not voluntary but coerced were not objective. Witness PW155 unsuccessfully tried to dispute all the evidence that the transfer of civilian population was done without coercion, even though he testified that his wife told him about the transfer he did not want to admit that there was an UNPROFOR soldier in each and every bus.[1676] However, when confronted with the fact that unlike 1993 when he did not let his family leave the enclave because he was afraid the process is not organized in 1995 he agreed to have the family leave because he acknowledged that he assumed that international organizations will be there to organize the evacuation.[1677]

836. It is not disputed that heavy fighting occurred over Zepa,[1678] Muslim witnesses testified that they participated in the defense[1679] while the Serbian witnesses described

[1671] Joseph Kingori, T19519;
[1672] PW162, T9335; PW161, T9546;
[1673] Meho Dzebo, T9595;
[1674] 5D259, 285IBlbr, dated 5 May 1995;
[1675] 5D244; dated 27 May 1995; also see 5D235, 28th Division Command, dated 17 June 1995; slso see in relation to Zepa see 6D39, dated 26 May 1995;
[1676] PW155, T6868;
[1677] PW155, T6889;
[1678] Meho Dzebo, T9595; Hamdija Torlak, 9727; Thomas DIbb, T16281;
[1679] PW155, T6831;

the severe fighting and the casualties on their side.[1680] However, when Zepa fell as desribed by Thomas Dibb, VRS forces did not enter the town among the population.[1681] Even though again some evidence was adduced that some houses were set on fire[1682] witness Dibb did not see who started those fires[1683] while from the UN report it can be seen that this was probably done by the Muslim forces that were departing.[1684]

837. Even though from a UN report dated 23 July it can be seen that the Muslim population was offered on the 20 July to stay, provided that they disarm[1685] discussion was devoted by the Prosecution to determining whether the population knew what happened to the military aged men of Srebrenica in the time when they moved from Zepa.[1686] Mr. Dibb however, could not explain when and where he heard facts or with whom he discussed what happened in Srebrenica[1687] while Mr. Torlak admitted that when the first negotiation was led on the 13 July nobody knew what happened in Srebrenica.[1688] Furthermore, Edward Joseph confirmed that during that time negotiations were led in Sarajevo and they had little information regarding the Muslim men from Srebrenica.[1689]

838. Finally what is most important from a legal standpoint is that it was not proven beyond reasonable doubt that the ordinary population that choose to evacuate had information about what occurred in Srebrenica, because as Mr. Joseph testified he does not recall a specific conversation with the population on this topic.[1690]

Lawful presence

839. Forcible transfer requires that a civilian population is dislocated from an area in which they *lawfully reside.* Although jurisprudence of both ICTs is not very

[1680] Milomir Savcic, T15280 also T15333
[1681] Thomas Dibb, T16279-80;
[1682] Thomas Dibb, T16284;
[1683] Thomas Dibb, T16307-8;
[1684] 6D29, Update, dated 26 July 1995;
[1685] 6D135, UN report, dated 23 July 1995;
[1686] Thomas Dibb, T16286;
[1687] Thomas Dibb, T16339-40;
[1688] Hamdija Torlak, T9862;
[1689] Edward Joseph, T14172;
[1690] Edward Joseph, T

elaborative on this element it is possible to see that the practice has followed the rationale behind the prohibition on forced displacement as stipulated by Geneva Conventions and Additional Protocols – a desire to prevent dislocation of civilians from their homes and communities in which many of them and their families have resided for decades.

840. In *Simic et al.* when discussing displacement from an area in which a population is lawfully present the Trial Chamber pointed to the said rationale behind the ban on forcible dislocation and stated:

> "… among the legal values protected by deportation and forcible transfer are the right of the victim to stay in *his or her home and community and the right not to be deprived of his or her property* by being forcibly displaced to another location."[1691]

841. The above stated goes in line with the wording of the Commentary of the Fourth Geneva Convention and the Second Additional Protocol which speak about the necessity of introducing a prohibition of forcible displacement since "all too often civilians are *uprooted from their homes* and forced to live in difficult or even quite unacceptable conditions"[1692].

842. Great majority of judgments of this Tribunal covering forcible transfer have taken this position as their starting point when discussing events in which residence of certain areas and municipalities throughout the former FRY were dislocated from their homes either elsewhere within a country or across a border.[1693] The Trail Chamber in *Krstic* phrased it in the following manner:

[1691] *Simic et al.* Trial Judgment, para 130;
[1692] Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, para 4874. Available at:< http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/00fa1ece76c58523c12563cd0043ad54!OpenDocument>
[1693] See, for example, Prosecutor v. Milutinovic et al., IT – 05-87, Trial Chamber Judgment (2009), Prosecutor v. Martic, IT – 95-11, Trial Chamber Judgment (2007), Prosecutor v. Brdjanin, IT-99-36, Trial Chamber Judgment (2004)

> "In this regard, the Trial Chamber notes that any forced displacement is by definition a traumatic experience *which involves abandoning one's home, losing property and being displaced under duress to another location*."[1694]

843. It then went on to rightfully note that even in cases where evacuation is allowed Geneva Conventions and Additional Protocols require that displaced civilians are transferred back to "their homes" once the hostilities have seized.[1695]

844. In the instant case approximately 80% of the population relocated from Srebrenica and Zepa during July were persons who were already torn from their homes and communities and who had found temporary shelter in the enclaves. They were already suffering that which the Geneva Conventions and Additional Protocols are aiming to prevent with the said ban. A large majority of the population relocated at the time was thus not being deprived of their right to remain in their community nor were they being striped of their property at that particular time.

845. As it was clearly explained in the UN report from 11 July "UNCHR reports that 80% to 90% of the population of Srebrenica (total pop is 40,000) are displaced persons who fled fighting earlier in the war, thus they do not have long-standing ties to homes and property in the enclave, and will probably be interested in leaving for Tuzla."[1696]

846. It was 285th IBIbr that informed the War presidency that 65% of total numbers of Zepa's inhabitants are refugees, and that elderly people as well as women and children have relatives in the free territory and that this part of population is constantly pressuring the municipal authorities to be evacuated in other parts of RBIH.[1697]

847. It is respectfully submitted that the population was evacuated due to potential of further hostilities in the field. The Defense therefore asserts that the lawful

[1694] Krstic, Trial Judgment, para 523
[1695] Ibid., para 524
[1696] 5D40, page 2;
[1697] 5D259, 285th IBlbr, dated 5 May 1995;

presence requirement, as understood by law and jurisprudence to date, has not been satisfied in this case.

Relocation from Srebrenica and Zepa was permitted under international law

848. The Geneva Conventions and Additional protocols recognize two general grounds according to which displacement of persons is legitimate in both international and internal armed conflict they are as follows: a) if it is carried out for the security of a civilian population; or b) if displacement is required by imperative military reasons. The Trial Chamber in Blagojevic thoroughly examined these stated grounds:

> 597. "…. Both Article 49(2) of the Fourth Geneva Convention and Article 17(1) of Additional Protocol II, which have been cited above, contain provisions providing for exceptions, namely, when "the security of the civilians involved or imperative military reasons so demand". The term used to describe the displacement in such exceptional situations is "evacuation". Evacuation is by definition a temporary and provisional measure and the law requires that individuals who have been evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased. From this it may be concluded that it is unlawful to use evacuation measures as a pretext to remove the population and effectuate control over a desired territory. It should be recalled here that, while evacuation is undertaken in the interests of the civilian population, it is by definition an extreme measure for those displaced.
>
> 598. The exceptions when evacuations may be carried out are somewhat overlapping. Evacuation to ensure the security of the population is authorized 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 later situation may

> only be carried out when necessitated by overriding, *i.e.* imperative, military reasons.[1975] In considering whether these exceptions justify proven acts of forcible population displacements, the trier of fact will 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'."[1698]

849. The Chamber also considered a third ground for the of civilians namely humanitarian reasons:

> "In light of the particular factual situation in the present case, the Trial Chamber has considered whether the law also provides for an exception to the general prohibition against forcible displacements that would permit evacuations for humanitarian reasons. It finds that it does. The Trial Chamber reiterates the general obligation of all parties to a conflict to protect and respect the civilian population as well as other protected persons. The Trial Chamber has already found that Article 17 of Additional Protocol II is applicable in this case. Article 17 provides in part that "[t]he displacement of the civilian population shall not be ordered for reasons related to the conflict." The Commentary to this provision 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."[1699]

850. However, the exception to this general exceptions to the general prohibition against forcible would not be applicable in situations where the "humanitarian crisis that caused the displacement [was] itself the result of the accuser's own unlawful activity".[1700]

[1698] Prosecutor v. Blagojevic, IT-02-60, Trial Chamber Judgment (2005), paras 597 & 598
[1699] Ibid. para 600
[1700] Prosecutor v. Martic, IT-99-36, Trial Chamber Judgment (2004), para 109

851. The Geneva Conventions also requires that persons evacuated are transferred back to their homes "as soon as the hostilities in the area in question have ceased."[1701]

852. In light of the foregoing and length of the civil war, it is respectfully submitted that the transfer of the civilian population in both Potocari and Zepa was a necessity stemming from both the need to ensure the safety of the civilian population and military necessity.

853. According to the Trial Chamber in Krstic the grounds permitting evacuation under the Geneva Conventions and the Additional Protocol were not met in case of relocation of Muslims from Srebrenica. The first ground, i.e. relocation for security reasons, was not met as:

> "…active *hostilities* in Srebrenica town itself and to the south of the enclave *had already ceased by the time people were bussed out of Potocari*. Security of the civilian population can thus not be presented as the reason justifying the transfer."[1702]

854. The Krstic Trial Chamber relied on the same reasoning when rejecting the military necessity ground for displacement.[1703]

855. However, as the Defense showed in the presentation of the facts of the case such hostilities were in no way over at the time when the transfers began. As previously stated on of the reasons was that Muslim soldiers rarely wore uniforms in so the danger existed that a certain number of them were among the population.[1704] Dutchbat witnesses confirmed that there were able bodied Muslim men in Potocari base and that some of them were not willing to give their names to Dutchbat.[1705] According to the ABiH report dated 12 July there was 300 combatants in the UN

[1701] Prosecutor v. Brdjanin, IT-99-36, Trial Chamber Judgment (2004), para 556
[1702] Prosecutor v. Krstic, IT-98-33, Trial Chamber Judgment (2001), para 525
[1703] Ibid. para 527
[1704] See genocide part of the brief "Forensic reports do not prove the number of killed alleged by the Prosecution or that the substantial number were not killed in combat";
[1705] Robert Franken, T2502;

base.[1706] Furthermore, it was confirmed that this was concern to the VRS and that Momir Nikolic was checking for Muslim soldiers within the civilian population.[1707] As seen from a document a Muslim soldier fired small mortar from inside the civilian crowd in the direction of the Bosnian Serb position and was behind the woman and children.[1708] The VRS could not know what Muslim soldiers are prepared to do considering that they even shot and killed Dutchbat soldier in order to stop them from withdrawing from the demarcation line.[1709]

856. Serbian forces were searching for the Muslim fighters on the 12 July from the direction of the yellow bridge to Potocari.[1710] MUP forces that were deployed securing the road did not know where precisely the Muslim army was.[1711] Fighting and shooting were still ongoing in the woods close to Potocari in the evening between 12 and 13 July.[1712] In the early morning of 13 July after a Muslim attack heavy fighting occurred where three members of the police were wounded and one was killed in Sandici near the Potocari.[1713] Witness Rutten confirmed that he saw Muslim fighters in one house on the 13 July.[1714]

857. It is respectfully submitted that the facts as presented support the conclusion that the transfer was not justified by security reason. Given the history of atrocities and the fact that the MUP members were informed that Serb civilians have gathered in Bratunac and getting ready to go into Srebrenica and take their revenge.[1715]

858. VRS forces just came into the enclave and were not familiar with the terrain and eventual position of the minefields thus a VRS soldier was killed by a mine.[1716]

[1706] 4D17;
[1707] Joseph Kingori, T19270;
[1708] 5D79, page 5;
[1709] Robert Franken, T2460;
[1710] Dobrisav Stanojevic, T12871;
[1711] Dobrisav Stanojevic, T12881;
[1712] Predrag Celic, T13502;
[1713] Dobrisav Stanojevic, T12920, testified that three person were wounded and one was killed); also see 4D108;
[1714] Johaness Rutten, 4828;
[1715] Mendeljev Djuric, T10894;
[1716] Dobrisav Stanojevic, T12871;

Mr. Franken confirmed that they had information that Muslims placed mines but refuse to tell Dutchbat their location.[1717]

859. Hence, it is respectfully submitted that the VRS decision to support the civilian population choice to leave the enclave was justified from the military standpoint and out of concern that population can found itself in the middle of advanced elevated hostilities between of VRS and ABiH forces.

860. A similar situation existed in Zepa, where soon after the attack the weapons that was handed to the UNPROFOR was returned,[1718] and the Muslim army started using civilian objects and moved their communications centre in the basement of the civilian hospital.[1719] Furthermore, Muslim forces started taking weapons from the UNPROFOR[1720] which enabled them to continue further fighting.

861. It is respectfully submitted that the transfer of the population from Zepa was warranted considering that Muslim forces from Zepa never surrendered and kept fighting even after the civilian population was evacuated from Zepa.[1721] This fighting was serious enough to be accompanied by grenade and mortar rounds[1722] and thus would endanger the security of the civilian population had they remained in Zepa.

862. Muslim representatives were asked several times during the negotiations whether population want to remain in Zepa[1723] and an agreement was reached on 25 July.[1724] Torlak explained that the general atmosphere was that everyone would leave on the grounds of security but he further explained that if the men in the enclave were more confident that the Bosnian government would agree to the POW exchange, the mood of fear would immediately change.[1725]

[1717] Robert Franken, T2664-5;
[1718] Meho Dzebo, T9600;
[1719] 6D81, 285th IBIbr, dated 2 July 1995;
[1720] 6D34, 285 IBlbr, dated 16 July 1995;
[1721] Thomas Dibb, T16337-8; Edward Joseph, T14249;
[1722] 6D136, Un report, dated 30 July 1995, page 3; for fighting before civilian population left see 6D133, UN report dated 20 July 1995;
[1723] Hamdija Torlak, T9800; also see P2490 transcript of the 19 July 1995 negotiations;
[1724] 6D30, agreement, dated 25 July 1995, paras 7 and 10;
[1725] Hamdija Torlak, T9814;

863. The Defense respectfully contents that the Trial Chamber in Krstic erred when it rejected the arguments that both the security of civilians in the enclave and/or military reasons required the transfer of Muslims from the enclave. The civilian population were at the time still very much in danger of further military operations and VRS forces were therefore obliged by Geneva Conventions and following Protocols to transfer the population to a territory of refuge. Although the said rules of international humanitarian law require that relocation be carried out to places within the occupied territory "unless physically impossible to do otherwise".[1726] However, this was not an option under the given circumstances.

864. Although it may be argued that the final requirement posed by the exemptions stipulated by Geneva Conventions, i.e. that population displaced was not returned to their homes upon seizure of hostilities, this requirement cannot apply in this case because: a) a great majority of persons relocated in July were not members of the two communities and their return would only formally, although not substantially, satisfy the said requirement; b) it was not possible for the VRS forces to organize the return of the civilian population especially considering that as already analyzed VRS tactical position in the time of the transfer on Krajina and other fronts was close to complete defeat.[1727] As reflected during the Trial evidence was adduced that population returned to both Zepa and Srebrenica.[1728]

Mens Rea requirements are not satisfied

865. The decisional authority on forcible transfer poses a number of mental state requirements that must be satisfied for a conviction to be warranted. It must be established beyond a reasonable doubt that the accused acted deliberately, with intent to inflict serious physical or mental harm upon the victim or to commit a serious attack upon human dignity and that his intent was furthermore directed at forcibly transferring a given civilian population. Facts presented throughout this Brief in

[1726] Commentary of Article 49 of the IV Geneva Convention relative to the Protection of Civilian Persons in Times of War, Available from: < http://www.icrc.org/ihl.nsf/COM/380-600056?OpenDocument>, Accessed on 25.05.2009
[1727] See genocide part of the brief "Killing of able bodied men was not perpetrated with specific genocidal intent to destroy the group in whole or in part";
[1728] PW126, T3595 and T3610; PW126 according to her testimony actually returned to the Srebrenica after the events and continued living there together with the Serbs;

relation to Ljubisa Beara's personality and his lack of involvement in the events that took place in Srebrenica and Zepa in the given time period suggests respectfully a a conclusion that he did not possess and did not have the requisite intent required for this crime.

866. For the foregoing the Defense respectfully submits that Ljubisa Beara is not guilty of forcible transfer.

Count 8 Deportation

867. Deportation as a crime against humanity entails forced displacement of individuals from an area in which they lawfully reside across a *de jure* or a *de facto* border. It is distinguishable from a forcible transfer as it presumes transfer across border.[1729] Hence, in addition to the elements of crimes against humanity common to all acts covered under Article 5 deportation itself requires the following elements:

1. forcible displacements which entails: (a) the displacement of persons by expulsion or other coercive acts, (b) from an area in which they are lawfully present, (c) without grounds permitted under international law
2. displacement of people across border from one state to another or, under certain circumstances, across a *de facto* border.
3. intent to displace a population, permanently or otherwise.

868. These elements would have to be met in relation to the events covered by the indictment which include alleged forcible displacement of population, both in relation to alleged forced relocation of persons to Kladanj as well as in relation to flight of discreet number of persons across the border with Serbia. The Defense argues that the two events have to viewed separately as it will argues that each has separate but distinct shortcomings that deprive them of characteristics of deportation as crime against humanity.

[1729] See, for example, Prosecutor v. Krstic, IT-98-33, Trial Chamber Judgment (2001), para 521 and Prosecutor v. Brdjanin, IT-99-36, Trial Chamber Judgment (2004), para 540.

Elements of crime of deportation

1. *Forcible displacement*

869. This element of deportation requires the following sub-elements to be fulfilled: that displacement of the population is forced; relocation from a territory in which the population lawfully resides; and lack of permissible grounds under international law for such a relocation.

870. As noted, by the Trial Chamber in Brdjanin the involuntary nature of the displacement is an essential element of deportation.[1730] Following the dictum of the various Trial and Appeals Chambers of this Tribunal, such as in Krnojelac, Blagojevic, and Simic, the forced character of the acts could be deduced from the absence of a "genuine choice".[1731] According to the existing jurisprudence of the ICTs genuine choice would not be possible in the presence of direct physical force, "threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against … persons…, or by taking advantage of a coercive environment"[1732] such as shelling of civilian objects, burning of civilian property, and commission of or the threat to commit other crimes "calculated to terrify the population and make them flee the area with no hope of return"[1733]. An express consent to or a request for removal from representatives of the population in question would not suffice to prove that removal was not forced if circumstances under which displacement took place were such that they deprived the population of a "genuine choice".[1734]

[1730] Prosecutor v. Brdjanin, IT-99-36, Trial Chamber Judgment (2004), para. 543; *Simić et al.* Trial Judgement, para. 125.
[1731] Prosecutor v. *Krnojelac*, IT – 97-25, Appeal Judgement (200"), para. 229; Prosecutor v.*B lagojević*, IT-02-60, Trial Chamber Judgement (200"), para. 596, Prosecutor v. Brdjanin, IT-99-36, Trial Chamber Judgment (2004), para.543; Prosecutor v. Stakic, IT-97-24, Appeals Chamber Judgment (2006), para. 279
[1732] Prosecutor v. Stakic, IT-97-24, Appeals Chamber Judgment (2006), para 281
[1733] Prosecutor v. *Simić et al.*, IT-95-9, Trial Chamber Judgement, para 126
[1734] See, for example, Prosecutor v. *Krnojelac*, IT – 97-25, Appeal Judgment (2003), para. 229, Prosecutor v. *Milošević*, IT-02-54, Rule 98 *bis* Decision, para. 72, Prosecutor v. *Simić et al.*, IT-95-9, Trial Chamber Judgement, para. 125; Prosecutor v. Stakic, IT-97-24, Appeals Chamber Judgment (2006), para. 279

2. *Lawful transfer under international law*

871. As with forcible transfer, deportation requires that the civilian population is dislocated from an area in which they *lawfully reside*. Relevant jurisprudence in this regard was analyzed above.

3. *Displacement across a border*

872. There is an unequivocal understanding that deportation implies forced displacement of a population across a *de jure* state border. As noted by the Appeals Chamber in Stakic:

> "The default principle under customary international law with respect to the nature of the border is that there must be expulsion across a *de jure* border to another country, as illustrated in Article 49 of Geneva Convention IV and the other references set out above."[1735]

873. The Appeals Chamber in Stakic also introduced an additional scenario which could be characterized as deportation – relocations across a *de facto* border.[1736] The existence of this scenario would have to be evaluated on a case by case basis.[1737]

874. Transfer across changing frontlines has however not been accepted as a possible modus of deportation. It has been expressly stated in Stakic that:

> "… displacements across constantly changing frontlines are not sufficient under customary international law to ground a conviction for deportation …"[1738]

4. *Intent to displace*

[1735] Prosecutor v. Stakic, IT-97-24, Appeals Chamber Judgment (2006), para 300
[1736] Prosecutor v. Stakic, IT-97-24, Appeals Chamber Judgment (2006), para 300
[1737] Ibid.
[1738] Prosecutor v. Stakic, IT-97-24, Appeals Chamber Judgment (2006)., para 303

875. Crime of deportation requires that the perpetrator act with intent to displace a population across a border.[1739] The existence of such an intent can be inferred from evidence showing that the alleged perpetrator, *inter alia*, participated in acts of forcible transfer, knew of such actions by others and had endorsed them by not taking any steps against responsible persons, and/or contributed to the atmosphere of insecurity though public speeches.[1740] It is not required for the intent to encompass a goal that the displaced population should not return.[1741]

Arguments in relation to deportation of population from Srebrenica

876. The Defense respectfully submits that there was no deportation of the civilian population from Srebrenica for the following reasons: a) there was no evidence adduced during the Trial that any part of population was deported from Srebrenica; and b) that the transfer did not take place across either a *de jure* or a *de facto* border. In addition to this the Defense also respectfully submits that Ljubisa Beara did not possess the requisite intent to displace a population across the border, either permanently or otherwise.

Arguments in relation to deportation of persons from Zepa

877. With respect to the group of able bodied men who crossed the border to Serbia it is respectfully submitted that elements of crime of deportation have not been met since: a) the acts were taken against persons believed to have been members of Muslim armed forces – there was thus no nexus between the alleged acts and the alleged attack against a civilian population; and b) there was no forced displacement as these persons were not deprived of "choice" when they crossed the Drina river to Serbia.

878. As previously stated the law on crimes against humanity requires that the civilian population be a primary not an incidental target of an attack and that any acts

[1739] Prosecutor v. Martic, IT – 95-11, Trial Chamber (2007), para 111
[1740] See, for example, Prosecutor v. Martic, IT – 95-11, Trial Chamber (2007)
[1741] Prosecutor v. Stakic, IT-97-24, Appeals Chamber (2006), para 307

taken have to be a part of an attack against such a population[1742] However, this is not the case in respect to the able bodied men which were being separated from the rest of the Zepa population, some of which subsequently fled to Serbia by crossing the Drina river. VRS forces focus on this group was entirely based on their perceived involvement in Muslim armed forces that were sheltering themselves among civilians. Any actions taken against this group were taken with, as the Appeals Chamber in Sljivancanin et al. put it, "an understanding" that they were directed against Muslim armed forces.[1743] And as the said Appeals Chamber noted:

> "The fact that they acted in such a way precludes that they intended that their acts form part of the attack against the civilian population … and renders their acts so removed from the attack that no nexus can be established."[1744]

879. During the Trial several witness testified about crossing the Drina into the Republic of Serbia. It is respectfully submitted that the persons who crossed the Drina into the Republic of Serbia were members of the ABiH and that they were involved in some way in combat actions conducted from Zepa. For example one of the men who crossed into Serbia, witness PW155, admitted that he participated in defense of the Zepa enclave.[1745]

880. Witness Meho Dzebo explicitly stated that the civilian population did not go to Serbia.[1746] Witness Torlak testified that he found out that member of the Zepa Brigade with their arms partly broke through the Serb line and reached Olovo and Kladanj and partly went to Serbia.[1747] General Smith who was involved in Zepa also confirmed that military forces "in most cases, went over Drina into Serbia".[1748]

881. Witness Vojinovic explained that he conducted an investigation and spoke to prisoners in the Foca prison and that they obtained intelligence information that between 1300 and 1500 members of the 285th Zepa Brigade refused to hand over their

[1742] See, for example, Prosecutor v. Kunarac, IT – 93-23 & 23/1-A, Appeals Chamber Judgment (2002), para 92
[1743] Sljivancanin et al. IT – 95-13/1-A, Appeals Chamber Judgment (2009), para 42
[1744] Ibid.
[1745] PW155, T6831;
[1746] Meho Dzebo, T9677;
[1747] Hamdija Torlak, T9824;
[1748] Rupert Smith, T17633;

military weapons and between 800 and 1000 soldiers crossed into Serbia.[1749] This information was confirmed by the Republic of Serbia which stated that between 31 July and 25 October 1995, 799 members of the armed forces from Zepa crossed Drina into Serbia and that the groups were armed.[1750]

882. Furthermore, after the interviews that were conducted the criminal complaint was filed against 149 persons for the crimes between April 1992 and July 1995 by forming special sabotage terrorist groups that carried out attacks on civilian settlements, killing civilians, looting destroying and torching property.[1751] Witness Vojinovic confirmed that the suspects were the people who have crossed in the territory of Serbia.[1752] This was also confirmed with the statements of several Muslims prisoners that have crossed Drina into Serbia that have actually mentioned names of the Muslim perpetrators who were members of the Zepa Brigade and names of the Serbian victims killed by those Muslims.[1753]

883. What is even more important in the light of the recent Mrksic Appeal Judgment, VRS leadership conducted long and hard negotiations for the simple reason to separate military forces from the civilian population. Witness Dzebo confirmed that crossing Drina happened only after the fall of Zepa, it was on 2 August and that people who cross were able bodied man.[1754] Serb forces knew quite well that after the evacuation of civilian population, Muslim armed forces are still in Zepa because Avdo Palic refused to surrender his troops[1755] and even attack Ukrainian base.[1756]

884. It was because of the VRS intention to make sure that the military is separated that the negotiations lasted long. Mr Torlak testified about the negotiations with Mladic on 19 July [1757] and he stated that from then up until the 27 July the key

[1749] Milan Vojnovic, T23687 and T23688;
[1750] 2D524; Information dated 8 March 1996;
[1751] 2D528, criminal complaint dated 23 August 1995;
[1752] Milan Vojinovic, T23699;
[1753] 2D422, statement of Lilic Nasko, also see Milan Vojinovic, T23706; 2D385, statement of Ziga Muhamed, also see Milan Vojinovic, T23706; also 2D416, statement of Senad Kurspahic, also see Milan Vojinovic, T23708;
[1754] Meho Dzebo. T9677-8;
[1755] Thomas Dibb, T16307;
[1756] 6D87, UN report, dated 20 July 1995; also see 6D91, UN report, dated 20 July 1995; also see 6D92 UN report, dated 20 July 1995;
[1757] Hamdija Torlak, T9728; also see 6D103, report on negotiation, dated 19 July 1995;

problem was the fate of the men of military age that were supposed to be exchanged for the captured Serb soldiers.[1758] Negotiations were held on 24 July[1759] and further on the 26 July.[1760] However, from the Muslim side, throughout the negotiation, the intent to surrender or to lay down the weapons never existed[1761] and even UNPROFOR doubted that negotiators could deliver surrender of the Muslim forces in Zepa.[1762] Finally, from the UN report dated 28 July it can be seen that it was known that there were no more persons to be evacuated but that BiH troops, approximately 1500, remained.[1763]

885. It is respectfully submitted that for foregoing reason the specific acts taken against this military group do not and cannot be qualify as crimes against humanity.

886. The Defense also submits that the lack of choice element of deportation was not satisfied by Prosecution. Persons who had crossed the boarder with in Serbia could have easily fled to another location within Bosnia and Herzegovina as they crossed the river to Serbia. As the Prosecution itself indicated "… Zepa's fighting age men did not surrender, instead exfiltrating to the hills surrounding the enclave, or heading east to cross the Drina to Serbia."[1764] This was confirmed by fact witnesses like Thomas Dibb who said that the men decided to go remain in the mountains.[1765] This military group not only chose not to surrender but also chose not to hide in the hills. They chose to escape to Serbia. It is thus evident that this element of deportation is not met in relation to the group of able bodied men who fled across the border to Serbia.

887. For the foregoing reasons, the Defense respectfully submits that with respect to the crime of deportation and Beara's responsibility the Prosecution did not prove the necessary element beyond reasonable doubt.

[1758] Hamdija Torlak, T9730-1;
[1759] Hamdija Torlak, T9808;
[1760] Hamdija Torlak, T9809;
[1761] 6D107, telegram to Gen Delic, dated 18 July 1995; 6D36, letter to Alija Izetbegovic, dated 19 July 1995; also see Hamdija Torlak, T9799;
[1762] 6D108, UN report, dated 26 July 1995, page 1;
[1763] 6D89, UN report dated 28 July 1995, page 3;
[1764] Prosecution's pre-trail brief pursuant to Rule 65 *ter* para 184;
[1765] Thomas Dibb, T16306;

Sentencing and mitigation

Should this Honorable Trial Chamber find that Beara is criminally responsible for any of the crimes alleged in the indictment, it is respectfully submitted that the degree of any participation in the crimes and his lack of effective control over those committing the crimes must be closely assessed in order to determine a fair, effective and proportionate sentence

888. Although the Beara Defense respectfully submits that an acquittal on all Counts is justified based on the evidence presented before this Honorable Trial Chamber, if this Chamber finds that Ljubisa Beara is personally responsible for any of the crimes alleged in the indictment, it is only natural that the Beara Defense would seek to be heard on the issue of sentencing. The Beara Defense thus respectfully submits the following arguments in relation to an appropriate sentence in this case.

889. The ICTY case law holds that deterrence and retribution are the primary principles underlying the sentencing of an individual by the Tribunal.[1766] Retribution entails a proportionate punishment for the offence committed, and deterrence ensures that the penalty imposed will dissuade others from commission of such crimes.[1767]

890. Article 24 of the ICTY Statute and Rule 101 of the ICTY Rules set forth the factors to be taken into account by the Chamber in determining a sentence. Article 24 directs that Trial Chambers "shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.[1768] This requirement is echoed in Rule 101(B)(iii). In that regard, under Article 142 of the SFRY Criminal Code, the minimum punishment for violations of international law in times of war or armed conflict is five years in prison and the maximum punishment is the death penalty.[1769] Article 41 of the SFRY Criminal Code provides that "[a] court shall determine sentence for the perpetrator of a crime within the boundaries prescribed by the code for this crime, bearing in mind the purpose of punishment and taking into account all circumstances influencing the degree of severity (mitigating and aggravating circumstances, and, in particular: the level of criminal responsibility, the

[1766] *Delalic* Appeal Judgment, para. 806; *Aleksovski* Appeal Judgment, para 185.
[1767] *Naletilic* Trial Judgment, para. 739; *Todorovic* Sentencing Judgment, para 29-30; *Plavsic* Sentencing Judgment, para. 23.
[1768] ICTY Statute Art. 24(1).
[1769] Chapter 16 of the SFRY Criminal Code relates to "Criminal Offences Against Humanity and International Law". *Vasiljevic* Trial Judgment, para. 669.

motive for the crime, the level of threat to or violation of protected assets, the circumstances under which the crime was committed, the previous character of the perpetrator, his/her personal circumstances and conduct after the commission of the crime, and other circumstances relating to the personality of the perpetrator.)"[1770]

891. The sentencing factors that must be considered under the ICTY Statute and Rules mirror many of the sentencing considerations listed in Art. 41 of the SFRY Criminal Code. ICTY Statute Article 24 instructs Trial Chambers to take into account "such factors as the gravity of the offence and the individual circumstances of the convicted person.[1771] ICTY Rule 101(B) adds any aggravating or mitigation circumstances to the list of mandatory considerations in the determination of the sentence. Under ICTY case law, it is axiomatic that in order to determine the gravity of the offence, it is necessary to consider "the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime."[1772]

Mitigation

892. Substantial mitigating evidence supports a sentence in line with the sentences handed down in previous cases such as those imposed in the cases Jokic Erdemovic Deronjic and Blagojevic case.[1773]

Prior to the alleged offenses, Ljubisa Beara's good character and service to the community were beyond reproach

893. Beara was born in Sarajevo, Bosnia and Herzegovina. Despite the fact that Beara held a high position before the war in Former Yugoslavia Beara never used his position for his personal gain or even for the his own children's benefit.[1774] Beara was a 'patter familias' type of person;[1775] loving and carrying for his family and friends.

[1770] Cited in *Tuta* and *Stella*.
[1771] ICTY Statute Art. 24(2).
[1772] Kupreskic Trial Judgment, para. 852 cited in *Aleksovski* Appeal Judgment, para. 182; *Delalic* Appeal Judgment, para. 731; *Jelisic* Appeal Judgment, para. 101.
[1773] See Blagojevic Trial Judgment, dated 17 January 2005; also see Erdemovic Sentencing Judgment, dated 5 March 1998;
[1774] 2D661, 92 bis statement Dragan Beara, page 1;
[1775] 2D662, 92 bis statement Marina Beara, page 1;

894. Beara acted professionally throughout his career[1776] and he was seen as a highly professional officer by others[1777] who never acted against legal regulations and rules of service.[1778] Evidence was heard that even when he had the legal authority to use force Beara tried to avoid using it in order to prevent any further escalation of conflict.[1779]

895. It is respectfully submitted that based on the evidence adduced during the trial, Beara never showed any discriminatory intent towards other ethnic groups during his military service[1780] and acted without prejudice towards his subordinates whether they were of Muslim, Croat, Serbian or Albanian origin.[1781]

896. It is respectfully submitted that Beara assited non Serbs during the war such as Lieutenant Senad Burzic who was wounded.[1782] Moreover Beara's assistance was not limited to tending to Burzic's immediate medical problems but Beara also razed money for Burzic's future care and comfort and collected money for a new prosthesis for his leg that was amputated.[1783]

897. Likewise, as adduced during trial, Beara never differentiated between people according to their ethnicity.[1784]

898. Moreover as perhaps best stated by witness 2D PW19 it is very hard to imagine Beara entrusting the lives of his wife and son in the hands of a Muslim if he had discriminatory tendencies.[1785]

[1776] 2D PW19, T25633 and T25635;
[1777] 2D PW19, T25633; Mikajlo Mitrovic T25042; also see 2D652, 92 bis statement Rajko Jelusic, page 2; 2D665, 92 bis statement of Alajica Bosko, page 2;
[1778] Mikajlo Mitrovic, T25054; also see 2D658, 92 bis statement Makivic Slobodan, page 4; also see 92 bis statement Cvijanovic Stojan, page 4;
[1779] Mikajlo Mitrovic, T25044;
[1780] 2D PW19, T25635;
[1781] 2D655, 92 bis statement of Tokic Mirsad, page 1; also see Milan Alajica, T24811;
[1782] Milan Alajica, T24809;
[1783] Milan Alajica, T24812;
[1784] 2D PW19, T25640;
[1785] 2D PW19, T25634;

Personal Circumstances and Conduct demonstrating lack of criminal motive

899. It is respectfully submitted that even after Beara joined the VRS Main Staff his conduct, attitude and behavior towards people of different nationalities remained the same. Witness Binenfeld confirmed that Ljubisa Beara was involved in the negotiations and organization of the exit of a convoy carrying people from Sarajevo in 1993.[1786] It was also uncontested that Beara did not have any prejudice towards any ethnic group including both the Jewish and Muslim communities.[1787]

Personal Circumstances and Conduct do not demonstrate any form and degree of criminal participation

900. It is undisputed that Beara did not physically commit any crimes personally.[1788] Likewise, there is no credible evidence that he was physically present when any crimes were committed. Instead, he is charged as a member of a joint criminal enterprise under Article 7(1). It is respectfully submitted the Prosecution failed has failed to present evidence to establish beyond a reasonable doubt that (1) Beara had effective power over any of the persons who committed the crimes, or (2) that Beara was a member of a joint criminal enterprise, or (3) that Beara had the intent to commit any of the crimes alleged in the indictment.

Voluntary surrender

901. It is respectfully submitted that on October 10, 2004 Beara voluntarily surrendered to the Jurisdiction of the ICTY. Attached hereto and incorporate herein as Annex A is the copy of a letter dated 24 March 2009 from the National Council for Cooperation with the ICTY attesting to the voluntary surrender of Ljubisa Beara.

Initial appearance

902. It is respectfully submitted that on 12 October 2004 Beara initially appeared before the Tribunal and at that time impressed upon all others who were indicted to voluntarily surrender. Specifically Beara stated “I wish to say something. All of those

[1786] Jakov Binnenfeld, T25555-7;
[1787] Jakov Binnenfeld, T25552;
[1788] See the Indictment;

who will see this or hear this or whatever, my comrades at arms who are now accused and who are fugitives, I wish to send a message to them that they voluntarily surrender as soon as possible to get a stone that is around the neck of our nation off our country. That is what I wish to say to all".[1789] It is further submitted that eight persons voluntary surrender shortly after Beara's plea for cooperation. These individuals are Dragomir Milosevic, date of surrender December 2, 2004, Milan Gvero, date of surrender February 24, 2005, Radivoje Miletic, date of surrender February 24, 2005, Drago Nikolic, date of surrender March 15, 2005, Vinko Pandurevic, date of surrender March 23, 2005, Ljubomir Borovcanin, date of surrender April 1, 2005, Milorad Trbic, date of surrender April 7, 2005, Vujadin Popovic, date of surrender April 14, 2005.

Cooperation with this Tribunal

903. It is respectfully submitted that this Honorable Trial Chamber should consider Beara's conduct and cooperation throughout the trial proceedings that have lasted approximately 3 years. As the Honorable Trial Chamber may recall, Beara at no time interfered or obstructed the Honorable Trial Chamber's scheduling despite its hectic pace.

904. During his stay at the UNDU Ljubisa Beara has shown good conduct and proven that he is not an individual prone to conflicts. Beara has been respected among the accused of various ethnic backgrounds and has fully abided by the provisions prescribed by the UNDU Authorities.

905. The Defense respectfully submits that for an individual such as Ljubisa Beara, an acquittal would indeed serve the goal of deterrence, both in terms of general deterrence for others contemplating war crimes and crimes against humanity, and in terms of deterring Beara as an individual. The ignominy and stigma that results from the indictment and trial on such horrific and tragic events is enough to deter anyone from participating in any way with crimes such as those alleged against Beara. He was a law abiding and productive citizen before the Bosnian civil war, and also after

[1789] See Initial Appearance, 12 October 2004, page.4;

the war, and when he returns, he will again be a productive and law-abiding citizen, as well as a loving and responsible husband and good parent if he is given the chance.

906. The Defense respectfully asks that The Honorable Trial Chamber, after the long proceedings and diligent and conscientious approach of all the parties, render a Judgment to Ljubisa Bear as it deem in the interest of Justice and in accordance with Beara's actual role in the tragic events of Srebrenica.

Conclusion

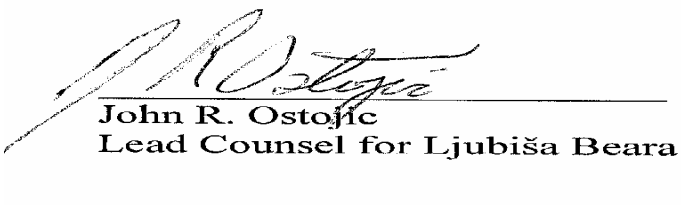
907. Beara is not guilty of the crimes alleged under the mode of individual responsibility, Article 7(1), as either a purported participant in an alleged joint criminal enterprise or as an aider and abettor to such criminal conduct. Beara at all times, as supported by witnesses from different ethnic groups, respected all the citizens of Bosnia and Herzegovina, regardless of ethnicity.

908. It is respectfully submitted that the Prosecution previously addressed sentencing relating to Beara and has acknowledged and admitted that not only was Beara a "empty vessel" but also cannot "hold a candle" to Blagojevic and other Commanders. It is further respectfully submitted that the Prosecution should be prohibited from entertaining any sentence request greater than that imposed on Blagojevic.

909. It is further most respectfully submitted that given Beara's age of 70, his voluntary surrender, his cooperation with the Tribunal, his plea for others to surrender at his initial appearance and his assistance to non Serbs during the war, should the Honorable Trial Chamber render a finding of guilt against Beara a sentence would be recommended without prejudice during the closing arguments which fully satisfies the principals and goals of the Tribunal.

Respectfully submitted by

Counsel for Mr. Ljubisa Beara,



John R. Ostojic
Lead Counsel for Ljubiša Beara

Predrag Nikolić
Co- Counsel for Ljubiša Beara

ANNEX A

Republic of Serbia

Office of the National Council for Cooperation with the International Criminal Tribunal for the former Yugoslavia

Number: 1/0-24/136-09

Date: 24 March 2009

Belgrade

Attorney JOHN OSTOJIC

SUBJECT: Certificate that the accused Ljubisa Beara surrendered voluntarily

In response to your request dated 24 March 2009 for a certificate that the accused Ljubisa Beara meets the requirements for receiving relief and further that he surrendered voluntarily to the authorities of the Republic of Serbia after the indictment was brought, I hereby confirm that Ljubisa Beara, indicted before the International Criminal Tribunal for the former Yugoslavia, surrendered voluntarily to the authorities of the Republic of Serbia on 9 October 2004, after which he went to The Hague where he was handed over to the ICTY organs.

DIRECTOR OF OFFICE
OF THE NATIONAL COUNCIL
Dusan Ignjatovic
/stamped; a signature/

Република Србија

Канцеларија Националног савета за сарадњу са Међународним кривичним трибуналом за бившу Југославију

Број: К9-24/136-09

Датум: 24. март 2009. године

Београд

Адвокат Џон Остојић

ПРЕДМЕТ: Потврда да се оптужени Љубиша Белча добровољно предао

Поводом Вашег захтева од 24. марта 2009. године, којим сте затражили достављање потврде да оптужени Љубиша Белча испуњава услове за добијање материјалне помоћи, односно да се добровољно предао властима Републике Србије након позивања оптужнице, овим потврђујем да се Љубиша Белча, оптужен пред Међународним кривичним трибуналом за бившу Југославију, добровољно предао властима Републике Србије 9. октобра 2004. године, након чега је отпутовао у Хаг, где је предат притвору МКТЈ.

ПОМОЋНИК ДИРЕКТОРА КАНЦЕЛАРИЈЕ НАЦИОНАЛНОГ САВЕТА

Душан Илић