**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR**

**THE FORMER YUGOSLAVIA**

**Case No. IT-05-88-A**

**IN THE APPEALS CHAMBER**

**Before:** **The Honorable Judge Patrick Robinson, Presiding**
**The Honorable Judge Mehmet Güney**
**The Honorable Judge Fausto Pocar**
**The Honorable Judge Liu Daqun**
**The Honorable Judge Andrésia Vaz**

**Registrar:** **Mr. John Hocking**

**Date:** **16 June 2011**

**THE PROSECUTOR**

**v.**

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

***PUBLIC REDACTED***

# APPELLANT LJUBIŠA BEARA'S NOTICE OF RE-CLASSIFICATION AND RE-FILING OF THE PUBLIC REDACTED VERSION OF APPEAL BRIEF

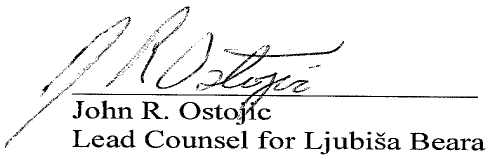
**The Office of the Prosecution:**
Mr. Peter Kremer, QC

**Counsel of the Appellant:**
Zoran Živanović and Mira Tapušković for Vujadin Popović
John Ostojić for Ljubiša Beara
Jelena Nikolić and Stephane Bourgon for Drago Nikolić
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

1. On 27 April 2001 the Defense for Ljubisa Beara filed its Public Redacted Version of the Appeal Brief and on 10 June 2011 it re-filled the Public Redacted Version of the Appeal Brief. On 14 June 2011 one error was discovered in the Public Redacted Version of the Appeal Brief that could inadvertently reveal the confidential information.
2. The Defense therefore requests that the Public Redacted Appeal Briefs filed on 27 April 2011 and 10 June 2011 be RE-CLASSIFIED as confidential.
3. The Defense of Ljubisa Beara hereby files a new and corrected Public Redacted Version of the Appeal Brief on behalf of Ljubisa Beara.

Respectfully submitted,

Lead Counsel for Mr.Ljubisa Beara



John R. Ostojic
Lead Counsel for Ljubiša Beara

# ANNEX A

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA**

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# APPELLANT LJUBIŠA BEARA'S APPEAL BRIEF

**The Office of the Prosecution:**
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1. On 10 June 2010, Ljubiša Beara ("the Appellant") was convicted by Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia on four counts of the Indictment: genocide, extermination, murder as a violation of the laws and customs of war and persecution. The Appellant was sentenced to life imprisonment.

2. The Appellant filed its Notice of Appeal on 8 September 2010. Appellant, by and through his attorney, John Ostojić, and pursuant to Rule 111 of the Rules of Procedure and Evidence hereby presents the following Appellant Brief and arguments in support of its Notice of Appeal.

## ERRORS OF LAW AND FACT BY THE TRIAL CHAMBER DURING THE COURSE OF THE TRIAL PROCEEDINGS

### GROUND 1

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION DURING THE COURSE OF THE TRIAL WHEN IT DENIED THE APPELLANT, LJUBIŠA BEARA, THE RIGHT TO CALL EVIDENCE WHICH WOULD REFUTE, REBUT AND/OR CONTRADICT THE EVIDENCE OF THE OTP, INCLUDING THE DENIAL OF THE RIGHT TO INTRODUCE RELEVANT DOCUMENTARY EVIDENCE THEREBY DENYING APPELLANT LJUBIŠA BEARA A FAIR TRIAL, CONSTITUTING A MISCARRIAGE OF JUSTICE.

3. The Defence submits that the Trial Chamber erred in law and abused its discretion by not allowing the Appellant to introduce evidence that would have refuted, rebutted and/or contradicted evidence presented by the Prosecution thereby infringing on Ljubiša Beara's right to a fair trial. This section of the Appeal will focus on: a) the refusal to admit interview records and written statement of Miloš Tomović, the Appellant's personal driver (sought to be introduced in order to challenge the credibility of co-Appellant Vinko Pandurević when testifying as a witness), and b) the lack of credibility of the Prosecution's case-in-chief.

4. Appellant is entitled to examine witnesses against him and to call witnesses on his behalf under the same conditions as those called by the Prosecution.[1] The Rules of Evidence provide that "a Chamber shall apply rules of evidence which will *best favour a fair determination of the matter before* it and are consonant with the spirit of the Statute and the general principles of law".[2] Introduction of written evidence is also permissible where it is in the interests of justice.[3] Furthermore, according to the Rules, the Defence can cross-examine witnesses both on the subject matter of the evidence in chief and, more importantly, for the issue presented here, on the matters affecting their credibility.[4] In the case of cross-examination, "Rule 90(h)(i) does not limit the matters that may be raised during a cross-examination that is directed solely at the credibility of the witness."[5] Defence, while conducting cross-examination, is free to confront a witness with testimony of another witness in order to impeach or challenge his credibility.[6] In doing so, it is an obligation to put to the testifying witness the evidence of a previous witness.[7]

5. On 12 March 2009, during the cross-examination of Vinko Pandurević, the Trial Chamber rejected a Defence motion to introduce evidence challenging the credibility of the witness as part of its cross-examination.[8] The request pertained to three documents: an OTP interview with Miloš Tomović; a statement on information procured by Bruce Bursik; and, a supplemental statement of Miloš Tomović.[9] Introduction of the OTP interview with Miloš Tomović, which contradicted the testimony of Pandurević, was rejected by the Trial Chamber because some parts of it had already been read into the record by the Defence counsel.[10] In addition, the admission of the remaining two documents was rejected because they were not "put to the witness".[11] The Defence argues that the Trial Chamber erred in law and abused its

[1] *ICTY Statute*, Article 21(4)(e); *International Covenant on Civil and Political Rights*, Article 14(3)(e); *European Convention on Human Rights*, Article 6(3)(d).
[2] ICTY Rule 90(A).
[3] ICTY Rule 90(F) and Rules 92 *bis, ter* and *quater.*
[4] ICTY Rule 90(H)(i).
[5] *Prosecutor v. Martić,* IT-95-11, Revised Version of the Decision Adopting Guidelines on the Standards Governing the Presentation of Evidence and the Conduct of Counsel in Court, 19 May 2006, para.9.
[6] *Id*., para.12.
[7] *Id.*
[8] T.32687-32688.
[9] *Id*; 2D639, 2D644, 2D645.
[10] *Id.*
[11] *Id.*

discretion by not permitting Beara to rely on these pieces of evidence in order to impeach the testimony given by Pandurević. Not admitting the foregoing documents as evidence for impeachment purposes has severely undermined the Defence's ability to call into question the credibility of this witness. The Trial Chamber's finding that partial introduction of information contained in the interview with Miloš Tomović sufficed for purpose of the Defence's challenge to Vinko Pandurević's credibility was erroneous.[12] The Defence respectfully submits that a complete and fair trial would have allowed for admission of all three documents. Pursuant to Rule 90(h)(i), the Defence was therefore entitled to use the OTP interview in its entirety, and all information contained therein, as a means to challenge Vinko Pandurević's credibility.

6. The Trial Chamber therefore abused its discretion in making a determination that only partial introduction of the OTP interview was sufficient for this purpose, thereby severely jeopardizing the Appellant's right to challenge the evidence against him through cross-examination. In order to fully appreciate the challenge to Pandurević's credibility, the Trial Chamber should have admitted all three documents for context in order to properly and fully consider his evidence.

7. The Defence also challenges the Trial Chamber's rationale in rejecting the statement on information procured by Bruce Bursik and the supplemental statement of Miloš Tomović.[13] The Trial Chamber restricted the Defence from using these two documents in the testimony of Pandurević, which constituted error.

8. It is respectfully submitted that the Trial Chamber erred in law and abused its discretion by restraining the Appellant's right to confront witnesses against him, among others, Vinko Pandurević. It further abused its discretion in refusing to admit the foregoing three documents into evidence. The three documents contradict the testimony of Pandurević and further substantiate and confirm Beara's whereabouts as presented by the Defence.

[12] T.32688.
[13] *Id.*

**GROUND 2**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION DURING THE COURSE OF THE TRIAL WHILE ADMITTING CERTAIN EVIDENCE, INCLUDING IMPROPER RULE 92 *QUATER* TESTIMONY, TO WHICH THE DEFENCE OBJECTED; THIS EVIDENCE WAS UNFAIRLY PREJUDICIAL TO THE RIGHT AFFORDED TO APPELLANT, LJUBIŠA BEARA, THEREBY DENYING APPELLANT A FAIR TRIAL, CONSTITUTING A MISCARRIAGE OF JUSTICE.

9. The Defence submits that the Trial Chamber erred in law and abused its discretion when it allowed into evidence an improper statement of Miroslav Deronjić, pursuant to Rule 92 *quater*. The Defence acknowledges that "[t]here is no provision in the Rules for requests for reconsideration, which are a product of the Tribunal's jurisprudence, and are permissible only under certain conditions".[14] Nonetheless, the Defence relies on the position of this Tribunal, as well as that of the ICTR, which allows for exceptional review of a prior interlocutory decision under its "inherent discretionary power", specifically, "'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice".[15] It is respectfully submitted that both a clear error of reasoning and a necessity to prevent injustice is applicable with respect to the erroneous admission of Deronjić's Rule 92 *quater* testimony.

10. The admission of the 92 *quater* statement of Miroslav Deronjić was first challenged in 2008. At that time, the Defence stressed that the testimony does not meet the requirements of Rules 89 and 92 *quater,* specifically highlighting that its admission would undermine the fairness of proceedings given its shortcomings, as well as the fact that it was a central piece of evidence on acts and conduct of the Appellant.

11. At all times, the Defence argued that Deronjić's statements should not be introduced as evidence for several reasons, such as the impossibility of cross-

[14] *Prosecutor v. Karadžić*, IT-95-5/18-T ("*Karadžić")*, Decision on Prosecution's Motion for Reconsideration, Alternatively for Certification, of the Decision Concerning the Evidence of Miroslav Deronjić, 20 April 2010 ("*Karadžić* Deronjić Reconsideration Decision"), para.7.
[15] *Id.*; *Ndindabahizi v. Prosecutor,* ICTR-01-71-A ("*Ndindabahizi"*), Decision on Defence "Requete de l'Appelant en Reconsideration de la Decision du 4 avril 2006 en Raison d'une Erreur Materielle", 14 June 2006, para.2; *Prosecutor v. Galić*, IT-98-29-A ("*Galić*"), Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2.

examination by the Beara Defence, lack of any corroboration and known changes and inconsistencies throughout the testimony. The admission of the Deronjić testimony seriously undermined the Appellant's right to a fair trial in violation of Rules 89(D) and 92 *quater*(B).

12. The same issue, whether to admit the testimony of Miroslav Deronjić, was addressed by the *Karadžić* Trial Chamber with a completely differing result. In *Karadžić*, the Trial Chamber refused to admit the testimony of Miroslav Deronjić as its probative value was considered to have been outweighed by the need to ensure a fair trial.[16] Further, in *Karadžić*, the Trial Chamber specifically noted the considerable amount of evidence offered by Deronjić on acts and conduct of the Accused Karadžić; this was a central point in its rejection of Deronjić's testimony. Moreover, the *Karadžić* Trial Chamber properly recognized the severe shortcomings of the Deronjić evidence, such as lack of corroboration and its inherent inconsistencies and, therefore, barred its admission in order to allow the accused to have a fair trial.[17]

13. Prior decisions of both the Trial Chamber and the Appeals Chamber, were respectfully erroneous and lead to an injustice as both Chambers failed to take the *Karadžić* approach and to review all relevant factors associated with Deronjić's testimony. The Trial Chamber relied heavily on Deronjić's uncorroborated, inconsistent testimony pertaining to, among other things, an alleged meeting held on 13 July finding that Beara played a "pivotal and high level role in the murder operation"[18] and that Beara was acting at all times with a certain mind set[19] thereby convicting him on various counts, including genocide and crimes against humanity. Further, and perhaps most importantly, the Appellant was denied the right to cross-examine a witness, whose testimony was specifically tendered to address acts and conduct of the Appellant, which is a direct violation of the rights guaranteed by the ICTY Statute, the ICCPR and the ECHR.

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[16] *Karadžić*, Decision on Prosecution's Motion for Admission of the Evidence of KDZ297 (Miroslav Deronjić) Pursuant to Rule 92 *quarter*, 23 March 2010 ("*Karadžić* Deronjić Decision"), para.39; *see also*, *Karadžić* Deronjić Reconsideration Decision.
[17] *Karadžić* Deronjić Decision, paras.16-39.
[18] *Prosecutor v. Popović et al.*, IT-05-88-T ("*Popović et al.*"), Trial Judgement, 10 June 2010 ("Judgement"), para.1300.
[19] *Id.*, para.1314.

14. The Appellant respectfully submits that the same analysis and conclusion that applied in the *Karadžić* Decision applies to this case as well. The Defence further submits that the Trial Chamber erred in law and abused its discretion in allowing the Rule 92 *quater* testimony of Deronjić to be admitted into evidence in violation of the Appellant's right to a fair trial, thereby prejudicing the Appellant and invalidating the Judgement.

15. Likewise, the Trial Chamber erred in its admission of the testimony of Nada Stojanović, another Rule 92 *quater* witness. This testimony was admitted pursuant to a motion by a co-Appellant.[20] As in the case of Deronjić, the information contained in Stojanović's statements substantially pertains to the acts and conduct of the Appellant by placing him at one of the sites of mass executions.[21] The Trial Chamber erroneously relied on this testimony in determining this allegation[22] and considered it in finding Beara guilty of crimes charged.[23] The testimony of Stojanović was not offered by the Prosecution likely because of its clear inadmissibility. The Trial Chamber admitted the testimony of Stojanović despite the fact that it was not given under oath and was not subject to cross-examination.[24] Moreover, the Prosecution acknowledged that her testimony, had she been alive to testify, should have been taken with a caveat as to the weight to be assessed by the Trial Chamber.[25] Likewise, the Trial Chamber erred and failed to consider that her testimony would have no credibility given her status as a suspect.[26] In addition, the Stojanović evidence was not corroborated by other credible and reliable evidence.[27] [Redacted][28]

16. Given the foregoing, the admission of Stojanović's testimony substantially violated the Appellant's right to a fair trial. Further, the Trial Chamber erred in law and abused its discretion in allowing the Rule 92 *quater* testimony of Stojanović to be

[20] *Popović et al.*, Decision on Motion on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 *quater*, 18 December 2008 ("Nikolić 92*qtr* Decision").
[21] Judgement, para.1277.
[22] *Id.*
[23] *Id.*, paras.1300-1302.
[24] Nikolić 92*qtr* Decision, para.46.
[25] *Id.*, para.22.
[26] *Id.*
[27] *Id.*, para.47.
[28] [Redacted]

admitted into evidence in violation of the Appellant's right to a fair trial, thereby prejudicing the Appellant and invalidating the Judgement.

**GROUND 3**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION DURING THE COURSE OF THE TRIAL BY ADMITTING EVIDENCE AND GIVING IT UNDUE WEIGHT, INCLUDING STATEMENT OF CO-APPELLANT LJUBOMIR BOROVČANIN AND THE IMPROPER 92 *BIS* TESTIMONY OF PW116; THIS EVIDENCE BEING UNFAIRLY PREJUDICIAL TO THE RIGHTS AFFORDED TO APPELLANT, LJUBIŠA BEARA, THEREBY DENYING HIM A FAIR TRIAL, CONSTITUTING A MISCARRIAGE OF JUSTICE.

17. The Defence submits that the Trial Chamber erred in law and abused its discretion when it allowed into evidence an improper statement of Ljubomir Borovčanin.

18. Borovčanin's statement asserted acts and conduct relating to Beara[29] and was thereby admitted in violation of the Rules and jurisprudence. The Trial Chamber knew that the Appellant had no opportunity to cross-examine Borovčanin and failed to properly weigh that evidence which was a further abuse of its discretion.

19. The Trial Chamber abused its discretion and relied on Borovčanin's statement to prove that Appellant was: in the area of Potočari on 12 July 1995; that on the afternoon of the same day the Appellant was with Deronjić in the centre of Bratunac[30]; and, that around 8pm on 13 July he overheard Deronjić and the Appellant arguing about where Bosnian Muslim captives were to be brought.[31] Borovčanin's allegations were later used to prove Beara's involvement in a plan to murder.[32] As shown in this Brief, these allegations are in conflict with other evidence presented to the Trial Chamber.[33] It was error by the Trial Chamber to admit and give any weight to the Borovčanin statement which constituted a miscarriage of justice.

[29] Judgement, para.1265.
[30] *Id*, para.1255.
[31] *Id*., para.1265.
[32] *Id*., paras.1265 & 1270.
[33] *See* Grounds 6 & 28 of this Brief.

20. Similarly, the Trial Chamber erred when it admitted and gave undue weight to the testimony of PW116. The statement of PW116 was the only evidence of the specific beatings and killings near the Kravica Supermarket.[34] The jurisprudence of the Tribunal holds that when the Appellant was not given adequate and proper opportunity to challenge the evidence and to question the witness, the evidence may lead to a conviction *only* if there is other corroborative evidence.[35] Further, the Appeals Chamber has held that evidence which had not been the subject of cross-examination and goes to the acts and conduct of the Appellant cannot be relied upon as the sole basis to establish a conviction.[36]

21. It is respectfully submitted that the Trial Chamber, by majority, erred and abused its discretion when it distinguished and relied up on the statement of PW116.[37] The Trial Chamber reasoned and found that the allegations in relation to opportunistic killings in Kravica based on PW116's uncorroborated evidence cannot be basis for a conviction of any of the accused for genocide, crimes against humanity or war crimes, but it could be basis of conviction for opportunistic killings.[38]

22. The Defence agrees with the dissenting opinion of the Honorable Judge Kwon on this matter in his assessment that this conclusion of the majority in the Trial Chamber is incorrect.[39] It is respectfully submitted that the evidence offered by PW116 should be assessed in accordance with the jurisprudence with respect to each separate charge against an accused, not it the context of each count such as crimes against humanity.[40]

23. Finally, it is respectfully submitted that the Trial Chamber erred in admitting the evidence of PW116 and agrees with the Honorable Judge Kwon that the opportunity of an accused to cross-examine the witness is far too important to be put

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[34] Judgement, para.448.
[35] *Galić*, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, para.12.
[36] *Prosecutor v. Prlić et al.*, IT-04-74 ("*Prlić et al.*"), Decision on Appeals against Decision Admitting Transcript of Jadranko *Prlić's* Questioning in Evidence, 23 November 2007, para.53; *see also Martić*, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, para.20.
[37] Judgement, para.63.
[38] *Id.*, para.448.
[39] Judgement, Dissenting and Separate Opinions of Judge Kwon, paras.43-45.
[40] *Id.*, para.43.

to a balancing test with the right to an expeditious trial.[41] Further, the Trial Chamber erred in law and abused its discretion in allowing the testimony of Borovčanin to be admitted into evidence in violation of the Appellant's right to a fair trial, thereby prejudicing the Appellant and invalidating the Judgement.

**GROUND 4**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN ADMITTING CERTAIN DOCUMENTARY EVIDENCE THAT IS GROSSLY UNRELIABLE AND UNTRUSTWORTHY INCLUDING, BUT NOT LIMITED TO, THE FOLLOWING: INTERCEPT TRANSCRIPTS, AERIAL IMAGES AND THE ZVORNIK BRIGADE NOTEBOOK, SAID EVIDENCE BEING UNFAIRLY PREJUDICIAL TO THE RIGHTS AFFORDED TO APPELLANT LJUBIŠA BEARA THEREBY DENYING HIM A FAIR TRIAL, CONSTITUTING A MISCARRIAGE OF JUSTICE.

24. The Trial Chamber erred as a matter of law in assessing the reliability of the transcripts of intercepted conversations when it stated that it placed reliance on the general procedures employed by the intercept operators.[42] It is respectfully submitted that the Trial Chamber erred in admitting the unreliable intercept communications and thereafter ascribed improper weight to this evidence.

25. Moreover, it is respectfully submitted that the Trial Chamber erred in failing to apply the principle that all reasonable inferences should be made in favor of an accused. Further, the Trial Chamber failed to recognize reasonable interpretations of vague conversations in favor of the Appellant.

*Intercept P1130*

26. With respect to intercept P1130, the Trial Chamber completely disregarded the trial testimony of PW127 and instead relied on a typed version of the conversation as being authentic and reliable. This version identifies the Appellant as one of the participants. PW127 confirmed that the original handwritten manuscript was more authoritative than the typed version of the conversation.[43] PW127 further confirmed

[41] *Id.*, para.45.
[42] Judgement, para.1232.
[43] T.5825-5833.

that all the words attributed to Beara in the typed version of the intercept should be attributed to Lučić.[44]

*Intercept P1164*

27. With respect to P1164, the Trial Chamber erred when it ignored the multiple alterations, modifications and changes made within the document in finding that it was authentic and reliable. The Trial Chamber erred when it found that the corrections in the notebook improved the reliability of the identification of the participants.[45] Moreover, the Trial Chamber erred in admitting P1164 following the testimony of PW132. In essence, PW132 acknowledged that he never wrote Beara's name in the transcript and instead used a series of cryptic letters. He further testified that this conversation was the most revised and edited of any transcribed by him and that he did not add the name 'Beara' to the line designating participants but, rather, stated that it was done subsequently.[46] Therefore, this document should not have been admitted.

*Intercept P1179*

28. Similarly, the Trial Chamber erred in admitting intercept conversation P1179 as evidence despite the testimony of PW133. It is respectfully submitted that the testimony of PW133 further supports that P1179 should not have been admitted or, at the very least, should be given little or no weight. PW133 allegedly recognized Beara's voice in this intercept, although there was no introduction between the participants of the intercept conversation. By his own admission, PW133 never reviewed any tape with a purported conversation which included a participant that was allegedly Beara.[47] Instead, PW133 surmised that he was able to identify participants in these intercept conversations through voice recognition. The Trial Chamber completely disregarded the fact that PW133 only mentioned this voice recognition for the first time when he came to The Hague to testify in the present case.[48] When testifying in the *Blagojević*[49] case, the witness did not mention recognizing Beara's voice in connection with P1179. Nevertheless, PW133 tried to explain that he was familiar with the conversation and that he was certain that Beara's

[44] T.5826.
[45] Judgement, para.1234.
[46] T.4457.
[47] T.5511.
[48] T.5495.
[49] *Prosecutor v. Blagojević et al.*, IT-02-60 ("*Blagojević et al.*").

name was mentioned on the switchboard, but it was not transcribed.[50] However, PW133's revised testimony was inconsistent with Stephanie Frease's report, which was noted that PW133 was shown this particular intercept and that he could not remember its contents or participants.[51] Furthermore, with respect to PW133's claim of voice recognition, the witness ultimately conceded there was no other entry involving Ljubiša Beara in the notebooks which he transcribed.[52] In addition, PW133 acknowledged that the Prosecution did not show him any other intercept conversations which purport to involve Beara.[53] It is plain from this evidence that PW133 could not have recognized Beara's voice. Therefore, the Trial Chamber made an error in admitting P1179 and further erred in giving it any weight.

*Intercepts P1178 and P1179*

29. The testimony of PW157 should, respectfully, be given no weight as being untruthful and contradictory. PW157 acknowledged that he cannot remember any of Beara's voice characteristics.[54] However, while testifying in *Krstić*[55], PW157 said that the participant in P1178 was 'most probably' Beara looking for Živanović. In the present trial, PW157 changed his testimony from *Krstić*, stating that he had read the transcript of the *Krstić* proceedings and determined that the 'most probably' should be removed.[56] However, the Prosecution conceded that the *Krstić* testimony was never produced in BCS to PW157 and that the witness could not have read it because he doesn't understand English.[57] Therefore, the Trial Chamber made an error while relying on PW157 to authenticate P1178 and P1179.

*Intercept P1187*

30. Finally, the Trial Chamber erred when it admitted P1187 insomuch as it was wholly unreliable. The Trial Chamber completely disregarded the fact that witness Trkulja had testified before the Trial Chamber and claimed that he had never asked to see or talk to Beara as alleged in the intercept conversation.[58] Beara's name was

[50] T.5556-7.
[51] T.5559; 2D1D70.
[52] T.5532.
[53] *Id.*
[54] T.7222.
[55] *Prosecutor v. Krstić*, IT-98-33 (*Krstić*).
[56] T.7221.
[57] *Id.*
[58] T.15133; P1187.

added by the operator in the middle of the conversation. Further, the Trial Chamber completely disregarded that if Beara was on the line he should know the reference to extension 155. Although the Prosecution expert, Richard Butler, dismissed this as a little anomaly, he nevertheless testified that his belief was that Beara would have known the number of the Main Staff operation office.[59] It is respectfully submitted that, given the foregoing, Beara was not a participant to the conversation as reflected in exhibit P1187. Had the Trial Chamber properly taken account of the testimony of Trkulja, it would not have admitted the intercept conversation P1187 or have given it any weight. Therefore, the Trial Chamber made an error in its reliance on P1187.

*Zvornik Brigade Notebook*

31. With respect to the Zvornik Brigade Notebook ("Notebook"), the Trial Chamber erred in admitting it into evidence and further erred by relying upon it in the Judgement. It is respectfully submitted that the Notebook was not maintained contemporaneously and was altered or modified. Further, it is respectfully submitted that the Trial Chamber failed to consider any of the arguments presented by the Appellant.

32. Specifically, the Trial Chamber ignored that, despite analysis of two handwriting experts, the Notebook contains ten pages of a yet-unknown author.[60] Additionally, it was not established when certain entries were made or whether the entries were added at a later date.[61] Furthermore, the Trial Chamber ignored the expert testimony that several entries that mention Beara were written asynchronously.[62] Therefore, the Trial Chamber made an error admitting the Notebook and further erred in giving it any weight.

*Aerial Images*

33. It is respectfully submitted that the Trial Chamber erred in admitting and relying upon certain aerial images.

[59] T.20606-7; P1187.
[60] P2848, *see also* Testimony of Kathryn Barr, T.13208, T.13219 and T.13225.
[61] T.13212 and T.13233.
[62] 2D582, p.8-9.

34. Specifically, the Trial Chamber failed to reconcile the inconsistent testimony of two Prosecution witnesses: Richard Butler and Jean Rene Ruez. Butler testified that it would be impermissible to add or remove dates within the aerial images.[63] However, Ruez admitted that he had, in fact, added and removed dates on certain aerial images.[64] Furthermore, the cross-examination of Ruez relating to the aerial images was restricted.[65]

35. It is respectfully submitted that the Trial Chamber failed to consider that reliance on aerial images may be misleading and inaccurate.[66]

36. In noting that these aerial images do not exist for every day,[67] it is respectfully submitted that the Trial Chamber erred in admitting these images in a manner that invalidates the Judgement.

**GROUND 5**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT PERMITTED, AND GAVE UNDUE WEIGHT TO, EVIDENCE WHICH IS GROSSLY UNRELIABLE, UNCORROBORATED AND UNTRUSTWORTHY.

37. The testimony of Prosecution experts did not establish criminal liability as it was not supported by the documentary evidence.

*Forensic Experts*

38. The reports of the forensic experts did not establish the precise time of death[68] and the cause of death was also undetermined in a significant number of cases[69]. As such, the Trial Chamber should not have admitted the testimony or reports of such experts.

[63] T.20182.
[64] T.1654.
[65] Ruez, 14/15 September 2006.
[66] T.21171-21172.
[67] T.33664.
[68] Judgement, para.610.
[69] *Id.*, para.612.

39. Specifically, the methodology used by the Prosecution's experts, such as William Haglund, was criticized by colleagues[70] and rejected by other International Tribunals.[71]

40. Further, the forensic expert reports do not allow for independent confirmation of its conclusions. The Trial Chamber erred when it disregarded the testimony of Defence experts stating that the conclusions of Haglund, Lawrence and Clark could not be verified because the descriptions of the injuries were seriously lacking in precision and detail.[72]

41. For example, during trial it was established that a forensic expert's conclusions were erroneous: Haglund's report stated that the victims of the Cerska site were executed on site[73] and that it was a primary, undisturbed grave.[74] However, Haglund's conclusion was refuted by the Prosecution investigator, Dušan Janc.[75]

42. Given the foregoing, any reliance on Haglund's report or testimony, as well as the other Prosecution expert evidence, should be given little or no weight.

43. Finally, the conclusions of the Prosecution's experts are based solely on circumstantial evidence. Prosecution expert Haglund recorded the manner of death for all individuals found in the graves as being homicide, even those individuals whose cause of death, he opined, was undetermined.[76] It is respectfully submitted that the Trial Chamber erred when it relied on the forensic experts' reports which were, at best, speculative.

*Demographic Experts*

44. The Trial Chamber erred when it admitted and gave undue weight to the Prosecution's demographic experts despite flaws in their methodology and errors in

[70] T.8915.
[71] T.8922; *see Prosecutor v. Rutaganda*, ICTR-96-3 ("*Rutaganda*"), Trial Judgement, 6 December 1999; *Rutaganda*, Appeal Judgement, 26 May 2003.
[72] Testimony of Dušan Dunjić, T.22816–22818.
[73] P611, p.66.
[74] T.8910; *see also* Testimony of Dušan Janc, T.33392.
[75] T.33528; *see also* 1D1391 (Cerska 20, Cerska 30, Cerska 32, Cerska 36, Cerska 51, Cerska 65, Cerska 66, Cerska 83, Cerska 101 and Cerska 116).
[76] P616, p.49; P611, p.51; P622, p.50.

their results. Some of the problems include: that the Prosecution experts used an unreasonably large number of keys (71) to match persons between 1991 census and voters list made after 1995 (which enabled them to match almost everybody)[77]; that the Prosecution experts disregarded available sources that would produce a more reliable list of missing persons[78]; that the Prosecution experts did not define the actual territory of Srebrenica[79]; and, that the concrete numbers of missing reached by Prosecution experts turned out to be grossly inaccurate when the process of matching was redone by Defence experts.[80]

*DNA Experts*

45. It was a discernible error by the Trial Chamber to admit and give undue weight to the DNA expert, Thomas Parsons. The ICMP never provided electropherograms representing the results of the genetic analysis of a DNA sample.[81] The Trial Chamber erred when it denied the Defence Motion requesting disclosure of the records establishing the identity of exhumed bodies[82] which would allow the Defence to verify and/or dispute the results reached by those experts. The conclusions of Parsons were accepted by the Trial Chamber even though they do not represent a list of closed cases, but rather, DNA match reports;[83] and, approximately 4,000 identifications were conducted before the ICMP received its professional accreditation.[84]

46. In addition, the methodology used by Parsons to calculate the total number of persons buried in Srebrenica graves[85] was erroneous. Likewise, the assumptions made by Parsons are speculative and cannot be confirmed.[86] Such methodology and assumption cannot suffice for proof beyond reasonable doubt.

[77] T.24339.
[78] Judgement, para.634; *see also* Testimony of Svetlana Radovanović, T.24326.
[79] Radovanović, T.24366.
[80] Testimony of Kovačević, T.22665 and T.22685; *see also* 1D1129, paras.14 & 27.
[81] Judgement, para.646.
[82] *Id.*, para.647.
[83] *Id.*, para.644.
[84] Testimony of Oliver Stojković, T.23010.
[85] Judgement, para.641.
[86] *Id.*

47. For the foregoing reasons, the Trial Chamber erred in admitting this evidence and relying on it in the findings of the Judgement.

*PW168 and Momir Nikolić*

48. It is respectfully submitted that the Trial Chamber erred when it admitted and relied on the evidence of both PW168 and Momir Nikolić. [Redacted]

49. In its Judgement, the Trial Chamber failed to consider PW168's lack of credibility. [Redacted].[87] [Redacted][88] [Redacted].[89] [Redacted].[90] In fact, the Trial Chamber found several instances where PW168's testimony was insufficient to make a factual finding.[91] [Redacted].[92] It is respectfully submitted that the Trial Chamber erred in giving any weight to the testimony of PW168.

50. Similarly, the Trial Chamber erred when it allowed and relied upon the testimony of Momir Nikolić. M. Nikolić acknowledged that he was willingly prepared to untruthfully admit that he ordered the executions in Sandici and in the warehouse in Kravica in order to secure a reduced sentence.[93] M. Nikolić indicated his willingness to lie in order to obtain a lighter sentence and explained that he did this because, at one point, the whole plea agreement came into question and he was "very keen to reach that agreement because [he] had no other way out".[94] The Trial Chamber erred while ignoring the foregoing testimony and should not have given any weight to the same.

51. It is respectfully submitted that the Trial Chamber's reliance on both PW168 and Momir Nikolić was an abuse of discretion that invalidates the Judgement.

*Vinko Pandurević*

[87] T.15939.
[88] T.15933.
[89] T.15938.
[90] T.15942-47.
[91] [Redacted]
[92] [Redacted]
[93] P4485; *see also* Testimony of Momir Nikolić T.33091.
[94] T.33091.

52. The Defence respectfully submits that the Trial Chamber erred when it permitted the evidence of Vinko Pandurević and ascribed it inordinate weight. This particular witness, as a co-accused, obviously had the motive to shift his responsibility to the security sector, similar to a strategy undertaken in the *Krstić*[95] and *Obrenović*[96] cases. The Trial Chamber recognized Pandurević's strategy of shifting the timing of certain events or denying particular facts.[97] When assessing Pandurević's criminal responsibility, the Trial Chamber correctly did not draw inferences from his questionable testimony.[98] Recognizing this, the Trial Chamber erred when it permitted Pandurević to testify as to the acts and conduct of the Appellant.

53. Further, it is respectfully submitted that Pandurević's testimony had one purpose, namely to shift responsibility to the security sector in order to avoid his own personal responsibility. Pandurević was allowed to hear all of the evidence in the case and testified at the end of the trial using the full record to transfer his responsibility to the Appellant and the security sector. It is respectfully submitted that Pandurević's testimony was unreliable and that the Trial Chamber erred when it gave such testimony any weight.[99]

*PW162, PW161, Ljubisav Simić, Božo Momčilović, Zlatan Čelanović, Momir Nikolić, Miroslav Deronjić, Miroslav Deronjić and Ljubomir Borovčanin*

54. It is respectfully submitted that the Trial Chamber failed to consider the bias and prejudice offered by witnesses PW162, PW161, Ljubisav Simić, Božo Momčilović, Zlatan Čelanović, Momir Nikolić, Miroslav Deronjić and Ljubomir Borovčanin and further erred in giving any weight to their testimony. The unreliability of their testimony is discussed in detail in Ground 6 of this Brief. By way of example, the testimony of M. Nikolić was inconsistent and contradictory to Miroslav Deronjić's statements, admitted pursuant to 92 *quater*, and, as such, should not have been relied upon by the Trial Chamber.

[95] *Supra*, n.55.
[96] *Prosecutor v. Obrenović*, IT-02-60/2 ("*Obrenović*").
[97] Judgement, para.23.
[98] *Id*.
[99] *Id.*

55. It is further respectfully submitted that the Trial Chamber ignored the close relationship between these witnesses and failed to give any weight or inference to meeting between them immediately following the Kravica executions. These meetings between the local officials clearly show that the forgoing witnesses were cooperating and working together. One such meeting that the Trial Chamber ignored or refused to consider was the meeting between PW161, PW162, Miroslav Deronjić and Ljubomir Borovčanin[100] which occurred before the alleged phone call to PW161 to meet with Ljubiša Beara and, respectfully, this should have been at least considered by the Trial Chamber as a proof of their knowledge about the crimes and motive to further manipulate the truth about the events in Srebrenica.

56. Likewise the trial record is replete with instances that Deronjić also had meetings with other important players during Srebrenica events namely Dragomir Vasić who, at the time, was the Chief of the CJB Zvornik.[101]

57. Further evidence that contradicts and fails to support the Trial Chamber's conclusion, and erroneous reliance on certain witnesses, is the testimony of Witness 2DPW19. [Redacted].[102]

58. It is respectfully submitted that the Trial Chamber erred and abused its discretion while it failed to address all the evidence and further abused its discretion when it gave any weight to the foregoing witnesses, thus necessitating a new trial.

## ERRORS OF LAW AND FACT BY THE TRIAL CHAMBER IN ITS JUDGEMENT LEADING TO A MISCARRIAGE OF JUSTICE

[100] PW 161, T9364; also T9459;
[101] P59; Zvornik CJB report no.277/95, 12 July 1995;
[102] 2D PW19, T.25630-31.

**GROUND 6**

THE TRIAL CHAMBER MADE ERRONEOUS, UNCORROBORATED AND UNSUPPORTED FACTUAL FINDINGS IN THE FOLLOWING PARAGRAPHS, *INTER ALIA*, AND THUS ERRED AS A MATTER OF LAW, ALL OF WHICH RESULTED IN A MISCARRIAGE OF JUSTICE WHICH DENIED THE APPELLANT, LJUBIŠA BEARA, THE FUNDAMENTAL RIGHT TO A FAIR TRIAL.

*A Widespread and Systematic Attack, paras.760-765*

59. The Trial Chamber erred when it found that the attack on the civilian population commenced with the issuance of Directive 7 and that Directive 7/1 was simply a further step in an attack against the civilian population of Srebrenica and Žepa.[103] The findings in relation to Directive 7/1 ignore a plain reading of the Directive. Directive 7/1 does not repeat the language of Directive 7 regarding the creation of an unbearable situation for the population of Srebrenica and Žepa.[104] Many witnesses with first-hand knowledge confirmed, with Directive 7/1, that the VRS Commander assigned a different task to the Drina Corps than that arising out of Directive 7.[105] The Trial Chamber acknowledged that witnesses, and even an expert report, stated that the tasks given to the Drina Corps in Directive 7 were made null and void.[106] It is respectfully submitted that, despite the foregoing, the Trial Chamber nevertheless erroneously reached a different conclusion and stated that Directive 7/1 did not expressly include any passage replacing Directive 7. It is further respectfully submitted that the Trial Chamber erred in its factual finding which resulted in miscarriage of justice.

*Formation and Initial Stages of the Plan to Murder, paras.1051-1054*

60. The findings of the Trial Chamber indicate that the separation process in Potočari marked the commencement of the implementation of the plan to murder the Bosnian males from Srebrenica.[107] It is respectfully submitted that the Trial Chamber was erroneous as the finding is unsupported by the evidence.

[103] Judgement, paras.760 & 765.
[104] 5D361.
[105] The Trial Chamber cited the testimonies of Manojlo Milovanović, T.12277, and Mirko Trivić, T.11929.
[106] Judgement, para.763, *citing*, among others, the testimony of Slobodan Kosovac, T.30473-30474 & T.30483.
[107] Judgement, paras.1052-1054.

61. The Trial Chamber failed to fully recognize and erred in its factual findings relating to the efforts that were made to check the identities of the detained men at Potočari.[108] Although the Trial Chamber found that efforts to check the identities of the detained men did occur, it nevertheless reached an erroneous finding of a plan to murder based solely on Nikolić's statement of facts and acceptance of responsibility. Furthermore, the testimony of Nikolić was contradicted by Kosorić about the purported 12 July meeting and whether the execution of men was discussed. Therefore, the Trial Chamber erred in failing to reconcile the testimony of DutchBat witnesses, failing to fully analyze the efforts to check the identity of the detained men and failing to give proper weight to the fact that the Kosorić testimony was in direct conflict with Momir Nikolić's self-serving testimony.

62. Furthermore, the Trial Chamber erred in determining that the conditions of detention support a conclusion that a plan to kill was in progress.[109] The Trial Chamber relied on circumstantial evidence and failed to appreciate the totality of the situation and, thus, erred in its factual finding. There is no evidence to show another manner of detaining prisoners or civilians under these conditions. The enormous number of civilians could not be placed in Potočari and, thus, it was unreasonable to invoke the conditions of detention as a proof of a plan to kill.

*Implementation of the Plan, paras.1055-1065*

63. The Trial Chamber's finding that all detained men were targeted for execution was erroneous based on the credible evidence presented during the trial.[110] The detention of Muslim men from the military column, who were trying to break from the encirclement, is supported by legitimate military reasons. The Trial Chamber completely disregarded evidence that the retreating column was a military threat to the town of Zvornik.[111] The Trial Chamber did not address the military effort to capture enemy prisoners. These matters require due attention considering there is

[108] *Id.*, n.3453.
[109] *Id.*, para.1053.
[110] *Id.,* paras.1055-1065.
[111] P1183; 5D303 & P1172; *see also* P200; P201 & P1173.

evidence before the Trial Chamber that Beara's intent was to transfer the prisoners to Batković camp.[112]

64. The conclusions in paragraph 1058 of the Judgement are not based on any evidence. The Trial Chamber erred when it found that that the reference to combat in the 13 July Order to the Drina Corps was simply an attempt to disguise the true nature of an imminent, killing operation.[113] The Trial Chamber's finding is erroneous and fails to be based on any credible evidence adduced at trial. It is simply an inference of fact erroneously made by the Trial Chamber.

65. It was respectfully an error for the Trial Chamber to go beyond the plain meaning of the words used in the Order issued to the Drina Corps on 13 July. It is respectfully submitted that the Trial Chamber further erred by failing to recognize other inferences such as legitimate military reasons and, thus, resulted in a miscarriage of justice which denied the Appellant his fundamental right to a fair trial.

66. Likewise, the Trial Chamber erred in its factual findings, in paragraph 1059 of the Judgement, when it utilized the massiveness of the killings of 13 July to support a premeditated nature of the events. As discussed within this Appellate Brief, the killings in Kravica, Cerska and Jadar river and the time of death do not support the Trial Chamber's conclusion about a premeditated organization of those killings.[114]

*Para.1068*

67. The Trial Chamber also erred in its finding, in paragraph 1068 of the Judgement, that heavy hand of the Security Branch was evident in the killing operation. Specifically, the Trial Chamber erred when it wrongfully inferred that Beara was familiar with the acts and intent of others simply by virtue of his position. The Trial Chamber, respectfully, did not cite to any direct evidence of conversations between Beara and other members of the security branch which may be deemed credible or reliable.

[112] *See, infra,* Grounds 15-16.
[113] *Id.*, paras.1057-1058.
[114] *See, infra,* Ground 17.

68. Similarly the Trial Chamber erred in its factual finding, in paragraph 1069 of the Judgement, that the Security Branch worked in a highly coordinated manner. The Trial Chamber reliance on three separate, independent instances fails to support a basis for its decision. In particular, with respect to the Appellant, there is no direct evidence before the Trial Chamber to provide such a conclusion and thus it was erroneous.

69. It is respectfully submitted that the Trial Chamber's findings, with respect to paragraph 1069, failed to reasonably infer a factual conclusion and were not corroborated by any independent and credible testimony.

70. Based upon the foregoing, the Trial Chamber's conclusion was premised on unsupported and uncorroborated inferences thereby constituting an error of fact and warranting a new trial.

*Paras.1122-1123*

71. It is respectfully submitted that the Trial Chamber erred in its finding, in paragraphs 1122-1123 of the Judgement, regarding the alleged meeting with Jokić. [Redacted][115] [Redacted].[116] Moreover, despite PW168's hearsay and disputed evidence, as well as the fact that Jokić did not and never confirmed such a meeting, the Trial Chamber erroneously and without explanation relied on the same. It is respectfully submitted that the Trial Chamber failed to reconcile the contradictory testimony and gave undue weight to hearsay evidence when erroneously reaching its finding.

72. Moreover, the Trial Chamber finding in paragraph 1123 of the Judgement is based on pure speculation and improper inferences. It is further submitted that PW165 did not confirm that he saw Beara at the Standard Barracks on 15 July and that such a finding of the Trial Chamber is a miscarriage of justice which warrants a new trial.

*Para.1210*

[115] Judgement, para.1122.
[116] PW168; T.15879; *see also* T.16539.

73. It is respectfully submitted that the Trial Chamber erred in its finding in paragraph 1210 of the Judgement when it sought to shift the burden of proof to the Appellant with respect to the issue of collusion between various witnesses.[117] A cursory, much less detailed review of the evidence related to Deronjić, Simić, PW161, PW162 and Čelanović, reveals that their testimony was coordinated and constructed in order to shift their responsibility and culpability to Beara. The Trial Chamber failed to recognize that the testimony of these witnesses was unreliable. Therefore the Trial Chamber erred as a matter of law and fact when it shifted the burden to Beara to concretely establish collusion on the part of these witnesses.

74. Moreover, the Defence outlined in its Final Brief several critical and important factors to the foregoing five witnesses which the Trial Chamber nonetheless ignored. Specifically, the Appellant established that Deronjić lied before other Trial Chambers about facts relevant to Beara and, not being cross-examined, is an unreliable witness in every respect. Furthermore, the Defence outlined in detail in its Final Brief that Deronjić admitted that he recounted the events with PW161 and PW162 and that all five witnesses had an opportunity to harmonize their stories before testifying.[118] Likewise, it has been established that the first time these witnesses mentioned Beara's involvement was immediately after Deronjić's plea agreement. Finally, it is respectfully submitted that, given each of the five witnesses' integral involvement in the events unfolding in Bratunac, they were clearly motivated to shift their responsibility to others.

75. It is respectfully submitted that the Trial Chamber's reliance in any respect to the testimony of these five individuals was an error of law and fact leading to a miscarriage of justice.

*Identification Evidence paras.1219-1229*

76. It is respectfully submitted that the Trial Chamber ignored the testimony and evidence of the only expert called on the issue of identification and recognition. The Trial Chamber erred as a matter of law and fact when it failed to properly and fully

[117] Judgement, para.1210.
[118] *See, infra,* Ground 5.

assess the identification evidence and erred in its findings in paragraphs 1219-1229 of the Judgement.

77. In relation to Birčaković, the Trial Chamber did not give any weight to the fact that Birčaković did not mentioned Beara in his previous statement[119] and that documentary evidence was at odds with his statement.[120] It should be noted, further, that Birčaković failed to recall that Beara wore glasses and the Trial Chamber nonetheless failed to discuss this inconsistency and Willem Wagenaar's testimony in this regard.[121]

78. The Trial Chamber further erred when it found that the contradictory versions of the chronology given by witness PW161 were simply his inability to clearly recollect the order of the events.[122]

*12–13 July 1995, paras.1255-1263*

79. It is respectfully submitted that the Trial Chamber erred in its finding, in paragraphs 1255-1263 of the Trial Judgement, regarding Beara's presence in Potočari on 12 July.

80. The Trial Chamber relied solely on the unsubstantiated and uncorroborated statement of Ljubomir Borovčanin.[123] Furthermore, the Trial Chamber failed to recognize that this witness statement was given without the opportunity of cross-examination and was not given under oath. Moreover, in reaching this conclusion, the Trial Chamber did not analyze or provide rationale regarding the *viva voce* testimony of Dragoslav Trisić, who testified that he cannot confirm that he saw Beara in Potočari on 12 July.[124] Furthermore, Borovčanin's testimony was not even corroborated by Miroslav Deronjić whose testimony was admitted pursuant to 92 *quater*.[125]

[119] Judgement, para.1221.
[120] *See, infra*, paras.83-85.
[121] T.25354; *see also* 2D574, p.11.
[122] Judgement, para.1223.
[123] *Id.*, para.1255.
[124] *Id.*, n.4065.
[125] P3139a.

81. In relation to the time period of 12-13 July, the Trial Chamber erroneously relied on an intercept conversation from 13 July, at 10:09am.[126] By admitting this conversation into evidence, the Trial Chamber completely disregarded the flaws of this intercept.[127] Further, Trial Chamber erroneously failed to accept the intercept of 13 July at 11:25am which plainly and unequivocally established and proved that Beara did not, at that time or any time, have the necessary *mens rea* and/or knowledge of any existence of a plan to kill Bosnian Muslims. It is respectfully submitted that the Trial Chamber erred in law and fact and further failed to reconcile these two intercepts in a fair and reasonable manner.

*Conversation on 13 July*

82. It is respectfully submitted that the Trial Chamber erred in its finding, in paragraphs 1060 and 1264-1271, that the Appellant had a series of heated exchanges with Miroslav Deronjić and that the Appellant purportedly told him that he had orders from the top to kill all the Bosnian Muslims who were being held in schools and buses in Bratunac. The Trial Chamber's findings are unreasonable insofar as they relied on testimony that is deemed not credible, was not subject to cross examination and was not corroborated by any other credible testimony.

83. The conclusion of the Trial Chamber regarding the contents of the purported conversations was based solely on the unreliable statement of Deronjić.

84. It is respectfully submitted that the Trial Chamber further erred when it sought to corroborate the purported conversation with further evidence that was not tested under cross-examination and was not given under oath, namely the statement of the co-accused, Borovčanin, as well as the unreliable and tainted testimony of Momir Nikolić.

85. The Trial Chamber further relied on evidence of Momir Nikolić to support Deronjić's allegations despite the fact that Deronjić acknowledged and confirmed that Nikolić was not present at the alleged meeting between Deronjić and Beara on 13

[126] Judgement, para.1257.
[127] *See*, *infra,* Grounds 4 & 19.

July.[128] The Trial Chamber simply stated, without any reasonable rationale, that it accepts Nikolić's uncorroborated version that he was present at the meeting. It is respectfully submitted that these findings by the Trial Chamber were erroneous and failed to fulfil its own cautionary guideline with respect to Momir Nikolić: that it will exercise caution in attributing weight to the testimony of Momir Nikolić given the number and variety of circumstances which affect the credibility of his evidence.[129]

86. Moreover, the Trial Chamber's reliance on a single document to support its foregoing conclusion, namely a transcript of the conversation between Karadžić and Deronjić[130], is erroneous. The document the Trial Chamber erroneously relies upon does not corroborate an alleged conversation between the Appellant and Deronjić. The contents of the conversation the Trial Chamber relies upon do not discuss killings and, more importantly do not support or corroborate the existence of a purported meeting between Deronjić and Beara on 13 July. It is respectfully submitted that no reasonable Trial Chamber would find that such evidence may be used as corroboration of a purported meeting between Deronjić and Beara.

*Standard Barracks Meeting at 8am, paras.1272-1280*

87. The Trial Chamber erred when it found that Beara, Popović and Nikolić meet at the Standard Barracks on 14 July at 8am, as reflected in the Judgement at paragraphs 1272-1280. The Trial Chamber finding was based solely on the uncorroborated testimony of Birčaković. Further, the Trial Chamber simply disregarded the documentary evidence contradicting Birčaković's testimony.[131] The documentary evidence, namely the vehicle logbook, does not support Birčaković's testimony that he went from the Standard to IKM and back, as he testified before the Trial Chamber.[132]

88. Furthermore, it is respectfully submitted, that the Trial Chamber acknowledged that there is no direct evidence of what was discussed at this purported

[128] Judgement, n.4166, citing P3139a; T .6139-6140.
[129] *Id.*, para.53.
[130] P1149a; Judgement, n.4112.
[131] T.11111; *see also* P296, p.4.
[132] T.11052-3; *see also* T.11112.

meeting on 14 July at 8:00am.[133] No reasonable Trial Chamber would make such a conclusion based on the lack of any evidence.

89. No reasonable Trial Chamber would completely disregard the documentary evidence that contradicts the testimony of witness Birčaković and, at the same time. The Trial Chamber erroneously inferred and concluded from no evidence the contents of this purported meeting and thus while reaching its findings failed to fairly asses the evidence before it, thereby constituted miscarriage of justice.

*Brick Factory Visit, para.1275*

90. It is respectfully submitted that the Trial Chamber erred in its finding, in paragraph 1275 of the Judgement, that the Appellant went to the Brick factory in Bratunac and that he was looking for the brick factory in order to place prisoners there with the intention of killing them, based solely on the Miroslav Deronjić 92 *quater* statement.[134] The Trial Chamber's reliance on uncorroborated testimony which was previously considered false and inconsistent, as well as unreliable, warrants a new trial.

*Orahovac Presence 14 July, para.1277*

91. It is respectfully submitted that the Trial Chamber erred in its finding, in paragraph 1277, when it gave weight to the unreliable and vague 92 *quater* testimony of Nada Stojanović. Nada Stojanović mentioned Beara only after his name was introduced by the Prosecution investigator which renders it not credible and unreliable. Furthermore, as noted by the Trial Chamber, the testimony of Nada Stojanović was untested[135] by Beara's Defence and further prevented Beara from conducting any cross-examination, or any manner of confrontation as guaranteed by this Tribunal. Likewise, the evidence given by Nada Stojanović was not supported by [Redacted] or the Zvornik Brigade Duty Officer Notebook.

92. Although the Trial Chamber relies on the Zvornik Brigade Duty Officer Notebook which reads "Colonel Beara is coming order to Orovoc, Petkovci, Ročević

[133] Judgement, para.472.
[134] *Id.*, n.4185.
[135] *Id.*, para.1277.

Pilica"[136] it erred by placing undue weight to such evidence. This heavily contested entry, on its face, does not support the conclusion that Beara ever actually was present in Orahovac.

93. Furthermore, [Redacted] also is not corroborative of all aspects of Nada Stojanović's testimony, including who was present in Orahovac.

94. The conclusion that Beara was at Orahovac on 14 July 1995 would not be reached by any reasonable Trial Chamber based on the untested, uncorroborated and questionable 92 *quater* testimony of Nada Stojanović. The Trial Chamber conclusion invalidates the Judgement because this finding supported the overall conclusion that Beara played a key role in overseeing the detention, transportation, execution and burial of Muslim males.[137]

*Standard Barracks Meeting at 3pm, para.1278*

95. It is respectfully submitted that the Trial Chamber erred in its finding in paragraph 1278 of the Judgement. The Trial Chamber relied on the testimony of PW104 relating to the meeting with Beara on 14 July at Standard Barracks, even though the witness could not remember the precise date or time of the meeting and, further, confirmed that the person sitting in the dock did not resemble the person who introduced himself as such and who held that briefing at the Zvornik Brigade barracks.[138]

96. Furthermore, the Trial Chamber failed to consider the foregoing facts and further erred and relied on PW104's interpretation of the purported meeting at the Standard Barracks on 14 July. Ultimately, PW104's testimony was speculative and unreliable.[139]

*Petkovci School, paras.1279-1280*

97. It is respectfully submitted that the Trial Chamber erred in its finding in paragraphs 1279 and 1280 of the Judgement. The Trial Chamber erroneously

[136] *Id.*, para.1276.
[137] *Id.*, para.1299.
[138] T.7941 & T8015.
[139] Judgement, para.1278.

concluded that Beara was present at Petkovci on 14 July overseeing and coordinating the detention, transport, execution and burial of the prisoners detained there.[140] The basis of the Trial Chamber's conclusion is the testimony of PW168. The evidence relied upon by the Chamber was not directly known to PW168 and was simply hearsay evidence which was purportedly relayed by Stanisić, Commander of the 6th Battalion. [Redacted].

98. It is respectfully submitted that the Trial Chamber conclusion was an error in fact that invalidates the Judgement considering that, among others, this meeting was used by the Trial Chamber to show Beara's omnipresence in the Zvornik area, the scene of mass killings.[141]

*15 July Conversation, paras.1281-1282*

99. It is respectfully submitted that the Trial Chamber erred in its finding in paragraphs 1281 and 1282 of the Judgement. At paragraph 1282 of the Judgement, the Trial Chamber made an unreasonable conclusion when it relied on intercept conversation P1179a to discuss the organisation of troops in relation to killing operations.[142] The Trial Chamber also erred in its finding relating to the intercept conversation P1177, dated 15 July at 9:52am.[143]

100. The Trial Chamber failed to reasonably infer facts from either intercept or other reliable documents and merely found an explanation to support its conclusion. It is respectfully submitted that the reasonable possibility exists that the men referred to in this intercept are the infantry company sent from 1st Krajina Corps.[144] The Trial Chamber simply ignored this evidence and erred while doing so. The Trial Chamber did not address that Prosecution Expert Richard Butler acknowledged that this report was not available to him when he was doing his analyses.[145] Butler's refusal to connect P2754 with the infantry company is that the 30 men referred to in conversation P1179 were requested for two or three days while there was no

[140] *Id.*, para.1279.
[141] *Id.*, para.1300.
[142] *Id.*, para.1282.
[143] *Id.*, para.1281; P1177a.
[144] P2754.
[145] T.20264.

information that reinforcements from Krajina were requested prior to 15 July 1995.[146] Such reasoning is flawed because on the face of the P2754 it can be seen that the document contains the words "based on an agreement" and while the document is dated 15 July it can be reasonably concluded and inferred that the agreement was reached in the preceding days.[147]

101. The Trial Chamber completely disregarded P2754 document and it is not clear whether in makings its finding they followed Butler's wrong reasoning or completely disregarded the report that provides an alternative explanation of the P1179 conversation. In any case, the Trial Chamber made an error that invalidated the Judgement because the conversation found at P1179 was used to support an erroneous conclusion of the Appellant's involvement in the killing, a driving force behind the murder enterprise and state of mind of a man bent on destroying a group by killing.[148]

*Standard Barracks Meetings After 6:30pm, para.1284*

102. It is respectfully submitted that the Trial Chamber erred in its finding, in paragraph 1284 of the Judgement, that sometime after 6:30pm Beara and Popović met at Standard Barracks.[149] The Trial Chamber's finding is based on unreliable and uncorroborated evidence.

103. Although the Trial Chamber relied on PW165, it was clear PW165 did not see Beara's face and only saw a person whom he speculated was Beara.[150] Further, he stated that he could not be sure of whom he saw because some unknown person told him Beara was going to be at that particular location.[151] The Trial Chamber has noted that PW165 was not sufficient to conclude that Beara was identified, but, nevertheless, found that he was present at the Standard Barracks. The Trial Chamber's reasoning and finding is plainly erroneous.

104. It is respectfully submitted that PW165's testimony cannot be considered as evidence of Beara's whereabouts because the PW165 was not sure who he saw, had

[146] *Id.*
[147] P2754.
[148] Judgement, paras.1313-1316.
[149] *Id.*, para.1284.
[150] Testimony of Wagenaar, T.25411.
[151] T.9962, T.9965 & T.9979.

no way of identifying this person since he had only seen him from the back and had never seen Beara before. Furthermore, given the lack of corroboration, the Trial Chamber's finding was erroneous and a miscarriage of justice.

*Conversation on 16 July, paras.1285*

105. It is respectfully submitted that the Trial Chamber erred in its finding in paragraph 1285 of the Judgement. The Trial Chamber's conclusion that the contents of the conversation depicted in exhibit P1187 were a coded and cryptic reference to the killing operation is erroneous and unsupported by any credible evidence.[152]

106. The Trial Chamber failed to adhere to the principle that any and all reasonable inferences should be made in favour of the Appellant. In addition, the Trial Chamber further erred when it failed to consider another document, namely P1200, which was recorded on the same date, 16 July 1995. Within document P1200, the allegedly coded and cryptic term 'triage' was used in order to determine who among the wounded would go to Belgrade and Tuzla.[153] It is undisputed that P1200 was using and referencing the term "triage" as a medical reference, yet the Trial Chamber refused to acknowledge any such inferences with respect to an identical term on the same date relating to exhibit P1187. The Trial Chamber erroneously concluded that two intercepts related to different matters and locations and thus cannot be interpreted in the same way.[154]

107. Such conclusion made by the Trial Chamber was not reasonable considering that two intercept conversations were made on the same day, that the same word was used and that they referred to Bosnian Muslims.[155] Moreover, the issue in question is not whether two intercept conversations relate to the same men or location but provide an alternative and reasonable interpretation than the interpretation made by the Trial Chamber. The Trial Chamber has not addressed whether the interpretation of the word 'triage' given in conversation P1200 is reasonable, but simply stated that

[152] Judgement, para.1285.
[153] P1200a.
[154] Judgement, para.1285, n.4242.
[155] P1187;P1200.

that conversation addresses a different matter, in their opinion, without giving further reasons.

*First Category Joint Criminal Enterprise, paras.1299-1302*

108. It is respectfully submitted that the Trial Chamber erred in its finding in paragraphs 1299-1302 of the Judgement. The Trial Chamber finding that Beara participated in and made a significant contribution to the JCE to murder is erroneous and uncorroborated on the evidence presented. The conclusion of the Trial Chamber that, by the morning of 12 July, Beara was aware of and implicated in the plan to murder[156] is not based on any evidence and is not a reasonable conclusion. It is respectfully submitted that the Trial Chamber's conclusion is based on pure speculation given Beara's rank and position.

109. Furthermore, the Trial Chamber's conclusion that, from the morning of 12 July, Beara played a key role in orchestrating the murder operation is similarly uncorroborated by evidence.[157]

110. The first two paragraphs refer to Beara's alleged presence on 11 July 1995 at IKM in Pribicevać and in front of the Bratunac Brigade Headquarters.[158] There is no evidence to prove that even if these two contested appearances of Beara happened, that they are in any way connected to any planning or coordinating either detention, transportation, execution or burial of Muslim men. Namely, even the Trial Chamber found that the JCE to murder started on 12 July.[159] It was a clear error on the part of the Trial Chamber to rely on evidence that was vague, uncorroborated and happened before a plan was found to have emerged, as proof of the Appellant's involvement in the plan to murder.

111. Further, the Trial Chamber reliance on the testimony of Čelanović and purported meeting with Beara in Bratunac on 13 July simply contradicts the conclusions reached by the Trial Chamber that Beara participated in planning

[156] Judgement, para.1299.
[157] *Id.*
[158] *Id.*, paras.1253-1254.
[159] *Id.*, para.1299.

coordinating and overseeing of the murders on 13 July.[160] A plain review of the conversation, as recounted by Čelanović, shows that Beara did not have the intent to murder and that he was not planning, coordinating and overseeing the plan to murder on 13 July.

112. It is respectfully submitted that the only reasonable conclusion from the testimony of Čelanović is that Beara was not participating in the murder operation in any way. In that conversation, Beara is clearly stating that prisoners should be transported to Kladanj the next morning and does not mention or imply to Čelanović, that the prisoners are to be killed.

113. It is respectfully submitted that the Trial Chamber erred in its conclusion in paragraph 1299 of the Judgement and unreasonably relied on the uncorroborated, unsworn and suspect testimonies of Deronjić, Nikolić and Borovčanin, as reflected in paragraphs 1263 – 1266.

114. Furthermore, the Trial Chamber conclusions in paragraph 1299 cannot be supported by the evidence discussed in paragraph 1267 of the Trial Judgement. The Trial Chamber completely disregarded the testimony of PW161. Witness PW161 actually testified that the employees of the public utilities company did gather bodies from the woods[161] and confirmed that, in the Glogova grave, bodies were also buried from in Ravni Buljim, Kamenica and Pobudje.[162] Considering the vast evidence of the fact that Muslims from the column were killed during legitimate combat engagements during the breakthrough of the column and the reference to burials from the woods it is also reasonable to conclude that machinery was needed for burials that resulted from legitimate military actions and were not connected to planning or killings as erroneously concluded by the Trial Chamber.

*Para.1404*

115. It is respectfully submitted that the Trial Chamber erred in its conclusion, in paragraph 1404 of the Judgement, that Nikolić was meeting with Beara and Popović

[160] *Id*., para.1262.
[161] T.9556.
[162] T.9538.

to discuss the details of a killing operation. As previously submitted the Trial Chamber's reliance on uncorroborated and untrustworthy evidence was erroneous and necessitates a new trial.

GROUND 7

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN APPLYING DIFFERENT STANDARDS TO ASSESS THE CREDIBILITY OF VARIOUS WITNESSES AND WAS GROSSLY INCONSISTENT WHILE WEIGHING THE EVIDENCE AND TESTIMONY PRESENTED BY THE APPELLANT, LJUBIŠA BEARA, THEREBY VIOLATING THE APPLICABLE RULES OF EVIDENCE AND PROCEDURE IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, WHICH CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT LJUBIŠA BEARA'S RIGHT TO A FAIR TRIAL.

116. It is respectfully submitted that the Trial Chamber applied different standards when weighing the testimonies of the Defence and Prosecution witnesses. In paragraph 1246 of the Judgement, the Trial Chamber found that the Defence witnesses Gavrilović and Cekić's detailed, identical accounts of the 14 July 1995 events was unusual - particularly in comparison to their memories on other events – thus they lacked credibility individually and cumulatively. The Trial Chamber further found that their frequent discussions and the way in which they developed their memories of the events further destroyed the veracity of their evidence.

117. While it is respectfully submitted that such a conclusion was unreasonable, it is furthermore an example of how the Trial Chamber used different evidentiary standards when giving weight to Defence and Prosecution witnesses.

118. Namely, when assessing the testimony of the Prosecution witnesses PW161 and PW162, the Trial Chamber applied a different standard than one used to assess Defence witnesses. In the case of these Prosecution witnesses, the Trial Chamber dismissed the Defence argument that PW161 and PW162 had harmonised their stories, despite their own finding that the two witnesses were friends and had contact

prior to their testimony.[163] In fact, the Trial Chamber completely disregarded PW162's outright admission that he had actually discussed his testimony with PW161.[164]

119. The testimony of PW162 is further called into question by the fact that he only implicated Beara after he had spoken to the attorney of Momir Nikolić and the Defence of Vidoje Blagojević;[165] further, like other Prosecution witnesses, he too had spoken with Miroslav Deronjić before mentioning Beara.[166] The assertion of the Trial Chamber that there is little intersection in their evidence, again, disregards that they do intersect on important findings regarding Beara.

120. Likewise, the Trial Chamber did not address the same concerns with Prosecution witnesses as it did with Defence witnesses, namely, it did not question how and when Prosecution witnesses developed their memories of the event.[167] Specifically, PW161 and PW162 failed to mention Beara when giving their initial statements to the Prosecution. In fact, PW162 did not mention the purported meeting with Beara on 14 July 1995 when he gave his statement in 1998 to the Prosecution's investigator.

121. It was unreasonable for the Trial Chamber to refuse to give any weight to the testimony of Defence witnesses because of their interactions, while simultaneously accepting and giving weight to the testimonies of PW161 and PW162, even though they had the same type of interaction.

*Paragraph 1258, Conversation 7D2D642*

122. The Trial Chamber erred in its finding that Beara purposely tried to mislead the listener when his conversation was captured on an intercept on 13 July.[168] This is an erroneous conclusion as is not based on a reasonable inference.

[163] Judgement, para.1211.
[164] T.9268-9.
[165] T.9292.
[166] P3139, p.121.
[167] Judgement, para.1246.
[168] Judgement, para.1259; *see also*, *infra*, Grounds 7 & 19.

123. The Judgement lacks any reasoned opinion as to how they differentiated intercept conversation 7D2D642 from other intercept conversations. The Trial Chamber states only that that the other participant in the conversation is not identified and that the context of the conversation is unclear.[169] These findings cannot support an inference of Beara's intent that is contrary to anything indicated in the plain exculpatory language reflected in 7D2D642. The Trial Chamber's conclusion of deliberate lies regarding the Mladić speech and the references to the transfers are based purely on speculation and without basis. No reasonable Trial Chamber could make such an inference without first establishing Mladić's intent, that Beara even saw Mladić during the events at issue, that Beara was aware of a plan to murder on 13 July or that Beara was aware of the prisoners in Sandici.

124. The most reasonable conclusion is to accept the plain words used by Beara in undisputed document produced by the Prosecution, namely 7D2D642. At the very least, the plain words should provide significant reasonable doubt as to the speculative findings of Beara's intent reached by the Trial Chamber.

*Content of Other Intercept Conversations*

125. The Trial Chamber likewise was grossly inconsistent in giving weight to documentary evidence that goes in favour of the Prosecution while discounting evidence that favours the Appellant.

126. For example, the Trial Chamber did not give a reasoned opinion as to why P1179 does not refer to men from the 1st Krajina Corps.[170] The same is true for the meaning given by the Trial Chamber to the word "parcels" and why the reasonable meaning as supported by other witnesses offered by the Defence was not accepted.[171]

127. Finally, the Trial Chamber was further inconsistent in its analysis of information contained in intercept conversations P1187 and P1200.[172] The Trial Chamber used the contents of conversation P1187 to conclude that it cryptically refers

[169] *Id.*, para.1259.
[170] P2754.
[171] *See* explanations given by [Redacted]; *see also* Testimony of Ljubo Rakić, T.22198-9;P377 ( 0293-5767 to 0293-5768); Beara Final Brief, paras.334-335.
[172] Judgement, para.1286.

to killing operations and prisoners in Pilica, basing this on only the identities of the participants and the word "triage".[173] However, P1200 also contains the word "triage", but the Trial Chamber determined it should not be interpreted in the same way as in P1187. The Trial Chamber did not provide any reasoning to support these diametric conclusions. The gravity of the Trial Chamber's unsupported inferences resulted in a finding of guilt, despite all ordinary meanings that could be reasonably inferred and found in these words, given their context.

GROUND 8

THE TRIAL CHAMBER DREW INFERENCES FROM THE CIRCUMSTANTIAL EVIDENCE THAT ARE IMPERMISSIBLE AS A MATTER OF LAW UNDER THE ICTY STATUTE, ARTICLE 21(3), WHICH INVALIDATED THE TRIAL CHAMBER'S DECISION RELATING TO COUNTS 1, 3, 5 AND 6 AND DENIED APPELLANT, LJUBIŠA BEARA, A FAIR TRIAL.

128. It is respectfully submitted that the *Čelebici* Appeal Judgement set forth that a conclusion of guilt can be inferred from circumstantial evidence only if it is established beyond any reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence, but it must be the only reasonable conclusion available. The *Čelebici* Appeal Chamber stated that if there is another conclusion which is also reasonably taken from the evidence, and which is consistent with the innocence of the Appellant, he must be acquitted.[174] It is respectfully submitted that, in the present case, the Trial Chamber drew impermissible inferences from circumstantial evidence when reaching its conclusions of guilt of the Appellant.

129. The Trial Chamber erred in making a conclusion that the separation process marked the commencement of the implementation of the plan to murder the Bosnian Muslim males, despite the other reasonable conclusions that could be made.[175]

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[173] *Id.*

[174] *Prosecutor v. Mucić et al.*, IT-96-21 ("*Čelebići*"), Appeals Judgement, 8 April 2003, para. 458; *Prosecutor v. Vasiljević*, IT-98-32 ("*Vasiljević*"), Appeal Judgement, 25 February 2004, para. 120; *Krstić*, Appeal Judgement, 19 April 2004, para. 41; *Prosecutor v. Kvočka et al.*, IT-98-30/1 ("*Kvočka et al.*"), Appeal Judgement, para. 237; *Prosecutor v. Stakić*, IT-97-24 ("*Stakić*"), Appeal Judgement, 22 March 2006, para. 219; *see also Prosecutor v. Ntagerura et al.*, ICTR-99-46-A ("*Ntagerura et al.*"), Appeal Judgement, 7 July 2006, para. 306.

[175] Judgement, para.1052.

130. The Trial Chamber additionally erred when finding that the Appellant had a role in the killing operation at Orahovac, Grbavci School, on 14 July.[176] There is no concrete evidence that Beara was in cooperation with M. Nikolić, among others, or that he played a coordinating role in the operation at Orahovac.[177]

131. Further, the Trial Chamber made erroneous findings based on circumstantial evidence regarding the purported Beara/Popović meeting at Standard Barracks on 15 July after 6:30pm.[178] The Trial Chamber subsequently used this erroneous finding and purported meeting as crucial proof of Beara's contribution to a JCE to murder.

132. Moreover, the Trial Chamber further erred when it reached a finding and a similar unsupported inference that Beara attended daily morning briefings of the Main Staff with Mladić, based solely on the evidence of Manojlo Milovanović.[179] However, the testimony of Milovanović, at least in this respect, was not at all clear regarding the participants at morning briefings or what was discussed at those meetings. The Trial Chamber subsequently used this erroneous finding and purported meeting as a proof of Beara's knowledge.

133. The Trial Chamber also used general provisions on the work of the security organs to erroneously infer Beara's knowledge of a plan to murder[180] and his purported knowledge of the illegal purpose of Directive 7.[181] This conclusion, found at paragraph 1206, is based solely on circumstantial evidence as the Instruction[182] does not support that killings were envisaged by a JCE as argued by the Prosecution.

134. Furthermore, it is respectfully submitted that no reasonable Trial Chamber could reach the findings of paragraphs 1258 and 1259 of the Judgement from the evidence available to the Trial Chamber. Rather than accepting the plain contents of the conversation reflected in 7D2D642, the Trial Chamber instead erred when it relied upon and used circumstantial evidence to construct a purpose totally unrelated to the

[176] *Id.*, para.1112.
[177] *Id.*
[178] *Id.*, para.1123.
[179] *Id.*, para.1203.
[180] *Id.*, para.1206.
[181] *Id.*, paras.1299 & 1324.
[182] P2741.

plain meaning of the words used by Beara in this intercept conversation from 13 July 1995.[183] The Trial Chamber's finding that Beara was deliberately misleading is at odds with their findings of other intercepts that Beara was openly speaking despite his purported knowledge of the vulnerability of phone conversations to interception. This is simply an unreasonable conclusion that could not be reached by any Trial Chamber.

135. The reference made to Mladić's speech at Sandici Meadow and his reference to the detention facilities and its alleged relation to Beara's intent and knowledge is premised on circumstantial evidence[184] and is speculative at best. There is no evidence to support the conclusion that Beara's intercepted conversation was in any way connected to the Mladić speech at Sandici, or that Beara was even aware of Mladić's intent or the speech at Sandici. The Trial Chamber subsequently used this erroneous finding as proof of Beara's awareness of the murder plan and his contribution to it.

136. Similarly, an entry from the Zvornik Duty Officer Notebook stating that Beara requested that a flat-bed trailer be sent to Bratunac[185] was again used by the Trial Chamber to support its conclusion regarding Beara's purported involvement in securing equipment for murders. Such an inference is unsupported because it is based solely upon the acceptance of Deronjić's un-tested, untruthful and uncorroborated Rule 92 *quater* statement. However, again, the Trial Chamber ignores all other reasonable inferences that could attribute a legitimate and legal reason to Beara's request, especially that PW162's testimony provided that machinery was used at times for burying combat casualties.

137. Similarly, the Trial Chamber's conclusion that "triage" should be interpreted as a cryptic reference to executions because there was no evidence of a legitimate medical triage is simply incorrect.[186] An intercept from the very same day confronts this finding.[187] In fact, it is respectfully submitted that quite the opposite is true, that there is no direct evidence to support the purported conversation between Trbić, Beara

[183] 7D2D642.
[184] Judgement, para.1259.
[185] *Id.*, para.1261.
[186] *Id.*, para.1285.
[187] P1200.

and Cerović that inspired this alternate meaning of the word as concluded by the Trial Chamber. The definition by the Trial Chamber is thus, baseless, unfounded, unreasonable and speculative at best.

138. Likewise, the conclusion that Beara is implicated in a plan to murder by the morning of 12 July is not supported by any evidence and is pure speculation on part of the Trial Chamber and supported only by Beara's military position.[188]

139. Finally, the Trial Chamber's finding as reflected in paragraphs 1299–1302, 1304, 1307, 1312–1318, 1322, 1324-1333, 1402, 1404, 1406, 1421, 1861, 1883, 1960 and 2037, as highlighted in the Appellant's Notice of Appeal and discussed within other sections of this Brief, are not substantiated by any credible evidence and are premised on pure surmise and conjecture without applying the legal guarantees afforded to the Appellant and thus a new trial is warranted rejecting these findings.

**GROUND 9**

THE TRIAL CHAMBER ERRED WHEN IT REFUSED TO PROPERLY CONSIDER THE TESTIMONY OF DEFENCE WITNESSES WHICH CONTRADICTED THE OTP'S EVIDENCE IN RELATION TO THE WHEREABOUTS OF THE APPELLANT LJUBIŠA BEARA AND IGNORED ALL REASONABLE INFERENCES WHICH CONFLICTED WITH SUCH A FINDING, IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, WHICH CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT LJUBIŠA BEARA'S RIGHT TO A FAIR TRIAL.

140. The Trial Chamber erred when it completely disregarded relevant parts of Defence witness testimony. This is shown where the Trial Chamber failed to analyze evidence clearly relevant to their findings.[189] Specifically, the Trial Chamber disregarded parts of Defence testimony on the issue of the Appellant's whereabouts on 13 and 14 July 1995 and further erred by making unreasonable conclusions in regard to this issue.

[188] Judgement, para.1299.
[189] *See Limaj* Appeal Judgment, para.86; *see also Kvočka et al.* Appeal Judgement, para.25.

141. The Defence submits that when comparing Prosecution and Defence witness' testimony on Beara's whereabouts on 13 and 14 July, the Trial Chamber chose to rely only on Prosecution witnesses. It should be restated that the testimony of Cekić, Gavrilović and Kerkez, who testified under oath in these proceedings, cannot be of less evidential value in comparison to the un-tested, uncorroborated and/or unreliable statements and testimony of Deronjić, Nikolić and Borovčanin, among others. Hence, the conclusion and findings by the Trial Chamber that none of the evidence or testimony proffered by the defense raised reasonable doubt is not the conclusion that would be reached by a reasonable Trial Chamber.

**GROUND 10**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FINDING THAT LACK OF A PHOTO LINE-UP DID NOT REDUCE THE PROBATIVE VALUE OF APPELLANT, LJUBIŠA BEARA'S IDENTIFICATION BY WITNESSES AND IGNORED ALL INFERENCES WHICH CONFLICTED WITH SUCH A FINDING, IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, WHICH CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT LJUBIŠA BEARA'S RIGHT TO A FAIR TRIAL.

142. When assessing the identification evidence, the Trial Chamber did not apply the factors as set forth by the *Kupreskić* Appeals Chamber.[190] The Trial Chamber further failed to recognize a distinction between identification and recognition witnesses.[191] The Trial Chamber in *Haradinaj* considered that additional factors must be considered in relation to recognition witnesses, such as the possibility of bias and the interval between the time the witness recognized the person and the time he had last seen him.[192]

[190] *Prosecutor v. Kupreškić et al.*, IT-95-16 ("*Kupreškić et al.*"), Appeals Judgment, 23 October 2001, para.40.
[191] *Prosecutor v. Haradinaj et al.*, IT-04-84 ("*Haradinaj et al.*"), Trial Chamber Judgment, 3 April 2008, para.29.
[192] *Id.*

143. It is submitted that in the particular circumstances, a photo line up was the only way to independently confirm the identification and recognition of Beara. Lack of such a line-up should have been remedied by the Trial Chamber by barring the alleged identifications of the Appellant by prosecution witnesses PW162,[193] PW104,[194] Peric,[195] PW165[196] and Egbers[197].

144. The Chamber erred when it relied on evidence that two witnesses (PW162 and PW104) saw Beara because the man they saw introduced himself as Beara.[198] This seemed to be the main argument by the Chamber despite the fact that PW104 clearly stated that Beara did not and does not resemble the person he purportedly met in July 1995. Likewise, PW162 stated that he would not know Beara today if he saw him on the street. The Trial Chamber simply glosses over these statements and does not accept the other, more reasonable inference of mistaken identification, erroneous identification or simply non-identification.

145. The third identification witness, PW165, the Trial Chamber relies upon actually did not identify Beara at all, but the Chamber inferred that the person PW165 saw from the back was Beara.[199] Such a conclusion defies any reasonableness.

146. Similarly, the Trial Chamber erred when it found that Vincent Egbers identified Beara. The report written by Egbers was cited as corroborative evidence, but the report does not add anything to independently support Egbers' identification because he was already mistaken in the first instance as to who he met when he wrote that same erroneous name in the report. The identification conducted from the video of an inspection of troops should have been dismissed by the Trial Chamber because it was highly prejudicial in the manner conducted as well as the number of times it took to ultimately allegedly identify him and the only person who remotely resembled Beara was Beara himself was on that video and no other possibilities were given to Egbers to test whether he truly knew who he talked to in 1995.

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[193] Judgement, para.1224.
[194] *Id.*, para.1225.
[195] *Id.*, para.1125.
[196] *Id.*, para.1227.
[197] *Id.*, para.12.
[198] *Id.,* paras.1224 & 1225.
[199] *Id.*, para.1228.

147. The Chamber never reconciled the fact that three of those five identification witnesses did not identifying the person they me as having glasses when they saw him.[200] Considering that evidence was presented that Beara always wore and always had to wear his glasses, these identifications should have been dismissed.

148. Thus, the Chamber erred when it did not apply the proper legal standards and due care in assessing the identification evidence when it accepted those identifications without a proper photo line up and when it found that lack of such a line up did not reduce the probative value of the identification.

**GROUND 11**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FINDING THAT INTERCEPT EVIDENCE IS RELIABLE AND ABUSE ITS DISCRETION WHEN NOT RELYING ON THE ONLY LINGUISTIC EXPERT'S, SLOBODAN REMETIC, TESTIMONY AND IGNORED CREDIBLE TESTIMONY AND INFERENCES WHICH CONFLICTED WITH SUCH A FINDING, IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, WHICH CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT LJUBIŠA BEARA'S RIGHT TO A FAIR TRIAL.

149. The Chamber erred when it did not rely on the expert report and testimony of Slobodan Remetić, the only linguistic expert who appeared before the Trial Chamber. The Trial Chamber erred in its reasoning that Remetić's analysis was carried out "without the benefit of hearing audio recordings of the relevant intercepts" and that his opinions were formed based on limited contact with Appellant which made his testimony incapable of raising doubt as to the reliability of the intercept evidence.[201] Remetić did, in fact, base his analysis on all available evidence, and personal

[200] Wagenaar, T.25354.
[201] Judgment, para.1231.

meetings with Beara and employed proper care when assessing Beara's speech patterns before providing his expert conclusion.[202]

150. The Chamber completely disregarded evidence that Beara's linguistic patterns of speech were also proven through the testimony of various witnesses. Numerous witnesses testified that Beara spoke with a distinct Croatian or more specifically with a Dalmatian accent.[203] Remetić further confirmed such testimony by speaking directly with Beara at the UNDU several times and supported what the witnesses had confirmed to the Trial Chamber. Hence, Remetic had more than sufficient basis to render his conclusion after he conducted several conversations with Beara in the detention unit and listening to audio recordings of Beara's interview in the detention unit.

151. The Trial Chamber's rational to reject Remetić's findings because of a lack of audio recordings is misplaced. The Trial Chamber rejected this argument regarding lack of audio recordings when it was made by the defense relating to the admissibility of the intercepts in general. Thus, the Trial Chamber failed to adequately and fairly consider independent and uncontroverted testimony.

152. Furthermore, the Trial Chamber erred in not relying on Remetić's analysis despite having access to transcripts which allowed him to see the repeated use of particular language techniques that Remetić would ascribe to Beara.

153. The Trial Chamber discussed several intercepts that Remetić found not containing sufficient linguistic indicators to be able to attribute those conversations to Beara.[204] However, it can be seen that the intercepts were nevertheless generally accepted regardless of the number of inconsistencies, even alterations, and Remetić's opinion. In those circumstances the Trial Chamber did not properly evaluate if Remetić's testimony put into doubt the intercepts that were alleged to include Beara.

[202] Remetić did listen audio transcripts of Beara's interview with the OTP and himself interviewed Beara at the U.N.D.U.
[203] Milan Kerkez, T24944; 2D PW19, T.25625-8 & T25633; Sredoje Simić, T.12427; Ljuban Mrković, T.24309; Branimir Grulović, T.23780 & T.23783; Mikajlo Mitrović, T.25047.
[204] Judgment, paras.1233-1237;P1130; P1164; P1178; P1179; P1380.

154. The Trial Chamber completely disregarded Remetić as the only linguistic expert, and his conclusions were not discussed in the Judgement. Remetić explicitly stated that a person's dialect cannot be hidden and that it is very difficult, almost impossible, to hide one's dialectological origin.[205] More specifically, in relation to the 18 intercepts Remetić analyzed, he 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".[206] Therefore, the alleged identity of Beara as a speaker on these intercepts was not established beyond a reasonable doubt.

155. In conclusion the Trial Chamber erred when it did not give any weight to Remetić's opinions and conclusions, especially given as the only linguistic analysis in the case.

**GROUND 12**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FINDING THAT THE APPELLANT LJUBIŠA BEARA'S EVIDENCE AS TO HIS WHEREABOUTS IS NOT REASONABLY TRUE AND IGNORED ALL CREDIBLE TESTIMONY AND INFERENCES WHICH CONFLICTED WITH SUCH A FINDING, IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, WHICH CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT LJUBIŠA BEARA'S RIGHT TO A FAIR TRIAL.

156. The Trial Chamber erred in applying an incorrect legal standard to the Appellant's alibi and further erred in finding that the Appellant did not raise a reasonable doubt as to his presence in Bratunac and Zvornik on 13 and 14 July 1995. With respect to this finding, the Trial Chamber inappropriately shifted the burden to the Defence in making it an obligation to raise reasonable doubt as to Beara's presence in Bratunac and Zvornik.

157. With respect to the wording "reasonably possibly true" as it relates to alibi the Appeal Chamber in *Musema* found that:

[205] T.24550.
[206] T.24556; T.24571-2; T.24595.

> In establishing its case, when an alibi defence is introduced, the Prosecution must prove, beyond any reasonable doubt, that the Appellant was present and committed the crimes for which he is charged and thereby discredit the alibi defence. The alibi defence does not carry a separate burden of proof. If the defence is reasonably possibly true, it must be successful.[207]

158. It is respectfully submitted that the Trial Chamber in the present case failed to apply the proper legal standard in determining the whereabouts or alibi of Beara. A reasonable Trial Chamber could not make such a similar finding because the analysis of the Trial Chamber actually deals with whether defence proved its case beyond reasonable doubt.

159. The Trial Chamber found that the alibi offered was not reasonably possibly true.[208] In doing so, the Trial Chamber applied a standard of 'beyond reasonable doubt' to the testimony of Defence witnesses and compared the evidence to the Prosecution witnesses in order to conclude that the Appellant's alibi is not reasonably possibly true. However, the Trial Chamber should have found that the testimony of Defence witnesses was reasonably possibly true because, as explained previously.

**GROUND 13**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FINDING THAT AT LEAST 5.336 INDIVIDUALS WERE KILLED IN THE EXECUTIONS FOLLOWING THE FALL OF SREBRENICA AND IGNORED ALL CREDIBLE TESTIMONY AND INFERENCES WHICH CONFLICTED WITH SUCH A FINDING, IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, WHICH CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT, LJUBIŠA BEARA'S RIGHT TO A FAIR TRIAL.

160. The Trial Chamber's finding that 5.336 individuals were killed in executions following the fall of Srebrenica is a finding that no reasonable tribunal could have reached and such error occasioned a miscarriage of justice. Trial Chamber made this

[207] *Musema v. Prosecutor,* ICTR-96-13 ("*Musema*"), Appeals Judgment,16 November 2001, para.205.
[208] Judgment, para.1246.

finding giving undue weight to Prosecution expert witnesses despite their flawed methodology and erroneous conclusions. Further discussion regarding expert testimony is found in Ground 5 of this Brief.

161. In addition, the Trial Chamber in reaching its conclusion regarding the number of individuals killed in executions, the Trial Chamber violated the best evidence rule and relied on unreliable and circumstantial evidence offered by Prosecution expert witnesses while disregarding clear and undisputed testimony of survivors which conflicted with the number killed and executed. Those survivor witnesses that testified before the Trial Chamber include, *inter alia*: Mevludin Oric, PW139, PW113, PW106, PW112, PW111 and PW110. Evidence regarding the large number of killed during legitimate combat engagement was provided by these witnesses and confirmed by independent documentary evidence.[209] The Defence cited to these exhibits, yet they were completely disregarded by the Trial Chamber.

162. The Trial Chamber did not discuss the number of killed in legitimate combat engagements as testified to by survivors. The Trial Chamber solely relies on Prosecution investigator Dusan Janc who gave his limited opinion that surface remains of 648 people that were the result of legitimate combat operations.[210]

163. The Trial Chamber further ignored the examination of the proximity of the legitimate combat engagements and the overlap with the locations of the mass graves; which was depicted by Janc on a map.[211] Even Janc conceded that it is possible that the numbers he identified in his report as to the number executed 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.[212]

164. Considering that the Chamber disregarded relevant testimony of survivors it further erred when it failed to assess Defence arguments that Prosecution experts' reports do not exclude the possibility that a substantial number of identified Muslim

[209] 1D374, p.2.
[210] Judgment, para.660.
[211] T.33611-5; 2DIC252.
[212] T.33626.

men were killed in combat.[213] In fact, the Trial Chamber did not address arguments regarding: John Clark's opinion that bodies in graves did not belong to the people killed in combat because lack of military clothing;[214] Clark's opinion on the same issue based on number of young, elderly and wounded men among casualties;[215] other experts conclusion in relation to cause and manner of death;[216] and the experts conclusion on dating of graves and decedents;[217]

165. The Trial Chamber erred in failing to analyze the report and conclusions of Svetlana Radovanović, in part, when she established 3277 overlaps of the database of the BiH army with the Brunborg's list; if Brunborg's broad key methodology were applied, the result would be around 5000 persons.[218] This information further supports the Defence argument that many of these soldiers actually died as a result of their engagement with VRS forces.

166. Although the Prosecution's chief military expert Butler confirmed that it was never a task of the prosecution to establish the number of killed in the column during combat activities,[219] it is submitted that the Chamber made an error when it did not discuss all the available evidence showing that a large number of legitimate casualties in the Muslim column should be included in the assessment of determining the number of killed and or executed.

167. It is respectfully submitted that the Trial Chamber completely disregarded the evidence presented by the defense and erred in its finding as to the number of killed in executions.

**GROUND 14**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT DID NOT PROPERLY CONSIDER AND FAILED TO GIVE ADEQUATE WEIGHT TO THE TESTIMONY OF EXPERTS DUŠAN DUNJIĆ, DEBRA KOMAR, MILADIN KOVACEVIĆ,

[213] Beara Final Brief, para.178-191.
[214] *Id.*, para.178-179.
[215] *Id.*, para.180-181.
[216] *Id.*, para.182-186.
[217] *Id.*, para.187-188.
[218] T.24348; 3D398, p.22; 3D398a.
[219] T.20248.

SVETLANA RADOVANOVIĆ AND OLIVER STOJKOVIC AND INSTEAD FOUND PROSECUTION'S EXPERTS CONCLUSIONS RELIABLE IN RELATION TO THE TIMEFRAME, MANNER AND CAUSE OF DEATH, MINIMUM NUMBER OF INDIVIDUALS IN EACH GRAVE, DEMOGRAPHIC FACTS AND DNA RESULTS AND IGNORED ALL CREDIBLE TESTIMONY AND INFERENCES WHICH CONFLICTED WITH SUCH A FINDING, IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, WHICH CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT, LJUBIŠA BEARA'S RIGHT TO A FAIR TRIAL.

168. The Trial Chamber erred in its assessment of the Defence experts and in its conclusion that evidence given by those experts is unreasonable and not supported by evidence. The Trial Chamber erred because it completely disregarded arguments and testimony of defence experts when reaching its conclusions. As argued previously the Chamber disregarded serious critiques of the methodology of prosecutor's experts: that large number of keys (71) was used to match persons between 1991 census and voters list made after 1995,[220] that prosecutor's experts disregarded available sources that would produce more reliable list of missing persons,[221] that prosecutor's experts did not define the actual territory of Srebrenica,[222] that the concrete numbers of missing reached by prosecutor's experts were inaccurate when a process of matching was redone by Defence experts.[223]

169. Further, the Trial Chamber shifted the burden of proof to the defence because it asked for defence experts to prove beyond reasonable doubts that the results of Prosecution experts are wrong. The Trial Chamber erred when found that Kovacević's analysis is fundamentally flawed because he did not used data from the ICRC and PHR on persons who were reported missing.[224] The separate opinion of the Honorable Judge Kwon is sound on this point. Judge Kwon found that Kovacević could have conducted his own analysis without relying on any of Brunborg's sources and then

[220] Radovanović, T.24339.
[221] Judgement, para.634; Radovanović, T.24326.
[222] Radovanović, T.24366.
[223] Kovačević, T.22665 & T.22685; 1D1129, paras.14 & 27.
[224] Judgement, para.633.

compared his results with those of Brunborg.[225] However, it should be noted that while the Prosecution and its experts are compelled to prove their case, namely, the number of missing persons beyond reasonable doubt, this is not the case with defence experts. The Trial Chamber applied wrong legal standard which constitutes an error that invalidates the Judgement.

170. In relation to the evidence given by the expert Radovanović, the Trial Chamber made illogical conclusions when assessing her results on the demographic evidence. The Trial Chamber actually shifted the burden of proof to the Defence when comparing the results of Brunborg and Radovanović on the total number of missing. The Trial Chamber did not accept Radovanović conclusion that 1.002 individuals who did not match with the census records should have been removed from overall number even while using Brunborg's methodology.[226] However, Brunborg's conclusion was nevertheless accepted because, in the words of Trial Chamber, Brunborg tried to fill gaps in his work.[227]

171. Similarly, the Trial Chamber concluded that people who may have died prior to 10 July are not wrongly included on the 2005 list of missing because they were identified in 'Srebrenica-Related Graves'.[228] It is submitted that without giving reasons for such a conclusion, and in light of Defence arguments that bodies not related to a JCE to murder were buried in mass graves, this shows that burden of proof was shifted from the Prosecution to Defence.

172. Finally, in relation to experts Kovacević and Radovanović, the Trial Chamber erred when it found that their evidence should be considered as pure speculation because their reports do not explain the sources of the documents used.[229] Such finding of the Trial Chamber is completely unsound. As found in a footnote of the Trial Chamber, Radovanović was asked where the documents came from and she

[225] *Id.*, n.2303.
[226] Judgement, para.635; Radovanović, T.24497-24499.
[227] Judgement, para.635.
[228] *Id.*, para.636.
[229] *Id.*, para.637.

responded that she received them from the Defence as materials disclosed by the OTP.[230]

173. The Trial Chamber further erred when it did not accepted Komar's result of a total of 3.959 identified individuals, after she eliminated the duplicate matches from ICMP raw data.[231] Komar extensively explained how she analyzed the ICMP raw material from October 2007 (P3002) and made her own excel sheet (2D543) by reorganizing the information found in the raw date of identification process.[232]

174. The Trial Chamber also completely disregarded testimony and evidence given by expert Komar disputing 758 unique profiles of DNA profiles that have not been associated with specific individuals, but included by Manning in total number of people associated with Srebrenica. According to Komar these allegedly unique profiles were not at all unique because they matched between two and four people.[233]

## ERRORS OF LAW AND FACT IN THE APPLICATION OF JCE

**GROUND 15**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN ITS APPLICATION OF THE JCE STANDARD WHILE FINDING THAT THE APPELLANT, LJUBIŠA BEARA, SIGNIFICANTLY CONTRIBUTED TO THE COMMON PURPOSE TO MURDER AND IGNORED ALL CREDIBLE TESTIMONY AND INFERENCES WHICH CONFLICTED WITH SUCH A FINDING, IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, WHICH CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT LJUBIŠA BEARA'S RIGHT TO A FAIR TRIAL.

[230] *Id.*, para.637, n.2317.
[231] *Id.*, para.642.
[232] T.23949-T.23958.
[233] T.23953-4 & T.23960; P2993 (0614-8657).

175. It is respectfully submitted that the Trial Chamber's conclusion that Beara significantly contributed to the common purpose to murder[234] was based on unreliable evidence.[235] As noted by the Trial Chamber, in order for Beara to be responsible for a JCE to murder, he must have participated in the common purpose, i.e., significantly contributed to a common purpose while sharing the intent with other members of the JCE to murder.[236]

176. The Trial Chamber's conclusion that, from the morning of 12 July, Beara played a key role in orchestrating the murder operation by planning, coordinating and overseeing the detention, transportation, execution and burial of the able-bodied Bosnian Muslim males is based on highly unreliable evidence which respectfully constitutes speculation.

177. The conclusion that Beara, as of the morning of 12 July, was aware of and implicated in the plan to murder solely because of his subordinate relationship with members of the Security Branch is a leap of faith.

178. Furthermore, the Trial Chamber erred because it did not give any reasoned opinion explaining such an important conclusion and, as such, it invalidated the decision. The Trial Chamber failed to provide any evidence or even indicia that Beara was acquainted with the events unfolding in front of the Fontana Hotel on 12 July. There was no evidence that Beara met with any of his subordinates before 13 July in order to be informed of the purported plan on 12 July.

179. Further, the Trial Chamber's conclusion that Beara's contribution is based on an alleged conversation with Deronjić on 13 July in the SDS offices[237] is erroneous as the Trial Chamber relied on untested, uncorroborated and previously recognized false testimony. This alleged conversation was previously discussed at length and is incorporated as if fully re-stated herein.

[234] Judgment, para.1302.
[235] *See, infra,* Grounds 6 & 8.
[236] Judgment, para.1298.
[237] Judgment, para.1300.

180. It is respectfully submitted that the Trial Chamber's conclusion that Beara's coordination of various components of the VRS and relevant civilian authorities, as outlined in paragraph 1271 of the Judgement, is not supported by any direct evidence. As stated previously it is the position of the Defence that certain civilian authorities falsely accused the Appellant because of their own involvement[238] in the crimes perpetrated in Bratunac and Zvornik among other places. Furthermore, this evidence from the close-knit circle of friends lacked any precision in describing events and was unable to recognize Beara properly, thus cannot be relied upon as corroboration to support the conclusions of the Trial Chamber.

*Identifying Locations*

181. It is respectfully submitted that implicating Beara in identifying locations and securing personnel and equipment is an erroneous conclusion that it is not based on any reliable evidence presented to the Trial Chamber.[239] Allegations of Appellant's involvement in identifying the brick factory in Bratunac are based solely on Deronjić's statement.[240] This statement is not corroborated as critical issues should be for conviction.[241] Considering that the Trial Chamber found that identifying locations was a critical component of Beara's contribution to the JCE to murder, it is respectfully submitted that the lack of any corroboration of Deronjić's statement in this regard constituted an erroneous finding that occasioned a miscarriage of justice.

*Securing the Personnel and Equipment*

182. It is respectfully submitted that the Trial Chamber's conclusion that Beara was involved in securing personnel and equipment is erroneously based on testimony in relation to machinery for burials. As previously argued the Defence disputes the conclusion reached by the Trial Chamber and its reliance on the testimony of PW162, PW161 and PW104 and their alleged identification of Beara. These arguments are respectfully incorporated as if fully re-stated herein. However, it is further noted that the Trial Chamber failed to find or rely on any direct evidence that even assuming that these conversations occurred they related to the burial of executed prisoners and not the burial of ABiH members killed in legitimate combat engagements with the VRS.

[238] *See, infra,* Grounds 5, 6 & 8.
[239] Judgment, para.1300.
[240] *Id.*, para.1275.
[241] *Id.*, para.1215.

183. In addition, PW162 testified that Beara was not even in the room while PW162 discussed with two other officers the status of construction machinery.[242] Thus, relying on this evidence is speculative.

184. Specifically, evidence was presented during the trial that bodies from the woods (Ravni Buljim, Kamenica and Pobudje) were being buried in mass graves using this machinery.[243] Further, the conclusion that Beara was involved in burials of bodies in Glogova was refuted and contradicted by Momir Nikolić who said that PW161 had lied about Beara's involvement.[244] As argued before the Trial Chamber during closing arguments, a reasonable Trial Chamber cannot use only the parts of the PW161 and Nikolić testimony that go in favour of the Prosecution's allegations and disregard portions of that same testimony that support an acquittal of Beara.

*Overseeing the Executions at the Individual Killings Sites*

185. It is respectfully submitted that the Trial Chamber further erred, in its conclusion, that Beara was overseeing the effective execution of the plan at the individual killing sites.[245] This conclusion is again based on unreliable and circumstantial evidence and, in many cases, the evidence presented refuted such a conclusion of the Trial Chamber. For example, Beara's alleged presence in Bratunac and his alleged meeting and conversation with Čelanović[246] speaks against the conclusion that Beara was overseeing executions. Even if, for the sake of argument, it is accepted that the meeting between Beara and Čelanović occurred, it only proves, while properly construing the plain meaning of the words used, that Beara did not have knowledge of any plan to murder, and was not involved in it or contribute to it because he stated to Čelanović that prisoners will be transferred to a prisoner camp in the morning.

186. The Čelanović testimony also goes directly against the testimony of Momir Nikolić, who claimed that he met Beara in Bratunac on 13 July and was purportedly

[242] *Id.*, para.1274.
[243] PW161, T.9556 & T.9538.
[244] Judgment, para.1273, n.4176.
[245] *Id.*, para.1300.
[246] *Id.,* para.1259.

told that the prisoners should be detained in the Zvornik area and executed.[247] It is submitted that considering that Čelanović's testimony goes directly against the testimony of Momir Nikolić, the allegations against Beara should not and cannot be used as proof beyond a reasonable doubt of Beara's contribution to a JCE to murder.

187. Similarly, it is respectfully submitted that the Trial Chamber erred in its conclusion as to Beara's presence in Orahovac.[248] The Trial Chamber conclusion relating to Beara's contribution to a JCE to murder cannot be based on the 92*bis* statement of Nada Stojanović or the testimony of PW168, as previously argued, this evidence is unreliable and untrustworthy.

*Meetings with Other Members of the JCE*

188. The Trial Chamber's conclusion that Beara interacted and met with other participants in the killing operation is based on the alleged meeting in the Standard Barracks on 13 July. The Trial Chamber drew an impermissible and erroneous conclusion, that a plan to murder was discussed at this meeting, without any direct evidence or corroboration. Namely, in paragraph 1300, where the entry from the Zvornik Duty Officers Notebook is cited that "Beara should come to Orovoc, Petkovci, Rocevic, Pilica".[249] Beara's presence in any of the foregoing places was never confirmed, corroborated by credible evidence or proven beyond reasonable doubt. Furthermore, the entry in the notebook that Beara was supposed to arrive in the places referred to above conflicts with the evidence given by Marko Milošević and Ostoja Stanisić[250] and thus cannot and should not amount to proof beyond reasonable doubt of Beara's contribution to a JCE to murder.

**GROUND 16**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN ITS APPLICATION OF THE JCE STANDARD WHILE FINDING THAT THE APPELLANT, LJUBIŠA BEARA SHARED THE INTENT TO CARRY OUT THE COMMON PURPOSE TO MURDER AND IGNORED ALL CREDIBLE TESTIMONY AND INFERENCES WHICH CONFLICTED WITH SUCH A FINDING IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE

[247] *Id.*, para.1266.
[248] *Id.*, para.1277.
[249] P377, p.128.
[250] *See, infra,* Grounds 4 & 5.

PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF THE APPELLANT, WHICH CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT, LJUBIŠA BEARA'S RIGHT TO A FAIR TRIAL.

189. It is respectfully submitted that the Trial Chamber reached an unreasonable conclusion and erred when it found that Beara shared the intent to carry out the common purpose to murder.[251]

190. Based on evidence before the Trial Chamber, Beara did not posses or share, alone or with other members of the JCE, an intent to murder. Although, the Trial Chamber concluded that it cannot determine with precision when the plan to murder was formed,[252] it however concluded that the forecasted separation process in Potočari and the third meeting at the Hotel Fontana marked the commencement of the implementation of the plan to murder.[253] Such a conclusion was supported with the alleged conversations between Nikolić, Popović and Kosorić on 12 July in front of the Hotel Fontana.

191. It is, respectfully, important to state that Appellant was not present or involved in any of the above-mentioned meetings and conversations. The first mention of Beara is made in relation to an alleged conversation on 13 July with Deronjić. Given that Deronjic's testimony was untested, untrustworthy and previously determined as false, this conversation cannot be relied upon by any reasonable Trial Chamber as a proof of the Appellant's *mens rea* for a JCE to murder.

192. In support of Beara's lack of *mens rea*, the intercept conversation from 13 July is one of the rare documents that undoubtedly reveals Beara's intent on 13 July towards the Muslim men.[254] In the intercept, it is rather clear that Beara's intent was that prisoners should be transferred in prisoner's camps.

[251] Judgment, para.1302.
[252] *Id.*, para.1051.
[253] *Id.*, para.1052.
[254] 7D2D642.

193. Similarly, the testimony of Prosecution's witness Čelanović confirmed that Beara personally talked to him on the night of 13 July and Beara stated that, according to his information, Muslim men from Bratunac are to be transferred in the morning to Kladanj. Again, the Trial Chamber failed or otherwise refused to accept very clear evidence by Beara as to his intent, even though it accepted Čelanović's testimony.

194. The Trial Chamber acknowledged that there is no evidence to support the whereabouts of Beara and what his actions were before the 13 July.[255] As argued in this Brief, the Trial Chamber's conclusion that Beara must have been involved in the murder plan solely because of the involvement of others officers of the security organ[256] is not the only reasonable conclusion based on the evidence and falls short of any standard required by international criminal law.

195. The Trial Chamber also erred when it failed to assess and properly consider evidence that contradicts its conclusion on the issue of Beara's *mens rea*, namely that the persons involved in the killing operation were Vasić and his men. As evidenced by uncontested documents, the Zvornik CJB report dated 12 July 1995 contains information that the evacuation of the civilian population of Srebrenica is underway.[257] In the same report Vasić is informing the MUP that Vasić himself ordered the closing of the roads Drinjaca – Han Pogled and Karakaj – Vlasenica.[258] Moreover, in another report dated 13 July, again from the Zvornik CJB (public security centre) it reflects that Mladić informed the MUP of the Republic of Srpska that the VRS is continuing operations towards Žepa and leaving all the other work to the MUP.[259] The 'work' referenced in this report is 1.a request for 10 tons of fuel forthe evacuation of the remaining civilian population from Srebrenica and 2. the killing of about 8.000 Muslim soldiers they blocked in the woods near Konjevic Polje.[260]

[255] Judgment, para.1299.
[256] *See, infra,* Grounds 8 & 15.
[257] P60, Zvornik CJB report no.281/95, 12 July 1995.
[258] P60, Zvornik CJB report no.281/95, 12 July 1995.
[259] P886, Zvornik CJB report no.283/95, 13 July 1995.
[260] P886, Zvornik CJB report no.283/95, 13 July 1995.

196. It is respectfully submitted that the forgoing evidence was erroneously disregarded by the Trial Chamber despite the fact that it is reasonable to conclude and infer that Vasić and MUP admitted that they perpetrated the crimes relating to Srebrenica and not Beara or members of the security organ.

197. It is further respectfully submitted that the Trial Chamber disregarded evidence of PW168, but only as it related to Pandurević, and yet accepted PW168's testimony against Beara. Specifically relating to the issue of knowledge and *mens rea* of Pandurević, [Redacted].[261] Pandurević'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."[262] The killings were not a clandestine operation operated by others but by members of the Zvornik Brigade. The Trial Chamber erred when it failed to consider the forgoing evidence and the inferences that should not have been made against Beara, but others.

198. [Redacted][263] There would be no other logical explanation to reference Orahovac unless one knew what was occurring there. It is respectfully submitted that the Trial Chamber erred when it found and concluded from unreliable circumstantial evidence that Beara possessed any criminal *mens rea*.

**GROUND 17**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FINDING THAT CERTAIN KILLINGS, SUCH AS AND PARTICULARLY THE KILLINGS IN KRAVICA, CERSKA, JADAR RIVER AND TRNOVO, FALL WITHIN THE COMMON CRIMINAL PURPOSE OF JCE TO MURDER AND IGNORED ALL INFERENCES WHICH CONFLICTED WITH SUCH A FINDING IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, WHICH

[261] [Redacted]
[262] P2232, page 13-14;
[263] [Redacted]

CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT LJUBIŠA BEARA'S RIGHT TO A FAIR TRIAL.

199. The Defence submits that the killings at Kravica, Cerska and Jadar River do not fall within common criminal purpose and cannot amount to a proof that genocidal intent existed on 13 July 1995. Arguments were presented, but not discussed by the Trial Chamber, that the Kravica murders were incidental and not planned as a part of the JCE, that it was not established when and how many of the people found in Cerska grave were killed on 13 July and that killings on the Jadar River, committed by police, cannot be a part of the common purpose to murder.

200. It is respectfully submitted that the Trial Chamber erred when reaching a conclusion that approximately 150 Muslim men were killed on 13 July in Cerska while, at the same time, the Prosecution evidence proves that some of these men were killed after 17 July 1995.[264] In doing so, the Trial Chamber disregarded evidence of the Prosecution investigator, Dušan Janc.[265] It is therefore respectfully submitted that the Trial Chamber reached an erroneous conclusion that Cerska was a primary mass grave and that all of the bodies found there were victims of 13 July.

201. For these reasons it was unreasonable to conclude based on the Kravica, Cerska, and Jadar River killings that they indicated co-ordination because of a staggering number of killings.[266] Considering these inconsistencies in the Prosecution evidence, the Trial Chamber's conclusion that the method and means of these killings puts them within the scope of the common purpose constitutes error.[267] Even though the killings in Bratunac and Zvornik have common traits, being done against the Srebrenica men[268], the difference between method and organization between them shows that they are not part of the same plan.

202. The Defence further agrees with the separate opinion of the Honorable Judge Kwon that the killings in Trnovo were not part of the common purpose of the JCE to

[264] Janc, T.33529.
[265] *See, infra*, Ground 5; *see also* Judgement, para.412.
[266] Judgement, para.859.
[267] *Id.*, para.1074.
[268] Judgement, para.1074.

murder.[269] It was not proven that the Skorpion unit was member of the JCE, that there was any link between perpetrators and the participants in the JCE to murder or that there were territorial or time connections with other murders within the JCE.

203. For the foregoing reasons, it is submitted that the Trial Chamber made unreasonable conclusions that could not have been made by any reasonable Trial Chamber.

**GROUND 18**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FINDING THAT IT WAS FORESEEABLE TO THE APPELLANT, LJUBIŠA BEARA, THAT THE OPPORTUNISTIC KILLINGS WOULD OCCUR, THAT HE WILLINGLY TOOK THAT RISK AND THAT A NECESSARY LINK BETWEEN PRINCIPAL PERPETRATORS AND BEARA EXISTED WHILE IGNORING ALL CREDIBLE TESTIMONY AND INFERENCES TO THE CONTRARY IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, WHICH CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT LJUBIŠA BEARA'S RIGHT TO A FAIR TRIAL.

204. No evidence was presented that it was foreseeable to Beara that the opportunistic killings would occur.

205. The Trial Chamber acknowledged that the evidence does not permit an exact determination as to who were participants and who were perpetrators in the common purpose.[270] Chamber went to conclude that various Battalion, Brigade and Corps Commanders, forces and individual members were drawn into plan as participants and perpetrators.[271] It is submitted that from such conclusions further conclusion on Beara responsibility for JCE III is impermissibly vague as to the question who were the JCE members and also erroneously unspecific.[272] Once again the Trial Chamber used inferences to conclude that Mladić as a Commander must have given authorisation

[269] *Id.*, Dissenting and Separate Opinions of Judge Kwon, paras.36-39.
[270] Judgement, para.1065.
[271] *Id.*, para.1070.
[272] *Prosecutor v. Krajišnik*, IT-00-39 (*Krajišnik*), Appeals Judgement, 17 March 2009, para.157.

and order for killing operation,[273] while Security Branch organized and implemented murder operation.[274]

206. There was no evidence presented that on 13 July, Beara was familiar that opportunistic killings are being committed in Bratunac, Petkovci School and Kravica supermarket.[275] Similarly, it was not established beyond reasonable doubt that Beara was present at these locations when the killings took place. From such evidence it is only reasonable to conclude that he did not know who is involved in guarding the prisoners that were held on these locations and that there was no link established to Beara.

207. There was no evidence presented that Beara was aware of the perpetrators of above-mentioned killings or that necessary link existed between him and such perpetrators.

208. Furthermore, the Trial Chamber has not provided a reasoned opinion for conclusion about Beara liability for certain opportunistic killings. The main inference was drawn from the alleged finding that Beara was an active participant in the JCE to murder.[276] The Defence refers to other parts of this Brief where it was shown that such a conclusion is not based on reliable evidence.[277]

## ERRORS OF LAW AND FACT IN THE APPLICATION OF ARTICLE 4 (GENOCIDE)

### GROUND 19

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT FOUND APPELLANT, LJUBIŠA BEARA, GUILTY OF GENOCIDE PURSUANT TO ARTICLE 4 OF THE STATUTE (SPECIFICALLY COUNT 1 OF THE INDICTMENT) WHEN IT MISAPPLIED THE ELEMENT OF *MENS REA* REQUIRED FOR THE CRIME OF GENOCIDE. IN FINDING THAT BEARA HAD SPECIFIC GENOCIDAL INTENT TO DESTROY THE TARGETED GROUP AND IGNORING ALL CREDIBLE TESTIMONY AND INFERENCES WHICH CONFLICTED WITH SUCH

[273] Judgement, para.1071.
[274] *Id.*
[275] *Id.*, paras.1303-1304.
[276] *Id.*, para.1304.
[277] *See, infra,* Ground 15.

A FINDING IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND, FURTHER, THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, THE FINDINGS CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT LJUBIŠA BEARA'S RIGHT TO A FAIR TRIAL.

209. The Trial Chamber has erred in law and abused its discretion in finding that Ljubiša Beara possessed: a) *dolus specialis,* i.e., intent to destroy the group or part thereof, as such; and b) underlying intent required for killing members of the group, i.e., the intention to cause death to members of the group.[278] Beara was convicted of one count of genocide under Article 4(2)(a) of the Statute, based on his membership in the JCE to murder, and found criminally responsible for conspiracy to commit genocide under Article 4(3). With respect to both findings, the Trial Chamber found that Beara possessed the required intent, both *dolus specialis* and the underlying intent for killing members of a group.[279] The Defence submits that the evidence presented at trial did not prove beyond reasonable doubt that the Appellant possessed the requisite intent for a finding of genocide. To the contrary, reliable evidence supports an alternative non-criminal intent – that any actions taken by Beara, with regard to the military-age men in the enclave, were lawful combat-related activities against a perceived military threat. The findings do not take a totality of the evidence into consideration and, as such, erroneously impute a criminal intent upon the Appellant and constitute a miscarriage of justice.

210. "For an accused to incur liability for a crime forming part of the common purpose under the first category JCE, the accused must possess the intent required for the crime, including the specific intent, when relevant."[280] Genocide, as a specific intent crime, requires both the special intent of genocide and the *mens rea* required for each of those crimes (e.g., intent for killing members of the group). With regard to the *mens rea* of murder or willful killing, "it must be established that the accused had an

[278] Judgement, paras.17-22.
[279] *Id.*
[280] *Id.*, para.1022.

intention to kill or to inflict grievous bodily harm or serious injury in the reasonable knowledge that it would likely lead to death".[281]

211. It is generally accepted that direct proof of genocidal intent is rarely available. Courts are often put in a position of reaching conclusions of genocidal intent on inferences that can be drawn from the evidence presented, including the context in which the crime was committed, the scale of crimes committed, systematic targeting of victims due to their membership in the group, repetition of destructive and discriminatory acts[282], utterances of the accused[283], and, under certain circumstances, attacks on cultural or religious monuments[284]. Given the circumstantial character of such evidence, the general rule is that conclusions reached must be ***the only reasonable inference available on the evidence***.[285] As the Appeals Chamber in *Vasiljević case* noted:

> …when a Chamber is confronted with the task of determining whether it can infer from the acts of an accused that he or she shared the intent to commit a crime, special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inferences.[286]

212. This stringent standard was further highlighted by the *Krstić* Appeals Chamber with regard to genocide, specifically, stating:

> Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. **Convictions for genocide can be entered only where that intent has been unequivocally established.**[287]

213. As such, evidence of an overall context in which the crimes have been committed has to be counterbalanced with the actual conduct of the Accused.[288] A decision on whether a particular accused would be found guilty of committing genocide or aiding and abetting or complicity to genocide would ultimately depend on

[281] *Prosecutor v. Brđanin*, IT-99-36 ("*Brđanin*"), Trial Judgement, 1 September 2004, para.386.
[282] Judgement, para.823.
[283] *Prosecutor v. Akayesu*, ICTR-96-4 ("*Akayesu*"), Trial Judgement, 2 September 1998, para.728.
[284] *Prosecutor* v. *Karadžić* et al., IT-95-5-R61, IT-95-18-R61, Consideration of the Indictment Within the Framework of Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 94.
[285] *Vasiljević* Appeals Judgement, para.131 (emphasis added); *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Appeals Judgement, 28 November 2007, para 524.
[286] *Id.*
[287] *Krstić* Appeals Judgement, para.134 (emphasis added).
[288] *Prosecutor* v. *Bagilishema*, ICTR-95-1A-T, Trial Judgement, 7 June 2001, para. 63.

the extent to which the evidence suggests his familiarity with a "genocidal" plan or a policy and his intentional contribution to its furtherance.[289] According to the International Law Commission, the definition of genocide requires "a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide".[290] General intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide.[291] The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act.[292]

214. In case of Ljubiša Beara, the Trial Chamber explained its finding that the Appellant possessed genocidal intent, in large part, by repeating acts used to find Beara's contribution to JCE to murder, acts which the Defence disputes herein.[293] The Trial Chamber cites to the Appellant's "detailed knowledge of the killing operation itself and [his] high level and far reaching participation in it."[294] As reference to support this knowledge, the Trial Chambers erroneously relies upon and refers to "Beara's walk through Bratunac on the night of 13 July, his personal visits to the various execution sights and the extensive logistical challenges he faced throughout … [h]is vigorous efforts to organise locations and sites, recruit personnel, secure equipment and oversee executions."[295]

215. The Defence submits that the above cited conclusions were neither supported by credible evidence, nor can they represent the only reasonable inference of a particular *mens rea* tantamount to genocidal intent.

216. To support this finding of detailed knowledge, the Trial Chamber cites to Beara's position, namely: "As the most senior officer of the Security Branch — the entity charged with a central directing role — he had perhaps the clearest overall

[289] Schabas, W., *Genocide in International Law* (April 2009), p.250.
[290] Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May-26 July 1996, UN Doc. A/51/10, p. 90.
[291] *Id.*, p. 87; *see also* Report of the International Law Commission on the Work of Its Forty-Seventh Session, 2 May-21 July 1995, UN Doc. A/50/10, p. 87.
[292] *Id.*
[293] *See, infra*, Ground 15.
[294] Judgement, para.1313.
[295] *Id.*, paras.1313-1314.

picture of the massive scale and scope of the killing operation."[296] However, such a conclusion is not fully supported by the other findings of the Judgement. Primarily, the Chambers finding that the "plan to murder" had been formulated by the morning of 12 July and "the Security Branch of the VRS had been tasked with a central coordinating role in the implementation of that plan" conflicts with its finding that there was "no direct evidence" of the Appellant's involvement prior to July 13.[297] Furthermore, sections of the Judgement dealing with the Trial Chamber's findings related to the formation of the plan to murder and the initial stages of the plan make no reference to the Appellant and his non-participation and lack of involvement therein.[298] Such lack of involvement cuts directly against any knowledge of a plan to perpetrate murder and/or possess genocidal intent. The Trial Chamber's finding and conclusion that the Appellant had knowledge of the killing operations solely as a result of his position is erroneous and unsubstantiated and does not suffice for a finding consistent with the jurisprudence that intent be unequivocally established.

217. With respect to the meetings that took place on the night of July 13, the Trial Chamber erroneously relied on contested and inconsistent testimony in finding that the Appellant actively participated in these meetings and that agreement on logistical arrangements and venues for killing operations were made at that time.[299] The Trial Chamber acknowledges that the evidence on this issue was "not consistent in every aspect and there are some discrepancies as to what was discussed and who participated in the meetings"[300] This unreliable evidence fails to support a finding beyond reasonable doubt that the Appellant was present at the alleged meetings during the night of 13 July and that he purportedly participated in discussions about logistical arrangements.[301]

218. The Trial Chamber's inferences of a genocidal intent also rely extensively on the evidence of intercepted communications. Overall, the Trial Chamber failed to consistently apply this source of information. For example, the Trial Chamber accepts (no less as evidence of genocidal intent) the intercept communication between the

[296] *Id.*, para.1313.
[297] *Id.*, para.1299.
[298] *Id.*, paras 1051-1055.
[299] *Id.*, paras 1060 & 1271.
[300] *Id.*, n.4167.
[301] *Id.*, para.1271.

Appellant and Lučić (intercepted on 13 July at 10:09am) as well as the intercept conversation between the Appellant and General Krstić (intercepted on 14 July at 10:00am).[302] Yet, the Trial Chamber failed to accept as credible, and gave no weight, to the exculpatory intercepted communication of 13 July at 11:25am.[303] The Trial Chamber erred when it rejected and gave no weight to the exculpatory intercepted communication and further erred in finding and rationalizing that the Appellant was aware of the "the vulnerability of phone conversations to interception" and the "secret nature of the killing operations."[304] The rationale of the Trial Chamber defies logic and fails to accept any evidence of the true state of mind and intent of the Appellant thereby prejudicing his rights and invalidating the Judgement.[305]

219. Moreover, the Trial Chamber failed to carefully examine the two intercepted conversations and merely interpreted these conversations to support an erroneous inference of intent. The first intercept conversation (13 July, from 10:09am) is only demonstrative of an instruction given by Beara to transfer the detained men to a prisoner camp. As such, it is largely in line with the 11:25am intercept (which the Trial Chamber refused to consider). The 11:25am intercept, however, corroborates the Chamber's finding that either on the evening of 12 July or early morning of 13 July, Čelanović was instructed by the Defendant to screen men taken into custody by the military police for those which had been involved in crimes against Serbian civilians in the previous year so that the "matter could be brought to the attention of the competent prosecutor".[306]

220. As highlighted previously, reliance on context is possible so long as it does not outweigh evidence of the actual deeds of an accused [307]; further, the offered scenario must be the only reasonable explanation, especially when the evidence is contested.[308] The evidence presented in this case cannot be characterized as that which leads to an unequivocal conclusion and thus cannot be sufficient for finding a criminal intent.

[302] *Id.*, para.1257; P1130a.
[303] *Id.*, para.1258; 7D2D642.
[304] *Id.*, para.1259.
[305] *See, infra,* Ground 7.
[306] *Id.*, para.1256.
[307] *Bagilishema* Trial Judgement, para. 63.
[308] *Brđanin* Trial Judgement, para.23.

221. It seems, rather, that the findings of this Trial Chamber were more of an adherence to previous decisions of this Tribunal, namely in the *Krstić* and *Blagojević* cases. In essence the Trial Chamber failed to consider and appreciate new evidence such as the undisputed dual-purpose of the military acts surrounding the Srebrenica enclave and simply refused to consider them in its deliberations and ultimate findings.

222. For example, the following finding, used by the Trial Chamber to impute genocidal intent to the Appellant fails to consider all of the evidence presented in the instant trial:

> "… the evidence establishes that the killing of the Bosnian Muslim males was not the result of panic upon the capture of thousands of men, nor was it a response to any military threat the men posed; indeed, the men targeted were those who had already surrendered. It is clear that the males were targeted by virtue of their membership in the Bosnian Muslim group. Further, not even a cursory attempt was made to distinguish between civilian and soldier and the Trial Chamber notes that some children, elderly and infirm were also killed. Searches were conducted in the days that followed the fall of Srebrenica to ensure that no Bosnian Muslim male escaped the grasp of the VRS Main Staff and Security Branch.
>
> The Trial Chamber finds that the murder operation – from the separations to detention to execution and burial – was a carefully orchestrated strategy to destroy aimed at the Muslim population of Eastern Bosnia."[309]

223. It does not appear that the Trial Chamber has given appropriate weight to its own finding that in this case that the Prosecution accepted that "there was a 'dual purpose' in the military attacks against the enclaves, with legitimate military aims being one of these purposes"[310]. However, if the Trial Chamber considered the dual-purpose it would have reached a finding similar to that in *Brđanin*. In *Brđanin*, similar military-based actions against predominantly*, but not exclusively,* military-aged men – when coupled with mass deportation of the population, including women and children – led to a conclusion that **did not** support a genocidal intent as the only reasonable inference.[311] Specifically, the *Brđanin* Trial Judgement found:

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[309] Judgement, paras 860 & 861.
[310] *Id.*, para 774.
[311] *Brđanin* Trial Judgement, para 976: "[t]he extremely high number of Bosnian Muslim and Bosnian Croat men, women and children forcibly displaced from the ARK in this case, particularly when compared to the number of Bosnian Muslims and Bosnian Croats subjected to the acts enumerated in

> …the victims of the underlying acts in Article 4(2)(a) to (c), particularly in camps and detention facilities, were predominantly, although not only, military-aged men. This additional factor could militate further against the conclusion that the existence of genocidal intent is the only reasonable inference that may be drawn from the evidence. There is an alternative explanation for the infliction of these acts on military-aged men, and that is that the goal was rather to eliminate any perceived threat to the implementation of the Strategic Plan in the ARK and beyond. Security for the Bosnian Serbs seems to have been the paramount interest. In the words of one witness: 'the aim was to reduce the threat to the detainer, the detainer's community, and anyone […] who looked as if they would fight, once sent to the other side, would be eligible for detention'[312]

224. It is respectfully submitted that the Defence in this case has presented an abundance of evidence to support its claim that actions taken in the enclave, particularly those against the male population, were not taken with the intent to destroy the Bosnian Muslims of Srebrenica and Žepa nor that Beara possessed, at any moment, such an intent.[313] The Defence further contends that the evidence presented during trial did not prove beyond a reasonable doubt that the Appellant intended to deprive military aged men in the enclave of their lives as members of a protected group and the Trial Chamber simply failed to consider any such evidence of this nature. The reliable evidence presented clearly supports that any actions taken by Beara were legitimate combat-related activities against a perceived military threat. Evidence showing that the actions of the Appellant were aimed at capturing, processing or exchanging prisoners rather than killing them was presented to the Trial Chamber which was, without basis, disregarded.[314]

225. The Defence therefore respectfully submits that the Trial Chamber erred in law and abused its discretion by finding that the evidence in this case proved, ***beyond reasonable doubt***, that Beara acted with the specific intent to kill members of a protected group. In failing to consider relevant factors or failing to give them

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Article 4(2)(a), (b) and (c), does not support the conclusion that the intent to destroy the groups in part, as opposed to the intent to forcibly displace them, *is the only reasonable inference that may be drawn from the evidence*" (emphasis added).

[312] *Id.*, para.979.

[313] Beara Final Brief, paras.726-756.

[314] Judgement, paras.1256, 1258 & 1262.

sufficient weight in reaching its conclusion regarding Beara's intent, the Trial Chamber erred in applying the "reasonable inference" standard by abusing its discretion to the Appellant's detriment which lead to a miscarriage of justice.

**GROUND 20**

(WITHDRAWN)

**GROUND 21**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FINDING THAT THE TARGETED PART OF BOSNIAN MUSLIMS WERE MUSLIMS OF EASTERN BOSNIA, SPECIFICALLY BOSNIAN MUSLIMS FROM SREBRENICA, AND THAT, AS SUCH, IT CONSTITUTED A SUBSTANTIAL COMPONENT OF THE ENTIRE GROUP OF BOSNIAN MUSLIMS AND IGNORED ALL CREDIBLE TESTIMONY AND INFERENCES WHICH CONFLICTED WITH SUCH A FINDING, IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, WHICH CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT LJUBISA BEARA'S RIGHT TO A FAIR TRIAL.

226. The Trial Chamber has erred in its application of the legal standard that requires that a targeted group "be a substantial part of the group because it 'must be significant enough to have an impact on the group as a whole.'"[315] By ignoring the numeric size of the group and relying on factors which are not primary to the assessment, it has impermissibly expanded the legal definition of a targeted group and created a miscarriage of justice. In doing so, the Trial Chamber has also failed to consider and address arguments and supporting evidence presented by the Defence in its final brief challenging such a finding.[316]

227. In defining that the Muslims of Eastern Bosnia constitute a substantial component of the entire group of Bosnian Muslims, the Trial Chamber explains:

> …As has been found by the Appeals Chamber, although the size of the Bosnian Muslim population in Srebrenica before

[315] Judgement, para.831.
[316] Beara Final Brief, paras.696-725.

> its capture by the VRS was a small percentage of the overall Muslim population of BiH at the time, the import of the community is not appreciated solely by its size. The Srebrenica enclave was of immense strategic importance to the Bosnian Serb leadership because (1) the ethnically Serb state they sought to create would remain divided and access to Serbia disrupted without Srebrenica; (2) most Muslim inhabitants of the region had, at the relevant time, sought refuge in the Srebrenica enclave and the elimination of the enclave would accomplish the goal of eliminating the Muslim presence in the entire region; and (3) the enclave's elimination despite international assurances of safety would demonstrate to the Bosnian Muslims their defencelessness and be "emblematic" of the fate of all Bosnian Muslims. The Chamber agrees with this analysis and adopts the conclusion.[317]

228. The Trial Chamber further found that although the size of the Bosnian Muslim population in question was just a small percentage of the overall Bosnian Muslim population, this numeric defect is remedied by:

a. the strategic value of territory in which it resided at a given point in time;
b. the fact that the population in question was actually a representative sample of a wider part of a group of Bosnian Muslims-Muslims of geographical region of Eastern Bosnia – who sought refuge in the enclave; and,
c. by an assumption that the destruction of a population in a safe area would send a strong message to the rest of the Muslim population about their fate.[318]

229. Under the Genocide Convention, targeted populations have to qualify under one or more of the four stipulated groups – national, ethnic, religious, or racial – and they have to be targeted for that specific reason.[319] Perpetrators are required to possess not only intent to murder, torture or rape a group member, but rather additional intent to destroy a group, or part thereof, as such.[320]

[317] Judgement, para.865.
[318] *Id.*
[319] *Convention on the Prevention and Punishment of the Crime of Genocide* (1951), Article II.
[320] *Krstić* Appeals Judgement, paras 8-11.

230. Determining whether a certain population satisfies the "substantial component" requirement starts with the membership of the group. All *travaux preparatores,* commentaries, and scholarly articles on the Genocide Convention unequivocally state that the gravity of the crime in question requires that the a "part" of the group be a "reasonably significant number, relative to the total of the group as a whole" for it to be considered as substantial.[321] This was further defined by the International Court of Justice ("ICJ") in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*) ("*BiH v. SiM*").[322] The Trial Chamber itself notes that the numeric size of the part of the group targeted… "is the necessary and important starting point in assessing whether the part targeted is substantial enough."[323]

231. However, the Trial Chamber's findings do not reflect a proper application of the foregoing insofar as the Trial Chamber stated: "the size of the Bosnian Muslim population in Srebrenica before its capture by the VRS was a small percentage of the overall Muslim population of BiH at the time."[324] Accordingly, the purported part of the protected group in this case, based on the Trial Chamber's finding, fails to satisfy the essential *substantiality* criterion.

232. It is respectfully submitted that the Trial Chamber erred when relying upon lesser factors.[325] Although other factors may come in play in making an overall assessment as to whether a certain population would qualify as a substantial part of the group, the lack of a reasonably significant percentage of a protected population

[321] *Id.,* n.21. *See* 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) ("Whitaker Report"), para 29; *see also* Nehimiah Robertson: "… the aim of the Convention is to deal with action against *large numbers, not individuals* even if they happen to possess the same characteristics" (Robertson N., "The Genocide Convention – Its Origins and Interpretation", pp. 17-18); 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. 380; and the International Court of Justice, case 91, *Case Concerning Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgement, 26 February 2007, para 198.
[322] *BiH v. SiM,* Judgement, para.200.
[323] Judgement, para.832.
[324] *Id.*, para.865.
[325] *Id.*

cannot be counterbalanced by factors such as territory, strategic military goals, among others.

233. The first supplemental factor stated by the Trial Chamber – Srebrenica's strategic location – on its face, has nothing to do with the intent of genocide, the destruction of a protected group or part thereof. Territorial aspirations are not about seeking to destroy the group or part thereof, rather they could show a strategic military goal that is not comparable to the *dolus specialis* of genocide. Given the ambiguity and lack of concrete detail of the Trial Chamber's finding of how such aspirations can equate with intention of destroying a group in whole or in part, this substitute element should not be given substantial weight. It is respectfully submitted that it cannot substitute for a substantiality finding.

234. Likewise, the Trial Chamber erred in applying the second supplemental factor. With this factor the Trial Chamber seems to be indirectly introducing another, wider part of a protected group – Muslims living in the geographic region of Eastern Bosnia[326] – for the purpose of counterbalancing the lack of evidence as to the substantiality criterion. Such a finding directly violates the right of the Appellant to know the case against him as it diverges from the specific population outlined in the Indictment. Further, this expansion highlights how the population of the enclave cannot be characterized as even a 'distinct part of the group' as set forth in *Krstić*.[327] The population in the enclave constitutes what is closer to "an accumulation of isolated individuals within [the group]" which is not sufficient to meet the test of "in part".[328] By impermissibly widening the scope of the group, the Trial Chamber improperly relied on this factor in assessing whether the Bosnian Muslims of Eastern Bosnia, as defined by the Prosecution in the Indictment, qualify as a substantive part of a protected group.

235. Further, the Trial Chamber erred in its application of the third supplemental factor. The Trial Chamber's conclusion that destruction of the Srebrenica and Žepa

[326] This is as opposed to the 'Bosnian Muslims of Eastern Bosnia' as defined by the Prosecution which in affect represent a much narrower fragment of the group focused solely on individuals present in Srebrenica and Žepa at relevant time.
[327] *Krstić* Trial Judgement, para.590.
[328] *Id.*

Muslims would question the viability of Bosnian Muslims as a whole was, respectfully, not supported by the evidence. The Trial Chamber sought to replace the substantiality criterion by expanding the protected group to those outside of the indicted charges. This also cannot be a factor that could be given any significant weight. More importantly, as shown, all three of these supplemental factors, even when combined, are insufficient to outweigh a lack of substantiality of a group.

236. It is respectfully submitted that the Trial Chamber has completely disregarded newly provided evidence relevant to the issue of whether the population targeted by the July events could have met the 'substantial part' criterion. This evidence which was not tendered in either the *Krstić* or *Blagojević* cases, is necessary and critical. Based on this new evidence, the Defence challenged the earlier finding in *Krstić* – that the enclave was *de facto* demilitarized. Further, the Trial Chamber failed to address and consider this evidence and merely incorporated the findings in *Krstić*.

237. Having in mind all of the above, it is respectfully submitted that the Trial Chamber erred in its application of the relevant law and abused its discretion by giving inordinate weight to less relevant factors. These findings invalidate this significant portion of the Judgement and constitute a miscarriage of justice.

**GROUND 22**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT FOUND APPELLANT LJUBISA BEARA GUILTY OF CONSPIRACY TO COMMIT GENOCIDE WHEN IT MODIFIED, ALTERED, AND MISAPPLIED THE ELEMENTS REQUIRED FOR CONSPIRACY IN FINDING THAT CONSPIRACY IS A CONTINUING CRIME IN DIRECT VIOLATION OF THE FUNDAMENTAL PRINCIPLE OF NON-RETROACTIVE APPLICATION OF SUBSTANTIVE CRIMINAL LAW NULLUM CRIMEN SINE LEGE.

238. It is respectfully submitted that the Trial Chamber erred in law and abused its discretion by finding that conspiracy under the Genocide Convention undoubtedly implies a continuing crime and thereby finding Ljubisa Beara guilty of conspiracy to commit genocide in violation of the principle *nullum crimen sine lege* and in absence of evidence supporting such a conclusion beyond reasonable doubt.

239. The finding of the Trial Chamber that conspiracy is treated as a continuing crime in common law countries is correct.[329] However, this precedent does not necessarily apply to an understanding of the specific crime of conspiracy to commit genocide, as set forth by the Genocide Convention. The Trial Chamber cites the records of the Sixth Committee meetings, referring to the Genocide Convention, as supporting that "the aim of the Convention is to prevent genocide, rather than punish it."[330] In order to fulfill this main objective of the Convention, member states agreed to enable punishment of such criminal agreements in order to prevent the commission of this crime.[331] In defining conspiracy at these meetings, it was stated to be "the agreement of two or more persons to commit an unlawful act"[332]. The records indicate that further explanation was provided as a "connivance of several persons to commit a crime, whether the crime was successful or not"[333] and "…the idea covered an agreement to commit a crime, whether or not the parties to the agreement began to carry out its design".[334] From these documents, it is unclear that the drafters intended the definition to encompass the common law approach to conspiracy that extends to cover crimes subsequent to formulation of an initial agreement. At best, the meeting minutes show that these committees, in preparing the framework of the Genocide Convention, voted in favor of the concept as defined for them – an agreement to commit an unlawful act, irrespective of the actual outcome. To claim more would imply reverting to extensive interpretation of what was said, to the detriment of the Appeallant.

240. Further, conspiracy as known in common law did not have customary law status at the time when the Genocide Convention was drafted; it is questionable whether it has gained such a status even to date. At Nuremburg its applicability was limited only to crimes against peace specifically because of opposition to the far-fetching character of the concept in common law.[335] Although various scholars have provided different interpretations of the extent to which the conspiracy theory was applicable to crimes listed in the London Charter pursuant to the agreement made

[329] Judgement, para.872.
[330] Judgement, n.2957.
[331] Judgement, para.2126.
[332] UN Doc. A/C.6/SR84.
[333] *Id.*
[334] UN Doc. E/AC. 25/SR.16.
[335] *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), p.47; also Ginsburgs, G., and Kudriavtsev, V.N., *The Nuremburg Trial and International Law*, Martin Njihoff Publishers (1990) ("The Nuremburg Trial").

between the State parties,[336] the practice of the Nuremburg Court unequivocally speaks to its limited use only in relation to crimes against peace. Furthermore, the Control Council Law No. 10 mentions conspiracy explicitly only in relation to charges on crimes against peace.[337]

241. According to the Trial Chamber's own finding on the applicable law both *ad hoc* Tribunals have dealt very little with the issue.[338] Even in face of a strong similarity between the concept of JCE and conspiracy under common law, this Tribunal in *Milutinović et al.* clearly underscored that "[c]riminal liability pursuant to a joint criminal enterprise is not a liability for . . . conspiring to commit crimes".[339]

242. Differing positions on conspiracy theory as known in common law countries again resurfaced at the time of the drafting of the Rome Statute.[340] The introduction of this concept was abandoned due to a disagreement between common law and civil law countries on the issue and was substituted with the introduction into the Statute of a set of factors for individual criminal liability previously "successfully negotiated" in relation to another multilateral treaty - the U.N. Convention for the Suppression of Terrorist Bombing.[341] The Rome Statute was carefully negotiated precisely to avoid legal uncertainty and potential violations of *nullum crimen sine lege* principle often associated with extensive judicial interpretations of existing law. A reference made by Judge Stevens of the U.S. Supreme Court in the Court's 2006 Decision in *Hamdan v. Rumsfeld* might best depict the status of the theory as known in common law countries - "conspiracy in the truest sense is not known to international law".[342]

243. The Trial Chamber therefore erred in law and abused its discretion in finding conspiracy to be a continuing crime under the Genocide Convention and relying on such a finding for the purpose of qualifying the purported actions of Beara as falling

[336] See Schabas, W., *Genocide in International Law*; *The Nuremburg Trial and International Law*; The debate pertains to Art. 6, para 3, where conspiracy is mentioned in relation to any of the crimes listed.
[337] http://avalon.law.yale.edu/imt/imt10.asp (last accessed on 21 January 2011).
[338] Judgement, para.871.
[339] *Prosecutor v. Milutinović et al.*, IT–99–37–AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, 21 May 2003.
[340] Scheffer, D.,"Why Hamdan is Right About Conspiracy Theory", http://jurist.law.pitt.edu/forumy/2006/03/why-hamdan-is-right-about-conspiracy.php (last accessed on 21 January 2011).
[341] *Id.*
[342] *Hamdan v. Rumsfeld*, 548 U. S. 557 (2006), p.47.

under a conspiracy to commit genocide.[343] This is particularly important as there is no direct and reliable evidence on the Defendant's involvement at the planning, i.e. agreeing stage of the process.[344] Although it is true that participation in a conspiracy can be inferred from subsequent coordinated actions in pursuit of an agreement, such a conclusion could not have been reached in relation to Beara because, as discussed in detail in other sections of this Appeal, the evidence in this case does not support drawing such an inference as the only reasonable conclusion. Accordingly, by extending the applicability of conspiracy charges under the Genocide Convention, the Trial Chamber prejudiced the Appellant, led to the miscarriage of justice and has thereby invalidated the Judgement in this part.

**GROUND 23**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FINDING THAT THE APPELLANT, LJUBISA BEARA, PLANNED AND ORDERED THE MURDER OF BOSNIAN MUSLIM MALES FROM SREBRENICA CONSTITUTING CRIMES OF GENOCIDE, EXTERMINATION, PERSECUTION AND MURDER, AS A VIOLATION OF THE LAWS OR CUSTOMS OF WAR, WITHOUT GIVING ANY REASONABLE FINDINGS OR ANALYSIS FOR SUCH A CONCLUSION AND IGNORING ALL CREDIBLE TESTIMONY AND INFERENCES WHICH CONFLICTED WITH SUCH A FINDING. THIS IS IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, WHICH CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT'S RIGHT TO A FAIR TRIAL.

244. The Trial Chamber finding that Beara also "planned and ordered the murder of Bosnian Muslim males from Srebrenica"[345] is not supported by any competent or credible evidence.

*Planning*

245. The Defense submits that the Trial Chamber could not have reached a conclusion that Beara was involved in any plan to murder Bosnian Muslim males

[343] Judgement, para.1322.
[344] Judgement, para.1299; *see also, infra,* Grounds 6, 15 & 19.
[345] Judgement, paras 1319, 1326, 1328 & 1333.

from Srebrenica based on the evidence presented without making an error in law and abusing its discretion by failing to apply the principle that all reasonable inferences should be made in favor of an accused.

246. The law on of *actus reus* of planning "…requires that one or more persons plan or design the criminal conduct constituting one or more crimes provided for in the Statute, which are later perpetrated. It is sufficient to demonstrate that the planning was a factor **substantially contributing** to such criminal conduct."[346]

247. The Judgement's sole basis for any link to planning is through Beara's formal position in the military hierarchy and not based on evidence that would show how he knew about or contributed to any such planning. However, according to the Judgement, a plan to murder Bosnian Muslim males was formulated by the morning of 12 July.[347] As the Trial Chamber found no evidence of Beara's participation in the murder operations prior to 13 July, he certainly could not have been found to have participated in the 'planning' at an early stage.[348]

248. Further, evidence presented to the Trial Chamber regarding the morning of 13 July suggests that the Appellant was at the time engaged in legitimate activities.[349] Based on the applicable law and the evidence presented, the Trial Chamber erred when it inferred the Appellant's involvement in the preparatory phase, as the "only reasonable inference" that can be drawn from the circumstantial evidence.

249. It is respectfully submitted that the Trial Chamber erred in its finding that the "logistics of the planned murder operation, including the location for the killings and burial as well as transportation and equipment" were the subject matter of these meetings.[350] Although the Trial Chamber recognized the vague, inconsistent and contradictory evidence as to the topics and participants of these purported meetings[351], it nevertheless erroneously relied on the same. Further, the Trial Chamber erred while relying on untrustworthy and unreliable testimony from various witnesses.[352]

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[346] *Limaj* Trial Judgement, para.513.
[347] Judgement, para.1299.
[348] *Id.*
[349] *Id.*, para.1256 & 1262.
[350] *Id.*, para.1271.
[351] *Id.*; *see also* n.4176.
[352] *See, infra*, Ground 6.

250. It is respectfully submitted that the Trial Chamber erred when it failed to give proper weight to the testimony of PW162 which establishes that Beara was not privy to discussions on logistical arrangements which took place in Bratunac that day.[353]

251. The Trial Chamber also erred in its conclusion that the Appellant participated in a meeting on 14 July at the Standard Barrack regarding organization of disposal of bodies of prisoners held in Zvornik, relying solely on the testimony of PW104. In doing so, the Trial Chamber ignored two significant factors, namely that PW104 was not able to identify Beara as the person whom he met on 14 July and that the PW104 speculated and assumed that a discussion was held regarding the organization of the disposal of bodies of prisoners held in Zvornik.[354]

252. Similarly, the Trial Chamber erroneously concluded that the Appellant was "present at Petkovci on July 14, overseeing and coordinating the detention, transport, execution and burial of the prisoners detained there".[355] With respect to this finding, the Trial Chamber erred by relying on uncorroborated hearsay statements.[356]

253. Given the foregoing, the Trial Chamber failed to properly infer from the evidence that the Appellant was not involved in the planning of the murder operations.

*Ordering*

254. The Defence respectfully submits that the evidence presented to the Trial Chamber could not have lead it to conclude that Beara ordered or had participated in ordering the murder of the Muslim male population in the enclave. In order find that Appellant 'ordered' the crimes alleged it must be shown that the accused was a person in a position of authority who had instructed another person to commit an offence[357] and that his order had a direct and substantial effect on the commission of the illegal

[353] Judgement, para.1274.
[354] *Id.*, para.1278; *see also, infra*, Ground 6.
[355] *Id.*, para.1279.
[356] *Id.*, n.4212.
[357] *Limaj* Trial Judgement, para.515.

act.[358] Furthermore, the evidence must establish "that the accused in issuing the order intended to bring about the commission of the crime, or was aware of the substantial likelihood that it would be committed in the execution of the order".[359]

255. It is respectfully submitted that the evidence tendered is vague, inconsistent and contradictory and, thus, the Trial Chamber erred when it relied upon such evidence to make its findings. The Trial Chamber relies upon the testimony of PW104[360], an intercepted conversation between Lucić and Beara in relation to the situation in Konjevic Polje,[361] the testimony of PW-161 in relation to Milici,[362] the testimony of witness Deronjic relating to Bratunac,[363] and the testimony of witness [Redacted],[364] [Redacted].[365] It is respectfully submitted that the foregoing evidence and testimony should not be given any weight and any reliance thereto is misplaced and therefore erroneous.

256. A similar finding made by the Trial Chamber in *Dragoljub Milosević* case was struck down on appeal. In that case, the Appeals Chamber clearly stated:

> … the Trial Chamber did not rely on any evidence that would identify a specific order issued by Milošević with respect to the campaign of shelling and sniping in Sarajevo as such. Rather, it relied on the nature of the campaign carried out in the context of a tight command to conclude that it could only "have been carried out on [Milošević's] instructions and orders". **The Appeals Chamber recalls that the *actus reus* of ordering cannot be established in the absence of a prior positive act because the very notion of "instructing"**, pivotal to the understanding of the question of "ordering", requires "a positive action by the person in a position of authority". The Appeals Chamber accepts that an order does not necessarily need to be explicit in relation to the consequences it will have. However, the Appeals Chamber is not satisfied that the Trial Chamber established beyond reasonable doubt that Milošević

[358] *Kamuhandu v. Prosecutor*, ICTR-99-54 ("*Kamuhandu*"), Appeals Judgement, 19 September 2005, para.75.
[359] *Prosecutor v Strugar*, IT-01-42 ("*Strugar*"), Trial Judgement, 31 January 2005, para. 333; *see also Limaj* Trial Judgement, para.515.
[360] Judgement, para.1278.
[361] *Id.*, para.1257.
[362] *Id*, para.1267.
[363] *Id.*, para.1264.
[364] [Redacted].
[365] [Redacted].

> instructed his troops to perform a campaign of sniping and shelling of the civilian population in Sarajevo as such.[366]

257. In the instant case, there was no evidence of a "positive act" upon which the Trial Chamber could reasonably rely in reaching its conclusion. Therefore, the Trial Chamber erred in its finding that the Appellant 'ordered' the killing operations.

258. The Trial Chamber has erred in law and abused its discretion in finding that the Appellant ordered and planned the murders of Bosnian Muslim males of Srebrenica.

## ERRORS OF LAW AND FACT IN THE APPLICATION OF ARTICLE 5

### GROUND 24

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FINDING THAT THE APPELLANT, LJUBISA BEARA, SATISFIES THE KNOWLEDGE REQUIREMENT FOR THE COMMISSION OF A CRIME UNDER ARTICLE 5 OF THE STATUTE; IT IGNORED ALL CREDIBLE TESTIMONY AND INFERENCES WHICH CONFLICTED WITH SUCH A FINDING IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND, FURTHER, THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT. THIS CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT LJUBISA BEARA'S RIGHT TO A FAIR TRIAL.

259. The Trial Chamber erred as a matter of law and abused its discretion by reaching the conclusion that "*Beara meets the knowledge requirement for the commission of a crime under Article 5 of the Statute*".[367] This conclusion fails to use *sufficient precision* to address the requirement that an accused should know that his acts form part of a criminal attack as required under Article 5.

260. The contested conclusion was, as follows:

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[366] *Prosecutor v. D. Milošević*, IT-98-29/1 ("*D. Milošević*"), Appeals Judgement, 12 November 2009, para.267 (emphasis added).
[367] Judgement, para.1324.

> As Chief of Security in the VRS Main Staff from 1992, ***Beara*** *had knowledge of the strategic goals* of the RS and VRS's leadership to remove the Bosnian Muslim population from Srebrenica and Žepa. His position required that he had intimate knowledge of Directive 7, Directive 7/1, the *Krivaja-95* Operation, and all orders pursuant to the implementation of Directive 7 that passed to subordinate security organs**.** From this, the Trial Chamber is satisfied beyond reasonable doubt that ***Beara*** *was well aware of the aim of the illegal purpose* of Directive 7, Directive 7/1, as well as Krivaja-95, and of the military action against a civilian population.[368]

261. This conclusion, as reached by the Trial Chamber, does not meet the standard set forth by the Appeals Chamber in *Blaškić* – that *sufficient precision* must be used to address the requirement that an accused know that his acts form part of a criminal attack as required under Article 5[369] This finding must include that the accused not only knew about an illegal attack on a civilian population, but also that his acts formed a part of such attack.[370] It is not sufficient that an accused 'knowingly took the risk of participating in the implementation of the ideology, policy or plan'.[371] Mere negligence will not suffice for a finding of culpable *mens rea*, as it must be closer to a standard of recklessness.[372] Further, the term 'civilian', as it applies to Article 5 crimes, is defined under the laws of armed conflict and excludes combatants or persons *hors de combat*.[373]

262. The evidence relied on by the Trial Chamber does not and cannot support a finding that Beara knew that his acts formed a part of a criminal attack, much less an attack on a civilian population. The Trial Chamber's reliance on such evidence constitutes and abuse of discretion and a miscarriage of justice.

263. In reaching its conclusion, the Trial Chamber relied on only one basis for inferring the Appellant's knowledge - his formal position in the VRS hierarchy.

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[368] *Id.* (emphasis added).
[369] *Prosecutor v. Blaškić*, IT-95-14 ("*Blaškić*"), Appeals Judgement, para 127.
[370] *Id.*, para.124.
[371] *Prosecutor v Šešelj*, IT-03-67 ("*Šešelj*"), Decision on Prosecution's Motion for Leave to File an Amended Indictment, 14 September 2007, para. 32, recalling *Blaškić* Appeals Judgement, para.126.
[372] *Prosecutor v Perišić*, IT-04-81 ("*Perišić")*, Decision on Preliminary Motions, 29 August 2005, para. 22.
[373] *Prosecutor v Mrkšić et al.,* No. IT-95-13/1 ("*Mrkšić et al.*"), Appeals Judgement, 5 May 2009, para. 35.

Specifically, the Trial Chamber found: "*[a]s Chief of Security in the VRS Main Staff from 1992, Beara had knowledge of the strategic goals of the RS and VRS's leadership to remove the Bosnian Muslim population from Srebrenica and Žepa*".[374] It is respectfully submitted that there is no credible evidence – direct or circumstantial – that establishes that the Appellant had any knowledge of these purported "strategic goals".

264. The Trial Chamber, respectfully, erred when it unreasonably concluded that "[h]is position required that he had intimate knowledge of Directive 7". The trial record is void of evidence linking Beara to Directive 7.

265. The Judgement delineates that Directive 7 was issued by Karadžić[375] and forwarded to the corps by the Chief of Staff of the Main Staff pursuant to the decision of the Supreme Commander.[376] The Trial Chamber failed to make any link between the Appellant and Directive 7.

266. Further, the Trial Chamber erroneously relies on the testimony of witness Milovanović, who provided background information on how combat reports were received, processed and shared at Main Staff meetings.[377] This testimony was of a general nature regarding the work and roles of the witness among others.[378] A closer examination of Milovanovic's testimony does nothing to support the erroneous findings of the Trial Chamber regarding Beara's purported knowledge.

267. The Trial Chamber could not have reasonably inferred, from the evidence adduced, that the Appellant had knowledge of an alleged goal of a widespread or systematic attack against a civilian population. It is respectfully submitted that the Trial Chamber's unreasonable inferences constitute an abuse of discretion as it is the only link to a finding of *mens rea* sufficient for Article 5 of the Statute.

[374] Judgement, para.1324.
[375] *Id.*, paras 199-200.
[376] *Id.*
[377] T.12188-12189.
[378] *Id.*

**GROUND 25**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FINDING THAT THE ATTACK WAS WIDESPREAD AND SYSTEMATIC DIRECTED AGAINST A CIVILIAN POPULATION OF SREBRENICA AND ŽEPA AND IGNORED ALL CREDIBLE TESTIMONY AND INFERENCES WHICH CONFLICTED WITH SUCH A FINDING, IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, WHICH CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT LJUBIŠA BEARA'S RIGHT TO A FAIR TRIAL.

268. As noted in the Notice of Appeal, the Defence asserts that the Trial Chamber erred in law and abused its discretion by finding that, for the purposes of a charge of extermination as a crime against humanity against Beara, the "widespread and systematic attack against civilian population" element of crimes against humanity was satisfied in relation to acts focused on by the Trial Chamber. In this respect the Trial Chamber found that:

> "… the large-scale murders of Bosnian Muslim males from Srebrenica amounted to extermination as a crime against humanity punishable under Article 5. These murders were either within the common purpose of the JCE to Murder or were a natural and foreseeable consequence of it. Beara participated in the JCE to Murder and met the knowledge requirement for a crime against humanity."[379]

269. The focus of the inquiry of the Chamber in this respect was thus narrower, only on alleged large scale murders of Bosnian Muslim males, as opposed to incorporating also other actions taken against women, children, the elderly, i.e. against the totality of population of the enclave. In order for actions taken against this group to satisfy the challenged general requirement of crimes against humanity the Chamber had to show that actions taken against the military aged men were part of an alleged bigger widespread and systematic attack against civilians and understood as

[379] Judgement, para.1325.

such.[380] Yet, relevant paragraphs of the Judgement which are cited in support of a finding that the "killings were committed in the context of a widespread and systematic attack against the civilian population"[381] do not at all deal with the issue of the nexus between a general alleged attack on the population of the enclave and actions taken against military aged men,[382] and challenges raised by the Defence in its Final Brief that actions taken against the Muslim male population were taken with an understanding that they were being taken as part of legitimate military activities against potential combatants. That being said, paragraphs of the Judgement following the ones that were cited do touch upon this issue and the Defence will therefore deal with them with an assumption that they created a basis for the conclusions reached by the Trial Chamber.[383]

270. Thus, according to the Trial Chamber's findings that acts committed against men in Potočari should be considered as being part of a widespread and systematic attack on civilians because: a) the remaining male population in Potočari was civilian as members of the ABiH and the vast majority of the able-bodied men were not in Potočari but rather had left in the column heading towards Tuzla; and b) the fact that a selection process based on membership in the ABiH or any army forces and a genuine screening process for war criminals was never conducted.[384] Similarly, the attack on the column of men heading for Tuzla also fell within a context of a wider attack on the civilian population due to the fact that despite the military component within the column all of its members were attacked "indiscriminately", and the close

[380] *Prosecutor v. Kunarac et al.*, IT-96-23 ("*Kunarac et al.*"), Appeals Judgement, 12 June 2002, para.85.
[381] Judgement, para.803; *see generally* paras.802-806.
[382] Judgement, paras.760-761 & n.2903. "The Trial Chamber finds that it has been established beyond reasonable doubt that there was a widespread and systematic attack directed against the Bosnian Muslim civilian populations of Srebrenica and Zepa, commencing with the issuance of Directive 7. This attack had various components, including the strangulation of the enclaves through the restriction of humanitarian supplies, the gradual weakening and disabling of UNPROFOR, and a planned military assault on the enclaves, and culminated in the removal of thousands of people from Srebrenica and Zepa. This attack was widespread because of its large scale and number of victims; and it was systematic because of the organised nature of the actions taken against the victims and the improbability of their random occurrence. The attack in its various components was directed against United Nations protected enclaves, the raison d'etre for which was the establishment of a safe area for civilian residents. There can thus be no doubt that the populations of these enclaves were predominantly and in fact overwhelmingly civilian and the Trial Chamber so finds. While the Trial Chamber has found members of the ABiH were present in the enclaves prior to and during the attack, this does not in any way affect the fundamental civilian status of the enclaves."
[383] Judgement, paras.778-785.
[384] Judgement, para.779.

temporal and geographical link to events in Srebrenica.[385] The Defence challenges the Trial Chamber's conclusion in both instances.

271. Namely, in the Trial Chamber's own finding an alleged widespread and systematic attack on a civilian population in the enclave began with the issuance of Directive 7[386], which spelled out the illegitimate goal of creating unbearable conditions of total insecurity for the enclave residents.[387] However, it was equally established by the Trial Chamber that the said Directive at the same time spelled out legitimate military goals.[388] Thus, it was possible that actions taken vis-a-vis military aged men, both in Potočari and in the column heading for Tuzla, formed a part of the implementation of the legitimate goal of the Directive, as opposed to being the criminal actions taken against civilians. More importantly, persons involved in such actions would have thus acted with an understanding that they were taking actions against combatants pursuant to legitimate goals stated in Directive 7.

272. In relation to actions taken against men in Potočari, evidence was adduced at trial that suggest a contrary conclusion to the one reached by the Trial Chamber. Thus, in the Trial Chamber's own admission:

> "There is evidence before the Trial Chamber that some efforts were made to screen the Bosnian Muslim prisoners: DutchBat members testified that Momir Nikolić, together with Colonel Vuković, did make some effort to check the identities of the detained men at Potočari, and that they did this with a list of alleged war criminals in their possession; Johannes Rutten testified that on 12 July at the White House, the VRS checked the men's fingers to see if they smelled of gunpowder and looked for military clothing or identification papers on them (Johannes Rutten, T.4853–4855, 30 Nov 2006)"[389]

273. Furthermore, in the Chamber's own finding the Appellant ordered such a process sometime on July 12 or 13, in relation to men detained by military police in

[385] *Id.*, paras.782-783.
[386] *Id.*, para.760.
[387] *Id.*, para.199.
[388] *Id.*, para.762.
[389] *Id.*, n.3543.

Bratunac.[390] The Chamber however disregarded this and similar evidence and gave more weight in respect to this issue to, for example, statements made to that effect by Momir Nikolic in his Statement of facts and acceptance of responsibility disregarding the highly contentious character of information provided through this Statement, as shown in other sections of this Appeal. Accordingly, when reaching a conclusion that men were not targeted as a potential military threat, the Chamber not only gave insufficient weight to evidence suggesting the contrary explanation but it also based its finding on evidence whose admissibility and credibility is questionable. The Chamber could not have therefore relied on this factor when finding, beyond reasonable doubt, that actions taken against Muslim males in Potočari were part of a widespread and systematic attack on the civilian population in the enclave.

274. Similarly, The Chamber could not have reached the same conclusion in relation to actions taken against the column of men fleeing for Tuzla. At the outset, the "civilian character" of the column cannot be said to have been proven beyond a reasonable doubt. The Chamber concluded that "there was a large component of civilians amongst those who were captured or surrendered was evident to all."[391] Yet, in its own words, it only found that approximately one third of the column was under armd and that some persons in the column were fully or partially dressed in military clothes.[392] It does not necessarily follow that those unarmed persons and those wearing civilian clothes were in fact civilians or persons *horse de combat.* Moreover, as highlighted by this Chamber in *Mrksic et al.* combatants and persons *horse de combat* are not, as a rule, covered by protection provided through Art.5 of the Statute. [393] Thus, "[t]he population against whom the attack is directed is considered civilian if it is predominantly civilian" and presence of *only a number* of non-civilians within it would not change such a character.[394] A group of people in which one third is known to be armed, with potentially more unarmed members or persons *horse de combat* within it, and one which, as established, was organized and led by formal members of

[390] *Id.*, para.1256.
[391] *Id.*, para.783.
[392] *Id.*, para.270.
[393] *Mrkšić et al.* Appeals Judgement, para.35.
[394] "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." *Prosecutor v. Naletilić et al.*, IT-98-34 ("*Naletilić et al.*"), Appeals Chamber Judgement, 3 May 2006, para.235.

an army division could not satisfy the requirement of being considered "civilian." The Trial Chamber therefore could not have reached such a conclusion based on the evidence before it without erring in law and abusing its discretion to that effect.

275. Furthermore, the Trial Chamber could not have found beyond reasonable doubt that those involved in the attack were not taking actions with an understanding that they were attacking combatants. [395] As highlighted at the outset, not all actions organized pursuant to Directive 7 were illegal as the Directive clearly outlined certain actions recognized as being legitimate combat goals. As the Trial Chamber itself established, the move of the column and the path it took was organized by the ABiH forces which on its face could have led to a logical conclusion that such an act is in fact an attempt of combatants operating in the enclave to hide within or flee the enclave, and the VRS force attacking it would have been seen as a logical military response.[396] Such a conclusion would have been furthermore strengthened by another established fact that members of armed forced were at the front and the rear of the column as it was moving.[397] The Trial Chamber could not have thus concluded that there was no evidence that "members of the Bosnian Serb Forces involved were operating under an assumption that they were taking custody of soldiers only"[398] without failing to give sufficient weight to factors relevant for such a determination.

276. In light of all of the above, namely that: a) not all actions taken pursuant to Directive 7 could have been considered illegal and part of an allegedly proclaimed attack on the civilian population, above all those taken against military aged men in the enclave; b) that evidence in relation to actions taken against Muslim males equally suggests that they were part of military activities against potential combatants thus negating that the only possible explanation would be that they were conducted with an understanding that they formed a part of a larger attack on the Muslim civilian population in the enclave; c) that the totality of evidence presented at trial does not speak in favour of the conclusion that the column of men that was heading for Tuzla was civilian in character, if assessed pursuant to the law on the matter; and d) that the evidence does not support a reasonable conclusion that an attack on the said column

[395] Judgement, para.783.
[396] *Id.*, para.268.
[397] *Id.*, para.271.
[398] *Id.*, para.783.

neither objectively or subjectively (i.e., known to had been) a part of a widespread and systematic attack on the civilian population. Thus, said actions for which Beara was convicted could not have been considered by their "nature or consequences … objectively [form a] part of the attack"[399] against civilians in the enclave and taken with knowledge that all relevant participants formed a part of such an attack.[400] The Trial Chamber therefore erred in law and abused its discretion in finding that actions taken against Muslim men in Potočari and against the column heading for Tuzla formed a part of a widespread and systematic attack on the civilian population in the enclave. By applying the law erroneously and abusing its discretion by reaching conclusions contrary to the relevant evidence, the Trial Chamber's findings led to a miscarriage of justice for the Appellant invalidating the Judgement in this part.

**GROUND 26**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FINDING THAT THE ATTACK ON THE COLUMN OF MEN WHO DEPARTED SREBRENICA EARLIER WAS PART OF THE CONTINUING WIDESPREAD AND SYSTEMATIC ATTACK AGAINST THE CIVILIAN POPULATION AND IGNORED ALL CREDIBLE TESTIMONY AND INFERENCES WHICH CONFLICTED WITH SUCH A FINDING, IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, WHICH CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT LJUBIŠA BEARA'S RIGHT TO A FAIR TRIAL.

277. The arguments in support of Ground 26 are essentially identical to those in support of those found, *infra*, in Ground 25 and, thus, are hereby respectfully incorporated here.

**GROUND 27**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT FOUND APPELLANT, LJUBIŠA BEARA, GUILTY OF EXTERMINATION PURSUANT TO ARTICLE 5 OF THE STATUTE (SPECIFICALLY COUNT 3 OF THE INDICTMENT), WHEN IT MISAPPLIED, MISCONSTRUED AND MISINTERPRETED THE ELEMENT OF *ACTUS REUS*

[399] *Kunarac* Appeals Judgement, para.99.
[400] *Id.*

REQUIRED FOR THE CRIME OF EXTERMINATION BY INCLUDING AS VICTIMS THE PERSONS THAT WERE TAKING ACTIVE PART IN HOSTILITIES OR/AND WERE NOT PART OF A WIDESPREAD AND SYSTEMATIC ATTACK ON A CIVILIAN POPULATION, IN DIRECT VIOLATION OF THE FUNDAMENTAL PRINCIPLES OF NON-RETROACTIVE APPLICATION OF SUBSTANTIVE CRIMINAL LAW NULLUM CRIMEN SINE LEGE.

278. In line with several of its previously presented challenges to the Trial Chamber's findings, namely grounds 24, 25 and 26 of the Notice of Appeal, the Defence also submits that the Trial Chamber erred in law and abused its discretion in finding that Beara committed extermination by finding that actions taken against perceived armed forces were crime against humanity.[401] Extermination as a crime against humanity requires mass killings or creation of conditions of life that lead to the mass killing of others, through … act(s) or omission(s).[402] As a crime against humanity, extermination also requires that persons subject to such acts are civilians or considered civilian due to their predominantly civilian composition.[403] As highlighted previously, such Article 5 acts have to, by their nature or consequence, form a part of an overall attack against civilians.[404]

279. As outlined in Ground 25, the evidence before the Trial Chamber did not establish, beyond reasonable doubt, that actions taken against men in Potočari and namely those within the column of men heading for Tuzla were against civilians as part of a widespread or systematic attack on the civilian population in the enclave. On the contrary, the evidence presented at trial equally suggests that such actions could have been taken in pursuit of legitimate military goals as stated in Directive 7. According to the Trial Chamber's own findings, the enclave was never fully demilitarized as some of the group's residents were armed combatants.[405] These armed combatants and the continued fighting, in violation of an agreed ceasefire, suggest that the VRS had legitimate military cause in line with the military goals of Directive 7 to respond to this situation. Evidence presented at trial suggests that killings of men in Potočari and the attack on the column heading for Tuzla may have

[401] Judgement, paras.354-355, 378-382, 410-414, 424-445, 607-664, 793-796, 802-806 & 1325.
[402] *Vasiljević* Trial Judgement, para 229.
[403] *Naletilić et al.* Appeals Judgement, para.235.
[404] *Kunarac* Appeals Judgement, para.99.
[405] Judgement, para.98.

likely been a part of such combat activities. It is respectfully submitted that, contrary to the Trial Chamber's findings, the evidence does not unequivocally show that the men who died in Potočari were victims of indiscriminate killings, but, perhaps, a perceived military threat. Witnesses have testified to the fact that in Potočari, VRS forces were screening individually for combatants and war criminals. Somewhere between 12 and 13 July, the Appellant himself requested that the men in the custody of the military police be screened for the purposes of determining whether they were combatants or potential war criminals.[406]

280. The Defence has furthermore shown that the column of men heading for Tuzla could not have been found to have had a civilian character based on the evidence and the relevant law. Furthermore, it was shown that the VRS did not perceive the column of men as having a civilian character. This column was comprised of armed men, members of official Muslim armed forces and, potentially, more unarmed combatants; it was organized and led by the 28th Division of the ABiH army and was protected from the rear by the ABiH Mountain Battalion.[407] The Prosecution's military expert, Richard Butler, conceded that the entire Muslim column, regardless of the civilian presence, was a legitimate military target; this was also acknowledged by the Prosecutor himself.[408] These admissions strongly support an inference that the VRS forces saw this column as a military maneuver and, thus, a cause for a military response. This conclusion is also supported by evidence.[409] Moreover, as adduced at trial, fractions of the column were directly engaged in fighting with VRS forces inflicting casualties to the VRS units.[410] The same evidence shows that many column members lost their lives in combat action with the VRS forces.[411] All of this evidence weighs strongly in favor of the VRS's presumption that this column was a legitimate military maneuver requiring a military response. Further, independent documentary evidence from the United Nations and substantiating testimony confirm that approximately 3,000 Bosnian Muslim male combatants were killed during their trek

[406] Judgement, para.1256.
[407] *Id.*, paras.270-271.
[408] T.20245 & T.3382.
[409] *See* P334.
[410] P1248 & P1212.
[411] *Id.*

towards Tuzla as a result of legitimate combat engagements, land mines and self-inflicted wounds, suicide.[412]

281. It is respectfully submitted that the evidence during trial does not support a finding that the only reasonable inference is that the VRS actions formed a part of an alleged attack on a civilian population in the enclave. As these attacks qualify as a confrontation and not as a 'widespread or systematic attack against a civilian population', the deaths or, respectfully, killings of men in Potočari and the attack on the Tuzla column could not qualify as acts of extermination pursuant to Article 5 of the Statute. By reaching a contrary conclusion, it is respectfully submitted that the Trial Chamber erred in law and impermissibly defined extermination and, thus, abused its discretion by failing to give sufficient or any weight to factors pointing to a contrary conclusion. As with all other grounds challenging the Trial Chamber's Article 5 findings, it is respectfully submitted that the Trial Chamber has invalidated the Judgement by acting in violation of the *nullum crimen sine lege* principle thereby causing prejudice to the Appellant.

**GROUND 28**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT FOUND APPELLANT, LJUBIŠA BEARA, GUILTY OF EXTERMINATION PURSUANT TO ARTICLE 5 OF THE STATUTE (SPECIFICALLY COUNT 3 OF THE INDICTMENT) WHEN IT FAILED TO CONSIDER THE TOTALITY OF THE EVIDENCE OFFERED ON THE ISSUE OF APPELLANT LJUBIŠA BEARA'S *MENS REA* WHICH IS REQUIRED FOR THE CRIME OF EXTERMINATION IN VIOLATION OF HIS RIGHT TO A FAIR TRIAL.

282. In addition Ground 27, it is respectfully submitted that the Trial Chamber erred in law and abused its discretion in finding that the Appellant met the required *mens rea* for extermination.[413] In order for Beara to meet the *mens rea* requirement, the evidence presented at trial must have shown, beyond reasonable doubt, that he: a) intended mass killings or the creation of conditions of life that lead to the mass killing

[412] 1D347.
[413] Judgement, paras.1325 & 2105; *see also* paras.1299-1302.

through act(s) or omission(s);[414] and b) knew about the widespread or systematic attack directed against a civilian population and was aware that his acts formed a part of that attack.[415] The issue of whether Beara possessed the requisite knowledge for Article 5 conviction is discussed further in Ground 24 of this Appeal. The Defence reiterates that the Appellant could not have been found to possess knowledge of an attack on civilians in the enclave nor did he know that any of his acts were a part of such an attack, contrary to the Trial Chamber's finding. The Defence will further show how Beara did not have the required intent for these crimes.

283. According to the Trial Chamber, Beara, as an alleged member of the JCE to murder, possessed the required intent for a finding of liability pursuant to JCE I and/or III.[416] This finding requires that the Appellant acted at all relevant times with the intent to kill or to create conditions of life that lead to mass killings[417] or with, at least, an awareness of the natural and foreseeable consequence of carrying out crimes common to the JCE to murder.[418]

284. It is undisputed that the Appellant did not commit any murders himself. The Trial Chamber found that Beara extensively participated in the planning and implementation of the killing operations[419] and that by his "actions and words" it was reasonable to conclude that he possessed an intent to murder.[420] The Defence respectfully submits that the evidence presented to the Trial Chamber does not support such a finding.

285. Namely, and as discussed in greater detail in Ground 19 of this Brief, the Appellant's presence and role in the planning of killing operations cannot be a reasonable conclusion based on the totality of evidence. There is no evidence of the Appellant's presence at or role in any events prior to 13 July.[421] His alleged involvement was inferred by the Trial Chamber solely based on his formal position in

[414] Prosecutor v. *Kayishema et al.,* ICTR-95-1 ("*Kayishema et al.*"), Trial Judgement, 21 May 1999, para.144; *Brđanin*, Trial Judgement, 1 September 2004, para.395.
[415] *Blaškić* Appeals Judgement, para 124.
[416] Judgement, para.1325.
[417] *Stakić*, Trial Judgement, 31 July 2003, para.641.
[418] *Blaškić* Appeals Judgement, para.33.
[419] Judgement, paras.1299-1300.
[420] *Id.*, para.1301.
[421] Judgement, para.1299.

the VRS hierarchy and the acts and words of persons officially subordinated to him.[422] These Trial Chamber inferences, it is respectfully submitted, are tenuous in absence of any other evidence to that effect and highly prejudicial to the Appellant. Likewise, the Trial Chamber found Beara's presence and role at the meetings of 13-14 July based on highly contentious testimony of witnesses such as Momir Nikolić, Deronjić, co-Appellant Borovčanin and Milorad Birčaković.[423] This is outlined further in Ground 6 of this Brief. As the Trial Chamber concluded that this evidence is "not consistent in every aspect and there are some discrepancies as to what was discussed and who participated in the meetings"[424] it is respectfully submitted that it could not have concluded as it did. Thus, it could not have relied on such evidence to infer, beyond reasonable doubt, the Appellant's state of mind.

286. Evidence of concrete actions taken by Beara in pursuit of an alleged plan to murder is equally problematic. Again, as shown in Ground 23 of this Brief, direct evidence of orders made by the Appellant do not involve the killing operation.[425] The intercept conversation with General Krstić does not, by its plain language or context, provide support for a conclusion of any order being issued by the Appellant. As noted in *Brđanin,* words of encouragement are not enough for a conviction unless they are "specific enough to constitute instructions".[426]

287. Testimony was presented to the Trial Chamber which shows that Beara was not present at meetings when concrete organizational matters were discussed.[427] Beara's presence at various execution locations[428], his statements of intent[429] and his intended actions[430] are all based on unreliable testimony. Any reason for use of logistical equipment was based on speculation as opposed to direct evidence of why he submitted a request.[431] As respectfully submitted in Grounds 5 and 6 of this Brief, the Trial Chamber relied on some intercept conversations as showing the culpability

[422] *Id.*
[423] *Id.*, paras.1264-1271.
[424] *Id.*, n.4167.
[425] *See*, *infra*, Ground 23.
[426] *Brđanin* Trial Chamber Judgement, para.468.
[427] Judgement, para.1274.
[428] *See, infra,* Ground 6; Judgement, para.1275 (Testimony of Deronjic); para.1272 (Testimony of Bircakovic).
[429] Judgement, para.1264.
[430] *Id.*, para 1279.
[431] *Id.*, para.1278.

of the Appellant[432], while entirely dismissing others containing exculpatory evidence.[433] Similarly, it is respectfully submitted that the Trial Chamber accorded little to no weight to other exculpatory evidence that show Beara's true intent, such as Beara's requests to screen detained men for war criminals,[434] Beara's engagement in efforts to organize transportation of the men out of the enclave[435] and Beara's reasons for the detention of men (exchange, as opposed to execution).[436]

288. Thus, it is respectfully submitted that the Trial Chamber abused its discretion to the prejudice of the Appellant by making inferences from unreliable evidence and erroneously finding that Beara possessed the *mens rea* of extermination under Article 5 of the Statute.

**GROUND 29**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT FOUND THE APPELLANT, LJUBIŠA BEARA, GUILTY OF PERSECUTIONS AND THAT HE ACTED WITH DISCRIMINATORY INTENT PURSUANT TO ARTICLE 5 OF THE STATUTE, (SPECIFICALLY COUNT 6 OF THE INDICTMENT), WHEN IT FAILED TO CONSIDER THE TOTALITY OF THE EVIDENCE ON THE ISSUE OF APPELLANT LJUBIŠA BEARA'S *MENS REA* IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, WHICH CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT LJUBIŠA BEARA'S RIGHT TO A FAIR TRIAL.

289. The Defence also challenges the Chamber's finding of guilt of Beara for persecution under Article 5 of the Statute, namely the finding that the Appellant possessed the special discriminatory intent required for the crime of persecution. Persecution requires evidence to show specific intent to discriminate on political, racial or religious grounds.[437] And the intent to discriminate must be related to the

[432] *Id.*, paras.1257 & 1281.
[433] *Id.*, paras.1258-1259.
[434] *Id.*, para.1256.
[435] *Id.*, para.1262.
[436] *Id.*, para.1291.
[437] *Kvočka* Appeals Judgement, para.460.

particular act(s) charged as persecutions.[438] According to this Chamber's ruling in *Kvočka et al*. the evidence will have to show that an Appellant charged under the first mode of JCE liability, as Beara, shares the discriminatory intent of the joint criminal enterprise.[439] Failing that, an Appellant could only be held liable as an aider and abettor if he/she knowingly makes a substantial contribution to the crime.[440] However, for finding that an Appellant possessed discriminatory intent it has to be established that an Appellant consciously intended to discriminate, not that he was "merely aware that he is in fact acting in a discriminatory way".[441] Existence of such intent can only be inferred from **"**objective facts and the general conduct of an Appellant seen in its entirety. Only on rare occasions it will be possible to establish such an intent on documents laying down a perpetrator's own *mens rea*".[442]

290. The Defence submits that the Chamber could not have found, as it did, that Ljubiša Beara possessed required discriminatory intent for persecution based on evidence before it without erring in the application of above cited standards and abusing its discretion to the detriment of the Appellant. According to the Chamber's finding Beara was a member of the JCE to murder.[443] In order for the Appellant to be found guilty of persecution the evidence had to have shown that he acted with discriminatory intent. Yet the Chamber bases its finding of such intent in relation to Ljubiša Beara on the following facts: a) knowledge of the plan to murder members of a single ethnic group; b) his willing participation in that plan, and c) to some limited extent his use of pejorative language about Bosnian Muslims.[444] It moreover did so despite admitting that: a) the derogatory language mentioned was "mildly derogatory" and although "inappropriate" not an "unusual" occurrence, and b) it did hear from witnesses who testified to the fact that the Appellant was not intolerant of other ethnic groups.[445] However, as shown above, to be found guilty of persecution the Chamber had to have established that Beara shared the aim of the discriminatory policy[446] and

[438] *Blagojević et al.*, Trial Judgement, 17 January 2005, para.584.
[439] *Kvočka et al.*, Trial Judgement, 2 November 2001, para.110.
[440] *Id.*
[441] *Vasiljević* Trial Judgement, para.248.
[442] *Prosecutor v. Kordić et al.*, IT-95-14/2 ("*Kordić et al.*"), Appeals Judgement, para.715.
[443] Judgement, para.1330.
[444] *Id.*, para.1331.
[445] *Id.*
[446] *Kordić et al.* Trial Judgement, 26 February 2001, para.220.

had consciously intended to discriminate.[447] Knowledge of such a plan and substantial contribution to its implementation would have made him liable only as an aider and abettor, not as the principal perpetrator. And as shown in the section of this Appeal dealing with genocidal intent, planning and ordering and knowledge requirement of crimes against humanity, evidence in this case does not support a conclusion that Ljubiša Beara had such knowledge. It does not lend support to a finding, beyond reasonable doubt, that the Appellant was privy nor had in any way participated in the formulation of an illegal policy and operational plans for murdering Muslim men due to their ethnical affiliation or that he at any later stage became aware of such a plan or part of it through his actions. Furthermore, limited use of pejorative language could not have been a factor weighing in favor of a finding of discriminatory intent due to the Chamber's own conclusions pertaining to the language used.[448] It moreover could not have been given that much weight in face of evidence openly speaking to the contrary, i.e., Beara's lack of prejudice toward persons of other ethnicity. Namely, Chamber completely disregarded evidence to the contrary of Muslim witness 2D PW19.[449] Overall, it would be difficult to argue that based on the evidence before it the Chamber had objective facts to rely on from which the Appellant's discriminatory intent could have been inferred. Similarly, as discussed elsewhere in this Appeal,[450] contentious character of evidence used by the Trial Chamber to establish the Appellant's actions and state of mind behind them does not lend support to an only reasonable conclusion that when acting at relevant times Ljubiša Beara conscientiously intended to discriminate, especially in light of evidence speaking to the contrary.

291. The Defence therefore respectfully submits that the Trial Chamber erred in law and abused its discretion in finding that Ljubiša Beara, as an alleged member of JCE to Murder, shared the discriminatory intent of other alleged members of the enterprise and that he acted with such intent. It reached a conclusion on the existence of such intent of a perpetrator by relying on factors relevant for aiding and abetting. It moreover relied on evidence which does not support an only reasonable inference to

[447] *Vasiljević* Trial Judgement, para.248.
[448] Judgement, para.1331: The Chamber characterised the language used as "mildly derogatory" and not "unusual" at the time.
[449] T.25634 & T.25640.
[450] *See, infra,* Grounds 5 & 6.

that effect. It also disregarded or did not give sufficient weight to evidence showing that Ljubiša Beara never possessed such intent or that he even possessed knowledge that persons were being singled out for murder due to membership in a single ethnical group and had contributed to such a plan. The Chamber's finding therefore led to miscarriage of justice for the Appellant and had invalidated the Judgement in this part.

**GROUND 30**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FINDING THAT IT WAS FORESEEABLE TO THE APPELLANT, LJUBISA BEARA, THAT THE OPPORTUNISTIC KILLINGS WOULD BE CARRIED OUT WITH PERSECUTORY INTENT AND MISAPPLIED THE ELEMENT OF *MENS REA* REQUIRED FOR THE CRIME OF PERSECUTION BY ERRONEOUSLY FINDING THAT THE SPECIFIC INTENT CRIME CAN BE COMMITTED THROUGH THE THIRD CATEGORY OF JCE IN DIRECT VIOLATION OF THE FUNDAMENTAL PRINCIPLES OF NON-RETROACTIVE APPLICATION OF SUBSTANTIVE CRIMINAL LAW NULLUM CRIMEN SINE LEGE.

292. The Trial Chamber's application of JCE III is erroneous in a manner that renders the Judgement invalid. The Appellant in the present case was convicted by the Trial Chamber as a principal perpetrator for the crime of Article 5 persecutions through "opportunistic" killings. This finding of commission through the third form of JCE is impermissible as persecution requires an element of special intent that is not required for "opportunistic" crimes or those crimes of foreseeability falling under JCE III. The Trial Chamber's conclusion was erroneous and invalidates its finding because if the correct legal standard was applied, the Appellant could not be found guilty for persecution through "opportunistic" killings.

293. As previously argued before this Tribunal, but without final decision on the substantive issue[451], neither customary law nor the Statute of the ICTY permits an accused to be convicted for a special intent crime as a principal perpetrator through the third mode of JCE criminal liability. The Defense incorporates the prior arguments of the *Karadžić* Defense[452] and asserts that the findings of the Trial

[451] *Karadžić*, Decision on Radovan Karadzic's Motions Challenging Jurisdiction (Omission Liability, JCE-III – Special Intent Crimes, Superior Responsibility), 25 June 2009, paras 33-37.
[452] *Karadžić*, Preliminary Motion to Dismiss JCE III – Special-Intent Crimes, 27 March 2009.

Chamber are impermissible as determining that specific intent crimes could be committed through JCE III.

294. Joint criminal enterprise, as a mode of liability[453], has varying *mens rea* requirements based on which version of JCE is applicable. For a finding of JCE III, a participant must participate in and further the criminal activity or the criminal purpose of a group; however, the intent requirement is only that "(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*."[454] The jurisprudence extends this liability to "opportunistic" crimes if they were a natural and foreseeable consequence, however, "to hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan."[455] "In general, in the case of a third category joint criminal enterprise, the crimes must be committed by members of the joint criminal enterprise."[456]

295. Jurisprudence of the ICTY, however, shows that the matter of specific intent for non-specific actors and crimes has created diverging viewpoints. While the *Tadić* Judgement established the three forms of JCE, it was silent on the specific issue of JCE III in relation to specific intent crimes.[457] Sometime later, the *Stakić* Trial Chamber rejected such compatibility, holding that "the application of a mode of liability cannot replace a core element of a crime". The *Stakić* Trial Chamber went on to find that:

> Conflating the third variant of joint criminal enterprise and the crime of genocide would result in the *dolus specialis* being so watered down that it is extinguished. Thus, the Trial Chamber finds that in order to "commit" genocide, the elements of that crime, including the *dolus specialis* must be met. The notions of "escalation" to genocide, or genocide as a "natural and foreseeable consequence" of an enterprise not

[453] *Prosecutor v. Milutinović et al*., IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Regarding Application of Joint Criminal Enterprise, 21 May 2003, para.20.
[454] *Prosecutor v Krnojelac,* IT-97-25 ("*Krnojelac*"), Appeals Judgement, 17 September 2003, para.32.
[455] *Prosecutor v. Limaj et al.*, IT-03-66-A, Appeals Judgement, 27 September 2007, para.120 (recalling *Prosecutor* v. *Brđanin*, IT-99-36, Appeals Judgement, 3 April 2007, para.413).
[456] *Id.,* para. 119.
[457] *Prosecutor v. Tadić*, IT-94-01 ("*Tadić*"), Appeals Judgement, *see esp.* paras 195-206.

> aimed specifically at genocide are not compatible with the definition of genocide under Article 4(3)(a).[458]

296. This analysis of the *Stakić* Trial Chamber was emphasized by the Trial Chamber in *Brđanin* in finding this mode of liability inapplicable to the specific intent crime of genocide and thus dropped such a charge based on the ICTY Rule 98*bis* hearing.[459] However, this Decision was struck down on Interlocutory Appeal and the count was reinstated.[460]

297. The reversal of the Trial Chamber's Decision in *Brđanin* was not a unanimous decision. Namely, the Honorable Judge Shahabuddeen dissented from this finding explaining that the third category of JCE cannot vary the elements of the crime.[461] As explained by the Honorable Judge Shahabuddeen:

> An accused convicted of a crime under the third category of joint criminal enterprise need not be shown to have intended to commit the crime or even to have known with certainty that the crime was to be committed. Rather, it is sufficient that that accused entered into a joint criminal enterprise to commit a different crime with the awareness that the commission of that agreed upon crime made it reasonably foreseeable to him that the crime charged would be committed by other members of the joint criminal enterprise, and it was committed. That way of putting it suggests that a case brought under the third joint criminal enterprise category of *Tadić* may be a case in which intent is not shown and that nevertheless a conviction could be made. I am uneasy about that possibility.[462]

298. At Trial Judgement, Brđanin was acquitted of these reinstated charges[463], however, the Trial Chamber alluded to the fact that the specific intent of the subordinates was sufficient to allow Article 7(1) responsibility of the superiors.[464] The *Stakić* Appeals Chamber later recognized the *Brđanin* Decision in this respect, though was not itself faced with the issue.[465] It should be noted that, following the *Brđanin* Interlocutory Decision, the Appeals Chamber in *Krstić* found that awareness

[458] *Prosecutor* v. *Stakić*, IT-97-24-T, Trial Judgement, 31 July 2003, para. 530.
[459] *Brđanin*, Decision on Motion for Acquittal Pursuant to Rule 98*bis*, 28 November 2003, para. 56.
[460] *Brđanin*, Decision on Interlocutory Appeal, 19 March 2004, para.7.
[461] *Id.*, Dissenting Opinion of Judge Shahabuddeen, para.4.
[462] *Id.*, para.1.
[463] *Brđanin,* Trial Judgement, 1 September 2004, para.709.
[464] *Id.*, para.721/731.
[465] *Stakić* Appeal Judgement, para.38.

of a genocidal intent of others does not itself extend that special intent to an accused.[466]

299. In addition, other international courts have rejected the idea of a specific intent crime being committed through a JCE III mode of commission; moreover, they have either severely limited or entirely abolished the application of JCE III. While the *Tadić* Appeals Judgement cited Article 25(3)(d) of the International Criminal Court's Rome Statute as a support for the existence of the notion "common plan", the Rome Statute explicitly requires intent of the actor, namely "*[s]uch contribution shall be intentional…*".[467] The Prosecution of the ICC has recognized the specificity of the Rome Statute and how it "deliberately avoids the broader definitions found in, for example, Article 7(1) of the ICTY Statute."[468] In the case of *Lubanga*, the ICC has adopted a concept of co-perpetration which, unlike JCE, is based on the concept of control over the crime.[469] With regard to a JCE III mode of liability for specific intent crimes, the ICC has unequivocally rejected such compatibility, stating:

> The Chamber considers that co-perpetration based on joint control over the crime requires above all that the suspect fulfill the subjective elements of the crime with which he or she is charged, including any requisite *dolus specialis* or ulterior intent for the type of crime involved.[470]

300. More recently, the Extraordinary Chambers in the Courts of Cambodia have also abolished any possibility of this form of liability in that it has found that the third variant of JCE was not founded in customary international law as determined by the *Tadić* Chambers.[471] The ECCC, therefore, refuses to apply JCE III entirely.[472]

301. Likewise, scholars seem to agree that special intent crimes based on JCE III would be ill-founded. For example, former Appeals Chamber Judge Antonio Cassese

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[466] *Prosecutor v. Krstić*, IT-98-33-A, Appeals Judgement, para.134.
[467] *Tadić* Appeals Judgement, para.222-223.
[468] *Prosecutor v. Thomas Lubanga Dyilo,* ICC-01/04-01/06, Pre-Trial Decision on the Confirmation of Charges, 29 January 2007, para.323.
[469] *Id.*, para.337-340; *see also*, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Pre-Trial Decision on the confirmation of Charges, 30 September 2008, paras 466-486; *Prosecutor v. Jean Pierre Bemba Gombo*, ICC-01/05-01/08, Pre-Trial Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paras 346-351.
[470] *Lubanga*, Decision on the Confirmation of Charges, para.349.
[471] ECCC, Case File No.: 002/19-09-2007-ECCC/OCIJ, Pre-Trial Chamber, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, paras 77 and 83.
[472] *Id.*

notes the "logical impossibility" of special intent crime throughout JCE III: "one may not be held responsible for committing a crime that requires special intent (in addition to the intent needed for the underlying crime) unless that special intent can be proved, whatever mode of responsibility for the commission of crimes is relied upon... ".[473] Essentially, if the specific intent is found, the person must be found guilty under a JCE I or II.[474] This is substantiated by case law that has shown specific intent crimes – such as genocide – can be found under a JCE I.[475] However, as JCE III does not require a special intent, there can be no finding of persecution pursuant to that mode of liability; thus, all elements have not been met and, therefore, a finding of guilt can not stand.

302. The Trial Judgement's finding on this issue is exactly that "uneasy possibility" to which the Honorable Judge Shahabuddeen referred. The Trial Chamber has applied an impossible legal standard – a special persecutory intent JCE III foreseeability. The intent to participate in a JCE and the specific discriminatory intent of persecution are not one and the same; furthermore, the dubious nature of JCE III itself requires that its boundaries not be stretched to further limits. As these findings of the Trial Chamber do not outline how a *dolus eventualis* can suffice for the required *dolus specialis*, this finding is invalid and must be reversed.

## ERRORS OF LAW AND FACT IN THE APPLICATION OF ARTICLE 3

### GROUND 31

**THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FINDING THE APPELLANT LJUBIŠA BEARA GUILTY OF MURDER PURSUANT TO ARTICLE 3, SPECIFICALLY COUNT 5 OF THE INDICTMENT WHEN IT MISAPPLIED THE DEFINITION OF MURDER TO INCLUDE A DISTINCTLY NEW AND BROADER DEFINITION OF MURDER NOT CONTEMPLATED BY THE STATUTE OR DECISIONAL AUTHORITY OF THE ICTY INCLUDING AS VICTIMS THE PERSONS THAT WERE TAKING ACTIVE PART IN HOSTILITIES IN DIRECT**

[473] *See* Antonio Cassese, "The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise", 5 JICJ 109, 2007, p.121.
[474] *Id.*
[475] *See Prosecutor v. Rwamakuba*, ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004.

VIOLATION OF THE FUNDAMENTAL PRINCIPLE OF NON-RETROACTIVE APPLICATION OF SUBSTANTIVE CRIMINAL LAW NULLUM CRIMEN SINE LEGE.

303. In *Kvočka et al*. this Chamber defined that a murder conviction under Article 3 of the Statute requires that the following factors are proven, beyond reasonable doubt, by the Prosecution:

> 1) the death of a victim taking no active part in the hostilities;
> 2) the death was the result of an act or omission of the Appellant or of one or more persons
> for whom the Appellant is criminally responsible;
> 3) the intent of the Appellant or of the person or persons for whom he is criminally responsible:
> a. to kill the victim; or
> b. to wilfully cause serious bodily harm which the perpetrator should reasonably have known might lead to death.[476]

304. Accordingly, one of the crucial elements for a murder conviction is that a victim was a person not taking active part in the hostilities at the time of his/her death.[477] This implies that the Prosecution must show that the perpetrator was aware or should have been aware of this status of the victim.[478] According to the analysis on the protection provided to civilians by Additional Protocol I to the Geneva Conventions in *Galić*:

> "In case of doubt as to the status of a person, that person shall be considered to be a civilian. However, in such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant."[479]

305. Such an assessment would have to be made on a case-by-case basis[480] based on factors such as victim's activity, whether or not he/she was carrying weapons, clothing, age and gender of the victim(s).[481] Membership in armed forces is seen as a "strong indicator" that a victim is directly participating in the hostilities, but is not "an indicator which in and of itself is sufficient to establish this".[482]

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[476] *Kvočka* Appeal Judgement, para. 261
[477] *See Kordić et al.*, Appeal Chamber Judgement, para.37; *Prosecutor v. Lukić et al.*, IT-98-32/1, Trial Judgement, 20 July 2009, para. 903.
[478] *Prosecutor v. Halilović*, IT-01-48 ("*Halilović*"), Trial Judgement, 16 November 2005, para.36.
[479] *Galić* Trial Chamber Judgement, 5 December 2003, para.55.
[480] *Halilović* Trial Judgement, para.34.
[481] *Id.*
[482] *Id.*

306. Ljubiša Beara has been found guilty under Article 5 of the Statute for murder of Bosnian Muslim men in Potočari and members of the column of men retreating for Tuzla.[483] In the Trial Chamber's opinion the Appellant knew that the victims were taking no active part in the hostilities when the murders were committed.[484] However, as was discussed in more detail in the section of this Appeal dealing with the attack on the Bosnian Muslim males being part of a widespread or systematic attack on a civilian population, evidence in this case does not provide for such an inference as the only reasonable one for each incident covered by the Chamber, and particularly in relation to the column of men heading for Tuzla. In the course of the trial it has been established that the enclave was never fully demilitarized and that armed conflict between Serb and Bosnian Muslim forces resumed shortly before the events of July 1995.[485] It was thus reasonable to presume that army forces and volunteer combatants were hiding within the enclave amongst civilians and that future actions should be taken pursuant to the legitimate military goal of Directive 7, i.e. "carrying out combat operations to inflict on the enemy 'as many losses as possible both in personnel and equipment'".[486] Specifically, for example in relation to the column of men heading for Tuzla - as stated by the Chamber itself, active army forces were very much present in the column, both heading it and keeping its back, and had even took lead in organizing the column and determined its route.[487] The column itself was only comprised of men, some were carrying weapons ranging from hunting rifles to semi automatic and automatic firearms, and some were dressed fully or partially in army clothes.[488] Testimonies of several witnesses show that even civilian clothing could not have been a relevant sign for recognizing civilians as opposed to combatants as due to various factors such as lack of camouflage uniforms.[489] Against such a backdrop, it would not have been reasonable to conclude that persons in the column being attacked were in fact not combatants. In light of the foregoing the attack on this column could not have been qualified as murder under Art. 5 of the Statute as it could not have been concluded, beyond reasonable doubt, that victims of that attack were person not taking active part in the hostilities.

[483] Judgement, para.793.
[484] *Id.*, para.1327.
[485] *Id.*, paras.96-101.
[486] *Id.*, para.199.
[487] *Id.*, paras.268 & 271.
[488] Judgement, para.270.
[489] T.1094 (Transcript of Testimony of Mevludin Orić) & T.7140 (Transcript of Testimony of PW156).

307. Similarly, the evidence before the Chamber did not provide a basis for an only reasonable conclusion that victims in each instance listed by the Chamber[490] were in fact not taking active part in the hostilities at the time of their death or that their alleged attackers could have in each instance reasonably concluded that they were not combatants. As noted above, combatants were present in the enclave, hiding among civilians and were more often than not wearing civilian clothes. Evidence has been presented at trial that VRS forces and the Appellant himself made attempts to separate combatants and known war criminals from the rest of the population,[491] but given the circumstances this might not have been an easy task at any given time. Testimony of forensic experts called both by the Prosecution and the Defence moreover suggests that it cannot be concluded, beyond reasonable doubt, that all victims whose bodies were dug up were in fact civilians or that they had not taken part in the hostilities at the time of their death.[492] The Trial Chamber could therefore not have concluded, beyond reasonable doubt, that persons listed as being killed were victims of murder under Article 5 of the Statute, as opposed to persons targeted due to their involvement in combat activities.

308. In conclusion, the Trial Chamber erred in law and abused its discretion in finding, beyond reasonable doubt, that all alleged victims of killing operations were in fact victims in the sense of murder as a crime against humanity under Art.5 of the Statute by disregarding or not giving enough weight to evidence to the contrary and thereby extending the application of Article 5 of the Statute to situations not covered by it. It thereby prejudiced the Appellant and invalidated the Judgement in relevant parts.

**GROUND 32**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT FOUND APPELLANT, LJUBIŠA BEARA GUILTY OF MURDER PURSUANT TO ARTICLE 3 OF THE STATUTE (SPECIFICALLY COUNT 5 OF THE INDICTMENT) WHEN IT FAILED TO CONSIDER THE TOTALITY OF THE EVIDENCE ON THE ISSUE OF APPELLANT. LJUBIŠA

[490] Judgement, para.794.
[491] Judgement, para.1256 & n.3543.
[492] Beara Final Brief, paras.510-639.

BEARA'S MENS REA IN VIOLATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE, THE PRINCIPLE OF BURDEN OF PROOF "BEYOND A REASONABLE DOUBT" AND FURTHER THE PRINCIPLE THAT ALL INFERENCES SHOULD BE MADE IN FAVOR OF APPELLANT, WHICH CONSTITUTED A MISCARRIAGE OF JUSTICE, THEREBY VIOLATING APPELLANT LJUBIŠA BEARA'S RIGHT TO A FAIR TRIAL.

309. Beara's intent to murder was discussed previously in grounds relating to the genocide intent and such arguments are fully incorporated herein.

## ERRORS OF LAW AND FACT BY THE TRIAL CHAMBER ON THE ISSUE OF SENTENCING

**GROUND 33**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW IN IMPOSING A LIFE SENTENCE ON APPELLANT LJUBIŠA BEARA BY FAILING TO CONSIDER THE TOTALITY OF THE EVIDENCE, THE LACK OF CREDIBLE EVIDENCE ADDUCED AGAINST APPELLANT LJUBISA BEARA AND THE LACK OF PURPORTED INVOLVEMENT BY APPELLANT, LJUBISA BEARA.

310. With respect to sentencing, the Trial Chamber even though it has considerable discretion, must not commit a discernible error.[493] The Chamber must not venture outside its discretionary framework in imposing the sentence.[494] It is submitted that by imposing life sentence on Ljubisa Beara, the Trial Chamber committed a number of discernible errors, argued below, by which it ventured outside its discretionary framework which justifies the intervention of the Appeals Chamber.

311. The Trial Chamber first erred in defining Beara's nature and extent of involvement, when it found that the Appellant had a personal view of the staggering number of victims destined for execution based on his purported walk through Bratunac on the night of 13 July, his purported visits to the various execution sights and the extensive logistical challenges he faced.[495] Such conclusions as previously

[493] *Nikolić* Appeal Judgement, para.9; *Babić* Appeal Judgement, para.7.
[494] *Jokić*, Judgement on Sentencing Appeal, 30 August 2005, para.8; *Nikolić*, Judgement on Sentencing Appeal, 8 March 2006, para.8; *Čelebici* Appeal Judgement, para.725.
[495] Trial Chamber Judgement, para.2164;

discussed were based on unreliable and untrustworthy evidence, and would not be made by any reasonable Trial Chamber.

312. It was discussed previously that the Appellant purported walk through Bratunac on the night of 13 July had a completely different purpose then the one erroneously found by the Chamber.[496] As it was shown the Appellant clearly stated to Čelanović that according to what he knows, prisoners should be transferred in the morning to Kladanj.[497] The Chamber further disregarded the part of Čelanović's testimony when he stated that Beara did not make any derogatory remarks about Bosnian Muslims.[498] The Trial Chamber thus made a discernible error when it took only one aspect of Celanovic's testimony to support its conclusion regarding the extent of the Appellants participation in JCE to murder.

313. Further, in relation to the conclusion that Beara visited various execution sites and faced extensive logistical challenges it was also shown that such conclusions are based on dubious testimony and unreliable intercept evidence.[499] Even if one accepts that Beara was on the cross road close to the Petkovci School, no evidence was adduced during the trial that Beara went into the School or helped in the crimes perpetrated in the School.

314. Similarly, regarding the logistical challenges it was not proven beyond reasonable doubt that any logistical challenges Beara allegedly faced were supposed to assist in the murder operation. It was not established beyond reasonable doubt that conversations in relation to machinery mentioned by witnesses PW161, PW162 and PW104 were used with knowledge that executions are being committed. As it was shown witnesses acknowledged that bodies from the woods (Ravni Buljim, Kamenica and Pobudje) were being buried in mass graves using this machinery[500] as a result of legitimate combat engagement.

[496] *See*, *infra*, Grounds 15 & 16.
[497] Zlatan Celanovic, T6638, 6641;
[498] Zlatan Celanovic, T6683;
[499] *See*, *infra*, Grounds 4-6.
[500] PW161, T9556 and T9538.

315. Moreover, the Trial Chamber made a discernible error when completely disregarded the fact that Beara did not directly or personally commit any of the crimes he was found guilty of.

316. The Trial Chamber made an error in law when it did not apply the standard imposed by the Appeal Chamber that "only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused's sentence or taken into account in aggravation of that sentence."[501] As shown, none of the conclusion made by the Chamber to support the alleged nature and extent of Beara's involvement was proved beyond a reasonable doubt which constitutes discernible error by the Chamber which invalidates the Judgement.

317. Moreover, the Trial Chamber failed to give an adequately reasoned opinion as required by Article 25 of the Statute of the Tribunal.

**GROUND 34**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND VIOLATED THE PRINCIPLE OF NULLUM CRIMEN, NULLA POENA SINE PRAEVIA LEGE POENALI IN IMPOSING A LIFE SENTENCE ON APPELLANT LJUBISA BEARA.

318. The principle that no crime committed and no punishment meted out, without a violation of penal law as it existed at the time of the violation is affirmed in national criminal codes of many countries and in most important international treaties. Hence, the principle is recognized in the European Convention of Human Rights,[502] the Rome Statute of the International Criminal Court,[503] and the International Covenant on Civil and Political Rights.[504]

319. Determining the punishment for the crimes committed in 1995 in the former Yugoslavia one has to look at the range of penalties in the laws in place in Yugoslavia.

[501] *Čelibici* Appeal Judgement, 20 Feb 2001, para.763.
[502] European Convention of Human Rights, Article 7(1).
[503] Rome Statute of the International Criminal Court, Articles 22 and 23.
[504] International Covenant on Civil and Political Rights, Article 15.

320. Sentencing practice also notes that in addition to the relevant law of the former Yugoslavia in force when the crime was committed, the Trial Chamber is required to consider how the law evolved subsequently. However, the Trial Chamber failed to consider and note that the subsequent practice of the Courts in Serbia, even today, recognized that the harshest penalty for the crimes in question is 20 years of prison. Legal scholars, such M. Cherif Bassiouni and Peter Manikas have also argued that in order to comply with the legal principle prohibiting *ex post facto* laws, the maximum custodial sentence for crimes within the Tribunal's jurisdiction should not exceed 20 years, in accordance with the Criminal Code of the former Yugoslavia, which was in effect at the time these crimes were committed. Thus, permitting a higher penalty and failing to limit sentences to 20 years' imprisonment would "violate the principles of legality and the prohibition against *ex post facto* laws."[505]

321. It is respectfully submitted that that insofar as the error of the Trial Chamber is discernible, a new trial, or in the alternative a substantial reduction of the sentence to comply with the sentencing procedures of the Former Yugoslavia is mandated.

**GROUND 35**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND VIOLATED ARTICLE 7 OF THE INTERNATIONAL COVENANT WHICH PROHIBITS CRUEL, INHUMANE AND DEGRADING PUNISHMENT WHILE IMPOSING A LIFE SENTENCE ON APPELLANT, LJUBISA BEARA.

322. As explained by William Schabas, the Yugoslavian lawmakers were clear in indicating that the maximum custodial sentence should be 20 years, as they viewed life imprisonment as a cruel punishment and thus abolished life sentences. Likewise, other European States, including Norway, Spain and Portugal view life imprisonment as cruel on the basis that perpetual detention is a form of cruel, inhuman and degrading punishment and have eliminated this sentence, instead opting for maximum prison terms of 25 years.[506]

[505] M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1995) 701-702.
[506] William A. Schabas, "Sentencing by International Tribunals: A Human Rights Approach" 7 *Duke Journal of Comparative and International Law* 461, 480 (1997).; *See* Jean Pradel, *Droit Penal Compare* (1995) 576.

323. Article 7 of the International Covenant on Civil and Political Rights (ICCPR) states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[507] Further, Article 10(3) of the ICCPR goes on to explain that "the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."[508] Reading Article 7 and Article 10 in conjunction, it is clear that the concept of a strictly punitive punishment of life imprisonment is at odds with the ICCPR. Perpetual detention, in the form of life imprisonment, is not only cruel, inhuman and degrading, but it also places prisoners in a situation in which the aims of reformation and social rehabilitation become unlikely goals, as they are presented with little motivation when faced with the prospect of lifelong detention.

324. In rendering a maximum sentence of life imprisonment against Appellant Ljubiša Beara, the Trial Chamber has pursued a form of punitive retribution, instead of pursuing the aims of reformation and rehabilitation, as specified in the ICCPR. As a result of the punitive nature of this sentence, it must be categorized as cruel, inhuman and degrading and is therefore in violation of the ICCPR.

**GROUND 36**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT DID NOT ADEQUATELY, PROPERLY AND SUFFICIENTLY CONTEMPLATE AND CONSIDER THE SENTENCING PRACTICES OF THE FORMER SFRY AS GUIDANCE IN SENTENCING WHILE IMPOSING A LIFE SENTENCE ON APPELLANT, LJUBISA BEARA.

325. As set forth herein above, the legal principle expressed in the maxim *nullum crimen, nulla poena sine praevia lege poenal* requires that the Trial Chamber take into account the laws and respective punishments for crimes as they existed in the Former Yugoslavia during the time period the crimes were allegedly committed by the Appellant.

326. In discussing the sentencing practices in the Courts of the Former Yugoslavia, the Trial Chamber erroneously refers to sentencing practices that came into effect

[507] International Covenant on Civil and Political Rights, Article 7.
[508] International Covenant on Civil and Political Rights, Article 10(3).

outside the dates of the crimes that were allegedly committed by the Appellant, explaining that in 1998, the Federation of BiH imposed a maximum custodial sentence of 20—40 years and that in October 2000, Republika Srpska imposed a maximum custodial sentence of life imprisonment.[509] The legal principle expressed in the maxim *nullum crimen, nulla poena sine praevia lege poenal* explicitly prohibits *ex post facto* laws, and thus amendments made to sentencing practices outside the date the crimes were allegedly committed is irrelevant, as the only relevant sentencing practices that need to be considered are those that were in effect at the time when the crimes were allegedly committed, which in this case was a maximum prison sentence of 20 years.

327. It is well established that an Accused has the basic right to be fully informed and have notice of the nature of the charges against him, as well as the potential punishment available.[510]

328. While erroneously misapplying the maximum sentence allowable under the Criminal Code of the Former Yugoslavia, the Trial Chamber has denied Appellant Ljubiša Beara the right to be fully informed and have notice of the laws and penalties that would be applied to him. The Trial Chamber's attempt to impose a life sentence, when the Criminal Code of the former Yugoslavia explicitly indicates that the maximum custodial sentence is 20 years, is a direct violation of the principles of legality and the prohibition against *ex post facto* laws.

**GROUND 37**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT DID NOT ADEQUATELY, PROPERLY AND SUFFICIENTLY CONTEMPLATE AND CONSIDER THE SENTENCING PRACTICES IN THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE

[509] Trial Judgement, para 2146.
[510] *Prosecutor v. Erdemović*, IT-96-22, Appeals Judgement, 7 October 1997, para 27, separate opinions of Judges Vohrah and McDonald [Stating that the Appellant's plea was not the result of an informed choice, as he did understand the severity of the charges against him and he did not understand the consequences of pleading guilty and the potential punishment he would face. Thus, they found the Appellant must be entitled to replead to the charges after having full knowledge of the nature of the charges and the gravity of punishment available for crimes against humanity, as opposed to war crimes.]

FORMER YUGOSLAVIA WHILE IMPOSING A LIFE SENTENCE ON APPELLANT, LJUBISA BEARA.

329. The Trial Chamber discussed the submission of the Prosecution in relation to the responsibility of Blagojević in relation to Beara,[511] but found no importance to this submission considering the evidence on Beara's authority and role in the events. First, as previously argued, the Trial Chamber erred when relying on Beara's authority and role surrounding the events which were not proven beyond a reasonable doubt which is known requirement to use certain facts as an aggravating circumstance. Further, in any case the Trial Chamber erred because it failed to appreciate the sentencing practice of the ICTY, more specifically the sentences imposed on Blagojević, Jokić, Erdemović and Deronjić sentences[512] among others as required by sentencing practice.[513]

**GROUND 38**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT EXCLUSIVELY RELIED ON THE FACTORS OF DETERRENCE AND RETRIBUTION TO IMPOSE ITS SENTENCE AGAINST APPELLANT, LJUBISA BEARA.

330. The Trial Chamber's imposition of a life sentence against Appellant Beara was based exclusively and solely on an unfair reliance upon the principles of retribution and deterrence as the sole determinative factors to be evaluated.[514]

331. The Trial Chamber ignored other important factors relating to sentencing, including: reintegration into society, proportionality and consistency. The Trial Chamber briefly mentions the sentencing purpose of rehabilitation, but appears to disregard and give minimal consideration to rehabilitation, explaining that "[i]n light of the serious nature of the crimes committed under the Tribunal's jurisdiction, it has not played a predominant role in sentencing."[515]

[511] Trial Chamber Judgement, para.2170;
[512] See Blagojevic Trial Judgement, dated 17 January 2005; also see Erdemovic Sentencing Judgement, dated 5 March 1998;
[513] See Celebici Appeal Judgement, para.757; Milosevic Appeal Judgement, para.326; Strugar Appeal Judgement, paras 348 – 349;
[514] Trial Judgement, para 2128-2129.
[515] Trial Judgement, para 2130.

332. By focusing solely on the principles of retribution and deterrence and failing to take into consideration other sentencing factors, particularly in dismissing rehabilitation, the Trial Chambers Judgement is not well-balanced and appears particularly punitive and should thus be reversed.

**GROUND 39**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT FAILED TO ADEQUATELY AND APPROPRIATELY CONSIDER AND GIVE ANY WEIGHT TO THE MITIGATING EVIDENCE OFFERED BY THE DEFENCE WHILE IMPOSING A LIFE SENTENCE AGAINST APPELLANT, LJUBISA BEARA.

333. The Trial Chamber erred when it gave very limited weight to all of the mitigating circumstances argued by the Defence.[516]

334. The mitigating circumstances presented by the Appellant were accepted in the practice of the ICTY. Hence, the good character and assistance to victims,[517] surrender to the Tribunal[518], the age of the accused,[519] were considered as mitigating factors by the ICTY Chambers.

335. In reality the Trial Chamber failed to give any weight to any of the recognized mitigating factors. This can be seen from the fact that Appellant received the harshest possible sentence.

336. The Trial Chamber further erred when it failed to adequately consider other mitigating factors offered by the Defence or that were on the record such as: prior good character and lack of criminal record,[520] good character after the events,[521]

[516] Judgement, paras 2167 – 2170;
[517] *Sikirica* Trial Chamber Judgement, para.195; *Blagojević*Trial Chamber Judgement, para.854; *Krnojelac* Trial Chamber Judgement, para.518.
[518] *Kunarac* Trial Chamber, para.868; *Plavsić* sentencing Judgement paras 83-84; *Jokić* Trial Chamber Judgement para. 857.
[519] *Ojdanić et al*., Trial Chamber Judgement, para.1188; *Krajišnik* Appeal Chamber Judgement, para.1164.
[520] See on prior good character and lack of criminal record: *Erdemovic*, Judgement, para.16, *Krstić* Appeal Judgement, para.273; *Aleksovski* Trial Judgement, para.236.
[521] *Blagojević* Trial Judgement, paras 858-860; *Bralo*, Trial Judgement, para.72; *Plavsić* Sentencing Judgement para.94.

conduct and demeanour while in detention that were recognized before in the practice of the ICTY as mitigating circumstances.[522]

337. Although the Trial Chamber noted the good behaviour of the accused and lack of prior criminal record for all accused in general, [523] it obviously failed to give to this mitigating factor any weight in relation to the Appellant.

338. Further, the Chamber failed to consider Beara's public plea to other fugitive indictees to surrender as a further mitigating circumstance.[524] It is submitted that the Chamber completely failed to consider such behaviour as proof of his remorse[525] and his good behaviour after the events.

339. It is respectfully submitted that the Trial Chamber imposed the maximum sentence against Beara because it did not reasonably and properly evaluate and weigh all the mitigating factors that were presented during the trial proceedings.

**GROUND 40**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT CONSIDERED AGGRAVATING FACTORS IN IMPOSING A LIFE SENTENCE AGAINST APPELLANT, LJUBISA BEARA.

340. The Trial Chamber erred in law when it identified the aggravating circumstances and gave them undue weight in imposing the sentence to Appellant. The Chamber failed to prove the existence of aggravating circumstances beyond reasonable doubt as required by previous sentencing practice of the ICTY.[526]

341. First, the Chamber erred when it found that willing participation of the Accused constitutes an aggravating factor and distinguished it from the voluntariness which is a necessary component of the crime,[527] and as such cannot be considered in

[522] *D. Nikolić*, Trial Judgement, para. 268; *Hadzihasanović* Trial Judgement, para.2074.
[523] Judgement, paras.2155 – 2156.
[524] Judgement, para.2168.
[525] *Brđanin* Appeal Judgement, para.177: the Appeal Chamber found that the Accused do not have to explicitly state this during his testimony, but that the Defence can express this to the victims. Hence, Beara's appeal to other co-accused should be seen as sign of respect express to the victims.
[526] *Blaskić* Appeal Judgement, para.686; *Čelebici* Appeal Judgement, para.697.
[527] Judgement, para.2154.

aggravation of sentence. The Trial Chamber cited no authority to support its finding that willing participation and willingness are two different concepts. It is submitted that willing participation is part of the subjective element of most crimes the Appellant was found guilty of. In addition, willing participation is also part of the subjective element of JCE responsibility that was the type of responsibility which the Appellant was convicted.

342. The Trial Chamber committed an error in law because in reality it considered twice the aggravating circumstances. First it gave them unduly weight and based on that choose an inadequate and harsh sentence and then used them to completely negate the mitigating circumstances. It is respectfully submitted that in such way the Trial Chamber made error in law that invalidate the sentence imposed on the Appellant.

343. Further, the Trial Chamber made an error when it found that Beara abused his position of authority to orchestrate the crimes.[528] As argued herein in this brief[529] the Trial Chamber made its finding about Beara's involvement based on unreliable evidence and by drawing impermissible inferences and conclusions from circumstantial evidence.

344. Trial Chamber also erred when it relied on the alleged conversation with Deronjić to claim that Beara's action were "cold and calculated" as an aggravating factor.[530] The Trial Chamber is relying solely on the alleged conversation with Deronjić to support its characterization of Beara's attitude and the testimony of this conversation is not only disputed but said testimony was untested by cross examination and was previously found by other Trial Chambers to be untrustworthy and unreliable. Further, this same testimony of Deronjić was rejected for these very reasons in the Karadžić case.

345. As a result of the Trial Chamber erroneously applying the foregoing as aggravating factor, the Trial Chamber erred as a matter of law and abused its

[528] Judgement, para.2165.
[529] *See, infra,* Grounds 4-6.
[530] Judgement, para 2166.

discretion which constituted a discernible error as a well as a miscarriage of justice when imposing a life sentence on Beara.

**GROUND 41**

THE TRIAL CHAMBER ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN IMPOSING EXCESSIVE AND DISPROPORTIONATE SENTENCE IN COMPARISON TO THE SENTENCES IMPOSED ON THOSE OF HIS CO-ACCUSED WHILE FAILING TO GIVE ANY WEIGHT TO APPELLANT LJUBISA BEARA'S CONDUCT BEFORE, DURING AND AFTER THE WAR, AND TO HIS CORRECT BEHAVIOUR DURING TRIAL AND IN UNITED NATION DETENTION UNIT.

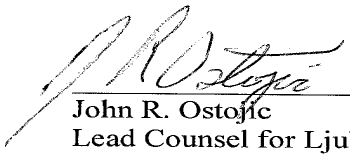
346. It is respectfully submitted that the Trial Chamber erred when it imposed to other co-accused in the instant proceedings disproportionate lower sentences as compared to the life sentence imposed on Appellant.

347. Further, the Trial Chamber erred when it imposed an excessive sentence on the Appellant. It is respectfully submitted that the sentences imposed against various commanders and MUP personnel, given the evidence, as well as the arguments and recommendations by the prosecution that Beara was an empty vessel and was not able to coordinate any troops or equipment, warrants a drastic reduction in the life sentence imposed.

It is respectfully submitted that based on the forgoing 41 errors or law and fact that were committed by the Trial Chamber that the Honorable Appellate Chamber grant Appellant, Ljubisa Beara, a new trial, enter an order dismissing the charges or substantially reduce the life sentence imposed.

Word count: 39,229

Respectfully submitted,



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