THE INTERNATIONAL CRIMINAL TRIBUNAL

FOR THE FORMER YUGOSLAVIA

Case No. IT-98-32/1-A

IN THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron
Judge Carmel Agius

Registrar: **Mr. John Hocking**

Date Filed: **2 November 2009**

THE PROSECUTOR

v.

MILAN LUKIĆ
SREDOJE LUKIĆ

PUBLIC REDACTED VERSION

APPEAL BRIEF ON BEHALF OF SREDOJE LUKIĆ

The Office of the Prosecutor:

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Counsel for the Appellant

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I – INTRODUCTION

1. Pursuant to Article 25 of the Statute of the International Criminal Tribunal for the Former Yugoslavia ("the Statute") and Rule 111 (1) of the Rules of Procedure and Evidence ("the Rules"), the Defence of Sredoje Lukić ("the Appellant") hereby files its Appeal Brief setting out its grounds of appeal against the Judgement of Trial Chamber III in the case of *Prosecutor v. Milan Lukić & Sredoje Lukić* dated 20 July 2009 ("Trial Judgement").

2. The grounds of appeal set out below are submitted on behalf of the Appellant. To date of the filing of this Appeal Brief, the Appellant has still not been provided with an official translation of the Trial Judgement in his native language, BCS. On behalf of the Appellant, notice is given that should further errors of law or fact become apparent upon his receiving the translation and providing instructions to counsel, an application for a variation of the grounds of appeal pursuant to Rule 108 of the Rules will be submitted.

3. The Appellant filed a timely Notice of Appeal against conviction and sentence.[1] In that Notice, the Appellant identified a number of respects in which the Trial Chamber failed in its Judgement to appropriately apply the correct legal standards relating to the burden and standard of proof (errors of law). The Appellant further identified those respects in which the Trial Chamber failed to set forth a sufficiently reasoned factual basis upon which it grounded the convictions in relation to Pionirska Street incident and the Uzamnica camp (errors of fact). Finally the Appellant contests the correct application of established standards regarding sentencing.

4. The Appellant respectfully submits that the Trial Chamber has committed various errors of law and fact, which invalidate the Trial Judgement and/or have occasioned a miscarriage of justice. The Appellant submits that for the reasons set out in the

[1] *Prosecutor v.Milan Lukic & Sredoje Lukic*,IT-98-32/1-A,Notice of Appeal on Behalf of Sredoje Lukic,dated 19 August 2009.

following Appeal Brief, the Appeals Chamber should reverse the Trial Judgement of the Trial Chamber and find the Appellant not guilty on the seven counts of the indictment. Pursuant to such a finding, it is respectfully submitted an order be made to effect the immediate release of the Appellant from custody.

Furthermore, the Defence respectfully supports the findings made in dissent of the majority verdict by His Honour Judge Robinson, and refers throughout to these discrepancies in judicial fact-finding in support of the arguments presented

II – FUNDAMENTAL ERRORS AND THEIR IMPACT UPON APELLATE REVIEW

A. Errors of Fact and Errors of Law

5. Where a party's arguments are insufficient to support the contention of an error, the Appeals Chamber may nevertheless conclude for other reasons that there is an error of law.[2]

6. Fundamentally, the Appeals Chamber reviews the Trial Chamber's findings of law to determine whether they are correct.[3] Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[4] In so doing, the Appeals Chamber corrects the legal error and also applies it to the evidence adduced at trial in order to determine whether it is convinced that the factual finding challenged by the Appellant should be confirmed on appeal.[5]

7. The Appeals Chamber actively infers a consideration of all the relevant evidence unless there is an indication that the Trial Chamber completely disregarded any piece

[2] *Kupreskic et al.*AJ,para.26.
[3] *Stakic* AJ,para.25.
[4] *Blaskic* AJ,para.15.
[5] *Blaskic* AJ,para.15.

of evidence. This may be the case where the Trial Chamber's reasoning fails to address evidence that is clearly relevant to its findings.[6]

8. It is well established in the Jurisprudence of the Tribunal that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved beyond reasonable doubt each element of that crime and the applicable mode of liability as well as any fact indispensable for entering the conviction.[7] This applies both to findings of fact based on direct evidence, and to those based on circumstantial evidence.[8]

9. Although the appeal grounds have been classified into those relating to Errors of Law and Errors of Fact, the defense is mindful that the distinction between an Error of Law and Error of Fact can quickly become blurred. The doctrinal difficulties in classifying the two categories can also lead to the characterization of a category of "mixed Errors of Law and Fact"[9] Therefore, the defense, in certain areas of doubt, refers to the Appeals Chamber regarding classification of specific errors.

10. In general, the appeal grounds of the defense in this brief should be read on the basis of the following principles. Primarily, it is jurisprudentially entrenched that an error of law invalidates a decision if it is an established error of law that "has an impact on the verdict of guilt."[10] By contrast appellate review of factual issues has been widely disfavored akin to the common law stance on such matters. A deferential approach has thus been adopted in re-testing a finding of fact reached by a Trial Chamber, resorted to only where the objective manifest unreasonableness threshold has been met. The ICTY Appeals Chamber in *Aleksovski* restated and affirmed this standard

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[6] *Kupreskic et al.*AJ,para.23.
[7] *Stakic* AJ,para.219;*Kupreskic* AJ,para.303;*Kordic and Cerkez* AJ,para.834;*Ntagerura et al.*AJ,paras.174-175.
[8] *Limaj et al.*AJ,para.12;*Celebici* AJ,para.458;*Brdanin* AJ,para.13.
[9] *Strugar*, TJ,para.252.
[10] *Akayesu* TJ,para.64.

and added another general situation in which it could reverse a finding of fact: "where the evaluation of the evidence is wholly erroneous."[11]

11. This principle has been more fully expanded by the Appeals Chamber where, in *Kupreskic* case they added that where evidence relied on at trial could not reasonably have been accepted by any reasonable person or the evaluation of evidence at trial was wholly erroneous, the Appeals Chamber would overturn the conviction since, under such circumstances, no reasonable tribunal of fact could be satisfied beyond reasonable doubt that the accused had participated in the criminal conduct[12] Thus, the Appeals grounds as developed by the defense in the instant case, fulfill the requirements in that:

- The described errors of Law do have an impact on the verdict of guilt;
- The described errors of fact do qualify the criterion of: "the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber."

B. Identification Evidence

12. Central to this case is the reliability of the purported identifications of the Accused which have been presented as evidence by the Prosecution in seeking to prove its case beyond reasonable doubt.

a) Rules Applicable to Proper Identification

13. Identification procedures are designed to test a witness's ability to accurately identify a person from a previous occasion and safeguard against mistaken identification.

14. It is emphasized that, like all elements of an offence, the identification of each accused as a perpetrator must be proved by the Prosecution beyond reasonable

[11] *Aleksovski* TJ,para.63.
[12] *Kupreškić et al* AJ,para 41.

doubt.[13] In order to determine this burden has been met the Trial Chamber should take into account the totality-of-evidence bearing on the identification of the Accused.[14] In particular, the Trial Chamber should take into account whether an identifying witness has any relevant motive which would be furthered by a false identification.

15. It has become widely accepted in both domestic criminal law systems and in the jurisprudence of this Tribunal that visual identification evidence is particularly liable to error and necessitates special treatment.[15] In the United Kingdom case *R v Turnbull*, the Court of Appeal laid down important guidelines for Judges in trials that involved disputed identification evidence, emphasizing particularly the need jury direction highlighting the particular scope for error of such evidence and need for a cautious approach.

16. Such an approach has been embraced by the ICTY Jurisprudence and is evidence in the judicial reasoning of the Appeals Chamber in *Kupreškić*. Echoing the *Turnbull* approach, it was held that when assessing visual identification evidence;

> [a] Trial Chamber must always, in the interests of justice, proceed with *extreme caution* when assessing a witness' identification of the accused made under difficult circumstances.[16] *(emphasis added)*

17. The *Limaj* Trial Chamber affirmed the approach taken in *Kupreškić*, re-stating the need for "extreme caution" in relation to visual identification evidence.[17]

b) Rules applicable to in-court identification

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[13] *Limaj* TJ,para.20.
[14] *Ibid.*
[15] *Regina v.Turnbull and Another*[1977] Q.B.224;*Reid v R* [1991] 1 AC 363 United Kingdom,*US v Wade*,338 US 218(1967) United States,Bundesgerichtshof,*reprinted in* Strafverteidiger 409(1991);Bundesgerichtshof,*reprinted in* Strafverteidiger 555(1992)Germany;Oberster Gerichtshof,10 December 1992,15 Os/150/92;4 June 1996,11 Os 59/96 and 20 March 2001,11 Os 141/00 Austria.
[16] *Kupreškić et al.*AJ,para.39.
[17] *Limaj* TJ,para.17,citing *Kupreškić* AJ,para.34.

18. One of the central arguments in international jurisprudence rationalizing the extremely cautious approach of fact-finders to in-court identifications is the imminent suggestive effect which is unavoidably implied by the use of this kind of identification.

19. In several domestic jurisdictions, whilst in-court identifications are not generally regarded as inadmissible, little weight is attached to an in-court identification made by a witness who has not previously identified the accused at an identity parade or other pre-trial identification procedure, unless the witness's attendance at such a procedure was unnecessary, impracticable or if there are other exceptional circumstances.[18]

20. In the United Kingdom, for example, the 'dock identification' of an accused for the first time during trial itself has long been considered an unfair and unsatisfactory procedure.[19]

III. STANDARDS OF EVIDENTIARY REASONING

(i) Lack of Reasoned Opinion

21. In line with the jurisprudence of the Appeals Chamber, an appellant claiming an error of law arising from the absence of a reasoned opinion must identify the specific issues, factual findings or arguments which he submits the Trial Chamber omitted to address and must explain why this omission invalidated the decision.[20] The right to a reasoned opinion is one of the elements of a fair trial requirement enshrined in Articles 20 and 21 of the Statute.[21]

(ii) Theory of Bayes

[18] For example, Blackstone's Criminal practice 2008, at F18.16 referring to the undertakings of *A-G v DPP* in 1976.
[19] Blackstone's Criminal practice 2008, at F18.16, referring to *Edwards v The Queen* (2006) UKPC 29.
[20] *Limaj et al.* AJ,para.9;*Kvocka et al.* AJ,para.25.
[21] *Furundija* AJ,para.69;*Naletilic et al.* AJ,para.603;*Kunarac et al.* AJ,para.41;*Hadihasanovic* AJ,para.13.

22. As addendum to the issue of the jurisprudential route of evidentiary reasoning in the instant case, the Defence hereby proffer that fundamental errors transpired throughout several of the Appeals grounds relating to the non-comprehensibility of the Trial Chamber's reasoning, in particular as to the witness testimony. In footnote 1 of the Notice of Appeal, the Defense has alluded to the theory of Bayes. This theory is introduced in order to show that the Trial Chamber in its evaluation of the evidence was wholly erroneous. Although the application of the theory of Bayes within criminal law remains contentious, some jurisdictions rely on its value.[22] Notwithstanding that the criminal courts could hardly apply this theory in a purely mathematical way, the logical structure how to evaluate criminal evidence may be subject of transposition to the appellate review by an international criminal tribunal.[23]

23. In concreto, the Theory of Bayes could be instructive for appellate review in that it could be an interpretive tool for the criterion of 'the only reasonable inference', which criterion is applied by the ICTY when assessing the value of substantial evidence. In fact, the theory of Bayes focuses on the existence of two alternatives in terms of its likelihood ratio. The probability of such alternatives may, therefore, be determinative for the mentioned criterion of 'the only reasonable inference'. It is therefore that the role of the Bayesian theory can be instructive to educate the evidentiary implications in the Lukic case, especially when dealing with his alibi defence and his non-presence at the alleged crime scene at the Pionirska street incident. In all these situations, a reasonable alternative with a high likelihood is provided by the Defence, yet ignored by the Trial Chamber.[24] The admissibility and introduction of the Bayesian theory in

[22] *See* the Appeal Brief of the Attorney General of the High Court (Den Bosch,The Netherlands)to the Supreme Court in the case of *Prosecutor v. Pruijmboom*,(10 February 2009,case number:20000934-07), in which the Attorney General relied on the theory of Bayes in order to overturn an acquittal by the High Court for murder. Also, see McDaniel v. Brown, (docket number 08-559), pending before the US Supreme Court after the Ninth Circuit analysed the evidence using the Bayesian theory and granted habeas corpus.
[23] Such a hybrid approach has been pursued by the German Supreme Court sitting in criminal matters.
[24] *See* Appeal's ground 1,2,7 and 8.

this context and within the area of the international criminal law can also serve as an objective standard to assess the margin of appreciation a Trier of fact is endowed.[25]

24. For a proper understanding of the relevance of this theory for the present Appeal, the Defense will outline the key elements of this concept.

25. The Bayesian theory introduces the definition of conditional change that a certain event A occurs. This change is expressed p(A) whereby the letter p expresses the probability.[26]

26. The theory of Bayes is increasingly used by Judges in Criminal cases to arrive at a fair and consistent determination of the factual evidence. In essence, this theory is meant to determine the relationship of probabilities which can vary depending on the other evidentiary findings. In fact this theory is a mathematical formula which considers the probability rate of two hypotheses. The exact formula reads:

> *Prior odds X Likelihood Ratio(LR) = posterior odds*
>
> *The term LR expresses the relationship between two hypotheses in terms of their probability. This is expressed by the formula:*
>
> *LR = Chance that the findings are true when hypothesis 1 is true / Chance that the findings are true when hypothesis 2 is true*

27. This model has been used in criminal cases for instance with respect to the impact of DNA evidence in criminal cases as well as with regard to the interpretation of forensic evidence in criminal cases in general. The following example may serve to explain the relevance of this theory to the assessment of the evidence in criminal cases:

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[25] W.A. Wagenaar,De Diagnostische Waarde van Bewijsmiddelen,(Diagnostic Value of Evidence),in M.J. Sjerps & J.A.Coster van Voorhout(red.),Het onzekere bewijs. Gebruik van statistiek en kansrekening in het strafrecht,Kluwer:Deventer 2005,pp3-25.

[26] Robertson, B. and Vignaux, G.A. (1995) Interpretating Evidence: Evaluating Forensic Science in the Courtroom. John Wiley and Sons, Chichester;Colin Howson and Peter Urbach (2005). Scientific Reasoning: the Bayesian Approach (3rd ed.).

> *How probable is it that an accuses produces a certain DNA trace? The theory of Bayes shows that the answer to this question not only depends on the Likelihood Ratio (LR) but also depends on the remaining evidence. Suppose that the crime took place on a ship on the high seas whereby – apart from the accused – 10 seamen could have produced the trace. Suppose that all these individuals are eligible as donor. However only the DNA profile of the accused is available. Two situations should now be distinguished :*
>
> - *Prior to the DNA test the LR is 1 to 10 that the accused was the donor of the trace*
> - *After the DNA test, the LR is 100 to 1 (when assuming that the match probability regarding to the DNA profiles is 1 to 1000).*

In other words, the prior odds rate in combination with the LR constitute the probability of certain hypotheses in criminal cases.

28. Transposed to the fact finding process by the International Criminal Judge, particularly in the instant case, the relevance of this model of Bayes relates to the following two elements:

    - The importance of the prior odds chance
    - The importance of any alternative hypothesis.

29. With respect to the last element, the theory of Bayes stresses the need that the Criminal Judge pays sufficient attention to any alternative hypothesis in order to prevent a too narrow view on the evidence.

30. With respect to the case against Mr. Lukic, the appeal grounds show that the Trial Chamber did ignore the impact of the principles of the theory of Bayes when evaluating the witness testimony.

31. As a result, this explains why the Trial Chamber did arrive at the described errors of Law and fact. Had it paid attention to the model of Bayes, the mistakes in the judicial reasoning, as detected by the defense in the appeal grounds, as well as the

phenomenon of the prosecution's fallacy, would have been prevented.[27] The Appeal grounds 1, 2, 6, 7 and 8 will delve deeper into these deficiencies. One example may serve to illustrate the relationship between the application of the criterion 'only reasonable inference' and 'the likelihood ratio'. In appeal ground 6a), para.204 and in subground 12b) para.296, the Defence has indicated that the presence of the Appellant at the Pionirska street incident was erroneously qualified by the Chamber as aiding and abetting to the crime of cruel treatment and inhumane acts. Rather, from his presence it could be reasonably inferred that he intended to assist the Koritinik group for the transfer which was planned for the following day.

32. An Appellate review of the Trial Chamber's conclusions show a defect in that its inferences lack a proper likelihood ratio and thus, cannot be justified as the only reasonable inferences.

iii) The principle of *in dubio pro reo*

33. The principle of *in dubio pro reo* is one of the foundational precepts of criminal law and is endemic in domestic and international legal systems as well as in the jurisprudence of the Tribunal and the ICTR.[28]

34. This provision accords with all major human rights instruments, for example the International Covenant on Civil and Political Rights, Art. 14 (2) and especially the European Convention on Human Rights, Art. 6 (2)[29] Since *Tadic*, it is established, that the European Convention on Human Rights is applicable in cases before the ICTY.[30] Therefore, the whole matter of presentation of evidence at the ICTY must be looked at in light of Article 6 (2) and (3) of the European Convention on Human

[27] *See* for an extensive description of the theory of Bayes and the relevance to criminal cases (Dutch publication),M.J.Sjerps, Forensic statistics and probability rates: interpretation of evidence, in: Forensic Sciences, edited by prof.A.P.A.Broeders and E.R. Muller,Kluwer 2008, pp467 – 496.
[28] *See* for example *Tadic* Extension of Time-Limit Appeal Decision,para.73;*Celebici* TJ,para.601;*Jelisic* TJ,para.108. *See* also *Akayesu* TJ,para.319.
[29] *Blagojevic* TJ,para.18.
[30] *Tadic*,Appeals Chamber's "Decision on The Defence Motion for Interlocutory Appeal On Jurisdiction",dated from 2 October 1995,paras.41pp.

Rights.[31] In the jurisprudence of the European Court of Human Rights (ECHR), Article 6 (2) embodies the principle of the presumption of innocence. It requires, *inter alia*, that when carrying out judicial duties, a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof being on the prosecution, with any doubt benefitting the accused.[32]

35. Article 21(3) of the ICTY Statute entitles the Accused to a presumption of innocence. The burden is on the Prosecution to prove the guilt of the Accused "beyond reasonable doubt." Thus it is for the Prosecution to prove every material fact going towards the guilt of the Accused. The burden does not shift to the Defence under any circumstances.[33] In accordance with Rule 87(A) of the Rules of Procedure and Evidence, the Trial Chamber should determine whether the ultimate result of the cumulative evidence is weighted and convincing enough to establish beyond reasonable doubt the facts alleged, and ultimately the guilt of the Accused. In determining whether the Prosecution has done so with respect to each particular Count in the Indictment, the Trial Chamber must also carefully consider whether there is any reasonable interpretation of the evidence admitted other than the guilt of the Accused. Any ambiguity or doubt must be resolved in favour of the Accused in accordance with the principle of *in dubio pro reo*.[34]

36. In determining whether the guilt of the accused has been established to this standard regarding each particular count in the indictment, the Tribunal has been careful to

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[31] ECHR:Case of *Barbera v.Spain*,A 146,Application No.10590/83,06.12.1988,para. 76.

[32] ECHR: Case of *Barbera v Spain*,A 146,Application No.10590/83,06.12.1988,para.77;ECHR: Case of *Lisiak v.Poland*,Application no.37443/97,05.11.2002/05.02.2003,para. 33: "... In that context, they stressed that the trial court had had to resolve a number of difficult questions relating to the assessment of evidence because the charges against the applicant had been based on circumstantial evidence and S.U., the only eye-witness, had given incoherent and discrepant testimony. Given these factors and the fact that important issues were at stake for the applicant in the proceedings, the court had to act with particular diligence so as to assess all the relevant material in conformity with the principle of *in dubio pro reo*. ...".

[33] *Vasiljević* AJ,para.120.

[34] *See Blagojevic* TJ,para.18.See also Tadic, Appeals Chamber, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence,para. 73, holding that: "[...] any doubt should be resolved in favour of the Appellant in accordance with the principle *in dubio pro reo*"; *Celebici* TJ, para. 601: "at the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved ";*Akayesu* TJ,para.319: "[...] the general principles of law stipulate that, in criminal matters, the version favourable to the Accused should be selected.".

consider whether there is any reasonable explanation for it other than the guilt of the accused.[35] This is so because any ambiguity must accrue to the Accused's advantage.[36]

37. It has been further articulated that "[i]t is not sufficient that it is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is consistent with the innocence of the Accused, he must be acquitted".[37]

IV – GROUNDS OF APPPEAL RELATING TO CONVICTION

A. Pionirska street incident

Ground 1 **- ERROR OF LAW AND/OR FACT- THAT APPELLANT WAS ARMED AND PRESENT AT THE *LOCUS IN QUO***

Subground 1a) Inaccurate/Insufficient weighting of witness evidence

No reasonable Trial Chamber would have found that Sredoje Lukic was present at Jusuf Memic's house during the robbery in Pionirska Street on 14 June 1992

38. No reasonable Trial Chamber could have drawn any inference from the evidence admitted through VG-018, VG-038, VG-084 and Huso Kurspahic placing the Appellant at the scene of the robbery during the Pionirska street incident, nor could a reasonable Trial Chamber have accepted that the testimony of those witnesses is credible in identifying the Appellant during the robbery (paras.585-591 and 593).

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[35] *Brđanin* TJ,para.23.
[36] *Brđanin* TJ,para.23.
[37] *Delalić et al.*AJ,para.458.

No reasonable Trial Chamber would have found that evidence by VG-018 was credible with regard to the presence of Sredoje Lukic

39. Primarily, witness VG-018 had no prior knowledge of Sredoje Lukic. She did not see Sredoje Lukic because she was in another room, nor was she in a position to see either Milan Lukic or Sredoje Lukic introducing themselves and she was unable to tell who was who (para.586). The Trial Chamber relies, in making its conclusions, wholly on the evidence that she heard Sredoje Lukic introduced himself by name, therefore placing him at the scene of the robbery (para.588).

40. The Trial Chamber, however, failed throughout the Judgement to consider or even directly acknowledge the fact that VG-013 and VG-038, whom were both accepted to have been with VG-018 throughout the entire duration of the incident[38], directly contradict this account. Neither witness VG-013 nor VG-038 or VG 18 or VG 78 nor VG 101 ever alleged hearing someone introduce himself as Sredoje Lukic during the incident. Had this introduction been audible to VG-018, it is logical that the other two witnesses, being in the same *locus in quo* at the relevant time would similarly have been able to hear this, and further, it is more than reasonable to assume that VG-13, who knew Sredoje Lukic well prior to the incident[39], would have heard the introduction and recognised the speaker as Sredoje Lukic, thus providing direct identification evidence which was markedly absent in this case.

41. Even apart from this introduction, the Appellant submits that during her testimony in the case *Prosecutor v.Mitar Vasiljevic*, VG-18 stated that Mitar Vasiljević had introduced himself and that Milan Lukić introduced himself as "Sredoje Lukić":

> *18* I wouldn't know Mitar if he hadn't said what his
> 19 name was. I wouldn't be able to recognize him. And I would have said the
> 20 same about him as I did about these three men. I didn't know them. This

[38] T.1359-1360.
[39] T.1000;Para.581 of Judgement.

> 21 Milan came and said that he was Sredoje Lukic and that is how I know.[40]
> *(emphasis added)*

42. Such evidence illustrates the nebulous nature of the purported identification by VG-018. VG-018's acknowledgement of the fact that Milan Lukic falsely represented himself to be Sredoje Lukic on at least one occasion casts serious doubt on the veracity of the identification of Sredoje Lukic at the scene.

43. Furthermore VG-018 was not informed by any other people about whether one of the men present at the scene was Sredoje Lukić. Nobody told VG-018 anything about Sredoje Lukić:

> Q. Yes. Thank you, Witness. My question is, though, do you know if anyone in the room with you recognised Milan and Sredoje and by knowing -- did anybody tell you that they knew who these men were?
> A. Yes. Jasmina told me that it was Milan Lukić but not -- I didn't hear anything about Sredoje.[41]

44. The above evidence clearly shows that VG-018 was not able to positively and beyond reasonable doubt identify that person as the Accused Sredoje Lukić. Such evidence is therefore insufficiently reliable to have been considered authoritative by any reasonably thinking Trial Chamber.

No reasonable Trial Chamber would have found that evidence by VG-084 was credible with regard to the presence of Sredoje Lukic

45. VG-084, a thirteen year old boy at the time of the robbery, like his mother VG-018 had no prior knowledge of Sredoje Lukic. The Trial Chamber relied on his evidence solely to demonstrate Sredoje Lukic was at the scene of the robbery, as VG-084's account was markedly silent regarding the specific acts allegedly carried out by the Appellant. It is respectfully submitted that VG-084 could not have seen the man who

[40] P82-T.1622.
[41] T.1310.

allegedly introduced himself as Sredoje Lukić, because, as stated by VG-018 who was with him throughout the entire duration of the incident, they were staying in a room different from the one in which the armed men allegedly introduced themselves.[42] Indeed, the Trial Chamber accepted that VG-84 was in no position to see the man who allegedly introduced himself.(para.590)

46. The Trial Chamber however erroneously concluded that VG-084 did hear Sredoje Lukic's introduction (para.590). This is directly contradictory to the witnesses own evidence on this matter. During his testimony VG-084 himself admitted that he had not, at any time, heard a man introducing himself as Sredoje Lukić in the Memić house.

> JUDGE ROBINSON: Did Sredoje Lukic say anything in your hearing to identify himself?
> THE WITNESS: [Interpretation] I didn't hear.[43]

47. VG-084 then stated that he only learnt about Sredoje Lukić from the people in the house who knew him. However, crucially, VG-084 when questioned on the issue was unable to name any of those people[44]. Furthermore, in contradiction to the testimony of VG-084, according to his mother VG-018 and other witnesses there was no discussion at all about a Sredoje Lukić.[45]

48. In the absence of any direct evidence provided by VG-084 that he personally heard or was able to see the man who introduced himself speaking and in the absence of any evidence that VG-084 had come to know of the identity of the Apellant by other means, namely by hearing about the man from others, VG-084's allegation against the Appellant is without merit.

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[42] T.1278;T.1367.
[43] T.1275,l.6-8.
[44] T.1286.
[45] T.1442;T.1310;VG-078.

No reasonable Trial Chamber would have found that evidence by VG-038 was credible with regard to the presence of Sredoje Lukic

49. In the course of his testimony, VG-038 dramatically changed his testimony. Namely, on the first day of his testimony he alleged to have known Sredoje Lukic for at least 7 years prior to the incident.[46] However, VG-038 fundamentally changed his testimony when he admitted subsequently that he in fact had no prior knowledge of Sredoje Lukic.[47] This casts serious doubt on the credibility of VG-038's testimony as a whole.

50. The Trial Chamber further relied on the testimony of VG-038 only in reference to the part which places Sredoje Lukic at the scene of the robbery, based on the allegation that other persons told him who Sredoje Lukic was (para.585). The Trial Chamber however omitted to consider the fact that this witness was unable to name the individuals from whom he allegedly received such information.

No reasonable Trial Chamber would have found that evidence by Huso Kurspahic was credible with regard to the presence of Sredoje Lukic

51. The Trial Chamber was satisfied that Huso Kurspahic's evidence was sufficient both to place Sredoje Lukic at the scene of the robbery and to implicate him as a participant in the robbery (para.591). His testimony is allegedly based upon his father's Hasib Kursaphic observations during the incident.

52. For two main reasons no reasonable Trial Chamber could have found his testimony was credible.

53. Primarily in para.591, the Trial Chamber mentions the interview between Hasib Kurspahic and a journalist, omitting to mention that that this interview was admitted into evidence, and that it was admitted upon request by the Prosecution (exhibit P40

[46] T.952-953.*See also*T.977.
[47] T.985-986.

and P41) and in case *Procecutor v. Vasiljevic* it was admitted as P145. In its evaluation of the evidence, the Trial Chamber neither acknowledged nor considered the fact that this was the first exhibit containing an account of the events in question to come into existence after the event, dated only 24 days after the incident, whilst all other material evidence was created significantly later.

54. Critically, in that interview Huso Kurpahić's father Hasib Kurspahic never implicated Sredoje Lukić as one of the perpetrators nor mentioned his name at all:

> "Journalist: Did you recognize somebody?
> HK: No, I did not. I knew them like from seeing before. That were that youngsters, when they were searching us. That evening, the same once arrived...
> Journalist: ... the ones who searched you ...
> HK: As I saw the one who told me: "Go, grandpa, go!" was the same one who searched me."[48]

55. In paragraph 591 the Trial Chamber concludes that Huso Kurspahic's father Hasib Kurspahic was personally acquainted with Sredoje Lukic prior to the incident and that he would have been able to recognize Sredoje Lukic on 14 June 1992. In fact, Sredoje Lukic and Hasib Kurspahic were more than just ordinary acquaintances. Their relationship was characterized by frequent contact and mutual respect.[49]

56. [REDACTED][50].

57. Secondly, In relation to this same incident and with regard to the same witness Huso Kurspahic, the Trial Chamber in the *Prosecutor v.Vasiljevic* found that:

> "Milan Lukic, Sredoje Lukic and the Accused were involved in the looting (VG-61, T 791). VG-61 was not present but was relying upon what his father, now deceased, told him, but there is no mention of this in his father's statement (Ex P 145)."[51]

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[48] P40 and P41,pp.8,9.
[49] T.914-915.
[50] T.875-876,878; [REDACTED];P37;T.796,798.
[51] *Vasiljevic* TJ, footnote 287.

58. For these reasons, it is submitted that no reasonable Trial Chamber could have found the evidence tendered by Huso Kurpahic credible in relation to Sredoje Lukic.

Subground 1b) Inconsistent and contradictory evidentiary reasoning

59. The Trial Chamber erred in law by applying an erroneous and incomprehensible method of evidentiary reasoning and decision making.

60. In respect of the robbery in the Pionirska street incident, the Trial Chamber based its conclusion in para.593 wholly on the evidence of VG-18, VG-38, VG-84 and Huso Kurspahic.

61. Such evidence was highly contradictory and was therefore an unreliable basis upon which to draw from. Thus, the conclusions which were drawn from the evidence were such that no reasonable Trial Chamber could have arrived at from logical analysis of the evidence

62. The Trial Chamber, in its Judgment, specifically omitted to specify whether Sredoje Lukic was in the house or around/outside the house. The Trial Chamber merely concluded that he was at the house while the robbery was taking place inside the house(para.593). This lack of precision is a direct result of the numerous anomalies and plain uncertainties in the evidence relied upon by the Trial Chamber in reaching its conclusion. None of the witnesses provided any reasonable evidence to support that conclusion.

63. The undisputed evidence in the present case showed that the Appellant was not present during the robbery. The sole identification witnesses, VG-013 and Hasib Kurspahic[52], did not identify the Appellant during the robbery (paras.581 and 591).

64. Other credible witnesses, VG-078 and VG-101, provide reliable descriptions of the perpetrators, none of which match the Appellant.[53] The Trial Chamber, again, failed

[52] Interview with Hasib Kurspahic P40 and P41,pp.8,9.

either to account for or even acknowledge the description of the perpetrators provided by these witnesses. VG-101 testified that on 14 June 1992 Milan Lukic and three other Serbs, i.e. a blonde Serb of heavier built than Milan Lukic, a young Serb (youngest of the group, perhaps 18 years old) and a moustached Serb with black curly hair entered the house and robbed the people.[54] The description provided by VG-101 in its entirety matches and is wholly consistent with the description provided by witness VG-089[55], who testified about the incident of 14 June 1992. None of those descriptions match the physical appearance of the Appellant. The Appellant, in proffering an explanation for this error, helpfully submitted an alternative person for whom he may have been mistaken. Namely, as witness MLD-25 confirmed, one of the perpetrators mentioned by numerous witnesses VGD-4[56].

65. In an identification case such as the present one, any reasonable Trial Chamber would have considered the descriptions of the perpetrators provided by credible witnesses[57]. The fact that the Trial Chamber ignored this evidence and chose to rely on other contradictory evidence (i.e. witnesses who have clearly not been able to identify the Appellant at the scene) instead, is exemplary of an erroneous and incomprehensible method of evidentiary reasoning and decision making. In so-doing, the Trial Chamber effectively reversed the existence of a clearly identifiable and reasonable doubt as regards the evidence into no reasonable doubt, by applying a 'pick and choose' method from the evidence.

66. This crucial evidence of VG-013 and Hasib Kurspahic, and also VG-078 and VG-101, directly contradicts the testimony of VG-038, VG-018, VG-084 and Huso Kurspahic. In fact, none of the witnesses the Trial Chamber relies on in paragraph 593 had prior knowledge of Sredoje Lukic, except Huso Kurspahic who was a hearsay witness.

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[53] [REDACTED]
[54] T.1432-1433.
[55] T.1755,1756,1769
[56] 2D55-part I;2D56.
[57] See Introduction paras.15-17.

Trial Chamber's reasoning in relation to VG-18

67. In paragraphs 586-588 the Trial Chamber found that VG-18, who had no prior knowledge of Sredoje Lukic and who neither saw him directly at the scene nor was corroborated by other witnesses in her assertions that she had overheard his introduction nevertheless placed Sredoje Lukic at the scene of the robbery. Admitting the many inconsistencies in her testimony and the clear confusion between Milan Lukic and Sredoje Lukic, the Trial Chamber relied on her testimony insofar as placing Sredoje Lukic at the scene, whilst contemporaneously giving no weight to her evidence as regards the specific acts of Sredoje Lukic.[58]

68. The Trial Chamber's finding that VG-18 heard Sredoje Lukic introduce himself by name, is unsupported by evidence and is in fact in direct contradiction to the testimony of other witnesses. When the men entered the house, VG-18 was in another room with her son, VG-84, as well as VG-38 and VG-13.[59] Her son testified that he did not hear anyone introduce himself as Sredoje Lukic[60], while also nothing in VG-38's and VG-13's testimony suggests that anyone introduced himself as such. Without any doubt, it is logical to deduce that, had Sredoje Lukic come into the house and introduced himself, then VG-13, one of the few people in the house who actually knew Sredoje Lukic well from before[61] would hear and recognize him. Crucially, VG-13 did not in fact hear or see Sredoje Lukic during the robbery.[62]

69. In completely disregarding the evidence of VG-13 - the one person who knew Sredoje Lukic and did not see or hear him- and instead relying on the confused and largely inconsistent evidence of a witness with no prior knowledge of him, evidence with numerous vital inconsistencies which were acknowledged by the Trial

[58] Para.588 of Judgement.
[59] T.1367,1369-1370,1359-1360.
[60] T.1274-1275.
[61] T.1000.
[62] Para.581 of Judgement.

Chmber[63]- the Trial Chamber applies an inconsistent and incomprehensible evidentiary reasoning and decision making.

70. In fact, even in the event that VG-18 did hear someone introduce himself, this can not be reasonably said to prove identification beyond reasonable doubt of someone the witness had no prior knowledge of.

71. As such, it is submitted that no reasonable Trial Chamber could have found that VG-18's evidence proves beyond reasonable doubt that Sredoje Lukic was present at the scene of the robbery.

Trial Chamber's reasoning in relation to VG-84

72. The Trial Chamber concludes in paragraphs 589-590 that VG-84, who was with his mother,VG-18, the entire time,[64] persistently held that he was within two meters of Sredoje Lukic when he supposedly introduced himself. However, this account was established to be erroneous when the witness admitted in cross-examination that he did not remember seeing the person who introduced himself as Sredoje Lukic, but was nevertheless able to hear Sredoje Lukic's introduction.

73. The inconsistencies and incomprehension in the Trial Chamber's evidentiary reasoning of VG-84's evidence is evident throughout its evaluation. The Trial Chamber found in paragraph 590 that VG-84 was near Sredoje Lukic when he introduced himself, even though it had already been established in the previous paragraph (para.589) that VG-84 stood by his mother in a separate room. Such synthesis of the evidence clearly demonstrates the incomprehensibility of the judicial reasoning, as it is an evident truth and a physical impossibility that one person be in two different places at the same time.

[63] Para.588 of Judgement.
[64] T.1277.

74. Moreover, the Trial Chamber ignored the fact that VG-84 did not directly testify in relation to hearing the Appellant introduce himself. Initially his testimony only detailed the fact that he was two metres away from the person alleged to be Sredoje Lukic[65]. The Trial Chamber erred in relying on the aforementioned inconsistency, i.e. VG-84 being held to be both together with his mother in another room, and simultaneously standing two metres away from the person but was unable to remember whether he saw the face of the person, to come to a conclusion that VG-084 could nevertheless hear someone introduce himself as Sredoje Lukic, something that this witness did not testify to. In fact, VG-84 specifically testified that he did not hear a man introducing himself as Sredoje Lukic.[66]

75. Therefore, the Trial Chamber's finding that VG-84 heard the introduction, which stands in stark contradiction to this witness's testimony, is a clear example of the arbitrary manner of evaluation of evidence with regard to the Appellant. Had the Trial Chamber not misstated VG-84's evidence in this part, it could not rationally have reached the conclusion that the witness could hear someone introduce himself as Sredoje Lukic.

76. Even in the event that VG-84 did hear someone introduce himself, this can not be reasonably said to identify the Appellant beyond reasonable doubt given that the witness had no prior knowledge of him at the material time (para.589).

77. The Trial Chamber's further finding in para.590 that other persons in the house told VG-84 that the perpetrator was Sredoje Lukic, is inherently unreliable. The 'other persons' to which VG-084 referred were never identified, crucially, because the witness was unable to either name or even give any useful information which may help yield an identification to the investigating authorities, even though he knew all the people in the house[67]. VG-101 clearly testified that there was no discussion regarding the identity of the perpetrators by the people in the Memic house.[68]

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[65] T.1277.
[66] T.1274-1275.
[67] T.1286.
[68] T.1442.

Furthermore, his mother, VG-18, who was with him at all times according to the Trial Chamber's finding, clearly stated that no one spoke of Sredoje Lukic[69]. Again, such reasoning illustrates that the Trial Chamber clearly disregarded the enormous inconsistencies in the evidence, did not consider the absence of corroborative evidence from any other source and accepted the account without any further elaboration or explanation as to why.

78. Based on the foregoing, no reasonable Trial Chamber could have found VG-84's evidence sufficient to prove beyond reasonable doubt that Sredoje Lukic was present at the scene of the robbery.

Trial Chamber's reasoning in relation to VG-38

79. In paras.582-585 the Trial Chamber found that VG-38, who had no prior knowledge of Sredoje Lukic - although he initially persistently claimed otherwise, was unable to distinguish between Milan Lukic and Sredoje Lukic. Further more, the witness in his testimony claimed to have heard of Sredoje Lukic from others - who remain unidentified. Despite this, and irrespective of the witnesses obvious confusion regarding the respective identity of Milan Lukic and Sredoje Lukic, the Trial Chamber in its judgement placed reliance on this testimony in placing Sredoje Lukic at scene of the robbery.

80. The Trial Chamber acknowledged that VG-38 did not initially tell the truth about knowing the Appellant from before[70] the many inconsistencies in his testimony (para.585). Based on these factors, the Trial Chamber decided not to place any weight to VG-38's testimony in relation to specific acts of Sredoje Lukic. However, it is paradoxical and illogical that the very same Trial Chamber which discounted the reliability of such evidence in one respect, should find his evidence reliable insofar as placing Sredoje Lukic at the scene of the robbery.

[69] T.1310.
[70] Para.582 of Judgement

81. The Trial Chamber noted in the Judgement that VG-38's evidence contradicts that of VG-13, who had solid prior knowledge of Sredoje Lukic and did not see him inside the house during the robbery.[71] It, however completely disregarded this fact in its evaluation finding instead, based on VG-38's testimony that he had heard of Sredoje Lukic's presence from others, that VG-038's evidence in fact placed the Appellant at the scene of the robbery.

82. The Trial Chamber erred in finding that VG-38 heard from others the identity of Sredoje Lukic. Given VG-38's lenient understanding of the truth, as recognized by the Trial Chamber in relation to the his allegation that he knew Sredoje Lukic prior to the incident, it is entirely incomprehensible how the Trial Chamber came to the conclusion to reject one of the many inconsistencies in his testimony and yet believe another of his assertions which was completely unsupported by any corroborative evidence.

83. VG-38's contention that he heard of Sredoje Lukic's presence by others is not only unsustainable, given that those people remain unidentified, it is furthermore in direct contradiction with the testimony of other witnesses. VG-101 clearly testified that there was no discussion on the identity of the perpetrators by the people in the Memic house.[72] VG-18, who was with him[73] stated that no one spoke of Sredoje Lukic[74]. And most importantly, his mother,VG-13, who was right besides him the entire time[75] and who knew Sredoje Lukic well, did not hear about him nor see him[76].

84. The Trial Chamber's evaluation of this witness's evidence in relation to the evidence of his mother VG-13 is simply perplexing. The Trial Chamber apparently rejects the evidence of the one witness who knew Sredoje Lukic from before, VG-13 and chooses to rely on inconsistent and unreliable evidence of her thirteen year old son. It provides no explanation as to why it ignores the evidence of VG-13. This is

[71] Para.584 of Judgement.
[72] T.1442.
[73] T.1367,1369-1370,1359-1360.
[74] T.1310.
[75] T.1121.
[76] Para.584 of Judgement;T.1099.

exemplary of the arbitrary approach adopted in evaluation of the evidence, by applying a method of 'pick and choose' with the sole purpose of arriving at the desirable conclusion beyond reasonable doubt.

Trial Chamber's reasoning in relation to Huso Kurspahic

85. In paragraph 591 the Trial Chamber accepted Huso Kurspahic's evidence. Huso Kurspahic, who was not present at the scene is essentially a hearsay witness giving evidence of events reported to him by his his father who was present. Notably, his testimony in relation to Sredoje Lukic is in direct contradiction to his father's interview which was given only 24 days after the incident. However instead of acknowledging the enhanced reliability of this direct evidence, the Trial Chamber chose to rely on the second-hand and inherently less reliable and less credible evidence of Huso Kurspahic in accepting both Sredoje Lukic's alleged presence at the scene of the robbery and his participation in the robbery.

86. The Trial Chamber notes in paragraph 591 the existence of the interview provided by Hasib Kurspahic, Huso Kurspahic's father and confirms the credibility of his account. However, the Trial Chamber erroneously interprets that in that interview Hasib Kurspahic did not name the perpetrators, and ignores the main part of that interview with regard to Sredoje Lukic. Namely, when asked whether he recognized any of the perpetrators, Hasib Kurspahic answered that he did not.[77] Hasib Kurspahic knew Sredoje Lukic personally prior to 14 June 1992.[78] Had Sredoje Lukic been at the scene, Hasib Kurspahic would certainly have recognized him and would have mentioned him in his interview.

87. The Trial Chamber further, without any further reasoning disregarded this interview.. It based its findings on Huso Kurspahic's claim that his father, in direct contradiction to his own interview which is admitted into evidence, had mentioned the Appellant as one of the perpetrators.

[77] P40 and P41, pp.8-9.
[78] Para.591 of Judgement;T.914-915;P37;T.805.

88. In relation to the same witness and the same incident the Trial Chamber in case *Prosecutor v.Vasiljevic* found that his testimony could not be accepted because his father Hasib Kurspahic made no mention of it in interview[79].

89. The present Trial Chamber found Huso Kruspahic to be not credible in relation to his evidence on the Bikavac incident (para.735), while at the same time finding him credible in relation to the Pionirska street incident.(para.591)

90. This method of "splitting" the personality of a particular witness in terms of credibility amounts to a legally incomprehensible method of decision-making such that it invalidates the Trial Judgement.

91. Furthermore, the failure of the Trial Chamber to consider the testimony of the only two witnesses who actually knew Sredoje Lukic and were present at the scene, Hasib Kurspahic and VG-13, and to instead rely on the testimony of a hearsay witness, whose testimony is not corroborated and who is found unreliable with regard to Bikavac incident, again clearly demonstrates the arbitrary approach applied by the Trial Chamber.

Ground 2 **– ERROR OF LAW AND/OR FACT- THAT APPELLANT WAS PRESENT AND PARTICIPATED IN THE TRANSFER OF THE KORTINIK GROUP**

92. In finding that the Appellant was present and participated in the transfer of the Koritnik group between Jusuf Memic's house and Adem Omeragic's house (para.607), the Trial Chamber by majority, Judge Robinson dissenting, endorsed several fundamental errors of fact occasioning a miscarriage of justice and/or errors of law invalidating the decision.

[79] *Vasiljevic* TJ,footnote 287.

93. The dissenting opinion of Judge Robinson on this allegation reflects the correct judicial view.

Subground 2a) Inaccurate/Insufficient weighting of witness evidence.

94. The Trial Chamber acknowledged the limitations of the evidence provided by numerous witnesses whom were unable to distinguish between Milan Lukic and Sredoje Lukic (paras.601, 604 and 605). However, without any further reflection on the nebulous nature of such evidence the Trial Chamber still proceeded to proffer that it was "satisfied" that such evidence was sufficient to demonstrate that both Accused were armed and present during the transfer to Adem Omeragic House.

95. From any logical analysis of the evidence, no reasonable trier of fact could have drawn such inference from this evidence. Consequently, the Trial Chamber, by majority, wrongfully placed the Appellant at the scene of the transfer in the Pionirska street incident, and, in preferring the testimony of witnesses VG-038, VG-084 and Huso Kurspahic whose credibility was impugned by the Defence throughout trial, occasioned fundamental errors in law and or fact invalidating the conclusions drawn by the Trial Chamber.

96. Such a deduction is a logical conclusion from close and careful examination of the evidence adduced, and is one which is supported by the separate opinion of Judge Robinson (para.1113) where he notes.

No reasonable Trial Chamber would have found that VG-038's evidence was credible with regard to the presence and participation in the transfer by Sredoje Lukic

97. The Trial Chamber found in para.601 that VG-038 did not distinguish between the individual actions of each perpetrator, and that his evidence as to the presence of Sredoje Lukic was "not specific". VG-038's inability to distinguish between Milan Lukic and Sredoje Lukic is an acknowledged fact, commented upon by the Chamber

in its' Judgment yet nevertheless, the Chamber in spite of these reservations paradoxically vested reliance in such evidence in arriving at the conclusion that Sredoje Lukic was present during the transfer. It is respectfully submitted that The Trial Chamber based this conclusion wholly on the witness's persistent repetition of the names of the alleged participants in the incident and not on the established facts.

98. Furthermore, the Trial Chamber, in arriving at this conclusion, neglected to consider a vital part of VG-038's testimony which directly contradicted its finding. Under oath, [REDACTED].[80] He further admitted that he was not allowed to look at the men closely.[81] In the absence of any direct identification evidence, the probative value of the evidence yielded by this witness was minimal and would have carried little weight in the considerations of a reasonable Trial Chamber. As such, in this circumstance, the Trial Chamber erred in unreasonably placing abnormally strong emphasis on the objectively speculative and nebulous evidence of VG-038.

99. Moreover, VG-38's evidence also stands in direct contradiction to the testimony proffered by his mother, and further, is inconsistent with VG-013's testimony, Hasib Kurspahic, VG-78 and VG-101. VG-13, who, as the Trial Chamber acknowledged, had solid prior knowledge of the Appellant and who was with VG-38 the entire time, did not see the Appellant during the transfer[82]. [REDACTED].[83] [REDACTED].[84] Hasib Kurspahic, VG-078 and VG-101 never mentioned the Appellant as one of the perpetrators.[85]

100. VG-038 confirmed a description of the man he alleged to be Sredoje Lukic as 'about forty years old, with black hair, darker than Milan' and without a moustache.[86] This description not only does not match the description of the Appellant, it is also in contradiction with the description of the perpetrators provided by VG-101, who stated

[80] P44-T.1378,lines-14-17.
[81] T.980.
[82] Para.412 of Judgement.T.1042,1099,1121-1122.
[83] 2D8-T.1443.
[84] 2D8-T.1504,lines-17-19.
[85] T.1435-1436;T.1381-1382.
[86] T.983-984.

that one of the Serbs had a black moustache and black curly hair, one had blondish hair and the third one was 18 years old or younger[87].

101. Based on the foregoing, no reasonable Trial Chamber would have found that VG-38's evidence reliably demonstrated the Appellant's presence and participation in the transfer. Such evidence was not only unclear but also unreliable, clearly speculative and riddled with inconsistencies. As such, taking the testimony of VG-038 in its totality in relation to the transfer, it was a demonstrably erroneous basis upon which to premise the conclusion that the Trial Chamber arrived at and one which could not have been endorsed by a reasonable Trial Chamber.

No reasonable Trial Chamber would have found that evidence by VG-084 was credible with regard to the presence and participation in the transfer by Sredoje Lukic

102. The Trial Chamber's findings that VG-084's evidence demonstrated that Sredoje Lukic was armed and present during the transfer to Adem Omeragic's house is unfounded. As already stated in Subground 1(a) VG-084 had no prior knowledge of Sredoje Lukic, and he was unable to make any identification tying the Appellant to the *loqus in quo*, as he did not see or hear the man who, as he initially claimed, introduced himself as Sredoje Lukic[88].

103. VG-84's claim that he heard of Sredoje Lukic's identity from other people in the house who knew him, is entirely unreliable as the witness –who knew all those people- was unable to name even one of them.[89] This allegation is further in direct contradiction to the testimony of VG-101 and even his own mother, VG-18 who was with him the entire time, who testified that there was no discussion about Sredoje Lukic[90].

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[87] T.1432.
[88] Paras.589-590 of Judgement; T.1274-1275.
[89] T.1286.
[90] T.1442;T.1310.

104. The Trial Chamber notes that VG-84 gave evidence that Sredoje Lukic ordered the transfer and that he was accompanied by Milan Lukic. However it omits to mention that the witness testified under cross-examination that he in fact does not know who ordered the transfer[91].

105. In contradiction to the testimonies of all other witnesses, VG-84 even testified that Sredoje Lukic was standing at the entrance door of the Omeragic house as the column was moving towards the house.[92]Under cross-examination however, the witness stated that it may also have been Milan Lukic at the door.[93]

106. In light of the forgoing inconsistencies, it is respectfully submitted that No reasonable Trial Chamber could have found that VG-84's evidence reliably demonstrated the Appellant's presence and participation in the transfer.

No reasonable Trial Chamber would have found that evidence by Huso Kurspahic was credible with regard to the presence and participation in the transfer by Sredoje Lukic

107. The Trial Chamber, in its findings rendered Huso Kurspahic's evidence placing Sredoje Lukic at the scene of the transfer (para.605) reliable. It is seminal to note that such evidence was not direct and was in essence hearsay evidence, based on what his father Hasib Kurspahic supposedly told him.

108. For two main reasons no reasonable Trial Chamber could have found his testimony was credible.

109. Primarily in para.591, the Trial Chamber mentions the interview between Hasib Kurspahic and a journalist, failing to mention that the reliability of the interview was openly endorsed by the Prosecution insofar as it was by deciding to admit the

[91] T.1275,l.6-8.
[92] T.1284.
[93] T.1284.

interview into evidence..[94] The Appellant submitted the details surrounding this interview in subground 1 (a).

110. Hasib Kurspahic had prior knowledge of Sredoje Lukic and thus would have been able to recognise Sredoje Lukic on 14 June 1992.[95] Yet, despite this fact, in his interview Hasib Kurspahic was completely silent as regards Sredoje Lukic, failing to mention and/or implicate him in any way in relation to the incident.[96] [REDACTED][97].

111. Secondly, the Appellant further submits that in relation to this same incident and the same witness the Trial Chamber in the case *Prosecutor v. Vasiljevic*, found with regard to transfer that:

> "VG-61 claimed that the Accused was there with Milan Lukic, Sredoje Lukic, Zoran Joksimovic and another (VG-61, T 795). VG-61 was not present but was relying upon what his father, now deceased, told him, but there is no mention of this in his father's statement (Ex P 145)."[98]

112. As such, in spite of such an acknowledgement and in the face of the evident inconsistencies, it is respectfully submitted that no reasonable Trial Chamber could have found Huso Kurspahic's evidence reliable in demonstrating the Appellant's presence and participation in the transfer.

Subground 2b) Inconsistent and contradictory evidentiary reasoning

113. The Trial Chamber erred in law by relying on an incomprehensible and erroneous method of evidentiary reasoning and decision making.

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[94] *Ibid.*
[95] Para.605 of Judgement.
[96] Interview with Hasib Kurspahic P40 and P41,pp.8,9.
[97] T.875-876,878; [REDACTED];P37;T.796,798.
[98] *Vasiljevic* TJ,footnote 298.

114. The undisputed evidence in this case shows that the Appellant was not present during the transfer. The sole identification witnesses, VG-013 and Hasib Kurpsahic did not identify the Appellant during the transfer (paras.600 and 605).

115. Other credible witnesses VG-078 and VG-101 neither mentioned nor described Sredoje Lukic as a perpetrator in this incident (para.602). As illustrated in subground 1(b) herein, it is poignant and extremely illustrative of the approach taken by the Trial Chamber in the Judgement that these witnesses provided very different descriptions of the perpetrators, none of which match the Appellant's physical appearance. Even more, VG-101 precisely described perpetrators of transfer.[99]

116. This crucial evidence of VG-013 and Hasib Kurpsahic, and also of VG-078 and VG-101 directly contradicts the testimony of VG-038, VG-084 and Huso Kurspahic.

117. The Appellant submits that the Trial Chamber completely disregarded the evidence of witnesses VG-13, Hasib Kurspahic, VG-78 and VG-101 in its reasoning. The evidence of these witnesses is critical to its findings, as VG-13 and Hasib Kurspahic are the only two survivors who actually had prior knowledge of Sredoje Lukic and would therefore have been able to recognize him, had he been at the scene. Witnesses VG-78 and VG101 on the other hand were the only ones able to yield any form of reliable description of the perpetrators, none of which matched the Appellant.

118. Had the Trial Chamber considered the relevant evidence of those witnesses with regard to the Appellant, it would have reached the rational and logical conclusion, in favour of the Appellant.

Trial Chamber's reasoning with regard to VG-38

119. In paragraph 601 the Trial Chamber summarised the evidence of VG-038 and reached the conclusion that, in fact during the transfer VG-38 was unable to see

[99] T.1432,1444-1446.

specifically where the men were standing, or look at the men closely. As regards the quality of such evidence, the Trial Chamber averred that his evidence as to the presence of Sredoje Lukic was not very specific, and his recollection was indiscriminate insofar as he often referred to the men collectively, did not distinguish between their individual actions and was unable to distinguish between Milan Lukic and Sredoje Lukic, but nevertheless the Trial Chamber found that his evidence reliably established that Sredoje Lukic was present during the transfer.

120. On the other hand, with regard to VG-18, who stated that she did not dare look at the perpetrators in the transfer but claimed to have recognised the voices, the Trial Chamber in paragraph 603 established that VG-18 was unable to identify the men and that the voice recognition was insufficient to link the Appellant to the transfer.

121. The fact that the Trial Chamber reaches one unreasoned conclusion regarding VG-38, while only two paragraphs further (para.603) it reaches exactly the opposite conclusion under almost the same circumstances with regard to VG-18, clearly demonstrates the inconsistent and incomprehensible evidentiary reasoning and decision making applied by the Trial Chamber.

122. Besides the fact that the Trial Chamber failed to provide a soundly reasoned opinion regarding its evidential conclusions, in relation to VG-38, who was clearly unable to distinguish between the two persons at the scene, the court nevertheless proceeded to hold that identification of the Appellant by VG-38 was reliable. Furthermore, the Chamber completely disregarded a vital part of VG-38's evidence bearing a direct impact on its finding. Namely, VG-038 testified under [REDACTED][100] and repeated that he was not allowed to look at the men closely.[101]

123. Based on this testimony, it is not a question of distinguishing between, but rather a question of seeing the perpetrators. It is clear from this witness's testimony that he

[100] P44-T.1378,l.14-17.
[101] T.980.

did not see the perpetrators, and thus could not be said to have reliably identified the Appellant as one of the perpetrators. Furthermore, the Trial Chamber finds that VG-38 was with his mother, VG-13, throughout the incident,[102] thus also during the transfer. VG-013 had prior knowledge of Sredoje Lukic[103] and she did not see Sredoje Lukic during the transfer[104]. [REDACTED][105]. Therefore VG-38, who did not have prior knowledge of the Appellant, and who was with his mother the entire time, could not reasonably have seen Sredoje Lukic during the transfer.

Trial Chamber's reasoning with regard to VG-84

124. In para.604, the Trial Chamber, after naming numerous inconsistencies in VG-84's testimony with regard to Sredoje Lukic, acknowledged again that VG-84 was unable to distinguish between Milan Lukic and Sredoje Lukic. From this stance, the Chamber, without any reasoned opinion, departed hastily toward the conclusion that VG-84's evidence nevertheless demonstrated that Sredoje Lukic was armed and present during the transfer to the Omeragic's house.

125. In its evaluation however, the Trial Chamber disregarded crucial evidence which had a direct impact on its findings. Throughout oral testimony, VG-84 testified that Sredoje Lukic was standing at the entrance door of the Omeragic house as the column was moving towards the house[106], however the witness subsequently admitted that it may also have been Milan Lukic at the door.[107] This testimony does not only show the degree of this witness's inability to distinguish between Milan Lukic and Sredoje Lukic in the same way as the inconsistencies named by the Trial Chamber do. It is in direct contradiction to the testimony of all other witnesses. Not only did none of those witnesses state that Sredoje Lukic stood at the entrance door, none of them saw Sredoje Lukic anywhere during the transfer.

[102] Para.584;T.1121.
[103] Para.581 of Judgement.
[104] Para.600 of Judgement;T.1121-1122;T.1099.
[105] 2D8-T.1504,l.17-19.
[106] T.1284.
[107] T.1284.

126. Its disregard of vital evidence at one hand and its unreasoned acceptance of inconsistencies on the other, clearly shows the arbitrary manner applied by the Trial Chamber in the evaluation of the evidence.

127. Had the Trial Chamber considered the above evidence, it would have reached a conclusion in favour of the Appellant.

128. Furthermore, the Trial Chamber's reasoning in paragraph 600 with regard to VG-13 is telling. Namely, VG-13, who did not see Sredoje Lukic during the incident, claimed that she heard of his presence from Edhem Kurspahic who, she presumed, knew him.[108] After considering that this testimony is contradicted by VG-18, the Trial Chamber rightly concludes that VG-13 does not reliably place the Appellant during the transfer.

129. And yet with regard to VG-84, with almost the same circumstances, where he also did not see Sredoje Lukic but claimed to have heard about his identity from others, whom he was not even able to name[109] and despite the fact that this testimony is in direct contradiction to the testimony of VG-101 and even his own mother, VG-18 who was with him the entire time and testified that there was no discussion about Sredoje Lukic[110], the Trial Chamber came to an entirely different conclusion.

130. This clearly demonstrates the application of an inconsistent and incomprehensible evidentiary reasoning and decision making.

Trial Chamber's reasoning with regard to Huso Kurspahic

131. In para.605, the Trial Chamber summarised that Huso Kurspahic's evidence, despite its hearsay character 'and in view of Hasib Kurspahic's prior knowledge of

[108] T.1039,1121.
[109] T.1286.
[110] T.1442;T.1310.

Sredoje Lukic', was reliable in placing Sredoje Lukic at the scene of the transfer. The Trial Chamber pivotally failed to provide any reasoned opinion for this finding.

132. Notably, in the very same paragraph as the Trial Chamber endorsed the reliability of Huso Kurspahic's evidence, it further commented that Hasib Kurspahic, Huso Kurspahic's father, had prior knowledge of Sredoje Lukic and would therefore have been able to recognise Sredoje Lukic on 14 June 1992. While the latter is a correct finding, the Trial Chamber ignores the core of this evidence, i.e. the fact that the interview of Hasib Kurspahic, given only 24 days after the incident and admitted into evidence in this case, specifically failed to implicate the Appellant and goes further to the extent that it is affirmed that indeed, he did not recognise any of the perpetrators.[111] The Trial Chamber completely disregarded this interview which was evidently relevant to its findings. This is a clear example of the inconsistent and incomprehensible evidentiary reasoning amounting to an arbitrary manner of evaluation of evidence on the side of the Trial Chamber.

133. The relevance of the interview of Hasib Kurspahic is even more evident as the Trial Chamber, in its finding on the reliability of Huso Kurspahic's evidence, clearly relied on the fact that his father, Hasib Kurspahic had prior knowledge of Sredoje Lukic. Had the Trial Chamber taken into account the interview of Hasib Kurspahic, it would have reached a different conclusion, in favour of the Appellant.

134. The Trial Chamber in the Vasiljevic case in relation to the same incident found that the evidence of Huso Kurspahic could not be accepted because his father did not mention this in his interview.[112]

135. The present Trial Chamber found Huso Kurpsahic not credible in relation to his evidence of the Bikavac incidenet (para.735) whilst at the same time finding him credible in relation to the transfer in Pionirska street incident (para.605). This method

[111] P40 and P41,pp.8-9.
[112] *Vasiljevic* TJ, footnote 298.

of "splitting" the personality of a particular witness in terms of credibility amounts to a legally incomprehensible method of decision-making such that it invalidates the Trial Judgement.

136. This clearly demonstrates the application of an inconsistent and incomprehensible evidentiary reasoning and decision making.

Ground 3 **ERROR OF LAW – THAT APPELLANT AIDED AND ABBETTED THE CRIME OF MURDER**

137. Under counts 9 and 10 of the Indictment, the Trial Chamber by majority, Judge Robinson dissenting, erroneously found Sredoje Lukic guilty under Article 7(1) of the Statute of aiding and abetting murder as both a crime against humanity and a violation of the laws or customs of war, pursuant to Articles 3 and 5(a) of the Statute, of 59 persons in the Pionirska street incident. The Trial Chamber has erroneously found that the Appellant's actions and conduct during the incident as a whole contributed to the commission of murder in Adem Omeragic's house. According to the Trial Chamber, the Appellant rendered practical assistance, which had a substantial effect on the commission of the crime of murder, when he was at Jusuf Memic's in the afternoon, visibly carrying arms and, in particular, when he participated in the transfer of the Koritnik Group to Adem Omeragic's house.[113]

138. In particular, the Appellant holds that the inconsistent sequence of findings could not allow a reasonable Trier of fact to arrive at the conclusion set out by the Trial Chamber in paragraph 934 of the Judgement and to apply to these findings the quantitative standard (sub-ground 3a) and neither the qualitative standard (sub-ground 3b) in relation to the *actus reus* of aiding and abetting the commission of murder.

Sub-ground 3a) Quantitative standard regarding aiding and abetting Murder.

[113] Para.932 of Judgement.

i) The logically inconsistent sequence of findings would not allow a reasonable Trier to reach the conclusion of the Trial Chamber

139. On the basis of the factual findings in relation to the presence of the Appellant around Jusuf Memic's house during the robbery and the strip search and the transfer of the Koritnik group to the Adem Omeragic's house, no reason reasonable Trial Chamber could have drawn the conclusion that the Appellant aided and abetted in the commission of Murder.

a. The Robbery

The Appellant notes that the Trial Chamber found reliable evidence insofar as it placed Sredoje Lukic *at the scene of the robbery* (based on testimonies of VG038, VG018, and VG084[114]) and as *participant* at the robbery (based on testimony of Huso Kurspahic[115]). However, paragraph 593 illustrates Trial Chamber's unsupported conclusion that Sredoje Lukic was *armed and present* at Jusuf Memic's house while the robbery was taking place *inside* the house. This later conclusion, based on which it can be reasonably inferred that Sredoje Lukic was outside while the robbery was placed inside, contradicts the later affirmation of the Chamber, who was 'satisfied that Sredoje Lukic entered Jusuf Memic's house during the robbery'.[116] Eventually, when analyzing the charges against the Appellant in respect to counts 9 and 10, the robbery incident is not mentioned[117].

b. The Strip Search

The Trial Chamber was initially satisfied that Sredoje Lukic was not involved in the strip searches, neither ordered nor carried them out[118]; this conclusion conflicts with the one rendered later in the

[114] Paras.585,588 and 590 of Judgement.
[115] Para.591 of Judgement.
[116] Para.637 of Judgement.
[117] Paras.928-934 of Judgement.
[118] Para.594 of Judgement.

Judgement by the Chamber that Sredoje Lukic entered Jusuf Memic's house during the strip search[119]. Furthermore, this finding does not form part of the basis on which the Trial Chamber found the Appellant guilty for aiding and abetting murder[120].

c. The Transfer

The Trial Chamber considered that VG038's[121] and Huso Kurspahic's[122] evidence reliably establishes that the Appellant was *present* at the scene of the transfer. Secondly, the Trial Chamber was satisfied that VG084's evidence proved that Sredoje Lukic was *armed and present* during the transfer to Adem Omeragic's house[123]. Eventually, when analyzing the charges against the Appellant in respect to counts 9 and 10, the Trial Chamber finds that Sredoje Lukic 'was involved' or 'participated' in the transfer.

140. In conclusion, there can be observed a gradual shift in the judicial interpretation of the same event throughout the Judgement which findings do not have a factual basis. This is visible in the illogical inconsistencies of the Trial Chamber in correctly characterizing the same act of the Appellant as either 'presence', 'present and armed', 'participation' or 'involvement', even though each of these terms describes a significantly different degree of involvement on part of the Appellant. This inconsistent sequence of findings, which directly impacts upon the appreciation of the element of substantial effect of the Appellant's contribution to the commission of murder, would not have allowed a reasonable Trier to find Sredoje Lukic guilty of aiding and abetting under counts 9 and 10.

ii) Even if the findings would be consistent throughout the Judgement, the Trial Chamber erroneously applied to these findings the

[119] Para.637 of Judgement.
[120] Paras.928-934 of Judgement.
[121] Para.601 of Judgement.
[122] Para.605 of Judgement.
[123] Para.604 of Judgement.

quantitative standard in relation to the *actus reus* of aiding and abetting the commission of murder.

141. The Trial Chamber articulated the elements of the *actus reus* of aiding and abetting as follows:

> "The *actus reus* of aiding and abetting has been defined as rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a crime provided for in the Statute. There is no requirement of a causal relationship between the conduct of the aider or abettor and the commission of the crime. The assistance may occur before, during or after the principal crime has been committed. Tacit approval of an accused who is physically present at the scene and in a position of authority may amount to encouragement and thus meet the *actus reus* of aiding and abetting."[124]

142. The Appellant does not argue that this definition of the *actus reus* of aiding and abetting is incorrect as such. However, the Trial Chamber's definition is incomplete and artificially construed. Some aspects of this definition need to be established in greater detail in order to enable them to be applied to the particular facts found by the Trial Chamber in this case.

143. The Trial Chamber's definition of the *actus reus* of aiding and abetting quoted in paragraph 141 above indicates that there are three types of acts, which considering their quality, may constitute aiding and abetting, namely:

(1) acts which consisted of *practical assistance* to the principal;

(2) acts which consisted of *encouragement* to the principal; and

(3) acts which consisted of *moral support* to the principal.

[124] Para.901 of Judgement.

144. The Trial Chamber's finding that Sredoje Lukic was criminally liable for aiding and abetting rested solely on its finding that his acts had 'rendered practical assistance' to the principal offenders[125]. In other words, his acts were found by the Trial Chamber to fall solely within the first of the three categories referred to in the previous paragraph.

145. However, the evidence does not support the finding that Sredoje Lukic's actions satisfy the requirement of providing the *actus reus* for 'aiding and abetting' within the context of said first category or type. The wording of the Trial Chamber's Judgement relies upon the following to show 'practical assistance'[126] in relation to the commission of murder in Adem Omeragic's house is:

> "Based on the evidence of VG018, VG038, VG084 and Huso Kurspahic, the Trial Chamber finds that Sredoje Lukic was *armed and present* at Jusuf Memic's house on 14 June 1992 while the robbery was taking place inside the house."[127]

In relation to the transfer to the Adem Omeragic's house, the Trial Chamber said:

> "Nevertheless, the Trial Chamber considers that VG038's evidence reliabily establishes that both Milan Lukic and Sredoje Lukic were *present* during the transfer."[128]

> "Nevertheless, the Trial Chamber is satisfied that VG084's evidence demonstrates that both Milan Lukic and Sredoje Lukic were *armed and present* during the transfer to Adem Omeragic's house."[129]

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[125] Para.932 of Judgement.
[126] *Ibid.*
[127] Para.593 (emphasis added) of Judgement.
[128] Para.601 (emphasis added) of Judgement.
[129] Para.604 (emphasis added) of Judgement.

> "Despite the hearsay character of Huso Kurspahic's evidence, and in view of Hasib Kurspahic's prior knowledge of Sredoje Lukic, the Trial Chamber finds reliable Huso Kurspahic's evidence placing Milan Lukic and Sredoje Lukic at the scene of the transfer."[130]

146. The Appellant therefore submits that the standards set out at the beginning of the Trial Judgment pervades the entire analysis that followed, since the practical assistance is erroneously proven by evidence of tacit approval by physical presence, which, in the reasoning of the Trial Chamber, could only account for encouragement and not for practical assistance.[131]

147. Furthermore, there was no finding and no evidence by the Trial Chamber in the case of Sredoje Lukic that his acts fell into the second or third of the categories mentioned in paragraph 143 above. There is no suggestion whatsoever in the Trial Chamber's Judgment that his mere presence 'encouraged' or provided 'moral support' to the principal offenders of the crimes at Pionirska Street

148. As the *Furundzija* Trial Chamber put it, '[w]hile any spectator can be said to be encouraging a spectacle - an audience being a necessary element of a spectacle - the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimizing or encouraging effect on the principals'[132]. In cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered together with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it. Furthermore, it follows that encouragement and moral support can only form a substantial contribution to a crime when the principal perpetrators are aware of it.

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[130] Para.605 (emphasis added) of Judgement.
[131] Para.901 of Judgement.
[132] *Furundzija* TJ,para.232.

149. Finally, the Appellant notes that, as presented in *Blagojevic* Appeal Judgement, an accused's position of authority and ability to exercise independent initiative constitute contextual factors that may go to proving the significance of the accused's assistance in the commission of the crime.[133] None of these factors were established by the Trial Chamber nor did the Chamber established the Appellant had a position with authority.

150. Accordingly, the Appellant submits that in this case, encouragement and moral support could only have had a substantial effect if the principal perpetrators of the crimes were aware that Sredoje Lukic made encouraging and supporting statements or encouraged and supported through his inaction.

151. The Trial Chamber's examination of Sredoje Lukic's responsibility for aiding and abetting murder refers to no evidence indicating that the principal perpetrator was encouraged to commit the murder by the Appellant's inactivity. Moreover, it cannot be contended that in essence, it was reasonable for the Trial Chamber to infer, from circumstantial evidence, that Sredoje Lukic's failure to intervene had the effect of encouraging the perpetrators to commit acts of murder. This inference would not be the only reasonable one, taking in consideration the present incident, i.e. the one at the Drina river incident or at the Varda factory, where the perpetrators' acts of murder did not require any form of encouraging or moral support for their acts to be committed.

152. Moreover, in the absence to the contrary, a reasonable Trier of fact would have concluded that Sredoje Lukic had no *de facto* authoritative function in the group of perpetrators. It is further submitted that the Appellant did neither expressly nor effectively ordered members of the group to commit crimes. The fact that Sredoje Lukic neither participated nor ordered others to do so render his assistance less than substantial.

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[133] *Blagojevic* AJ,para.195.

Sub-ground 3b) Qualitative standard regarding aiding and abetting Murder

153. The Trial Chamber's Judgment repeatedly acknowledged that in order for an act to fall within the category of aiding and abetting, it is necessary for the act to have met a quantitative standard of substantial effect on the commission of the crime, or must have substantially assisted in the commission of the crime. The Appellant submits that the Trial Chamber erroneously applied not only the qualitative standard for practical assistance but also for encouragement and moral support.

i.Qualitative standard for practical assistance

154. When appreciating the legal elements of aiding and abetting, Trial Chamber asserts that the assistance need not have caused the act of the principal, but it must have had a substantial effect on the commission of the crime.

155. However, various other Judgments of the Tribunal confirm that an act will not satisfy the elements of *the actus reus* of aiding and abetting unless the act in question had a *substantial* effect on the commission of the crime. Indeed, the Appeals Chamber has gone further holding that the act in question must have a '*direct* and substantial" effect on the commission of the crime. Precedent demonstrates that the act of the accused must 'have *significantly facilitated* the perpetration of the crime", or must constitute a 'substantial contribution' to the commission of the crime. Furthermore, the Appeals Chamber has held that the act in question must be 'specifically directed to assist ... the perpetration of a certain specific crime"[134].

156. It is clear from these pronouncements that not every act of assistance given by an accused to a perpetrator of a crime, no matter how minimum, will constitute aiding and abetting. Even if particular acts, how minimum they may be, of an accused would in some way stimulate perpetrators to commit a crime, the assistance will not amount

[134] *Vasiljevic* AJ,para.102.

to aiding and abetting if it is too remote or insubstantial or tangential to be considered as 'substantial assistance', or as a 'substantial *contribution*' to the commission of the crime. Furthermore, assistance given to the perpetrators of a crime may not legally amount to aiding and abetting where the act of the accused was not 'specifically directed' to assisting the perpetrator in the commission of the crime.

157. Therefore, the Appellant submits that the evidence of 'tacit approval by being physically present and armed'[135] does not by itself and cannot meet the threshold for substantial contribution to the commission of the crime by practical assistance. Additionally, no reasonable Trier of fact could have find the conduct of Sredoje Lukic other than insubstantial or tangential to the commission of the crime. Therefore, the Trial Chamber erred in law and also to the facts by wrongly applying these criteria. Even if the Trial Chamber would have correctly applied the quantitative standard for encouragement and moral support, it would not have arrived at a conviction in the absence of sufficient evidence thereof.

(ii) Qualitative standard for encouragement and moral support

158. The Tribunal's Judgments repeatedly acknowledged that 'encouragement' and 'moral support' are two forms of conduct each of which may lead to criminal responsibility for aiding and abetting a crime. The encouragement or support need not be explicit; under certain circumstance, even the act of being present on the crime scene (or in its vicinity) as a 'silent spectator' can be construed as the tacit approval or encouragement of the crime. In any case, the contribution to the crime of this encouragement or moral support must always be substantial.

159. The Tribunal's jurisprudence has repeatedly set forth that presence alone at the scene of the crime is not conclusive of aiding and abetting unless it is shown to have a

[135] See *supra* para.145.

significant legitimizing or encouraging effect on the principal.[136] Moreover, the Trial Chamber in *Aleksovski* ruled that the absence of any reaction on the part of the accused is not in itself enough to establish that he approved and encouraged the commission of the crime. According to this Judgement, one cannot be held responsible under Article 7(1) in circumstances where the accused does not have direct authority over the main perpetrators of the crimes.[137]

160. Therefore, it is submitted that based on the evidence provided with regard to the mere presence of Sredoje Lukic at the place of the crime, the Appellant does not meet the criteria set out by the Tribunals established case law for acts which consisted of encouragement and moral support to the principals.

161. Furthermore, the Tribunal's jurisprudence has promulgated that presence, when combined with authority[138], can constitute assistance in the form of moral support, including tacit approval, that is, the *actus reus* of the offence[139]. However, an individual's presence and position of authority alone are not conclusive of aiding and abetting unless it is shown to have a significant legitimizing or encouraging effect on the principal. It is necessary to consider the relevant facts to assess the impact of the accused's presence at the scene to determine whether it had a substantial effect on the perpetration of the crime.[140] The presence of a superior may, however, be perceived as an important *indicium* of encouragement and support."[141]

162. Although Sredoje Lukic apparently belonged to the group of men which the Trial Chamber found to have been present in the Pionirska street incident, there was no finding by the Trial Chamber that Sredoje Lukic in his factual position had authority

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[136] *Kunarac* TJ,para.393;*Tadic* AJ,para.689; *Furundzija* TJ,para.232.
[137] *Aleksovski* TJ,para.129.
[138] As noted in the *Furundzija* TJ,para.209: the 'supporter must be of a certain status for this to be sufficient criminal responsibility'.
[139] *Aleksovski* TJ,para.87.
[140] The Appeals Chamber in *Celebici* case para.669 and 684 found that the participation of an accused in the classification and releasing of prisoners, where he had no authority to do so, may not be sufficient to establish a degree of participation sufficient to constitute a substantial effect on the continuing detention of persons (as aiding and abetting).
[141] *Simic, Tadic and Zaric* TJ,para.165.

to release or save the civilians or even that as a practical matter he could affect who should be released or saved. The Trial Chamber does not refer to any evidence which allowed beyond any reasonable doubt for the exclusive inference that the Appellant was aware of the unlawfulness of the acts against the civilians. On the basis of these finding, a reasonable Trier would have concluded that the Appellant was not in a position to affect the sequence of events. Sredoje Lukic cannot therefore be deemed to have participated in this offence.

163. The Trial Chamber found in the *Oric* Trial that only if the principal perpetrator is not already prepared to commit the crime, '[...] may any contribution making the planning, preparation or execution of the crime possible or at least easier to constitute aiding and abetting.'[142]

164. Nevertheless, any reasonable Trier could have found the evidence in the present case to be such that it clearly indicates that the principal perpetrator was already accustomed with similar acts (Drina river incident, the Varda factory incident, the Bikavac incident). Hence, no additional encouragement from the Appellant was necessary or instrumental also for committing the crime on the Pionirska street. It can be reasonably inferred therefore that the principal perpetrator was already fully determined to commit the crime, that any acts of Sredoje Lukic to convince, encourage or morally assure him to commit the crime could not qualify as aiding and abetting the crime of murder.

165. Additionally, in the *Akayesu* case, the Trial Chamber of the International Criminal Tribunal for Rwanda held that the accused had abetted acts of sexual violence merely by his having been present near the premises where the crime occurred. The Trial Chamber based its conclusions on the fact that the accused had previously provided verbal encouragement for the commission of similar acts and that his position as mayor conferred on him such authority that his silence in the face of crimes being committed nearby could be interpreted by the perpetrators of the rapes only as a

[142] *Oric* TJ,para.281.

signal of official tolerance for sexual violence.[143] The Judgements of the Trial Chamber in the *Tadic* case and the *Furundjiza* Trial Judgement laid down these parameters by considering that the presence of the accused when crimes were committed by a group would attach criminal responsibility to the accused only if he had 'previously played an active role in similar acts committed by the same group and had not expressly spoken out against the conduct of the group.[144] These criteria were also endorsed in the *Aleksovski* Trial Judgement, were it was noted that the accused's prior or concomitant behavior or statements is to be taken into account in order to interpret his presence as an act of abetting.[145]

166. However, the Trial Chamber did not rely on nor was it presented with evidence of incidents which took place before the Pionirska street incidents and where Sredoje Lukic had taken part of together with the group of perpetrators. It can be therefore reasonably inferred that this incident was the first one in which Sredoje Lukic allegedly participated. Accordingly, the Appellant's acts do not meet these parameters as laid down by the Tribunal for aiding and abetting.

167. In conclusion, for the aforementioned arguments, the acts of the Appellant were erroneously proven to be meeting the qualitative character of the *actus reus* of aiding and abetting, not only for acts of practical assistance but also for encouragement and moral support towards the principal offender as identified by the Trial Chamber.

168. For the reasons stated above, the dissenting opinion of Justice Robinson in the instant case accurately reflects the correct standard and jurisprudential view. Finding only evidence with regard to the mere presence of the Appellant at the time and place of the acts, it does not suffice to infer that the Appellant rendered practical assistance as a form of aiding and abetting the murder at Adem Omeragic's house. Moreover, absent to evidence in support to his *de facto* authoritative position and influence over the crime perpetrators, no reasonable Trier could infer that Sredoje Lukic had a

[143] *Akayesu* Trial Chamber, Prosecutor's Closing Brief, para.68.
[144] *Furundzija* TJ,para.274.
[145] *Aleksovski* TJ,para.65.

substantial effect on the perpetration of the crime of murder through encouragement and moral support.

Ground 4 **ERROR OF LAW – APPELLANT'S REQUISITE *MENS REA* FOR MURDER**

169. The Trial Chamber, by majority, Judge Robinson dissenting, erroneously holds that the Appellant knew that those whom he allegedly participated in the transfer to Adem Omeragic's house would be killed as a result of the fire when the house was set ablaze. The Trial Chamber also erred by accepting that the Appellant also knew that his acts and conduct contributed to the commission of the murder.[146]

170. In particular, on the basis of the paras.928-934 and paras.1027-1035 of the Trial Judgement no reasonable Trial Chamber could have drawn the conclusion that the Appellant had the required *mens rea* for aiding and abetting the commission of Murder.

171. The Appellant submits that, when defining the required *mens rea* required for aiding and abetting, the Trial Chamber expressly ignored the criteria set out in the *Oric* Trial Chamber Judgement[147], which are specifically relevant for Sredoje Lukic acts. Therefore, it is submitted that the Trial Chamber erred in finding the Appellant guilty for aiding and abetting by applying the wrong and reduced standards of *mens rea*.

172. Therefore, based on the Tribunal's contemporary case law on this issue, the *Oric* Trial Judgement set out the following cumulative conditions with regard to *mens rea* for aiding and abetting:

> "[...] (i) aiding and abetting must be intentional; (ii) the aider and abettor must have 'double intent', namely both with regard to the furthering effect

[146] Para.933 of Judgement.
[147] See *infra* para.172.

> of his own contribution and the intentional completion of the crime by the principal perpetrator; (iii) the intention must contain a cognitive element of knowledge and a volitional element of acceptance, whereby the aider and abettor may be considered as accepting the criminal result of his conduct if he is aware that in consequence of his contribution, the commission of the crime is more likely than not; and (iv) with regard to the content of his knowledge, the aider and abettor must at the least be aware of the type and the essential elements of the crime(s) to be committed. This, however, does not require that the aider and abettor already foresees the place, time and number of the precise crimes which may be committed in consequence of his supportive contributions, nor that a certain plan or concerted action with the principal perpetrator must have existed."[148]

173. The Trial Chamber did not properly apply these two standards of requisite intent (conditions (i) and (ii))[149] and requisite knowledge (conditions (iii) and (iv))[150] when convicting the Appellant and therefore erred in law. Moreover, even if these standards would be applied to the acts of Sredoje Lukic, the evidence presented to the Court justifies the conclusion that at least one of the conditions is not met. Hence, the Appellant did not have the required *mens rea* for aiding and abetting murder.

174. In conclusion the Appellant holds that the Trial Chamber erred in law by accepting the liability mode of aiding and abetting as to the crime of Murder.

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[148] *Oric* TJ,para.288.
[149] See *infra* Subground 4a).
[150] See *infra* Subground 4b).

Subground 4a) Appellant's requisite intent for aiding and abetting Murder

175. The Appellant reiterates that the requisite intent for aiding and abetting Murder requires the Trial Chamber to find that the (i) aiding and abetting must be intentional; and (ii) the aider and abettor must have 'double intent', namely both with regard to the furthering effect of his own contribution and the intentional completion of the crime by the principal perpetrator.[151]

176. It is submitted that the Trial Chamber found no evidence nor did it arrive at a reasonable inference that the aiding and abetting of the Appellant was intentional and neither that he had 'double intent' toward the crime of murder.

177. In particular, based on the factual findings arrived at by the Trial Chamber that Sredoje Lukic was merely present outside Jusuf Memic's house during the robbery which took place inside the house, that he was not involved (and therefore, not present) during the strip search and the removal of the women among the Koritnik group, and that he was present and participated in the transfer of the Koritnik group from Jusuf Memic's house to Adem Omeragic house, the Trial Chamber could not have convicted the Appellant. This conclusion is moreover justified now that the Trial Chamber found that he was not present during the incidents at the Adem Omeragic house.

178. These factual findings demonstrate that he was not even a direct spectator of the incidents taking place in Jusuf Memic's house (being found by the Trial Chamber as being present outside the house). Furthermore, even though he was found as participating in the transfer of the group from one house to the other, there were no findings of the Trial Chamber with regard to acts or incidents which would be similar to the crime of murder or which would predict the murder. As a result, no reasonable Trier would have found the Appellant as intending to aid or abet the crime of murder when there is no evidence indicating that Sredoje Lukic was close to Adem

[151] *Oric* TJ,para.288.

Omeragic's house. As decided by the Trial Chamber in *Tadic*, the requisite intent for aiding and abetting needs to be proven by 'a conscious decision to participate'[152] of the accused, and no evidence was found or no conclusions were inferred in the Trial Judgement of the present case.

179. Therefore, based on the aforementioned reasons, the conclusion that the Appellant intended to aid and abet the crime of murder is not the only reasonable one the Trial Chamber could have arrived at. Accordingly, the element of aiding and abetting, in terms of its intentional element, could not be proven beyond any reasonable doubt. In fact, based on the evidence presented against Sredoje Lukic's acts during the incidents on the Pionirska street, it could only be reasonably inferred that he intended to assist the Koritinik people for the transfer which was planned for the following day.

180. This other inference which could only be made based on the evidence of the present case also justifies the inference that since the Appellant's intent was to assist the Koritnik people transfer for the bus of the following day and also he was not direct spectator of the acts committed by the principal perpetrators (as found by the Trial Chamber), Sredoje Lukic had no intention to complete the crime of murder pursued by the offenders at Adem Omeragic's house.

181. In conclusion, the Trial Chamber could not have concluded beyond any reasonable doubt that the Appellant met any of the two conditions of the requisite intent for aiding and abetting the crime of murder. Moreover, even if the Trial Chamber had found that any of the two conditions were met, the fact that the other condition was not met would require any reasonable Trier of fact to find Sredoje Lukic as not having the requisite intent and *mens rea* for aiding and abetting.

[152] *Tadic* TJ,para.674.

Subground 4b) Appellant's requisite knowledge of the commission of Murder

182. The Appellant emphasizes that the requisite knowledge for aiding and abetting Murder requires the Trial Chamber to find that '(iii) the intention must contain a cognitive element of knowledge and a volitional element of acceptance, whereby the aider and abettor may be considered as accepting the criminal result of his conduct if he is aware that in consequence of his contribution, the commission of the crime is more likely than not; and (iv) with regard to the content of his knowledge, the aider and abettor must at the least be aware of the type and the essential elements of the crime(s) to be committed.'[153]

183. These criteria were promulgated in previous findings of the Tribunal, holding that "it is sufficient that the aider and abettor had knowledge that his or her own acts assisted in the commission of the specific crime by the principal offender. The aider and abettor must also be aware of the 'essential elements' of the crime committed by the principal offender, including the state of mind of the principal offender." The Appeals Chamber has applied this formulation consistently in its Judgements. [154]

184. Furthermore, the Appeals Chamber in *Blaskic* concurred with the conclusion in *Furundzija* Trial Chamber that 'it is not necessary that the aider and abettor ... know the precise crime that was intended and which in the event was committed. If he was aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor."[155] This conclusion was also adopted by the *Brdjanin* Trial Judgement. [156]

185. The Appellant submits that the Trial Chamber could not have proven beyond any reasonable doubt the elements of knowledge and the volitional element of acceptance. Taking in consideration the conclusion of the the above analysis of the factual

[153] *Oric* TJ,para.288.
[154] *Blaskic* AJ,para.45;*Vasiljevic* AJ,para.102;*Tadic* AJ,para.229; *Blagojevic* AJ,para.221.
[155] *Blaskic* AJ,para.50.
[156] *Brdjanin* TJ,para.272.

findings and of the potential inferences from the available evidence[157], the Appellant's presence as an outsider/indirect spectator to the incidents at Jusuf Memic's house and, more importantly, his participation to a transfer lacking the prerequisite elements of murder, and last but not least, the lack of presence at the murder acts at Adem Omeragic's house, demonstrate that Sredoje Lukic cannot be reasonably considered as accepting the criminal result of his conduct. Thus, no reasonable Trier could find him being aware that in consequence of his contribution, the commission of the crime would have beem more likely than not.

186. With regard to the fourth criterion set out in *Oric* Trial Judgement, even though the crime of murder was committed, there is no evidence that at any point during the incidents on the Pionirska street, the Appellant was aware that the crime (together with its essential elements and type) would probably be committed. Furthermore, based on the above analysis of the factual findings and of the possible inferences from the available evidence[158], a reasonable inference in this direction could neither have been made.

187. In conclusion, the Trial Chamber could not have concluded beyond any reasonable doubt that the Appellant met any of the two conditions of the requisite knowledge for aiding and abetting the crime of murder. Moreover, even if a Trial Chamber would have found that any of the two conditions were met, the fact that the other condition was not met would require any reasonable Trier to find Sredoje Lukic as not having the requisite knowledge and *mens rea* for aiding and abetting.

[157] See *supra* paras176-179.
[158] Ibid.

Ground 5 – ERROR OF LAW - AIDING AND ABBETTING CRUEL TREATMENT AND INHUMANE ACTS

188. In para. 984 of the impugned Judgement, the Trial Chamber erroneously holds that the Appellant's acts and conduct during the Pionirska Street incident contributed to the commission of the crimes of Cruel Treatment and Inhumane Acts against the survivors of incident. The Trial Chamber incorrectly found that the Appellant rendered practical assistance to the commission of these crimes when he was at Jusuf Memic's house in the afternoon, visibly carrying arms and, in particular, when he participated in the transfer of the Koritnik group to Adem Omeragic's house.

189. As to the above[159], the criteria to be applied in relation to aiding and abetting and the level of contribution of the aider and abettor must meet both a qualitative and quantitative standard.

190. Based on the analysis pursued above[160], one can observe an unfounded shift in the evidentiary reasoning of the Court with regard to the same event. This is visible in the illogical inconsistencies of the Trial Chamber in its characterization of the same act of the Appellant as either 'presence', 'present and armed', 'participation' or 'involvement', even though each of these terms describes significantly different degrees of contribution on behalf of the Appellant. This inconsistent sequence of findings, which directly affects the appreciation of the substantial effect of the Appellant's contribution to the commission of cruel treatment and inhumane acts, would not allow a reasonable Trier to find Sredoje Lukic guilty of aiding and abetting under counts 11 and 12.

[159] See *supra* Ground 4.
[160] See *supra* Sub-ground 4a).

ii) quantitative standard in relation to aiding and abetting the commission of Cruel Treatment and Inhumane Acts is not correctly applied.

191. Based on the analysis above of the qualitative standard in relation to aiding and abetting[161], the Appellant submits that the *actus reus* standards set out at the beginning of the Trial Judgement renders the entire analysis that followed moot. This is evidenced by the fact that the Court deems the practical assistance to crimes of cruel treatment and inhumane acts to be proven by evidence of tacit approval by physical presence, while in the reasoning of the Trial Chamber, this could only account for encouragement or moral support and not for practical assistance.[162]

192. Nevertheless, reiterating the arguments mentioned under sub-ground 3b)[163], there was no finding and no evidence by the Trial Chamber in the case of Sredoje Lukic that his acts fell into the second or third of the categories mentioned in paragraph 43. There is no suggestion whatsoever in the Trial Chamber's Judgement that his mere presence 'encouraged' or provided 'moral support' to the principal offenders of the crimes at Pionirska Street.

Sub-ground 5b) Qualitative standard for aiding and abetting the commission of Cruel Treatment and Inhumane Acts

193. ICTY case law repeatedly acknowledged that in order for an act to fall within the category of aiding and abetting, it is necessary for the act to have met the standard of substantial effect on the commission of the crime, or must have substantially assisted in the commission of the crime. The Appellant submits that the Trial Chamber erroneously applied not only the quantitative standard for practical assistance but also those for encouragement and moral support.

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[161] See *supra* Sub-ground 4b).
[162] Para.901 of Judgement.
[163] See *supra* paras.147-152.

i. Qualitative standard for practical assistance

194. As demonstrated above[164], the Appellant submits that the evidence of 'tacit approval by being physically present and armed'[165] does not and cannot meet the threshold for substantial contribution to the commission of the cruel treatment and inhumane acts by practical assistance, since no reasonable Trier could have find the conduct of Sredoje Lukic other than insubstantial or tangential to the commission of these crimes. Therefore, the Trial Chamber erred by applying this criteria, while in fact it should have applied the quantitative standard for encouragement and moral support.

i. Qualitative standard for encouragement and moral support

195. Taking in consideration the arguments above[166], the acts of the Appellant were erroneously proven to be meeting the qualitative character of the *actus reus* of aiding and abetting, not only for acts of practical assistance but also for encouragement and moral support towards the principal offender as identified by the Trial Chamber.

196. In addition, the dissenting opinion of Justice Robinson in the instant case accurately reflects the correct standard and jurisprudential view. When the presented evidence only indicates a mere presence of the Appellant at the time and place of the acts, it does not suffice to infer that the Appellant rendered practical assistance as a form of aiding and abetting the cruel treatment and inhumane acts on Pionirska street. Moreover, absent to evidence in support to his *de facto* authoritative position and influence over the crime perpetrators, no reasonable Trier could infer that Sredoje Lukic had a substantial effect on the perpetration of cruel treatment and inhumane acts through encouragement and moral support.

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[164] See *supra* paras.155-157.
[165] See *supra* para.146.
[166] See *supra* paras.159-167.

Ground 6 **– ERROR OF LAW - APPELLANTS REQUISITE *MENS REA* FOR CRUEL TREATMENT AND INHUMAN ACTS**

197. The Trial Chamber erred in law by finding that the Appellant knew that the survivors were subjected to serious mental and physical suffering and that his acts and conduct facilitated the commission of these crimes[167]. Furthermore, the Trial Chamber erred in law by accepting that the alleged assistance of the Appellant in the transfer of the Koritnik Group to another place amounted to aiding and abetting the crimes of Cruel Treatment and Inhumane Acts.

198. The Appellant submits that, when defining the requisite *mens rea* for aiding and abetting, the Trial Chamber expressly ignored the criteria set out in the *Oric* Trial Chamber Judgement[168], which are specifically relevant for Sredoje Lukic acts. Therefore, it is submitted that the Trial Chamber erred in finding the Appellant guilty for aiding and abetting by applying the wrong and reduced standards of *mens rea*.

199. Therefore, based on the Tribunal's contemporary criteria on this issue, the *Oric* Trial Judgement set out the following cumulative conditions with regard to *mens rea* for aiding and abetting:

> "[...] (i) aiding and abetting must be intentional; (ii) the aider and abettor must have 'double intent', namely both with regard to the furthering effect of his own contribution and the intentional completion of the crime by the principal perpetrator; (iii) the intention must contain a cognitive element of knowledge and a volitional element of acceptance, whereby the aider and abettor may be considered as accepting the criminal result of his conduct if he is aware that in consequence of his contribution, the commission of the crime is more likely than not; and (iv) with regard to the content of his knowledge, the aider and abettor must at the least be aware of the type and the essential elements of the crime(s) to be committed. This, however,

[167] See *supra* para.187.
[168] See *infra* para.199.

does not require that the aider and abetter already foresees the place, time and number of the precise crimes which may be committed in consequence of his supportive contributions, nor that a certain plan or concerted action with the principal perpetrator must have existed."[169]

200. The Trial Chamber did not properly apply these two standards of requisite intent (conditions (i) and (ii))[170] and requisite knowledge (conditions (iii) and (iv))[171] when convicting the Appellant and therefore erred in law. Moreover, even if these standards would have been correctly applied to the acts of Sredoje Lukic, it would have been established that at least one of the conditions is not met. Hence, the Appellant did not have the required *mens rea* for aiding and abetting cruel treatment and inhumane acts.

201. In conclusion the Appellant holds that the Trial Chamber erred in law by accepting the liability mode of aiding and abetting as to the crime of cruel treatment and inhumane acts.

Subground 6a) Inaccurate/Insufficient weighting of witness evidence

202. The Appellant emphasizes that the requisite intent for aiding and abetting Murder requires the Trial Chamber to find that the (i) aiding and abetting must be intentional; and (ii) the aider and abettor must have 'double intent', namely both with regard to the furthering effect of his own contribution and the intentional completion of the crime by the principal perpetrator.[172]

203. It is submitted that the Trial Chamber was not cognizant of any evidence or reasonable inference that the aiding and abetting of the Appellant was intentional and neither that he had 'double intent' toward the crime of murder.

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[169] *Oric* TJ,para.288.
[170] See *infra* Subground 4a).
[171] See *infra* Subground 4b).
[172] *Oric* TJ,para.288.

204. Based on the reasons mentioned above[173], the conclusion that the Appellant intended to aid and abet in committing the cruel treatment and inhumane acts is not the only reasonable one the Trial Chamber could have arrived at. As a result, aiding and abetting in terms of the intentional element could not have been proven intentional beyond any reasonable doubt. In fact, based on the evidence connected to to Sredoje Lukic's acts during the incidents on the Pionirska street, it could be reasonably inferred that he merely intended to assist the Koritinik people for the transfer which was planned for the following day[174].

205. This alternative inference from paragraph 102, based on the evidence of the present case, also counts for the inference that since the Appellant's intent was to assist the Koritnik people transfer for the bus of the following day and also he was not direct spectator of the acts committed by the principal perpetrators (as found by the Trial Chamber), Sredoje Lukic had no intention to complete the crime of cruel treatment and inhumane acts pursued by the offenders at Adem Omeragic's house.

206. In conclusion, the Trial Chamber did not conclude beyond any reasonable doubt that the Appellant met any of the two conditions of the requisite intent for aiding and abetting the cruel treatment and inhumane acts. Moreover, even if the Trial Chamber had found that any of the two conditions were met, the fact that the other condition was not met would require any reasonable Trier to find Sredoje Lukic as not having the requisite intent and *mens rea* for aiding and abetting.

Subground 6b) Absence of requisite knowledge

207. The Appellant stresses that the requisite knowledge for aiding and abetting cruel treatment and inhumane acts requires the Trial Chamber to find that '(iii) the intention must contain a cognitive element of knowledge and a volitional element of acceptance, whereby the aider and abettor may be considered as accepting the

[173] See *supra* paras.177-178.
[174] Supported also *Vasiljevic* TJ para.191

criminal result of his conduct if he is aware that in consequence of his contribution, the commission of the crime is more likely than not; and (iv) with regard to the content of his knowledge, the aider and abettor must at the least be aware of the type and the essential elements of the crime(s) to be committed.'[175]

208. The Appellant submits that the Trial Chamber did not prove nor could have been proven beyond any reasonable doubt the elements of knowledge and the volitional element of acceptance. Taking in consideration the conclusion of the above analysis as to the factual findings and of the possible inferences from the available evidence[176], his presence as an outsider/indirect spectator to the incidents at Jusuf Memic's house and, more importantly, his participation to a transfer lacking the requisite elements of cruel treatment and inhumane acts, and last but not least, the lack of presence at the criminal acts at Adem Omeragic's house demonstrate that Sredoje Lukic cannot be considered as accepting the criminal result of his conduct. No reasonable Trier could have found him of being aware that in consequence of his contribution, the commission of the crime would have been more likely than not.

209. With regard to the fourth criterion set out in *Oric* Trial Judgement, even though cruel treatment and inhumane acts were committed, there is no evidence that at any point during the incidents on the Pionirska street, the Appellant was aware that the crime (together with its essential elements and type) would probably be committed. Furthemore, based on the above analysis of the factual findings and of the possible inferences from the available evidence[177], a reasonable inference in this direction could neither have been made.

210. In conclusion, the Trial Chamber did not conclude beyond any reasonable doubt that the Appellant met any of the two conditions of the requisite knowledge for aiding and abetting the commission of cruel treatment and inhumane acts. Moreover, even if the Trial Chamber had found that any of the two conditions were met, the fact that the

[175] *Oric* TJ,para.288.
[176] See *supra* paras.178-179.
[177] Ibid.

other condition was not met would require any reasonable Trier to find Sredoje Lukic as not having the requisite knowledge and *mens rea* for aiding and abetting.

Ground 7 **- ERROR OF LAW AND/OR FACT – IMPLAUSIBILITY OF APPELLANT's ALIBI**

a) Pionirska Street Incident

211. When determining in para.637 of the Trial Judgement, that the Appellant was present at the Pionirska Street incident on 14 June 1992, the Trial Chamber rejected erroneously the alibi defence that the Appellant was in fact celebrating the Serbian Christian Orthodox holiday of Holy Trinity in the village of Krtinska in Obrenovac with his family and friends.

212. The Trial Chamber erred in failing to compare the testimonies of the defence witnesses in relation to the Appellant's presence at Pionirska Street on 14 June 1992 with relevant pieces of evidence on the record and the testimonies of other prosecution witnesses the Trial Chamber accepted to be reliable. Had the Trial Chamber considered this evidence, it could not have concluded beyond a reasonable doubt that the Appellant was at Pionirska Street on 14 June 1992.

213. Besides submitting that Sredoje Lukić was not identified as one of the perpetrators of the Pionirska Street incident, the Defence submitted that Sredoje Lukić could not have committed the crimes charged in the Second Amended Indictment because he was not present in Višegrad on 14 June 1992, having been celebrating the Serbian Christian Orthodox holiday of Holy Trinity in the village of Krtinska in Obrenovac with his family and friends on that day. Both alibi witnesses for the Pionirska Street incident, Witnesses Veroljub Živković and Branimir Bugarski, provided consistent and credible accounts of Sredoje Lukić's presence in

Krtinska, Obrenovac on 14 June 1992.[178] Both witnesses provided credible reasons for their ability to remember this particular Holy Trinity in 1992, namely because it was the first Holy Trinity after the breakout of the war and Witness Burgarski's family was in mourning because of the death of two close family members a few months before. Neither the content of the testimony nor the credibility of the witnesses have been effectively attacked or rebutted by the Prosecution.

214. In this regard, the Defence recalls that the Prosecution did not present any specific rebuttal witness with regard to the alibi defence offered by the Defence of Sredoje Lukić, as has been acknowledged by the Trial Chamber in paragraphs 529-550 of the Trial Judgement. where Prosecutions alibi Rebuttal is discussed. It follows from these paragraphs that the Prosecution did not even try to rebut the Appellant's alibi defence.

215. It is the Appellant's case that his alibi tendered is both credible and plausible. In 1992, the Serbian Christian Orthodox holiday of Holy Trinity was on Sunday 14 June.[179] Sredoje Lukić celebrated this holiday exactly on this very day together with his family and friends at the house of Milojko Popadić in Obrenovac.

216. In its Judgement the Trial Chamber very plainly and clearly erroneously stated that it considered "certain aspects of the alibi evidence difficult to believe"[180] and further finding "implausible the witnesses' recollection and the alleged subsequent repeated discussion".[181] The Appellant submits that by undertaking this abovementioned approach the Trial Chamber misconstrued the burden of proof relating to alibi defences and thus passed Judgement under an error of law, therefore invalidating the Trial Judgement entirely.

217. The Trial Chamber especially erroneously rejected Branimir Bugarski's account that his recollection was facilitated by the fact that Milojko Popadic and Sredoje

[178] 2D43.
[179] 2D43;T.3613-3614.
[180] Para.633 of Judgement.
[181] Para.634 of Judgement.

Lukic did not enter his house to join the festivities upon their arrival.[182] finally stating: "When the Prosecution asked Branimir Bugarski whether he was mistaken about the year and whether he was not remembering the feast of Holy Trinity in 1999, the year when a bomb fell not far from his village, Branimir Bugarski did not give a clear answer."[183] But, even with regard to this question, even when the Prosecution tried to mislead the witness, Mr.Bugarski provided a very precisely explanation about when a bomb fell in his village, while the question regarding the feest that year was not precise.[184] Even more strikingly, the Trial Chamber admitted in further reasoning regarding this witness, that the witness endured the cross-examination well (para.738).

218. In this regard, the Appellant recalls the previous Jurisprudence of the ICTY and ICTR Appeals Chamber regarding the consequences of alibi defences on the burden of proof, namely that the raising of such a defence does not affect the onus incumbent on the Prosecution to establish beyond reasonable doubt, despite the alibi, the accused's guilt. Consequently, the accused bears no onus to establish the alibi, but it is for the Prosecution to eliminate any reasonable possibility that the alibi is true. Moreover, the demonstration that an alibi is false is not sufficient to demonstrate the accused's guilt.

219. The Appeals Chamber in Judgement dated 27 September 2007 in the Case *The Prosecutor v.Limaj et al.*:

> 63. The Appeals Chamber notes and agrees with the ICTR Appeals Chamber's finding in *Kamuhanda* with respect to the burden of proof regarding alibi that:
>
> > [a]n alibi [...] is intended to raise reasonable doubt about the presence of the accused at the crime site, this being an element of the prosecution's case, thus the burden of proof is on the prosecution.[185]

[182] *Ibid.*
[183] *Ibid.*
[184] T.3746-3747.
[185] *Kamuhanda* AJ,para.167. *See also Kajelijeli* AJ,paras.41-42, and *Kayishema and Ruzindana* AJ,para.111.

Similarly, the ICTR Appeals Chamber held in *Kajelijeli* that:

> [t]he burden of proving beyond reasonable doubt the facts charged remains squarely on the shoulders of the Prosecution. Indeed, it is incumbent on the Prosecution to establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.[186]

> This does not, however, require the Prosecution to specifically disprove each alibi witness's testimony beyond reasonable doubt. Rather, the Prosecution's burden is to prove the accused's guilt as to the alleged crimes beyond reasonable doubt in spite of the proffered alibi.

220. Based on these standards, the Appellant submits, that the Trial Chamber did not demonstrate at any point in paragraphs 632-635 of the Trial Judgement, where it discusses the alibi defence of the Appellant, that the factual foundation supporting the Appellant's alibi was insufficient. No evidence was tendered to this effect by the Prosecution and no finding made on this issue by the Trial Chamber itself. Thus, in rendering such a Judgement, the Trial Chamber in fact erroneously shifted the burden of proof onto the Appellant, contravening the established jurisprudential methodology of the ICTY.

221. Furthermore, this approach by the Trial Chamber violated the right of the Appellant to a fair trial. The Trial failed to provide a reasoned opinion in respect of its rejection of alibi statements and consequently the Appellant's alibi, showing a neglect to properly analyze defence evidence. In so doing, the Trial Chamber made greatly superficial findings, which do not fulfil the criterions of a reasoned opinion, as outlined in II. C. (i).

222. In the circumstances, it is respectfully submitted that the finding of the Trial Chamber, in rejecting the credibility and reliability of the Appellant's alibi evidence amounted to error of fact/ or law.

b) Circumvention of Mitar Vasiljevic's alibi by majority of Trial Chamber and the impact on the appellant's position

[186] *Niyitegeka* AJ,para.60 (internal footnotes omitted).*See also Čelebići* AJ,para.581;*Musema* AJ,para.202 (with reference to *Kunarac et al.* TJ,para.625);*Kayishema and Ruzindana* AJ,para.113.

(i) Introduction

223. Throughout the Trial, the Appellant challenged the credibility of VG013, VG038, VG078, VG101 and Huso Kurspahic, whose evidence placed Mitar Vasiljevic on Pionirska Street after 4p.m. at times relevant to the charges in the indictment.[187]

224. By majority, the Trial Chamber found that the Uzice hospital logbook entry and case history – the evidential base of Mitar Vasiljevic' alibi in his own trial which was both accepted by the Trial Chamber and not appealed by the Proescution - are false.[188] This conclusion was arrived at on the basis of Dr.Raby's evidence that the 1992 X-ray presented by Mitar Vasiljevic during his trial in support of his alibi did not match an X-ray taken of his leg in 2001.[189] As a consequence of this finding, the Trial Chamber majority accepted the Prosecution evidence that Mitar Vasiljevic was present at Pionirska Street on 14 June 1992 during the periods of transfer and the house burning.[190] Consequently, the Trial Chamber by majority, Judge Robinson dissenting, found "that the Milan Lukic Defence and the Sredoje Lukic Defence have not succeeded in challenging the credibility of witnesses who identified Milan Lukic and Sredoje Lukic during the events surrounding the Pionirska Street incident."[191] The Trial Chamber did not discuss the fact that a previous Trial Chamber had already found Mitar Vasiljevic' alibi credible and sufficient to acquit him with regard to the Pionirska Street incident.

225. The dissenting opinion of Judge Robinson on this allegation reflects the correct judicial view.[192]

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[187] Para.437 of Judgement
[188] Para.572 of Judgement.
[189] Para.572 of Judgement.
[190] Para.577 of Judgement.
[191] Para.577 of Judgement.
[192] Para.1109 of Judgement.

(ii) Errors of Fact and/or Error of Law

226. First of all, the Appellant respectfully submits that a Trial Chamber, called upon in another case, cannot overturn such judicial findings with respect to an accused not standing trial before it. Acceptance of such a judicial approach would be tantamount to a circumvention of the Appeals Chamber Judgement through an extra-judicial procedure. Even if there is no binding precedent within the ICTY system, decisions of other Trial Chambers are considered to be persuasive authorities.[193] Consideration of the Trial Chamber findings in the *Vasiljevic* case by the Trial Chamber in this case should have been paramount in maintaining internal consistency and safeguarding the legitimacy of prior findings within the court. Given that the completely opposite conclusions from the very same evidence presented in both Trials were drawn, it is evident that there was no such discussion by the Trial Chamber. Thus, the Trial Chamber erred in accepting the evidence of the Prosecution witnesses and finding that the hospital logbook entry and the hospital case history were false.

227. The second error of law relates to the fact that the Trial Chamber acted *proprio motu* as an Appeal Chamber, reviewing its own previous decision on motion for judicial notice by erroneously dismissing evidence and facts already accepted as reliable.

228. The Procedural History section of the Judgement indicates that the Trial Chamber granted[194] on 12 November 2008 the 'Sredoje Lukic's Amended Motion for Judicial Notice of Adjudicated Facts with Annex A' ('Sredoje Lukic Motion'). The adjudicated facts derived from the *Vasiljevic* Trial Judgement were:

> '1. The medical records from the Uzice hospital were accurate and "these records give rise, at least, to the reasonable possibility that the Accused [Vasiljevic] was present at the Uzice hospital as stated in those records."

[193] "The Precedent of Appeals Chambers Decisions in the International Criminal Tribunals", Xavier Tracol, Leiden Journal of International Law, 17 (2004),p.99.
[194] Para.1148 of Judgement; also, see *footnote* 3128.

> 2. "[T]here was no evidence to suggest that these hospital records had been interfered with."
> 3. "[T]he Accused [Vasiljevic] was in hospital on the date and at the time recorded in the protocol of patients admitted to the Uzice hospital." '[195]

The Trial Chamber additionally found that the Prosecution did not present any evidence that the medical records, which constituted the evidence of the judicial notice for the aforementioned facts, 'were either forged or tampered with'.[196]

229. Moreover, the *Vasiljevic* Trial Chamber has already subjected the medical records 'to the tests of relevance, probative value and reliability' according to Rule 89 of the Rules of Procedure and Evidence ("Rules) when accepting that the medical records from the Uzice hospital were accurate, reliable and relating to the accused[197]. Furthermore, even though the same Trial Chamber decided that the x-ray was probably not of the accused, it simultaneously found that this did not affect its acceptance of the medical records as relevant and reliable evidence[198].

230. Nevertheless, the majority of the Trial Chamber in the present case, Judge Robinson dissenting, decided *proprio motu* to re-evaluate the facts in conjunction with a reasonable inference that 'may be drawn' from an allegedly false x-ray, and found by majority, Judge Robinson dissenting, that the medical records lacked credibility.[199]

231. The Appellant submits that these two decisions of the *Lukic et al.* Trial Chamber contravene the Tribunals Jurisprudence and Rules, since the *Vasiljevic* Trial Judgement had already accepted that the medical records from the Uzice hospital are accurate.

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[195] *Prosecutor v. Milan Lukic and Sredoje Lukic*, Decision on Sredoje Lukic's Amended Motion for Judicial notice of adjudicated facts with Annex A, 12 Nov 2008.
[196] Para.572 of Judgement.
[197] *Vasiljevic* TJ,paras.136-145.
[198] *Vasiljevic* TJ,para.142.
[199] Para.572 of Judgement.

232. In addition, erroneously reviewing the facts already accepted, the Trial Chamber did not motivate its departure from the Sredoje Lukic Motion.

233. Finally, the Appellant emphasizes that the judicial notice equips courts to make just decisions and enables them to avoid the rebuke and ridicule that would be heaped upon them were they to turn a blind eye to history or science or to embark upon fatuous and unnecessary enquiries.[200] Also, to the extent that the Tribunals create an historical record of the conflict, it is desirable that they arrive at relatively similar conclusions.[201]

234. These two errors of law, although primarily affecting the alibi of Mitar Vasiljevic, do also affect the assessment of the evidence in the instant case since it demonstrates the apparent bias of the Trial Chamber, which can be aptly illustrated by reference to appeal ground 1, 2 and 8 detailed herein.

235. It is submitted that this amounts to a mistake of fact and/or law by the Trial Chamber.

[200] *Norman et al.* (SCSL-04-14-AR73), Separate Opinion of Judge Robertson, 16 May 2005,para.15.
[201] *Semanza*(ICTR-97-20-I), Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 November 2000,para.20.

B. Uzamnica Camp

Ground 8 **- ERROR OF FACT AND/OR LAW – APPELLANT's PRESENCE AND INVOLVEMENT IN THE UZAMNICA CAMP BEATINGS**

236. The Trial Chamber found unanimously that the Appellant came to the Uzamnica camp on several occasions in the second half of 1992 and in the later months of 1993, and that he beat the detainees, including Islam Kustura, Nurko Dervišević and Adem Berberović (para.841).

237. The Appellant submits that the Trial Judgement reflects in this regard several fundamental errors of fact occasioning a miscarriage of justice and/or errors of law invalidating the decision.

Subground 8a) Erroneous weighting / analysis of witness evidence

No reasonable Trial Chamber would have found that evidence by Nurko Dervisevic was credible with regard to the participation of Sredoje Lukic in Uzamnica camp incident

238. The Trial Chamber erroneously concluded that Sredoje Lukic beat Nurko Dervisevic on several occasions in Uzamnica camp (para.841). The Trial Chamber challenges the testimony of Nurko Dervisevic that Sredoje Lukic hit him only once, by relying on the testimony of the other two witnesses and his statement from 1998[202], an error which the Appellant will address below.

239. The Trial Chamber in its Judgement completely disregarded the fact that Nurko Dervisevic in not one of the three written statements given prior to his testimony before the Trial Chamber[203], never once mentioned the Appellant as one of the

[202] Para.836 of Judgement.
[203] 2D15;2D16;2D17.

perpetrators of the beatings in the Uzamnica barracks. In fact Nurko Dervišević made no mention of the Appellant at all in those statements. The fact that two of those statements were given very shortly after his exchange, i.e. 23 December 1994 and 6 January 1995, when his memory was fresh, is of paramount importance as it severely affects the credibility and the reliability of his subsequent statements and testimony.

240. Even more, questioned by the Prosecution in direct examination whether anyone apart from Milan Lukić beat him during the time he was imprisoned in the camp, Nurko Dervišević did not mention Sredoje Lukić at all:

> 12 Q. Now, did anyone else beat you other than Milan Lukic during your
> 13 time in detention?
> 14 A. Yes. Once there was Milan Spasojevic, called Mico, and he took
> 15 out me and Mustafa Cuprija, a neighbour of mine. He was four years older
> 16 than I. He gave us some sticks to beat each other with three times each.
> 17 He hit me three times, and it was very painful, and I hit him three
> 18 times, but this man, "You're not doing it well enough. You don't want to
> 19 beat each other?" He took the sticks from us and beat us. This man was
> 20 sick. He had trouble with his blood sugar, and he was peeing blood.
> 21 This same Mico –
> 22 JUDGE ROBINSON: Thank you very much, Witness.[204]

241. As the Trial Chamber found that Nurko Dervisevic knew Sredoje Lukic before the war[205] then given the above mentioned statements and the testimony a reasonable conclusion would be that Nurko Dervisevic would have been able to include him in the statements and in the transcript. The fact that Nurko Dervisevic did not mentioned him in statements given just couple weeks after release from Uzamnica camp and above marked portion of his testimony clearly shows that he did not see appellant in Uzamnica camp.

[204] T.1962.
[205] Para.837of Judgement.

242. Had the Trial Chamber taken into consideration the aforementioned facts, it would have found the testimony of Nurko Dervisevic not credible in relation to the participation Sredoje Lukic in the Uzamnica camp incident.

No reasonable Trial Chamber would have found that evidence by Islam Kustura was credible with regard to the presence of Sredoje Lukic in Uzamnica camp incident

243. The Trial Chamber erroneously found that Sredoje Lukic beat Islam Kustur in Uzamnica camp.

244. Only four weeks after his release from the Uzamnica camp on 18 November 1994 witness Islam Kustura gave a written statement[206]. In that statement he provided an extensive list of names of no less than 16 guards and soldiers allegedly responsible for the mistreatments there and which he attested to the authenticity of during cross-examination by affirming that it was his signature on the face of the statement.[207] And yet in that statement witness Islam Kustura did not mention Sredoje Lukic as one of the perpetrators. During cross-examination this witness provided an unsatisfactory explanation for that huge discrepancy.[208]

245. Even more, witness Islam Kustura provided an entirely incorrect physical description of the perpetrator whom he thought was Sredoje Lukic.

> 2 Q. Yesterday you stated that Milan Lukic is one metre 90, or 180
> 3 centimetres tall. I refer to page 83, line 21. My question is, is Milan
> 4 Lukic taller than Sredoje Lukic as far as you remember?
> 5 A. Yes. Yes.
> 6 Q. Could you estimate how much taller Milan Lukic is than Sredoje
> 7 Lukic, in centimetres perhaps?
> 8 A. Taller by about 20 cent.
> 9 Q. 20 centimetres, yes. Did I understand you correctly, 20

[206] 2D19.
[207] T.2273.
[208] Para.834 of Judgement.

10 centimetres?
11 A. Yes.[209]

246. This physical description of the Appellant is clearly inaccurate. In this respect, the Defence refers to [REDACTED] Exhibit [REDACTED] according to which the Appellant's height is 1,85m.[210] It is submitted that strong evidence suggests that the Co-Accused is approximately of equal height.[211] The fact that both Accused are of almost identical height is verified by a still image of both Accused taken in the courtroom during trial.[212] The incorrect description of "Sredoje Lukić" provided by this witness, demonstrates not only that Islam Kustura did not 'know' the Appellant from before, but thus that it would have been impossible on this basis for him to have been in a position to 'recognise' the Appellant, illustrating more poignantly the witness's determination to falsely incriminate the Accused. The foregoing thus clearly exhibits that the man identified by this witness is not in fact the Appellant, Sredoje Lukic.

247. As the Trial Chamber found that Islam Kustura knew Sredoje Lukic before the war[213] then given the above mentioned statement and the description provided in testimony a reasonable conclusion would be that Islam Kustura would have been able to include him in the statement and to provide proper description of Appellant in the testimony. The fact that Islam Kustura did not mentioned Appellant in his statement just four weeks after releasment from Uzamnica camp and dramatically incorrect description provided in testimony clearly shows that he did not see appellant in Uzamnica camp.

248. The reasonable number of facts clearly proves that witness Islam Kustura was not beaten by the Appellant and that the witness did not even see the Appelant in Uzamnica camp.

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[209] T.2271-2272.
[210] [REDACTED]
[211] T.6519.
[212] 2D52.
[213] Para.837 of Judgement.

No reasonable Trial Chamber would have found that evidence by Adem Omeragic was credible with regard to the presence of Sredoje Lukic in Uzamnica camp incident

249. The Trial Chamber erroneously found that the Appellant had beaten Adem Berberovic in the Uzamnica camp.

250. Adem Berberovic had no prior knowledge of Sredoje Lukic[214]. Adem Berberovic provided an entirely incorrect physical description of the Appellant:

> 17 If you say that -- that Milan Lukic is taller than Sredoje Lukic,
> 18 due to your memory is it -- is it perhaps 20 centimetre, the difference
> 19 between both?
> 20 He is taller than Sredoje, taller. How much taller exactly it's
> 21 difficult to say. Maybe 15 centimetres, maybe 20. I wasn't taking
> 22 measurements. He was taller, that much I can say. Now you're asking me
> 23 about centimetres. I really can't say.
> 24 Q. Thank you very much. Thank you. All right. Sir, in line 22
> 1 you're saying, "He is taller than Sredoje." Which person do you mean
> 2 with "he is taller than Sredoje"?
> 3 A. Milan Lukic.[215]

251. As already previously explained with regard to witness Islam Kustura (para.246 of this Brief), such an allegation made by witness Adem Berberovic clearly indicates that in this concrete case this is an identification of a different person and not the Appellant.

[redacted]Furthermore, during Adem Berberović's witness interview given to the OTP-ICTY investigator in 2000, he was shown a photospread on which he allegedly identified Sredoje Lukić.[216] This witness interview was conducted by investigator Ib Jul Hansen. Ib Jul Hansen and his colleagues never used photographs of appellant in any

[214] Para.838 of Judgement.
[215] T.2551-2552.
[216] 2D20,p.3.

photospead.[217] However, the Trial Chamber erroneously found in para.838 that the photospread shown to Adem Berberovic most probably did not contain any photos of the Appellant and in the absence of the photospread the Trial Chamber is not in a position to assess whether Adem Berberovic recognised Sredoje Lukic in the photospread or not. [REDACTED]

[REDACTED].[218]

253. The reasonable number of facts unambiguously proves that Adem Berberovic did not identify the Appellant in the Uzamnica camp.

Subground 8b) Inconsistent and contradictory evidentiary reasoning

254. The Trial Chamber erred in law by applying an erroneous and incomprehensible method of evidentiary reasoning and decision making.

255. In paras.834-839 of the Trial Judgement the reasoning for such conclusions are detailed. In para.841 specifically the Trial Chamber acknowledged that – *in toto* - the evidence relating to the Uzamnica camp was widely inconsistent as a whole. However, the Trial Chamber erroneously determined to follow this evidence despite the acknowledgement of the limitations and weaknesses of the evidence adduced. Thus, the Trial Chamber did not conclude that the Prosecution failed to prove its case in respect to the Uzamnica camp beyond reasonable doubt, as a rational reasoning of the evidence would necessitate.

256. Primarily, the Trial Judgement reads in para.834 that "witness accounts differ widely". However, despite acknowledging the weakness and inherent inconsistencies

[217] Para.805 of Judgment
[218] [REDACTED]

in the witness testimonies, the Trial Chamber erroneously accepted the Appellant's presence in the Uzamnica Camp .[219] It is not explained how and why the Trial Chamber overcame the identified discrepancies in the Prosecution's evidence as outlined in para.834 of the Trial Judgement. Close reading of the Trial Judgement cannot but lead to the conclusion that no reasonable Trial Chamber could have drawn such a finding from the evidence and testimony of Islam Kustura, Adem Berberović and Nurko Dervišević. The conclusion drawn in para.841, that the Appellant came to the Uzamnica camp on several occasions and beat the detainees, is unfounded by the Trial Chamber's own admission in para.834 and thus arbitrary.

257. Secondly, the Trial Chamber erroneously found in para.835 that there is evidence that in October 1992, Sredoje Lukic, together with Milan Lukic, beat Islam Kustura with a rifle and with wooden stakes and after these first beatings, Islam Kustura had to lie down for some time to recover.

The Appellant directs the Appeals Chamber's attention to the striking fact, that the Trial Chamber did not present *any* basis of reference for this severe allegation. Therefore, a conviction should not be based on such unfounded findings.

258. Thirdly, the Trial Chamber erroneously drew the conclusion in para.836 of the Trial Judgement that Sredoje Lukic came to the Uzamnica camp and beat Nurko Dervisevic more than once. As foundation for this finding, the Trial Chamber referred in this paragraph to the testimonies of Adem Berberovic and Islam Kustura. The Trial Chamber thereby erroneously considered their testimonies to be more reliable than the testimony of Nurko Dervisevic and did not sufficiently discuss the striking discrepancies in the evidence tendered through Nurko Dervisevic's testimony.

259. Nurko Dervisevic testified in trial that during his detention at the Uzamnica barracks he saw the Appellant, whom he had known 15 years prior to 1992,[220] only

[219] Para.841 of Judgement.
[220] T.1999.*See also* P112,p.2.

once, when the Appellant allegedly came together with Milan Lukić.[221] [REDACTED][222] Two of his sons were killed during the war by Serbian forces. The Trial Chamber erroneously ignored that neither Adem Berberovic[223] nor Islam Kustura[224] could give in cross examination any reasonable explanation why Nurko Dervisevic should have lied under oath in stating that Sredoje Lukic came only once during the 28 months of imprisonment. The Trial Chamber erroneously failed to take these responses of Adem Berberovic and Islam Kustura in cross examination into account by judging in para.836 that their testimony is of higher reliability than the testimony of Nurko Dervisevic.

260. Fourthly, the Trial Chamber erroneously found in para.837 of the Trial Judgement, that the evidently flawed and incorrect physical description of the Appellant elicited through Prosecution witnesses Nurko Dervisevic and Islam Kustura, did not call into question their allegations, that they knew Sredoje Lukic from before the war.

261. The Appellant recalls that neither Adem Berberovic[225] nor Islam Kustura[226] were able to give a correct physical description of the Appellant in the evidence tendered through them.

262. It is telling that the Trial Chamber continued with this approach and erroneously ignored in the following para.838 the striking inability of Adem Berberovic to describe the Appellant correctly. Furthermore, the Prosecution witness did not provide a correct description of the physical appearance of the man purported to be the Appellant.[227]

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[221] T.1963;T.1970;T.1999;T.2004.
[222] T.1971-1973.
[223] T.2553.
[224] T.2284.
[225] See *supra*, para.250.
[226] See *supra*, para.245.
[227] See *supra* para.250;T.2551-2552.

263. Even more, The Trial Chamber erroneously excluded a vital part of VG-025's testimony in para.818. The Trial Chamber cited the following:

> "VG025 knew Sredoje Lukic as a police officer for a couple of years before the war"

264. The Trial Chamber however excluded the following part of that same paragraph of the statement, which reads:

[REDACTED]"[228]

265. [REDACTED].[229] His testimony is in direct contradiction to the testimony of other witnesses and it unambiguously demonstrates that Sredoje Lukic did not come to the u Uzamnica camp in the relevant time.

266. The Appellant therefore respectfully submits that, based on the evidence at hand, no reasonable Trial Chamber could have found that the Appellant was involved in any criminal acts in the Uzamnica camp.

Ground 9 **- ERROR OF LAW AND/OR FACT -** ***ACTUS REUS*** **THRESHOLD FOR INHUMANE TREATMENT**

267. The Appellant submits that the Trial Chamber erroneously found him guilty under Article 7 (1) of the Statute of committing cruel treatment, pursuant to Article 3 of the Statute (count 21), and inhumane acts, pursuant to Article 5(i) of the Statute (count 20) against Muslim detainees in the Uzamnica camp, including Nurko Dervisevic and Islam Kustura at paras.989-991 of the Trial Judgement.[230]

i) Definition of cruel treatment and inhumane acts in international jurisprudence

[228] P171 para.9.
[229] P168, pp 6 and 8.
[230] Para.989 of Judgement.

268. From the outset, it must be stressed that there is presently no definition of "cruel treatment" in any international legal instrument. Accordingly, it was observed in *Tadić* that "it has been found impossible to find any satisfactory definition of this general concept, whose application to a specific case must be assessed on the basis of all the particularities of the concrete situation".[231] The Appeals Chamber in *Čelebići* defined cruel treatment as:

> a. An intentional act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity
> b. Committed against a person taking no active part in the hostilities.[232]

This was confirmed by the Appeals Chamber in *Blaškić*[233] and the Trial Chamber in *Jelišić*.[234]

269. Further, Count 20 charges the Appellant with inhumane acts. The Appeals Chamber in *Čelebići* defined inhumane acts as:

> (ii) An intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity
> (iii) Committed against a protected person.[235]

[231] *Tadic*,Case No.IT-94-1-T,Opinion and Judgement,7 May 1997,para.724.
[232] *Čelebići* AJ,paras.424,426.
[233] *Blaskic* AJ,para.595.
[234] *Jelisic* TJ,para.41.
[235] *Čelebići* AJ,para.426.

270. 157. Similarly, the European Commission of Human Rights has described inhumane acts as that which "deliberately causes *serious* mental and physical suffering".[236] It can be observed that, as stated by the Trial Chamber in *Jelišić*, these two standards have the same legal meaning.[237] Thus, if the Prosecution is unable to prove the commission of cruel treatment they will similarly be unable to prove the commission of inhumane acts.

ii) Quantative standards of cruel treatment and inhuman acts

271. Since the Trial Judgement refers in its respective findings explicitly to Nurko Dervisevic and Islam Kustura, the Appellant will deal with these witnesses separately.

(a) Nurko Dervisevic

272. Nurko Dervišević testified that the Appellant slapped him several times on the face on one single occasion.[238] As outlined in paragraphs 238 through 242 of this Appeal Brief, the Appellant holds the view that no reasonable Trial Chamber could have found that the evidence by Nurko Dervisevic was credible with regard to the participation of Sredoje Lukic in the Uzamnica camp incident. Nevertheless, in the case the Appeals Chamber accepts him as a credible witness, the Appellant avers in the alternative that the alleged act of the Appellant striking Nurko Dervišević on one single occasion is insufficient to satisfy the quantitative standards of the *actus reus* of the crimes charged in the Second Amended Indictment, namely (i) *inhumane acts*, a crime against humanity, under Articles 5(i) and 7(1) of the Statute of the Tribunal and (Count 20) (ii) *cruel treatment*, a violation of the laws or customs of war, as recognized by Common Article 3(1)(a) of the Geneva Conventions of 1949, punishable under Articles 3 and 7(1) of the Statute of the Tribunal (Count 21). The Appellant submits, that the alleged conduct does also not meet the interpretation of

[236] As discussed in *Yagiz v. Turkey*, 22 EHRR 573,1996.
[237] *Jelisic* TJ,para.52.
[238] T.2007,l.21.

these articles as established in Appeals Chambers jurisprudence as outlined in paragraphs 268, 269 of this Appeal Brief..

273. Applying this standard as outlined in paragraphs 268 through 270 of this Appeal Brief to the instant proceedings, the Appellant's alleged actions, if any, do not amount to cruel treatment or inhumane acts with regard to Nurko Dervisevic.

(b) Islam Kustura

274. Mr Kustura's testimony notably lacks any individualized description of a cruel treatment or an inhumane act, allegedly committed by the Appellant. Moreover, the Appellant submits that no reasonable trier of fact could base a conviction on Islam Kustura's biased and hostile account of the events in question.

275. Furthermore, the Appellant refers to the Trial Judgement, where the Trial Chamber correctly considered Islam Kustura's testimony an "overstatement" namely that Sredoje Lukic was "always" with Milan Lukic since other evidence does not establish that Sredoje Lukic came to the camp as often as Milan Lukic."[239] Notably, the Trial Chamber failed to discuss the question of credibility or reliability of Islam's Kustura's evidence later in the Judgement or at all. Consequently, there is no credible evidence that Sredoje Lukic had ever beaten Islam Kustura or, in fact, mistreated any other prisoner at the Uzamnica camp.

iii) Qualitative standards of cruel treatment and inhumane acts

276. The Appellant further submits that the specific allegations of cruel treatment and inhumane acts do not meet the qualitative standards laid down by the jurisprudence of this Tribunal in regard to Nurko Dervisevic and Islam Kustura. Thus, it is respectfully

[239] Para.834 of Judgement.

submitted that the respective findings of the Trial Chambers in paragraphs 989 through 991 are erroneous.

277. The Appellant underlines with regard to Nurko Dervisevic as well as to Islam Kustura that the Prosecution tendered no evidence during trial in order to establish the duration of the particular alleged treatments, nor prove the consequent mental or physical impact on the witness, nor establish the degree of seriousness of the mental harm, physical suffering or the impact on the witness' human dignity caused by this incident. From analysis of the evidence it is clear that Nurko Dervišević only testified as to the physical, emotional and mental injuries he suffered as a result of his 28 month detention.[240] The Prosecution manifestly failed to prove the specific extent to which the Appellant's alleged single action of slapping Nurko Dervisevic several times on the face had in fact lead to a severe physical suffering or contributed to the deterioration of his health. The Prosecution made no attempt to adduce medical records in respect of this or any other Prosecution witnesses, rendering the allegations of specific mistreatment at the hands of the Appellant completely unsubstantiated and unclear given the disparity regarding to what extent the alleged act contributed to the alleged serious health situation of the witness. Based on a logical analysis of the evidence and circumstances surrounding the witness testimony, it is evident that it has not been proven beyond a reasonable doubt that Nurko Dervisevic's health situation was affected by the Appellant at any time. The testimony of this witness yielded no specific details regarding his health situation and consequently the Defence could not investigate these claims to establish their veracity.

278. In light of the foregoing, the Appellant submits that the alleged crimes committed in the Uzamnica camp with which he is charged do not amount to cruel treatment and/or inhumane acts as charged. In the circumstances, it is averred that the failure of the Trial Chamber to address any of the aforementioned factual and legal factors when assessing the alleged responsibility of the Appellant for the indicted crimes within the Uzamnica camp, amounted to errors of fact and/or law.

[240] T.1970-1971.

Ground 10 **- ERROR OF LAW - *MENS REA* THRESHOLD FOR INHUMANE TREATMENT**

279. The Trial Chamber erred in law by finding that the Appellant 'acted with intent to inflict serious injuries or suffering'[241] against Muslim detainees at the Uzamnica detention camp.

280. Based upon the evidence as laid down in paras.773-776, 782 and 788-789, as referred to by the Trial Chamber in footnote 2901 of para.990, the Trial Chamber could not reasonably have drawn the conclusion that the Appellant acted with intent to inflict serious injuries or suffering.

281. The Trial Chamber overlooked the fact that there was no compelling evidence that the Appellant bore the intention to commit Cruel Treatment and Inhumane Acts, or that he knew that his acts and conduct contributed to the commission of Cruel Treatment and Inhumane Acts. In addition to the conclusion that no reasonable Trier of law could have arrived at the conclusion that the applicant had the requisite *mens rea* for committing the crimes of Cruel Treatment and Inhumane Acts, the Trial Chamber erroneously applied the standard for *mens rea* in relation to the crimes of Cruel Treatment and Inhuman Acts.

C. OTHER GROUNDS RELATED TO ERRORS IN FACT AND OR IN LAW

[241] Para.990 of Judgement.

Ground 11. **ERROR OF FACT AND/OR LAW - REQUISITE INTENT FOR PERSECUTION**

282. The Judgement of the Trial Chamber reflects several essential errors of fact, occasioning a miscarriage of justice and/ or errors in law invalidating the decision by finding that the Appellant aided in and abetted in the commission of Persecution in relation to the acts in the Pionirska street incident and the Uzamnica camp beatings (para. 1040).

283. Based upon the findings in paras.1027-1035 and paras.1038-1040, the Trial Chamber could not have reasonably drawn the conclusion that the Appellant committed the crime of Persecution in relation to the acts in Pionirska street and the Uzamnica detention camp in the form of murder, the unlawful detention and confinement, of the victims under inhumane conditions, the harassment, humiliation, terrorization and psychological abuse of the victims and the theft of personal property and the destruction of houses (paras.1027-1035 and paras.1038-1040).

284. The dissenting opinion of Judge Robinson relating to the main elements of the Appellant's participation in Persecution in the Pionirska street incident serves as the correct judicial view (paras1027-1035 and paras.1112-1113).

285. The Appeals Chamber has defined Persecutions as 'an act or omission which:

> 1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary and treaty law (*actus reus*); and
> 2. was carried out deliberately with the intention to discriminate on one of the listed grounds specifically race, religion or politics (*mens rea*)."[242]

[242] *Kordic* AJ,para.101.*See* also *Blaskic* AJ,para.131;*Krnojelac* AJ,para.185.

286. According to ICTY case law, the Prosecutor must also establish that there were discriminatory consequences. It is not sufficient to prove that the accused conducted an act with the intent to discriminate: it must be shown that a victim was actually persecuted.[243] The Trial Chamber failed to determine this.

287. When appraising those elements concerning the *actus reus* for the crime of Persecution, a reasonable Trial Chamber could not have drawn the conclusion that the requirements for the discriminatory intent of Persecution were fulfilled. The Appellant submits that he did not commit the crimes relating to the Pionirska street incident and the beatings at the Uzamnica detention camp.

Ground 12 **- ERROR IN FACT AND/OR LAW - *MENS REA* FOR AIDING AND ABETTING THE CRIME OF PERSECUTION**

288. The Trial Chamber erroneously holds that the Appellant aided and abetted the crime of Persecution in relation to the charges concerning the Pionirska street incident and the Uzamnica camp beatings[244], in terms of the *mens rea* element.

Subground 12a) Requisite intent

289. As to the elements of *mens rea*, the crime against humanity of Persecution is a crime with a 'specific intent'[245]. "While the intent to discriminate need not to be the primary intent with respect to the act, it must be a significant one"[246]. This discriminatory act must be established with respect to the specific act that is charged rather than with the attack in general.[247] The Appeals Chamber ruled that 'it is not the case that any type of act, committed with the requisite discriminatory intent, amounts to persecutions as

[243] *Vasiljevic* TJ,para.245;*Krnojelac* TJ,para.432.
[244] Para.1040 of Judgement.
[245] *Kvocka* AJ,para.460.See *Vasiljevic* TJ para.248, and *Krnojelac* TJ,para.435.
[246] *Krnojelac* TJ,para.435.
[247] *Krnojelac* TJ,para.249.

a crime against humanity'[248]. The Trial Chamber did not properly apply this standard when it found the Appellant guilty of aiding and abetting Persecutions.

290. The Trial Chamber overlooked the fact that there is no evidence that the Appellant had the intention to aid or abet Persecution, or that he knew that his acts and conduct contributed to aiding and abetting Persecution. In addition to the conclusion that no reasonable Trier of fact could have arrived at the conclusion that the applicant had the requisite *mens rea* for aiding and abetting Persecution, the Trial Chamber incorrectly applied the standard for accepting *mens rea* for aiding and abetting Persecution.

291. The Appeals Chamber has held on another occasion that "[a]n individual who aids and abets other individuals committing a specific intent offence may be held responsible if he assists the commission of the crime knowing the intent behind the crime.[249]"

292. The Trial Chamber did not apply this standard when convicting the Appellant and therefore erred in law.

293. According to ICTY case law, the Prosecutor must also establish that there were discriminatory consequences. It is not sufficient to merely prove that the accused conducted an act with the intent to discriminate: it must additionally be shown that a victim was actually persecuted[250]. The Trial Chamber failed to determine this.

294. In conclusion the Appellant holds that the Trial Chamber erred in law by convicting him for the liability mode of aiding and abetting as to the crime of Persecution.

Sub-ground 12b) Requisite Knowledge

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[248] *Blaskic* AJ,para.139.
[249] See *Vasiljevic* AJ,para.142.
[250] *Vasiljevic* TJ, para.245;*Krnojelac* TJ,para.432.

295. As to the awareness element of *mens rea*, it should be established that an accomplice had knowledge of the acts and intent being carried out be the principal perpetrator[251]. Moreover, where the accused is attributed with a certain position he must know that his presence would be seen by the perpetrator of the crime as encouragement or support any act of Persecution. In the instant case, the Trial Chamber overlooked this element in that no evidence has been provided that the Appellant did have this type of knowledge or that his presence encouraged or provided moral support to the principal offender(s).

296. The conclusion of the Trial Chamber as to the acceptance of knowledge for Persecution on the part of the Appellant cannot be upheld for the subsequent reason. In paragraph 51 of the present case[252] it was found that at the relevant time in 1992, in the Visegrad area, Muslims had been deported by bus to Muslim areas. The Trial Chamber should have taken into account that, notwithstanding the lack of proof of his alleged presence, the intent of the Appellant could simply have been to house the Koritnik people for bus transfer next day.

Ground 13 – **ERROR OF LAW – INACCURATE APPLICTION OF *IN DUBIO PRO REO***

297. The Appellant submits that the Trial Chamber ignored the application of the principle of *in dubio pro reo* in the Trial Judgement *in toto* when interpreting the tendered evidence with respect to both the Pionirska Street incident and the Uzamnica camp. It resolved all – uncontested existing - ambiguities and inconsistencies of the evidence to the disadvantage of the Appellant. This approach invalidates the Trial Judgement with regard to the Pionirska Street incident and the Uzamnica camp as a whole and amounts to an error of law.

a) The principle *in dubio pro reo*

[251] See *Akayesu* TJ,para. 479.*See* also Article 30 ICC Statute.
[252] Supported by *Vasiljevic* TJ, para.191.

298. First of all, the Appellant refers to the Chapter II. D. of this brief where the legal foundation and scope of the principle of *in dubio pro reo* is outlined. The ICTY Appeals Chamber jurisprudence on the issue of *in dubio pro reo* and its practical application is extremely clear and firmly established.

b) Erroneous application of the principle *in dubio pro reo* in the Trial Judgement

299. The Appellant submits that he has established beyond reasonable doubt that no reasonable trier of fact could have reached a guilty finding with regard to his alleged participation in either the Pionirska Street or the Uzamnica camp incidents. It is respectfully submitted that the conclusion of the Trial Chamber regarding the allegations against the Appellant are entirely at odds with the evidence and further, that no reasonable trier of fact could have reached this conclusion from rational exploration of the evidence. Insofar as it might be argued that there was more than one conclusion reasonably open on the evidence presented, the principle *in dubio pro reo* left the Trial Chamber with no alternative, but to draw the available conclusion that was consistent with the innocence of the Appellant.

300. With regard to the erroneous conclusions of the Trial Chamber in respect to the alleged participation of the Appellant in the Pionirska Street incident, the Appellant refers first of all to Ground 1 b) (paragraphs 59-91) and Ground 2 b) (paragraphs 113-136) of this Appeal Brief, where it is outlined that in the light of the inconsistent evidence no reasonable trier of fact could have reached a guilty finding with regard to the alleged participation of the Appellant in the Pionirska Street incidents. In this regard, the correct application of the principle *in dubio pro reo* would have led to an acquittal.

301. Secondly, the Appellant submits that it has been established beyond reasonable doubt that no reasonable trier of fact could have reached a guilty finding with regard to the alleged participation in the Uzamnica camp incidents. In this regard, the Appellant refers to Ground 8 b) (paragraphs 254 through 266 of this Appeal Brief), where it is

outlined, that in the light of the inconsistent evidence no reasonable trier of fact could have reached a guilty finding with regard to the alleged participation in the Uzamnica camp incidents. A correct application of the principle *in dubio pro reo,* it is submitted, would have called for the acquittal of the Appellant.

Ground 14 **– ERROR OF LAW- ERRONEOUS APPLICATION OF THE WELL-ESTABLISHED TRIBUNAL JURISPRUDENCE REGARDING IN-COURT IDENTIFICATIONS**

302. The Trial Chamber erred in law holding in para. 34 of the Trial Judgement that categories of "identification" and "recognition" cannot be so strictly interpreted as to require that a witness must had prior knowledge of the accused before the start of the commission of a crime in order to be classified as a recognition witness.

303. This error invalidates the Trial Judgment, putting the Appellant in an unfair and prejudiced situation with regards to the alleged participation in the Pionirska Street and the Uzamnica camp incidents.

304. As stated in paragraph 34 of the Trial Judgment, the Trial Chamber treated Prosecution witnesses, who did not know nor had met or identified the Appellant at any time before 14 June 1992, not as identification witnesses, but rather as recognition witnesses. Consequently, the Trial Chamber erroneously allowed the Prosecution to attempt in-court identifications with these witnesses with the effect that the Trial Chamber circumvented the strict standards developed for identification witnesses and the admissibility and reliability of in-dock identification in international relevant jurisprudence. In misapprehending the well established Tribunal's case law regarding in-court identification - as outlined in Chapter II. B, b, paragraphs 18-20 of this Defence Appeal Brief – the Trial Chamber occasioned an error of law invalidating the basis upon which its decision was premised.

305. This error further affected the logical weight to be attached to an enormous number of Prosecution witnesses who fundamentally admitted to have no prior knowledge of the Appellant before the 14 June 1992[253], and those witnesses whom also allegedly received knowledge about him during the day of 14 June 1992[254] or during their detention in the Uzamnica camp.[255] In consequence of its approach, the Trial Chamber treated the identifications proffered by these witnesses erroneously, with the effect that all consequent 'in-court' identifications were without any substantive or probative value since there was not an identification procedure with regard to the Appellant before trial. By inaccurately and inappropriately construing the role of these witnesses as furnishing the Court with recognition evidence, the Trial Chamber increased the number of in-court identifications they could regard as reliable.

306. The Appellant respectfully submits that had the Trial Chamber complied with the standards of identification as developed by the ICTY's jurisprudence as outlined under Chapter II. B., paragraphs 13 through 17 of this Appeal Brief, it would have accepted the vast majority of Prosecution witnesses as identification witnesses and, in response to the fact that the Prosecution did not conduct any proper identification procedure in pre-trial - the Trial Chamber would have consequently excluded in-court identifications before and during trial for these witnesses.

307. The Trial Chamber erred by merely noting the standing objections of the Defence without addressing them appropriately. In this regard, the Appellant reiterates that throughout these proceedings his Defence Counsels have continuously objected to "in-court identifications".[256] Nevertheless, the Trial Chamber did not decide until the end of trial, even after concern was raised by the testimony of Witness Ib Jul Hansen,

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[253] VG-018,VG-038,VG-084,VG-078,VG-101.
[254] VG-018,VG-038,VG-084.
[255] Adem Berberovic.
[256] *See,* for example,T.794,l.5 – 6;T.885,l.19 – 25;T.1010,l.10 – 12;T.1417,l. 5 – 6;T.1453,l.19;[REDACTED];T.1688,l.25;T.1868,l.9 – 10;T.2518,l.4 – 5;T.2895,l.11-12;T.2981,l.17-18;T.3401,l.13-16;T.3217,l.10-12;T.7006,l.11-17.

Prosecution investigator in this proceedings. [REDACTED][257] These are therefore flawed and should not be relied upon as proper "in-court identifications".

308. The Trial Chamber's omission to forbid such in-court identifications from the very beginning of trial adversely affected the fairness of the proceedings as a whole, causing irreparable prejudice to the Appellant. From logical analysis of the evidence it is evidently unfair to give the Prosecution throughout the whole trial, the opportunity to incite witnesses to make in-court identifications and to motivate them to point out an accused in the court room. The Appellant refers to Chapter II. B., paragraphs 13 through 20 of this Appeal Brief, where the international established standards for identification procedures in pre trial and in-court identifications are outlined. Following these well-established standards, the Trial Chamber should have defined an identification standard or protocol prior to the start of the trial in order to prevent this Prosecution practice. In this case, the Trial Chamber's failure to do this caused irreparable damage to the fairness of the proceedings as a whole, thus invalidating the Trial Judgement as a whole.

309. Finally, it is reiterated that a reasonable Trial Chamber would have been minded to conclude that none of the Prosecution witnesses recognized or identified the Appellant beyond reasonable doubt as one of the perpetrators of the crimes he is charged with in the Second Amended Indictment or any other alleged incident mentioned during the course of the Trial.

V – GROUND OF APPEAL RELATING TO SENTENCING

Ground 15 **– IMPROPER APPLICATION OF THE DISCRETIONARY POWERS OF A TRIAL CHAMBERS.**

[257] [REDACTED], Para.805of Judgment

310. The Trial Chamber failed to correctly exercise its discretion in that the sentence imposed was manifestly excessive under all circumstances. Had the Trial Chamber not committed this error, it would have imposed a sentence considerably more lenient in the case.

I-Excessive and disproportionate sentence

311. When imposing a sentence of 30 years' imprisonment, the Trial Chamber committed a discernible error by failing to give weight to Sredoje Lukic's conduct before and during the war. In all the circumstances, including a comparison of the sentences imposed on those of his co-accused who were found guilty of Indictment crimes, the sentence that the Trial Chamber imposed on the Appellant was disproportionate and excessive.

312. The difference between 30 years of imprisonment and a life sentence which was imposed on the Co-accused, is fairly insignificant having in mind the age of Appellant. The Co-accused is convicted for nearly all counts in the Indictment (19 counts) while the Appellant is convicted for 7 counts in the Indictment, with a dissenting opinion of the Presiding Judge Robinson for two most serious counts. These facts clearly speak in favour of a lower sentence than the one imposed on the Appellant by the Trial Chamber.

313. As has been accepted by the Tribunal's case law, the culpability of an aider and abettor may be lessened if he does not share the intent of the main offenders. This may serve as a mitigating factor.[258] The Trial Chamber found that Sredoje Lukic did not participate in setting Adem Omeragic's house on fire or in shooting at the windows of the house as persons attempted to escape.[259] There is no evidence that Sredoje Lukic shared the intent of the main offenders. And yet the Trial Chamber

[258] *See Vasiljević* TJ,para.71; *Brđanin* TJ,para.274.
[259] Para.613 of Judgement.

completely disregarded this factor which is of great significance for the sentence to be imposed[260].

314. Had the Trial Chamber taken into consideration the foregoing facts, it would have imposed a significantly lower sentence on the Appellant.

II - The Trial Chamber made errors in applying aggravating factors (paras.1087-1090)

The Trial Chamber failed to take any account of Sredoje Lukic's degree of alleged participation in the alleged crimes

315. The Trial Chamber finds Sredoje Lukic responsible as aider and abettor based on the finding that he was present and armed during the incident in the Pionirska street. The Trial Chamber failed to take into account the degree of alleged participation in the underlying crimes.

316. The Appeals Chamber has consistently held that the degree of participation is relevant to the gravity of the offence.[261]

317. Had the Trial Chamber considered the degree of Sredoje Lukić's alleged participation in the underlying crimes, a shorter sentence of imprisonment would have been imposed. The Trial Chamber thus abused its discretion so as to justify the intervention of the Appeals Chamber.

318. The Trial Chamber finds that Sredoje Lukic's alleged participation in the incident in the Pionirska street was limited to the robbery[262] and later transfer[263], and not in the

[260] The *Jokic* Trial Judgment,IT-02-60/T,comparable in scale and gravity to the instant case,attracted a sentence of 9 years illustrating the clear inconsistency in sentencing jurisprudence, given the instant Appellant's 30 year term. Furthermore, the *Haradinaj* Trial Judgment,IT-04-84/T, echoes this with the accused Brahimaj serving 6 years.
[261] *Aleksovski* AJ, para.182;*Babic* AJ, para.88;*Celebici* AJ,para.39.
[262] Para.593 of Judgement.
[263] Para.607 of Judgement.

burning of the house or shooting the people[264]. In addition to the submissions made by the Appellant in the previous grounds of Appeal, the Trial Chamber did not consider any precise *actus reus* of Sredoje Lukic in the incident in the Pionirska street. The Trial Chamber did not even determine the location of Sredoje Lukic during the incident. It failed to specify whether he was in the house or around the house. The Trial Chamber merely places him at the scene of the crime by stating that he was at the house[265], and that he participated in the transfer[266] without any further specification.

319. In para.1088 the Trial Chamber states that there is no evidence that Sredoje Lukic did anything to stop the burning or to release the victims. In contradiction to those statements however, the Trial Chamber in para.613 finds that there is no reliable evidence that Sredoje Lukic participated in setting Adem Omeragic's house on fire or in shooting at the windows of that house as persons attempted to escape during the Pionirska street incident.

320. Had the Trial Chamber properly considered Sredoje Lukic's degree of participation, it would consequently impose a lower sentence.

The Trial Chamber erroneously found that alleged participation of Sredoje Lukic in those crimes was a cruel inversion of the duty he had to the citizens of Visegrad as police officer (para.1090)

321. As regards the Trial Chamber findings that many of the victims recognised Sredoje Lukic as a police officer,[267] the Appellant has submitted in the previous Appeal grounds that not one witness stated this, while credible witnesses, who have known him, did not see him at the scene of the incident. The Trial Chamber did not even consider the fact in the relevant time for Pionirska street incident Sredoje Lukic was a

[264] Para.613 of Judgement.
[265] Para.593 of Judgement.
[266] Para.607 of Judgement.
[267] Para.1090 of Judgement.

regular lowest policeman without any rank. This fact has been confirmed by numerous admitted exhibits[268] as well as witness testimonies[269].

322. In relation to Uzamnica camp incident the Trial Chamber did not consider the fact that Appellant was not a policeman after 20 January 1992[270]. After that day he was a member of Army as ordinary soldier.[271]

III-The Trial Chamber ignored and misinterpreted several fundamental mitigating circumstances (paras.1091-1094), including those related to the character of the Appellant (paras.1095-1096). The Trial Chamber failed to properly take account of this negation of mitigating factors.

The Trial Chamber erroneously gave only some weight to the fact that the Appellant rendered assistance to an individual (para.1092)

323. The Trial Chamber in para.1092 mentions that the Defence submitted that the Appellant risked his own safety in helping the Muslims. Had the Trial Chamber correctly taken into account the given reference provided by the Defence, it would have given significantly more weight to this mitigating circumstance, which would have automatically led to a substantial reduction in the sentence.

324. Namely, Prosecution witnesses who testified that Sredoje Lukic helped Muslims, have stated the following:

> 10 Q. Thank you. You said that Sredoje Lukic was afraid of
> 11 Milan Lukic; true?
> 12 A. Well, by worth of mouth, yes, he was. People said so[272].

325. VG-064 stated:

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[268] P209-P214;2D60.
[269] [REDACTED];T.3216;T.4991;T.5074;T.5302;2D57.
[270] 2D60.
[271] 2D61;2D62.
[272] T.583.

[REDACTED][273]

326. The abovementioned testimonies concern the period directly prior to the incident in the Pionirska street.. The Trial Chamber failed to consider those testimonies. The same testimonies are in direct contradiction to the finding in para.1092 that the Trial Chamber did not underestimate that rendering assistance to Muslims might have been difficult for Sredoje Lukic.

327. The Trial Chamber further finds (para.1092) that Sredoje Lukic simply did not help to more people. But in fact, the exact number of people that Sredoje Lukic helped during that period was not established in the present case. The Trial Chamber's conclusion is therefore not only unreasoned, but unfounded by the evidence presented. A fact is that the abovementioned witnesses initiated to testify about how Sredoje Lukic helped the Muslims. Besides that, a great number of other Prosecution witnesses testified about Sredoje Lukic in an exceptionally positive light.[274]

328. Had the Trial Chamber considered and accepted the foregoing, it would have consequently imposed a lower sentence.

The Trial Chamber erroneously found that Expressions of regrets are not substantial enough to warrant great weight to be placed upon them as a mitigating factor (para.1094)

329. The Trial Chamber accepts the sincerity of expressions of regret expressed by the Appellant through his Counsel. The Trial Chamber however finds that no great weight is to be placed upon those expressions as a mitigating factor, relying on the argument that this is the kind contemplated by the law. In the same paragraph in footnote 3054, the Trial Chamber erroneously refers to para.752 of Judgement in *Oric* case. The Trial Chamber in *Oric* case in that paragraph of the Judgement recognized

[273] T[REDACTED].
[274] T.1230-1231;T[REDACTED];T.2761;T.570.

expressions of remorse as a mitigating factor if they are real and sincere, while relying on the case law of the Tribunal[275] and further held that Appeals Chamber has held that an accused can express sincere regrets without admitting his participation in a crime[276].

330. The situation in the present case is identical to the situation in *Oric* case, i.e. that the Trial Chamber accepts the sincerity of expressions of regret without admitting his participation in a crime, and yet with an entirely different conclusion. Had the Trial Chamber followed the standard accepted by the Tribunal's case law and followed in *Oric* case[277], it would have consequently imposed a lower sentence.

IV - The Trial Chamber made errors in applying character of Sredoje Lukic (paras.1087-1090)

331. The Trial Chamber entirely erroneously concluded on Sredoje Lukic's character after he was held hostage in April 1992(para.1096).

332. The Trial Chamber bases its conclusion on the testimony of Huso Kurspahic from the *Vasiljevic* case, stating that during his release Sredoje Lukic looked terrified and did not appear "normal". A reasonable conclusion would have been that it is normal to look that way when someone has been released from captivity where he was subjected to torture and mistreatment.

333. The Trial Chamber further bases it s conclusion on the testimony of witness VG-115 that Sredoje Lukic "changed a lot" when the war started. However, the Trial Chamber did not accept the testimony of VG-115 in other significant aspects.[278] Even more, the Trial Chamber in the *Vasiljevic* case found the testimony of this witness unreliable.[279]

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[275] *Momir Nikolic* Appeal Sentencing Judgement paras.91-93;*Dragan Nikolic* Appeal Sentencing Judgement,paras. 61,63;*Jelisic* AJ,para.126.
[276] *Momir Nikolic* Appeal Sentencing Judgement,paras.92-93.
[277] Oric TJ,para.752.
[278] Paras.565 and 733 of Judgement.
[279] Vasiljevic TJ,paras.89,90 and 159.

334. The Trial Chamber completely disregarded the numerous Prosecution and Defence witnesses who testified about Sredoje Lukic's character after April 1992.

335. All three Defence witnesses testified about his exceptionally positive character in that period[280], explaining that after his release Sredoje Lukic tried to find a job in Belgrade in order to permanently leave Visegrad and the war in Bosnia[281]

336. The Appellant especially submits that a significant number of Prosecution witnesses testified positively about Sredoje Lukic, even upon being questioned by the Prosecution, which is a rare occurrence before this Tribunal.[282]

337. Prosecution witness Ferid Spahic left Visegrad on 14 June 1992. He testified that Sredoje Lukic was a friendly person, a good person of good character.[283] Witness VG-017 stayed in Visegrad until mid June 1992. VG-017 testified that Sredoje Lukić was "a very good man".[284] [REDACTED][285]

338. Sredoje Lukic saved VG-64's husband and his brother at the end of May or beginning of June 1992. Witness VG-064 testified:

> 6 Q. I have one question for you. Perhaps you will agree with me that
> 7 Sredoje Lukic is a positive personality who in those difficult times
> 8 exposed himself to danger in order to save your husband and his brother;
> 9 is that right?
> 10 A. Yes.[286]

[280] 2D41;T.3765;T.3676.
[281] 2D44, p.12,l.19-28;2D47,paras.6and 8.
[282] VG-032,VG-013,VG-064,VG-017,VG-133,Ferid Spahic,Mevsud Poljo.
[283] T.570.
[284] [REDACTED]
[285] [REDACTED].*See also* 1D63,p.4,para.3.
[286] T.2922.

339. Witness Mevsud Poljo testified about how Sredoje Lukic saved Muslims in that same.[287] He further stated:

> 2 And if I may say about Sredoje, I
> 3 only heard good things.[288]

340. VG-133 testified that Sredoje Lukić is a positive personality and a pleasant character who did not fit into the overall war atmosphere that prevailed at the time in spring-summer 1992.[289]

341. Had the Trial Chamber taken into account the abovementioned evidence, it would have found that Sredoje Lukic was a very positive character in the period after April 1992, which would have significantly influenced the sentence in favour of the Appellant.

VI - OVERALL REQUEST FOR RELIEF

342. Based on the above grounds of appeal, no reasonable trier of fact could have accepted the evidence the Appellant respectfully requests that the Appeals Chamber:

(1) reverse the decision of the Trial Chamber to convict him on Count 1 of the Indictment and enter a Judgement of acquittal;
(2) reverse the decision of the Trial Chamber to convict him on Count 9 of the Indictment and enter a Judgement of acquittal;
(3) reverse the decision of the Trial Chamber to convict him on Count 10 of the Indictment and enter a Judgement of acquittal;
(4) reverse the decision of the Trial Chamber to convict him on Count 11 of the Indictment and enter a Judgement of acquittal;
(5) reverse the decision of the Trial Chamber to convict him on Count 12 of the Indictment and enter a Judgement of acquittal;

[287] T.583-584.
[288] T.580.
[289] [REDACTED]

(6) reverse the decision of the Trial Chamber to convict him on Count 20 of the Indictment and enter a Judgement of acquittal;

(7) reverse the decision of the Trial Chamber to convict him on Count 21 of the Indictment and enter a Judgement of acquittal;

(8) set aside or reduce the sentence imposed on the Appellant by the Trial Chamber as may be appropriate in the light of its reversal or revision of the convictions by the Trial Chamber; or, alternatively

(9) grant the Appellant such further and other relief in connection with his appeal as the Appeals Chamber may consider to be just and proper.

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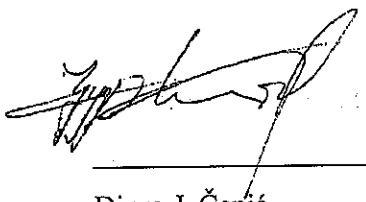
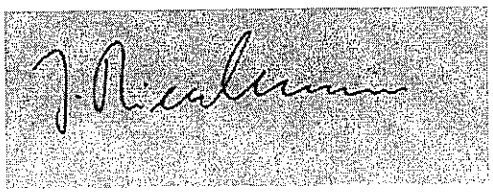
Respectfully submitted.



Djuro J. Čepić
Lead Counsel for Sredoje Lukić
and with him



Jens Dieckmann
Co-Counsel for Sredoje Lukić

with Prof. G. G.J Knoops, Legal Consultant for the Defence of Mr. Sredoje Lukić.

Dated this 2 November 2009

The Hague, The Netherlands

THE INTERNATIONAL CRIMINAL TRIBUNAL

FOR THE FORMER YUGOSLAVIA

Case No. IT-98-32/1-A

IN THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron
Judge Carmel Agius

Registrar: **Mr. John Hocking**

Date Filed: **2nd November 2009**

THE PROSECUTOR

V

MILAN LUKIĆ &
SREDOJE LUKIĆ

BOOK OF AUTHORITIES FOR THE APPELLANTS BRIEF OF SREDOJE LUKIĆ

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Mr. Djuro J. Čepić and Mr. Jens Dieckmann with Prof. G.G.J Knoops as Legal Consultant for Mr. Sredoje Lukić

A. NATIONAL AND INTERNATIONAL AUTHORITIES

PART 1: ***Introduction***

- *Prosecutor v. Milan Lukic and Sredoje Lukic*, Trial Judgement IT-98-32/1-T, 20 July 2009
- *Prosecutor v. Milan Lukic and Sredoje Lukic* IT-98-32/1-A, Notice of Appeal 19th August 2009
-

PART 2: ***Fundamental Errors and Their Impact upon Appellate review***

- *Prosecutor v. Kupreskic et al.* Appeal Judgement, IT-95-16-A 23rd October 2001
- *Prosecutor v. Stakic* Appeal Judgement, IT-97-24-A 22nd March 2006
- *Prosecutor v. Blaskic* Appeal Judgement, IT-95-14-A 29th July 2004
- *Prosecutor v. Kordic and Cerkez* Appeal Judgement, IT-95-14/2-A 17th December 2004
- *Prosecutor v. Ntagerura et al.* Appeal Judgement, ICTR- 99-46-A28 7th July
- *Prosecutor v. Limaj et al.* Appeal Judgement, IT-03-66-A 27th September 2007
- *Prosecutor v. Delalić et al*, Appeal Judgement, IT-96-21-A, 20 February 2001
- *Prosecutor v. Brdanin* Trial Judgement, IT-99-36-T1st September 2004
- *Prosecution v. Pavle Strugar*, Trial Judgement, IT-01-42-A, 17 July 2008
- *Prosecutor v. Akayesu* , Trial Judgement, ICTR-96-4-T, [DATE] para 64
- *Prosecutor v. Aleksovski* Trial Judgement, IT-95-14/1 25th June 1999
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- *Regina v. Turnbull and Another* [1977] Q.B.224, United Kingdom
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- *R v Edwards* (2006) 150 S.J 570, PC, United Kingdom
- *R v Thomas* [1994] Crim LR 128, United Kingdom
- *Prosecutor v. Kvocka et al.* Appeal Judgement, IT-98-30/1 A 28th February 2005
- *Prosecutor v. Furundzija* Appeal Judgement, IT-95-17/1-A 21st July 2000
- *Prosecutor v. Naletilic et al.* Appeal Judgement, IT-98-34-A 3rd May 2006

- *Prosecutor v. Hadihasanovic* Trial Judgement, IT-01-47-T 15th March 2006
- *Prosecutor v. Galic* Appeal Judgement, IT-98-29-A 30th November 2006
- Prosecutor v. Pruijmboom, (10 February 2009, case number: 20000934-07), the High Court (den Bosch, the Netherlands)
- McDaniel v. Brown, (docket number 08-559), pending before the US Supreme Court.
- *Prosecutor v. Tadic* Appeal Judgement, IT-94-1-A and IT-94-1-A*bis* 26th January 2000
- *Prosecutor v. Blagojevic and Jokic* Appeal Judgement, IT-02-60-A 9th May 2007
- Barbera v Spain, A 146, Application No. 10590/83, 06.12.1988, ECHR
- Lisiak v. Poland, Application no. 37443/97, 05.11.2002/05.02.2003, ECHR
- *Prosecutor v. Vasiljevic* Appeal Judgement, IT-98-32-A 25th February 2004

PART 3:
Ground 1:

- *Prosecutor v Vasiljevic* Trial Judgement, IT-98-32-T, 29 November 2002

Ground 2:

- *Prosecutor v Vasiljevic* Trial Judgement, IT-98-32-T, 29 November 2002
- *Prosecutor v. Milan Lukic and Sredoje Lukic*, Trial Judgement IT-98-32/1-T, 20 July 2009

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- *Prosecutor v.Tadic* Appeal Judgement, IT-94-1-A, 15th July 1999
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- *Prosecutor v. Delalić et al*, Appeal Judgement, IT-96-21-A, 20 February 2001
- *Prosecutor* v. *Simic, Tadic and Zaric*, Trial Judgement, IT-95-9-T 17th October 2003
- *Prosecutor v. Oric* Trial Judgement , IT-03-68-T, 30th June 2006
- *Prosecutor v. Akayesu* Trial Judgement, ICTR-96-4-T

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- *Prosecutor v. Milan Lukic and Sredoje Lukic*, Trial Judgement IT-98-32/1-T, 20 July 2009
- *Prosecutor v. Oric* Trial Judgement , IT-03-68-T, 30th June 2006
- *Prosecutor v. Tadic* Trial Judgement, IT-94-1-T 26th January 2000
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- *Prosecutor v. Tadic* Appeal Judgement, IT-94-1-A and IT-94-1-A*bis* 26th January 2000
- *Prosecutor v. Blagojevic and Jokic* Appeal Judgement, IT-02-60-A 9th May 2007
- *Prosecutor v. Blaskic* Appeal Judgement, IT-95-14-A 29th July 2004
- *Prosecutor v. Brdanin* Trial Judgement, IT-99-36-T1st September 2004

Ground 5:

- *Prosecutor v. Milan Lukic and Sredoje Lukic*, Trial Judgement IT-98-32/1-T, 20 July 2009

Ground 6:

- *Prosecutor v. Milan Lukic and Sredoje Lukic*, Trial Judgement IT-98-32/1-T, 20 July 2009
- *Prosecutor v. Oric*, Trial Judgement , IT-03-68-T, 30th June 2006

Ground 7:

- *Prosecutor v. Milan Lukic and Sredoje Lukic*, Trial Judgement IT-98-32/1-T, 20 July 2009
- *Prosecutor v. Limaj et al.*, Appeal Judgement, IT-03-66-A 27th September 2007
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- *Prosecutor v. Kayishema and Ruzindana*, Appeal Judgement, ICTR-95-1-A, 1st June 2001
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- *Prosecutor v. Kunarac et al,* Trial Judgement, IT-96-23 & 23/1, 22nd February 2001
- *Prosecutor v. Vasiljevic*, Trial Judgement, IT-98-32-T, 29th November 2002
- *Prosecutor v. Semanza*, ICTR-97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 November 2000, para. 20.

Ground 8:

- *Prosecutor v. Milan Lukic and Sredoje Lukic*, Trial Judgement, IT-98-32/1-T, 20 July 2009

Ground 9:

- *Prosecutor v. Milan Lukic and Sredoje Lukic*, Trial Judgement IT-98-32/1-T, 20 July 2009
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- *Prosecutor v. Delalić et al*, Appeal Judgement, IT-96-21-A, 20 February 2001
- *Prosecutor v. Blaskic*, Appeal Judgement, IT-95-14-A 29th July 2004
- *Prosecutor v. Jelisic*, Trial Judgement, IT-95-10-T, 14th December 1999
- *Yagiz v Turkey*, [1996] 22 EHRR 573, ECHR

Ground 10:

- *Prosecutor v. Milan Lukic and Sredoje Lukic*, Trial Judgement, IT-98-32/1-T, 20 July 2009

Ground 11:

- *Prosecutor v. Milan Lukic and Sredoje Lukic*, Trial Judgement, IT-98-32/1-T, 20 July 2009
- *Prosecutor v. Kordic and Cerkez* Appeal Judgement, IT-95-14/2-A 17th December 2004
- *Prosecutor v. Blaskic* Appeal Judgement, IT-95-14-A 29th July 2004
- *Prosecutor v. Krnojelac*, Appeal Judgement, IT-97-25-A,17th September 2003

Ground 12:

- *Prosecutor v. Milan Lukic and Sredoje Lukic*, Trial Judgement, IT-98-32/1-T, 20 July 2009
- *Prosecutor v. Vasiljevic*, Trial Judgement, IT-98-32-T, 29th November 2002
- *Prosecutor v. Krnojelac*, Appeal Judgement, IT-97-25-A, 17th September 2003
- *Prosecutor v. Kvocka et al.*, Appeal Judgement, IT-98-30/1 A, 28th February 2005
- *Prosecutor v. Blaskic*, Appeal Judgement, IT-95-14-A, 29th July 2004
- *Prosecutor v. Kordic and Cerkez*, Appeal Judgement, IT-95-14/2-A, 17th December 2004
- *Prosecutor v. Vasiljevic*, Appeal Judgement, IT-98-32-A, 25th February 2004
- *Prosecutor v. Akayesu*, Trial Judgement, ICTR-96-4-T, 2 September 1998

Ground 13:

- *Prosecutor v. Milan Lukic and Sredoje Lukic*, Trial Judgement, IT-98-32/1-T, 20 July 2009

Ground 14:

- *Prosecutor v. Milan Lukic and Sredoje Lukic*, Trial Judgement, IT-98-32/1-T, 20 July 2009

Ground 15:

- *Prosecutor v. Milan Lukic and Sredoje Lukic*, Trial Judgement, IT-98-32/1-T, 20 July 2009
- *Prosecutor v. Aleksovski* Appeal Judgement, IT-95-14/1-A 24th March 2000
- *Prosecutor v. Babic* Appeal Judgement, IT-03-72-A, 18th July 2005
- *Prosecutor v. Delalić et al*, Appeal Judgement, IT-96-21-A, 20 February 2001
- *Proseuctor v Nikolic,* Appeal against Sentencing Judgement, IT-94-2-A, 4th February 2005
- *Prosecutor v. Jelisic*, Trial Judgement, IT-95-10-T, 14th December 1999
- *Prosecutor v. Oric*, Trial Judgement , IT-03-68-T, 30th June 2006
- *Prosecutor v. Vasiljevic*, Trial Judgement, IT-98-32-T, 29th November 2002
- *Prosecutor v. Brdanin* Trial Judgement, IT-99-36-T1st September 2004
- *Prosecutor v. Blagojevic and Jokic* Trial Judgement, IT-02-60-T, 17th January 2005
- *Prosecutor v Haradinaj et al* Trial Judgement, IT-04-84-T, 3rd April 2008

B. INTERNATIONAL CONVENTIONS, COMMENTARIES, NATIONAL LAWS

Introduction:

- International Criminal Tribunal for the Former Yugoslavia Statute, Article 25
- International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence, Rule 111 (1)
- Blackstone's Criminal Practice 2008, F18.16 (United Kingdom)
- European Convention on Human Rights, Article 14(2)
- European Convention on Human Rights, Article 6(2)
- European Convention on Human Rights, Article 3
- International Criminal Tribunal for the Former Yugoslavia Statute Statute, Article 21(3)
- International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence, Rule 87(A)

Ground 1- 11:

- *n/a*

Ground 12:

- International Criminal Court Statute, Article 30

Ground 13 -14:

- *n/a*

C. BOOKS AND ARTICLES

Introduction:

- *Hodge M Malek, Jonathan Auburn, Roderick Bagshaw*, Phipson on Evidence, 16th ed., 2005, 15-14
- *H. Dennis*, The Law of Evidence, 1999, p. 214
- *W.A. Wagenaar, De Diagnostische Waarde van Bewijsmiddelen*, (Diagnostic Value of Evidence), in M.J. Sjerps & J.A. Coster van Voorhout (red.), Het onzekere bewijs. Gebruik van statistiek en kansrekening in het strafrecht, Kluwer: Deventer 2005, p. 3-25.
- *Robertson, B. and Vignaux, G.A.* (1995) Interpreting Evidence: Evaluating Forensic Science in the Courtroom. John Wiley and Sons. Chichester
- *Colin Howson and Peter Urbach* (2005). Scientific Reasoning: the Bayesian Approach (3rd ed.). Open Court Publishing Company. ISBN 978-0812695786.
- *Morris H. DeGroot and Mark J. Schervish* (2002). Probability and Statistics (third ed.). Addison-Wesley. ISBN 9780201524888.
- *Bolstad, William M.* (2004) Introduction to Bayesian Statistics, John Wiley ISBN 0-471-27020-2
- *Carlin, Bradley P. and Louis, Thomas A.* (2008). Bayesian Methods for Data Analysis, Third Edition. Boca Raton, FL: Chapman and Hall/CRC. ISBN 1-584-88697-8
- *M.J. Sjerps* (2008) Forensic statistics and probability rates: interpretation of evidence, in: Forensic Sciences, edited by prof. A.P.A. Broeders and E.R. Muller, Kluwer, p. 467 – 496 (Dutch publication)

Ground 1- 6

- *n/a*

Ground 7:

- *Xavier Tracol* (2004) "The Precedent of Appeals Chambers Decisions in the International Criminal Tribunals", , Leiden Journal of International Law, 17.

Ground 8,9,10,11,12,13,14 and 15

- *n/a*

D. EXHIBITS

Ground 1:

- *PROSECUTION EXHIBITS*
  - P82
  - P37
  - P40
  - P41

- *DEFENCE EXHIBITS*
  - *n/a*

Ground 2:

- *PROSECUTION EXHIBITS*
  - P40
  - P41
  - P37

- *DEFENCE EXHIBITS*
  - 2D55
  - 2D56

Ground 3-6:

- *n/a*

Ground 7:.

- *PROSECUTION EXHIBITS*
  - P199 (First Instance Judgement of the Obrenovac Municipal Court)
  - P200
  - P201 (Second Instance Judgement of the District Court in Belgrade).
  - P202.
  - P205.

- *DEFENCE EXHIBITS*
  - 2D41
  - 2D43
  - 2D44
  - 2D47.
  - 2D49.
  - 2D53
  - 2D54

Ground 8:

- *PROSECUTION EXHIBITS*
  - P112

- P141
- P142
- P168
- P171

- *DEFENCE EXHIBITS*
  - 1D61
  - 2D15
  - 2D16
  - 2D17.
  - 2D19.
  - 2D52
  - 2D64.

Ground 9:.

- *PROSECUTION EXHIBITS*
  - P171
  - P168

- *DEFENCE EXHIBITS*
  - *n/a*

Grounds 10-14

- *n/a*

Ground 15 :

- *PROSECUTION EXHIBITS*
  - P209
  - P210
  - P211
  - P212
  - P213
  - P214
  - P215

- *DEFENCE EXHIBITS*
  - 2D60
  - 2D57
  - 2D47
  - 2D41
  - 1D63