

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

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

IN THE APPEALS CHAMBER

Before Judge Mehmet Günev
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron
Judge Carmel Agius

Registrar: Mr. John Hocking

Date Filed: 17 March 2010

THE PROSECUTOR

v.

**MILAN LUKIĆ &
SREDOJE LUKIĆ**

PUBLIC REDACTED VERSION

MILAN LUKIĆ'S APPEAL BRIEF

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INTRODUCTION

OVERVIEW

1. On 20 July 2009, Chamber III (“Chamber”) found Milan Lukic responsible pursuant to Article 7(1) of the Statute of the Tribunal (“Statute”), for murder and cruel treatment as violations of the laws of war under Article 3 of the Statute and for murder, persecution, extermination and inhumane acts as crimes against humanity under the Statute. The Chamber sentenced Milan Lukic to life imprisonment.¹
2. On 26 November 2009, Milan Lukic sought leave to amend his Notice of Appeal. On 4 December 2009, a Corrigendum was filed. On 16 December, the Appeals Chamber granted Milan Lukic leave to amend his Notice of Appeal and accepted the Amended Notice of Appeal appended to the Motion of 26 November 2009.
3. Pursuant to Article 25 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (“**the Statute**”) and Rule 111 of the Rules of Procedure, Milan Lukic files his Appeal Brief setting out his grounds of appeal against the Trial Judgment.
4. Each alleged error of law was such as to invalidate the Trial Judgment, and each alleged error of fact, individually and/or cumulatively, occasioned a miscarriage of justice.

¹ TJ.paras.1099-1101.

THE LAW GOVERNING IDENTIFICATION EVIDENCE

5. Identification was an essential issue in this case.² The United States Supreme Court has emphasised that the “*annals of criminal law are rife with instances of mistaken identification...*”³ Milan Lukic contends that, in relation to each crime site, the Chamber failed to apply due care to the evidence which tended to implicate him. A failure to observe the correct legal standards may invalidate the Chamber’s conclusion that Milan Lukic was correctly identified as a perpetrator of some or all of the alleged crimes.

6. Despite the importance of identification evidence in this case, the Trial Judgment contains no reference to the appropriate standards. In setting out its position on evidentiary matters failed to direct itself to the key legal principles, recognised by the Appeals Chamber, that govern the assessment of identification evidence.⁴ Milan Lukic contends that this failure led to a lack of rigour when assessing the evidence.

A. Applicable standards when assessing identification evidence

7. The Appeals Chamber has repeatedly emphasised the need to exercise “*extreme caution*” in relation to evidence of visual identification of an accused, especially when the sighting occurred in difficult circumstances.⁵ This is because identification evidence is vulnerable to

*“...the frailties of human perceptions and the very serious risk that a miscarriage of justice might result from reliance upon even the most confident witnesses who purport to identify an accused without an adequate opportunity to verify their observations.”*⁶

8. In *Kunarac*, the Chamber underlined the risk of distorted recollection and the vulnerability to suggestion:

² T.372.Judge Robinson.

³ *U.S. v Wade*, 388 U.S. 218, 228-229 (1967) (footnote omitted); *Kupreskic*, AJ, para.36.

⁴ Cf. *Vasilievic*, TJ para.16 *et seq.*

⁵ *Kupreškić*, AJ, para.34; *Kvočka*, AJ, para.24; *Limaj*, AJ, paras.27,30.

⁶ *Kupreškić*, AJ, para.34.

*“Identification is notoriously uncertain. It depends upon so many variables. They include...the extent of the opportunity for observation in a variety of circumstances; the vagaries of human perception and recollection; and the tendency of the mind to respond to suggestions, notably the tendency to substitute a photographic image once seen for a hazy recollection of the person initially observed.”*⁷

9. Special caution is necessary before accepting identification evidence because of the possibility that even a completely honest witness may have been mistaken in their identification.⁸

10. Milan Lukic contends that the Chamber failed to have proper regard to fundamental principles governing the assessment of identification evidence. In *Kupreskic*, the Appeals Chamber considered the following factors when assessing identification evidence:
 - a. identifications by witnesses who had only a fleeting glance or an obstructed view;
 - b. identifications occurring in the dark;
 - c. identifications as a result of a traumatic event and as a result of a traumatic event experienced by the witness;
 - d. inconsistent or inaccurate testimony about the defendant’s physical characteristics at the time of the event;
 - e. misidentification or denial of the ability to identify followed by later identification of the defendant by a witness;
 - f. the existence of irreconcilable witness testimonies;
 - g. a witness’ delayed assertion of memory regarding the defendant coupled with the “clear possibility” from the circumstances that the witness had been influenced by suggestions from others. In this regard, the Appeals Chamber noted that it is unacceptable for a Trial Judge to make no comment on the frailty of identification evidence other than the general statement that evidence is credible and therefore accepted.⁹

⁷ *Kunarac, Chamber Decision on Motion for Acquittal*(3.07.2000), para. 8.

⁸ *Kunarac, Decision on Motion for Acquittal*(3.07. 2000), para. 8.

⁹ *Kupreskic, AJ*, para.40.

11. While a Chamber is not obliged to refer to every piece of evidence on the trial record in its judgment, where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Chamber must rigorously implement its duty to provide a reasoned opinion. This means articulating the factors relied upon in support of the identifications and adequately addressing any significant factors impacting negatively on the reliability of the identification evidence.¹⁰
12. Milan Lukic respectfully contends that the Chamber in this case fell far short of these standards.

B. The Chamber's treatment of "recognition" witnesses

13. Milan Lukic contends that the Chamber erred in its treatment of "*recognition*" witnesses. The Chamber observed that the Tribunal's case-law recognises a distinction between "*identification witnesses*" and "*recognition witnesses*".¹¹ Relying upon the *Tadic* Trial Judgment, the Chamber held that an "*identification witness*" is one who did not previously know the accused by sight, whereas a "*recognition witness*" is one with "*prior knowledge of the accused which enabled them to recognise the accused at the time of the alleged crime.*"¹² In relation to individual crime sites, the Chamber sought to identify any evidence that a witness "*recognised*" Milan Lukic before proceeding to place great weight on the evidence of that witness. The Chamber failed to properly direct itself to the dangers of mistaken "*recognition*".
14. The distinction the Chamber drew between "*identification*" and "*recognition*" witnesses was flawed. As noted by the *Haradinai* Chamber, "*recognition*" evidence is just a subset of identification evidence: "*in both cases, identification evidence must be treated with caution as its qualities can depend on many variables, such as the vagaries of human perception and recollection.*"¹³ Evidence of claimed recognition does not render it any

¹⁰ *Kupreskic*, AJ, para.39.

¹¹ TJ, para.31.

¹² TJ, para.31.

¹³ *Haradinai*, TJ, para.29.

less vulnerable to error. The considerations affecting the reliability of identification evidence apply equally to purported recognition evidence.¹⁴ Factors such as distance, lighting and surrounding circumstances are also critical to the assessment of “*recognition*” evidence. Furthermore, the *Haradinai* Chamber considered that additional factors must be considered in relation to “*recognition*” witnesses, such as the possibility of bias and the interval between the time the witness “*recognised*” the person and the time he had last seen him.¹⁵

15. The approach of the Chamber in *Haradinai* is consistent with the approach in national jurisdictions. English caselaw reminds us that mistakes in recognition can be made even where close relatives and friends are involved.¹⁶ Where an alleged recognition is made in difficult circumstances, even on the basis of a lengthy observation, it cannot be regarded as inherently more reliable than “*identification*” evidence. Many people have experienced seeing someone in the street whom they knew, only to discover they were wrong: “*I could have sworn it was you*” indicates the sort of caution that the finder of fact must apply.¹⁷

16. In the case of recognition, “*the risk is not that the witness will pick out the wrong persons on a [identification] parade, but that at the time of the offence he mistakenly thinks that he recognises the offender.*”¹⁸

17. Importantly, the Chamber diluted the standard of caution even further by extending its “*category*” of recognition witnesses. The Chamber held that the categories of “*identification*” and “*recognition*” cannot be so strictly interpreted as to require that a witness must have knowledge of the accused prior to the start of the commission of a crime in order to be “*classified*” as a recognition witness. The Chamber was satisfied that, where a crime is committed over a “*long period of time and a witness has acquired*

¹⁴ *Haradinai*, T.J. para. 29.

¹⁵ *Haradinai*, T.J. para. 29.

¹⁶ *R. v. Bowden* [1993] Crim LR 379.

¹⁷ *R. v. Bentley* [1991] Crim LR 620, CA.

¹⁸ Archbold § 14-19 citing *R v. Thomas* [1994] Crim LR 128, CA.

sufficient knowledge of the accused during that period, such a witness is a ‘recognition witness’”¹⁹.

18. The Chamber did not cite any authority for this approach. The risk of error in this approach is plain, and is compounded by the Chamber’s pervasive placing of significant weight on the evidence of “*recognition*” witnesses. For example, the Chamber held that a witness who allegedly learned the name of their assailant during the course of an attack was properly considered as a “*recognition*” witness. English caselaw rejects such an approach because of its inherent risk of error.²⁰

C. The Conduct of In-Court Identifications

19. In court identifications were performed in relation to every crime site. Milan Lukic contends that the individual and cumulative prejudicial impact of these identifications undermines the safeness of his convictions.

20. In *Limai*²¹, *Kunarac*²² and *Kamuhanda*²³ the Appeals Chamber considered that no probative weight should be attached to in-court identifications. In-court identifications are inherently unreliable because all of the circumstances of a trial necessarily lead a witness to identify the person on trial.²⁴

21. Archbold states the principle as follows:

*“The practice of inviting a witness to identify a defendant for the first time when the defendant is in the dock has long been regarded as undesirable.... Although a trial judge retains a discretion to permit a dock identification, it is submitted that in practice the exercise of such discretion should not even be considered unless: (a) a defendant has refused to comply with a formal request to attend an identification parade, and (b) none of the other identification procedures has been carried out as a result of the defendant’s fault.”*²⁵

¹⁹TJ.para.34.

²⁰*R. v.Ferguson*[1992]CrimLR363CA.

²¹*Limai*.AJ.para. 27.

²²*Kunarac*.AJ.para.320.

²³*Kamuhanda*.AJ.para.243.

²⁴*Limai*.AJ.para.27.

²⁵ §14-46

22. The Judicial Committee of the Privy Council, the highest appellate court for numerous Commonwealth jurisdictions, has held that a dock identification may only be permitted in exceptional circumstances and where there will be no injustice or prejudice done to a defendant, which will only be the case when there is **no issue as to identification**.²⁶ However, for many years courts in numerous jurisdictions have recognised that dock identifications are permissible only in the most exceptional circumstances, none of which apply in this case.
23. In the circumstances of this trial, a photograph of Milan Lukic, in court, appears on the Tribunal's own website. **Exh.1D72** provides a sample of some of the photographs of Milan Lukic readily available on the internet at the time witnesses travelled to The Hague to testify. Footage of Milan Lukic's **trial** was frequently broadcast in Bosnia. At least one witness admitted that they had seen such footage.²⁷ In such circumstances, in-court identifications should have been prohibited.
24. The Chamber held that probative weight could be attached to in-court identifications performed by the witnesses it considered to be "*recognition witnesses*".²⁸ The Trial Judgment does not always explicitly categorise witnesses as "*recognition witnesses*", but as noted above the Chamber had an expansive definition of this "*category*" in mind.

²⁶ *Constance, Wilson and Lee v The State* Appeal No.31 of 1998.PC.

²⁷ VG133.T.3029.

²⁸ TJ.paras.30-34.

FIRST GROUND: THE DRINA RIVER INCIDENT

SUB-GROUND 1(A): THE CHAMBER ERRED IN LAW BY APPLYING THE WRONG LEGAL AND EVIDENTIARY STANDARD TO THE CRIME OF MURDER

25. It is a well-established that the death of the victim must be proved beyond reasonable doubt for an accused to be held responsible for murder. While proof of death does not necessarily require recovery of a dead body,²⁹ in the absence of such evidence the circumstantial evidence proving death must be strong.

26. For murder to be established on the basis of circumstantial evidence, the victim's death must be the only reasonable inference.³⁰ The *Tadic* Chamber held that where there is more than one conclusion reasonably open on the evidence as to the death of a victim, it is not for a Chamber to draw the conclusion least favourable to the accused.³¹ In *Krnjelac*, the Chamber held that alleged victims had not been killed on the basis that there was evidence of: (i) death certificates with dates of death inconsistent with other evidence (ii) incorrect names on death certificates; and (iii) possible alternative causes of death.³²

27. In relation to the Drina River Incident, the proof of death relied upon by the Chamber was the account given by eyewitnesses. The Chamber found that five men (Meho Dzafic, Ekrem Dzafic, Hasan Mutapcic, Hasan Kustura and Amir Kurtalic) were killed.³³

28. The bodies of the alleged victims were not recovered and no death certificates were presented. Crucially, the Chamber ignored the reasonable possibility that some of the alleged victims of the Drina River Incident are still alive, or that the circumstances of their death are inconsistent with the prosecution's case.

²⁹ *Krnjelac*, T.J. paras. 326-327.

³⁰ *Stakic*, T.J. para. 939.

³¹ *Tadic*, T.J. para. 240. See *Oric*, T.J. para. 347.

³² *Krnjelac*, T.J. paras. 340-342.

³³ T.J. para. 200.

29. The prosecution's failure to meet the legal and evidentiary burden for murder is summarised below. In light of these material discrepancies, the reasonable inference remained that the events alleged by the prosecution did not take place.

Alleged Victim	Reasons why the prosecution failed to meet its legal and evidentiary burden
Meho Dzafic	<ul style="list-style-type: none"> • No body • No death certificate • Disappeared in Visegrad³⁴ • Disappeared on June 7 1992³⁵
Ekrem Dzafic	<ul style="list-style-type: none"> • No body • No death certificate • Disappeared in Holiiaci³⁶ • Disappeared in Visegrad³⁷ • Disappeared on June 7 1992³⁸ • Killed on June 7 1992³⁹
Hasan Mutapcic	<ul style="list-style-type: none"> • Body found in a place inconsistent with the crime site. Body exhumed on 14 November 2002 at Kamenicko Tocilo-Srebrenica.⁴⁰ • Disappeared in Bikavac⁴¹ • Disappeared in Visegrad⁴²
Hasan Kustura	<ul style="list-style-type: none"> • No body • [REDACTED]⁴³ • Not listed as having disappeared in ICRC reports • Disappeared in Visegrad⁴⁴ • Killed on June 25 1992⁴⁵
Amir Kurtalic	<ul style="list-style-type: none"> • No body • No death • Disappeared in Sase⁴⁶ • Killed on 31 May 1992⁴⁷

³⁴ P119.d.1

³⁵ P119.d.1

³⁶ P119.d.1

³⁷ P119.d.9

³⁸ P119.d.1

³⁹ P119.d.9

⁴⁰ P119. d.9.P172.d.938

⁴¹ P119.d.1

⁴² P119.d.9

⁴³ 1D22. [REDACTED]

⁴⁴ P119.d.9

⁴⁵ P119.d.9

⁴⁶ P119.d.1

⁴⁷ P119. d.9

SUB-GROUND 1(B): THE CHAMBER ERRED IN LAW WHEN HOLDING THAT, IN A NON-JCE CASE, THE COMMISSION OF MURDER IS ESTABLISHED IN THE ABSENCE OF ANY EVIDENCE THAT MILAN LUKIC KILLED EKREM DZAFIC, HASAN MUTAPCIC, HASAN KUSTURA AND AMIR KURTALIC

30. The Chamber found that Milan Lukic shot at the seven victims of the Drina River Incident, of whom five died.⁴⁸ While the Chamber found that only one of the men was actually killed by Milan Lukic, it nevertheless held that he had *committed* the murder of all five men.⁴⁹ The Chamber cited no authority to directly support its approach, which contrasts with the Appeals Chamber’s approach in the *Tadic* case where, on similar facts, responsibility as a principal perpetrator was imposed on the basis of joint criminal enterprise liability.
31. In this case, the prosecution chose not to allege joint criminal enterprise liability.⁵⁰ Faced with this method of charging, the Chamber drew an analogy with ICTR caselaw and held that a person who “*commits*” a crime need not personally commit the crime if the evidence shows that his acts were “*integral*” to the crime.⁵¹
32. This approach demands review by the Appeals Chamber because causes confusion in the law. The Chamber offered no standard by which to measure whether acts are “*integral*” to a crime. Milan Lukic respectfully submits that the Appeals Chamber should restore certainty to the law by rejecting the Chamber’s approach.
33. In *Gacumbitsi*, the Appeals Chamber held that “*in the context of genocide, [...] “direct and physical perpetration”* need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime.⁵² However, any analogy between such a large-scale case and a single crime like the Drina River Incident is stretched. As Judge Liu noted in his dissenting opinion in the *Seromba* case, the analysis in *Gacumbitsi* does not mean that ““*committing*” *per se* is not limited to **direct and physical perpetration**

⁴⁸ TJ para.194

⁴⁹ TJ para.117,907.

⁵⁰ T.255

⁵¹ TJ.para.908

⁵² *Gacumbitsi*.AJ.para.60.

and that other acts can constitute direct participation in the *actus reus* of the crime”.⁵³ Milan Lukic did not directly or physically kill the other victims, and so did not “commit” murder.

34. Moreover, the analysis of the Majority in *Gacumbitsi* was vague in that it failed to explain which acts constitute direct participation in the *actus reus* of the crime.⁵⁴
35. Judge Shahabuddeen pointed out in his separate opinion in *Gacumbitsi* that co-perpetration and the joint criminal enterprise are two different theories that legal systems follow **alternatively** because these two theories overlap and therefore cannot both simultaneously be valid in the same jurisdiction.⁵⁵
36. The Appeals Chamber has decided that joint criminal enterprise is the method by which an accused can be held responsible as a principal for the acts of others. The Chamber’s approach in this case should be rejected. Subject to the other grounds of appeal advanced in relation to the Drina River Incident, the highest at which the responsibility of Milan Lukic can be put for the death of Ekrem Dzafic, Hasan Mutapcic, Hasan Kustura and Amir Kurtalic is that of an aider and abettor.

SUB-GROUND 1(C): THE CHAMBER ERRED IN LAW BY PERMITTING IN-COURT IDENTIFICATIONS

37. Four prosecution witnesses testified to the Drina River Incident: VG014⁵⁶ and VG032⁵⁷ were survivors; VG079 claimed to have witnessed events from the other side of the Drina river;⁵⁸ and Mitar Vasilievic who was convicted by this Tribunal as a participant in the crime.⁵⁹

⁵³ *Seromba*.AJ. Dissenting opinion of Judge Liu.para 2.

⁵⁴ *Gacumbitsi*.AJ.Dissenting opinion of Judge Guev.para 6.

⁵⁵ *Gacumbitsi*.AJ.Separate opinion of Judge Shahabuddeen. para 50.

⁵⁶ TJ.paras.129-131.

⁵⁷ TJ.paras.126-128.

⁵⁸ TJ.para.135.

⁵⁹ TJ.paras.132-134.

38. An in-court identification of Milan Lukic was performed by the two survivors.⁶⁰ The Chamber placed emphasis on the evidence of VG-014, whose evidence corroborated Mitar Vasilievic's evidence in certain respects, in order to reject a defence submission that Mitar Vasilievic had falsely implicated Milan Lukic in order to shift responsibility away from himself.⁶¹
39. The Chamber should not have permitted VG014 or VG032 to identify Milan Lukic in court. The identification of Milan Lukic as a perpetrator of the Drina River Incident was disputed. By allowing VG014 and VG032 to identify Milan Lukic in court, serious prejudice resulted.

VG-014

40. VG014's evidence was that he went to secondary school with Milan Lukic in 1983 and 1984, though they were not in the same class. He described seeing Milan Lukic, during breaks among other 300–400 students.⁶² The last time VG014 saw Milan Lukic prior to the Drina River Incident was 1984, when they were both 16 years old.⁶³ Yet VG014 testified that he "*recognised*" Milan Lukic as soon as he entered VG014's house.⁶⁴
41. Given that this "*recognition*" was disputed, no in-court identification should have been permitted. It served no purpose other than to prejudice the defence.
42. Crucially, VG014's description of the man who entered his house did not match Milan Lukic.

[REDACTED]

was consistent in this respect.⁶⁶

⁶⁵ VG014's evidence throughout

⁶⁰ TJ.para.128-129.

⁶¹ TJ para.195. *See Vasilievic AJ.*

⁶² T.302-303

⁶³ T.297

⁶⁴ TJ.para.129.

⁶⁵ 1D1.D.2.

⁶⁶ Exhibit P5.T. 299. 01.388-393.

43. Milan Lukic has never had a large birth mark on any cheek.⁶⁷
44. The clear inference is that the man VG014 “*recognised*” on the day of the Drina River Incident was not Milan Lukic. A positive in-court identification, when circumstances conspired to ensure that VG014 picked out Milan Lukic, was unduly prejudicial. If the prosecution wished to bolster VG014’s identification of Milan Lukic as the man he “*recognised*” on the day of the Drina River Incident, it should have done so by a fair out-of-court procedure.
45. VG014’s identification of Milan Lukic as the perpetrator could not be relied upon in light of this serious breach of due process. The Appeals Chamber should consider the identification evidence relevant to the Drina River incident in the absence of VG-014’s positive “*recognition*” of Milan Lukic.

VG032

46. VG032 had no personal prior knowledge of Milan Lukic before the day of the Drina River Incident.⁶⁸ Given that identification was disputed, this should preclude an in-court identification procedure.
47. This is unaltered by VG032’s assertion that he had seen Milan Lukic on two isolated occasions in April and May 1992. On one of these occasions he was apparently told by a friend that the man he saw was Milan Lukic, but was provided with **no other information** about him whatsoever.⁶⁹ VG032’s evidence was that he “*did not pay much attention*”⁷⁰ to the man identified as Milan Lukic.⁷¹ Notably, while VG032 remembered Milan Lukic, he could not remember the names of the friends who pointed him out.⁷²

⁶⁷ 1D10.1D11.1D12.1D13.1D14.1D15.1D16.1D17.1D45.1D46.1D50.1D72.1D126.P9.P10.P230.P231.P232. P258

⁶⁸ TJ.para.207.

⁶⁹ TJ.para.126.

⁷⁰ T.1210

⁷¹ T.1212

⁷² T.1213

48. Unlike VG014, no description was provided by VG032 against which the defence could test his purported “*recognition*”. In these circumstances, an in-court identification procedure is an evidentiary short-cut which prejudices the accused. The Appeals Chamber should consider the identification evidence relevant to the Drina River Incident in the absence of the evidence of VG32.
49. If these submissions find favour with the Appeals Chamber, the only remaining evidence is that of Mitar Vasilievic – a witness with a clear motive to implicate others in *his* crime in an attempt to minimise his own involvement – and VG079, who was located across the river and in no position to recognise any of the perpetrators. Therefore, Milan Lukic’s convictions for the Drina River Incident are unsafe and should be reversed.

SUB-GROUND 1(D): THE CHAMBER ERRED IN LAW BY FAILING TO APPLY DUE CARE TO IDENTIFICATION EVIDENCE

50. The Chamber failed to direct itself to the appropriate standards when assessing identification evidence. Of particular relevance to this identification evidence was the issue of purported recognition based upon fleeting glances and the impact of traumatic events on witnesses’ ability to recognise and remember their assailants.
51. The Chamber failed to direct itself to the possibility that VG032 and VG014 were mistaken when they “*recognised*” Milan Lukic – a man neither of them knew well and who they identified in most traumatic circumstances. For the reasons given above, no reasonable Chamber having applied the correct standards, could conclude that either VG014 or VG032’s “*recognition*” of Milan Lukic was reliable.
52. The Chamber failed to direct itself to the factors to be considered in weighing the hearsay evidence of VG073. This witness was apparently told Milan Lukic’s name by either a “*colleague*” or a “*friend*” or his “*brother-in-law*”.⁷³ The witness was inconsistent as to which. The proper standards of identification evidence ensure extreme caution with such evidence. The Chamber accepted this witness’ “*recognition*” of Milan Lukic without question.

⁷³ TJ.dara.139: 1D2pg.3.

53. Had the Chamber correctly applied the proper standards, it would have concluded that Milan Lukic had not been identified as a perpetrator of the Drina River Incident.

SUB-GROUND 1(E): THE CHAMBER ERRED IN FACT IN ITS ASSESSMENT OF THE IDENTIFICATION EVIDENCE

54. No reasonable Chamber could have ignored important inconsistencies in witnesses' descriptions of the man they thought was Milan Lukic. The man VG014 identified as Milan Lukic had a distinctive mole on his face. VG032's evidence was that Milan Lukic did not have a mole.⁷⁴ No reasonable Chamber could fail to give considerable weight to this discrepancy. If VG014's evidence of his familiarity with Milan Lukic was accepted, his evidence had to be given more weight than that of VG-032. Accordingly, no reasonable Chamber could find that Milan Lukic had been correctly identified.

55. Further, no reasonable Chamber could place any weight on the purported identification evidence of Milan Lukic by VG073, who watched events unfold from across the river through binoculars, for the reasons given above.

SUB-GROUND 1(F): THE CHAMBER ERRED IN LAW IN ITS ASSESSMENT OF THE EVIDENCE OF AN ALLEGED ACCOMPLICE, MITAR VASILJEVIC, AND REACHED IRRATIONAL CONCLUSIONS

56. The Chamber accepted that "*Mitar Vasiljevic recognized Milan Lukic as having been present during the events prior to and during the Drina River incident on 7 June 1992*".⁷⁵ The Chamber erred in law by failing to direct itself to the risks inherent in the evidence of a co-accused.

57. The Chamber failed to properly direct itself to Mitar Vasiljevic's bad character and whether his evidence was tainted by improper motive. VG014's evidence was an insufficient basis upon which to corroborate the evidence of Mitar Vasiljevic. VG014 testified in Vasiljevic's trial. [REDACTED]

⁷⁴ T.1209

⁷⁵ TJ.para.133.

[REDACTED]

[REDACTED]⁷⁶ [REDACTED]

[REDACTED]⁷⁷ [REDACTED]⁷⁸ Mitar

Vasilievic had a clear incentive to manufacture his evidence to corroborate VG014 to some extent and implicate whoever VG014 implicated.

58. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷⁹ The Appeals Chamber should consider the evidence identifying

Milan Lukic in the absence of the evidence of Mitar Vasilievic.

SUB-GROUND 1(G): THE CHAMBER ERRED IN LAW BY REVERSING THE BURDEN OF PROOF ON ALIBI

59. Milan Lukic's alibi for both the Drina River Incident and the Varda Factory Incident was that he was in Belgrade from 7 to 10 June 1992 and so was not in a position to commit these crimes.

60. The Chamber correctly described the legal principles relevant to alibi evidence.⁸⁰ These were recently confirmed by the Appeals Chamber in *Zigiranvirazo*. However, the Chamber did not apply the legal standard that it had described and instead reversed the burden of proof.

61. The Appeals Chamber has recognised that the language used in a Judgment can indicate that the Chamber misapplied the burden of proof.⁸¹ It is presumed that the language used in a judgment accurately describes the approach adopted by the Chamber.⁸² A careful

⁷⁶ T.5211-22

⁷⁷ T.1539-1540

⁷⁸ T.1554-1556

⁷⁹ T.1499-1500

⁸⁰ TJ.paras. 22-29.

⁸¹ *Musema*.AJ. paras. 209,295; *Limai*.AJ. para.65;*Kamuhanda*.AJ.para.39.

⁸² *Musema*.AJ.para.209.

analysis of specific findings is necessary to establish whether the Chamber misapplied the burden of proof.⁸³ Where a Chamber's assessment of alibi evidence has not been sufficiently careful, the Appeals Chamber should conclude that the burden of proof was reversed.⁸⁴

62. Rather than consider whether Milan Lukic's alibi was reasonably possibly true, the Chamber considered whether the alibi had been proved beyond reasonable doubt. The following wording demonstrates the Chamber's erroneous approach:

- a. *"there are a number of aspects in MLD1's account that are difficult to believe";⁸⁵ "[...] the Chamber, therefore, considers that the testimony of Hamdiia Vilić [...] raise serious questions [...] as to the credibility of MLD10 in general and in respect of her alibi evidence regarding the Drina river and Varda factory incidents";⁸⁶*
- b. the episode with the argument Milan Lukic had with the woman at MLD15's party *"appears somewhat strange and artificial";⁸⁷*
- c. *"[...] this inconsistency is sufficiently significant to call into question the alibi as a whole, as it casts reasonable doubt on the alibi evidence of MLD10 and Zelko Markovic, in addition to that of MLD1";⁸⁸ and*
- d. *"[...] the inconsistency resulting from MLD24's evidence casts further doubt upon the veracity of the alibi presented as a whole".⁸⁹*

63. Therefore, the approach of the Chamber in practice required Milan Lukic to prove his alibi **beyond reasonable doubt**. The language used by the Chamber cannot be read any other way. The Chamber may well have had doubts about Milan Lukic's alibi, but this did not mean that it was not reasonably possibly true.

⁸³ *Zigiranvirazo*, AJ, para.21. *Musema* AJ, paras.210,211.

⁸⁴ *Zigiranvirazo*, AJ, para.21

⁸⁵ TJ, para.212

⁸⁶ TJ, para.216(emphasis added)

⁸⁷ TJ, para.221

⁸⁸ TJ, para.223(emphasis added)

⁸⁹ TJ, para.226(emphasis added)

SUB-GROUND 1(H): THE CHAMBER ERRED IN FACT WHEN HOLDING THAT MILAN LUKIC'S ALIBI WAS NOT REASONABLY POSSIBLY TRUE

64. No reasonable Chamber could conclude that that Milan Lukic's alibi was not reasonably possibly true. In assessing the alibi evidence, the Chamber erred in many ways.

65. First, the Chamber took account of unproved allegations that alibi witnesses were bribed. During the Trial, the Chamber ordered the prosecution to investigate possible charges of contempt of court for the alleged bribery of, among others, MLD10. On 6 October 2008, the Chamber held that there was insufficient evidence to proceed, but allowed the Prosecution call Hamdiia Vilic in relation to the bribery allegations.

66. Hamdiia Vilic testified that his family perished in the Bikavac fire and that he believed Milan Lukic to be responsible.⁹⁰ Therefore, this witness would never testify on Milan Lukic's behalf.⁹¹ However, Vilic's evidence was that he answered **four** phone calls from Milan Lukic⁹² and people connected to him and that he agreed to go to MLD10's house to discuss Milan Lukic's case.⁹³ Had the Chamber applied a consistent standard to the evidence related to Milan Lukic's alibi, it was bound to consider such allegations "*strange and artificial*".⁹⁴ Given that these serious allegations were unproved, no reasonable Chamber could consider them when assessing the evidence of MLD10.⁹⁵

67. The Chamber repeated its error when assessing MLD1's evidence. The Chamber held that the prosecution's allegations of contempt did not discredit his evidence as a whole, but selectively considered these allegations when considering Milan Lukic's alibi.⁹⁶ Similarly, the Chamber rejected MLD1's evidence on the basis of VG148, who testified to a close relationship with MLD1 but said he was never told of MLD1's account of being saved by Milan Lukic.⁹⁷ [REDACTED]

⁹⁰ TJ.para.215.T.3456

⁹¹ TJ.para.215

⁹² T.3457.3460.3461

⁹³ T.3463

⁹⁴ Cf. TJ.para.221 as to the evidence of MLD15.

⁹⁵ TJ.para.216.

⁹⁶ TJ.para.211

⁹⁷ TJ.para.213

treatment.¹⁰⁴ However, elsewhere the Chamber held that MLD24 was an unreliable witness.¹⁰⁵ No reasonable Chamber could discount his evidence on the one hand, then rely upon his evidence to undermine Milan Lukic's alibi on the other hand.

71. Fifthly, the Chamber erroneously held that the evidence provided by MLD10 and Zelko Markovic did not refer to 1992, as opposed to any other year.¹⁰⁶ No reasonable Chamber could adopt such an approach – their evidence, viewed as a whole, related to the war in general and 1992 in particular. A failure to specifically identify the year 1992 was immaterial.

72. Sixthly, the Chamber erred in its assessment of contradictions in the alibi rebuttal evidence. The Chamber noted “*significant*” contradictions in VG063's evidence but held that these did “*not affect the credibility and reliability*” of her allegations.¹⁰⁷

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¹¹¹ No reasonable Chamber could place any weight on this witness as rebutting Milan Lukic's alibi.

73. For all these reasons, no reasonable Chamber could conclude that the evidence excluded the reasonable possibility that Milan Lukic's alibi was true. The Appeals Chamber should correct the Chamber's error and enter an acquittal for all counts related to the Drina River Incident.

¹⁰⁴ TJ.para.226

¹⁰⁵ TJ.paras.625,627

¹⁰⁶ TJ.para.217

¹⁰⁷ TJ.para. 229

¹⁰⁸ 2D13 p.3;2D12 p.2;1D15 p.5;1D49.p.4

¹⁰⁹ 1D49p.4.7.

¹¹⁰ 1D49.p.12

¹¹¹ 1D49.p.11

SUB-GROUND 1(I): THE CHAMBER ERRED IN FACT WHEN ASSESSING THE CREDIBILITY OF PROSECUTION WITNESSES

74. This Sub-ground is withdrawn.

SUB-GROUND 1(J): THE CHAMBER ERRED IN LAW OR ALTERNATIVELY IN FACT IN ITS ASSESSMENT OF THE MENTAL SUFFERING OF SURVIVORS

75. This Sub-ground is withdrawn.

SECOND GROUND:THE VARDA FACTORY INCIDENT

SUB-GROUND 2(A): THE CHAMBER ERRED IN LAW BY APPLYING THE WRONG LEGAL AND EVIDENTIARY STANDARD TO THE CRIME OF MURDER

76. The Chamber erred in its finding that Milan Lukic shot and killed¹¹² 7 Bosnian Muslims, because the death of these individuals was not proven.

77. An autopsy report was presented for only one of the victims-Hamed Osmanagic. This did not provide a date or place of death.¹¹³ In respect of the other victims, the finding was made solely on the basis of the evidence of VG017, VG024, VG042¹¹⁴, all unreliable witnesses. They testified that some of the bodies were later buried in different locations, but none of the bodies were exhumed or identified.¹¹⁵

78. In summary, each victims' death was not established for the following reasons:

Alleged Victim	Reasons
Hamed Osmanagic	<ul style="list-style-type: none"> The body found and identified¹¹⁶ as Hamed Osmanagic - died at an unknown place and date¹¹⁷ The identification report¹¹⁸ is <i>inconsistent</i> with the autopsy report¹¹⁹ as to the facial injuries on the body
Nusret Aliosevic	<ul style="list-style-type: none"> No body found No death certificate
Nedžad Bektas	<ul style="list-style-type: none"> No body found Death certificate: date of death is 19 June 1992: inconsistent with the Drina River Incident¹²⁰

¹¹² TJ.para.329

¹¹³ TJ.para.254.317.319

¹¹⁴ TJ.para.318

¹¹⁵ TJ. paras 312.318

¹¹⁶ P124

¹¹⁷ P123

¹¹⁸ P124

¹¹⁹ P123

Musan Čančar	<ul style="list-style-type: none"> • No body found • No death certificate
Ibrisim Memisevic	<ul style="list-style-type: none"> • No body found • No death certificate • The person is still alive. He submitted a request for the return of his abandoned property in Omerigici village on 19 May 1999.¹²¹ VG017¹²² and VG042¹²³ testified that they buried Ibrisim Memisevic. (VG042 located the spot as being outside her front door) but neither mentioned the presence of the other. The Chamber considered this a minor inconsistency that did not affect the witnesses' credibility.¹²⁴ If the location of the body was known, it should have been exhumed.
Lutvo Tvrtkovic	<ul style="list-style-type: none"> • No body found • No death certificate
Sabahudin Velagic	<ul style="list-style-type: none"> • No body found • Death certificate: date of death: 30 May 1992, inconsistent with the Drina River Incident¹²⁵

SUB-GROUND 2(B): THE CHAMBER ERRED IN LAW BY PERMITTING IN-COURT IDENTIFICATIONS

79. Three prosecution witnesses testified to the Varda Factory Incident: VG017, VG024, VG042. An in-court identification was performed by VG024, despite the objection of the counsel,¹²⁶ who was an employee of the factory and claimed to recognise Milan Lukic during the Varda Factory Incident.¹²⁷ The Chamber relied upon this in-court

¹²⁰ 1D241

¹²¹ 1D226.D.2

¹²² T.2710/5-10

¹²³ T.2792/3-10

¹²⁴ TJ.para. 312

¹²⁵ 1D243

¹²⁶ T.3217.

¹²⁷ TJ.para. 264.

identification for its conclusion that VG024 knew Milan Lukic and recognised him inside the Varda factory.¹²⁸

80. The Chamber should not have permitted VG024 to identify Milan Lukic in court. By allowing VG024 to identify Milan Lukic in court, serious prejudice resulted.

81. The identification of Milan Lukic as the perpetrator of Varda Factory Incident was disputed. [REDACTED]

[REDACTED].¹²⁹ However, this was when Milan Lukic was a child. VG024's could not say when the last time was that she saw Milan Lukic before the war, but testified that it was when he left for military service.¹³⁰

82. VG024's evidence was that Milan Lukic was an "almost a regular visitor"¹³¹ to the Varda factory in 1992 and she gave evidence of a prior incident on 25 May 1992.¹³² However, this evidence did not diminish the risk of a mistaken recognition in relation to any of these alleged occasions.

83. [REDACTED]
[REDACTED]
[REDACTED]¹³³ [REDACTED]
[REDACTED]¹³⁴ is insufficient. Moreover, prior to VG024's in-court identification of Milan Lukic, she had misidentified him on at least two occasions.

84. **Exhibit 1D80** is a statement that witness VG024 gave on 18 December 1998. In this statement, VG024 identifies an individual wearing a red top and dark trousers in several different photographs as being Milan Lukic. These photographs were admitted within

¹²⁸ TJ.para. 323.

¹²⁹ T.3206; Exhibit 1D78, p.2; Exhibit 2D34, p.3.

¹³⁰ TJ.para. 264.

¹³¹ T.3222.

¹³² T.3223.

¹³³ 1D78.T.3249.

¹³⁴ T.3260.

Exhibit 1D75. The individual in the photographs is not Milan Lukic. The Chamber held that this erroneous identification did not undermine VG024’s confirmation that she saw Milan Lukic on the day of the Varda Factory Incident. The Chamber was satisfied by her explanation that the photographs were “*blurry*” and that she was unable to see properly the man depicted.¹³⁵ However, a clear error, or even a risk of mistaken identification, in a pre-trial procedure must prevent in-court identification.

85. Witness VG024 misidentified Milan Lukic on a further occasion [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹³⁶ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹³⁷ [REDACTED]

86. In any event, VG024’s in-court identification of Milan Lukic took place 16 years after the Varda Factory Incident. Appearances change greatly over such a period. By allowing VG024 to identify Milan Lukic in court, when the circumstances conspire to ensure a positive identification, the Chamber erred in law. If the prosecution wanted to bolster VG024’s identification of Milan Lukic, it should have sought to ensure the integrity of the identification by means of an out-of-court procedure.

87. It may be tempting to reconsider all of VG024’s identification evidence to try to undo the damage caused by her in-court identification of Milan Lukic, but leave her positive “*recognition*” in place on alternate grounds. Such a temptation should be resisted. If no important advantage was obtained by the procedure, the prosecution would not have used it. Further, the in-court identification was intrinsic to the Chamber’s conclusion that

¹³⁵ T.J.dara.263.

¹³⁶ 1D81.d.1.

¹³⁷ T.3275

VG024 recognised Milan Lukic on the day of the Varda Factory Incident.¹³⁸ Finally, it is impossible to discern the unseen impact that VG024's in-court identification of Milan Lukic had on the Chamber's assessment of all her evidence.

88. The fairest remedy available to the Appeals Chamber is to consider the identification of Milan Lukic in the absence of VG024's evidence. This turns solely upon the evidence of VG042 – a witness at least 50 metres away from the events. Therefore, the Appeals Chamber should quash Milan Lukic's convictions.

SUB-GROUND 2(C): THE CHAMBER ERRED IN LAW BY FAILING TO APPLY DUE CARE TO IDENTIFICATION EVIDENCE

89. The Chamber failed to direct itself to the appropriate standards when assessing identification evidence. Of particular relevance to Varda Factory Incident were issues of: distance, purported recognition, inconsistent accounts, and delayed assertions that it was Milan Lukic who perpetrated the alleged murders.

90. Had the Chamber correctly applied the proper standards, it would have concluded that Milan Lukic had not been identified as the perpetrator.

VG042

91. The Chamber relied "*primarily*" on the evidence of VG042, who it concluded had a clear line of sight from the balcony of her house and was able to see what happened at the Varda factory that day.¹³⁹

92. **Recognition.** The Chamber was satisfied that witness VG042 knew Milan Lukic before the Varda Factory Incident.¹⁴⁰ However, the last time she saw Milan Lukic before the war was when he was a child.¹⁴¹ The Chamber failed to apply any rigour to VG042's

¹³⁸ TJ.para.323.

¹³⁹ TJ.para.300.

¹⁴⁰ TJ.para.320.

¹⁴¹ TJ.para.257. See T.2781.

recognition of Milan Lukic. Consequently, the Chamber placed considerable weight upon a “*recognition*” of Milan Lukic, when it should not have done so.

93. In particular, the Chamber agreed with the defence submission that it was impossible for VG042 to see Milan Lukic as a young boy on the bus before she was married. Their age differences made this impossible.¹⁴² Further, VG042 estimated Milan Lukic to have been about 40 years old at the time of the Varda Factory Incident.¹⁴³ Despite this evidence, the Chamber was nonetheless satisfied that VG042 knew Milan Lukic before the Varda Factory Incident and, crucially, that she recognised him on that day.¹⁴⁴ Had the Chamber applied the standards of identification evidence rigorously, it would not have concluded that VG042’s “*recognition*” of Milan Lukic was established.

94. **Distance.** Witness VG042’s evidence was that she was able to recognise Milan Lukic even though she was 50 metres “*as the crow flies*” behind the main gate of the Varda factory.¹⁴⁵ **Exh.P157** is a photograph used by VG042 to indicate:(i)the top-floor balcony of her house from where she observed events (marked with a circle):(ii)the location where she alleged that she saw Milan Lukic park a red Passat vehicle (marked with an “x”); and (iii)the location where she alleged that she saw victims being shot (marked with lines next to the river).¹⁴⁶ Even accepting this evidence at face value, and VG-042’s assertion that her eyesight was “*good*” in 1992, 50 metres is a considerable distance – at least the length of half a football pitch. The Trial Judgment does not demonstrate extreme caution assessing this evidence.

95. A Defence expert witness travelled to the site. He noted the large area of the Varda factory complex, covering millions of square feet.¹⁴⁷ **Exh.1D216** shows his markings of the distances involved based upon his visit: it was 75 to 100 metres from VG042’s house to where she said she initially saw Milan Lukic. **Exh.2D23** was a videotape shown to

¹⁴² See T.2777-2779.

¹⁴³ T. 2831.

¹⁴⁴ TJ.para. 320.

¹⁴⁵ TJ.para. 238.

¹⁴⁶ T.2793-2794.

¹⁴⁷ T.6576.

VG042 which demonstrates the inherent unlikelihood of a positive visual recognition of Milan Lukic from her balcony.

96. Moreover, the record suggests that VG042 overstated her ability to perform identifications from a distance. **Exh.P153** is a photograph of part of the Varda factory. It is just about possible to make out a small number of people in the foreground of this photograph, standing next to a car. VG042's evidence was that she was able to "recognise" those people.¹⁴⁸ The Appeals Chamber is invited to consider this photograph. It is respectfully submitted any recognition based upon this photograph is impossible.

[REDACTED]

[REDACTED]

[REDACTED]¹⁴⁹ It is

submitted that such a detailed observation from (even) 50 metres is impossible.

97. The above submissions are not weakened by VG042's evidence that a child on the balcony with her was able to recognise her father amongst the victims and screamed out. The Chamber failed to consider that the probability of accurate recognition increases with familiarity. For example, the child could well have recognised her father on the basis of distinctive clothes that he was wearing. The ability of a child to recognise its father did not establish that VG042 correctly identified Milan Lukic.

98. **Traumatic events.** In addition to the undoubted trauma of the events witnessed by VG042 during the Varda Factory Incident, the Chamber failed to consider the impact of events earlier that day. VG042's evidence was that earlier that morning her husband was taken away by a man she identified as Milan Lukic. She showed "*considerable confusion*" over timing and the sequence of events.¹⁵⁰ It may be she confused the person who took her husband away that morning with the person who she saw kill the victims of the Varda Factory Incident.

¹⁴⁸ T.2793.

¹⁴⁹ 1D68, d.3.

¹⁵⁰ TJ.para.242.

99. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

VG024

100. The Chamber also relied upon VG024's recollection of events.¹⁵²
101. **Recognition of Milan Lukic.** VG024's purported recognition of Milan Lukic was addressed above. A further example of lack of care applied to this evidence is the Chamber's finding that on the day of the Varda Factory Incident, VG024 heard Milan Lukic say to another employee of the Varda Factory who was also named Milan: "*I'm Milan as well*".¹⁵³ This was not VG024's evidence. VG024 testified that this occurred on 25 May 1992, not the day of the Varda Factory Incident.¹⁵⁴ Consequently, the Chamber failed to properly assess VG024's recognition of Milan Lukic on either 25 May 1992 or the day of the Varda Factory Incident.
102. **A fleeting glance.** VG024's testified that on the day of the Varda Factory Incident she was about to leave at around 11:45 when: "*as soon as I turned around, I realised that Milan Lukic was coming my way. As soon as I set eyes on him -- we passed each other. I passed him and I smiled.*"¹⁵⁵ Given that VG024 passed this man "*as soon*" as she set eye on him, VG024's opportunity to "*recognise*" the individual was necessarily limited. The Chamber failed to direct itself to or properly consider the opportunity that VG024 had to recognise Milan Lukic in light of this evidence.

¹⁵¹ 1D66.d.6.

¹⁵² TJ.para.303.

¹⁵³ TJ.para.263.

¹⁵⁴ T.3223.

¹⁵⁵ T.3225.

SUB-GROUND 2(D): THE CHAMBER ERRED IN FACT IN ITS ASSESSMENT OF THE IDENTIFICATION EVIDENCE

103. All of the prosecution’s witnesses testified to the presence of other individuals. While the Chamber did not accept VG017’s identification of Milan Lukic in light of “*significant inconsistencies*”, it is notable that VG017 testified to the presence of three men in uniform.¹⁵⁶ VG024’s evidence was that Milan Lukic came into the factory but one other person waited at the entrance.¹⁵⁷ Thereafter, even accepting VG024’s evidence as the Chamber did, she did not observe the incident without interruption and did not have an unobstructed view to the bank of the Drina river.¹⁵⁸ VG042’s evidence was that Milan Lukic arrived with the “*driver*” of the Passat, who she presumed to be Sredoje Lukic.¹⁵⁹
104. This evidence, especially given the difficulties over VG042’s purported recognition discussed above, provided no basis upon which a reasonable Chamber could conclude that Milan Lukic – as opposed to another individual - had been identified as the shooter. The Chamber completely failed to address this issue, except for “*recalling its finding that another man was with Milan Lukic when he arrived at the Varda factory*” but noting that “*there is no evidence that this man or any other armed persons were with Milan Lukic at the river and could have shot the men.*”¹⁶⁰
105. The Chamber failed to address a fundamental incompatibility in the evidence of VG042 and VG024. VG042’s evidence was that earlier on the day of the Varda Factory Incident, she witnessed Milan Lukic take her husband and two other individuals away from the Varda factory.¹⁶¹ However, according to VG024’s evidence, she was present in the Varda factory throughout the morning. Her failure to mention such an occurrence is striking and was not addressed by the Chamber.

¹⁵⁶ TJ.para.234.

¹⁵⁷ TJ.para.234.

¹⁵⁸ TJ.para.304.

¹⁵⁹ TJ.para.234.

¹⁶⁰ TJ.para.325.

¹⁶¹ T.2787-2788.

106. Moreover, the evidence of VG042 and VG024 differed as to the location of the red Passat. Witness VG024 placed the Passat at the water's edge.¹⁶² Witness VG042 placed the Passat at the guard's house, noticeably closer to her house.¹⁶³ The Chamber failed to consider the difference in these accounts. Crucially, if VG024's evidence was accepted and credible, it made VG042's "*recognition*" of Milan Lukic even less likely.

SUB-GROUND 2(E):THE CHAMBER ERRED IN LAW BY REVERSING THE BURDEN OF PROOF ON ALIBI

107. See discussion under Sub-Ground 1(G) combined with 2(F) below.

SUB-GROUND 2(F): THE CHAMBER ERRED IN FACT WHEN HOLDING THAT MILAN LUKIC'S ALIBI WAS NOT REASONABLY POSSIBLY TRUE

108. Milan Lukic presented the same alibi applicable to both incidents Varda and Drina. Witnesses VG131, VG141 and VG133 testified as alibi rebuttal witnesses for the Varda factory incident.¹⁶⁴

109. The Chamber failed to apply due care to the identification evidence of VG131. Before encountering Milan Lukic on 9 June 1992, the witness had never seen, heard of or met Milan Lukic.

[REDACTED]

[REDACTED] ¹⁶⁵ [REDACTED]

[REDACTED] ¹⁶⁶ [REDACTED]

111. [REDACTED]

[REDACTED] ¹⁶⁷ [REDACTED]

[REDACTED] ¹⁶⁸ [REDACTED]

¹⁶² Exhibit P192.

¹⁶³ Exhibit P157.

¹⁶⁴ TJ.paras.278-280.281-297.328

¹⁶⁵ 1D89.para.11

¹⁶⁶ 1D89.para.23

¹⁶⁷ 1D88

¹⁶⁸ 1D89.para.10

[REDACTED]
[REDACTED]¹⁶⁹

112. The Chamber erred in ignoring the following problems VG131's evidence: identification occurred in the dark and as a result of a traumatic event experienced directly by the witness.

113. The Chamber failed also to apply due care to the identification evidence of witness VG141.

114. [REDACTED]
[REDACTED]
[REDACTED]¹⁷⁰ [REDACTED]
[REDACTED]
[REDACTED]¹⁷¹

115. The witness testified that she was extremely scared and shocked throughout the relevant period of time.¹⁷²

116. [REDACTED]¹⁷³ [REDACTED]
[REDACTED]

117. [REDACTED]
[REDACTED]¹⁷⁴ [REDACTED]¹⁷⁵ This contradicts her testimony before the Tribunal, where she stated that she saw her father-in-law, mother-in-law and VG133 on the same date, and it was then that all three confirmed that

¹⁶⁹ 1D89.para.17

¹⁷⁰ 1D224.4 at:T6745

¹⁷¹ 1D224.4 at p.3 para.6

¹⁷² T6768

¹⁷³ T6745:1D224.4 at p.2.para.4.p.3para.6

¹⁷⁴ 1D224.4 at para.7

¹⁷⁵ 1D224.4 et para.8

it was Milan Lukic.¹⁷⁶ She testified that she did not know how her father-in-law knew that it was Milan Lukic.¹⁷⁷

118. During her cross-examination, the witness changed her story again and said that she “*recognized him by the red Passat car*”.¹⁷⁸ The red Passat is not mentioned in her statement. During cross-examination, the witness could not explain why she omitted this information, other than saying that “*she did not know whether it was important*”.¹⁷⁹

119. Furthermore, she stated that she filed a police report when she got to Visoko, where she identified Milan Lukic on a photo spread.¹⁸⁰ This crucial information was missing from the statement. During cross-examination, the witness could not explain why she omitted this information, other than saying that she “*didn’t think there was any need to, to talk about a picture*”.¹⁸¹ although later in her testimony she stated that she believed that “*it was sufficient for [her] that her neighbours had confirmed that it was Mr. Milan Lukic.*”¹⁸²

120. The Chamber erred in relying on the identification of the witness who had no prior knowledge of the Accused, and whose rationale for identification of the accused varied throughout the trial.

121. Concerning VG133, she was found to be a reliable alibi rebuttal witness¹⁸³ although her evidence was completely inconsistent regarding the date of the events she testified about. She testified that the events she described had occurred on the 10 of June¹⁸⁴ but during cross examination she first reaffirmed that date and later on said that she could not remember the date of the incident.¹⁸⁵ It was her husband and mother-in-law

¹⁷⁶ T.6750

¹⁷⁷ T.6777

¹⁷⁸ T.6771

¹⁷⁹ T.6771

¹⁸⁰ T.6778

¹⁸¹ T.6778

¹⁸² T.6779

¹⁸³ TJ.para.328

¹⁸⁴ T.2972-2973

¹⁸⁵ T.3024-3026

who had reminded her that Milan Lukic had arrived on the same day she went looking for her mother.¹⁸⁶

122. [REDACTED] ¹⁸⁷ [REDACTED]
 [REDACTED]
 [REDACTED] ¹⁸⁸ [REDACTED] ¹⁸⁹ [REDACTED] ¹⁹⁰

123. Notwithstanding these inconsistencies, VG133 was considered a reliable witness because his evidence is corroborated by VG141's evidence who testified that the same events happened on the 10 of June.¹⁹¹ A key question is why the Chamber instead of using the VG133's evidence to discredit VG141's evidence it approached the issue the other way round. And if this is the method used by the Chamber, why it only applied it to the Prosecution's evidence and not to the defence's as well?

124. In any case, the incredible evidence produced by the Prosecution did not establish that Milan Lukic's alibi was not reasonably possibly true.

SUB-GROUND 2(G): THE CHAMBER ERRED IN FACT WHEN ASSESSING THE CREDIBILITY OF PROSECUTION WITNESSES

VG042 and her account of day of the Varda Factory Incident

125. VG042's evidence was that the day before the Varda Factory Incident, Ms. Zukic was killed. During the evening she received threatening phonecalls at home prompting her family to spend the night in the woods.¹⁹² The next morning, her husband went to work at 7.00am meanwhile she went to the Zukic house to help place her body in a car.¹⁹³ She then returned to her home. At half past ten, when the factory workers got a break for breakfast, Milan Lukic came in a red Passat and took her husband and two other men

¹⁸⁶ T.3022-3023.3025

¹⁸⁷ T.3022

¹⁸⁸ T.2972-2973

¹⁸⁹ T.2973.3014-3015, 3017-3018

¹⁹⁰ T.3019.T3014

¹⁹¹ T.6787

¹⁹² T.2802.

¹⁹³ T.2801.

away. Milan Lukic subsequently returned, perhaps half an hour later, to commit the killings for which he was convicted.¹⁹⁴

126. VG042's evidence lacked credibility in important respects. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]¹⁹⁵ [REDACTED]
 [REDACTED]
 [REDACTED]¹⁹⁶ [REDACTED]
 [REDACTED]¹⁹⁷ The Chamber noted that when asked about the discrepancies between her original statements and her oral evidence, VG-042 "*demonstrated confusion*".¹⁹⁸

127. The Chamber decided that it would not attach any probative value to VG042's 1993 or 1994 statements.¹⁹⁹ This was an unreasonable conclusion which deprived Milan Lukic of important evidence undermining the credibility of VG042's account, especially her complete failure to mention Milan Lukic's involvement in her first statement. No reasonable Chamber would have adopted such an approach.

VG024

128. The Chamber overlooked material inconsistencies which go to the credibility of VG-024's account. VG024 testified that after "*recognising*" Milan Lukic inside the factory, she left and saw Milan Lukic take the victims towards the sawmill where they were made to remove items of clothing before being taken down to the Drina river and shot.²⁰⁰ **Exh.P190** is witness VG024's depiction of the route she took. Written on **Exh.P190** in red is: (1) where she worked inside the factory; (2) where she said she saw Milan Lukic enter the factory; (3) the sawmill; and (4) where she said she saw the red

¹⁹⁴ T.2788-2790.

¹⁹⁵ 1D66

¹⁹⁶ 1D67

¹⁹⁷ 1D67.d.3.

¹⁹⁸ TJpara.242.

¹⁹⁹ TJpara.242

²⁰⁰ T.3226-3229.

Passat vehicle parked.²⁰¹ On **Exh.P191**, VG024 indicated (2) where she said she stopped outside the factory and observed events; and (3) where she said she saw Milan Lukic and the imminent victims.²⁰²

129. Witness VG024 gave prior statements describing what she observed on the day of the Varda Factory Incident. **Exh.1D178** is a statement she gave in 1994. This contains no mention that she observed events outside the factory. Rather, she said that people were taken outside and “*after a few minutes... my colleagues and I heard volleys of automatic fire*”.²⁰³ **Exh.1D179** is a statement she gave in 1998. On this occasion, her account was that she had heard from another individual that Milan Lukic had shot the seven men in front of the sawmill on the bank of the Drina river.²⁰⁴

130. The Chamber placed no weight on the fact that VG024’s prior statements did not mention her seeing Milan Lukic taking the men to the Drina river and lining them up “*in light of her confirmation while testifying that she had seen this taking place*.”²⁰⁵ No reasonable Chamber could dismiss these inconsistencies. The clear risk existed that in oral testimony VG024 had either deliberately or unconsciously extended her account of what she saw.

131. There is further evidence to support this conclusion. During oral testimony, 16 years after the event in question, VG024 asserted for the first time that she saw people on the balcony of a house. **Exh.P192** is VG024’s depiction in red of (1)where she said she saw people on a balcony; and (3)where she said she saw the red Passat vehicle.²⁰⁶ It is notable that the location she identified of the red Passat differed from the location indicated in **Exh.P179**. [REDACTED]

²⁰⁷ No reasonable Chamber could

²⁰¹ T.3230-31.

²⁰² T.3253.

²⁰³ Exh.1D78.p.3.

²⁰⁴ Exh.1D79.p.5.

²⁰⁵ TJ.para.304.

²⁰⁶ T.3233.

²⁰⁷ T.3266

fail to consider the reason for this delayed assertion, particularly in light of the evidence given to remarkably similar effect by Witness VG042.

SUB-GROUND 2(H): THE CHAMBER REACHED IRRATIONAL CONCLUSIONS WHEN CONVICTING MILAN LUKIC OF PERSECUTIONS IN RELATION TO THE VARDA FACTOR INCIDENT

132. The Chamber adopted an irrational approach to Count 1 (persecutions) and Counts 6 and 7 (murders).

133. At **para.1005** of the Trial Judgment, the Chamber held that it would not hold Milan Lukic responsible for separate persecutory acts in relation to the Varda Factory Incident, but rather consider them in sentencing. The rationale for the Chamber's approach was that the persecutory were "*so closely intertwined with the act of murder that they cannot be distinguished from that act*".

134. However, at **para.1026** the Chamber ignored its earlier determination and proceeded to convict Milan Lukic of persecution for the Varda Factory Incident.

135. The results of the Chamber's erroneous approach are that (1) Milan Lukic was convicted of crimes which, on the facts, the Chamber had found to be cumulative of each other; and (2) Milan Lukic was sentenced twice for the persecutory nature of the killings during the Varda Factory Incident.

136. The Appeals Chamber is invited to correct the Chamber's error and (1) overturn Milan Lukic's conviction for persecution under Count 1 of the Indictment, so far as that relations to the Varda Factory Incident; and/or (2) recognise the Chamber's error by reducing Milan Lukic's sentence.

THIRD GROUND: THE PIONIRSKA STREET INCIDENT

SUB-GROUND 3(A): THE CHAMBER ERRED IN LAW BY APPLYING THE WRONG LEGAL AND EVIDENTIARY STANDARD TO THE CRIMES OF MURDER AND EXTERMINATION

A. Insufficient proof that all of the alleged victims died as alleged

137. Insufficient proof of death was presented for the Pionirska counts. Bodies were never found or exhumed for **any** of the alleged victims and no death certificates were presented. Other than alleged eyewitnesses, the **only** evidence given was Ewa Tabeau's report.²⁰⁸ The Chamber found that 59 (of 70 charged) were killed by Milan Lukic.²⁰⁹ The Chamber failed to establish with sufficient certainty that all of these individuals were victims of the Pionirska Street Incident.

138. The Chamber failed to properly consider evidence demonstrating that some victims were alive, had never existed, or that the date on which they died was inconsistent with the Pionirska allegations. The Chamber failed to consider:

- a. Responses from Requests for Assistance from Bosnian Authorities indicating that the majority of victims did not exist and do not have a JMBG.²¹⁰ These responses also demonstrate alleged victims registering their current address or filing requests for abandoned property²¹¹ **after** the Pionirska Street Incident;
- b. Medical documents demonstrating that an alleged victim received medical treatment on a date **after** the Pionirska Street Incident;²¹²
- c. Testimony of CW1, a person listed as a scheduled murder victim, who denied that they nor several family members were even in Visegrad at the time, casting doubt on other named victims having existed.
- d. Testimony of Huso Kurspahic demonstrating the inaccuracy of Schedule A of the Indictment listing the alleged victims.

²⁰⁸ TJ.para.389

²⁰⁹ TJ.para.567

²¹⁰ 1D233.1D221

²¹¹ 1D226

²¹² 1D225

- e. Expert forensic evidence that the house at Pionirska could not have had a fully evolved fire involving the stated number of victims.
- f. Testimony of Amor Masovic that no human remains were located at Pionirska nor bodies exhumed.
- g. Ewa Tabeau's P119 confirms a lack of any independent evidence as to the existence of certain alleged victims.

139. The proof of the death of each of the victims was not been established for the following reasons:

Alleged victim(s)	Insufficient evidence of proof of death
All 59 individuals identified by the Chamber in para.567 of the judgment	<ul style="list-style-type: none"> • No Body • No Death Certificate
Hasena LNU Tima Jasarević/Velić. Haira Jasarević/Halilović. Muio Jasarević/Halilović. Aliia Kurspahić Dzheva Kurspahić. FNU Kurspahić. Hasa Kurspahić. Hana/Hasiba Kurspahić. Hata Kurspahić. Ifeta Kurspahić. Ismet Kurspahić. Izeta Kurspahić. Maida Kurspahić. Meira Kurspahić. Mina Kurspahić. Munevera Kurspahić. Pasija Kurspahić. Ramiza Kurspahić. Sadeta Kurspahić. Saima Kurspahić. Seila Kurspahić. Vahid Kurspahić. Fazila Memisević.	<ul style="list-style-type: none"> • No Body • No Death Certificate Presented • RFA Response shows no JMBG (ID number) or other registration person's existence.²¹³ Confirmed by Ewa Tabeau's chart²¹⁴ which lacks JMBG proof of existence. The importance of the JMBG and the storage of records was explained by witnesses from the Visegrad Police.²¹⁵

²¹³ 1D233.1D221

²¹⁴ P119

²¹⁵ Zoran Uscumlic.Stoia Vuicic

Haraga Sehić.	
Hasena LNU ²¹⁶ Hairia Kurspahić ²¹⁷ Hana/Hasiba Kurspahić. ²¹⁸ Hasan Kurspahić. ²¹⁹ Izeta Kurspahić. ²²⁰ Maida Kurspahić. ²²¹ Mina Kurspahić. ²²² Seila Kurspahić ²²³	<ul style="list-style-type: none"> • No Body • No Death Certificate • CW1 testimony creates reasonable doubt the individual perished in any fire at Pionirska
Redzo Memisević Ismet Kurspahić Medo Kurspahić Hasan Kurspahić Meho Jasarević/Halilović	<ul style="list-style-type: none"> • No Body • No Death Certificate • RFA Response shows individuals are alive and sought return of property <u>after</u> Pionirska Street Incident²²⁴
Ismeta Kurspahic	<ul style="list-style-type: none"> • No Body • No Death Certificate • Visegrad Health Center Logs demonstrate individual alive²²⁵
Muio Jasarević/Halilović	<ul style="list-style-type: none"> • No Body • No Death Certificate • [REDACTED]

B. Grossly inadequate forensic evidence

140. Amor Masović, a prosecution witness, testified 311 bodies were exhumed from 67 locations in Višegrad Municipality.²²⁶ Of that forensic evidence, 0% (0 out of 311) was linked to the Pionirska Street Incident.²²⁷ No forensic evidence was obtained by the

²¹⁶ T.5561

²¹⁷ T.5565-5566

²¹⁸ T.5568-5569

²¹⁹ T.5566-5567

²²⁰ T.5569-5570

²²¹ T.5570-5571

²²² T.5572

²²³ T.5574

²²⁴ 1D226

²²⁵ 1D225

²²⁶ T.3182-3183.P183.P174

²²⁷ T.3185-3186

prosecution. Masovic conceded that the reasonable conclusion exists that the events did not occur and that witnesses were being untruthful.²²⁸

C. Insufficient proof that the fire occurred as alleged

141. The Chamber failed to appreciate the significance of three defence experts that the fire could not have occurred as alleged.²²⁹ The Chamber approached defence expert evidence as being qualified and uncertain. In fact it was categorical.

142. The evidence of Benjamin Dimas, an arson expert, was that:

- a. There was no evidence indicating the results of an air-fuel explosion of the nature postulated by the Prosecution;²³⁰
- b. Dark areas around the doorway were tested with a scratch test and determined to be moisture and mould, not ash or soot resulting from a fire;²³¹
- c. Discoloured wooden door shims were caused by mould rather than a fire;²³²
- d. The exterior of the structure and openings did not show **any** signs consistent with a fully enveloped fire having been inside the subject room;²³³
- e. It would have been **impossible** to remove all evidence of fire, and searches of the wood and dirt floor revealed no evidence of a fire of the type alleged;²³⁴
- f. There was evidence of a small fire, faeces, and chicken bones indicating someone living in the room and making a small cooking fire, but not rising to the intensity necessary to consume a whole room full of bodies;²³⁵
- g. The water seepage and moisture present in the room would act to preserve rather than wash away evidence of fire damage, which could not have been covered up by mould growth.²³⁶

²²⁸ *Id.*

²²⁹ *See* TJ, para.553

²³⁰ T.5954-5955

²³¹ T.5955-5957, 1D165, 1D187

²³² P280, 1D188, T.5958-5959

²³³ T.5960

²³⁴ T.5964-5966

²³⁵ T.5969-5972, 5975

- h. If 60+ persons been in the room during a fire, their body mass would have fueled the fire even more, leading to the deposit of forensic evidence that was not present at all.²³⁷
143. The evidence of Martin McCov, another arson expert, was that:
- a. The forensic evidence disproved the possibility of a fire having enveloped the room;²³⁸
 - b. Based upon data on-scene throughout the room and from all surfaces there was no fire of great intensity that fully enveloped the room; there were remnants of a small debris fire in one small part of the room, but also many surfaces untouched by fire, including wood that was pristine.²³⁹
 - c. The darkened appearance of the wood flooring in the room was caused by moisture and possible rotting rather than charring.²⁴⁰
 - d. The darkened wood at the door frame and the darkened plaster around the door area were the result of mould, and did not show evidence of any exposure to heat, fire, discoloration or charring. Had a fire taken place, such effects are irreversible.²⁴¹
 - e. The Pipe Chase or chimney in the room lacked any evidence of a fire or soot thus excluding the possibility that there had been a fully enveloped fire in the room.²⁴²
144. The evidence of Stephen O'Donnell, an explosive expert, was that:
- a. The darkened wood flooring was not carbonized or subjected to fire.²⁴³
 - b. None of the wood in/around the door showed evidence of fire damage.²⁴⁴

²³⁶ T.5972-5974

²³⁷ T.6098.6099

²³⁸ T.5665.1D22

²³⁹ T.5688.5689

²⁴⁰ T.5695.5697

²⁴¹ T.5698-5699

²⁴² T.5707-5709

²⁴³ T.5440.1D145

²⁴⁴ T.5484

- c. Blackened appearance of concrete was due to mould, not fire.²⁴⁵
 - d. In response to the prosecution's assertion that a fuel-air-explosion occurred, nobody could possibly have survived such an event and there would certainly have been no screams for half an hour as alleged.²⁴⁶
145. No reasonable Chamber could fail to appreciate the significance of the above evidence. Reasonable doubt remained as to whether the fire occurred as alleged in the Indictment.

SUB-GROUND 3(B): THE CHAMBER ERRED IN LAW BY PERMITTING IN-COURT IDENTIFICATIONS

146. Eight prosecution witnesses testified to the Pionirska Street Incident: VG013, VG018, VG038, VG078, VG084, VG101, VG115 and Huso Kurspahic (hearsay via his son). The Chamber permitted four of the witnesses to identify Milan Lukic in court as a perpetrator involved in the Pionirska Street Incident: VG013²⁴⁷, VG078²⁴⁸, VG101²⁴⁹ and VG115²⁵⁰. The evidence of VG078, VG101 and VG013 was vital to the Chamber's finding that Milan Lukic had been correctly identified as responsible for the Pionirska Street Incident.
147. The Chamber should not have allowed any of these witnesses to identify Milan Lukic in court. Counsel for Milan Lukic objected to in-court identification in relation to the Pionirska Street Incident.²⁵¹ The identification of Milan Lukic as a participant in the Pionirska Street Incident was disputed. By allowing these witnesses to identify Milan Lukic in court, serious prejudice resulted.

VG013

²⁴⁵ T.5508

²⁴⁶ T.5506

²⁴⁷ TJ.para.415

²⁴⁸ TJ.para.424

²⁴⁹ TJ.para.428

²⁵⁰ TJ.para.433

²⁵¹ VG013:T.1010-1011;VG101:T.1453;VG115:T.794

148. VG013's evidence was initially that the first time she saw Milan Lukic was on 14 June 1992, the day of the Pionirska Street Incident.²⁵² An in-court identification should never be permitted in such circumstances. If the prosecution wished to bolster this witness' identification evidence done so by an appropriate out-of-court procedure.

149. The prosecution asked VG013 witness if she could recognise Sredoie Lukic in the court room. In answering, VG013 identified Milan Lukic as well.²⁵³

150. It is no answer to say that her identification of Milan Lukic in court was not prompted by the prosecution. The prosecution asked her to identify Sredoie Lukic, who was sitting next to Milan Lukic in the dock. The clear risk existed that she would identify both accused when asked to identify one. No in-court identification should be performed in these circumstances.

151. After VG013 had identified Milan Lukic in court, her evidence changed significantly. In cross-examination she asserted, for the first time, that she had seen Milan Lukic prior to the incident in the area in which she lived.²⁵⁴ She said that she saw Milan Lukic twice a year when she went to the *Panos* hotel and said that he was a neighbour in her community.²⁵⁵ This witness gave four previous statements: **Exhibit 1D26** is her statement of 11 August 1995; **Exhibit 1D29** is from 14 August 1995; **Exhibit P60** is from 12 to 13 February 1998; and **Exhibit P62** is from a 5 May 2008. Not once did this witness mention such prior knowledge of Milan Lukic.

152. Having identified Milan Lukic in court, VG013's evidence of her prior knowledge of Milan Lukic mushroomed. The Chamber inexplicably ignored VG013's categorical evidence that had not known Milan Lukic; rather the Chamber found that VG013 had "*solid prior knowledge*" of Milan Lukic and accepted her identification of him as the perpetrator of key aspects of the Pionirska Street Incident.²⁵⁶ The real risk exists that

²⁵² T.1055

²⁵³ T.1010

²⁵⁴ T.1104

²⁵⁵ T.1105

²⁵⁶ TJ.para.612

VG013's evidence that she "*recognised*" Milan Lukic during the Pionirska Street Incident was polluted by her identification of him in court. This practice should have been prevented. The Appeals Chamber should consider the prosecution's evidence identifying Milan Lukic as a perpetrator of the Pionirska Street Incident in the absence of the evidence of VG013.

VG078 and VG101

153. These witnesses are sisters.²⁵⁷ VG101's evidence was that she went to primary school and secondary school with Milan Lukic during which time she saw him daily. After finishing school, she said that she would see Milan Lukic at dances and parties.²⁵⁸

154. VG078's evidence was that Milan Lukic was one year older than her and that she also went to school with him. She said that she attended school with him for seven years and would see him there.²⁵⁹ Her evidence was that initially she did not recognise Milan Lukic, but was "*reminded*" by VG101 as to his identity.²⁶⁰

155. Even accepting the evidence of VG078's and VG101's prior knowledge as true does not remove the real risk of mistaken recognition, especially as VG078's "*recognition*" depended on the VG101's "*recognition*". In any event, if the evidence of these witnesses was to be accepted, there is little added by in-court identification except prejudice to the accused. They simply identified the person they went to school with, but the indelible image left in the mind of the Chamber is that they identified a person involved in the Pionirska Street Incident.

156. In the circumstances of this case, neither VG078 nor VG101 should have been permitted to identify Milan Lukic in court. The extent of these witnesses' prior knowledge of Milan Lukic was contested.

²⁵⁷ TJ.para.331

²⁵⁸ TJ.para.425

²⁵⁹ TJ.para.421

²⁶⁰ TJ.para.422

157. The Chamber concluded that VG101 and Milan Lukic went to primary and secondary school together for 11 years.²⁶¹ The Chamber seriously erred in this conclusion. VG101's evidence was that she finished school at the age of 18, therefore in 1987.²⁶² She said that Milan Lukic was a year old than her and that they went to elementary school together in Prelovo and secondary school in Visegrad.²⁶³
158. The Chamber ignored defence evidence that Milan Lukic left school in 1985. **Exh.1D105** is the record of his attendance at high school in Visegrad. Further, the Chamber ignored evidence that Milan Lukic did not attend the same primary school as VG101. **Exh.1D106** is the record demonstrating that his first school was in Klasnik. The evidence before the Chamber was that he attended that school for four years, only thereafter attending primary school in Prelovo.²⁶⁴ Further, in relation to the Drina River Incident, prosecution witness VG014 testified that he attended secondary school with Milan Lukic and that he had left school after the second year.²⁶⁵ This evidence demonstrates that VG101 overstated her prior knowledge and therefore Milan Lukic. The evidence of VG101's prior knowledge of Milan Lukic did not remove the risk of mistaken recognition. Therefore, she should not have been permitted to identify Milan Lukic in court.
159. VG078's prior knowledge of Milan Lukic was similarly limited. Indeed her evidence was that she was never in the same class as Milan Lukic and that she went to school in Sarajevo at times.²⁶⁶ She gave no evidence of having seen Milan Lukic after school. The risk of this witness mistakenly "*recognising*" Milan Lukic was significant. Therefore, she should not have been permitted to identify him in court.
160. The Appeals Chamber should consider the prosecution's evidence identifying Milan Lukic as a perpetrator of the Pionirska Street Incident in the absence of the evidence VG078 and VG101.

²⁶¹ TJ.para.425

²⁶² T.1433

²⁶³ T.1433

²⁶⁴ T.4490

²⁶⁵ TJ.para.129

²⁶⁶ T.1392

VG115

161. VG115 “*occasionally*” saw Milan Lukic when she would visit her cousin at the company where VG115 worked and would “*regularly*” encounter him on Pionirska Street.²⁶⁷ If this evidence was accepted, a positive in-court identification was inevitable. Again, however, the practice was improper. The Chamber found that VG115 was a witness prone to exaggeration²⁶⁸ and discounted significant parts of her testimony as lacking credibility.²⁶⁹ It cannot be proper that such a witness is permitted to identify an accused in court thus directly implicating him in events she was found not to have seen.

SUB-GROUND 3(C): THE CHAMBER ERRED IN LAW BY FAILING TO APPLY DUE CARE TO IDENTIFICATION EVIDENCE

162. The Chamber failed to direct itself to the appropriate standards when assessing identification evidence in relation to the Pionirska Street Incident. Of particular relevance to this identification evidence were issues of: purported recognition in traumatic circumstances, lighting, inconsistent accounts, delayed assertions that Milan Lukic performed key acts fundamental to his conviction, and the appropriate weight to be given to inconsistent hearsay evidence.

VG013

163. The evidence of VG013 was fundamental to Milan Lukic’s conviction. VG013’s purported recognition of Milan Lukic is addressed above. The Chamber failed to give any consideration to the possibility that VG013 had mistakenly “*recognised*” Milan Lukic. In addition, VG013 was the only witness who claimed to have seen Milan Lukic open the door to the house and place a “*device*” with a lighted fuse, which started the fire.²⁷⁰ The Chamber considered VG013 to be reliable in this respect.²⁷¹ This is a bare statement. The Chamber failed to test this vital evidence against the proper standards. No reasonable

²⁶⁷ TJ.para.429

²⁶⁸ TJ.para.565

²⁶⁹ TJ.para.576

²⁷⁰ TJ.para.47

²⁷¹ TJ.para.608

VG078 and VG101

168. The Chamber's failure to properly consider the risk of mistaken "*recognition*" by these witnesses is addressed above.

Hasib Kurspahic

169. Hasib Kurspahic was a hearsay witness, whose evidence identifying Milan Lukic was admitted through his son, Huso Kurspahic. The Chamber found his identification evidence to be reliable despite its hearsay character.²⁷⁹

170. Hasib Kurspahic had no prior knowledge of Milan Lukic. Rather, the evidence was that he was able to identify him because Mitar Vasilievic addressed him as "*Milan*" and a woman said she had gone to school with Milan Lukic.²⁸⁰ However, the Chamber held that there was at least one other "*Milan*" present during the Pionirska Incident.²⁸¹ Further, identification via the further hearsay evidence of a former schoolmate – most likely VG101 – is unreliable. Such a chain of hearsay is an insufficient basis upon which to place weight on Hasib Kurspahic's "*recognition*".

SUB-GROUND 3(D): THE CHAMBER ERRED IN FACT IN ITS ASSESSMENT OF THE IDENTIFICATION EVIDENCE

171. For the reasons given above, no reasonable Chamber could conclude that Milan Lukic had been correctly identified. In particular, no reasonable Chamber having considered errors in the witnesses' identification of Mitar Vasilievic, could conclude that Milan Lukic had been correctly identified.

²⁷⁹ TJ.para.605

²⁸⁰ TJ.para.435

²⁸¹ TJ.para.343

SUB-GROUND 3(E): THE CHAMBER ERRED IN LAW OR ALTERNATIVELY IN FACT IN ITS TREATMENT OF EVIDENCE AS TO THE PRESENCE OF MITAR VASILJEVIC

172. Milan Lukic was initially indicted together with Mitar Vasiljevic for the Pionirska Street Incident.²⁸² This Tribunal held, in an earlier trial, that Mitar Vasiljevic did not participate in the Pionirska Street Incident in any way.²⁸³ The *Vasiljevic* Chamber found that Mitar Vasiljevic broke his leg on the afternoon of 14 June 1992 and was admitted to Uzice Hospital, one hour's drive from Visegrad.²⁸⁴ Notably, the Office of the Prosecutor did not appeal.

173. In the instant case, the Chamber reached the opposite conclusion. The Chamber held by majority, Judge Robinson dissenting, that Mitar Vasiljevic was in fact present on Pionirska Street at all relevant times.²⁸⁵ The Chamber's finding has undermines public confidence in the judgments of this Tribunal. The Trial Judgment in this case is a collateral attack on the findings of the Trial Judgment in *Vasiljevic*. Further, the alleged presence of Mitar Vasiljevic was crucial to the Chamber's conviction of Milan Lukic. All of the key prosecution witnesses claimed that they saw Mitar Vasiljevic and Milan Lukic together during the Pionirska Street Incident.

A. Error in law in relation to Exhibit 1D39

174. At trial, the defence for Milan Lukic presented documentary evidence, consisting of various records from the Visegrad Health Centre and a case history from the Uzice Hospital. This evidence demonstrated that Mitar Vasiljevic broke his leg during the afternoon of 14 June 1992 such that he could not have participated in the Pionirska Street Incident.

175. **Exhibit 1D38** contains various parts of the Uzice Hospital records demonstrating Vasiljevic's arrival there from Visegrad Health Centre and subsequent surgery. In

²⁸² Initial Indictment, 25.1.2000

²⁸³ *Vasiljevic* TJ, paras. 129-146

²⁸⁴ *Vasiljevic* TJ, para. 55

²⁸⁵ TJ, para. 577

addition, the Chamber took Judicial Notice of Adjudicated Facts as to the veracity and accuracy of these records.²⁸⁶

176. **Exhibit 1D39** is the logbook entry for Visegrad health centre, clearly marked 14 June 1992, thus corroborating **Exhibit 1D38**.
177. **Exhibit 1D39** was admitted into evidence without translation. The Chamber held that this was done “*inadvertently*” and that the lack of translation meant that it would not attach any weight to this document.²⁸⁷
178. Milan Lukic challenges the Chamber’s approach. Inadvertence on the part of the Chamber should not have prejudiced Milan Lukic. So far as Counsel on appeal have been able to determine, the Milan Lukic defence team were not notified of any difficulty with **Exhibit 1D39**. Moreover, the Presiding Judge was well-aware of the contents and significance of **Exhibit 1D39**: “*I take this opportunity to clarify that Exhibit 1D39 only comprises pages of the logbook which contain entries of 14th June 1992.*”²⁸⁸ The name “*Mitar Vasilievic*” can plainly be seen on the face of **Exhibit 1D39**.
179. Further, the Chamber’s approach was inconsistent. **Exhibits P68, P165 and P166** were other extracts from the Visegrad health centre logbook, admitted as prosecution evidence and relied upon by the Trial Judgment as prejudicial to Milan Lukic.²⁸⁹ These portions were not translated either.
180. **Exhibit 1D39** is significant. Counsel for Milan Lukic intends to separately file a translation of this exhibit for Chamber’s consideration. The interests of justice are served by such consideration, given that the Chamber’s inadvertence played some role in its findings.

²⁸⁶ Adjudicated Facts Decision, 22 August 2008, fact numbers 1-3

²⁸⁷ TJ, para. 570

²⁸⁸ T, 2766

²⁸⁹ TJ, fn. 327. See also Exh. P162, admitted without translation but not relied upon

181. The significance of **Exhibit 1D39** is its corroboration of **Exhibit 1D38**. Had the majority considered **Exhibit 1D39**, any doubts as to the weight to be attached to **Exhibit 1D38** would have been dispelled.²⁹⁰

B. Error in fact as to the presence of Mitar Vasilievic

182. No reasonable Chamber could have found that the presence of Mitar Vasilievic was established. The Chamber erred by relying upon a “*reasonable inference*” that **Exhibit 1D38** was false. This was not the only reasonable inference available, as noted by Judge Robinson in his dissent:

*“no conclusive evidence has been presented to contradict the authenticity of the Uzice hospital logbook entry and the Uzice hospital case history. While the evidence of Dr. Raby may cast some doubt on their credibility, I do not regard that as a sufficient basis to reject them as false. Innocuous factors, including clerical error in accurately identifying Mitar Vasilievic’s 1992 xray, may provide an explanation for the findings of Dr. Raby.”*²⁹¹

183. Therefore, Milan Lukic should have been given the benefit of other reasonable inferences consistent with innocence. No reasonable majority could have excluded the reasonable possibility noted by Judge Robinson.

SUB-GROUND 3(F) THE CHAMBER ERRED IN FACT WHEN ASSESSING THE CREDIBILITY OF PROSECUTION WITNESSES

184. It is useful to note that the Chamber in the *Vasilievic* case held that key prosecution witnesses who testified in this case were not reliable.²⁹²

*“The Chamber in any event has serious doubts as to the reliability of the evidence of the witnesses who claimed to have seen or identified [Mitar Vasilievic]... In expressing these doubts, the Chamber has assessed the identification evidence of these witnesses in accordance with the principles set out earlier. **This finding is largely independent of the alibi evidence, but it is very substantially reinforced by that alibi evidence.**”*²⁹³

²⁹⁰ TJ.para.572

²⁹¹ TJ.para.1109

²⁹² *Vasilievic*.TJ.para.148 for VG013.VG038.VG078.VG101; para.153 for VG018.VG084; paras.159-160 for VG115

²⁹³ *Vasilievic*.TJ.para.146

185. The same prosecution witnesses testified in this case and gave evidence that they saw Mitar Vasilievic together with Milan Lukic.

186. VG013 gave evidence that he knew Mitar Vasilievic.²⁹⁴ The Chamber accepted that he “*recognised*” Mitar Vasilievic.²⁹⁵

187. VG101’s evidence was that she knew Mitar Vasilievic and that she recognised him “*immediately*”.²⁹⁶ The Chamber accepted that she “*recognised*” Mitar Vasilievic.²⁹⁷

188. [REDACTED]
[REDACTED]²⁹⁸ The Chamber accepted that she “*recognised*” Mitar Vasilievic.²⁹⁹

189. Huso Kurspahic’s evidence suggested that his father knew Mitar Vasilievic personally for around 20 years.³⁰⁰ The Chamber apparently accepted that this hearsay witness “*recognised*” Mitar Vasilievic during the Pionirska Street Incident.³⁰¹

190. As held by the Chamber in *Vasilievic*, the evidence of key prosecution witnesses that they “*recognised*” Mitar Vasilievic could not possibly be true. If these witnesses were mistaken in their apparently compelling “*recognition*” of Mitar Vasilievic, it follows that their “*recognition*” of Milan Lukic is undermined.

SUB-GROUND 3(G): THE CHAMBER ERRED IN LAW BY REVERSING THE BURDEN OF PROOF ON ALIBI

191. The jurisprudence of the two *ad hoc* tribunals on alibi is well established and could be summarized in that the accused has no obligation to prove his proffered alibi beyond reasonable doubt.

²⁹⁴ T.1029.2D8.T.1432-1433

²⁹⁵ TJ.para.360.368.441-442

²⁹⁶ T.1431

²⁹⁷ TJ.para.360.445

²⁹⁸ P88.p.5

²⁹⁹ TJ.para.360.444

³⁰⁰ P37.T.791-792

³⁰¹ TJ.para.360.446

192. Milan Lukic's alibi was that along with other members from the reserve police he was deployed to Kopito between 13-15 June 1992. Rather than consider whether Milan Lukic's alibi was reasonably possibly true, the Chamber considered whether the alibi had been proved beyond reasonable doubt. The following wording demonstrates the Chamber's erroneous approach.

- a. While assessing Goran Deric's evidence the Chamber found that "*it appears odd, to say the least, that the Rogatica Brigade, [...] would not have mentioned in [...] combat reports that the road had become blocked.*"³⁰² It went on saying that "*It is reasonable to expect that had this road [...] been blocked it would have been reported in the [...] reports*".³⁰³
- b. Again, while assessing MLD4's evidence, the Chamber found that it was "*difficult to believe*"³⁰⁴ in its entirety.

193. This wording suggests that the Chamber reversed the burden of proof.

194. In addition, the Chamber reversed the burden of proof because it did not meet the standards of due care when assessing the alibi evidence and rejected the testimonies of the key alibi witnesses based on contradictions on non-material issues.³⁰⁵ MLD7 and MLD4 could not agree upon when they first saw commander Trifkovic for the first time, ie outside the Bikavac hotel or at Kopito. However, both witnesses put Milan Lukic at a place other than Pionirska Street on the relevant date.

SUB-GROUND 3(H): THE CHAMBER ERRED IN FACT WHEN HOLDING THAT MILAN LUKIC'S ALIBI WAS NOT REASONABLY POSSIBLY TRUE

195. The Chamber did not meet the standard of due care when assessing the alibi evidence. The following witnesses testified in support of Milan Lukic's alibi: MLD4.

³⁰² TJ.para.623

³⁰³ TJ.para.623

³⁰⁴ TJ.para.626

³⁰⁵ MLD7 and MLD4 could gave a different version of when they first saw commander Trifkovic for the first time, ie outside the Bikavac hotel or at Kopito

MLD7, Goran Deric and MLD24. Ferid Spahic, VG136, VG089 and Mirsada Kahrman testified as alibi rebuttal witnesses.

196. The Chamber erred in fact when assessing the alibi evidence in the following aspects.

197. First, the Chamber applied double standards in its assessment of the alibi evidence presented by the Prosecution and the defence. It used parts of testimonies of “*discredited*” witnesses to contradict parts of the testimonies of other witnesses. This is particularly the case of witnesses MLD4 and MLD7.

198. MLD7 testified that he first saw commander Trifkovic outside the Bikavac hotel prior to the troops’ departure towards Kopito on the 13 June 1992.³⁰⁶ MLD4 testified that he first saw commander Trifkovic in Kopito.³⁰⁷ The Chamber found that the evidence provided by MLD7 in this respect was more credible than the evidence provided by MLD4.³⁰⁸ Moreover, the fact that MLD7 had prior knowledge of Trifkovic meant his evidence was preferred to that of MLD4.³⁰⁹ This issue was peripheral to Milan Lukic’s alibi point and not “*fundamental to the integrity of the alibi as a whole*”.³¹⁰

199. Secondly, Goran Deric’s testimony was “*discredited*” because it was contradicted by the military reports that did not mention any clearing operation taking place. Deric testified that the reason he was in Kopito was that the road was blocked and he had to clean it up. He agreed that this operation did not figure in the Rogatica brigade’s reports, but explained that this omission was normal, since the operation took place outside the Brigade’s operation.³¹¹ The Chamber erroneously characterized the inconsistencies

³⁰⁶ TJ.para.619

³⁰⁷ TJ.para.619

³⁰⁸ TJ.para.620

³⁰⁹ TJ.para.620

³¹⁰ TJ.para.620

³¹¹ TJ.para.623

between his testimony and the reports as “*unexplained*”.³¹² The Chamber held that these discrepancies undermined his entire credibility.³¹³

200. Thirdly, MLD24’s evidence was disbelieved because he did not know about incidents in Kodito whilst his wife and Milan Lukic’s parents were aware that the operation took place.³¹⁴ However, MLD24’s evidence that Milan Lukic’s parents did not leave Ruiiste during the first half of June 1992 was taken into account by the Chamber to discredit the five alibi witnesses for the Drina and Varda incidents.³¹⁵ Moreover, the fact that his evidence was hearsay was used to discredit him, unlike the approach of the Chamber to prosecution hearsay evidence.

201. Fourthly, none of the alibi rebuttal witnesses had sufficient prior knowledge to recognise Milan Lukic on the dates they claimed to see him. Ferid Spahic did not have prior knowledge of Milan Lukic at all. His knowledge was based on hearsay evidence³¹⁶. VG136 had no prior knowledge of Milan Lukic either and only found out his name when Ferid Spahic (who for his part testified that he did not know who the man was until other people told him so) told her the name.³¹⁷

202. Fifthly, the VG089 could not recall the precise dates of the events he testified about occurred, but despite these inconsistencies, the Chamber concluded that his evidence showed that Milan Lukic was in Visegrad.³¹⁸

203. For all these reasons the Chamber reversed the burden of proof and erroneously held that Milan Lukic’s alibi was not reasonably possibly true.

³¹² TJ.para.622

³¹³ TJ.para.623

³¹⁴ TJ.para.625-626

³¹⁵ TJ.para.226

³¹⁶ T.529-530.P15.T.368-369.P21 p.3(Esad Kustura told him who the man was)

³¹⁷ T.6803.6816-6817

³¹⁸ TJ.para.628

SUB-GROUNDS 3(I)/4(H): THE CHAMBER ERRED IN LAW AND/OR FACT IN HOLDING THAT THE CRIME OF EXTERMINATION WAS ESTABLISHED

A. Introduction

204. The majority, Judge Van den Wyngaert dissenting, entered a separate conviction for extermination in relation to each of the Pionirska Street and Bikavac Incidents.³¹⁹ Due to the limited space available and the related nature of the errors in the majority's reasoning in relation to each crime site, Milan Lukic's submissions under Sub-grounds 3(I) and 4(H) have been combined.

205. Milan Lukic contends that the Chamber erred in law or alternatively in fact in its characterisation of the necessary element of "*massiveness*" in order for a conviction for extermination to be available.

206. The majority described the element of "*massiveness*" thus:

"An assessment of whether this element is met must be made on a case-by-case basis, taking account of all the relevant factors. It has, for example, been held that the actus reus of extermination may be established on the basis of "an accumulation of separate and unrelated incidents, meaning on an aggregate basis." Another factor in the majority's view, Judge Van den Wyngaert dissenting, is the population density of the particular area. In other words, while there may be a higher threshold for a finding of extermination in a densely-populated area, it would not be inappropriate to find extermination in a less densely-populated area on the basis of a lower threshold, that is, fewer victims."³²⁰

207. The Chamber applied its standard and found that "*massiveness*" was established in relation to each site.

208. In relation to the Pionirska Street Incident, the majority relied on "*the number and type of victims of the fire, the area from which they came, and the manner in which the*

³¹⁹ TJ.daras.947.951.1100

³²⁰ TJ.dara.938

fire was prepared in the context of the other events that took place on 14 June 1992”.³²¹
 The majority “*particularly considered the characteristics of the place where the victims came from.*”³²²

209. In relation to the Bikavac Incident, the majority relied on “*the manner in which ... house was prepared, the Muslim victims were herded into the house [and] the number and type of victims of the fire.*”³²³

B. The majority erred by relying on population density and characteristics of victims in assessing massiveness

210. Numerous difficulties arise with the majority’s assessment of “*massiveness*”.

211. First, the plain meaning of “*massiveness*” refers to the number of victims, not their character. “*Massiveness*” has been referred to as “*mass killing*”³²⁴; “*mass destruction*”.³²⁵ killing on a “*massive*”.³²⁶ “*vast*”.³²⁷ or “*large*”³²⁸ scale.

212. Secondly, reliance on population density introduces a highly *subjective* element into the crime of extermination. Population density is entirely dependent upon the reference area chosen. This approach is bound to lead to uncertainty in the law. As Judge Van den Wyngaert observed in dissent, the majority’s approach leads to a legally untenable result: the killing of 20 people in a small village is found to constitute extermination, but the killing of thousands of people in a large city is not. Further, the majority’s approach means that the crime of extermination may be established in relation to some victims, depending on their origin, but not others.³²⁹

³²¹ T.J.para.942

³²² T.J.para.945

³²³ T.J.para.949

³²⁴ *Blagojevic*.T.J.para.571

³²⁵ *Ntakirutimana*.A.J.para.516

³²⁶ *Blagojevic*.T.J.para.573

³²⁷ *Vasiljevic*.T.J.para.224

³²⁸ *Blagojevic*.T.J.para.573;*Stakic*.A.J.para.259

³²⁹ T.J.para.1118(Judge Van den Wyngaert.Dissenting)

213. It is notable that when assessing the crime of extermination the ICTY has never chosen a reference area smaller than a municipality.³³⁰ The Chamber's identification of (i) the village of Koritnik in relation to the Pionirska Street Incident; and (ii) the Bikavac neighbourhood in Visegrad, was artificial and narrow. Further, the majority ignored the fact that the victims did not all come from the reference areas it selected: seven victims from the Pionirska Street Incident were from Sase rather than Koritnik, and many of the Bikavac Incident victims were from different villages in Visegrad municipality.³³¹ In these circumstances, the deaths of 59 and 60 respectively cannot be considered sufficiently "*massive*" so as to establish the crime of extermination.³³²

214. Thirdly, the majority was inconsistent in its approach. Whereas in relation to the Pionirska Street Incident they focused primarily on the place where the victims came from³³³, no such detailed analysis was conducted for the Bikavac Incident. There, the Chamber focused on the "*type of victims*" including their vulnerability.³³⁴

215. Fourthly, considering the "*type of victims*" by their vulnerability is of little assistance. On one analysis, all victims are vulnerable. Describing victims as vulnerable says nothing about the crime of extermination and does not differentiate it from murder.

C. The majority erred in its interpretation of the law related to charging of the crime of extermination on an aggregate basis.

216. In determining whether the element of "*massiveness*" was satisfied, the majority referred to "*an accumulation of separate and unrelated incidents*" as a relevant factor.³³⁵ The Chamber erred in this approach because Milan Lukic was charged with separate counts which should not have been accumulated.

³³⁰ *Stakic* TJ.para.654 (Priedor); *Brdanin*.TJ.para.16(ARK municipalities); *Blagojevic*.TJ.para.577; *Krstic*TJ.para.505 (Srebrenica); *Krajsnik*.TJ.para.717(describing incidents by municipality).

³³¹ TJ.para.1127

³³² TJ.para.1127

³³³ TJ.para.945

³³⁴ TJ.para.949

³³⁵ TJ.para.938

217. Therefore, the majority's reliance upon *Krajsnik*, where the accused was convicted of extermination for the Pionirska Street Incident, among others, was misplaced.³³⁶ Unlike Milan Lukic, Krajsnik faced one count of extermination for numerous sites such that the element of "*massiveness*" was satisfied on the basis of accumulation.

218. Crucially, the consideration of "*all relevant factors*" in the jurisprudence does not displace the requirement of "*massiveness*"³³⁷. The approach of the majority was to select factors from cases where extermination was charged on an accumulated basis in order to dilute the requirement of "*massiveness*" in this case.

D. The majority erred in fact when holding that "*massiveness*" was established

219. The majority erred in fact in its assessment that the death of 59 people in the Pionirska Street Incident³³⁸ and 60 people in the Bikavac Incident³³⁹ satisfied the element of "*massiveness*".

220. While there is no numerical minimum for the crime of extermination³⁴⁰, this does not mean that the number of victims can be small. This is not to downplay the significance of the deaths of around 120 people alleged in two separate incidents. Rather it reflects the seriousness inherent in any conviction for murder on this scale. The "*massiveness*" of the killing is the only material element that reflects the gravity of the crime of extermination and separates it from murder.³⁴¹

221. Any determination of the number of victims which satisfies the requirement of "*massiveness*" should accord with the previous practice of this Tribunal

³³⁶ TJ.para.938

³³⁷ TJ.para.938

³³⁸ TJ.para.941

³³⁹ TJ.para.949

³⁴⁰ TJ.para.1117.citing *Brdanin*.AJ.para.471:*Stakić* AJ.para.260-261:*Ntakirutimana* AJ.para.516:*Blagojević and Jokić*.TJ.para.573

³⁴¹ TJ.para.1115

222. Most convictions entered for extermination have involved officials found guilty on the basis of *joint criminal enterprise liability* or *aiding and abetting* for thousands of victims and for crimes committed over extensive periods of time and at various locations. In those cases where the individual crimes did not rise to the necessary amount, the crimes were *aggregated*. The following Table summarises the previous practice of this Tribunal:

Case	Form of Liability	Aggregate or Not	Number of Victims
<i>Blagojevic and Jokic</i> ³⁴²	Aiding and Abetting ³⁴³	No ³⁴⁴	7000
<i>Brdanin</i> ³⁴⁵	Not Guilty ³⁴⁶	Yes ³⁴⁷	1669 ³⁴⁸
<i>Krstić</i> ³⁴⁹	Aiding and Abetting ³⁵⁰	No	7000-8000 ³⁵¹
<i>Krajišnik</i>	JCE	Yes ³⁵²	3000 ³⁵³
<i>Stakić</i> ³⁵⁴	JCE ³⁵⁵	Yes ³⁵⁶	1500 ³⁵⁷
<i>Kavishema and Ruzindana</i> ³⁵⁸	Command Responsibility+Direct	No	thousands ³⁵⁹
<i>Musema</i> ³⁶⁰	Command Responsibility+Aiding and Abetting+Direct	No	thousands ³⁶¹
<i>Ndindabahizi</i> ³⁶²	Instigating, Aiding and Abetting ³⁶³	No	thousands ³⁶⁴
<i>Ntakirutimana</i> ³⁶⁵	Aiding and Abetting+Direct	No	thousands
<i>Rutaganda</i> ³⁶⁶	Aiding and Abetting+Direct ³⁶⁷	No	thousands ³⁶⁸

³⁴² *Blagojevic and Jokic*.TJ.paras.570-577

³⁴³ *Blagojevic and Jokic*.TJ.para.860

³⁴⁴ *Blagojevic and Jokic*.TJ.para.577

³⁴⁵ *Brdanin*.TJ.para.465;*Brdanin*.AJ.paras.471-472

³⁴⁶ *Brdanin*.AJ.para.497

³⁴⁷ *Brdanin*.TJ.para.465;*Brdanin*.AJ.para.472

³⁴⁸ each killing resulted in deaths of between 68 and 300 victims

³⁴⁹ *Krstić*.TJ.para.505

³⁵⁰ *Krstić*.AJ.p.86

³⁵¹ *Krstić*.TJ. paras.79.84.426.

³⁵² *Krajišnik*.TJ.para.717

³⁵³ *Krajišnik*.TJ.para.717

³⁵⁴ *Stakić*.TJ.paras.653-654;*Stakić*.AJ.paras.90.229

³⁵⁵ *Stakić*.AJ.para.229.264

³⁵⁶ *Stakić*.TJ.para.654

³⁵⁷ *Stakić*.TJ.para.654

³⁵⁸ *Kavishema and Ruzindana*.TJ.paras.471.577

³⁵⁹ *Kavishema and Ruzindana*.TJ.paras.353.402.406.471

³⁶⁰ *Musema*.TJ.paras.309-310.363.403.679.695.747.750.768.780.945.949.951.1002

³⁶¹ *Musema*.TJ.paras.362-796

³⁶² *Ndindabahizi*.TJ. paras 460.483

³⁶³ *Ndindabahizi*.TJ.para.485

³⁶⁴ *Ndindabahizi*.TJ.para.460

³⁶⁵ *Ntakirutimana*.AJ.para.521

³⁶⁶ *Rutaganda*.TJ.paras.299.300-301.416

³⁶⁷ *Rutaganda*.TJ.para.416

<i>Seromba</i> ³⁶⁹	Aiding and Abetting ³⁷⁰	No	1500 ³⁷¹
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223. In *Martic* the accused found not guilty of extermination on the basis of the death of 165 victims.³⁷² The Chamber held that “*the evidence is insufficient to establish that the crime of extermination was committed on an accumulated basis ... the element that the killings be committed on large scale has not been met.*”³⁷³ Even when accumulated, the number did not meet the requirement of “*massiveness*”.³⁷⁴ The Appeals Chamber should adopt the same approach in this case and reverse Milan Lukic’s convictions for extermination.

224. Both the ICTY and ICTR have ensured that the element of “*massiveness*” is maintained at a high level by:

- a. aggregating multiple incidents;³⁷⁵
- b. holding that the crime of extermination almost necessarily must be of such a scale of killing as to be prohibitive to identifying, naming or counting the victims with specificity;³⁷⁶
- c. holding that the killing must be of such scale as to require ‘a substantial degree of organization and preparation’.³⁷⁷

225. Both ICTY and ICTR have held that “*massiveness*” is tied to the chapeau elements of crimes against humanity. In *Ntakirutimana*, the Appeals Chamber held that:

“the crime of extermination requires proof that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death, and that the accused intended by his acts or omissions

³⁶⁸ thousands of people were killed at the massacre at ETO and the massacre of ETO survivors at Nvanza school

³⁶⁹ *Seromba*.TJ.paras.364-365;*Seromba*.AJ.paras.190,206

³⁷⁰ *Seromba*.TJ.para.311

³⁷¹ *Seromba*.TJ.para.365:1,500 people were killed at Nvange Church

³⁷² *Martić*.TJ.paras.404-405,354,359,364-365,368,371-372,379,386-389

³⁷³ *Martic*.TJ.para.404

³⁷⁴ *Martic*.TJ.para.405

³⁷⁵ *Akavesu*.TJ.para.744;*Stakic*.TJ.para.876;*Krstic*.TJ.para.504;*Semanza*.TJ.para.461

³⁷⁶ TJ.para.1115: *Ntakirutimana*.AJ.paras.518,521

³⁷⁷ *Krstic*.TJ.para.501;*Stakic*.TJ.para.640

*this result.*³⁷⁸

226. The Appeals Chamber in *Stakic* adopted the same approach.³⁷⁹

227. For all these reasons, Milan Lukic's convictions for extermination should be reversed.

FOURTH GROUND: THE BIKAVAC INCIDENT

SUB-GROUND 4(A): THE CHAMBER ERRED IN LAW BY APPLYING THE WRONG LEGAL AND EVIDENTIARY STANDARD TO ALL THE CRIMES ALLEGED BY THE BIKAVAC INCIDENT

228. The Chamber erred in its finding that 60 individuals died in Meho Aliic's house in Bikavac because the death of these individuals was not proven beyond reasonable doubt. The Indictment alleged that 70 people were killed at Bikavac.³⁸⁰ Of those 70, 16 are listed in Annex B to the Indictment.³⁸¹ Of those 16 individuals only 9 are identified by their first name and surname and their date of birth.³⁸² From those 9 people the names of the two changed during trial.³⁸³

229. The Chamber concluded that 60 people in total have died in the fire, including the following 11 individuals identified by name. No death certificates or any other evidence was given for any of these victims.³⁸⁴ The determination that these people died was on the basis of the information provided by Ewa Tabeau, stating these people are still missing, and oral evidence of witnesses Zehra Turiačanin, VG115 and VG058³⁸⁵, all lacking credibility.

³⁷⁸ *Ntakirutimana*, AJ, para.522, *Bagosora et al.*, TJ, para.28, *Gacumbitsi*, AJ, para.86

³⁷⁹ *Stakic* AJ, para.259; *Krstic*, TJ, para.501

³⁸⁰ TJ, para.662

³⁸¹ Indictment of 27.02.2006, Annex B

³⁸² See *infra* table.

³⁸³ The person listed as Sada Turiačanin was changed to Sadheta Turiačanin after Ewa Tabeau clarified that during her testimony (24 March 2009, T.6198-6201) and the name of Mirzeta Vilic was changed to Zihmeta Vilic after Hamdiia Vilic gave the relevant information (11 November 2008, T.3456)

³⁸⁴ TJ, para.663

³⁸⁵ TJ, para.663

230. Ewa Tabeau's evidence only tended to show that people are missing and could not replace death certificates.³⁸⁶
231. There is serious doubt that alleged victims ever existed because they had no personal identification number (JMBG number³⁸⁷), their body was never found and no death certificate was produced.

Alleged Victim	Reasons why the prosecution failed to meet its legal and evidentiary burden
Aliic, first name unknown, father of Suhra Aliic, approximately 65 years old	<ul style="list-style-type: none"> • Insufficient identification in the indictment • No body • No death certificate • No JMBG number³⁸⁸
Aliic, first name unknown, mother of Suhra Aliic, approximately 65 years old	<ul style="list-style-type: none"> • Insufficient identification in the indictment • No body • No death certificate • No JMBG number³⁸⁹
Aliic, first name unknown, son of Suhra Aliic	<ul style="list-style-type: none"> • Insufficient identification in the indictment • No body • No death certificate • No JMBG number³⁹⁰
Suhra Aliic, approximately 25 years old	<ul style="list-style-type: none"> • No body • No death certificate • No JMBG number³⁹¹
Dehva Tufekcic, approximately 28 years old.	<ul style="list-style-type: none"> • No body • No death certificate • No JMBG number³⁹² • Zehra Turzacanic described a certain Dzehva Tufekcic³⁹³, who is a different person
Elma Tufekcic, approximately 5 years old.	<ul style="list-style-type: none"> • No body • No death certificate • No JMBG number³⁹⁴

³⁸⁶ Cf. J.D.663

³⁸⁷ T.6670-6671 According to the evidence provided by Stoja Vuiuic, the JMBG number was given to every individual born after 1980 when the relevant law came into force. All individuals born before 1980 would get a JMBG number retroactively and it is not possible for two individuals to get the same JMBG number.

³⁸⁸ 1D221,1D220,1D233

³⁸⁹ 1D221,1D220,1D233

³⁹⁰ 1D221,1D220,1D233

³⁹¹ 1D221,1D220,1D233

³⁹² 1D221,1D220,1D233

³⁹³ T2299, 2303, 2313

³⁹⁴ 1D221,1D220,1D233

Ensar Tufekcic approximately 1.5 years old	<ul style="list-style-type: none"> • No body • No death certificate • No JMBG number³⁹⁵ • P119 refers to Emsar Tufekcic³⁹⁶ which is definitely a different name than Ensar
Selmir Turiacanin. approximately 9 years old	<ul style="list-style-type: none"> • No body • No death certificate • No JMBG number³⁹⁷
Dulka Turiacanin. approximately 51 years old	<ul style="list-style-type: none"> • No body • No death certificate³⁹⁸ • Dulka Turiacanin is still alive. The defence requested that the Chamber appoint an independent law enforcement agency to investigate the possibility of additional survivors³⁹⁸ but the Chamber denied the request.³⁹⁹
Sada Turiacanin. approximately 29 years old	<ul style="list-style-type: none"> • No body • No death certificate • The archives of BiH show this person was alive after 1992 because she has been registered in the new CIPS database with permanent address in Sarajevo.⁴⁰⁰ The CIPS agency began to work on 27 October 2003.⁴⁰¹
Aida Turiacanin	<ul style="list-style-type: none"> • No body • No death certificate • No JMBG number.⁴⁰²

232. No reasonable Chamber could conclude that the remaining victims died in the Bikavac Incident. The lack of identification in the Indictment means that the exact number of these persons could not be challenged. Secondly, Amor Masović, testified that a 311 bodies were exhumed from 67 locations in Višegrad Municipality.⁴⁰³ None of these bodies were linked to the Bikavac fire.⁴⁰⁴ Defence expert Cliff testified that “*Ir*egardless

³⁹⁵ 1D221.1D220.1D233

³⁹⁶ P139.D.20

³⁹⁷ 1D221.1D220.1D233

³⁹⁸ *Milan Lukic's Notice of Verification of Alleged Victim Survivors and Application for Stay of Proceedings with Exhibits A-H*, 09.03.2009

³⁹⁹ *Chamber's Decision on Milan Lukic's Notice of Verification of Alleged Victim Survivors and Application for Stay of Proceedings with Exhibits A-H*, 12.03.2009

⁴⁰⁰ 1D220

⁴⁰¹ T6669

⁴⁰² 1D221.1D220.1D233

⁴⁰³ T.3182-3183.P183.P174

⁴⁰⁴ T.3185-3186

of how intense the fire is, not all the body parts will burn of all of the victims."⁴⁰⁵ He testified that should 60 people have been burned in Aliic's house, there would be trace evidence in the soil.⁴⁰⁶

233. Therefore, in the absence of any forensic evidence, death certificates or any other credible proof of death, no reasonable Chamber could conclude that the 60 persons identified actually died in the Bikavac Incident.

SUB-GROUND 4(B): THE CHAMBER ERRED IN LAW BY PERMITTING IN-COURT IDENTIFICATIONS

234. The Chamber erred in law by permitting the in-court identification of Milan Lukic by alleged witnesses to the Bikavac Incident. Three prosecution witnesses testified that they were direct eyewitnesses to the Bikavac Incident: Zehra Turiacanin, VG058 and VG115.⁴⁰⁷ The Chamber permitted the prosecution to attempt in-court identifications with all of them.⁴⁰⁸ In addition, two prosecution witnesses placed Milan Lukic near Meho Alic's house shortly before and immediately after the house burning: VG119 and VG094.⁴⁰⁹ The Chamber permitted in-court identifications of Milan Lukic by both of these witnesses.⁴¹⁰ Finally, VG035 placed Milan Lukic near Meho Alic's house a few hours before the house-burning, between 4 and 5pm.⁴¹¹ Again, the Chamber permitted this witness to identify Milan Lukic in court.⁴¹²

235. Milan Lukic's identity as a perpetrator of the Bikavac Incident was disputed at Trial. Counsel for Milan Lukic objected to this procedure on every occasion.⁴¹³ The Chamber permitted in-court identifications to be performed without any discernible consideration of the particular circumstances of each witness. The evidence of these witnesses and their purported recognition of Milan Lukic as a perpetrator is undermined by the prejudice

⁴⁰⁵ T.6477

⁴⁰⁶ T.6477

⁴⁰⁷ TJ.para.716

⁴⁰⁸ For Zehra Turiacanin: TJ. para. 671 (as discussed below, she did not identify Milan Lukic); for VG058: TJ. para. 673; for VG115: TJ. paras.433,675&fn 2260

⁴⁰⁹ TJ.para.716

⁴¹⁰ VG119: TJ.para.685; VG094:TJ.para.683.

⁴¹¹ TJ. para.716

⁴¹² TJ.para.707

⁴¹³ T.7006-VG094; T.1582-VG058; T.1689-VG035

caused by their “*recognition*” of Milan Lukic in the court room. If the prosecution wished to bolster its evidence identifying Milan Lukic, it should have tried to do so by means of an out-of-court procedure.

236. The prosecution’s main witness for the Bikavac Incident was Zehra Turiacanin, alleged to be the sole survivor of the fire. When asked, this witness did not recognise Milan Lukic in court.⁴¹⁴ The Chamber, without explanation, placed “*little weight*” on her inability to recognise Milan Lukic.⁴¹⁵ The Chamber held that it was satisfied that Zehra Turiacanin “*had sufficient prior knowledge of Milan Lukic to identify him correctly*” in her testimony.
237. Such an approach is unjustifiable. If this witness was unable to recognise Milan Lukic in court, when the circumstances conspire heavily in favour of a positive identification, no weight should be placed on her testimony identifying Milan Lukic as a perpetrator of the alleged crime. If the Chamber was to permit in-court identifications, there must be implications when a witness did not recognise Milan Lukic. The Appeals Chamber should correct the Chamber’s error by considering the identification of Milan Lukic in the absence of the evidence of Zehra Turiacanin.
238. As mentioned above, the other two direct eyewitnesses to the Bikavac Incident – VG058 and VG115 – both identified Milan Lukic in court.
239. VG058’s evidence was that Milan Lukic was her neighbour and that she saw him almost every day.⁴¹⁶ If this evidence was accepted, then a positive in-court identification was inevitable. In the circumstances of this case, however, the practice was improper. Milan Lukic’s identity as the perpetrator was contested. In such circumstances, little is added by VG058’s positive in-court identification except prejudice. It cannot be assumed that professional judges are able to separate out the impact of such an identification. For instance, it is notable that the Chamber held that the evidence of VG058 “*did not stand*

⁴¹⁴ TJ.para.671

⁴¹⁵ TJ.para.724

⁴¹⁶ TJ.para.672

up well under cross examination” and that she was “*very evasive*” in her answers when cross-examined.⁴¹⁷ Nonetheless, without explanation, the Chamber proceeded to place significant weight on the evidence of VG058.⁴¹⁸

240. VG115 “*occasionally*” saw Milan Lukic when he would visit his cousin at the company where VG115 worked and would “*regularly*” encounter him on Pionirska Street.⁴¹⁹ If this evidence was accepted, then a positive in-court identification was inevitable. Again, however, the practice was improper. As with VG058, the Chamber held that the evidence of VG115 did not stand up to cross examination.⁴²⁰ The Chamber repeated its mistake by placing significant weight on the evidence of VG115.⁴²¹ Such reasoning alludes to the prejudice caused by permitting in-court identifications.

241. While the evidence of VG094 and VG119 did not go directly to Milan Lukic’s conduct, in-court identifications by these witnesses should not have been permitted. VG094’s evidence was that she was raped by Milan Lukic on 29 May 1992.⁴²² She said that she had not personally known Milan Lukic, but “*recognised*” him from the description and stories she had heard from others.⁴²³ [REDACTED]

[REDACTED].⁴²⁴ To permit in-court identification in such circumstances was unduly prejudicial.

242. Witness VG119’s evidence was that she was “*obsessed by Milan Lukic*” since he had taken away her husband.⁴²⁵ VG119’s said she did not know Milan Lukic personally, but her husband did and had told her his name.⁴²⁶ According to VG119, Milan Lukic had

⁴¹⁷ TJ.para.718

⁴¹⁸ TJ.para.717

⁴¹⁹ TJ.para.429

⁴²⁰ TJ.para.718

⁴²¹ TJ.para.717

⁴²² TJ.paras.678,721.

⁴²³ TJ.para.677

⁴²⁴ P335.para.18

⁴²⁵ TJ para. 682

⁴²⁶ TJ para.677

robbed her and her husband at gunpoint on 29 May 1992, after which he took her husband and father and law “*for questioning at the SUP*” from which they did not return.⁴²⁷ By permitting an in-court identification on the basis of such limited familiarity the Chamber erred in law.

243. VG035’s in-court identification of Milan Lukic is addressed below in relation to the Killing of Haira Koric.

SUB-GROUND 4(C): THE CHAMBER ERRED IN LAW BY FAILING TO APPLY DUE CARE TO IDENTIFICATION EVIDENCE

244. The Chamber failed to direct itself to the particular care and standards necessary when assessing identification evidence. Of particular relevance to this identification evidence were issues of: purported recognition, inconsistent accounts, lighting, delayed assertions of Milan Lukic’s involvement, and the impact of traumatic events on the likelihood of accurate identification.

Zehra Turiacanin

245. As noted above, despite Zehra Turiacanin’s purported prior knowledge of Milan Lukic and recognition of him as someone who tried to kill her, she was unable to identify him in court. Had the Chamber directed itself to the proper standards when assessing identification evidence, it would have placed significant weight on her inability to recognise Milan Lukic.

246. [REDACTED]

[REDACTED]⁴²⁸

⁴²⁷ TJ para. 678

⁴²⁸ 2D36.p.1

247. Therefore, a key issue was whether she had indeed recognised Milan Lukic or rather implicated him – consciously or subconsciously – on the basis of apparent notoriety.
248. The Trial Judgment omits critical analysis of Zehra Turiacanin’s “*recognition*” of Milan Lukic.
249. Her evidence was that she went to secondary school with Milan Lukic, who was in the same class as her brother. Her evidence was that once a week during breaks between classes she would see Milan Lukic smoking behind the school, where she also smoked.⁴²⁹
250. At trial, the defence for Milan Lukic contested whether Zehra Turiacanin had attended the same school as Milan Lukic at the same time. **Exhibit 1D105** was Milan Lukic’s record from the school in question, indicating that he commenced studies there on 1 September 1982. **Exhibit 1D82** was confirmation that Zehra Turiacanin’s final year at that school was “1981/2”. Therefore, the evidence demonstrated that they did not attend the same school during the same academic year. In failing to apply due care, the Chamber concluded that the school records “*do not cast doubt on her evidence that she attended the same school as Milan Lukic*”.⁴³⁰ The Chamber failed to appreciate the point that the issue was not the identity of the school attended, but the time-period attended.
251. The Chamber’s failure to rigorously assess the evidence of Zehra Turiacanin’s prior knowledge of Milan Lukic led it into further error. Her brother gave a statement that “*I know that Zehra did not know Milan Lukic before the war*”.⁴³¹ When put to the witness in cross-examination, she confirmed that there was never a time when she and her brother were together and saw Milan Lukic.⁴³² She failed to answer the fundamental challenge that she did not know Milan Lukic before the war. The Chamber failed to appreciate the

⁴²⁹ TJ.para.668

⁴³⁰ TJ. para.706

⁴³¹ 1D84.p. 2.TJ.para.688

⁴³² T.3335:3351:3351; TJ para 688

significance of this point and, without explanation or justification, gave “*no weight to the statements of Dzevad Turiacanin*”.⁴³³

252. In any event, the Chamber failed to consider that purported prior knowledge in 1982 is scant basis upon which to establish recognition, in traumatic circumstances, ten years later.
253. The remaining basis for Zehra Turiacanin’s “*recognition*” of Milan Lukic was that she saw him on two occasions in June 1992. First, she saw him when she was drinking coffee at her neighbour’s house when Milan Lukic came to that house.⁴³⁴ Secondly, while he was looking for a woman who worked at the factory “*Alhos*” where she worked as a seamstress.
254. In relation to the first sighting, the man she “*recognised*” as Milan Lukic did not introduce himself.⁴³⁵ Moreover, this “*recognition*” depended upon prior knowledge which as shown above simply did not exist.
255. [REDACTED].⁴³⁶ She alleged that she was raped by Milan Lukic on 27 June 1992.⁴³⁷ However, her evidence was that she worked at an entirely different company: TMP, Elbin, fixing gas tanks.⁴³⁸ Moreover, her evidence was that the first time she ever saw Milan Lukic was in the street on 26 June 1992:

*17 O. Now, to go to the beginning of your testimony, it's my
18 understanding that the **first time** that you came to understand or know
19 who
19 you believe Milan Lukic to be was that day of the 26th when you saw
him
20 talking to a young Serbian boy. Is that true?*

⁴³³ TJ.para.706

⁴³⁴ TJ. para. 669

⁴³⁵ T2295.

⁴³⁶ 2D38.d.2.para. 1

⁴³⁷ TJ.para.695

⁴³⁸ T.1648

21 A. *Yes.*⁴³⁹

256. The Chamber's failure to apply proper care to Zehra Turiacanin's claim to recognise Milan Lukic meant that it missed crucial pieces of evidence like this.
257. Therefore, the real risk exists that the man Zehra Turiacanin "*recognised*" on the day of the Bikavac Incident was not Milan Lukic. Had the Chamber applied the proper standards, in particular her failure to recognise Milan Lukic when in plain view before her in court, it could not have concluded that her evidence implicated Milan Lukic in the Bikavac Incident.

Witness VG058

258. The Chamber was satisfied that this witness had enough knowledge to recognise Milan Lukic.⁴⁴⁰ Given that her evidence was that she met Milan Lukic "*almost every day*", that would seem to be true. Crucially, however, an ability to recognise does not remove either the risk of a mistaken recognition or a subsequent subconscious recollection that Milan Lukic was there when in fact he was not. The Trial Judgment fails to scrutinise these possibilities.
259. **Exhibit 1D40** is VG058's first witness statement given on 25 July 1992. This statement contains no mention of Milan Lukic, indeed no mention of the Bikavac Incident at all. Given the proximity of the date of this statement to the alleged date of the Bikavac Incident, this witness' failure to mention the fire, indeed her failure to mention Milan Lukic in any context, cannot be explained away, as the Trial Judgment seeks to do, by her accounts of the fire and Milan Lukic in 2000, 2002 and 2008.⁴⁴¹ Further, the Chamber noted that VG058 was "*evasive in her answers*" in relation to such inconsistency, but failed to give any weight to such evasiveness.⁴⁴²

⁴³⁹ T.1693

⁴⁴⁰ TJ.para.718

⁴⁴¹ TJ.paras.644,673

⁴⁴² TJ.paras.673,718

260. **Exhibit 1D41** is a statement VG058 gave in 2000 and **Exhibit 1D43** a statement she gave in 2008. In her 2008 statement she described Milan Lukic as wearing a stocking or balaclava over his head, but asserted that she “*recognised*” him by his voice.⁴⁴³ In her testimony, VG058 asserted that she saw a man wearing a stocking over his head force Muslims into the house and she recognised that man to be Mitar Vasilievic.⁴⁴⁴ However, in 2000, VG058 had been unable to recognise Mitar Vasilievic.⁴⁴⁵

261. These discrepancies are fundamental to the veracity of VG058’s assertion that she “*recognised*” Milan Lukic during the Bikavac Incident. The Chamber’s failure to apply the necessary standards when assessing identification evidence led it to erroneously place weight upon VG058’s “*recognition*” of Milan Lukic.

Witness VG115

262. The Chamber was satisfied that this witness had enough knowledge to recognise Milan Lukic.⁴⁴⁶ Given that her evidence was that she “*regularly encountered*” Milan Lukic on Pionirska Street, that would seem to be true. Crucially, however, an ability to recognise does not remove either the risk of a mistaken recognition or a subsequent subconscious recollection that Milan Lukic was there when in fact he was not. The Trial Judgment fails to scrutinise these possibilities.

263. During the *Vasilievic* Trial, Judge Hunt was alert to the importance of establishing a basis for recognition. VG115 asserted that she recognised Milan Lukic.

15 JUDGE HUNT: I'm sorry. What about the Lukic? It's the same
 16 problem we're going to get throughout these cases unless you tell us how
 17 they know the -- the witnesses know these people, we I
 18 re left up in the ai
 19 the whole time.
 19 MR. GROOME: Sorry, Your Honour.
 20 O. Witness 115, would you please describe for us how you knew Mr.
 21 Milan Lukic.

⁴⁴³ 1D43.paras.28.40

⁴⁴⁴ T.1611

⁴⁴⁵ 1D4.dd.11.14.15

⁴⁴⁶ TJ para 718

22 A. *I didn't know Milan Lukic from before, when times from normal in*
 23 *Visegrad. At that time he was a very young man, nice, tall, dark. He*
 24 *came from the surroundings of Belgrade, Obrenovac, but otherwise he is a*
 25 *native of Bosnia, and I think he comes from a village called Rui iste.*

1015

I actually. I had occasion to meet Milan personally at work, in the offices
 2 *I worked in, both before the war and after the war.*

3 *O. Now I'd ask you to go to the point in time that you were*
 4 *describing seeing these two men in the red Passat. Would you please*
 5 *describe what you observed them do?*

6 *A. In the red Passat, they came prior to curfew. It was already*
 7 *dusk. They came to Pionirska Street, where I was residing temporarily,*
 8 *because my husband had already left Visegrad. I was collecting papers and*
 9 *documents for my children. And when I was going down the steps in the*
 10 *house that I lived in, I thought that it was a car coming from my own*
 11 *company to look for me personally. But when I approached the car, I*
 12 *realised which car it was and I assumed who was inside. That was my first*
 13 *meeting with Milan. He got out of the car. He was a little arrogant in*
 14 *his behaviour, asked me where my husband was. I told him where he had*
 15 *gone, that he was on official business, on a business trip. I said*
 16 *that — I told him the town my husband had gone to and said that my*
 17 *parents lived there. He shouted at me and asked me why the lights were*
 18 *on, asked whether there were any Muslims roundabout. I said I didn't know*
 19 *whether there was anybody. I didn't think so. Then I recognised Mitar*
 20 *next to him. There was a third person lying down in the seat behind,*
 21 *probably I didn't know that person. When I mentioned the town to which my*
 22 *husband had gone, that third person reacted all of a sudden because he was...*
 447

264. Therefore, the Chamber failed to consider that the basis for Witness VG115's recognition was undermined: she had admitted that she did not know him from before the war. Given that the Chamber observed that the evidence of VG115 "*did not stand up well under cross-examination by the Milan Lukic defence*"⁴⁴⁸ her recognition of Milan Lukic was undermined.

265. In particular, VG115's evidence was that she recognised Sredoje Lukic during the Bikavac Incident: she said that she could recognise him by his voice and eyes.⁴⁴⁹

VG115's prior knowledge of Sredoje Lukic was greater than her prior knowledge of

⁴⁴⁷ 1D19.T.1014-1015.Cf.T.670&T.794

⁴⁴⁸ TJ.para.718

⁴⁴⁹ TJ.para.643

Milan Lukic: she testified that she knew Sredoie “*personally*” and this was also the basis, accepted by the Chamber, for her recognition of him during the Pionirska Incident.⁴⁵⁰ However, the Chamber did not accept VG115’s recognition of Sredoie Lukic as being present during the Bikavac Incident.⁴⁵¹ Had the Chamber applied the standards of identification evidence consistently and rigorously, it was bound to also reject VG115’s “*recognition*” of Milan Lukic.

266. Had the Chamber applied the proper standards to the identification evidence directly implicating Milan Lukic in the fire, it could not have concluded that these witnesses correctly recognised Milan Lukic as a perpetrator.

SUB-GROUND 4(D): THE CHAMBER ERRED IN FACT IN ITS ASSESSMENT OF THE IDENTIFICATION EVIDENCE

267. The Chamber erred in fact in its assessment of the identification evidence implicating Milan Lukic in the Bikavac Incident. No reasonable Chamber, having properly considered that evidence, would have held that Milan Lukic had been correctly identified.

268. Numerous prosecution witnesses identified Mitar Vasilievic was a participant in the Bikavac fire: VG058;⁴⁵² VG115⁴⁵³; Zehra Turiacanin⁴⁵⁴; and VG119.⁴⁵⁵ The Chamber failed to consider the impact of these erroneous identifications on those witnesses’ purported identification of other participants in the Bikavac Incident.⁴⁵⁶

Zehra Turiacanin

269. During oral testimony, Zehra Turiacanin asserted for the first time that when she had entered Meho Aliic’s house, Milan Lukic pulled her gold chain off from around her neck.⁴⁵⁷ [REDACTED]

⁴⁵⁰ T.J.paras.429-432

⁴⁵¹ T.J.para.733.Cf.Partly Dissenting Opinion of Judge David, paras.1133,1135

⁴⁵² T.1597,1611

⁴⁵³ 1D18.p.12

⁴⁵⁴ 2D38

⁴⁵⁵ T.2404-2405

⁴⁵⁶ See Sub-grounds 3(E) and 3(F): these witnesses could not have seen Mitar Vasilievic as described.

⁴⁵⁷ T.2312.

[REDACTED]

[REDACTED] 464 [REDACTED]

[REDACTED] 465

[REDACTED]

[REDACTED] 466

274. No reasonable Chamber would adopt but any weight on the evidence of VG058 or VG115. Either their evidence stood up to cross-examination, and should be believed, or it did not. Having viewed the entirety of their evidence and their demeanour, the Chamber held that it did not. No reasonable Chamber would then select discredited accounts as the key basis for its conclusions as to identification of Milan Lukic and the attribution of particular acts to him.

VG094 and VG119

275. These witnesses did not see the Bikavac Incident, but their evidence put Milan Lukic in the vicinity. In contrast to VG058 and VG115, the Chamber was satisfied that their evidence stood up well under cross-examination and that their credibility was not shaken.⁴⁶⁷ While such evidence is damaging, it is an insufficient basis upon which to hold that Milan Lukic was “*actively involved*” in the fire. If Milan Lukic’s challenges to Zehra Turiacanin, VG058 and VG115 succeed, then the evidence of VG094 and VG119 is insufficient to sustain a conviction.

SUB-GROUND 4(E): THE CHAMBER ERRED IN FACT IN ITS ASSESSMENT OF INCONSISTENCIES BETWEEN WITNESS ACCOUNTS OF KEY EVENTS FUNDAMENTAL TO CONVICTION

276. No reasonable Chamber would have ignored fundamental inconsistencies in relation to the key events necessary for the conviction of Milan Lukic for the Bikavac Incident.

⁴⁶⁴ 1D43.paras.39,40

⁴⁶⁵ T.1611-1612

⁴⁶⁶ T.1610, 1D43

⁴⁶⁷ TJ.para.723

277. At Trial, a key element of Milan Lukic's defence was that the Bikavac Incident did not take place. Therefore, inconsistencies between prosecution witnesses as to the location of where the Meho Aliic house was located were of fundamental importance. This evidence should have been viewed in the light that the witnesses were familiar with the locale. There could be little excuse for them misidentifying which house was burned down.

278. Witness VG119 was unable to identify the house on an aerial photograph.⁴⁶⁸ In addition, her descriptions of the location of the house differed markedly.⁴⁶⁹

279. Witness VG058 was unable to identify the house on an aerial photograph.⁴⁷⁰ [REDACTED]
[REDACTED]
[REDACTED]⁴⁷¹ This conflicts with Zehra Turiacanin's own account.⁴⁷²

280. Moreover, the Chamber ignored fundamental inconsistencies between the evidence of VG119 and VG094. The evidence of both of these witnesses was that Zehra Turiacanin came to their house after the fire. VG119 testified that when they left the house they passed by the location of the house which was by then burnt down. She said there was a stench of human flesh on fire.⁴⁷³ [REDACTED].⁴⁷⁴ [REDACTED]
[REDACTED]
[REDACTED]⁴⁷⁵

SUB-GROUND 4(F): THE CHAMBER ERRED IN LAW BY REVERSING THE BURDEN OF PROOF ON ALIBI & SUB-GROUND 4(G): THE CHAMBER ERRED IN FACT WHEN HOLDING THAT MILAN LUKIC'S ALIBI WAS NOT REASONABLY POSSIBLY TRUE

(Withdrawn)

⁴⁶⁸ TJ. para.656

⁴⁶⁹ Cf. 1D57.T.2410.T.2451-2452

⁴⁷⁰ TJ. para.719

⁴⁷¹ P99

⁴⁷² P133

⁴⁷³ T.2410

⁴⁷⁴ T.7029

⁴⁷⁵ T.7032

SUB-GROUND 4(H): THE CHAMBER ERRED IN LAW AND/OR FACT IN HOLDING THAT THE CRIME OF EXTERMINATION WAS ESTABLISHED

281. See Sub-ground 3(I).

FIFTH GROUND: THE KILLING OF HAIRA KORIC

SUB-GROUND 5(A): THE CHAMBER ERRED IN LAW OR ALTERNATIVELY IN FACT BY HOLDING THAT THE MURDER OF HAIRA KORIC WAS PREMEDITATED SUCH THAT THE ELEMENTS OF MURDER AS A CRIME AGAINST HUMANITY OR WAR CRIME WERE NOT ESTABLISHED

282. Due to limitations on word-count, this Sub-ground is withdrawn.

SUB-GROUND 5(B): THE CHAMBER ERRED IN LAW BY PERMITTING IN-COURT IDENTIFICATIONS

283. Two witnesses testified to the killing of Haira Koric: VG035 and CW2. An in-court identification was performed by VG035, who claimed to recognise Milan Lukic as the person who shot Haira Koric.⁴⁷⁶

284. The Chamber should not have permitted VG035 to identify Milan Lukic in court. Counsel for Milan Lukic objected to this procedure at the time.⁴⁷⁷ By allowing VG035 to identify Milan Lukic in court, serious prejudice resulted. It is notable that when asked if she could identify Milan Lukic in court, she asked if he could stand before identifying him.⁴⁷⁸

285. The identity of Milan Lukic as the killer of Haira Koric was disputed. The killing of Haira Koric took place on a day between 28 June and 5 July 1992.⁴⁷⁹ VG035's evidence was that the first time she ever saw Milan Lukic was on 26 June 1992, when she said that he introduced himself by name and gave his year of birth.⁴⁸⁰ She identified Milan Lukic as the man who raped her three times on 27 June 1992.⁴⁸¹

286. 

⁴⁷⁶ TJ.para.747

⁴⁷⁷ T.1688-1689

⁴⁷⁸ T.1688-1689

⁴⁷⁹ TJ.para.758

⁴⁸⁰ T.1654.1693

⁴⁸¹ TJ.para.695

██████████.⁴⁸² This description was reflected in the Interpol areest warrant.⁴⁸³ Milan Lukic has no birthmarks on his body and does not have blue eyes.⁴⁸⁴

287. The Chamber erred by permitting in-court identification. Bolstering of VG035's identification evidence should have been done by the Prosecutor through an out-of-court method which ensured the integrity of the identification.

288. At trial, VG035 testified that she was shown a photo-spread by investigators in 2001 but claimed that she did not identify Milan Lukic for fear of personal safety.⁴⁸⁵ She claimed that she had been "*waiting for this moment*" to identify Milan Lukic.⁴⁸⁶ The Chamber blindly accepted this explanation.⁴⁸⁷

289. However, VG035 had already identified Milan Lukic in her 1998 statement – in great detail – as the man who raped her and the man who killed of Haira Koric. Therefore, no reasonable Chamber could have accepted that she had "*waited*" for the right moment. The Chamber erred in accepting her failure to identify Milan Lukic in 2001.

290. In these circumstances, it is unacceptable to allow a witness to identify an accused in court. Even professional judges are not immune from the impact of a rape victim identifying an accused as the man who raped her. The Appeals Chamber is invited to halt this prejudicial practice and consider the evidence of the identity of Haira Koric's killer in the absence of VG-035's evidence. For the reasons given below, an acquittal must follow.

SUB-GROUND 5(C): THE CHAMBER ERRED IN FACT IN ITS ASSESSMENT OF IDENTIFICATION EVIDENCE

291. There is little doubt that VG-035 endured a horrific ordeal. However, for the reasons given above, it was not proved to the sufficient standard that it was Milan Lukic who

⁴⁸² 1D44.d.2

⁴⁸³ 1D237

⁴⁸⁴ 1D46

⁴⁸⁵ T.1696

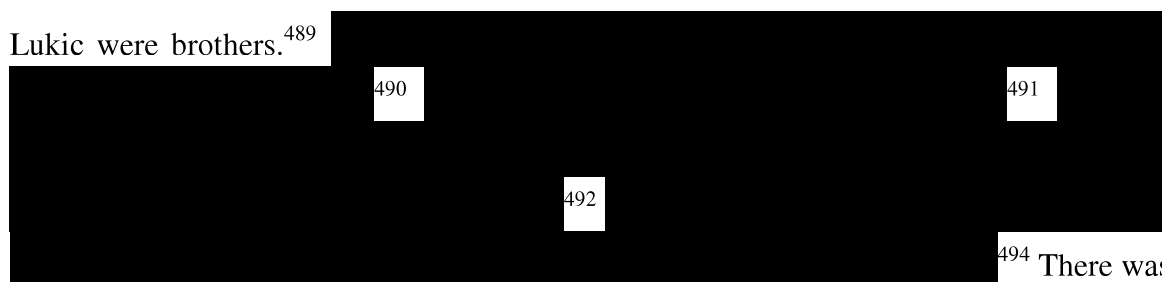
⁴⁸⁶ TJ.para.697

⁴⁸⁷ TJ para 697-755

raped her. Her purported recognition of Milan Lukic as the killer of Haira Koric is unsafe, as is Milan Lukic's conviction for that crime.

292. The only other witness to identify Milan Lukic as the killer of Haira Koric was CW2. This witness' prior knowledge of Milan Lukic was limited. Her evidence was that he had come to her house in June 1992 with other armed. In addition, she said that she was at the house where she and VG035 were staying when Milan Lukic took VG035 away and raped her.⁴⁸⁸

293. However, CW2's knowledge of Milan Lukic was sparse. She thought that he and Sredoje Lukic were brothers.⁴⁸⁹



⁴⁹⁴ There was no evidence upon which the Chamber could safely conclude that CW2 recognised Milan Lukic on the day that Haira Koric was killed.

294. No reasonable Chamber could conclude that Milan Lukic was identified as the killer of Haira Koric. His convictions should therefore be reversed.

SUB-GROUND 5(D): THE CHAMBER ERRED IN FACT IN ITS ASSESSMENT OF THE CREDIBILITY OF PROSECUTION WITNESSES AND INCONSISTENCIES BETWEEN WITNESS ACCOUNTS OF KEY EVENTS FUNDAMENTAL TO CONVICTION

295. The Chamber erred in its assessment of the credibility of the accounts given by VG-035 and CW2.

⁴⁸⁸ TJ.para.699

⁴⁸⁹ TJ.para.699

⁴⁹⁰ P336.d.29

⁴⁹¹ P336.d.30

⁴⁹² P336.d.30

⁴⁹³ P336.d.30

⁴⁹⁴ P336.d.29.T.7079-7080

296. In her first⁴⁹⁵ statement⁴⁹⁶ given in 2008, CW2 identified somebody other than Milan Lukic, as the person who shot Haira Koric.⁴⁹⁷ CW2 testified that the contents of this statement were truthful.⁴⁹⁸ The Chamber accepted CW2's explanation that she had always maintained that it was Milan Lukic who shot Haira Koric.⁴⁹⁹ No reasonable Chamber could simply discount **Exhibit 1D228** in this way: it establishes reasonable doubt as to the identity of the perpetrator, especially when considered in light of CW2's description of Milan Lukic as having blonde hair. It is a fundamental principle of this Tribunal that such doubt must be resolved in favour of an accused.

297. [REDACTED]⁵⁰⁰, there were other material inconsistencies between their accounts. VG035's evidence was that Milan Lukic was with his "group" when he ordered them to stop.⁵⁰¹ [REDACTED]
[REDACTED]⁵⁰² [REDACTED]
[REDACTED]
[REDACTED]⁵⁰³.

298. [REDACTED]
[REDACTED]⁵⁰⁴ a scene that is impossible to picture unless Haira Koric was walking backwards.

299. The Chamber *also* erred in its finding that Haira Koric died as a result of Milan Lukic's shooting, because her death was not proved beyond reasonable doubt.

300. No death certificate was tendered into evidence, her body has never been found, she is not listed in Ewa Tabeau's⁵⁰⁵ list of potential victims from various biographic sources.

⁴⁹⁵ T.7073

⁴⁹⁶ 1D228

⁴⁹⁷ 1D228.D.5

⁴⁹⁸ T.7065

⁴⁹⁹ TJ.para.751

⁵⁰⁰ T.7082

⁵⁰¹ TJ.para.744

⁵⁰² P336.D.42

⁵⁰³ 1D44.D.6

⁵⁰⁴ 1D44.D.6:TJ.para.745.fn.2419

Therefore it has not been proven beyond reasonable doubt that Haira Koric has been shot and died as a result. The Chamber relied exclusively upon unreliable testimonies of VG-032 and CW2 to prove Koric's death.

301. Inconsistencies between the number of attackers present (two as opposed to a "group") and remarkable events such as the victim attempting to hug the killer are material. Such inconsistencies undermine the credibility of the accounts of the killing and the identification of Milan Lukic as the killer.
302. For all the reasons given above, the Appeals Chamber should reverse Milan Lukic's conviction for the murder of Haira Koric and enter an acquittal.

SIXTH GROUND: INCIDENTS AT THE UZAMNICA DETENTION CAMP

SUB-GROUND 6(A): THE CHAMBER ERRED IN LAW BY PERMITTING IN-COURT IDENTIFICATIONS

303. The Chamber erred by allowing Nurko Dervisevic⁵⁰⁶ and Adem Berberovic⁵⁰⁷ to identify Milan Lukic in Courtroom despite the objections.⁵⁰⁸ Neither of these witnesses knew Milan Lukic before the war.⁵⁰⁹ The evidentiary basis for these witnesses' "recognition" was that "other detainees" told them who Milan Lukic was.⁵¹⁰ The prosecution did not call any such detainees.⁵¹¹
304. The practice of conducting in-court identifications in such circumstances is unduly prejudicial. The Chamber's findings on identification should be considered in the absence of the identification evidence of these witnesses.

SUB-GROUND 6(B): THE CHAMBER ERRED IN LAW BY FAILING TO APPLY DUE CARE TO IDENTIFICATION EVIDENCE

305. Three prosecution witnesses gave *viva voce* evidence concerning the Uzamnica Barrack Incidents: Adem Berberovic.⁵¹² Islam Kustura⁵¹³ and Nurko Dervisevic.⁵¹⁴ The evidence of a fourth witness, VG25, was admitted pursuant Rule 92 *auater* because his health did not allow him to travel.⁵¹⁵ VG025 was the only witness who had any prior knowledge of Milan Lukic.

VG025

⁵⁰⁶ T.1968-1969

⁵⁰⁷ T2520-2523

⁵⁰⁸ T.1969:T.2518.

⁵⁰⁹ TJ.paras. 802.810.

⁵¹⁰ TJ.paras. 802.811.

⁵¹¹ The prosecution's case was that between June 1992 and October 1994 around 45 men, 11 men and two children were detained in the Uzmanica camp: TJ.para. 760.

⁵¹² TJ.802-806

⁵¹³ TJ.807-809

⁵¹⁴ TJ.810-814

⁵¹⁵ TJ.par.815-818

306. The Chamber erred in law in its treatment of the evidence of VG025. This purported identification went to the acts and conduct of the accused – a factor weighing against admissibility under Rule 92 *quater*.

307. The defence objected to the admission of VG025’s evidence and requested that he testify by video link. The Chamber considered that the witness was too sick to testify by this method and that, Judge Robinson dissenting, the statements were admissible.⁵¹⁶

308. The basis for the Chamber’s reliance upon VG025’s evidence was that it was “*corroborated*” by the evidence of other witnesses. However, these were all hearsay witnesses of varying degrees. Corroboration should not be based upon such a diluted standard. The effect of the Chamber’s approach was that the defence was precluded from cross-examining **any** witness who could properly claim to “*recognise*” Milan Lukic.

309. [REDACTED]
[REDACTED]
[REDACTED]⁵¹⁷ [REDACTED]
[REDACTED]⁵¹⁸ Such inconsistency questions the extent of VG025’s prior knowledge of Milan Lukic and whether he really “*recognised*” him. The defence was unable to cross-examine VG025 on the basis for his “*recognition*”.

310. There was further evidence that VG025 did not “*recognise*” Milan Lukic. [REDACTED]
[REDACTED]⁵¹⁹
Therefore, the Chamber erred in considering that VG025 “*recognised*” Milan Lukic at all. The Chamber’s statement that it was “*mindful*” of the absence of cross-examination and the absence of VG025’s identification of Milan Lukic in photographs does not adequately address the difficulties with this witness’ evidence.⁵²⁰

⁵¹⁶ IT-98-32/1-T. *Decision on Prosecution Motion to Admit Statements Pursuant to Rule 92 Quater (VG-025)* (22.10.2008).

⁵¹⁷ P168

⁵¹⁸ P170.para.2

⁵¹⁹ 1D75.d.2

⁵²⁰ TJ.para.824.

Adem Berberovic, Islam Kustura and Nurko Dervisevic

311. The three witnesses who purported to corroborate VG025's "*recognition*" were Adem Berberovic, Islam Kustura and Nurko Dervisevic. None had any prior knowledge of Milan Lukic.⁵²¹
312. The Chamber held that it was "*reasonable to infer*", on the basis of the conditions of detention and the length of time over which they were detained together, that VG025 "*confirmed*" the other detainees' "*knowledge*" that it was Milan Lukic who beat them.⁵²² There was no evidence to this effect. Such an adverse inference should not have been drawn. Therefore, the Chamber erred by treating Berberovic and Dervisevic as "*recognition*" witnesses.
313. The Chamber further failed to direct itself to the likelihood of an accurate identification. The Chamber found that detainees were beaten inside the barracks,⁵²³ where there was no electricity.⁵²⁴ It was dark inside the hanger. The evidence showed that Dervisevic had problems with his eyesight and that he complained about not being able to see properly.⁵²⁵

SUB-GROUND 6(C): THE CHAMBER ERRED IN FACT IN ITS ASSESSMENT OF IDENTIFICATION EVIDENCE

314. The visual description of Milan Lukic by Berberovic in his statements could fit almost anyone.⁵²⁶
315. Islam Kustura had no prior knowledge of Milan Lukic. He learned the identity of Milan Lukic from an **unidentified** person in the camp.⁵²⁷ [REDACTED]

⁵²¹ T.2507-2508:T.2181:T.2508:T.1962

⁵²² TJ.para.826.

⁵²³ TJ.para.769

⁵²⁴ TJ.para.761

⁵²⁵ TJ.para.804.

⁵²⁶ P142.D.9

⁵²⁷ T.2181

████████████████████⁵²⁸ VG025, who knew Sredoje Lukic for 15 years, testified that he saw Sredoje Lukic at Uzamnica **only once**.⁵²⁹ if at all.⁵³⁰ It is therefore impossible that Kustura properly identified Milan Lukic.

316. VG025's based his "*recognition*" of Milan Lukic in part on a red Passat vehicle. However, he claims to have seen this car before the death of Behija Zukic.⁵³¹ No other witness testified about seeing Milan Lukic driving the red Passat prior to Zukic's death.

317. Therefore, combined with the errors alleged elsewhere in relation to this Ground, no reasonable Chamber could place any weight on the purported identification evidence of Milan Lukic by Dervisevic, Kustura, or Berberovic.

SUB-GROUND 6 (D): THE CHAMBER ERRED IN FACT IN ITS ASSESSMENT OF THE CREDIBILITY OF PROSECUTION'S WITNESSES AND INCONSISTENCIES IN THEIR ACCOUNTS.

318. Adem Berberovic testified that he saw Milan Lukic in the Uzamnica Camp every month of 1993.⁵³² Islam Kustura testified that Milan Lukic came to the Uzamnica Camp every other day from 1992 to summer of 1994.⁵³³ Nurko Dervisevic testified that he saw 'Milan Lukic' throughout September 1993.⁵³⁴ As outlined below, these accounts are incredible given Milan Lukic's imprisonment at these times.⁵³⁵ The Chamber erred by considering such evidence when assessing the credibility of these witnesses.

SUB-GROUND 6(E): THE CHAMBER ERRED IN LAW BY REVERSING THE BURDEN OF PROOF ON ALIBI

319. In evaluating whether the Chamber reversed the burden of proof on alibi, the Appeals Chamber should consider whether the Chamber met the standard of due care in the

⁵²⁸ T.2181:T2189

⁵²⁹ T.2003

⁵³⁰ P171.D.3.para.9

⁵³¹ T.1734-35

⁵³² T.2540

⁵³³ T.2199

⁵³⁴ T.1993

⁵³⁵ 1D238

assessment of the evidence.⁵³⁶ As argued below, the Chamber reversed the burden of proof because it failed to meet the standard of due care in its assessment of the alibi evidence.

SUB-GROUND 6(F): THE CHAMBER ERRED IN FACT WHEN HOLDING THAT MILAN LUKIC’S ALIBI WAS NOT REASONABLY POSSIBLY TRUE

320. For large portions of 1993 and 1994, Milan Lukic was detained by the Serbian Authorities. **Exhibit 1D238** records that Milan Lukic was imprisoned or detained during the following periods: from 10 March 1993 to 13 March 1993; from 27 March 1993 to 14 April 1993; 29 June 1993 to 9 October 1993; and from 15 October 1993 to 6 June 1994.⁵³⁷ The Chamber erred by holding that this documentary evidence only showed that Milan Lukic was detained “*for a few days in March 1993 and in the first half of April 1993.*”⁵³⁸
321. No reasonable Chamber would have concluded that **Exhibit 1D238** did not “*tend to show that he was not present in Uzamnica camp at the time of the beatings because it relates to different time periods.*”⁵³⁹
322. Consequently, Milan Lukic could only possibly have been at Uzamnica for a few months in 1993, but certainly not ‘every month’ as asserted.⁵⁴⁰ Berberovic testified that he saw Milan Lukic **every month** of 1993.⁵⁴¹ This is impossible.

⁵³⁶ *Zigiranvirazo* AJ, para.21

⁵³⁷ 1D238

⁵³⁸ TJ, para.829.

⁵³⁹ TJ, para.831

⁵⁴⁰ T.2540

⁵⁴¹ T.2540

SEVENTH GROUND: VARIOUS BREACHES OF THE RIGHT TO A FAIR TRIAL

SUB-GROUND 7(A): INADEQUATE TIME AND RESOURCES GIVEN

A. Lack of Time and Facilities Prior to the Commencement of Trial



323. The trial was accelerated 12 June 2008, without giving any opportunity to adequately prepare. It must be taken into account the sum of events:

- a. Trial was scheduled for 9 July 2008;
- b. OTP proposing to double the scope of the Indictment⁵⁴²;
- c. Recent re-assignment of lead counsel⁵⁴³;

324. The Chamber ignored factors as to trial preparedness of the defense, including:

- a. lack of co-counsel to assist lead counsel during trial;⁵⁴⁴
- b. lack of pre-trial preparation by previous counsel;
- c. recent appointment of lead counsel.⁵⁴⁵

325.


⁵⁴⁶ Such lack of forewarning is incredible since Alarid,⁵⁴⁷ had just been re-assigned as Lead Counsel,⁵⁴⁸ having only been involved in the case since 10 March 2008. Unredacted statements of many OTP witnesses were only made available to the defense on 1 April 2008.⁵⁴⁹ Thus, a significant amount of the Prosecution's case was unavailable until 2 months before trial.

⁵⁴² Prosecution Motion Seeking Leave to Amend the Second Amended Indictment, 16.06.2008

⁵⁴³ Registry Decision, 12.06.2008

⁵⁴⁴ Registry Decision, 04.07.2008

⁵⁴⁵ Registry Decision, 12.06.2008

⁵⁴⁶ T.15-22

⁵⁴⁷ Lead counsel at Trial

⁵⁴⁸ Registry Decision, 12.06.2008

⁵⁴⁹ Order for Extension of Time, 01.04.2008

326. Thereafter the Defense raised the difficulties/impossibilities of adequate preparation arising from the early trial date, which the Court dismissed.⁵⁵⁰

327. Intensive work that took time away from case preparation included amending a prior filing as to Alibi.⁵⁵¹ The defense was faced with re-doing their defense pre-trial brief.⁵⁵² It should be recalled that due to problems with prior counsel many of these deadlines had to be deferred and completed by Alarid AFTER 12 June 2008.⁵⁵³

328. Furthermore, in June the Prosecution sought to change its witnesses.⁵⁵⁴ Thus, less than one month before trial the Defense still did not know the entirety of the Prosecution's case.

B. Cross-Examination

329. The limits imposed upon cross-examination also infringe upon rights that Appellant is entitled to under the ICCPR(Article 6). The jurisprudence of the European Court of Human Rights affirms that cross-examination is fundamental to a fair trial.⁵⁵⁵ The ECHR has repeatedly stated that the Defense must be given "an adequate and proper opportunity to challenge and question a witness against him"⁵⁵⁶ and that Art. 6(1) is "intended above all to secure the interests of the defense and those of the proper administration of justice."⁵⁵⁷

330. In this case the Chamber imposed restrictions on cross-examination time (60% of the examination in chief).⁵⁵⁸

⁵⁵⁰ T.199

⁵⁵¹ Decision on Prosecution Motion for an Order Requiring the Accused Milan Lukic to Clarify Alibi Notice Served under Rule 67(A)(i)(a).15.05.2008

⁵⁵² Decision On Prosecution's Response And Motion For Clarification Of Defence Pre-Trial Briefs.16.05.2008

⁵⁵³ T.204-205

⁵⁵⁴ Further Decision on Prosecution's Motion to Amend Rule 65 ter Witness List and Related Submissions.19.06.2008

⁵⁵⁵ *Saidi v. France*.17 EHRR 251 [1994]. para 44 (ECHR); *Van Mechelen v. Netherlands*.25 EHRR 647 [1998] (ECHR).para 51

⁵⁵⁶ *Krasniki v. Czech Republic*.[2006] EHRR 51277/99.para.33 (ECHR); *Kostovski v. Netherlands*. [1991] EHRR 434.para.41 (ECHR)

⁵⁵⁷ *Acquaviva v. France*.[1995] EHRR 48.para.66 (ECHR)

⁵⁵⁸ T.199-203;2287-2379;3310-3356;3357-3375

331. Prosecution witnesses gave multiple written statements, including many inconsistencies, and contradictions for cross-examination purposes. Some of the witnesses that had multiple statements included: VG42(4)⁵⁵⁹; VG14(3)⁵⁶⁰; VG38(5)⁵⁶¹; VG13(6)⁵⁶²; VG63(6)⁵⁶³; VG16(4)⁵⁶⁴; ██████████⁵⁶⁵; VG24(6)⁵⁶⁶; ██████████⁵⁶⁷; VG131(3)⁵⁶⁸; VG94(3)⁵⁶⁹; VG79(3)⁵⁷⁰; VG11/Spahic(5)⁵⁷¹; VG97(2)⁵⁷²; VG115(3)⁵⁷³; VG104(4)⁵⁷⁴; VG32(2)⁵⁷⁵; VG84(5)⁵⁷⁶; VG18(2)⁵⁷⁷; VG78(4)⁵⁷⁸; VG101(2)⁵⁷⁹; VG58(4)⁵⁸⁰; VG89(2)⁵⁸¹; VG82(2)⁵⁸²; VG119(4)⁵⁸³; VG17(2)⁵⁸⁴; VG64(2)⁵⁸⁵; Amor Masovic(5)⁵⁸⁶; VG141(4)⁵⁸⁷; CW2(2)⁵⁸⁸; VG47(2)⁵⁸⁹; VG61(3)⁵⁹⁰; Nurko Dervisevic(2)⁵⁹¹; VG136(2)⁵⁹²

⁵⁵⁹ 1D67.1D66.1D68.1D69
⁵⁶⁰ 1D1.1D76.P5
⁵⁶¹ 2D4.1D26.1D27.P44.P45
⁵⁶² 2D6.2D8.2D9.1D29.P60. P62
⁵⁶³ 2D12.2D14.2D11.2D13.1D49:1D51
⁵⁶⁴ 2D15.2D16.2D17.2D18
⁵⁶⁵ 2D20.1D61.P142
⁵⁶⁶ 2D34.2D35.1D79.1D80.1D81
⁵⁶⁷ 2D36.2D38.2D39.1D83.P66.P139
⁵⁶⁸ 2D40.1D88.1D89
⁵⁶⁹ 2D69.1D227.P335
⁵⁷⁰ 1D2.P7.P8
⁵⁷¹ 1D6.1D7.P19.P20.P21
⁵⁷² 1D8.P28
⁵⁷³ 1D18.1D19.1D21
⁵⁷⁴ 1D23.1D24.P34.P35
⁵⁷⁵ 1D30.1D31
⁵⁷⁶ 1D32.P72.P73.P74.P82
⁵⁷⁷ 1D33.1D34
⁵⁷⁸ 1D35.P88.P89.P92
⁵⁷⁹ 1D36.1D37
⁵⁸⁰ 1D40.1D41.1D42.1D43
⁵⁸¹ 1D47.1D48
⁵⁸² 1D52.P116
⁵⁸³ 1D57.1D58.1D59.1D60
⁵⁸⁴ 1D63.1D64
⁵⁸⁵ 1D70.P159
⁵⁸⁶ 1D77.P172.P173.P179.P183
⁵⁸⁷ 1D224.1.1D224.2.1D224.3.1D224.4
⁵⁸⁸ 1D228.P336
⁵⁸⁹ P23.P24
⁵⁹⁰ P36.P37.P38
⁵⁹¹ P111.P112
⁵⁹² P331.P330

C. Inadequate time to prepare defense case

332. Due to staffing issues of the defense, the preparation of the defense case-in-chief was severely hampered. With the ongoing trial the presence of both lead and co-counsel was required in The Hague. As such, at the end of the Prosecution's case-in-chief, the defense counsels had not had an opportunity to meet with potential witnesses.

333. On 13 November 2008 the Defense sought a 6 week pause, after the Prosecution case, to perform the necessary preparations for the defense case.⁵⁹³

334. The Chamber denied the same, holding Rule 65ter filings due 19 November 2008 (one day after the ruling), and setting 1 December 2008 as the start date.⁵⁹⁴ The list contained 124 names, predominately due to the fact that it was unknown if many witnesses could be located or even if they would be willing to testify.⁵⁹⁵

D. Limitation on witnesses the defense could call

335. The Chamber ordered that the Defense could call 45 witnesses for a total of 60 hours.⁵⁹⁶

336. Among the other 124 were witnesses who gave statements to the OTP and thus were being solely called to confirm same, and records custodians. OTP investigators and translators were included solely to address witness statements changed at proofing. The Defense therefore filed a request seeking to exclude the above from the 45 witness limit.⁵⁹⁷

337. Specifically the following witnesses were the subject of the motion:

- a. VG-55;VG-59;VG-31;VG-10;VG-26;VG-60;Jasmin Odobasic (OTP uncalled witnesses).

⁵⁹³ Milan Lukić's Motion For Extension Of Time To Prepare The Defence Case-In-Chief.13.11.2008

⁵⁹⁴ Decision on Milan Lukic's Motion for extension of time to prepare the defense case in chief.18.11.2008

⁵⁹⁵ Milan Lukic's Submissions Pursuant to 65 Ter (G).19.11.2008

⁵⁹⁶ Order Pursuant To Rule 73 Ter Of The Rules Of Procedure And Evidence.26.11.2008

⁵⁹⁷ Milan Lukic's Motion to Exclude Custodial and Statement Witnesses from Total Witnesses allotted.1.12.2008

- b. 11 OTP Investigators/Interpreters.
- c. Slavko Sandev (#65); Diordje Mrsevic (#66); Visegrad (#96); Mokra Gora (#73)
(record custodians)

338. [REDACTED]
[REDACTED]⁵⁹⁸ [REDACTED]⁵⁹⁹ However, the Chamber denied this motion.⁶⁰⁰

339. A motion to compel disclosure of contact information for OTP uncalled witnesses was filed 1 December 2009.⁶⁰¹ The Chamber only granted the Motion, 30 March 2009, a full 4 months after the defense filed their motion.⁶⁰² The decision recognized the significance of this disclosure stating:

The Chamber considers that the Defence's forensic purpose in seeking to contact the persons is evident and that any information they may provide to the Defence is likely to be of relevance to the Defence case.⁶⁰³

340. With the late date of the information being given, it was impossible, given the upcoming end date of trial and the time required to locate and process witness travel, to make use of the compelled information to present these witnesses.

341. The delay by the Chamber in compelling this information for 4 months constitutes discernible error that severely prejudiced Appellant.

342. In another instance, the Defense, became aware that persons who were listed as victims were alive. The defense sought, a stay in proceedings to conduct further investigations.⁶⁰⁴ That request was denied. Nevertheless, the defense was able to locate

⁵⁹⁸ T.1717-1718:T.3193-3195.

⁵⁹⁹ T.3193-3194:T. 3338

⁶⁰⁰ Decision on Motions Relating to Milan Lukic Updated Witness List"4.12.2008

⁶⁰¹ Milan Lukić's motion to compel disclosure of contact information.1.12.2008

⁶⁰² Decision On Milan Lukić's Motion To Compel Disclosure Of Contact Information And On The Prosecution's Urgent Motion To Compel Production Of Contact Information.30.03.2009

⁶⁰³ *Ibid* at para.24

⁶⁰⁴ Milan Lukic's Notice of Verification of Alleged Victim Survivors and Application for Stay of Proceedings with A-H.09.03.2009

CW1, a person alleged to have perished in Pionirska, who testified as to persons who were erroneously on the victim list. All told, 17 alleged victims of Pionirska were called into serious question by CW1⁶⁰⁵:

Alleged Victim	Transcript
5.Hasena LNU	Tr. 5561/13-22
15.Aner Kurspahic	Tr.5564/16-23
23.Hairija Kurspahic	Tr.5565/24-5566/10
26.Hasan Kurspahic	Tr.5566/21-5567/19
27.Hasiba Kurspahic	Tr.5568/15-5569/1
28.Hasnija Kurspahic	Tr.5569/6-12
34.Izeta Kurspahic	Tr.5569/25-5570/2
35.Kada Kurspahic	Tr.5570/3-13
36.Latifa Kurspahic	Tr.5570/14-15
37.Leila Kurspahic	Tr. 5570/19-20
38.Maida Kurspahic	Tr. 5570/24-5571/10
42.Meva Kurspahic	Tr. 5571/22-5572/6
43.Mina Kurspahic	Tr.5572/14-21
47.Munira Kurspahic	Tr.5573/7-9
55.Saha Kurspahic	Tr.5574/9-11
57.Seila Kurspahic	Tr.5574/15-22
66.Haraha Sehic	Tr.5576/23-24

343. The Court erred by not attributing more weight/significance to the foregoing.

344. The Defense sought to recall OTP witnesses as to Pionirska.⁶⁰⁶ The Chamber allowed the recall of only VG61(Huso Kurspahic).⁶⁰⁷ The information provided by the defense investigations, the testimony of CW1 and the corrections of Huso Kurspahic were not known nor available at the time these OTP witnesses originally testified. By not allowing the defense to confront these witnesses, and then positively relying on these same witnesses to convict the Appellant the Chamber erred.

⁶⁰⁵ Defense Submission As To Testimony Of Witness CW1 Calling Into Question Alleged Victims From Pionirska Street Charges In The Indictment.24.03.2009

⁶⁰⁶ Milan Lukić's Amended Fourth Defence Motion To Amend Its Rule 65ter Witness List 24 March 2009

⁶⁰⁷ T.6972-6973

E. Prior counsel did no Preparatory Work

345. Since 6 April 2006 through the commencement of trial Lukic had been assigned 3 different attorneys, two of whom cut off communication with Appellant before adequate replacement.⁶⁰⁸

346. The first, assigned 6 April 2006, was only preparing the case for four months before Appellant requested new counsel.⁶⁰⁹ His work was almost exclusively focused on defending the Rule 11 bis application.

347. After over a year of Lukic having no effective communications with counsel, Second counsel was assigned on 5 December 2007.⁶¹⁰

348. On 4 July 2008 the withdrawal of second counsel was granted by the Registry.⁶¹¹ Second counsel neither facilitated preparation for trial, nor was in a place to assist with the trial on 9 July 2008.

349. In *Krajinik* the Appeals Chamber in rejecting the arguments of ineffective assistance of counsel stressed that:

The Appeals Chamber accepts that the work product handed over from Counsel Brashich to Counsel Stewart was not in as good a state as it should have been. Nonetheless, the new Defence team benefited from some of the work done by the Brashich team, in particular the pre-trial brief. Moreover, the Chamber and the Registrar were aware of the situation, and addressed it by adjusting the pace of trial and allotting the new Defence team substantial legal-aid time for pre-trial preparation.⁶¹²

350. However, in contrast, first counsel did not provide a pre-trial brief, and the filings made by the second had to be considerably amended/re-filed, including the pre-trial brief, after being ruled insufficient by the Chamber. Although aware of the problem with prior counsel, the Chamber and Registry did not adjust the pace of trial nor allot substantial legal-aid time for pre-trial preparation.

⁶⁰⁸ Registry Decision.12.06.2008

⁶⁰⁹ *Ibid.*, Milan Lukic Letters to the Chamber filed 10.08.2007, 29.08.2007

⁶¹⁰ Registry Decision.5.12.2007

⁶¹¹ Registry Decision.4.06.2008

⁶¹² *Krajinik* AJ.para.47

351. A new co-counsel for the defense was not available until 23 October 2008.⁶¹³ and only conducted cross-examination of one witness⁶¹⁴.

352. The foregoing errors give cause for Appellant to be granted a new and fair trial.

SUB-GROUND 7(B): THE PROSECUTION REPEATEDLY BREACHED ITS DISCLOSURE OBLIGATIONS

(withdrawn)

SUB-GROUND 7(C): INAPPROPRIATE CONDITIONS WERE PLACED UPON THE PRESENTATION OF DEFENCE EVIDENCE. THE DEFENCE WAS PRECLUDED FROM INTRODUCING EVIDENCE CONTRADICTING THE ACCOUNTS GIVEN BY PROSECUTION WITNESSES.

353. During the Prosecution's case-in-chief, the defense was not permitted to utilize OTP witness statements to confront witnesses during cross-examination. Specifically, uncalled OTP witnesses (usually close family members of witnesses) gave conflicting often exculpatory statements. By way of example, a summary of some of the said statements is as follows:

- a. VG31 – identifies a Tanaskovic and Trifkovic as responsible potentially for 2 of the scheduled victims who were not seen again.⁶¹⁵
- b. VG59 – expressly disavows his prior statement that “Milan Lukic” arrested him, saving expressly it was not Milan Lukic.⁶¹⁶ His wife (VG64) testified Milan Lukic arrested her husband, the same Milan Lukic she identified for the remainder of her testimony.
- c. Persons giving differing accounts of Milan Lukic's appearance contradicting OTP witnesses

⁶¹³ Registry Decision, 23.10.2008

⁶¹⁴ Amor Masovic

⁶¹⁵ Milan Lukic's Submissions Pursuant to 65 Ter (G), 19.11.2008, Document #10

⁶¹⁶ *Ibid.* documents #29-31

354. In almost every instance, the efforts of the defense to utilize the statements in cross-examination were denied, with the caveat that the defense would have to call the person in their own case-in-chief.⁶¹⁷

355. However, during the defense case-in-chief, the defense was prevented from calling these persons by way of the prosecution's continuing refusal to give the contact information for these former OTP witnesses to the defense, and the delay on the part of the Chamber to issue a ruling compelling the same, until just days before the end of the trial.

SUB-GROUND 7(D): THE CHAMBER FAILED TO ADDRESS UNDUE INFLUENCE OF WITNESSES BY THIRD PARTIES.

356. [REDACTED]⁶¹⁸ [REDACTED]
[REDACTED]⁶¹⁹ [REDACTED]
[REDACTED]
[REDACTED]

357. [REDACTED]⁶²⁰ [REDACTED]
[REDACTED]⁶²¹ [REDACTED]:

- a. [REDACTED]⁶²²
- b. [REDACTED]⁶²³
- c. [REDACTED]
[REDACTED]⁶²⁴

⁶¹⁷ T.2902-2903:T.6511-6512

⁶¹⁸ [REDACTED]

⁶¹⁹ [REDACTED]

⁶²⁰ [REDACTED]

⁶²¹ [REDACTED]

⁶²² [REDACTED]

⁶²³ [REDACTED]

⁶²⁴ [REDACTED]

d. [REDACTED] 625

358. [REDACTED] 626 [REDACTED] 627

359. [REDACTED] 628 [REDACTED] 629

360. [REDACTED] 630 [REDACTED] 631

361. [REDACTED] 632 [REDACTED] 633 [REDACTED] 634 [REDACTED] 635 [REDACTED] 636 [REDACTED] 637 [REDACTED] 638 [REDACTED] 639 [REDACTED] 640 [REDACTED] 641 [REDACTED] 642

625 [REDACTED]
626 [REDACTED]
627 [REDACTED]
628 [REDACTED]
629 [REDACTED]
630 [REDACTED]
631 [REDACTED]
632 [REDACTED]
633 [REDACTED]
634 [REDACTED]
635 [REDACTED]
636 [REDACTED]
637 [REDACTED]
638 [REDACTED]
639 [REDACTED]
640 [REDACTED]
641 [REDACTED]
642 [REDACTED]

362. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 643

363. [REDACTED]

[REDACTED] 644 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 645

b. [REDACTED]

[REDACTED] 646

c. [REDACTED]

[REDACTED] 647

d. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 648

643 [REDACTED]

644 [REDACTED]

[REDACTED]

645 [REDACTED]

646 [REDACTED]

647 [REDACTED]

648 [REDACTED]

364. [REDACTED]

365. [REDACTED]
[REDACTED]
[REDACTED]

a. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] 650

b [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] 651

366. [REDACTED]
[REDACTED] 652 [REDACTED]

649 [REDACTED]
650 [REDACTED]
651 [REDACTED]
652 [REDACTED]

[REDACTED] 653 [REDACTED]
[REDACTED] 654

367. [REDACTED]
[REDACTED]
[REDACTED] 655 [REDACTED]
[REDACTED]
[REDACTED]

368. [REDACTED] 656
[REDACTED]
[REDACTED]
[REDACTED]

369. [REDACTED] 657 [REDACTED]
[REDACTED]

370. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- a. [REDACTED] 658 [REDACTED]
[REDACTED] 659)
- b. [REDACTED] 660, [REDACTED] 661)
- c. [REDACTED] 662)

653 [REDACTED]
 654 [REDACTED]
 655 [REDACTED]
 [REDACTED]
 656 [REDACTED]
 657 [REDACTED]
 658 [REDACTED]
 658 [REDACTED]
 659 [REDACTED]
 660 [REDACTED]
 661 [REDACTED]

- d. [REDACTED] 663)
 - e. [REDACTED] 664 [REDACTED]
[REDACTED] 665)
 - f. [REDACTED] 666. “ [REDACTED]
[REDACTED] 667)
 - g. [REDACTED]
[REDACTED] 668)
 - h. [REDACTED] 669)
 - i. [REDACTED] 670)
371. [REDACTED]

662 [REDACTED]
 663 [REDACTED]
 664 [REDACTED]
 665 [REDACTED]
 666 [REDACTED]
 667 [REDACTED]
 668 [REDACTED]
 669 [REDACTED]
 670 [REDACTED]

EIGHTH GROUND: SENTENCING

SUB-GROUND 8(A): FAILURE TO TAKE ACCOUNT OF POSITION AND AGE OF MILAN LUKIC AS A MITIGATING FACTOR

372. The Chamber erred in failing to give weight to mitigating factors and failed to apply the principle of proportionality. Personal circumstances of an accused and factual backdrop of a particular case ought to be taken into account in sentencing as “there are certain features of [Appellant’s] case that must be taken into account in his favour when deciding upon the measure of sentence to be imposed upon him.”⁶⁷¹

373. The jurisprudence has recognized that the “harsh environment” of the armed conflict must be considered and weighed in the sentence.⁶⁷² Such an approach recognizes people are forced to act/react in extreme circumstances, in a climate of fear and uncertainty. It is artificial and unjust to exclude this entirely from consideration in arriving at an appropriate sentence. The critical elements to be considered are the manner in which Appellant was involuntarily thrust into a very chaotic war, and his very young age and status as a reserve policeman.

374. Milan Lukić was a hardworking and gainfully employed 25 year-old who worked in Switzerland and Germany and lived in Belgrade.⁶⁷³ He saved up and purchased an apartment in Belgrade before the war.⁶⁷⁴

375. Zeliko Markovic described him as a paragon of gentlemen-like behavior, who used to sell drinks and food at the bus station to earn money.⁶⁷⁵ Prior to the war he never showed any traces of intolerance towards persons of different ethnic groups.⁶⁷⁶

⁶⁷¹ *Delalic*, T.J. para. 1283

⁶⁷² *Delalic*, T.J. para. 1283

⁶⁷³ T.3844-3845; T.4087-4089; 1D203, p.8.11

⁶⁷⁴ 1D239

⁶⁷⁵ T.3844-3845.

⁶⁷⁶ T.3845.

376. It must be recalled that after the hostilities had erupted in Višegrad, Lukić returned from Switzerland, and told Markovic that he needed to go to Višegrad to check on his ailing mother and evacuate her out to Belgrade.⁶⁷⁷

377. That Appellant intended to return to Belgrade with his mother via rental car is demonstrated by the fact that he put down a deposit of 1000 Swiss francs, which was a great wealth in 1992.⁶⁷⁸

378. At a checkpoint the Police instructed Appellant he had to register/report to the Višegrad Police Station.⁶⁷⁹ After being in the Police Station Appellant came out dressed in a police uniform.⁶⁸⁰ Markovic testified that Lukic had been mobilized into the reserve force of the Police⁶⁸¹ Dr. Hough describes the manner in which Appellant was involuntarily tricked into the Police and was inexperienced.⁶⁸²

379. Markovic testified that Appellant was upset over these developments,⁶⁸³ and exclaimed he should have stayed in Switzerland.⁶⁸⁴ This was not considered by the Chamber.

380. As to his character/reputation, Appellant was kind towards people regardless of nationality.⁶⁸⁵ He was said not to distinguish between people based on their ethnicity.⁶⁸⁶ [REDACTED] ⁶⁸⁷ that Lukić behaved well

⁶⁷⁷ T.3846-3849.

⁶⁷⁸ T.3851-3852.

⁶⁷⁹ T.3853.

⁶⁸⁰ T.3855.

⁶⁸¹ T.3855.

⁶⁸² 1D203, D.12-18.21-23

⁶⁸³ T.3855-3856.

⁶⁸⁴ T.3858.

⁶⁸⁵ T.3951.

⁶⁸⁶ T.3951.

⁶⁸⁷ T.4486.

towards everyone.⁶⁸⁸ he never engaged in fights or quarrels and was a positive, upbeat person.⁶⁸⁹

381. There was evidence presented of his efforts, even during the war, to assist persons inclusive of ethnic Muslims.⁶⁹⁰

382. In *Erdemovic*, the Chamber accepted as mitigating the young age (23 years) of Erdemovic, as well as his low rank.⁶⁹¹ A similar analysis ought to have been employed here.

SUB-GROUND 8(B): FAILURE TO CONSIDER THE CLOSING REMARKS OF MILAN LUKIC

(withdrawn)

SUB-GROUND 8(C): FAILURE TO CONSIDER GOOD CHARACTER AND PERSONAL CIRCUMSTANCES OF MILAN LUKIC

383. The judgment discounts entirely the personal circumstances of Appellant.⁶⁹² Likewise the Chamber failed to take into account the lack of a criminal record as a mitigating factor. Other cases have focused on prior positive conduct/good character.⁶⁹³ Thus the same should have been considered and a reduction of the sentence should have been imposed.

384. The Defense presented some factors identified above in Sub-ground 8(a), and also including:

- a. Prior to the conflict, Milan Lukić was a hard-working, law-abiding and productive citizen.
- b. Appellant did not have any criminal record before the chaos and war that erupted in Višegrad in 1992.⁶⁹⁴

⁶⁸⁸ T.4499.

⁶⁸⁹ T.4499.

⁶⁹⁰ T.3954-3955;T.3957-3959;T.3965-3966;T.4190;T4326-4328.

⁶⁹¹ *Erdemovic*.TJ.para.92-95

⁶⁹² TJ.para.1076

⁶⁹³ *Krnjelac*.TJ.para.519; *Kupreskic*. AJ.para.459

⁶⁹⁴ 1D234

c. The Analysis of Dr. George Hough, discussed herein below.

SUB-GROUND 8(D): FAILURE TO CONSIDER EXPERT EVIDENCE RELEVANT TO SENTENCING

385. Although the judgment asserts that the Psychological analysis of Dr. Hough was taken into account⁶⁹⁵ the imposition of a life sentence indicates otherwise. This is particularly true in that the Chamber's discussion fails to make note of a bulk of Hough's findings.⁶⁹⁶

386. Dr. Hough's evidence⁶⁹⁷ is relevant to consider Appellant's his *mens rea* and/or his ability to stand up to persons who were in a power position over him.⁶⁹⁸ both in terms of the positions that they held during the war.⁶⁹⁹ and the positions of trust they had held earlier⁷⁰⁰.

387. Hough concluded a relatively tranquil life before the war, and then the war period, when everything changed for Appellant.⁷⁰¹ Lukić's induction into the war was slow, first being shocked by the media reports on television while he was still in Switzerland.⁷⁰² Lukić gave donations to refugee causes, irrespective of the group.⁷⁰³ Hough confirmed that an old school professor was in charge of the Police, and he pressed Lukic into service.⁷⁰⁴ Hough reported that Appellant did not seem to catch on to the seriousness of the situation until later.⁷⁰⁵ According to Hough, Lukić's induction into the war was passive "going along with the flow", forced mobilization doing police work without training.⁷⁰⁶

⁶⁹⁵ TJ.para.1074-1075

⁶⁹⁶ TJ.para.1074

⁶⁹⁷ 1D203

⁶⁹⁸ Branimir Savovic&Risto Perisic

⁶⁹⁹ Chief of Police and President of the Crisis Staff.

⁷⁰⁰ Both were his teachers in school.

⁷⁰¹ T.6299-6300.

⁷⁰² T.6300

⁷⁰³ T.6300

⁷⁰⁴ T.6300-6301

⁷⁰⁵ T.6301

⁷⁰⁶ T.6301-6302.

388. Appellant's role as a policeman was low level, essentially acting on lists generated by superiors of "extremists" to be rounded up for interrogations: Lukić always introduced himself because he viewed himself as a professional policeman.⁷⁰⁷ The error of the Chamber in this regard is evident in that it expressed that no such evidence was led.⁷⁰⁸

389. Hough described that the psychological testing showed Lukic to be a man of average intelligence.⁷⁰⁹ Appellant is more a follower than a leader, a man in the undistinguished middle.⁷¹⁰ Appellant according to Hough, is a man who's quite obedient to authority.⁷¹¹ This analysis was not part of the Judgment.

⁷⁰⁷ T.6304-6305

⁷⁰⁸ TJ.para.1075

⁷⁰⁹ T.6313

⁷¹⁰ T.6314-6315

⁷¹¹ T.6319

OVERALL RELIEF SOUGHT

1. For all of the foregoing reasons, Milan Lukic respectfully requests that the Appeals Chamber reverse the Trial Judgment and enter a verdict of NOT GUILTY in respect of all counts.
2. Further and alternatively, if the Appeals Chamber considers that any of the verdicts recorded against Milan Lukic should stand, the sentence should be reduced because, when sentencing, the Trial Chamber committed discernible errors as set out above.

Word Count: 29.891

Dated this 17th day of December 2009
At The Hague

RESPECTFULLY SUBMITTED.

Tomislav Visnic



Dragan Ivetic



Counsels for Milan Lukic