



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of the  
Former Yugoslavia since 1991

Case No. IT-98-32/1-A  
Date: 4 December 2012  
Original: English

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**IN THE APPEALS CHAMBER**

**Before:** Judge Mehmet Güney, Presiding  
Judge Carmel Agius  
Judge Fausto Pocar  
Judge Liu Daqun  
Judge Howard Morrison

**Registrar:** Mr. John Hocking

**Judgement of:** 4 December 2012

**PROSECUTOR**

**v.**

**MILAN LUKIĆ  
SREDOJE LUKIĆ**

***PUBLIC***

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**JUDGEMENT**

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**The Office of the Prosecutor:**

Mr. Peter Kremer, QC  
Ms. Virginie Monchy  
Mr. Matthias Schuster  
Mr. Matthew Gillett

**Counsel for Milan Lukić:**

Mr. Tomislav Višnjić  
Mr. Dragan Ivetić

**Counsel for Sredoje Lukić:**

Mr. Đuro Čepić  
Mr. Jens Dieckmann  
Prof. G.G.J. Knoops, as Legal Consultant

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## I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Appeals Chamber” and “Tribunal”, respectively) is seised of appeals filed by Milan Lukić, Sredoje Lukić, and the Office of the Prosecutor (“Prosecution”) against the “Judgement” rendered on 20 July 2009 by Trial Chamber III (“Trial Chamber”) in the case of *Prosecutor v. Milan Lukić and Sredoje Lukić* (“Trial Judgement”).<sup>1</sup>

### A. Background

2. Milan Lukić was born on 6 September 1967 in Foča and grew up near Višegrad town in eastern Bosnia.<sup>2</sup> For a period in 1992, he lived in Šeganje, an area of Višegrad town.<sup>3</sup> Sredoje Lukić was born on 5 April 1961 in Rujište.<sup>4</sup> For much of the pre-war period, he worked as a police officer in the traffic section of the Višegrad Public Security Station.<sup>5</sup> In the beginning of April 1992, he left the Višegrad police<sup>6</sup> but returned to work as a police officer in Višegrad around May 1992 and was listed as a member of the police on “war assignments” from 4 August 1992 until 20 January 1993.<sup>7</sup>

3. The allegations against Milan Lukić and Sredoje Lukić (collectively, “Appellants”) relate to incidents that occurred between 1992 and 1994 in eastern Bosnia.<sup>8</sup> The Trial Chamber made the following findings:

- On 7 June 1992, Milan Lukić, Mitar Vasiljević (“Vasiljević”), and two soldiers lined up seven Muslim civilian men along the Drina River and shot at them. Five men were killed and two survived (“Drina River Incident”).<sup>9</sup>

- On or about 10 June 1992, Milan Lukić selected seven Muslim men from the Varda Factory in Višegrad, and shot and killed them on the bank of the Drina River (“Varda Factory Incident”).<sup>10</sup>

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<sup>1</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Judgement, 20 July 2009.

<sup>2</sup> Trial Judgement, paras 1-2.

<sup>3</sup> Trial Judgement, para. 3.

<sup>4</sup> Trial Judgement, para. 4.

<sup>5</sup> Trial Judgement, para. 5.

<sup>6</sup> Trial Judgement, para. 7.

<sup>7</sup> Trial Judgement, para. 8.

<sup>8</sup> See *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Second Amended Indictment, 27 February 2006 (“Indictment”), pp. 2-6.

<sup>9</sup> Trial Judgement, paras 200, 230, 906-907, 911, 963-966.

<sup>10</sup> Trial Judgement, paras 329, 913-914, 1004.



- On 14 June 1992, Milan Lukić and Sredoje Lukić were among a group of armed men present at a house on Pionirska Street in Višegrad town (“Memić House”) where a group of at least 66 Muslim civilians from Koritnik and Sase villages (“Koritnik Group”) was held.<sup>11</sup> The Koritnik Group was robbed and subjected to other criminal acts.<sup>12</sup> The members of the group were subsequently transferred by Milan Lukić, Sredoje Lukić, and the group of armed men to a second house on Pionirska Street (“Transfer” and “Omeragić House”, respectively) where they were locked inside.<sup>13</sup> Milan Lukić and other armed men then set fire to the Omeragić House and shot at individuals who tried to escape, killing 59 people (“Pionirska Street Incident”).<sup>14</sup> Sredoje Lukić was not found to have participated in setting the Omeragić House on fire.<sup>15</sup>

- On or about 27 June 1992, Milan Lukić and a group of armed men forced approximately 60 Muslim civilians into the house of Meho Aljić in Bikavac (“Aljić House”) and set the house on fire, killing at least 60 people and seriously injuring the sole survivor (“Bikavac Incident”).<sup>16</sup>

- On a day between 28 June 1992 and 5 July 1992, Milan Lukić singled out Hajra Korić, a Muslim civilian, from a group of women in Potok, a settlement of Višegrad, and killed her with two shots.<sup>17</sup>

- On numerous occasions between 1992 and 1993, Milan Lukić and Sredoje Lukić beat Muslim men detained at the Uzamnica camp (“Uzamnica Camp”), inflicting serious injuries on many of the detainees.<sup>18</sup>

4. The Trial Chamber found Milan Lukić guilty pursuant to Article 7(1) of the Statute of the Tribunal (“Statute”) of violations of the laws or customs of war under Article 3 of the Statute for committing murder<sup>19</sup> and cruel treatment.<sup>20</sup> Milan Lukić was also convicted of crimes against humanity under Article 5 of the Statute for committing persecutions,<sup>21</sup> murder,<sup>22</sup> extermination,<sup>23</sup>

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<sup>11</sup> Trial Judgement, paras 631, 637, 917, 930, 1008-1009, 1028, 1030-1031.

<sup>12</sup> Trial Judgement, paras 592-593, 596, 631, 637, 969.

<sup>13</sup> Trial Judgement, paras 569, 606-607, 612, 631, 637.

<sup>14</sup> Trial Judgement, paras 569, 612-613, 631, 916-918, 929, 933, 946, 1010-1011.

<sup>15</sup> Trial Judgement, paras 613, 637, 930, 1034.

<sup>16</sup> Trial Judgement, paras 703, 709, 715, 731, 973-974, 1017.

<sup>17</sup> Trial Judgement, paras 754, 758, 925, 1022.

<sup>18</sup> Trial Judgement, paras 821, 833, 841, 978, 990.

<sup>19</sup> Trial Judgement, paras 911, 914, 919, 923, 927, 1099.

<sup>20</sup> Trial Judgement, paras 966, 971, 976, 981, 1099.

<sup>21</sup> Trial Judgement, paras 1026, 1099.

<sup>22</sup> Trial Judgement, paras 911, 914, 919, 923, 927, 1099.

<sup>23</sup> Trial Judgement, paras 947, 951, 1100. Judge Van den Wyngaert dissented with regard to Counts 8 and 13 (Trial Judgement, para. 1100).

and other inhumane acts.<sup>24</sup> The Trial Chamber sentenced Milan Lukić to a term of life imprisonment.<sup>25</sup>

5. The Trial Chamber found Sredoje Lukić guilty pursuant to Article 7(1) of the Statute of violations of the laws or customs of war under Article 3 of the Statute for committing cruel treatment,<sup>26</sup> and aiding and abetting murder<sup>27</sup> and cruel treatment.<sup>28</sup> Sredoje Lukić was also convicted of crimes against humanity under Article 5 of the Statute for committing other inhumane acts,<sup>29</sup> and for aiding and abetting persecutions,<sup>30</sup> murder,<sup>31</sup> and other inhumane acts.<sup>32</sup> Sredoje Lukić was acquitted of all remaining counts.<sup>33</sup> The Trial Chamber sentenced him to a term of 30 years' imprisonment.<sup>34</sup>

## **B. The Appeals**

6. Milan Lukić sets forth eight grounds of appeal against the Trial Judgement, seeking an acquittal on all counts. In the alternative, he argues that his sentence should be reduced.<sup>35</sup>

7. Sredoje Lukić presents 15 grounds of appeal against the Trial Judgement, seeking an acquittal on all counts or, in the alternative, a reduction in sentence.<sup>36</sup>

8. The Prosecution raises two grounds of appeal. It submits that the Trial Chamber erred in failing to convict Sredoje Lukić for aiding and abetting extermination under Article 5(b) of the Statute with respect to the Pionirska Street Incident, and for committing persecutions under Article 5(h) of the Statute in relation to the beatings at the Uzamnica Camp, despite having made

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<sup>24</sup> Trial Judgement, paras 966, 971, 976, 981, 1099.

<sup>25</sup> Trial Judgement, para. 1101.

<sup>26</sup> Trial Judgement, paras 991, 1104.

<sup>27</sup> Trial Judgement, paras 934, 1105.

<sup>28</sup> Trial Judgement, paras 986, 1104.

<sup>29</sup> Trial Judgement, paras 991, 1104.

<sup>30</sup> Trial Judgement, paras 1040, 1104.

<sup>31</sup> Trial Judgement, paras 934, 1105. Judge Robinson dissented with regard to Counts 9 and 10 (Trial Judgement, para. 1105).

<sup>32</sup> Trial Judgement, paras 985-986, 1104. The Appeals Chamber notes that paragraph 985 of the Trial Judgement suggests that Judge Robinson dissented with regard to the finding that Sredoje Lukić aided and abetted the commission of cruel treatment as a violation of the laws or customs of war and other inhumane acts as a crime against humanity during the Pionirska Street Incident. By contrast, no mention of such dissent is included in the disposition. Moreover, the separate opinion of Judge Robinson only expresses his dissent with respect to murder and persecutions. Thus, the Appeals Chamber considers the dissent mentioned in paragraph 985 of the Trial Judgement to be an editorial oversight and finds the disposition to be authoritative.

<sup>33</sup> Trial Judgement, paras 936, 953, 955, 988, 1103. Judge David dissented with regard to Counts 8, 13-17 (Trial Judgement, para. 1103).

<sup>34</sup> Trial Judgement, para. 1106.

<sup>35</sup> Milan Lukic's [*sic*] Appeal Brief, 17 December 2009 (confidential) ("Milan Lukić Appeal Brief"), p. 112, paras 1-2.

<sup>36</sup> Appeal Brief on Behalf of Sredoje Lukić, 2 November 2009 (confidential) ("Sredoje Lukić Appeal Brief"), para. 342.

the necessary findings for these convictions.<sup>37</sup> The Prosecution requests that the Appeals Chamber convict Sredoje Lukić for these incidents and increase his sentence accordingly.<sup>38</sup>

### **C. Appeal Hearing**

9. The Appeals Chamber heard oral submissions of the parties regarding these appeals on 14 and 15 September 2011. Having considered their written and oral submissions, the Appeals Chamber hereby renders its Judgement.

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<sup>37</sup> Prosecution Appeal Brief, 2 November 2009 (“Prosecution Appeal Brief”), paras 4-7, 9-10.

<sup>38</sup> Prosecution Appeal Brief, paras 8, 11-12.

## II. STANDARD OF REVIEW

10. On appeal, the parties must limit their arguments to legal errors that invalidate the decision of the trial chamber and to factual errors that result in a miscarriage of justice.<sup>39</sup> These criteria are set forth in Article 25 of the Statute and are well established in the jurisprudence of the *ad hoc* Tribunals.<sup>40</sup> In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the trial judgement, but which is nevertheless of general significance to the Tribunal's jurisprudence.<sup>41</sup>

11. A party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the alleged error invalidates the decision.<sup>42</sup> An allegation of an error of law which has no chance of changing the outcome of a decision may be rejected on that ground.<sup>43</sup> However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude for other reasons that there is an error of law.<sup>44</sup> It is necessary for any appellant claiming an error of law on the basis of lack of a reasoned opinion to identify the specific issues, factual findings, or arguments which an appellant submits the trial chamber omitted to address and to explain why this omission invalidated the decision.<sup>45</sup>

12. The Appeals Chamber reviews the trial chamber's findings of law to determine whether or not they are correct.<sup>46</sup> Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of the wrong legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.<sup>47</sup> In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by an appellant before the

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<sup>39</sup> *Haradinaj et al.* Appeal Judgement, para. 9; *Boškoski and Tarčulovski* Appeal Judgement, para. 9; *Milošević* Appeal Judgement, para. 12.

<sup>40</sup> *Haradinaj et al.* Appeal Judgement, para. 9; *Boškoski and Tarčulovski* Appeal Judgement, para. 9; *Milošević* Appeal Judgement, para. 12.

<sup>41</sup> *Haradinaj et al.* Appeal Judgement, para. 9; *Boškoski and Tarčulovski* Appeal Judgement, para. 9; *Milošević* Appeal Judgement, para. 12.

<sup>42</sup> *Haradinaj et al.* Appeal Judgement, para. 10; *Boškoski and Tarčulovski* Appeal Judgement, para. 10; *Milošević* Appeal Judgement, para. 13.

<sup>43</sup> *Haradinaj et al.* Appeal Judgement, para. 10; *Boškoski and Tarčulovski* Appeal Judgement, para. 10; *Milošević* Appeal Judgement, para. 13.

<sup>44</sup> *Haradinaj et al.* Appeal Judgement, para. 10; *Boškoski and Tarčulovski* Appeal Judgement, para. 10; *Milošević* Appeal Judgement, para. 13.

<sup>45</sup> *Haradinaj et al.* Appeal Judgement, para. 10; *Boškoski and Tarčulovski* Appeal Judgement, para. 10; *Milošević* Appeal Judgement, para. 13.

<sup>46</sup> *Haradinaj et al.* Appeal Judgement, para. 11; *Boškoski and Tarčulovski* Appeal Judgement, para. 11; *Milošević* Appeal Judgement, para. 14.

<sup>47</sup> *Haradinaj et al.* Appeal Judgement, para. 11; *Boškoski and Tarčulovski* Appeal Judgement, para. 11; *Milošević* Appeal Judgement, para. 14.

finding is confirmed on appeal.<sup>48</sup> The Appeals Chamber will not review the entire trial record *de novo*. Rather, it will in principle only take into account evidence referred to by the trial chamber in the body of the trial judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, additional evidence admitted on appeal.<sup>49</sup>

13. When considering alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness.<sup>50</sup> In reviewing the findings of the trial chamber, the Appeals Chamber will only substitute its own findings for that of the trial chamber when no reasonable trier of fact could have reached the original decision.<sup>51</sup> The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.<sup>52</sup> Further, only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the trial chamber.<sup>53</sup>

14. The Appeals Chamber recalls that, when it is confronted with an alleged error of fact and when additional evidence is admitted on appeal, but there is no error in the legal standard, the following two-step standard will apply:

- (i) The Appeals Chamber will first determine, on the basis of the trial record alone, whether no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. If that is the case, then no further examination of the matter is necessary as a matter of law.
- (ii) If, however, the Appeals Chamber determines that a reasonable trier of fact could have reached a conclusion of guilt beyond reasonable doubt, then the Appeals Chamber will determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt.<sup>54</sup>

15. When applying these principles, the Appeals Chamber recalls that it has identified several types of deficient submissions on appeal which are bound to be summarily dismissed. In particular, the Appeals Chamber will dismiss without detailed analysis: (a) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings; (b) mere assertions that the trial chamber must have failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence

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<sup>48</sup> *Haradinaj et al.* Appeal Judgement, para. 11; *Boškoski and Tarčulovski* Appeal Judgement, para. 11; *Milošević* Appeal Judgement, para. 14.

<sup>49</sup> *Haradinaj et al.* Appeal Judgement, para. 11; *Boškoski and Tarčulovski* Appeal Judgement, para. 12; *Milošević* Appeal Judgement, para. 14.

<sup>50</sup> *Haradinaj et al.* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 13; *Milošević* Appeal Judgement, para. 15.

<sup>51</sup> *Haradinaj et al.* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 13; *Milošević* Appeal Judgement, para. 15.

<sup>52</sup> *Haradinaj et al.* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 13; *Mrkšić and Šljivančanin* Appeal Judgement, para. 13.

<sup>53</sup> *Haradinaj et al.* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 13; *Milošević* Appeal Judgement, para. 15.

<sup>54</sup> *Blaškić* Appeal Judgement, para. 24(c).

could have reached the same conclusion as the trial chamber; (c) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding; (d) arguments that challenge a trial chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence; (e) arguments contrary to common sense; (f) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appealing party; (g) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the trial chamber constituted an error warranting the intervention of the Appeals Chamber; (h) allegations based on material not on the record; (i) mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate an error; and (j) mere assertions that the trial chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.<sup>55</sup>

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<sup>55</sup> *Haradinaj et al.* Appeal Judgement, para. 13; *Boškoski and Tarčulovski* Appeal Judgement, para. 18; *Milošević* Appeal Judgement, para. 17.

### III. ALLEGED VIOLATIONS OF THE RIGHT TO A FAIR TRIAL

#### A. Introduction

16. Milan Lukić submits that his right to a fair trial was violated when the Trial Chamber:<sup>56</sup> (i) denied him adequate time and facilities to prepare his defence prior to the commencement of the trial;<sup>57</sup> (ii) imposed inappropriate restrictions on the conduct of his defence during trial;<sup>58</sup> and (iii) failed to address the undue influence upon Prosecution witnesses by third parties.<sup>59</sup>

17. The Appeals Chamber recalls that where a party alleges on appeal that its right to a fair trial has been infringed, it must prove that the trial chamber violated a provision of the Statute and/or the Tribunal's Rules of Procedure and Evidence ("Rules") and that this caused prejudice to the alleging party, such as to amount to an error of law invalidating the trial judgement.<sup>60</sup> Trial chambers enjoy considerable discretion in relation to the management of the proceedings before them.<sup>61</sup> Decisions concerning the scheduling of trials, the time afforded to the parties, and the parameters of cross-examination are discretionary decisions to which the Appeals Chamber must accord deference.<sup>62</sup> In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber has committed a discernible error resulting in prejudice to that party.<sup>63</sup> The Appeals Chamber will only overturn a trial chamber's discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.<sup>64</sup> The Appeals Chamber will also consider whether the trial chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.<sup>65</sup>

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<sup>56</sup> Milan Lukić's seventh ground of appeal.

<sup>57</sup> Milan Lukić Appeal Brief, paras 323-328, 332-334, 345-352; Milan Lukic's [*sic*] Reply Brief, 22 February 2010 (confidential) ("Milan Lukić Reply Brief"), paras 121-122, 124.

<sup>58</sup> Milan Lukić Appeal Brief, paras 329-331, 335-344, 353-355; Milan Lukić Reply Brief, paras 123, 125-130.

<sup>59</sup> Milan Lukić Appeal Brief, paras 356-371; Milan Lukić Reply Brief, paras 131-132. Milan Lukić has withdrawn sub-ground 7(B) (Milan Lukić Appeal Brief, p. 100).

<sup>60</sup> *Haradinaj et al.* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, para. 28; *Galić* Appeal Judgement, para. 21; *Kordić and Čerkez* Appeal Judgement, para. 119.

<sup>61</sup> *Krajišnik* Appeal Judgement, paras 81, 99.

<sup>62</sup> See *Haradinaj et al.* Appeal Judgement, para. 17; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.5, Decision on Radovan Karadžić's Appeal of the Decision on Commencement of Trial, 13 October 2009 ("*Karadžić* Decision on Commencement of Trial"), para. 6; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence and on Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006, p. 3.

<sup>63</sup> *Krajišnik* Appeal Judgement, para. 81.

<sup>64</sup> *Krajišnik* Appeal Judgement, para. 81.

<sup>65</sup> *Krajišnik* Appeal Judgement, para. 81.

## **B. Adequate time and facilities for pre-trial preparation**

18. Milan Lukić submits that the Trial Chamber violated his right to have adequate time and facilities to prepare his defence prior to the commencement of the trial on 9 July 2008, and requests a retrial.<sup>66</sup> He argues that the Trial Chamber accelerated the scheduling of the trial without “forewarning”<sup>67</sup> and without considering: (i) the problems with the composition and preparedness of his defence team (“Defence Team”);<sup>68</sup> (ii) the Prosecution’s proposal to “double the scope of the Indictment” shortly before trial;<sup>69</sup> (iii) that certain Prosecution witness statements were only made available to him on 1 April 2008;<sup>70</sup> and (iv) that the Prosecution “sought to change its witnesses” less than a month before trial.<sup>71</sup>

19. The Prosecution responds that Milan Lukić fails to demonstrate that the Trial Chamber denied him adequate time and facilities for his defence or that the Trial Chamber abused its discretion in commencing the trial.<sup>72</sup> It contends that Milan Lukić had adequate notice of the trial date.<sup>73</sup> In particular, it argues that: (i) Milan Lukić was continuously represented throughout and his Defence Team had adequate time to prepare;<sup>74</sup> (ii) the Trial Chamber’s decision to dismiss the Prosecution’s motion to expand the scope of the Indictment renders Milan Lukić’s argument in this respect moot;<sup>75</sup> (iii) Milan Lukić misstates the record with respect to the availability of Prosecution witness statements;<sup>76</sup> and (iv) Milan Lukić fails to demonstrate that the Trial Chamber erred when allowing the Prosecution to call additional witnesses to rebut his alibi.<sup>77</sup>

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<sup>66</sup> Milan Lukić’s sub-ground 7(A) (in part). Milan Lukić Appeal Brief, paras 323-328, 332-334, 345-352; Milan Lukić Reply Brief, paras 121-122, 124.

<sup>67</sup> Milan Lukić Appeal Brief, para. 325.

<sup>68</sup> Milan Lukić Appeal Brief, paras 323-325, 345-352; Milan Lukić Reply Brief, paras 121-122.

<sup>69</sup> Milan Lukić Appeal Brief, para. 323.

<sup>70</sup> Milan Lukić Appeal Brief, para. 325, referring to *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Order for Extension of Time, 1 April 2008 (“Order for Extension of Time of 1 April 2008”).

<sup>71</sup> Milan Lukić Appeal Brief, para. 328, referring to *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Further Decision on Prosecution’s Motion to Amend Rule 65 *ter* Witness List and Related Submissions, 19 June 2008 (“Further Decision on Amending Rule 65 *ter* List of 19 June 2008”). The Appeals Chamber notes that the decision to include the additional witnesses was rendered in June 2008 (*see* Further Decision on Amending Rule 65 *Ter* List of 19 June 2008, p. 8). However, contrary to Milan Lukić’s submission, the Prosecution proposed additional witnesses nearly four months before the trial started when filing its witness list on 14 March 2008 with its pre-trial brief (*see Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Prosecution List of Witnesses Pursuant to Rule 65 *Ter* (E) (II), 14 March 2008 (confidential); *see also Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecution’s Motion to Amend Rule 65 *ter* Witness List and on Related Submissions, 22 April 2008, paras 2-3).

<sup>72</sup> Prosecution Response to Milan Lukić’s Appeal, 5 February 2010 (confidential) and subsequent corrigenda of 6 April 2010, 13 April 2010, 6 December 2010 (collectively, “Prosecution Response Brief (Milan Lukić)”), paras 229, 234-238.

<sup>73</sup> Prosecution Response Brief (Milan Lukić), para. 234.

<sup>74</sup> Prosecution Response Brief (Milan Lukić), paras 230-232, 235-238, 244-247, 253-258.

<sup>75</sup> Prosecution Response Brief (Milan Lukić), para. 233.

<sup>76</sup> Prosecution Response Brief (Milan Lukić), para. 240.

<sup>77</sup> Prosecution Response Brief (Milan Lukić), para. 240.



20. The Appeals Chamber recalls that what constitutes adequate time and facilities for the preparation of a defence cannot be assessed in the abstract, but depends on the circumstances of each case,<sup>78</sup> including the preparation time available during trial.<sup>79</sup> Furthermore, the Appeals Chamber will assess whether a defence team as a whole, and not any individual counsel, was deprived of adequate time and facilities.<sup>80</sup> In order to succeed on appeal, Milan Lukić must show that the Trial Chamber committed a discernible error that resulted in prejudice to him.<sup>81</sup>

21. As early as 4 September 2007, the Pre-Trial Judge informed the parties that the trial would possibly commence after the summer of 2008 or in early 2009.<sup>82</sup> The parties were informed on 11 December 2007 that the likely date for the pre-trial conference was 16 May 2008 and that the earliest date for the trial to commence was in the summer of 2008 but that it could be later, in early 2009.<sup>83</sup> On 12 June 2008, the Pre-Trial Judge told the parties that the trial would start on 9 July 2008.<sup>84</sup> Thus, Milan Lukić was aware of the anticipated start of trial at least seven months prior to 9 July 2008. The Appeals Chamber therefore finds no merit in Milan Lukić's assertion that he suffered a "lack of forewarning" as to the start of his trial.

22. Milan Lukić submits that the Trial Chamber ignored a number of factors relating to the composition and preparedness of his Defence Team that disrupted his pre-trial preparations, namely that: (i) his third lead counsel, Jason Alarid ("Alarid"), had only been involved in the case since 10 March 2008 and was only assigned as lead counsel on 12 June 2008;<sup>85</sup> (ii) Alarid was required to use trial preparation time to amend filings of previous lead counsel, including Milan Lukić's notice of alibi, and to re-submit the pre-trial brief;<sup>86</sup> (iii) no co-counsel was appointed until October 2008;<sup>87</sup> (iv) his first lead counsel, Alan Yatvin ("Yatvin"), focused entirely on Rule 11 *bis* proceedings and his second lead counsel, Bojan Sulejić ("Sulejić"), "neither facilitated preparation

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<sup>78</sup> *Krajišnik* Appeal Judgement, para. 80, referring to *Nahimana et al.* Appeal Judgement, para. 220.

<sup>79</sup> *Karadžić* Decision on Commencement of Trial, para. 24.

<sup>80</sup> *Krajišnik* Appeal Judgement, para. 80, referring to *Nahimana et al.* Appeal Judgement, para. 220.

<sup>81</sup> See *Krajišnik* Appeal Judgement, para. 81.

<sup>82</sup> Transcript page in the present case at trial ("T.") 123 (4 September 2007). The Pre-Trial Judge stated: "[T]he hope is that this case could perhaps [...] be ready to be docketed some time after summer or early the following year. The summer of next year, early the following year, that's the indication that we can offer. This is no news to the parties." (T. 123 (4 September 2007)).

<sup>83</sup> T. 140-141 (11 December 2007). The Pre-Trial Judge stated: "[T]he earliest day for this case to be docketed is mid-2008, so in [...] the summer of next year, but it can also slide into later and even the early parts of the following year 2009" (T. 141 (11 December 2007)).

<sup>84</sup> The Pre-Trial Judge informed the parties that the pre-trial conference would be held on either 2 July 2008 or 9 July 2008, and that the trial was to start on 9 July 2008 (T. 186-187, 190 (12 June 2008); Trial Judgement, para. 1141). On 19 June 2008, the Trial Chamber issued an order re-scheduling the pre-trial conference for 9 July 2008 and ordered that the trial would commence immediately after the completion of the pre-trial conference (*Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Order Rescheduling Pre-Trial Conference, 19 June 2008, p. 1).

<sup>85</sup> Milan Lukić Appeal Brief, paras 324-325; Milan Lukić Reply Brief, paras 121-122.

<sup>86</sup> Milan Lukić Appeal Brief, paras 327, 349-350.

<sup>87</sup> Milan Lukić Appeal Brief, para. 351.

for trial, nor was in a place to assist with the trial”;<sup>88</sup> and (v) both lead counsel who preceded Alarid ceased communication with Milan Lukić before they were replaced.<sup>89</sup>

23. According to the Prosecution, Milan Lukić was continuously represented by a defence team, albeit with some changes in its composition, since his initial appearance on 24 February 2006.<sup>90</sup> The Prosecution further submits that Milan Lukić fails to provide examples of any gross misconduct by prior counsel in their preparation of the defence case.<sup>91</sup>

24. At the outset, the Appeals Chamber notes that Alarid had been a member of the Defence Team for more than 120 days prior to the commencement of trial on 9 July 2008. He was first appointed as co-counsel<sup>92</sup> and was therefore able to assist in Milan Lukić’s preparation for trial even prior to his assignment as lead counsel on 12 June 2008.<sup>93</sup> Considering that in his capacity as co-counsel Alarid was assigned to assist with all matters in relation to the defence of Milan Lukić,<sup>94</sup> once Alarid became lead counsel Milan Lukić had the benefit of his continuous involvement in the case preparation. The Appeals Chamber also notes that Milan Lukić had benefited from the services of a defence team since his arrest in 2006.<sup>95</sup> In view of these circumstances, the Appeals Chamber is not satisfied that the late assignment of Alarid to the position of lead counsel had a detrimental effect upon Milan Lukić’s ability to prepare for trial or that on this basis Alarid proceeded to trial unprepared.

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<sup>88</sup> Milan Lukić Appeal Brief, paras 345-348; Milan Lukić Reply Brief, para. 121.

<sup>89</sup> Milan Lukić Appeal Brief, paras 345, 347.

<sup>90</sup> Prosecution Response Brief (Milan Lukić), para. 232, in which the Prosecution further argues that, contrary to Milan Lukić’s claim, Alarid had been on the Defence Team for 121 days before the trial commenced.

<sup>91</sup> Prosecution Response Brief (Milan Lukić), paras 253-256.

<sup>92</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Registry Decision, 10 March 2008, p. 2. The Appeals Chamber further notes that upon Milan Lukić’s request, the Registry assigned Sulejić as his co-counsel on 12 June 2008 (*see Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Registry Decision, 12 June 2008 (“Registry Decision of 12 June 2008”), p. 3). On 4 July 2008, the Registry granted Alarid’s request that Sulejić be withdrawn as co-counsel (*Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Registry Decision, 4 July 2008 (“Registry Decision of 4 July 2008”), pp. 2-3). Dragan Ivetić (“Ivetić”) was appointed as new co-counsel on 23 October 2008 (*Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Registry Decision, 23 October 2008 (“Registry Decision of 23 October 2008”), p. 2). The Appeals Chamber notes that Alarid only requested the assignment of Ivetić as new co-counsel on 11 October 2008 (Registry Decision of 23 October 2008, p. 1).

<sup>93</sup> *See* Registry Decision of 12 June 2008, p. 3.

<sup>94</sup> *See* Directive on Assignment of Counsel, IT/73/Rev.11, 11 July 2006, Article 16(C).

<sup>95</sup> The Appeals Chamber notes that, on 24 February 2006, Michael Karnavas was assigned as counsel to represent Milan Lukić for the purposes of his initial appearance before the Tribunal and for other matters as necessary until a permanent counsel could be assigned (*Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-I, Registry Decision, 24 February 2006, p. 2). On 13 April 2006, the Registry assigned Yatvin as lead counsel (*Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Registry Decision, 13 April 2006 (“Registry Decision of 13 April 2006”), p. 2). Following allegations raised by Milan Lukić against his Defence Team, the Registry withdrew Yatvin and assigned Sulejić as his lead counsel (*Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Registry Decision, 5 December 2007 (“Registry Decision of 5 December 2007”), pp. 2, 4-5). With respect to the date when Yatvin was initially appointed, the Appeals Chamber notes that Milan Lukić erroneously refers to 6 April 2006 instead of 13 April 2006 (*see* Registry Decision of 13 April 2006, p. 2).

25. Turning to Milan Lukić's submission that Alarid had to use trial preparation time to re-file the notice of alibi prepared by previous counsel, the Appeals Chamber notes that the Trial Chamber ordered Milan Lukić to clarify several paragraphs in his notice of alibi.<sup>96</sup> The Appeals Chamber observes that the work required to be undertaken in response to a request for clarification might have had an impact on the Defence Team's time to otherwise prepare for trial. Nevertheless, Milan Lukić has failed to show that the Trial Chamber's assessment of the preparedness of the Defence Team was rendered unreasonable by this request for clarification. Subsequently, the Trial Chamber found that the pre-trial brief filed by previous counsel did not fully comply with the requirements of Rule 65 *ter*(F) of the Rules and ordered Milan Lukić to file "further submissions", which he filed on 19 June 2008.<sup>97</sup> The Appeals Chamber notes that many of these submissions were identical to Milan Lukić's submissions in the pre-trial brief.<sup>98</sup> The Appeals Chamber further notes that pre-trial deadlines were extended in light of Alarid's recent assignment as lead counsel.<sup>99</sup> Thus, Milan Lukić has failed to demonstrate that the fact that Alarid had to file these further submissions amounts to an error in the Trial Chamber's assessment of the preparedness of the Defence Team for the start of trial.

26. Further, the Trial Chamber was mindful that Milan Lukić did not have co-counsel during the initial months of the trial.<sup>100</sup> While the trial commenced on 9 July 2008, it proceeded for only three days during which it heard two witnesses and then adjourned for a total of six weeks, including the court recess.<sup>101</sup> In addition, the Trial Chamber granted Milan Lukić's request for an amendment to the trial schedule and ordered that the trial be heard only four days per week.<sup>102</sup> It also scheduled a break of eight trial days during the Prosecution case and announced an additional six days on which the Trial Chamber would not sit.<sup>103</sup> The trial record shows that, between

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<sup>96</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision on the Prosecution's Motion for an Order Requiring the Accused Milan Lukić to Clarify Alibi Notice Served Under Rule 67(A)(i)(a) and on the Defence of Milan Lukić's Second Motion Concerning Protective Measures for Alibi Witnesses, 8 May 2008, para. 24.

<sup>97</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecution's Response and Motion for Clarification of Defence Pre-Trial Briefs, 16 May 2008 ("Decision on Motion for Clarification of 16 May 2008"), paras 7, 10. The Pre-Trial Judge granted Milan Lukić an extension of time of 14 days to file a response to the Prosecution's Rules 92 *bis* and 92 *ter* motions (*see* T. 152-153 (12 March 2008)) and, after considering that his team was "relatively recently appointed", allowed him to file an amended pre-trial brief by 29 May 2008 (Decision on Motion for Clarification of 16 May 2008, paras 7, 12). The Appeals Chamber observes that Milan Lukić did not respect this deadline and filed his submissions only on 19 June 2008, without any substantial changes to his preliminary pre-trial brief.

<sup>98</sup> *See Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Milan Lukić's Preliminary Pre Trial Brief [*sic*] Pursuant to Rule 65*ter* (F) and Continued Request for Extension [*sic*] of Time (confidential), 25 April 2008, paras 6-7, 11-23; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Milan Lukić's Further Submissions Required by the Trial Chamber Decision of 15 May 2008 with Regard to the Defence Pre-Trial Brief, 19 June 2008 (confidential), paras 8-15, 19-26.

<sup>99</sup> *See supra* fn. 97.

<sup>100</sup> T. 1691 (15 September 2008).

<sup>101</sup> T. 462 (11 July 2008) (private session). *See also* Trial Judgement, para. 1142.

<sup>102</sup> T. 1690-1691 (15 September 2008).

<sup>103</sup> T. 1690-1691 (15 September 2008). *See also* T. 3774 (9 December 2008).

9 July 2008 and the beginning of the court recess in mid-December 2008, the Trial Chamber sat for 46 days, an average of less than ten days per month. Thus, Milan Lukić has not shown that the Trial Chamber erroneously exercised its discretion when scheduling the trial for 9 July 2008 despite the late assignment of his co-counsel.

27. The Appeals Chamber notes that Milan Lukić informed the Trial Chamber in August 2007 that he had not been in communication with his first appointed lead counsel, Yatvin, for twelve months.<sup>104</sup> However, the Registry informed the Trial Chamber that Yatvin had regularly visited and communicated with Milan Lukić the preceding year and that, despite Yatvin's efforts, Milan Lukić had recently refused to respond to or meet with him, alleging his involvement in a terrorist organisation.<sup>105</sup> After an inquiry, the Registry found that Milan Lukić's assertions were "completely baseless" and that Yatvin had been performing his duties "diligently and competently".<sup>106</sup> Moreover, Milan Lukić has failed to substantiate his argument that Yatvin focused almost exclusively on 11 *bis* proceedings. Thus, Milan Lukić has not shown that the Trial Chamber erred in its consideration of Yatvin's ability to continue with the preparation of the Defence Team, despite the disrupted communication between them. Further, the Appeals Chamber notes that on 18 January 2007, Jelena Lopičić-Jancić was assigned as co-counsel.<sup>107</sup>

28. The Appeals Chamber also notes that on 24 March 2008, Milan Lukić informed the Registry that problems had arisen between himself and Sulejić, his second lead counsel, and requested that Sulejić be reassigned as co-counsel.<sup>108</sup> The Registry found that, at the time, none of the allegations against Sulejić had been substantiated<sup>109</sup> and Sulejić remained on the Defence Team until his withdrawal at the request of Alarid on 4 July 2008.<sup>110</sup> In these circumstances, the Appeals Chamber is not satisfied that problems between Milan Lukić and Sulejić render erroneous the Trial Chamber's assessment of the preparedness of the Defence Team.

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<sup>104</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Correspondence, 29 August 2007. *See also* *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Correspondence, 10 August 2007.

<sup>105</sup> Registry Decision of 5 December 2007, p. 2; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Registry Submission Pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding Milan Lukić's Letter to the Trial Chamber Dated 23 August 2007, 3 September 2007, para. 3.

<sup>106</sup> Registry Decision of 5 December 2007, p. 2. Furthermore, Milan Lukić did not dispute the Registry's submission that he maintained communication with then co-counsel Jelena Lopičić-Jancić and worked with her on the preparation of the case (*see* Registry Decision of 5 December 2007, p. 3).

<sup>107</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Registry Decision, 18 January 2007, p. 2.

<sup>108</sup> *See* Registry Decision of 12 June 2008, p. 2. Shortly thereafter, Milan Lukić wrote to the Registry reiterating the allegations and requesting Sulejić's complete withdrawal from the case (*see* Registry Decision of 12 June 2008, p. 2).

<sup>109</sup> Registry Decision of 12 June 2008, p. 3. The Deputy Registrar further found that it would not be in the interests of justice to withdraw Sulejić completely since: (i) the start of trial was imminent; (ii) the continuity of the Defence Team was of utmost importance; and (iii) Sulejić had represented Milan Lukić for six months, was fully familiar with the case, and was therefore expected to facilitate its preparation for trial (Registry Decision of 12 June 2008, p. 3).

<sup>110</sup> Registry Decision of 4 July 2008.

29. The Appeals Chamber turns to Milan Lukić's argument that he did not have adequate time to prepare for trial because the Prosecution sought to double the scope of the Indictment. In this regard, the Appeals Chamber notes that, on 16 June 2008, the Prosecution requested leave to amend the Indictment and to add new charges.<sup>111</sup> On 8 July 2008, the Trial Chamber denied the Prosecution's request on the basis that granting the amendment shortly before the start of trial would deprive Milan Lukić of an adequate opportunity to prepare his defence.<sup>112</sup> In these circumstances, Milan Lukić has failed to identify any error and the Appeals Chamber dismisses his argument accordingly.

30. Milan Lukić further submits that the unredacted statements of many Prosecution witnesses were only made available to him on 1 April 2008,<sup>113</sup> and that the Prosecution "sought to change its witnesses" less than one month before trial.<sup>114</sup> The Appeals Chamber notes that, on 10 January 2008, Milan Lukić filed his notice of alibi.<sup>115</sup> On 12 March 2008, the Prosecution stated that it had identified alibi rebuttal witnesses as well as witnesses who would testify on substantive charges ("Additional Witnesses").<sup>116</sup> The Prosecution requested the Trial Chamber's permission to provide the Defence with the redacted statements of 15 of the Additional Witnesses, and sought an extension of time for the provision of the unredacted statements.<sup>117</sup> The Prosecution's request was granted in part, and the redacted statements of 15 of the Additional Witnesses were disclosed to Milan Lukić on 1 April 2008, more than three months before the trial commenced.<sup>118</sup> No appeal was filed by Milan Lukić in this regard.

31. While acknowledging that the delayed disclosure of the unredacted statements reduced the time available to the Defence to investigate the statements,<sup>119</sup> the Trial Chamber nevertheless

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<sup>111</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Prosecution Motion Seeking Leave to Amend the Second Amended Indictment, 16 June 2008, para. 3.

<sup>112</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include UN Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as well as on Milan Lukić's Request for Reconsideration or Certification of the Pre-Trial Judge's Order of 19 June 2008, 8 July 2008, paras 54-55, 63-64.

<sup>113</sup> Milan Lukić Appeal Brief, para. 325, referring to Order for Extension of Time of 1 April 2008.

<sup>114</sup> Milan Lukić Appeal Brief, para. 328, referring to Further Decision on Amending Rule 65 *ter* List of 19 June 2008.

<sup>115</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Milan Lukić's Defence Notice Under Rule 67(A)(i)(a), 10 January 2008.

<sup>116</sup> T. 160-161 (12 March 2008).

<sup>117</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Prosecution's Status Report on Disclosure of Material for Newly Identified Prosecution Witnesses with Confidential and Ex Parte Annex A and Request for Further Extension of Time, 20 March 2008 (confidential with confidential and *ex parte* Annex A), para. 8.

<sup>118</sup> Order for Extension of Time of 1 April 2008, p. 1; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Prosecution's Response to Order of the Pre-Trial Judge in Relation to Delayed Disclosure of Statements of New Witnesses Pursuant to Rule 66(A)(II) and Reply to Sredoje Lukić's Response of 3 April 2008, 4 April 2008 (confidential) ("Prosecution Response of 4 April 2008"), para. 2.

<sup>119</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision in Relation to Prosecution Proposed Witnesses, 8 July 2008 ("Decision of 8 July 2008"), p. 4.

allowed the inclusion of six of the 15 Additional Witnesses on the Prosecution's witness list.<sup>120</sup> The Appeals Chamber notes that the first of these six witnesses was cross-examined on 29 August 2008,<sup>121</sup> nearly five months after the disclosure of her unredacted statements.<sup>122</sup> Considering the lapse of time between the disclosure of the witness statements and the start of the trial, as well as breaks in the proceedings,<sup>123</sup> the Appeals Chamber is satisfied that the examination of witnesses was scheduled in such a way as to allow Milan Lukić sufficient time to prepare. Milan Lukić has therefore failed to demonstrate that the Trial Chamber erred with regard to the disclosure of the witness statements or the inclusion of these witnesses on the Prosecution's witness list. The Appeals Chamber accordingly dismisses Milan Lukić's arguments in this regard.

32. For the foregoing reasons, Milan Lukić has not shown that the Trial Chamber denied him adequate time and facilities to prepare his defence prior to the commencement of the trial. To this extent, his sub-ground 7(A) is dismissed.

### **C. Restrictions on the conduct of Milan Lukić's Defence**

33. Milan Lukić submits that the Trial Chamber inappropriately placed restrictions on the conduct of his defence by: (i) limiting the time available for cross-examination; (ii) denying his request to delay the commencement of the presentation of his case; (iii) violating his right to call witnesses, including those who were not called to testify by the Prosecution ("Uncalled Prosecution Witnesses") and to cross-examine Prosecution witnesses; and (iv) denying his request to recall Prosecution witnesses.<sup>124</sup>

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<sup>120</sup> Further Decision on Amending Rule 65 *ter* List of 19 June 2008, p. 8; Decision of 8 July 2008, pp. 5-6. The six witnesses were VG035, VG085, VG089, VG094, VG104 (Mirsada Kahrman ("Kahrman")), and VG119. VG085 was later replaced by VG042 (*see Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Motion for Leave to Amend Prosecution's List of Witnesses with Annexes A and B Insofar as it Concerns Witnesses VG-042 and VG-064, 22 September 2008, para. 18).

<sup>121</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Certificate on the Confidential Witness List, 15 January 2010 (confidential) ("Confidential Witness List"), p. 4. *See also* Kahrman, T. 801-868 (29 August 2008).

<sup>122</sup> Kahrman testified on 29 August 2008 and her statements were attached to motions filed on 15 February 2008 and formal disclosure was subsequently made. Milan Lukić was in possession of Kahrman's statement as of 15 February 2008 (*see Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Prosecution's Reponse to "Decision on Prosecution's Motion to Amend Rule 65 *ter* Witness List and on Related Submissions", 25 April 2008, para. 6, fn. 2). The Appeals Chamber notes that Milan Lukić submits that he had received the unredacted statements by 1 April 2008 of many Prosecution witnesses (Milan Lukić Appeal Brief, para. 325). The Appeals Chamber further notes that in a decision of 8 July 2008, the Trial Chamber permitted the Prosecution to lead the alibi rebuttal evidence of VG035, VG085, VG094, and VG119 after recalling that "inclusion of witnesses upon the Prosecution's witness list [...] is contingent upon disclosure having been carried out pursuant to Rule 66(A)(ii)" (*Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision in Relation to Prosecution Proposed Witnesses, 8 July 2008 (confidential), pp. 3, 6). Additionally, the Trial Chamber permitted the Prosecution to include VG089 on its witness list, having noted "that full disclosure was made on 20 March 2008" (*Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Further Decision on Prosecution's Motion to Amend Rule 65 *ter* Witness List and Related Submissions, 19 June 2008, pp. 6, 8).

<sup>123</sup> T. 463 (11 July 2008). The Trial Chamber did not sit between 11 July 2008 and 25 August 2008.

<sup>124</sup> Milan Lukić's sub-grounds 7(A) (in part) and (C). Milan Lukić Appeal Brief, paras 329-330, 332-344, 353-355; Milan Lukić Reply Brief, paras 121-130.

## 1. Limitation on the time available for cross-examination

34. Milan Lukić submits that the Trial Chamber erred by allocating to him only 60% of the time used by the Prosecution in its examination-in-chief, arguing that some of the witnesses gave inconsistent and contradictory statements that needed to be addressed in cross-examination.<sup>125</sup>

35. The Prosecution responds that the Trial Chamber properly exercised its discretion in limiting Milan Lukić's time for cross-examination.<sup>126</sup>

36. The Trial Chamber determined that for purposes of cross-examination, each accused had at his disposal 60% of the time spent by the Prosecution in its examination-in-chief.<sup>127</sup> The Trial Chamber informed the parties that they could file applications for an extension of time if needed.<sup>128</sup> Milan Lukić used nearly 53 hours for cross-examination, whereas the Prosecution's examination-in-chief lasted approximately 48 hours.<sup>129</sup> Accordingly, the Appeals Chamber notes that the time used by Milan Lukić in fact exceeded the time taken by the Prosecution, which suggests that the Trial Chamber did not strictly follow its original decision as to the allocation of time for cross-examination for each party, but adapted to the circumstances.<sup>130</sup> Milan Lukić has thus failed to demonstrate that the Trial Chamber erred when it restricted his time available for cross-examination.

## 2. Milan Lukić's request to delay the commencement of the presentation of his case

37. Milan Lukić contends that the Trial Chamber erred in denying his request to delay the commencement of his defence case, submitting that additional time was necessary due to "staffing issues".<sup>131</sup> In particular, he submits that additional time was necessary due to the fact that, during the Prosecution case, both of his counsel were required at the seat of the Tribunal, and therefore could not meet with potential witnesses in the region.<sup>132</sup>

38. The Prosecution responds that Milan Lukić misstates the record as his request to delay the commencement of his case was partly granted by the Trial Chamber.<sup>133</sup>

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<sup>125</sup> Milan Lukić Appeal Brief, paras 329-331; Milan Lukić Reply Brief, para. 123.

<sup>126</sup> Prosecution Response Brief (Milan Lukić), paras 241-243.

<sup>127</sup> T. 202 (9 July 2008).

<sup>128</sup> T. 202 (9 July 2008); T. 284 (10 July 2008).

<sup>129</sup> Exh. CA00001 (Witness Testimony Time Report) (confidential), p. 47.

<sup>130</sup> The Appeals Chamber notes that the Trial Chamber observed "that the Prosecution has made good use of the provisions of Rule 92 ter [*sic*], thus accelerating the pace at which witnesses appear in court and at which the Defence must prepare" (T. 1691 (15 September 2008)).

<sup>131</sup> Milan Lukić Appeal Brief, para. 332; Milan Lukić Reply Brief, para. 124.

<sup>132</sup> Milan Lukić Appeal Brief, para. 332; Milan Lukić Reply Brief, para. 124.

<sup>133</sup> Prosecution Response Brief (Milan Lukić), paras 245, 247.

39. The Appeals Chamber notes that, on 6 November 2008, the Trial Chamber scheduled Sredoje Lukić's case to commence on 24 November 2008, and ordered that the presentation of Milan Lukić's case should immediately follow.<sup>134</sup> On 14 November 2008, Milan Lukić requested a delay of the commencement of his case by six weeks.<sup>135</sup> The Trial Chamber granted his request in part by rescheduling the start of Sredoje Lukić's case to 1 December 2008, effectively allowing Milan Lukić an extra week for trial preparation.<sup>136</sup> In so doing, the Trial Chamber noted that Milan Lukić had nearly three years to prepare his defence.<sup>137</sup> Ultimately, Milan Lukić's case was further adjourned until 17 December 2008, which gave him approximately three additional weeks to prepare his defence.<sup>138</sup>

40. The Appeals Chamber considers that Milan Lukić has failed to show that members of his Defence Team were unable to travel to the region to meet with potential witnesses during non-sitting days. He has also failed to identify the witnesses that his counsel was unable to meet, or explain the significance of their potential testimony. In these circumstances, the Appeals Chamber finds that the Trial Chamber did not err in scheduling the date for the commencement of Milan Lukić's case on 17 December 2008.

### 3. Alleged violations of Milan Lukić's right to call witnesses

41. Milan Lukić further submits that the Trial Chamber placed unfair limits on the presentation of his case by: (i) allowing him to call only 45 of his proposed 124 witnesses, but dismissing his request that 21 of his proposed witnesses not be counted towards the 45 witnesses allocated to him;<sup>139</sup> and (ii) ordering the disclosure of contact information of the Uncalled Prosecution Witnesses with a significant delay, thereby preventing him from obtaining their testimony.<sup>140</sup> According to Milan Lukić, the situation was aggravated by the fact that he was prevented from confronting Prosecution witnesses with the statements of Uncalled Prosecution Witnesses.<sup>141</sup>

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<sup>134</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Scheduling Order, 6 November 2008, p. 3. See also Trial Judgement, para. 1143.

<sup>135</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Milan Lukić's Motion for Extension of Time to Prepare the Defence Case-in-Chief, 14 November 2008, paras 8-19, 26.

<sup>136</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Milan Lukić's Motion for Extension of Time to Prepare the Defence Case-in-Chief, 18 November 2008 ("Decision of 18 November 2008"), p. 2.

<sup>137</sup> Decision of 18 November 2008, p. 3.

<sup>138</sup> Trial Judgement, para. 1143.

<sup>139</sup> Milan Lukić Appeal Brief, paras 335-337, referring to *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Order Pursuant to Rule 73 *ter* of the Rules of Procedure and Evidence, 26 November 2008 ("Order Pursuant to Rule 73 *ter* of 26 November 2008").

<sup>140</sup> Milan Lukić Appeal Brief, paras 339-341.

<sup>141</sup> Milan Lukić Appeal Brief, paras 338-340, 353-355; Milan Lukić Reply Brief, paras 126-127, 129-130.



42. The Prosecution responds that while the Trial Chamber only allowed Milan Lukić to call 45 witnesses, it was his strategic decision to call only 28 witnesses.<sup>142</sup> It submits that Milan Lukić did not apprise the Trial Chamber of any difficulties in locating the Uncalled Prosecution Witnesses.<sup>143</sup> Finally, it argues that Milan Lukić has failed to demonstrate any impact their proposed testimony could have had on the verdict.<sup>144</sup>

43. Milan Lukić replies that the Trial Chamber's deadline for the conclusion of his case made no provision for allowing him to "extend [his] case", and that it was impractical to obtain attendance of the Uncalled Prosecution Witnesses in such a short time, and not a "*strategic choice*".<sup>145</sup>

44. The Trial Chamber concluded that a number of considerations warranted allowing Milan Lukić to call 45 defence witnesses for a total of 60 hours.<sup>146</sup> Ultimately, Milan Lukić only called 28 witnesses for a total of nearly 34 hours during his defence case.<sup>147</sup> In these circumstances, his mere assertion that the Trial Chamber unlawfully dismissed his request to call 21 additional witnesses is insufficient to demonstrate an error. Consequently, the Appeals Chamber considers that Milan Lukić has failed to show that the allocated number of witnesses prevented him from setting forth his case in a manner consistent with his rights pursuant to Article 21 of the Statute.

45. As to Milan Lukić's argument that he had insufficient time to locate the Uncalled Prosecution Witnesses, the Appeals Chamber notes that Milan Lukić's defence case concluded on 21 April 2009, three weeks after the Trial Chamber had ordered the Prosecution to disclose the contact information of these witnesses.<sup>148</sup> The trial record shows that Milan Lukić neither requested additional time to contact the Uncalled Prosecution Witnesses nor informed the Trial Chamber of any difficulty in contacting these individuals. Milan Lukić has also failed to demonstrate the relevance of their expected testimony to his defence or explain why its exclusion resulted in prejudice to him. In these circumstances, the Appeals Chamber is not satisfied that Milan Lukić has demonstrated that he suffered prejudice as a result of the delay in the disclosure of the relevant contact information.

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<sup>142</sup> Prosecution Response Brief (Milan Lukić), para. 248.

<sup>143</sup> Prosecution Response Brief (Milan Lukić), paras 249-250.

<sup>144</sup> Prosecution Response Brief (Milan Lukić), para. 250.

<sup>145</sup> Milan Lukić Reply Brief, para. 126.

<sup>146</sup> Order Pursuant to Rule 73 *ter* of 26 November 2008, p. 3. *See also Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Motions Relating to Milan Lukić's Updated Witness List, 4 December 2008 (confidential), pp. 4-6.

<sup>147</sup> Trial Judgement, para. 20; Exh. CA00001 (Witness Testimony Time Report) (confidential), p. 47.

<sup>148</sup> Trial Judgement, para. 1143; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, 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 March 2009, para. 58.

46. Milan Lukić further argues that he was prevented from confronting Prosecution witnesses with the allegedly conflicting and exculpatory statements of the Uncalled Prosecution Witnesses during cross-examination.<sup>149</sup> While Milan Lukić describes the statement of Uncalled Prosecution Witness VG031 as exculpatory, he has failed to identify which witnesses he was unable to confront with VG031's statement.<sup>150</sup> Milan Lukić contends that during the cross-examination of VG064 he was prevented from using a statement of Uncalled Prosecution Witness VG059, wherein VG059 allegedly "disavows his prior statement that 'Milan Lukić' arrested him, saying expressly it was not Milan Lukić."<sup>151</sup> The Trial Chamber did not allow Milan Lukić to ask VG064 about what VG059 had said in his statement, noting that no foundation had been laid to establish that VG064 had any knowledge of what was contained in VG059's statement.<sup>152</sup> However, contrary to Milan Lukić's submission, he was permitted to question VG064 about her knowledge of substantive matters contained in VG059's statement,<sup>153</sup> and was also given the opportunity to call VG059 as a defence witness in order to show potential inconsistencies in their evidence.<sup>154</sup> The Appeals Chamber recalls that it has dismissed Milan Lukić's argument that he was prevented from calling VG059 as a witness due to the late disclosure of VG059's contact information.<sup>155</sup> Consequently, Milan Lukić has not shown that the Trial Chamber erroneously prevented him from confronting Prosecution witnesses with the statements of the Uncalled Prosecution Witnesses during cross-examination.

#### 4. Milan Lukić's request to recall Prosecution witnesses

47. Milan Lukić submits that, in its decision of 30 March 2009<sup>156</sup> and oral decision of 7 April 2009,<sup>157</sup> the Trial Chamber erred when it denied his request to recall Prosecution witnesses - with the exception of Huso Kurspahić - since new information on the Pionirska Street

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<sup>149</sup> Milan Lukić Appeal Brief, paras 338-340, 353-355; Milan Lukić Reply Brief, paras 126-127, 129-130.

<sup>150</sup> Milan Lukić Appeal Brief, para. 353, referring to *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Milan Lukić's Submissions Pursuant to 65 *ter*(G), 19 November 2008 (confidential with confidential Annexes A and B) ("Milan Lukić's 65 *ter* Submissions of 19 November 2008"), Annex B, Document No. 10. Milan Lukić's submission that he could not use statements of those Uncalled Prosecution Witnesses who gave "differing accounts of Milan Lukić's appearance contradicting [Prosecution] witnesses" lacks any reference to the trial record, and therefore fails to meet the standard of review on appeal (*see supra* para. 15). The Appeals Chamber further notes that Milan Lukić confronted VG017 with VG031's statement which was denied admission based on lack of authentication (*see* VG017, T. 2745-2758 (9 October 2008)). Milan Lukić further refers to the examination of expert witness Clifford Jenkins ("Jenkins") (*see* Milan Lukić Appeal Brief, para. 354, referring to Jenkins, T. 6511-6512 (27 March 2009)). The Appeals Chamber notes, however, that the Trial Chamber allowed Milan Lukić to use a statement given by VG031 during the examination of Jenkins, postponing its decision on the admissibility of the statement (*see* Jenkins, T. 6512 (27 March 2009)).

<sup>151</sup> Milan Lukić Appeal Brief, para. 353, referring to Milan Lukić's 65 *ter* Submissions of 19 November 2008, Annex B, Document Nos. 29-31.

<sup>152</sup> VG064, T. 2903-2904, 2907 (private session) (28 October 2008).

<sup>153</sup> VG064, T. 2907 (private session), 2910-2911 (28 October 2008).

<sup>154</sup> *See* VG064, T. 2907 (28 October 2008) (private session).

<sup>155</sup> *See supra* para. 45.

<sup>156</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Milan Lukić's Amended Fourth Defence Motion to Amend its Rule 65*ter* List (confidential), 30 March 2009 ("Decision of 30 March 2009"), p. 3.

<sup>157</sup> T. 6972-6973 (7 April 2009) ("Decision of 7 April 2009").

Incident had emerged after they had testified regarding this incident.<sup>158</sup> He adds that the Trial Chamber relied “positively” on the evidence of these witnesses in reaching its conclusion as to his criminal responsibility.<sup>159</sup>

48. The Prosecution responds that Milan Lukić’s argument that his request to recall Prosecution witnesses was erroneously denied warrants summary dismissal, as it was raised at trial.<sup>160</sup>

49. On 25 March 2009, Milan Lukić filed a motion requesting that the Trial Chamber allow him to amend his Rule 65 *ter* witness list to include Huso Kurspahić, VG013, VG018, and VG084.<sup>161</sup> He submitted that Huso Kurspahić had revised his story as to whom he believed had been killed during the Pionirska Street Incident.<sup>162</sup> In reference to the other three witnesses, Milan Lukić asserted only that they would be able to assist “with explanation regarding their evidence thus far.”<sup>163</sup> As a result, on 30 March 2009, the Trial Chamber allowed Milan Lukić to add Huso Kurspahić to his witness list but refused the addition of VG013, VG018, or VG084.<sup>164</sup> Milan Lukić did not appeal this decision.

50. On 2 April 2009, Milan Lukić filed another motion in which he called into question the list of the alleged victims of the Pionirska Street Incident and requested, *inter alia*, to recall all Prosecution witnesses who had testified with regard to this incident.<sup>165</sup> On 7 April 2009, the Trial Chamber affirmed its prior decision and held that recalling these Prosecution witnesses would be contrary to the interests of judicial economy.<sup>166</sup> It noted that it had called Huso Kurspahić as a Chamber witness in light of the new information that he had provided regarding the victims of the incident.<sup>167</sup> The Trial Chamber concluded that, in the absence of a similar indication that other Prosecution witnesses also had new information, there was no merit in Milan Lukić’s request.<sup>168</sup> Milan Lukić did not appeal this decision.

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<sup>158</sup> Milan Lukić Appeal Brief, para. 344.

<sup>159</sup> Milan Lukić Appeal Brief, para. 344.

<sup>160</sup> Prosecution Response Brief (Milan Lukić), para. 252.

<sup>161</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Milan Lukić’s Amended Fourth Defence Motion to Amend its Rule 65*ter* Witness List, 25 March 2009 (public with confidential annex) (“Motion of 25 March 2009”), paras 5-10.

<sup>162</sup> Motion of 25 March 2009, para. 9.

<sup>163</sup> Motion of 25 March 2009, para. 18.

<sup>164</sup> Decision of 30 March 2009, p. 3.

<sup>165</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Defence Submission as to Testimony of Witness CW1 Calling into Question Alleged Victims from Pionirska Street Charges in the Indictment, 2 April 2009 (public with confidential Annex A) (“Milan Lukić’s Submission of 2 April 2009”), pp. 3, 5.

<sup>166</sup> Decision of 7 April 2009.

<sup>167</sup> Decision of 7 April 2009.

<sup>168</sup> Decision of 7 April 2009. The Trial Chamber explicitly stated that the issue of the alleged victims of the Pionirska Street Incident, who had been confirmed to be alive, would be considered during deliberations (Decision of 7 April 2009).

51. Milan Lukić has failed to show that the Decision of 30 March 2009 denying his request to recall VG013, VG018, and VG084 constituted an infringement of his right to a fair trial. Similarly, in the absence of any indication that the Prosecution witnesses would have been able to provide new information concerning the victims of the Pionirska Street Incident, Milan Lukić has not demonstrated a discernible error in the Decision of 7 April 2009.<sup>169</sup> Thus, Milan Lukić has not shown that the Trial Chamber erred in denying his request to recall Prosecution witnesses VG013, VG018, or VG84.

## 5. Conclusion

52. The Appeals Chamber finds that Milan Lukić has failed to demonstrate that the Trial Chamber committed a discernible error with respect to any restrictions on the conduct of his defence case. The remainder of sub-ground 7(A), as well as sub-ground 7(C), are rejected.

### **D. Undue influence on witnesses by third parties**

53. Milan Lukić contends that the following errors by the Trial Chamber, considered cumulatively, deprived him of his right to a fair trial:<sup>170</sup> (i) the denial of his request to initiate Rule 77 contempt proceedings against Bakira Hasečić (“Hasečić”), the President of the “Women Victims of War Association” (“Association”);<sup>171</sup> (ii) his inability to effectively cross-examine the Prosecution witnesses affected by the allegations of undue influence against Hasečić;<sup>172</sup> and (iii) the failure to adequately review the impact of Hasečić’s influence on the testimony of Prosecution witnesses and properly question their credibility.<sup>173</sup>

54. The Prosecution responds that: (i) Milan Lukić has failed to show that the Trial Chamber erred in finding that Hasečić did not damage the integrity of the proceedings;<sup>174</sup> (ii) Milan Lukić explored the issue in cross-examination and was permitted to call additional witnesses on this matter, but declined to do so;<sup>175</sup> and (iii) the Trial Chamber properly evaluated the reliability and credibility of the relevant Prosecution witnesses.<sup>176</sup> The Prosecution argues that, even if the

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<sup>169</sup> Decision of 7 April 2009.

<sup>170</sup> Milan Lukić’s sub-ground 7(D). Milan Lukić Appeal Brief, para. 371.

<sup>171</sup> Milan Lukić Appeal Brief, para. 356.

<sup>172</sup> Milan Lukić Appeal Brief, paras 366-368.

<sup>173</sup> Milan Lukić Appeal Brief, paras 356, 370, referring to VG024, VG063, VG094, VG119, VG131, VG141, CW2, Zehra Turjačanin, and Huso Kurspahić.

<sup>174</sup> Prosecution Response Brief (Milan Lukić), para. 263, referring to *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Milan Lukić’s Request for Contempt Proceedings to be Instituted Against Bakira Hasečić, 20 July 2009 (confidential) (“Rule 77 Decision”), para. 16. The Prosecution further submits that Milan Lukić had ample time to investigate whether Hasečić influenced Prosecution witnesses (Prosecution Response Brief (Milan Lukić), para. 265).

<sup>175</sup> Prosecution Response Brief (Milan Lukić), paras 263-265.

<sup>176</sup> Prosecution Response Brief (Milan Lukić), paras 263, 266-268.

allegations against Hasečić were true, they “could only have had limited effect on the proceedings”.<sup>177</sup>

55. Milan Lukić replies that the Prosecution’s arguments should be dismissed in light of its “own internal finding” that Hasečić exerted undue influence on witnesses in other proceedings.<sup>178</sup>

56. The Appeals Chamber recalls that a decision denying a request to initiate contempt proceedings is a decision disposing of a contempt case within the meaning of Rule 77(J) of the Rules.<sup>179</sup> On 20 July 2009, the Trial Chamber denied Milan Lukić’s request to initiate contempt proceedings against Hasečić,<sup>180</sup> concluding that it had not been established that the actions of Hasečić damaged the integrity of the proceedings.<sup>181</sup> As Milan Lukić did not file a notice of appeal challenging the impugned decision within 15 days, the Appeals Chamber finds that he waived his right to appeal the refusal to initiate contempt proceedings against Hasečić.<sup>182</sup> Accordingly, the Appeals Chamber will consider Milan Lukić’s arguments only to the extent that they are related to findings contained in the Trial Judgement. In particular, the Appeals Chamber will examine whether the Trial Chamber: (i) took sufficient measures, irrespective of any Rule 77 proceedings, to ensure that the trial proceedings were conducted with full respect for Milan Lukić’s rights under Article 21 of the Statute, including his right to cross-examine witnesses against him; and (ii) gave sufficient consideration to the allegations against Hasečić in its evaluation of the evidence.

57. With respect to Milan Lukić’s argument that he was unable to effectively cross-examine Prosecution witnesses involved with Hasečić, the Appeals Chamber notes that, on 5 May 2008, the Prosecution provided Milan Lukić with information that indicated that Hasečić allegedly used her power to grant rape victim status and the material benefits related to such status in order to coerce women to give false statements of crimes committed against them.<sup>183</sup> Further, the Prosecution disclosed to Milan Lukić “at least 25 statements” made to the Association, including statements

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<sup>177</sup> Prosecution Response Brief (Milan Lukić), para. 264.

<sup>178</sup> Milan Lukić Reply Brief, para. 132.

<sup>179</sup> *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.2, Decision on the Prosecution’s Appeal Against the Trial Chamber’s Decision of 10 June 2008, 25 July 2008 (confidential), para. 12.

<sup>180</sup> Rule 77 Decision, para. 21.

<sup>181</sup> Rule 77 Decision, para. 16.

<sup>182</sup> The Appeals Chamber notes that Milan Lukić only sought to appeal the Rule 77 Decision in his original notice of appeal filed on 19 August 2009, which was filed 15 days after the expiration of the time limit provided by Rule 77(J) of the Rules for filing a notice of appeal against a decision disposing of a contempt case (*see* Notice of Appeal from Trial Judgement, 19 August 2009 (public with confidential Annex A), Annex A, p. 3).

<sup>183</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Milan Lukić’s Motion to Compel Rule 68 Disclosure, 4 December 2008 (confidential and corrected version) (“Decision on Rule 68 Disclosure of 4 December 2008”), para. 1; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Milan Lukić’s Urgent Motion Compelling Rule 68 Disclosure Regarding Witness Tampering on the Part of Bakira Hasečić and the Association of Women Victims of War, 4 November 2008, (confidential with confidential Annexes A, B and C), Annex A, paras 6, 9.

made by Prosecution witnesses.<sup>184</sup> This information put Milan Lukić on notice of the allegations against Hasečić, giving him the opportunity to cross-examine witnesses who had given statements to the Association. In fact, Milan Lukić questioned a number of witnesses about their relationship with the Association.<sup>185</sup> In addition, more than four months before the end of the trial, the Trial Chamber allowed Milan Lukić to amend his Rule 65 *ter* list to include the women who had raised the allegation of interference against Hasečić.<sup>186</sup> The Appeals Chamber notes that Milan Lukić did not seek to recall Prosecution witnesses with respect to these allegations. His argument that he was unable to effectively cross-examine these Prosecution witnesses is therefore rejected.

58. Further, the Appeals Chamber notes that, on 9 December 2008, the Prosecution submitted that three potential female witnesses were unwilling to speak to the Defence Team.<sup>187</sup> However, once Milan Lukić had received their identifying information, he was obliged to make use of all mechanisms of compulsion available under the Statute and the Rules had he wanted to contact them.<sup>188</sup> Having failed to do so, Milan Lukić has not shown a discernible error by the Trial Chamber with respect to his opportunity to examine these women.

59. The Appeals Chamber turns to Milan Lukić's allegations that Hasečić influenced a number of Prosecution witnesses and that the Trial Chamber failed to adequately review the impact of this influence on their credibility.<sup>189</sup> Milan Lukić submits that the "minimal mention" of Hasečić in the Trial Judgement shows that the Trial Chamber did not carefully review the allegation that Hasečić unduly influenced Prosecution witnesses.<sup>190</sup> In support of this allegation, he refers, *inter alia*, to: (i) Prosecution statements explaining CW2's removal from the Prosecution's witness list and the reluctance of witnesses to speak to his Defence Team;<sup>191</sup> and (ii) the information disclosed by the Prosecution pursuant to Rule 68 of the Rules concerning alleged interference by Hasečić with the evidence of witnesses.<sup>192</sup>

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<sup>184</sup> Decision on Rule 68 Disclosure of 4 December 2008, para. 9. *See also Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Prosecution Response to "Milan Lukić's Urgent Motion Compelling Rule 68 Disclosure Regarding Witness Tampering on the Part of Bakira Hasečić and the Association of Women Victims of War", 7 November 2008 (confidential), para. 7.

<sup>185</sup> *See* VG024, T. 3274-3278 (3 November 2008) (private session); VG141, T. 6781-6791 (6 April 2009) (private session); CW2, T. 7071-7073 (9 April 2009).

<sup>186</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Third Defence Motion to Amend Witness List, 2 March 2009 (confidential), p. 4.

<sup>187</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Prosecution Motion to Redact Identifying Information, 9 December 2008 (confidential with confidential Annex A), paras 3-6, 10-12, 16-17, 20.

<sup>188</sup> *Cf. Kupreškić et al.* Appeal Judgement, para. 50, referring to *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 16 October 1998, para. 47.

<sup>189</sup> Milan Lukić Appeal Brief, paras 356-371; Milan Lukić Reply Brief, paras 131-132.

<sup>190</sup> Milan Lukić Appeal Brief, para. 369.

<sup>191</sup> Milan Lukić Appeal Brief, paras 362, 365.

<sup>192</sup> Milan Lukić Appeal Brief, paras 363-364.

60. The Appeals Chamber recalls that the Statute's fair trial requirements "include the right of each accused to a reasoned opinion by the Trial Chamber under Article 23 of the Statute and Rule 98ter(C) [*sic*] of the Rules".<sup>193</sup> Where a party alleges on appeal that its right to a fair trial has been violated, it must prove that the trial chamber's violation of a provision of the Statute or the Rules caused prejudice to the party, such as to amount to an error of law invalidating the trial judgement.<sup>194</sup>

61. The Appeals Chamber recalls that general observations on the length of the discussion of the evidence in a trial judgement "do not qualify, except in particularly complex cases, as the basis of a valid ground of appeal [for lack of reasoned opinion]."<sup>195</sup> The Appeals Chamber observes that Milan Lukić does not assert any specific error on the part of the Trial Chamber in relation to its evaluation of the evidence of two of the witnesses who were allegedly influenced by Hasečić, namely Adem Berberović and VG097.<sup>196</sup> Moreover, he does not demonstrate that Huso Kurspahić<sup>197</sup> and Zehra Turjačanin<sup>198</sup> were members of the Association or provided statements to it; nor does he show that their evidence was influenced by Hasečić in any way. Furthermore, in evaluating the testimony of VG063, VG024, VG141, and CW2, the Trial Chamber considered that their evidence may have been influenced by Hasečić.<sup>199</sup> The Appeals Chamber is thus satisfied that the Trial Chamber explicitly took into account their involvement with her.<sup>200</sup> Accordingly, Milan Lukić has not shown that the Trial Chamber failed to provide a reasoned opinion when it considered any alleged influence by Hasečić on the testimony of these eight witnesses.

62. However, the Appeals Chamber notes with concern that, in evaluating the testimony of VG094, VG119, and VG131, the Trial Chamber did not explicitly consider their involvement with

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<sup>193</sup> *Krajišnik* Appeal Judgement, para. 139, referring to *Limaj et al.* Appeal Judgement, para. 81. See also *Naletilić and Martinović* Appeal Judgement, para. 603.

<sup>194</sup> See *supra* para. 17.

<sup>195</sup> *Kvočka et al.* Appeal Judgement, para. 25. See also *Krajišnik* Appeal Judgement, para. 134. With respect to Milan Lukić's assertion that the trial chamber in the *Vasiljević* case found Hasečić's evidence not credible (Milan Lukić Appeal Brief, para. 357), the Appeals Chamber recalls that it is well established in the jurisprudence of the Tribunal that whereas a trial chamber may follow a decision of another trial chamber, should it find it persuasive, trial chambers' decisions have no binding force upon each other (see *Aleksovski* Appeal Judgement, para. 114).

<sup>196</sup> See Milan Lukić Appeal Brief, paras 361, 370.

<sup>197</sup> The evidence cited in the Milan Lukić Appeal Brief shows only that Huso Kurspahić was present in Koritnik when a protest organised by Hasečić and the Association was taking place (see Milan Lukić Appeal Brief, para. 361, referring to Huso Kurspahić, T. 6881-6882 (7 April 2009)).

<sup>198</sup> Milan Lukić Appeal Brief, para. 361, referring to Exh. 2D39.

<sup>199</sup> In relation to VG063, the Trial Chamber noted that Milan Lukić suggested during cross-examination that the payments from the Association were an incentive for the witness to testify against him, to which VG063 replied that her testimony was never influenced by anyone (see Trial Judgement, para. 189). The Trial Chamber considered that VG024 gave a statement to the Association, but found that her credibility was not affected by it (Trial Judgement, paras 265, 322). It also considered VG141's denial of the allegation of interference by Hasečić, or that she provided the statement in order to obtain benefits from the Association (see Trial Judgement, paras 295-296). The Trial Chamber was aware that CW2 denied being influenced by Hasečić (see Trial Judgement, para. 752).

<sup>200</sup> Any other allegations concerning the evaluation of the testimony of these witnesses will only be considered where they are properly raised under Milan Lukić's other grounds of appeal.

Hasečić,<sup>201</sup> despite mention of it during cross-examination.<sup>202</sup> In light of the serious allegations raised against Hasečić, the Trial Chamber should have explained why it considered these witnesses to be reliable despite their involvement with the Association. The Trial Chamber's silence on this matter is particularly concerning since it expressly recognised that the reliability of Prosecution witnesses who provided statements to or had involvement with the Association may have been affected.<sup>203</sup> The Appeals Chamber therefore finds that the Trial Chamber did not adequately assess any impact of the witnesses' involvement with the Association on their credibility, and accordingly finds that it failed to provide a reasoned opinion in this respect. Since Milan Lukić also challenges the reliability and credibility of VG094, VG119, and VG131 under his second and fourth grounds of appeal,<sup>204</sup> the Appeals Chamber will evaluate any impact of their involvement with the Association when addressing Milan Lukić's related challenges.

63. The Appeals Chamber grants Milan Lukić's sub-ground 7(D) to the extent that the Trial Chamber erred in failing to provide a reasoned opinion as to why it considered VG094, VG119, and VG131 to be reliable despite their involvement with the Association. Any impact of this error will be discussed under Milan Lukić's second and fourth grounds of appeal. The remainder of Milan Lukić's sub-ground 7(D) is dismissed.

### **E. Conclusion**

64. For the foregoing reasons, Milan Lukić's sub-ground 7(D) is granted insofar as the Trial Chamber erred in failing to provide a reasoned opinion as to why it considered VG094, VG119, and VG131 to be reliable despite their involvement with the Association. Any impact of this error will

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<sup>201</sup> See Trial Judgement, paras 328, 709, 723.

<sup>202</sup> See VG094: "Q. Did you give a statement to the Association of Women Victims of War headed by a Ms. Bakira Hasečić? A. Yes, yes. [...] Q. I take it, then, that you are or were at some point in time a member of the Association of Women Victims of War; is that accurate? A. I just have to explain to the Trial Chamber. In order to exercise my rights as a civilian victim of the war and receive some benefits, I had to become a member of the Association of Women Victims of War, but I'm not activist of that association." (T. 7032-7033 (8 April 2009) (closed session)); VG119: "Q. Are you a member of the Women Victims of War? A. No. Q. How many times have you met with their representatives, anyone? A. Just the one time I gave the statement. Q. Have you ever met with Bakira, the president of the association? A. Only when I provided the statement to her. I did say that, didn't I? Q. [...] So she was present for that statement specifically? A. That's right. Q. And did you ever have phone conversations at any time with her? A. No. I was never in touch again with anyone I was providing my statements to except for those specific occasions when I gave my statements, and that was it." (T. 2459-2460 (1 October 2008)); VG131: "A. I first met Bakira in 2006 or 2007 when I was trying to apply for my entitlement [...]. A. When I finally went to that commission [which decided on disability payments], they told me that I would need to become a member of the Women Victims of War Association. This was a prerequisite in order to obtain this entitlement. They said I couldn't do without it. Q. Did you, in fact, give a statement to the Association for Women Victims of War? A. Yes. [...] Q. How many times did you meet with that committee? A. Once. But because I was not a member of the association, I had to resubmit evidence of my membership at a later stage." (T. 3440, 3398-3399 (5 November 2008) (closed session)).

<sup>203</sup> Decision on Rule 68 Disclosure of 4 December 2008, para. 18.

<sup>204</sup> Milan Lukić Appeal Brief, paras 109-112, 280.



be discussed under Milan Lukić's second and fourth grounds of appeal. The remainder of Milan Lukić's seventh ground of appeal is dismissed.

## IV. MILAN LUKIĆ'S ALIBI FOR THE DRINA RIVER INCIDENT AND THE VARDA FACTORY INCIDENT

### A. Introduction

65. At trial, Milan Lukić presented evidence that, on 7 June 1992 he escorted his mother to Belgrade for medical treatment and remained there until 10 June 1992, thereby providing an alibi for both the Drina River Incident and the Varda Factory Incident.<sup>205</sup> He led the evidence of five alibi witnesses: (i) MLD1; (ii) MLD10; (iii) MLD15; (iv) MLD17; and (v) Željko Marković ("Marković").

66. In rebuttal, the Prosecution presented seven witnesses. In relation to the Drina River Incident, the Prosecution led the evidence of VG146, VG148, Hamdija Vilić ("Vilić"), and VG063.<sup>206</sup> In relation to the Varda Factory Incident, the Prosecution led the evidence of VG131, VG133, and VG141.<sup>207</sup>

67. The Trial Chamber found that:

the evidence led in support of Milan Lukić's alibi was characterised by inconsistencies and unreliable testimony. On the basis of the evidence as a whole, that is, the evidence led by the Prosecution and the evidence led by the Defence, the Trial Chamber finds that the alibi is not reasonably possibly true [...] In sum, the Trial Chamber rejects the alibi as a cynical and callously orchestrated artifice.<sup>208</sup>

68. Milan Lukić argues that the Trial Chamber erred in: (i) reversing the burden of proof of the proffered alibi; and (ii) incorrectly assessing parts of the alibi evidence before it.<sup>209</sup>

### B. Burden of proof of alibi

69. Milan Lukić submits that, while the Trial Chamber correctly described the legal principles relevant to alibi evidence, the language used in the Trial Judgement demonstrates that in fact it reversed the burden of proof.<sup>210</sup> The Prosecution responds that the Trial Chamber properly applied the standard for alibi evidence.<sup>211</sup>

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<sup>205</sup> Trial Judgement, paras 146-166.

<sup>206</sup> Trial Judgement, paras 167-190.

<sup>207</sup> Trial Judgement, paras 278-297.

<sup>208</sup> Trial Judgement, para. 230. The Trial Chamber reached the same finding with regard to the Varda Factory Incident on or around 10 June 1992 (see Trial Judgement, para. 329).

<sup>209</sup> Milan Lukić's sub-grounds 1(G) and (H), 2(E) and (F). Milan Lukić Appeal Brief, paras 59-73, 107-124; Milan Lukić Reply Brief, paras 36-44.

<sup>210</sup> Milan Lukić's sub-grounds 1(G) and 2(E). Milan Lukić Appeal Brief, paras 60-63, 107, referring to Trial Judgement, paras 212, 216, 221, 223, 226; Milan Lukić Reply Brief, paras 36, 54. In this regard, the Appeals Chamber notes that

70. With respect to MLD1, the Trial Chamber held that “[t]here are a number of aspects of MLD1’s account that are difficult to believe”.<sup>212</sup> It further found that Vilić’s testimony “raise[s] 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”.<sup>213</sup> The Trial Chamber also found MLD15’s evidence “somewhat strange and artificial”.<sup>214</sup> The Appeals Chamber considers that in making these findings, the Trial Chamber explained its reasons for concluding that the witnesses lacked credibility. Such language does not indicate a reversal of the burden of proof. On the contrary, it shows that the Trial Chamber carefully considered the evidence of these alibi witnesses.

71. The Trial Chamber considered that inconsistencies in witness testimonies “call into question the alibi as a whole, *as [they cast] reasonable doubt on the alibi evidence*” of MLD1, MLD10, and Marković.<sup>215</sup> It also found that an “inconsistency resulting from MLD24’s evidence *casts further doubt upon the veracity of the alibi presented as a whole.*”<sup>216</sup> The use of these phrases is unfortunate since, taken in isolation, they could be interpreted as requiring Milan Lukić to prove beyond reasonable doubt that he was in Belgrade at the time of the alleged crimes. However, the Appeals Chamber observes that such language must be viewed in the broader context of the Trial Chamber’s findings.<sup>217</sup> The fact that the Trial Chamber in some instances used language which may be misunderstood does not necessarily mean that the Trial Chamber fundamentally misplaced the burden of proof.<sup>218</sup>

72. The Trial Chamber articulated the correct legal standard applicable to the examination of alibi evidence. In particular, it recalled that “in putting forward an alibi, an accused need only produce evidence likely to raise a reasonable doubt in the Prosecution’s case”<sup>219</sup> and that “it remains incumbent on the Prosecution to establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true”.<sup>220</sup> Thus, the Appeals Chamber considers that, when using this language, the Trial Chamber was explaining why it did not find that the proffered alibi raised a reasonable doubt in the Prosecution’s case. The Trial Chamber rejected Milan Lukić’s alibi after

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Milan Lukić only raises challenges with respect to the language used by the Trial Chamber in assessing the credibility of MLD1, MLD10, MLD15, and Marković.

<sup>211</sup> Prosecution Response Brief (Milan Lukić), paras 48-51.

<sup>212</sup> Trial Judgement, para. 212.

<sup>213</sup> Trial Judgement, para. 216.

<sup>214</sup> Trial Judgement, para. 221.

<sup>215</sup> Trial Judgement, para. 223 (emphasis added).

<sup>216</sup> Trial Judgement, para. 226 (emphasis added).

<sup>217</sup> Cf. *Zigiranyirazo* Appeal Judgement, para. 20.

<sup>218</sup> *Kamuhanda* Appeal Judgement, para. 39.

<sup>219</sup> Trial Judgement, para. 28, referring to *Niyitegeka* Appeal Judgement, para. 60. See also *Limaj et al.* Appeal Judgement, para. 65.

<sup>220</sup> Trial Judgement, para. 28, referring to *Niyitegeka* Appeal Judgement, para. 60. See also *Limaj et al.* Appeal Judgement, para. 63; *Musema* Appeal Judgement, para. 202.

having considered the evidence as a whole.<sup>221</sup> In these circumstances, the Appeals Chamber finds that Milan Lukić has failed to show that the Trial Chamber erred in law in assessing his alibi for the Drina River and Varda Factory Incidents.

### **C. Assessment of Milan Lukić's alibi**

73. The Trial Chamber considered that:

MLD1, MLD10, MLD15, MLD17 and Željko Marković testified that they met, spoke with, and saw, Milan Lukić in Belgrade and Novi Pazar on various occasions between 7-10 June 1992. MLD1's evidence constitutes the core of the alibi presented and is, as such, of crucial importance to the credibility of the alibi as a whole. MLD1's account provides the basis for Milan Lukić going to Novi Pazar on 10 June 1992, and arranging to meet MLD10 there. In addition, it was a primary subject of conversation between Milan Lukić and Željko Marković during their first meeting, and the subsequent phone call.<sup>222</sup>

74. Milan Lukić argues that the Trial Chamber erred in its assessment of the alibi evidence and alibi rebuttal evidence challenging specific individual findings.<sup>223</sup> Milan Lukić raises three main challenges. First, he submits that the Trial Chamber erred in: (i) considering unproven allegations of bribery of his alibi witnesses; and (ii) rejecting the evidence of alibi witnesses based on minor inconsistencies.<sup>224</sup> Second, with regard to the Prosecution's alibi rebuttal witnesses, Milan Lukić challenges their identification of him.<sup>225</sup> Third, he also submits that the Trial Chamber applied inconsistent standards in assessing the evidence of his alibi witnesses compared to the evidence of the Prosecution's alibi rebuttal witnesses.<sup>226</sup>

75. The Prosecution responds that Milan Lukić's challenges should be summarily dismissed, as he seeks to replace the Trial Chamber's evaluation of the evidence with his own and ignores relevant factual findings.<sup>227</sup>

#### **1. Alleged errors relating to Milan Lukić's alibi witnesses**

##### **(a) Alleged errors in the consideration of allegations of bribery of Milan Lukić's alibi witnesses**

76. During the trial, the Trial Chamber twice ordered the Prosecution to investigate possible contempt charges for bribery of Milan Lukić's alibi witnesses.<sup>228</sup> First, in August 2008, with regard

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<sup>221</sup> Trial Judgement, paras 230, 329.

<sup>222</sup> Trial Judgement, para. 210.

<sup>223</sup> Milan Lukić's sub-grounds 1(H) and 2(F). Milan Lukić Appeal Brief, paras 64-73, 108-124; Milan Lukić Reply Brief, paras 37-44, 55-58.

<sup>224</sup> Milan Lukić Appeal Brief, paras 65-66, 68-71; Milan Lukić Reply Brief, paras 38, 40-44.

<sup>225</sup> Milan Lukić Appeal Brief, paras 72, 109-123; Milan Lukić Reply Brief, paras 56-58.

<sup>226</sup> Milan Lukić Appeal Brief, para. 67; Milan Lukić Reply Brief, para. 39.

<sup>227</sup> Prosecution Response Brief (Milan Lukić), paras 52-69, 99-104.

<sup>228</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Order on Prosecution's Urgent Motion to Investigate Potential Contempt of the Tribunal, 29 August 2008 (confidential and *ex parte*; *ex parte* status lifted by an

to MLD10 and others<sup>229</sup> and second, in February 2009, with regard to MLD1 and others.<sup>230</sup> Following the first investigation, the Trial Chamber found that there were insufficient grounds to proceed in respect of MLD10.<sup>231</sup> It indicated, however, that it was open to the Prosecution to cross-examine MLD10 in relation to the allegations of attempted bribery.<sup>232</sup>

77. After receiving the Prosecution's report from the second investigation, the Trial Chamber held that the bribery allegations, if substantiated, raised a question as to the reliability of the evidence of MLD1 and other witnesses.<sup>233</sup> Furthermore, the Trial Chamber stated that these allegations might impact its assessment of the evidence in the proceedings as a whole.<sup>234</sup> While the Trial Chamber acknowledged that certain parts of the allegations could raise questions of contempt, it reiterated that its primary interest was the impact of the allegations on the reliability of the evidence before it.<sup>235</sup> The Trial Chamber did not proceed with the contempt allegations concerning MLD1.<sup>236</sup> However, it subsequently considered these allegations of bribery involving MLD1 and MLD10 in the Trial Judgement when assessing their credibility.<sup>237</sup>

78. Milan Lukić argues that this constitutes an error.<sup>238</sup> Specifically, he claims that the Trial Chamber erred by considering evidence of the unproved bribery allegations in its assessment of the credibility of MLD1 and MLD10, while it had found that there was insufficient evidence to proceed with charges of contempt.<sup>239</sup>

79. The Appeals Chamber recalls that "[t]he fact that the Prosecution did not prove [...] that Defence witnesses were giving false testimony [does] not prevent the Trial Chamber from

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order of the Trial Chamber on 11 November 2008) ("Order on First Prosecution Application Under Rule 77"); *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Order on Prosecution's Application Under Rule 77, 10 February 2009 (confidential and *ex parte*) ("Order on Second Prosecution Application Under Rule 77"). See also Trial Judgement, paras 170, 177, 1164.

<sup>229</sup> Order on First Prosecution Application Under Rule 77. See also Trial Judgement, paras 170, 1164.

<sup>230</sup> Order on Second Prosecution Application Under Rule 77. See also Trial Judgement, paras 177, 1164.

<sup>231</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution Submission of Report Pursuant to Order to Investigate Potential Contempt of the Tribunal, as Amended, Decision on Motion for Leave to Amend Prosecution's List of Witnesses, Decision on Third Prosecution Urgent Motion in Connection with Contempt Proceedings, 6 October 2008 (confidential and *ex parte*) ("Decision of 6 October 2008"), p. 4. See also Trial Judgement, paras 170, 1164.

<sup>232</sup> Trial Judgement, para. 170; Decision of 6 October 2008, pp. 3-4. MLD10 was cross-examined on 18 December 2008 and 14 January 2009 (see T. 3989-4027 (18 December 2008); T. 4039-4068 (14 January 2009)).

<sup>233</sup> T. 5511-5512 (13 March 2009) (private session).

<sup>234</sup> T. 5511-5512 (13 March 2009) (private session).

<sup>235</sup> T. 5511-5513 (13 March 2009) (private session).

<sup>236</sup> T. 5511-5513 (13 March 2009) (private session); *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution's Submission of Final Report Pursuant to Trial Chamber's Order on Prosecution's Application Under Rule 77, 20 July 2009 (confidential). On 13 March 2009, the Trial Chamber asked the parties to indicate whether they wished to call any of the individuals mentioned in the report (Trial Judgement, paras 177-178, 1165. See also T. 5513 (13 March 2009) (private session)). Neither the Prosecution nor Milan Lukić requested to call MLD1, who had previously testified in relation to the contempt allegations (see Trial Judgement, para. 177).

<sup>237</sup> Trial Judgement, paras 167-182, 211, 214-216.

<sup>238</sup> Milan Lukić Appeal Brief, paras 64-67; Milan Lukić Reply Brief, para. 38.

<sup>239</sup> Milan Lukić Appeal Brief, paras 64-67; Milan Lukić Reply Brief, para. 38.

exercising its discretion in assessing the weight to be attached to their evidence.”<sup>240</sup> Consequently, even if the Trial Chamber found that the evidence of bribery was not sufficient to trigger contempt proceedings, it was within its discretion to consider that evidence in assessing the credibility of MLD1 and MLD10 in relation to the alibi. The Appeals Chamber therefore finds that the Trial Chamber did not err in considering the bribery allegations as one of several factors in its credibility assessment of MLD1<sup>241</sup> and MLD10.<sup>242</sup>

(b) Alleged errors in the rejection of alibi evidence based on minor inconsistencies

80. According to the alibi evidence presented by Milan Lukić at trial, on 7 June 1992, he escorted his mother to Belgrade for medical treatment and remained there until 10 June 1992.<sup>243</sup> MLD1, a Muslim from Višegrad, testified that he and his fiancée were assisted in fleeing from Višegrad by Milan Lukić who allowed them to travel with him and his mother to Belgrade on 7 June 1992.<sup>244</sup> In Belgrade, they stayed with Milan Lukić until he drove them to Novi Pazar on 10 June 1992.<sup>245</sup> MLD15 testified that in Belgrade, Milan Lukić attended his engagement party on the evening of 7 June 1992 and that they played billiards on 9 June 1992.<sup>246</sup> According to Marković, he spoke to Milan Lukić on the phone on 7 June 1992 and met with him in Belgrade on the morning of 8 June 1992.<sup>247</sup> MLD17 testified that she spoke to Milan Lukić in the parking lot of her building on the afternoon of 7 June 1992, saw him from her balcony on 8 June 1992, met with him on 9 June 1992 as she was leaving the apartment building, and that he briefly visited her on 10 June 1992 before leaving for Novi Pazar.<sup>248</sup> Finally, MLD10 testified that she talked on the phone with Milan Lukić on 8 June 1992 and met with him in Novi Pazar on 10 June 1992 to give him a package for her family in Višegrad.<sup>249</sup>

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<sup>240</sup> *Bikindi* Appeal Judgement, para. 115.

<sup>241</sup> The Trial Chamber did not reject MLD1’s evidence only on the basis of the bribery allegations. The Trial Chamber found that “[w]hile the evidence led by the Prosecution as to contemptuous conduct in relation to VG145 and VG146 is insufficient to discredit MLD1’s evidence *in toto*, [...] the Trial Chamber will be particularly cautious in evaluating the credibility of MLD1.” (Trial Judgement, para. 211). It subsequently found that MLD1’s evidence lacked credibility “[a]fter considering [it] in its entirety” (Trial Judgement, para. 212). *See also infra* para. 88.

<sup>242</sup> The Trial Chamber did not reject MLD10’s evidence only on the basis of the bribery allegations. It considered that “the testimony of Hamdija Vilić arising from the allegations of bribery and MLD10’s evidence in this respect raise serious questions as to the credibility of MLD10 in general and in respect of her alibi evidence [...]. The Trial Chamber [has] considered these allegations in its final evaluation of MLD10’s credibility.” (Trial Judgement, para. 216). It conducted a further analysis of her evidence and found her not credible on the basis of several inconsistencies, including that she testified that Milan Lukić told her on 8 June 1992 that he was travelling to Novi Pazar with some Muslims, while MLD1 testified that he and his girlfriend only decided to go to Novi Pazar on 10 June 1992 (Trial Judgement, paras 217, 223, 225).

<sup>243</sup> Trial Judgement, paras 146-147, 149, 154-155, 157, 159, 161, 164-165.

<sup>244</sup> Trial Judgement, paras 147, 149.

<sup>245</sup> Trial Judgement, para. 150.

<sup>246</sup> Trial Judgement, paras 157-159.

<sup>247</sup> Trial Judgement, paras 154-155.

<sup>248</sup> Trial Judgement, paras 164-165.

<sup>249</sup> Trial Judgement, paras 161-162.

81. Milan Lukić submits that the Trial Chamber “erred when rejecting alibi witnesses on the basis of minor contradictions which did not undermine the alibi *per se*”.<sup>250</sup> In this regard, Milan Lukić raises a number of specific challenges to the Trial Chamber’s evaluation of the alibi evidence. The Appeals Chamber will consider each of these challenges in turn.

82. First, Milan Lukić points to the Trial Chamber’s reliance on the inability of MLD1, MLD10, MLD15, MLD17, and Marković to give specific information about the health problems of his mother to discredit them.<sup>251</sup>

83. The Appeals Chamber notes that the witnesses’ lack of knowledge of the health situation of Milan Lukić’s mother was only one of the Trial Chamber’s considerations when rejecting the alibi of Milan Lukić.<sup>252</sup> The Appeals Chamber is therefore of the view that it was within the discretion of, and reasonable for, the Trial Chamber to take into account the inability of MLD1, MLD10, MLD15, MLD17, and Marković to specify the health problems of Milan Lukić’s mother when assessing the veracity of Milan Lukić’s alibi.

84. Second, Milan Lukić argues that no reasonable trial chamber could conclude that the inconsistency in MLD17’s evidence regarding how often she met Milan Lukić in April eliminated the reasonable possibility that Milan Lukić’s alibi was true.<sup>253</sup> He further argues that the Trial Chamber’s reasoning that MLD17 should have spent more time with Milan Lukić in Belgrade in June 1992 is arbitrary.<sup>254</sup>

85. The Trial Chamber noted that MLD17 was inconsistent as to how often she had met Milan Lukić in April 1992, when she became acquainted with him.<sup>255</sup> Although MLD17 testified during examination-in-chief that in April she met him “occasionally”, she testified during cross-examination that she met him two or three times a week and over the weekend.<sup>256</sup> The Trial Chamber also noted MLD17’s evidence that she and Milan Lukić met with considerable regularity over the month of April.<sup>257</sup> It consequently found her evidence that Milan Lukić only visited her briefly during his alleged stay in Belgrade, early in the morning on 10 June 1992, to be

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<sup>250</sup> Milan Lukić Appeal Brief, para. 68.

<sup>251</sup> Milan Lukić Appeal Brief, para. 68; Milan Lukić Reply Brief, para. 41.

<sup>252</sup> Trial Judgement, para. 230. *See also* Trial Judgement, paras 211-213, 215-217, 221-226.

<sup>253</sup> Milan Lukić Appeal Brief, para. 69, referring to Trial Judgement, para. 222.

<sup>254</sup> Milan Lukić Reply Brief, para. 42, referring to Trial Judgement, para. 222.

<sup>255</sup> Trial Judgement, para. 222.

<sup>256</sup> Trial Judgement, para. 222.

<sup>257</sup> Trial Judgement, para. 222.

“unconvincing”.<sup>258</sup> The Trial Chamber added that, while this did not discredit MLD17’s evidence *in toto*, it would take it into account in its overall consideration of her evidence.<sup>259</sup>

86. Contrary to Milan Lukić’s argument, the Trial Chamber did not find that the inconsistency in MLD17’s evidence as to how often she and Milan Lukić met in April 1992 undermined the possibility that his alibi was reasonably possibly true. The Trial Chamber merely took the inconsistencies in MLD17’s evidence into consideration as one of the factors, among others, in its overall assessment of the alibi evidence. The Appeals Chamber further recalls that trial chambers are vested with broad discretion in the assessment of the weight and credibility to be accorded to the testimony of a witness.<sup>260</sup> It therefore remains unconvinced by Milan Lukić’s argument that the Trial Chamber’s assessment of MLD17’s evidence regarding how often she saw Milan Lukić in June 1992, when he claims to have been in Belgrade, was “arbitrary”.

87. Third, Milan Lukić asserts that the Trial Chamber erred in rejecting MLD1’s evidence based, in part, on his lack of knowledge as to where Milan Lukić went after leaving him and his fiancée at Novi Pazar, on 10 June 1992.<sup>261</sup>

88. The Trial Chamber noted that no evidence was presented as to the time Milan Lukić and his mother returned to Višegrad from Novi Pazar.<sup>262</sup> It also noted that MLD1 “who purportedly, and very quickly, had become so close to Milan Lukić that he managed to convince him to drive him and his fiancée to Belgrade” did not provide information on this matter.<sup>263</sup> However, contrary to Milan Lukić’s submission, the Trial Chamber did not reject his alibi evidence on this basis alone.<sup>264</sup> It considered MLD1’s demeanour in court and indicated that some aspects of his testimony were difficult to believe.<sup>265</sup> The Trial Chamber exercised particular caution in evaluating the credibility of MLD1 and considered his evidence in its entirety and in relation to the evidence of other

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<sup>258</sup> Trial Judgement, para. 222.

<sup>259</sup> Trial Judgement, para. 222.

<sup>260</sup> *Nchamihigo* Appeal Judgement, para. 47; *Bikindi* Appeal Judgement, para. 116; *Nahimana et al.* Appeal Judgement, para. 194.

<sup>261</sup> Milan Lukić Appeal Brief, para. 68.

<sup>262</sup> Trial Judgement, para. 224.

<sup>263</sup> Trial Judgement, para. 224.

<sup>264</sup> Trial Judgement, paras 211-213, 224, 226

<sup>265</sup> Trial Judgement, paras 211-212. The Trial Chamber mentioned, *inter alia*, that it was difficult to believe that: (i) MLD1, a Muslim who had previously been detained and beaten by Serb soldiers, would ask Milan Lukić, a Serb policeman he had never met before, to take him and his fiancée out of Višegrad; (ii) MLD1, who was purportedly engaged to a woman and regularly stayed at her apartment, would not know the address of the apartment where she lived; (iii) Milan Lukić decided to risk aggravating his mother’s ill-health by undertaking a long trip to Belgrade and then to Novi Pazar in order to bring two Muslims there with whom he had little or no relationship; (iv) MLD1 and his alleged fiancée decided to go to Belgrade with Milan Lukić rather than attempt to get to Muslim-controlled territory, and that MLD1 was unable to provide a satisfactory explanation for this decision; (v) MLD1 chose to return to Višegrad *immediately* after arriving at Novi Pazar, despite having been so fearful only four days earlier that he chose to leave Višegrad with a Serb he did not know.



witnesses.<sup>266</sup> In these circumstances, the Appeals Chamber finds that the Trial Chamber, in its discretion, reasonably assessed the alibi evidence of MLD1.

89. Fourth, Milan Lukić contends that with regard to MLD15, the Trial Chamber also erroneously relied upon “irrelevant considerations”, namely MLD15’s inability to specify the exact time he saw an argument between Milan Lukić and another woman at a party MLD15 organised in order to propose to his girlfriend.<sup>267</sup>

90. The Appeals Chamber notes that Milan Lukić misstates the Trial Chamber’s finding when he claims that it rejected MLD15’s evidence based on the witness’ inability to specify the exact time the witness saw the argument between Milan Lukić and another woman.<sup>268</sup> The Trial Chamber assessed MLD15’s evidence as a whole and concluded that: “[t]his entire episode appears somewhat strange and artificial: a very good friend chooses to disrupt such an important celebration and so soon after MLD15 had proposed to his girlfriend.”<sup>269</sup> The Appeals Chamber finds that the Trial Chamber acted within its discretion when it made this finding, and reasonably took it into consideration in its assessment of MLD15’s credibility and in its overall assessment of the proffered alibi.

91. Fifth, Milan Lukić submits that the Trial Chamber erred in relying on one portion of MLD24’s evidence to discredit Milan Lukić’s alibi while at the same time rejecting other parts of MLD24’s evidence.<sup>270</sup>

92. The Appeals Chamber notes that the Trial Chamber accepted MLD24’s evidence that Milan Lukić’s parents did not leave the Rujište area during the first half of June 1992 and found that this evidence discredited Milan Lukić’s alibi for the Drina River and Varda Factory Incidents.<sup>271</sup> However, the Trial Chamber found MLD24 unreliable in the context of Milan Lukić’s alibi for the Pionirska Street Incident, namely with respect to Milan Lukić’s alleged presence in Kopito from 13 to 15 June 1992.<sup>272</sup> The Trial Chamber found it “difficult to believe” that MLD24, as a mobilised soldier, did not know about the operation in Kopito but found out about it from Milan Lukić’s parents and his own wife.<sup>273</sup> The Appeals Chamber recalls that it is open to a trial chamber to accept

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<sup>266</sup> Trial Judgement, paras 210-213, 223-224, 226.

<sup>267</sup> Milan Lukić Appeal Brief, para. 68.

<sup>268</sup> Milan Lukić Appeal Brief, para. 68.

<sup>269</sup> Trial Judgement, para. 221.

<sup>270</sup> Milan Lukić refers to the Trial Chamber’s acceptance of MLD24’s evidence that Milan Lukić’s parents lived in a tent near his military position in Rujište where he saw them often and that they had not left the area during the first half of June 1992, while elsewhere in the Trial Judgement it held that MLD24 was an “unreliable witness” (Milan Lukić Appeal Brief, para. 70, referring to Trial Judgement, para. 626; Milan Lukić Reply Brief, para. 43).

<sup>271</sup> Trial Judgement, paras 226, 277.

<sup>272</sup> Trial Judgement, para. 626.

<sup>273</sup> Trial Judgement, para. 626.

some parts of a witness's testimony and reject others.<sup>274</sup> The Appeals Chamber finds that Milan Lukić has failed to show that the Trial Chamber erred in accepting MLD24's evidence in relation to the Drina River and Varda Factory Incidents while rejecting it with regard to the Pionirska Street Incident.

93. Finally, Milan Lukić argues that the Trial Chamber erred in dismissing the evidence of MLD10 and Marković on the basis that their alibi evidence did not refer to 1992.<sup>275</sup>

94. The Trial Chamber based its finding on MLD10's explanation that she remembered the dates of 8 and 10 June 1992<sup>276</sup> because her husband had come back from his work in Germany some seven days before, and it was her birthday on 13 June.<sup>277</sup> The Trial Chamber considered MLD10's evidence that her husband had been working in Germany since 1973,<sup>278</sup> and that she and her husband "always [had] a [birthday] celebration as much as [they] could."<sup>279</sup> In these circumstances, the Appeals Chamber finds that Milan Lukić has not shown that the Trial Chamber erred in finding that nothing in MLD10's evidence specifically links her recollection of the meeting with Milan Lukić to 1992. Hence, a reasonable trier of fact could have found that MLD10's contact with Milan Lukić on 8 and 10 June did not necessarily occur in 1992.

95. With regard to Marković's phone call and meeting with Milan Lukić, the Trial Chamber considered that Marković remembered the dates he was in contact with Milan Lukić because when Milan Lukić called, he was celebrating the anniversary of living with his wife, which he does annually on 7 June, and met with Milan Lukić the following day.<sup>280</sup> While this evidence might not reflect a specific link to 1992, the totality of Marković's testimony shows that his recollection of the phone call and meeting with Milan Lukić was linked to the war in general and 1992 in particular. Marković testified that in May 1992, he accompanied Milan Lukić on a trip from Belgrade to Višegrad.<sup>281</sup> During this trip, Milan Lukić was mobilised into the reserve police force, which, the Trial Chamber found, occurred in 1992.<sup>282</sup> Marković testified that the trip to Belgrade, which Milan Lukić proffered as an alibi for the Drina River Incident, "was not much later. It was the

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<sup>274</sup> *Haradinaj et al.* Appeal Judgement, para. 201, referring to *Blagojević and Jokić* Appeal Judgement, para. 82 (citing *Kupreškić et al.* Appeal Judgement, para. 333).

<sup>275</sup> Milan Lukić argues that their evidence, viewed as a whole, related to the war in general and 1992 in particular, and that therefore their failure to specifically identify the year 1992 was immaterial. He further argues that the war started in 1992 and that it was thus easy for both witnesses to link specific events to that year (Milan Lukić Appeal Brief, para. 71; Milan Lukić Reply Brief, para. 44).

<sup>276</sup> Trial Judgement, para. 217.

<sup>277</sup> Trial Judgement, para. 217.

<sup>278</sup> Trial Judgement, para. 162.

<sup>279</sup> MLD10, T. 3955 (18 December 2008) (emphasis added).

<sup>280</sup> Trial Judgement, para. 154.

<sup>281</sup> Marković, T. 3846-3847, 3849, 3852 (17 December 2008).

<sup>282</sup> Trial Judgement, paras 614-618.

7<sup>th</sup> of June.”<sup>283</sup> Milan Lukić’s mobilisation into the reserve police force was not an annual occurrence. Thus, the Trial Chamber erred when it found that “there is nothing that would specifically tie his recollection of Milan Lukić’s phone call to 7 June 1992, as opposed to any other year.”<sup>284</sup> However, considering that the Trial Chamber did not reject Marković’s alibi evidence for this reason alone<sup>285</sup> and did not reject Milan Lukić’s alibi solely on the basis of inconsistencies in Marković’s evidence,<sup>286</sup> the Appeals Chamber finds that this error has no impact on the Trial Chamber’s finding regarding Marković’s alibi evidence, and more generally, its rejection of Milan Lukić’s alibi.

## 2. Alleged errors in the assessment of the Prosecution’s alibi rebuttal evidence

96. With respect to the Drina River Incident, the Trial Chamber found that VG063’s alibi rebuttal evidence was not sufficiently specific as to the dates on which she saw Milan Lukić in Višegrad.<sup>287</sup> As to the Varda Factory Incident, the Trial Chamber held that the evidence of VG131, VG133, and VG141 “clearly place[d] Milan Lukić in Višegrad on the evening of 9 June 1992 and on 10 June 1992.”<sup>288</sup>

97. Milan Lukić raises several arguments relating, *inter alia*, to the identification of him by VG063, VG131, VG133, and VG141. As the Trial Chamber did not rely on VG063 in its overall assessment with regard to the Drina River Incident or the Varda Factory Incident,<sup>289</sup> the Appeals Chamber will not consider Milan Lukić’s arguments in relation to this witness any further.

### (a) VG131

98. The Trial Chamber considered VG131’s evidence that, on 9 June 1992, Milan Lukić and Vasiljević came to an apartment in Višegrad, where VG131 stayed with other Muslim

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<sup>283</sup> Marković, T. 3856 (17 December 2008).

<sup>284</sup> Trial Judgement, para. 217.

<sup>285</sup> The Trial Chamber also noted that Marković testified that Milan Lukić asked him about getting to Novi Pazar on the morning of 8 June 1992 as he was taking some Muslims there while, on the other hand, MLD1 testified that it was not until 10 June 1992 that he and his fiancée decided to go to Novi Pazar, and that only after they made this decision did they ask Milan Lukić to drive them there. The Trial Chamber considered that “this inconsistency is sufficiently significant to call into question the alibi as a whole, as it casts reasonable doubt on the alibi evidence of [...] Željko Marković, in addition to that of MLD1.” (Trial Judgement, para. 223).

<sup>286</sup> As discussed above, the Trial Chamber rejected the alibi on the basis of multiple inconsistencies and unreliable evidence, including that of MLD1, which according to the Trial Chamber constituted the core of the alibi presented (Trial Judgement, paras 210-213, 230).

<sup>287</sup> Trial Judgement, para. 229.

<sup>288</sup> Trial Judgement, para. 328.

<sup>289</sup> Trial Judgement, para. 229.

inhabitants.<sup>290</sup> She further testified that Milan Lukić had a short conversation with them and introduced himself.<sup>291</sup> The Trial Chamber found VG131 to be credible and reliable.<sup>292</sup>

99. Milan Lukić argues that the Trial Chamber ignored the fact that VG131 had never seen him prior to 9 June 1992 and that the identification took place in the dark and as a result of a traumatic event.<sup>293</sup> He also argues that the Trial Chamber failed to adequately review the impact of Hasečić, the President of the Association, on the credibility of VG131.<sup>294</sup>

100. Contrary to Milan Lukić's submission, the Trial Chamber did consider that VG131 met Milan Lukić for the first time on 9 June 1992 but was satisfied that her knowledge of Milan Lukić was based on his personal introduction to her.<sup>295</sup> It further considered that Milan Lukić came to the apartment where VG131 was staying at noon, introduced himself, and raped her later that night.<sup>296</sup> Given that Milan Lukić introduced himself to VG131 at noon, before she was traumatised by the rape, the Appeals Chamber considers that the Trial Chamber acted reasonably when it did not take into account the darkness or any trauma resulting from the rape in its assessment of VG131's identification of Milan Lukić.

101. The Appeals Chamber recalls that the Trial Chamber did not explain why it considered VG131 credible despite her involvement with Hasečić and the Association.<sup>297</sup> VG131 testified that she "first met Bakira [Hasečić] in 2006 or 2007 when [VG131] was trying to apply for her entitlement" as a rape victim.<sup>298</sup> She testified that she gave a statement to the Association which was reviewed when considering whether she would be granted the entitlement.<sup>299</sup> VG131 gave an out-of-court statement prior to her first contact with Hasečić, on 2 July 1992,<sup>300</sup> and one thereafter, on 14 August 2008.<sup>301</sup> Neither these statements nor her in-court testimony show any inconsistency which indicates that VG131 changed her evidence after having been in contact with Hasečić. In these circumstances, the Appeals Chamber finds that a reasonable trial chamber could have found that VG131's evidence was not affected by her involvement with Hasečić and the Association. Consequently, the Appeals Chamber finds that Milan Lukić has failed to show that the Trial Chamber erred in concluding that VG131 was credible.

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<sup>290</sup> Trial Judgement, para. 278.

<sup>291</sup> Trial Judgement, paras 278-279.

<sup>292</sup> Trial Judgement, para. 328.

<sup>293</sup> Milan Lukić Appeal Brief, paras 109-112; Milan Lukić Reply Brief, para. 56. The traumatic event is the alleged rape of the witness by Milan Lukić.

<sup>294</sup> Milan Lukić Appeal Brief, paras 361, 370.

<sup>295</sup> Trial Judgement, para. 279.

<sup>296</sup> Trial Judgement, paras 278-280, referring to VG131, T. 3379-3381 (5 November 2008) (closed session).

<sup>297</sup> *See supra* para. 62.

<sup>298</sup> VG131, T. 3440 (5 November 2008) (closed session).

<sup>299</sup> VG131, T. 3398-3399 (5 November 2008) (closed session).

(b) VG133

102. The Trial Chamber considered VG133's evidence that on 10 June 1992, between 6:00 p.m. and 7:00 p.m., Milan Lukić arrived in a red Passat at an apartment building in Višegrad where VG133 and VG141 were staying.<sup>302</sup> VG133 testified that Milan Lukić looked at her for about 15 to 20 seconds.<sup>303</sup> She further testified that she saw Milan Lukić subsequently put four Muslim men into the Passat, and shoot them on a bridge over the Drina River.<sup>304</sup> The Trial Chamber found VG133 to be credible and reliable.<sup>305</sup>

103. Milan Lukić argues that the Trial Chamber erred in ignoring the discrepancies in VG133's evidence as to the date of this incident.<sup>306</sup> He also argues that VG133's evidence was discredited by VG141's evidence and not corroborated as the Trial Chamber found.<sup>307</sup>

104. The Trial Chamber set out in detail VG133's evidence as to the date on which she witnessed the above-mentioned incident.<sup>308</sup> It considered that "VG133 displayed confusion as to the date of the incident, and that, while during cross-examination she was uncertain about the timing of the incident, she confirmed that it took place in the evening of 10 June 1992 both during cross-examination and re-examination."<sup>309</sup> The Trial Chamber thus explicitly assessed VG133's evidence as to the date of the incident, and was ultimately satisfied on the basis of her evidence that it occurred on 10 June 1992.<sup>310</sup> The Trial Chamber further considered that VG133's account was corroborated by VG141.<sup>311</sup>

105. Milan Lukić has not shown that the Trial Chamber erred in failing to use VG141's evidence to discredit VG133's evidence. In raising this argument, Milan Lukić merely suggests that the Trial Chamber failed to interpret VG141's evidence in a particular manner.<sup>312</sup> In these circumstances, the Appeals Chamber is satisfied that the Trial Chamber did not err in finding that VG141's evidence on the date of this incident corroborated that of VG133. The Appeals Chamber therefore finds that the Trial Chamber reasonably accepted VG133's evidence to rebut the alibi.

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<sup>300</sup> See Exh. 2D40.

<sup>301</sup> See Exh. 1D89.

<sup>302</sup> Trial Judgement, para. 281.

<sup>303</sup> Trial Judgement, para. 283.

<sup>304</sup> Trial Judgement, paras 284-285.

<sup>305</sup> Trial Judgement, para. 328.

<sup>306</sup> Milan Lukić Appeal Brief, paras 121-123.

<sup>307</sup> Milan Lukić Appeal Brief, para. 123.

<sup>308</sup> Trial Judgement, paras 287-289.

<sup>309</sup> Trial Judgement, para. 328.

<sup>310</sup> Trial Judgement, paras 287-289, 328.

<sup>311</sup> Trial Judgement, para. 328.

<sup>312</sup> See Milan Lukić Appeal Brief, para. 123.

(c) VG141

106. The Trial Chamber considered VG141's evidence that she had been told by VG133 as well as VG133's parents-in-law that it was Milan Lukić who had come to her door on 10 June 1992.<sup>313</sup> VG141 further testified that when she first saw him, it was light outside and she stood about one metre away from him.<sup>314</sup> Further, she gave evidence that she saw Milan Lukić shoot the four Muslim men on the bridge over the Drina River.<sup>315</sup> The Trial Chamber found that VG141 was credible and reliable.<sup>316</sup>

107. Milan Lukić argues that the Trial Chamber erred in relying on VG141's identification evidence because she had never seen him prior to the incident on 10 June 1992,<sup>317</sup> and that the basis for her identification of him varied throughout the trial.<sup>318</sup> In particular, he argues that while VG141 maintained in her 2008 statement that VG133's father-in-law told her that he recognised Milan Lukić and that *a week later* VG133 confirmed this information, she testified at trial that VG133 and her parents-in-law confirmed *on the same date* that it was Milan Lukić.<sup>319</sup>

108. When assessing VG141's evidence, the Trial Chamber took into account that she did not know Milan Lukić before 10 June 1992,<sup>320</sup> but also considered that she was able to look at him for a few minutes.<sup>321</sup> The Trial Chamber further took into consideration that VG141 identified Milan Lukić on the basis that he was driving the red Passat that had belonged to Behija Zukić.<sup>322</sup> It also noted that she had not mentioned the red Passat as a basis for identifying him in her statements.<sup>323</sup> However, the Trial Chamber accepted VG141's testimony that she had not mentioned the red Passat because she did not think it was important.<sup>324</sup> The Trial Chamber further considered VG141's testimony that she had identified Milan Lukić in a photograph when she gave her statement in Visoko and that she had not mentioned this statement to the Prosecution or in any of her other statements because she thought it was not important.<sup>325</sup> The Trial Chamber also took note of her evidence that when giving her statements "questions were always put to her by different people".<sup>326</sup>

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<sup>313</sup> Trial Judgement, paras 281, 291.

<sup>314</sup> Trial Judgement, para. 291.

<sup>315</sup> Trial Judgement, paras 284-285.

<sup>316</sup> Trial Judgement, para. 328.

<sup>317</sup> This incident is the alleged killing of four Muslim men by Milan Lukić. Milan Lukić collected these men from the apartment building where VG141 was staying (see Trial Judgement, paras 283-285).

<sup>318</sup> Milan Lukić Appeal Brief, paras 113-120; Milan Lukić Reply Brief, para. 57.

<sup>319</sup> Milan Lukić Appeal Brief, paras 116-119, referring to VG141, T. 6750 (6 April 2009) (private session), Exh. 1D224.4 (confidential), paras 7-8.

<sup>320</sup> Trial Judgement, para. 291.

<sup>321</sup> Trial Judgement, para. 291.

<sup>322</sup> Trial Judgement, para. 293.

<sup>323</sup> Trial Judgement, para. 293.

<sup>324</sup> Trial Judgement, para. 293.

<sup>325</sup> Trial Judgement, para. 292.

<sup>326</sup> Trial Judgement, para. 292.

The Appeals Chamber observes that the Trial Chamber considered these factors and was nevertheless satisfied that VG141 was a credible and reliable witness.<sup>327</sup> Milan Lukić has failed to show any error of the Trial Chamber in this regard.

109. On the basis of VG141's testimony, the Trial Chamber noted that, about half an hour after the incident, VG133 and her parents-in-law told VG141 that Milan Lukić was the man who had come armed to the apartment.<sup>328</sup> However, it did not explicitly address that in a previous statement VG141 stated that VG133's father-in-law identified Milan Lukić to her after the incident and that VG133 confirmed this identification a week later.<sup>329</sup>

110. The Appeals Chamber is not convinced by Milan Lukić's argument in this regard. The Trial Chamber referred to both VG141's oral testimony and her 2008 statement when summarising her evidence.<sup>330</sup> The Appeals Chamber recalls that a trial chamber is not required to address every minor inconsistency in a witness's evidence<sup>331</sup> or to articulate every step of its reasoning.<sup>332</sup> The Appeals Chamber also notes that the discrepancy was minor and that her evidence in this regard consistently indicated that VG133's father-in-law identified Milan Lukić to her. In these circumstances, the Appeals Chamber finds that the Trial Chamber reasonably accepted VG141 as an alibi rebuttal witness.

### 3. Alleged application of inconsistent standards in the assessment of the evidence of alibi witnesses compared to alibi rebuttal witnesses

111. Milan Lukić raises a number of arguments alleging that the Trial Chamber applied inconsistent standards. In particular, he argues that the Trial Chamber erred when it accepted the improbable evidence of Vilić, a Prosecution witness, while it found MLD15's testimony "*strange and artificial*".<sup>333</sup> He further claims that no reasonable trial chamber could have treated the similar evidence of MLD1 and CW2 differently.<sup>334</sup>

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<sup>327</sup> Trial Judgement, para. 328.

<sup>328</sup> Trial Judgement, paras 291, 328.

<sup>329</sup> VG141 stated that, about half an hour after the incident, she went to the apartment of VG133's parents-in-law where VG133's father-in-law told her that it was Milan Lukić who had come to their door. VG133, who had seen Milan Lukić several times prior to this incident, confirmed about one week later that it was Milan Lukić who had come to their door and shot the men on the bridge (*see* Exh. 1D224.4 (confidential), paras 7-9).

<sup>330</sup> Trial Judgement, fn. 1092, referring to VG141, T. 6750 (6 April 2009), Exh. 1D224.4 (confidential), pp. 1-3.

<sup>331</sup> *Haradinaj et al.* Appeal Judgement, para. 134.

<sup>332</sup> *Renzaho* Appeal Judgement, para. 527.

<sup>333</sup> Milan Lukić Appeal Brief, para. 66 (emphasis in original), referring to Trial Judgement, para. 221.

<sup>334</sup> Milan Lukić Appeal Brief, para. 67. In reply, Milan Lukić claims that the Trial Chamber treated "identical" evidence differently (Milan Lukić Reply Brief, para. 39).

112. The Appeals Chamber recalls that a trial chamber has a broad discretion to consider all relevant factors in determining the weight to attach to the evidence of any given witness.<sup>335</sup> It is within the discretion of a trial chamber to evaluate the evidence as a whole, without explaining its decision in detail.<sup>336</sup> Merely stating that two witnesses, who testified about two separate events, were accorded different weight by the Trial Chamber does not meet the standard of appeal.

113. In these circumstances, the Appeals Chamber considers that Milan Lukić has failed to show that the Trial Chamber erred in finding that MLD15's evidence was "*strange and artificial*", while Vilić's evidence was not, and in according different weight to the evidence of MLD1 and CW2.

#### 4. Conclusion

114. The Appeals Chamber has found that, with exception of the Trial Chamber's evaluation of Marković's alibi evidence, Milan Lukić has failed to demonstrate that the Trial Chamber erred in assessing his alibi evidence for the Drina River and Varda Factory Incidents. The Appeals Chamber considers that this error is minor and has no impact on the Trial Chamber's overall assessment of Marković's alibi evidence, or more generally, on its rejection of Milan Lukić's alibi as a whole. The Appeals Chamber finds that, in view of the evidence as a whole, a reasonable trier of fact could have found that the alibi was not reasonably possibly true.

#### D. Conclusion

115. Milan Lukić has not shown that the Trial Chamber erred in assessing his alibi for the Drina River and Varda Factory Incidents or in finding that his alibi was not reasonably possibly true. Therefore, the Appeals Chamber dismisses sub-grounds 1(G) and (H) and 2(E) and (F) of Milan Lukić's appeal.

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<sup>335</sup> See *supra* para. 86.

<sup>336</sup> *Kvočka et al.* Appeal Judgement, para. 23, referring to *Čelebići* Appeal Judgement, paras 481, 498; *Kupreškić et al.* Appeal Judgement, para. 32.



## V. IDENTIFICATION EVIDENCE

116. Milan Lukić and Sredoje Lukić raise two general errors of law with respect to identification evidence, namely that the Trial Chamber erred in: (i) labelling the witnesses as “identification” or “recognition” witnesses; and (ii) allowing in-court identification. In particular, Milan Lukić contends that the Trial Chamber’s distinction between “identification” and “recognition” witnesses is flawed, since the considerations affecting the reliability of identification evidence apply equally to both categories.<sup>337</sup> Both Milan Lukić and Sredoje Lukić argue that the Trial Chamber erred in considering certain witnesses as recognition witnesses, instead of identification witnesses, and by consequently allowing them to perform in-court identification, causing Milan Lukić and Sredoje Lukić prejudice.<sup>338</sup> In their view, the Trial Chamber erred in law by permitting those in-court identifications with respect to each crime site.<sup>339</sup> They also submit that the failure of a witness to identify an accused during a pre-trial procedure necessarily precludes a trial chamber from allowing in-court identification.<sup>340</sup> Further, they submit that the Trial Chamber improperly relied on the in-court identification evidence of “recognition” witnesses.<sup>341</sup>

117. The Prosecution responds that Milan Lukić’s submissions warrant summary dismissal, as the Appeals Chamber and numerous trial chambers have accepted in-court identification by recognition witnesses.<sup>342</sup> It further responds that Sredoje Lukić fails to show that the Trial Chamber’s findings on in-court identification are relevant to the judgement against him.<sup>343</sup>

### A. “Identification” and “recognition” witnesses

118. The Trial Chamber noted that there was a difference between “identification” witnesses, to whom the accused was “previously unknown by sight” and “recognition” witnesses who had prior knowledge of the accused enabling them to recognise the accused at the time of the alleged crime.<sup>344</sup> A witness’s prior knowledge of, or level of familiarity with, an accused is a relevant factor in the assessment of identification evidence. The Appeals Chamber considers that, as part of its

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<sup>337</sup> Milan Lukić Appeal Brief, paras 13-16; Milan Lukić Reply Brief, para. 3.

<sup>338</sup> Milan Lukić Appeal Brief, paras 17-18, 24; Milan Lukić Reply Brief, para. 4; Sredoje Lukić Appeal Brief, paras 302-306; Sredoje Lukić’s Reply to the Prosecution’s Response Brief, 29 December 2009 (confidential) (“Sredoje Lukić Reply Brief”), paras 120-121. Sredoje Lukić further submits that VG018, VG038, VG084, and Islam Kustura did not have prior knowledge of him (Sredoje Lukić Appeal Brief, paras 39, 45, 79, 246). These submissions will be addressed *infra* in Sections IX.D.3(a)(i)-(ii) and XII.C.1(a).

<sup>339</sup> Milan Lukić Appeal Brief, paras 19-23, 40-49, 80, 147-161, 234-243, 283-290, 303-304; Milan Lukić Reply Brief, paras 6, 8, 16-17, 20; Sredoje Lukić Appeal Brief, paras 18-20, 302, 304-306; Sredoje Lukić Reply Brief, paras 121-122.

<sup>340</sup> Milan Lukić Appeal Brief, para. 84; Sredoje Lukić Appeal Brief, paras 19, 306.

<sup>341</sup> Milan Lukić Appeal Brief, para. 24; Milan Lukić Reply Brief, para. 4; Sredoje Lukić Appeal Brief, para. 305.

<sup>342</sup> Prosecution Response Brief (Milan Lukić), para. 4.

<sup>343</sup> Prosecution Response to Sredoje Lukić’s Appeal, 14 December 2009 (confidential) (“Prosecution Response Brief (Sredoje Lukić)”), para. 191.

reasoned opinion, a trial chamber should articulate the basis on which it was satisfied that the witness had prior knowledge of an accused and was therefore able to recognise that individual at the crime scene.<sup>345</sup>

119. The Appeals Chamber finds no error in the Trial Chamber having distinguished between “identification” and “recognition” witnesses. The Appeals Chamber further considers that the Trial Chamber rightly pointed out that a witness who has “acquired sufficient knowledge” of an accused, for example when a crime is committed over a long period of time, may be considered a “recognition” witness.<sup>346</sup> The Appeals Chamber finds that Milan Lukić and Sredoje Lukić have not shown that the Trial Chamber erred in law by distinguishing between “identification” and “recognition” witnesses.

## **B. In-court identification**

120. The Appeals Chamber recalls that in-court identification is generally permissible.<sup>347</sup> Contrary to the Appellants’ contention,<sup>348</sup> the fact that a witness fails to identify the accused during a pre-trial identification exercise does not bar a trial chamber from allowing in-court identification.<sup>349</sup> However, in-court identification should be given “‘little or no credence’ given the signals that can identify an accused aside from prior acquaintance”.<sup>350</sup> A trial chamber must therefore exercise caution in assessing such evidence.<sup>351</sup> The Appeals Chamber considers that, while little or no weight should be given to a witness’s in-court identification evidence,<sup>352</sup> a witness’s failure to identify an accused in court can be a reason for declining to rely on the identification evidence of that witness.<sup>353</sup> The distinction between an “identification” or “recognition” witness is thus irrelevant in the context of in-court identification. In the present case, the Trial Chamber allowed in-court identifications by several witnesses. The Appeals Chamber considers that, as a matter of law, Milan Lukić and Sredoje Lukić have not shown that the Trial Chamber erred by allowing in-court identification *per se*. The Appeals Chamber will evaluate the Appellants’ claims regarding each witness in the appropriate section.

<sup>344</sup> Trial Judgement, para. 31, referring to *Tadić* Trial Judgement, para. 545, *Haradinaj et al.* Trial Judgement, para. 29.

<sup>345</sup> *Haradinaj et al.* Appeal Judgement, para. 152, referring to *Kupreškić et al.* Appeal Judgement, para. 39.

<sup>346</sup> See Trial Judgement, para. 34.

<sup>347</sup> See *Kalimanzira* Appeal Judgement, para. 96; *Kamuhanda* Appeal Judgement, para. 243.

<sup>348</sup> Milan Lukić Appeal Brief, para. 84; Sredoje Lukić Appeal Brief, paras 19, 306.

<sup>349</sup> *Limaj et al.* Appeal Judgement, para. 29.

<sup>350</sup> *Kalimanzira* Appeal Judgement, para. 96. See also *Kamuhanda* Appeal Judgement, para. 243, referring to *Kunarac et al.* Trial Judgement, para. 562, *Kunarac et al.* Appeal Judgement, para. 320.

<sup>351</sup> *Kalimanzira* Appeal Judgement, para. 96, referring to *Kamuhanda* Appeal Judgement, para. 243. See also *Limaj et al.* Appeal Judgement, paras 27-28; *Kunarac et al.* Appeal Judgement, paras 226-227, 320, upholding *Kunarac et al.* Trial Judgement, para. 562.

<sup>352</sup> See *Kamuhanda* Appeal Judgement, paras 243 (referring to *Kunarac et al.* Trial Judgement, para. 562, *Kunarac et al.* Appeal Judgement, para. 320), 244.

<sup>353</sup> *Limaj et al.* Appeal Judgement, fn. 68; *Kvočka et al.* Appeal Judgement, para. 473.

## VI. DRINA RIVER INCIDENT

### A. Introduction

121. The Trial Chamber found that, on 7 June 1992, seven Bosnian Muslim men – Meho Džafić, his son Ekrem Džafić, Hasan Mutapčić, Hasan Kustura, Amir Kurtalić, VG014, and VG032 – were abducted and taken by Milan Lukić and other soldiers to a house in Bikavac.<sup>354</sup> At the house, Milan Lukić robbed the men at gunpoint and threatened to kill them.<sup>355</sup> The men were then taken to the Vilina Vlas Hotel, prior to being brought by Milan Lukić, together with Vasiljević and two soldiers, to Sase by the Drina River.<sup>356</sup> Milan Lukić, the two soldiers, and Vasiljević herded the seven men to the banks of the Drina River, where Milan Lukić then ordered them to line up.<sup>357</sup> Milan Lukić and the two soldiers opened fire on the men killing all but VG014 and VG032.<sup>358</sup>

122. The Trial Chamber found Milan Lukić guilty of committing murder as a violation of the laws or customs of war and as a crime against humanity, for the killing of Meho Džafić, Ekrem Džafić, Hasan Mutapčić, Hasan Kustura, and Amir Kurtalić.<sup>359</sup> Further, in respect of VG014 and VG032, it found him guilty of committing cruel treatment as a violation of the laws or customs of war and other inhumane acts as a crime against humanity.<sup>360</sup> Additionally, having found that Milan Lukić had discriminatory intent when he shot at the seven Muslim men, the Trial Chamber found him guilty of the crime of persecutions as a crime against humanity for the murder of five men, as well as the harassment, humiliation, terrorisation, and psychological abuse of the two survivors.<sup>361</sup>

123. Milan Lukić challenges the Trial Chamber's findings that:<sup>362</sup> (i) he was identified as a perpetrator of the Drina River Incident;<sup>363</sup> (ii) the death of the victims was proven;<sup>364</sup> and (iii) he was responsible for committing all five murders although the Trial Chamber found that he actually killed only one victim.<sup>365</sup>

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<sup>354</sup> Trial Judgement, paras 101-106, 193, 196, 230.

<sup>355</sup> Trial Judgement, paras 106, 193, 196, 230.

<sup>356</sup> Trial Judgement, paras 109-113, 193-194, 196-197, 230.

<sup>357</sup> Trial Judgement, paras 111, 113-115, 194, 230, 907.

<sup>358</sup> Trial Judgement, paras 116-118, 194, 200, 906-907.

<sup>359</sup> Trial Judgement, paras 911, 1099.

<sup>360</sup> Trial Judgement, paras 966, 1099.

<sup>361</sup> Trial Judgement, paras 1000, 1099.

<sup>362</sup> Milan Lukić's sub-grounds 1(A) through (F).

<sup>363</sup> Milan Lukić Appeal Brief, paras 37-58; Milan Lukić Reply Brief, paras 27-35.

<sup>364</sup> Milan Lukić Appeal Brief, paras 25-29; Milan Lukić Reply Brief, paras 21-23.

<sup>365</sup> Milan Lukić Appeal Brief, paras 30-36; Milan Lukić Reply Brief, paras 24-26.

## **B. Identification of Milan Lukić**

124. The Trial Chamber relied on the evidence of VG014, VG032, and Vasiljević for the identification of Milan Lukić as a perpetrator of the Drina River Incident.<sup>366</sup> The Trial Chamber did not rely on VG079's evidence for the identification of Milan Lukić but found it to be corroborative of the evidence of VG014, VG032, and Vasiljević in other respects.<sup>367</sup>

125. Milan Lukić submits that the Trial Chamber erred:<sup>368</sup> (i) in law in permitting in-court identifications of him by VG014 and VG032, as these were unduly prejudicial;<sup>369</sup> (ii) in relying upon the identification evidence of Vasiljević, an alleged accomplice, who sought to falsely implicate him in order to shift responsibility;<sup>370</sup> and (iii) by failing to apply due care when assessing the identification evidence of VG014, VG032, and VG079.<sup>371</sup>

### **1. In-court identification**

126. In summarising the Prosecution's case, the Trial Chamber observed that both VG014 and VG032 identified Milan Lukić in the courtroom.<sup>372</sup> The Appeals Chamber recalls that it is within the discretion of a trial chamber to allow in-court identification.<sup>373</sup> However, when finding these witnesses reliable with regard to the Drina River Incident, the Trial Chamber did not refer to their in-court identifications of Milan Lukić. Instead, the Trial Chamber relied upon: (i) VG014's prior knowledge of Milan Lukić; (ii) VG032's acquired knowledge of Milan Lukić; (iii) the strong similarities between the two witnesses' identification evidence; and (iv) additional corroborative evidence.<sup>374</sup> In these circumstances, the Appeals Chamber is satisfied that the Trial Chamber did not attribute undue weight to the in-court identifications offered by VG014 and VG032 and that they were considered as only one element in the larger "process".<sup>375</sup> The Appeals Chamber therefore finds that Milan Lukić has failed to show that he suffered prejudice from the in-court identifications by these witnesses.

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<sup>366</sup> Trial Judgement, paras 201-208.

<sup>367</sup> Trial Judgement, para. 209.

<sup>368</sup> Milan Lukić's sub-grounds 1(C) through (F).

<sup>369</sup> Milan Lukić Appeal Brief, paras 19, 37-48; Milan Lukić Reply Brief, paras 27, 30. Milan Lukić has withdrawn sub-grounds 1(I) and (J) (*see* Milan Lukić Appeal Brief, paras 74-75).

<sup>370</sup> Milan Lukić Appeal Brief, paras 37, 49, 56-58; Milan Lukić Reply Brief, para. 35.

<sup>371</sup> Milan Lukić Appeal Brief, paras 50-55 (Milan Lukić mistakenly refers to VG079 as VG073); Milan Lukić Reply Brief, paras 31-34. *See also* Milan Lukić Appeal Brief, paras 5-24.

<sup>372</sup> Trial Judgement, paras 128-129.

<sup>373</sup> *See supra* para. 120.

<sup>374</sup> Trial Judgement, paras 201, 207-209.

<sup>375</sup> *See Kamuhanda Appeal Judgement*, para. 244.

## 2. Reliance on the evidence of an alleged accomplice

127. Milan Lukić argues that the Trial Chamber erred in accepting the identification evidence of Vasiljević, an alleged accomplice of Milan Lukić, without proper caution and without considering that Vasiljević had heard VG014's evidence during his own trial.<sup>376</sup> Milan Lukić contends that the Trial Chamber failed to consider that Vasiljević had a "clear incentive to manufacture his evidence to corroborate VG014 to some extent".<sup>377</sup>

128. The Appeals Chamber recalls that a trial chamber has the discretion to rely upon evidence of accomplice witnesses.<sup>378</sup> However, when weighing the probative value of such evidence, the trial chamber is bound to carefully consider the totality of the circumstances in which it was tendered. In particular, consideration should be given to circumstances showing that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal or to lie.<sup>379</sup> This does not mean that corroboration is required.<sup>380</sup> However, a trial chamber must explain the reasons for accepting the evidence of an accomplice.<sup>381</sup>

129. The Appeals Chamber notes that the Trial Chamber accepted the testimony of Vasiljević after considering: (i) discrepancies between his evidence and the evidence of VG014 and VG032;<sup>382</sup> (ii) that Vasiljević had known Milan Lukić for a significant period of time and was his *kum*, and could, therefore, recognise him on the day of the incident;<sup>383</sup> (iii) that Vasiljević had the opportunity to observe Milan Lukić's actions throughout the incident;<sup>384</sup> (iv) that Vasiljević's alcohol consumption did not impact his ability to recognise Milan Lukić at the time of the incident;<sup>385</sup> (v) Milan Lukić's argument that Vasiljević lacked credibility because, as a former co-accused, Vasiljević had an incentive to implicate him;<sup>386</sup> and (vi) that Vasiljević's evidence corroborated the credible evidence of VG014.<sup>387</sup>

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<sup>376</sup> Milan Lukić Appeal Brief, paras 37, 56-58; Milan Lukić Reply Brief, para. 35.

<sup>377</sup> Milan Lukić Appeal Brief, para. 57.

<sup>378</sup> *Kanyarukiga* Appeal Judgement, para. 181; *Setako* Appeal Judgement, para. 143; *Muvunyi II* Appeal Judgement, para. 37; *Nchamihigo* Appeal Judgement, paras 47, 305.

<sup>379</sup> *Kanyarukiga* Appeal Judgement, para. 181; *Setako* Appeal Judgement, para. 143; *Muvunyi II* Appeal Judgement, para. 37; *Nchamihigo* Appeal Judgement, paras 42, 305. See also *Blagojević and Jokić* Appeal Judgement, para. 82.

<sup>380</sup> *Nchamihigo* Appeal Judgement, paras 46-48.

<sup>381</sup> *Krajišnik* Appeal Judgement, para. 146. See also *Haradinaj et al.* Appeal Judgement, para. 145.

<sup>382</sup> Trial Judgement, paras 197-198.

<sup>383</sup> Trial Judgement, paras 132, 206. The Trial Judgement defined *kum* as "a close relationship between families in Serb culture that involves members of the connected families being godparents to the children of the other family, and being the best man at weddings of members of the other family" (Trial Judgement, para. 132).

<sup>384</sup> Trial Judgement, para. 206.

<sup>385</sup> Trial Judgement, para. 206.

<sup>386</sup> Trial Judgement, para. 195.

<sup>387</sup> Trial Judgement, para. 195.

130. The Appeals Chamber further notes that, when finding that Vasiljević's evidence corroborated VG014's evidence, the Trial Chamber did not explicitly examine whether Vasiljević's evidence in the present case was affected by the testimony of VG014, who also testified during Vasiljević's own trial.<sup>388</sup> The Appeals Chamber observes, however, that at the time of his testimony in the present case, Vasiljević's own case had concluded,<sup>389</sup> and therefore considers there to have been less of an incentive for Vasiljević to implicate Milan Lukić. In support of his argument that Vasiljević's testimony was influenced by hearing VG014's evidence in his own trial, Milan Lukić refers only to an immaterial portion of Vasiljević's testimony, in which Vasiljević states that he learned from witnesses in his own trial that Milan Lukić was driving a red Passat in the summer of 1992.<sup>390</sup> Before relying on Vasiljević's evidence, the Trial Chamber also carefully considered the effects of Vasiljević's alcohol intoxication at the time of the incident<sup>391</sup> and, after having considered the evidence of two expert witnesses,<sup>392</sup> it concluded that "[a]lthough there is evidence of Mitar Vasiljević's alcoholism and that he drank alcohol on 7 June 1992, [...] the Trial Chamber finds that he was able to recognise Milan Lukić and is satisfied that he did recognise Milan Lukić on 7 June 1992."<sup>393</sup> In these circumstances, the Appeals Chamber finds that a reasonable trier of fact could have relied upon the identification evidence of Vasiljević.

### 3. Alleged errors with regard to identification evidence

131. The Trial Chamber found that Milan Lukić was one of the perpetrators of the Drina River Incident based, *inter alia*, on the identification evidence of the two survivors, VG014<sup>394</sup> and VG032.<sup>395</sup> The Trial Chamber found that VG014 knew Milan Lukić prior to the incident, as they attended the same secondary school between 1983 and 1984.<sup>396</sup> It found that VG014 was therefore able to recognise Milan Lukić as he entered VG014's house on 7 June 1992.<sup>397</sup> When assessing the evidence of VG032, the Trial Chamber considered that he had not had any direct personal contact with Milan Lukić prior to 7 June 1992.<sup>398</sup> However, the Trial Chamber also noted that, sometime between April and May 1992, acquaintances of VG032 had pointed Milan Lukić out to him at a

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<sup>388</sup> See *Vasiljević* Trial Judgement, paras 96-115.

<sup>389</sup> The Appeals Chamber rendered its judgement on 25 February 2004, sentencing Vasiljević to 15 years' imprisonment (*Vasiljević* Appeal Judgement, p. 60).

<sup>390</sup> Milan Lukić Appeal Brief, para. 58 (confidential), referring to Vasiljević, T. 1499-1500 (10 September 2008) (private session).

<sup>391</sup> Trial Judgement, para. 134.

<sup>392</sup> Trial Judgement, paras 137-145, 202-206.

<sup>393</sup> Trial Judgement, para. 206.

<sup>394</sup> Trial Judgement, paras 201, 208, 230.

<sup>395</sup> Trial Judgement, paras 207-208, 230.

<sup>396</sup> Trial Judgement, para. 201. See also Trial Judgement, para. 129.

<sup>397</sup> Trial Judgement, para. 201.

<sup>398</sup> Trial Judgement, para. 207.

café in Višegrad.<sup>399</sup> It further considered that VG032 recognised Milan Lukić one or two days after this encounter at the Višegrad Health Centre driving a red Passat.<sup>400</sup> This was corroborated by the testimony of VG024 and VG133 that Milan Lukić drove a red Passat during the relevant period.<sup>401</sup>

132. Milan Lukić submits that the Trial Chamber failed to apply the correct evidentiary standard when it found that VG014 and VG032 recognised him.<sup>402</sup> He submits that the Trial Chamber erred in not placing more weight on the evidence of VG014. Milan Lukić argues that VG014's evidence that the perpetrator had a mole on his face does not match his own appearance<sup>403</sup> and that the "clear inference" to be drawn was that the man VG014 "recognised" on the day of the Drina River Incident was in fact not him.<sup>404</sup> He further argues that the Trial Chamber did not place sufficient weight on the inconsistency between evidence of VG014 that the perpetrator had a mole and VG032's evidence that he did not.<sup>405</sup> In addition, he contends that VG032 had no prior knowledge of him and therefore would not have been able to recognise him as a perpetrator of the Drina River Incident.<sup>406</sup>

133. Milan Lukić further submits that both witnesses' identifications were unreliable as they were "based upon fleeting glances" and impaired by "the impact of traumatic events".<sup>407</sup> Finally, Milan Lukić challenges the Trial Chamber's reliance upon the testimony of VG079, "who watched [the] events unfold from across the river through binoculars" and who was told Milan Lukić's name by a colleague, friend, or his brother-in-law.<sup>408</sup>

134. The Prosecution responds that Milan Lukić fails to demonstrate that the Trial Chamber ignored "important inconsistencies" in VG014 and VG032's evidence, and submits that the Trial Chamber properly assessed the similar descriptions of Milan Lukić provided by VG032 and VG014.<sup>409</sup> It further argues that Milan Lukić fails to demonstrate an error in the Trial Chamber's assessment of VG032's prior knowledge of him.<sup>410</sup> It also asserts that the witnesses did not have a "fleeting glance" of Milan Lukić as they were exposed to him continuously over several hours, and

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<sup>399</sup> Trial Judgement, para. 207. *See also* Trial Judgement, para. 126.

<sup>400</sup> Trial Judgement, para. 207.

<sup>401</sup> Trial Judgement, paras 264, 286. *See also* Trial Judgement, para. 232.

<sup>402</sup> Milan Lukić Appeal Brief, paras 50-53.

<sup>403</sup> Milan Lukić Appeal Brief, para. 42.

<sup>404</sup> Milan Lukić Appeal Brief, paras 42-44.

<sup>405</sup> Milan Lukić Appeal Brief, para. 54; Milan Lukić Reply Brief, para. 31.

<sup>406</sup> Milan Lukić Appeal Brief, paras 46-47. Milan Lukić submits that VG032's ability to recognise him as the perpetrator was not enhanced by the fact that VG032 saw him on two separate occasions in April and May 1992. Milan Lukić contends that, on one occasion, VG032 was merely told by a friend that the man he saw was Milan Lukić but, on this occasion, VG032 had not paid very much attention to the man the friend had identified to him and he was unable to remember the name of the friend who had identified Milan Lukić to him (Milan Lukić Appeal Brief, paras 46-47).

<sup>407</sup> Milan Lukić Appeal Brief, para. 50.

<sup>408</sup> Milan Lukić Appeal Brief, paras 52, 55.

<sup>409</sup> Prosecution Response Brief (Milan Lukić), para. 40.

<sup>410</sup> Prosecution Response Brief (Milan Lukić), paras 29-34.

that the Trial Chamber was aware of the potential impact of the traumatic events experienced by the witnesses.<sup>411</sup> Finally, the Prosecution submits that Milan Lukić's challenge to VG079's identification evidence should be summarily dismissed, as the Trial Chamber did not rely on this aspect of his evidence.<sup>412</sup>

135. The Appeals Chamber recalls that minor inconsistencies commonly occur in witness testimony without rendering it unreliable.<sup>413</sup> It is within the discretion of a trial chamber to evaluate discrepancies and to consider the credibility of the evidence as a whole, without explaining every detail of its decision.<sup>414</sup> The Appeals Chamber recalls that a trial chamber is required to "carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence".<sup>415</sup> A trial chamber should consider whether there is inconsistent or inaccurate testimony concerning an accused's physical characteristics,<sup>416</sup> or any other evidence regarding an accused's identity which may be decisive in a trial chamber's decision to rely on the identification evidence.<sup>417</sup>

136. The Appeals Chamber further recalls that "where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a 'reasoned opinion'".<sup>418</sup> In these instances, the Trial Chamber must "carefully articulate the factors relied upon in support of the identification of the accused and adequately address any *significant* factors impacting negatively on the reliability of the identification evidence".<sup>419</sup>

137. Factors relevant to the Appeals Chamber's determination of whether a trial chamber's decision to rely upon identification evidence was unreasonable or rendered the conviction unsafe, include:

[I]dentifications of defendants by witnesses who had only a fleeting glance or an obstructed view of the defendant; identifications occurring in the dark and as a result of a traumatic event experienced by the witness; inconsistent or inaccurate testimony about the defendant's physical characteristics at the time of the event; misidentification or denial of the ability to identify followed by later identification of the defendant by a witness; the existence of irreconcilable

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<sup>411</sup> Prosecution Response Brief (Milan Lukić), para. 37.

<sup>412</sup> Prosecution Response Brief (Milan Lukić), paras 38, 41.

<sup>413</sup> *Haradinaj et al.* Appeal Judgement, para. 134.

<sup>414</sup> *See supra* para. 112.

<sup>415</sup> *Kupreškić et al.* Appeal Judgement, para. 39.

<sup>416</sup> *Kupreškić et al.* Appeal Judgement, para. 40.

<sup>417</sup> *See Furundžija* Appeal Judgement, para. 107.

<sup>418</sup> *Haradinaj et al.* Appeal Judgement, para. 152. *See also* *Kvočka et al.* Appeal Judgement, para. 24; *Kupreškić et al.* Appeal Judgement, para. 39; *Renzaho* Appeal Judgement, para. 527.

<sup>419</sup> *Haradinaj et al.* Appeal Judgement, para. 152, referring to *Kupreškić et al.* Appeal Judgement, para. 39 (emphasis added).



witness testimonies; and 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.<sup>420</sup>

138. Furthermore, the Appeals Chamber considers that this list is not intended to be exhaustive.<sup>421</sup> A trial chamber is not bound to consider all of these factors, but only those appropriate in the circumstances of the case.<sup>422</sup>

139. The Appeals Chamber is not convinced that the Trial Chamber applied the wrong evidentiary standard to the identification evidence of VG014 and VG032 or that the Trial Chamber erred in its assessment of the inconsistency between VG014 and VG032's evidence as to whether Milan Lukić had a mole or a birth mark on his right cheek. The Trial Chamber considered VG014's testimony with regard to the mole.<sup>423</sup> It also considered the demeanour of VG014 in cross-examination when testifying about this, and found him to be credible.<sup>424</sup> The Trial Chamber found that the fundamental features of VG014's identification evidence were very similar to VG032's description of Milan Lukić.<sup>425</sup> Although the inconsistency arising from VG032's testimony to the effect that Milan Lukić did not have a mole on his cheek was not expressly addressed by the Trial Chamber, the Appeals Chamber recalls that a trial chamber need not explain every step of its reasoning or refer to every piece of evidence of the trial record.<sup>426</sup> The Appeals Chamber considers that the Trial Chamber was not required to consider VG032's evidence that Milan Lukić did not have a mole on his cheek when concluding that VG014 was credible. In these circumstances, the Appeals Chamber considers that it was within the Trial Chamber's discretion to conclude that the discrepancy between the two testimonies did not undermine the witnesses' identification of Milan Lukić.

140. The Appeals Chamber is equally unconvinced by Milan Lukić's contention that the Trial Chamber erred in concluding that VG032 was in a position to identify him during the event. The

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<sup>420</sup> *Haradinaj et al.* Appeal Judgement, para. 156, referring to *Kupreškić et al.* Appeal Judgement, para. 40 (internal citations omitted).

<sup>421</sup> See *Bikindi* Appeal Judgement, para. 116.

<sup>422</sup> See *Kordić and Čerkez* Appeal Judgement, para. 382.

<sup>423</sup> Trial Judgement, para. 130, fns 489-490, referring to VG014, T. 391 (11 July 2008). When questioned as to the location of Milan Lukić's mole, VG014, referring to his February 1998 statement (Exh. P5, p. 5 (confidential)), responded that he "didn't remember whether it was on the right side or the left side". See also Trial Judgement, para. 129, referring to VG014, T. 299 (10 July 2008), T. 390 (11 July 2008). In re-examination, VG014 pointed at two moles on the left side of Milan Lukić's face on a still image taken in the courtroom (see Exh. P9) and stated that these were consistent with the moles as he recalled them (see Trial Judgement, para. 131, fn. 492, referring to VG014, T. 413 (11 July 2008)).

<sup>424</sup> The Trial Chamber found that "VG014 was not shaken in cross-examination [and] maintained that he recognised Milan Lukić on 7 June 1992 and that he had seen a mole on his face on that date" (Trial Judgement, para. 201).

<sup>425</sup> The Trial Chamber found that both witnesses observed that Milan Lukić: (i) had blackened his face with paint or soot; (ii) wore a blue camouflage police uniform; (iii) wore sneakers; (iv) had a band-aid on his right arm; and (v) was carrying a sniper rifle fitted with a silencer (Trial Judgement, para. 208).

<sup>426</sup> *Renzaho* Appeal Judgement, para. 527 and references cited therein; *Nchamihigo* Appeal Judgement, para. 121; *Karera* Appeal Judgement, para. 20. See also VG032, T. 1209-1210 (4 September 2008).

Appeals Chamber recalls that a witness's claim to having prior knowledge of an accused must be carefully assessed.<sup>427</sup> In this context, the Appeals Chamber recalls that neither the Rules nor the jurisprudence of the Tribunal require a particular type of identification evidence.<sup>428</sup> Although a trial chamber may "take the approach it considers most appropriate for the assessment of evidence",<sup>429</sup> it must carefully evaluate any identification evidence.<sup>430</sup>

141. The Trial Chamber found that sometime between April and May 1992, acquaintances of VG032 had identified Milan Lukić to him at a café in Višegrad.<sup>431</sup> However, the Appeals Chamber notes that VG032 was unable to name the individuals who identified Milan Lukić to him at the café.<sup>432</sup> On 7 June 1992, VG032 was continuously in the presence of Milan Lukić from the time of the abduction, between 5:00 p.m. and 5:30 p.m., until the men were lined up and shot at along the Drina River at approximately 7:45 p.m.<sup>433</sup> The Trial Chamber also considered VG032's testimony to the effect that on the day of the incident, another soldier referred to Milan Lukić by name.<sup>434</sup> The Trial Chamber further found that both VG014 and VG032 described Milan Lukić's appearance on the day in question in similar terms.<sup>435</sup> The Appeals Chamber concludes that when relying on VG032's evidence, the Trial Chamber took into consideration the identification evidence as a whole and undertook a comprehensive analysis which addressed the significant factors undermining the reliability of the identification evidence.<sup>436</sup> The Appeals Chamber therefore finds that the Trial Chamber did not err when it accepted VG032's assertion that he was able to recognise Milan Lukić on the day of the incident.<sup>437</sup>

142. The Trial Chamber did not explicitly consider whether the ability of VG014 and VG032 to recognise or remember their assailants was affected by their traumatic experience during the Drina River Incident.<sup>438</sup> Although the circumstances were indeed stressful and threatening for VG014 and VG032,<sup>439</sup> the Trial Chamber based its conclusion upon their prolonged encounters with Milan Lukić.<sup>440</sup>

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<sup>427</sup> *Cf. supra* para. 118.

<sup>428</sup> *Kalimanzira* Appeal Judgement, para. 96. *See also Kamuhanda* Appeal Judgement, para. 298.

<sup>429</sup> *Kalimanzira* Appeal Judgement, para. 96; *Rutaganda* Appeal Judgement, para. 207.

<sup>430</sup> *See Kupreškić et al.* Appeal Judgement, para. 34.

<sup>431</sup> Trial Judgement, paras 126, 207.

<sup>432</sup> *See* VG032, T. 1213 (4 September 2008).

<sup>433</sup> Trial Judgement, paras 101-102, 105-118, 907. *See also* Trial Judgement, paras 193, 196.

<sup>434</sup> Trial Judgement, para. 127.

<sup>435</sup> *See supra* fn. 425.

<sup>436</sup> Trial Judgement, paras 126-127, 207-208.

<sup>437</sup> Trial Judgement, paras 126, 208.

<sup>438</sup> *See* Milan Lukić Appeal Brief, para. 50; Milan Lukić Reply Brief, para. 31.

<sup>439</sup> For instance, VG032 testified that one of the soldiers had been quite friendly to the detained men and changed his demeanour only when they were ordered to walk towards the Drina River and threatened to kill them should they try to run away (*see* Trial Judgement, para. 113).

<sup>440</sup> Trial Judgement, paras 101-131.

143. Further, the Appeals Chamber notes that Milan Lukić's assertion that both VG014 and VG032 only had a fleeting look at him misstates the Trial Judgement, which holds that on 7 June 1992, these witnesses were continuously in the presence of Milan Lukić.<sup>441</sup> In these circumstances, the Appeals Chamber is satisfied that the Trial Chamber did not err.

144. The Appeals Chamber notes that the Trial Chamber explicitly placed no weight on the identification evidence of VG079, but rather found it corroborated the evidence of VG014 and VG032 in other respects.<sup>442</sup> Since the identification evidence of VG079 had no impact on the Trial Chamber's assessment, the Appeals Chamber discerns no error and dismisses Milan Lukić's submission in this regard.

#### 4. Conclusion

145. Milan Lukić's sub-grounds 1(C) through (F), challenging his identification as a perpetrator of the Drina River Incident, are therefore dismissed.

### C. Proof of death

146. In finding that Meho Džafić, Ekrem Džafić, Hasan Mutapčić, Hasan Kustura, and Amir Kurtalić died during the Drina River Incident, the Trial Chamber considered, *inter alia*, the testimony of Ewa Tabeau ("Tabeau") and Amor Mašović ("Mašović"), the President of the Bosnia and Herzegovina State Commission for Tracing Missing Persons of Bosnia and Herzegovina, as well as Exhibits P119 ("Prosecution's Victims Chart") and P184, a table of missing persons compiled by Mašović ("Mašović's Missing Persons Chart").<sup>443</sup> The Trial Chamber held that any discrepancies in this evidence did not affect the direct and credible eye-witness evidence of VG014, VG032, and Vasiljević.<sup>444</sup>

147. Milan Lukić argues that the Trial Chamber erred by relying only on eye-witness testimony to support a finding of death with respect to five victims, when none of the bodies were recovered, and no death certificates were presented.<sup>445</sup> More specifically, he submits that the finding that the victims were dead was not the only reasonable conclusion based on the evidence.<sup>446</sup> In support, Milan Lukić argues that there are discrepancies in the Prosecution's Victims Chart and that a list of

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<sup>441</sup> Trial Judgement, paras 101-102, 105-118.

<sup>442</sup> Trial Judgement, paras 208-209.

<sup>443</sup> Trial Judgement, paras 199-200.

<sup>444</sup> Trial Judgement, paras 199-200.

<sup>445</sup> Milan Lukić's sub-ground 1(A). Milan Lukić Appeal Brief, paras 25, 27-28; Milan Lukić Reply Brief, paras 21-22.

<sup>446</sup> Milan Lukić Appeal Brief, paras 25, 27-28.

persons who filed a request for return of property<sup>447</sup> shows that Hasan Kustura, one of the victims, is still alive.<sup>448</sup>

148. The Prosecution responds that the Trial Chamber correctly found that the only reasonable inference was that the victims of the Drina River Incident were murdered on 7 June 1992, based on the eye-witness testimonies of VG032, VG014, VG079, and Vasiljević.<sup>449</sup> It further submits that the Trial Chamber considered the discrepancies in the documentary evidence as to the circumstances surrounding the death of the five victims and correctly found that it did not undermine the credibility of the eye-witness testimonies.<sup>450</sup> With regard to Hasan Kustura, the Prosecution argues that the person named Hasan Kustura in the Property Records is a different person than the one who died at the Drina River Incident.<sup>451</sup>

149. The Appeals Chamber recalls that there is no requirement that the body of a victim be recovered in order to prove death beyond a reasonable doubt, and that a victim's death can be inferred circumstantially from all the evidence presented to the Trial Chamber.<sup>452</sup> Consequently, the evidence of an eye-witness can be the sole basis for a finding that a person is dead. The Appeals Chamber also recalls that, in order to successfully challenge the trial chamber's assessment of circumstantial evidence on appeal, an appellant must show that no reasonable trier of fact could have found that the conclusion reached by the trial chamber was the only reasonable inference.<sup>453</sup>

150. The Appeals Chamber turns to consider whether the Trial Chamber erred in finding that the death of the victims was the only reasonable inference based on the evidence presented at trial. The Appeals Chamber notes that the Trial Chamber took into account the discrepancies in relation to the place and date of the disappearance or death of the five victims listed in the Prosecution's Victims Chart, as well as the inconsistencies between the Prosecution's Victims Chart and the evidence of the eye-witnesses.<sup>454</sup> The Trial Chamber considered the evidence of Tabeau, who testified that

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<sup>447</sup> Exh. 1D226 ("Property Records").

<sup>448</sup> Milan Lukić Appeal Brief, paras 28-29; Milan Lukić Reply Brief, para. 23.

<sup>449</sup> Prosecution Response Brief (Milan Lukić), paras 7-11.

<sup>450</sup> Prosecution Response Brief (Milan Lukić), para. 12.

<sup>451</sup> Prosecution Response Brief (Milan Lukić), para. 13.

<sup>452</sup> *Kvočka et al.* Appeal Judgement, para. 260.

<sup>453</sup> *See supra* para. 13.

<sup>454</sup> Trial Judgement, paras 124, 199. For example, the Prosecution's Victims Chart contains the following information as reported to the International Committee of the Red Cross ("ICRC"): Mehmed Džafić disappeared in Višegrad, Ekrem Džafić in Holijaci, Hasan Mutapčić in Bikavac, and Amir Kurtalić in Sase; no place of disappearance is listed for Hasan Kustura. However, the Prosecution's Victims Chart also includes information from the Bosnian Book of Dead that all five victims disappeared in Višegrad (*see also* Trial Judgement, paras 124-125, fns 456, 459). Milan Lukić further argues that the ICRC indicates that Ekrem Džafić disappeared in Holijaci but that the Bosnian Book of Dead indicates that he disappeared in Višegrad. Further in relation to Ekrem Džafić, Milan Lukić argues that the ICRC indicates that he disappeared on 7 June 1992 whereas the Bosnian Book of Dead indicates that he was killed on this date. He further submits that: (i) the ICRC records that Hasan Mutapčić disappeared in Bikavac but that the Bosnian Book of Dead indicates that he disappeared in Višegrad; (ii) the ICRC does not record Hasan Kustura as having disappeared but the Bosnian Book of Dead indicates that he was killed on 25 June 1992 in Višegrad; and (iii) the ICRC indicates that Amir

many of the data sources used in creating the Prosecution's Victims Chart were compiled by non-professionals, namely "NGOs or volunteers who wanted to share the information they had with somebody", often without identification cards and in chaotic circumstances, which had an impact on the accuracy of the information collected.<sup>455</sup> In light of Tabeau's evidence as to how the source information was compiled, the Trial Chamber found that "any discrepancies in [*inter alia*, the Prosecution's Victims Chart did] not affect the direct and credible evidence of VG014, VG032 and Vasiljević in respect of the five victims of the Drina river incident."<sup>456</sup>

151. The Appeals Chamber further notes that while cross-examining expert witness Tabeau, Milan Lukić challenged the credibility of the Prosecution's Victims Chart by advancing the argument that one of the five victims, Hasan Kustura, was still alive.<sup>457</sup> In support, Milan Lukić tendered the Property Records, which included a request, dating from 2001, for the return of property by a Hasan Kustura, born on 7 May 1939.<sup>458</sup> In finding that Hasan Kustura had died in the Drina River Incident, the Trial Chamber did not consider the Property Records.

152. The Appeals Chamber considers that the Property Records are relevant to the Trial Chamber's finding that an individual with the name Hasan Kustura died and that the failure to consider the entries in the Property Records constitutes an error. The Appeals Chamber will now assess the impact of this error.

153. The Appeals Chamber notes that the Prosecution's Victims Chart was unclear as it referred to two individuals named Hasan Kustura, the Hasan Kustura born on 7 May 1939, and the Hasan Kustura born on 13 August 1959.<sup>459</sup> However, according to Tabeau, the person named Hasan Kustura born on 13 August 1959 was the victim of the Drina River Incident.<sup>460</sup> In cross-examination, Tabeau testified that she was not aware that a Hasan Kustura had requested the return of property.<sup>461</sup> In these circumstances, the Appeals Chamber is of the view that it was reasonable to conclude that Hasan Kustura died in the Drina River Incident since the Property Records relate to a different Hasan Kustura than the one found to have died by the Trial Chamber and referred to by Tabeau.

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Kurtalić disappeared in Sase but the Bosnian Book of Dead records that he was killed on 31 May 1992. Milan Lukić also submits that the ICRC indicates that Meho Džafić disappeared in Višegrad on 7 June 1992, but the Appeals Chamber notes that this is not inconsistent with the Prosecution's case or the findings of the Trial Chamber (*see* Milan Lukić Appeal Brief, para. 29).

<sup>455</sup> Trial Judgement, paras 124, 199, 252-253; Tabeau, T. 2094-2095 (22 September 2008). Tabeau further explained that "when cross-referencing sources it is often the case that we see small differences in the date of birth or the date of disappearance or death" (Tabeau, T. 2095 (22 September 2008)).

<sup>456</sup> Trial Judgement, para. 199.

<sup>457</sup> Tabeau, T. 6130-6133 (24 March 2009).

<sup>458</sup> Property Records, p. 1.

<sup>459</sup> Prosecution's Victims Chart, pp. 1, 9. *See also* Tabeau, T. 6130-6133 (24 March 2009); Trial Judgement, para. 124.

154. In light of the foregoing, the Appeals Chamber finds that Milan Lukić has failed to show that the Trial Chamber erred in its assessment of the evidence or in finding that the only reasonable inference was that Meho Džafić, Ekrem Džafić, Hasan Mutapčić, Hasan Kustura, and Amir Kurtalić died in the Drina River Incident. Accordingly, Milan Lukić's sub-ground 1(A) is dismissed.

**D. Alleged error in finding that Milan Lukić committed the murders**

155. The Trial Chamber found that "Milan Lukić shot at the seven captured men whom he had ordered to line up along the bank of the Drina river"<sup>462</sup> and that five of them were killed on 7 June 1992.<sup>463</sup> It found that one of the seven men, Meho Džafić, was killed by a muffled shot.<sup>464</sup> The Trial Chamber concluded that the rifles of the two other soldiers were not fitted with silencers.<sup>465</sup> It could not be established whether the bullets which killed the other four victims had been fired by Milan Lukić or the other soldiers.<sup>466</sup>

156. The Trial Chamber further found that Milan Lukić acted with intent to commit murder as a violation of the laws or customs of war and as a crime against humanity<sup>467</sup> and concluded that he personally killed Meho Džafić.<sup>468</sup> In relation to the killing of the other four men the Trial Chamber found:

that Milan Lukić's role and actions in the events leading up to the killings, at Sase and, particularly, at the river's edge before and during the killings, were such that were it not for his presence and directions, including regarding the manner in which the men were to be killed, the killings would not have been committed. The Trial Chamber therefore holds that he is also responsible for having committed the killings of Ekrem Džafić, Hasan Mutapčić, Hasan Kustura and Amir Kurtalić.<sup>469</sup>

157. In convicting Milan Lukić of committing murder, the Trial Chamber relied on the proposition contained in the *Seromba* and *Gacumbitsi* Appeal Judgements<sup>470</sup> that: "a person who did not personally physically commit a crime – in the present case, personally shooting each victim – can nonetheless be liable for committing the crime of murder if there is evidence that the perpetrator's acts were as much an integral part of the murder as the killings which the crime enabled."<sup>471</sup> The Trial Chamber acknowledged that the crime charged in the present case was murder, and not genocide or extermination, which were the crimes under consideration in *Seromba*

<sup>460</sup> Tabeau, T. 6133 (24 March 2009); Prosecution's Victims Chart, p. 9.

<sup>461</sup> Tabeau, T. 6130-6131 (24 March 2009).

<sup>462</sup> Trial Judgement, para. 907.

<sup>463</sup> Trial Judgement, para. 906.

<sup>464</sup> Trial Judgement, para. 907.

<sup>465</sup> Trial Judgement, para. 907.

<sup>466</sup> See Trial Judgement, paras 907-908.

<sup>467</sup> Trial Judgement, para. 910.

<sup>468</sup> Trial Judgement, para. 907.

<sup>469</sup> Trial Judgement, para. 908.

<sup>470</sup> *Seromba* Appeal Judgement, para. 161; *Gacumbitsi* Appeal Judgement, para. 60.

and *Gacumbitsi*.<sup>472</sup> However, in its view, the reasoning was also applicable to the crime of murder.<sup>473</sup>

158. Milan Lukić argues that the Trial Chamber erred in law in reaching this conclusion in a “non-JCE case”.<sup>474</sup> He contends that the Trial Chamber offered no standard by which to measure whether acts are “integral” to the crime and that any analogy it drew between a large scale crime such as genocide in *Gacumbitsi* and a single crime such as the Drina River Incident is stretched and causes confusion in the law.<sup>475</sup> Milan Lukić asserts that, apart from direct personal commission, JCE is the only other form of commission recognised by the Tribunal and that the mode of liability applied by the Trial Chamber in his case – which he labels “co-perpetration” – is incompatible with JCE and is not valid law within the jurisdiction of the Tribunal.<sup>476</sup> He therefore submits that the Appeals Chamber should reject the Trial Chamber’s approach and that, subject to his other grounds of appeal, he should be considered as an aider and abettor.<sup>477</sup>

159. The Prosecution responds that the Trial Chamber correctly convicted Milan Lukić for committing murder based on the *Seromba* and *Gacumbitsi* cases.<sup>478</sup> It further argues that the *Limaj et al.* Appeal Judgement also supports Milan Lukić’s conviction for committing murder.<sup>479</sup>

160. Milan Lukić replies that the “*Limaj* case is irrelevant because the point at issue in this case was not argued.”<sup>480</sup>

161. Contrary to his argument, Milan Lukić was not convicted of “co-perpetrating” but for committing murder. The Appeals Chamber therefore dismisses Milan Lukić’s argument in this respect.

162. The Appeals Chamber does not find it necessary to consider whether the *Seromba/Gacumbitsi* line of reasoning should be followed with regard to the crime of murder. Contrary to Milan Lukić’s assertion, the Appeals Chamber is of the view that the *Limaj et al.* Appeal Judgement is relevant to the issue at hand. In that case, the Appeals Chamber upheld Haradin Bala’s conviction as a direct perpetrator, in the absence of a JCE, for committing murder by executing nine prisoners, on the basis that he “participated physically in the material elements of

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<sup>471</sup> Trial Judgement, para. 908, referring to Trial Judgement, paras 897-898.

<sup>472</sup> Trial Judgement, para. 908.

<sup>473</sup> Trial Judgement, para. 908.

<sup>474</sup> Milan Lukić’s sub-ground 1(B). Milan Lukić Appeal Brief, paras 30-33; Milan Lukić Reply Brief, paras 24-25. Joint Criminal Enterprise is referred to herein as “JCE”.

<sup>475</sup> Milan Lukić Appeal Brief, paras 31-33.

<sup>476</sup> Milan Lukić Appeal Brief, paras 35-36.

<sup>477</sup> Milan Lukić Appeal Brief, paras 32, 36.

<sup>478</sup> Prosecution Response Brief (Milan Lukić), paras 15-22.

<sup>479</sup> Prosecution Response Brief (Milan Lukić), para. 23.

the crime of murder, jointly with Murrizi, and perhaps with a third KLA soldier” and without a need to show whose bullet killed each victim.<sup>481</sup> Similarly, the Appeals Chamber is satisfied that the Trial Chamber did not err when finding that Milan Lukić, jointly with others, participated in the material elements of the crime of murder, and is therefore responsible for the death of all five victims, regardless of whether or not he personally fired the fatal bullet in each case. Milan Lukić’s arguments to the contrary are dismissed, and his sub-ground 1(B) is thus rejected.

#### **E. Conclusion**

163. The Appeals Chamber dismisses Milan Lukić’s sub-grounds 1(A) through (F).

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<sup>480</sup> Milan Lukić Reply Brief, para. 26.

<sup>481</sup> *Limaj et al.* Appeal Judgement, paras 47-50. *See also Limaj et al.* Trial Judgement, paras 664, 670, 741.



## VII. VARDA FACTORY INCIDENT

### A. Introduction

164. The Trial Chamber found that, on or about 10 June 1992, Milan Lukić selected seven Bosnian Muslim civilians from the Varda Factory, forced them to walk to the bank of the nearby Drina River, and shot them dead.<sup>482</sup> The victims were identified as Nusret Aljošević, Nedžad Bektaš, Mušan Čančar, Ibrišim Memišević, Hamed Osmanagić, Lutvo Tvrtković, and Sabahudin Velagić.<sup>483</sup> In reaching this conclusion, the Trial Chamber relied primarily on the evidence of VG024 and VG042.<sup>484</sup> Based on these findings, Milan Lukić was convicted of committing murder as a violation of the laws or customs of war and as a crime against humanity, and persecutions as a crime against humanity.<sup>485</sup>

165. Milan Lukić submits that the Trial Chamber erred in:<sup>486</sup> (i) finding that VG024, VG042, and VG017 were credible;<sup>487</sup> (ii) its assessment of the identification evidence of VG024 and VG042;<sup>488</sup> and (iii) finding that the death of the seven victims was proven beyond reasonable doubt.<sup>489</sup>

### B. Credibility

166. In finding that Milan Lukić was a perpetrator of the crimes committed at the Varda Factory, the Trial Chamber relied on VG024, VG042, and, to a lesser extent, VG017.<sup>490</sup> VG024 was in the Varda Factory when Milan Lukić arrived and assembled the victims.<sup>491</sup> VG042 witnessed the events from the balcony of her home across the street from the Varda Factory.<sup>492</sup> VG017 could observe part of the events, but did not see the incident without interruption.<sup>493</sup>

167. Milan Lukić challenges the credibility of VG024, VG042, and VG017 on the basis of inconsistencies in their evidence.<sup>494</sup>

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<sup>482</sup> Trial Judgement, para. 329.

<sup>483</sup> Trial Judgement, para. 329.

<sup>484</sup> Trial Judgement, paras 300-305, 329.

<sup>485</sup> Trial Judgement, paras 914, 1026, 1099.

<sup>486</sup> Milan Lukić's sub-grounds 2(A) through (D) and (G).

<sup>487</sup> Milan Lukić Appeal Brief, paras 77-78, 103-106, 125-131; Milan Lukić Reply Brief, paras 47-53, 59.

<sup>488</sup> Milan Lukić Appeal Brief, paras 79-106; Milan Lukić Reply Brief, paras 47-53.

<sup>489</sup> Milan Lukić Appeal Brief, paras 76-78; Milan Lukić Reply Brief, paras 45-46.

<sup>490</sup> Trial Judgement, paras 300-305. The Trial Chamber placed "little weight on VG017's evidence, except with regard to his evidence concerning the victims of the incident" which the Trial Chamber considered in corroboration of other evidence (Trial Judgement, para. 305).

<sup>491</sup> Trial Judgement, paras 237, 304.

<sup>492</sup> Trial Judgement, paras 238, 300.

<sup>493</sup> Trial Judgement, paras 249, 305.

<sup>494</sup> Milan Lukić's sub-grounds 2(D) and (G). Milan Lukić Appeal Brief, paras 77-78, 103-106, 125-131; Milan Lukić Reply Brief, paras 47-53, 59.

168. The Prosecution responds that the Trial Chamber properly relied on VG024's evidence despite inconsistencies between her prior statements and oral testimony,<sup>495</sup> and that VG042's credibility was not undermined by the statements she gave in 1993 and 1994.<sup>496</sup>

### 1. VG024

169. Milan Lukić argues that the Trial Chamber erred when it failed to give sufficient weight to the material inconsistencies between VG024's oral testimony and her prior written statements to the Ministry of Internal Affairs of Bosnia and Herzegovina in 1994 and to the Prosecution in 1998, respectively.<sup>497</sup> He states that VG024 testified that she had seen the men lined up at the Drina River without their work clothes, while in her 1994 statement she did not mention having observed events outside the Varda Factory.<sup>498</sup> He also argues that, in her 1998 statement, VG024 indicated that she had heard from somebody else that Milan Lukić had shot the seven men at the Drina River.<sup>499</sup> According to Milan Lukić, VG024 asserted for the first time during her oral testimony that she saw people on the balcony of a house and heard a child scream during the incident.<sup>500</sup> In addition, he submits that VG024 gave inconsistent evidence as to where the red Passat he arrived in was parked.<sup>501</sup>

170. The Trial Chamber considered the inconsistencies between VG024's testimony and her prior statements of 1994 and 1998 concerning the relevant events.<sup>502</sup> The Trial Chamber accepted VG024's explanation that her 1998 statement was "given in haste" and "rekindled" her memory of the events.<sup>503</sup> The Trial Chamber considered the inconsistencies and her explanation that she did not know in 1994 that some of the "details" of this incident were important.<sup>504</sup> These "details" included

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<sup>495</sup> Prosecution Response Brief (Milan Lukić), paras 106-107.

<sup>496</sup> Prosecution Response Brief (Milan Lukić), para. 105. The Prosecution does not respond explicitly with respect to the credibility of VG017.

<sup>497</sup> Milan Lukić Appeal Brief, paras 128-131; Milan Lukić Reply Brief, paras 53, 59. The Appeals Chamber notes that Milan Lukić mistakenly cites Exh. 1D178 instead of Exh. 1D78 (*see* Milan Lukić Appeal Brief, para. 129). The Appeals Chamber notes that Milan Lukić also erroneously cites Exh. 1D179 which is not a witness statement of VG024 (*see* Milan Lukić Appeal Brief, para. 129). The Appeals Chamber understands that Milan Lukić intended to refer to Exh. 1D79 (confidential). However, this exhibit was removed from the record pursuant to an order of the Trial Chamber on 27 April 2009 because it was a duplicative of Exh. 2D34 (confidential) (*see Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Order Concerning the Removal of Duplicate Exhibits from the Trial Record, 27 April 2009 (confidential) ("Order of 27 April 2009"), p. 2).

<sup>498</sup> Milan Lukić Appeal Brief, paras 128-130.

<sup>499</sup> Milan Lukić Appeal Brief, para. 129.

<sup>500</sup> Milan Lukić Appeal Brief, para. 131.

<sup>501</sup> Milan Lukić Appeal Brief, para. 131. Specifically, Milan Lukić argues that the location where VG024 placed the red Passat in Exh. P192 differs from the location indicated in Exh. P179. The Appeals Chamber understands that he intends to refer to Exh. 1D79 which was ultimately removed as it is duplicative of Exh. 2D34 (*see* Order of 27 April 2009).

<sup>502</sup> Trial Judgement, paras 246-247, 304. The Trial Chamber considered that, in her 1994 statement, VG024 mentioned that she and her colleagues "heard volleys of automatic fire" and that, in her 1998 statement, VG024 stated that she was "behind the factory when she heard 'a burst of fire'." It also noted that, at trial, VG024 testified that she "ran away and then heard a long burst of gunfire" (Trial Judgement, para. 247).

<sup>503</sup> Trial Judgement, paras 246, 304.

<sup>504</sup> Trial Judgement, paras 246, 304.

her testimony that she observed events outside the Varda Factory, saw people on the balcony of a house, and heard a child scream.<sup>505</sup> The Trial Chamber further considered that VG024's evidence supported VG042's testimony.<sup>506</sup> Having taken into account VG024's in-court testimony that she saw Milan Lukić taking the men to the Drina River and lining them up, the Trial Chamber did not accord any weight to the fact that VG024's prior statements failed to mention this.<sup>507</sup> The Appeals Chamber recalls that a trial chamber may accept a witness's evidence notwithstanding inconsistent prior statements.<sup>508</sup> In these circumstances, Milan Lukić has not shown that the Trial Chamber erred in finding VG024 credible.

171. The Appeals Chamber turns to Milan Lukić's claim that VG024's evidence was inconsistent in specifying where the red Passat was located.<sup>509</sup> The Trial Chamber did not explicitly consider this issue. The Appeals Chamber notes that VG024 marked the location on two photographs, Exhibits P190 and P192.<sup>510</sup> The Appeals Chamber observes that, despite the fact that the photographs were taken from different perspectives and from significantly different distances, VG024 consistently located the red Passat on the river-side of the factory compound. The Appeals Chamber further finds that Milan Lukić's argument that the red Passat's location marked on Exhibit P192 differs from the location that was indicated in VG024's prior statement is unfounded, as this statement mentions the position of the red Passat on another day. In these circumstances, the Appeals Chamber finds that Milan Lukić has failed to show an inconsistency in VG024's evidence or that it was unreasonable for the Trial Chamber to find VG024 credible.

172. Consequently, the Appeals Chamber dismisses Milan Lukić's assertion that the Trial Chamber erred in evaluating VG024's credibility.

## 2. VG042 and VG017

173. Milan Lukić submits that the Trial Chamber erred in finding that VG042 was credible.<sup>511</sup> He argues that two of her prior written statements to the Ministry of Internal Affairs of Bosnia and Herzegovina from 1993 and 1994 were inconsistent with her oral testimony, and that the Trial Chamber found that VG042 "demonstrated confusion" when asked about these discrepancies.<sup>512</sup> In

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<sup>505</sup> Trial Judgement, para. 246, referring to VG024, T. 3267 (3 November 2008) (private session): "I thought this was not that relevant, essential. I heard this child scream, probably recognizing somebody of their own, but I don't know. I never asked."

<sup>506</sup> Trial Judgement, para. 304.

<sup>507</sup> Trial Judgement, para. 304.

<sup>508</sup> *Kupreškić et al.* Appeal Judgement, para. 156.

<sup>509</sup> Milan Lukić Appeal Brief, paras 128, 131.

<sup>510</sup> VG024, T. 3230-3231, 3233 (3 November 2008).

<sup>511</sup> Milan Lukić Appeal Brief, paras 125-127; Milan Lukić Reply Brief, para. 49.

<sup>512</sup> Milan Lukić Appeal Brief, para. 126, referring to Exhs 1D66 (1993), 1D67 (1994). *See also* Milan Lukić Appeal Brief, para. 127.

particular, Milan Lukić asserts that the Trial Chamber erred in failing to consider that VG042 did not identify him as the perpetrator of the Varda Factory Incident in her 1993 statement.<sup>513</sup> He further argues that the Trial Chamber erred in finding that VG042 and VG017 were credible, despite their inconsistent accounts of Ibrišim Memišević's burial.<sup>514</sup>

174. The Appeals Chamber notes that the Trial Chamber found that VG042 exhibited confusion when questions were put to her in relation to the prior statements of 1993 and 1994.<sup>515</sup> However, the Trial Chamber was satisfied that she was confused about what was being asked of her in cross-examination.<sup>516</sup> Milan Lukić's argument in this regard is therefore dismissed.

175. The Trial Chamber considered that: (i) some of the information included in VG042's statements from 1993 and 1994 was provided by other people; (ii) the signatures on the statements did not belong to her; and (iii) the 1994 statement was not read back to VG042 at the time it was made.<sup>517</sup> The Trial Chamber found that "there [was] considerable uncertainty" as to what information in the 1993 and 1994 statements could be properly ascribed to the witness, and accordingly attached no probative weight to the statements.<sup>518</sup> In these circumstances, the Appeals Chamber finds that Milan Lukić has failed to show that the Trial Chamber was unreasonable in relying on the in-court testimony of VG042.

176. The Trial Chamber found that the credibility of VG042 and VG017 was not affected by their failure to mention each other's presence in their testimony regarding the burial of Ibrišim Memišević.<sup>519</sup> In this regard, the Appeals Chamber notes that neither witness was asked about the presence of the other at the burial.<sup>520</sup> Further, VG042 testified that she was one of the women who had retrieved the body, and VG017 testified that he had dug the grave.<sup>521</sup> As VG042 and VG017 were involved in different stages of the burial, the fact that the witnesses did not mention each other does not show an inconsistency in their evidence.

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<sup>513</sup> Milan Lukić Appeal Brief, paras 99 (confidential), 127. Milan Lukić also argues that, in her 1993 statement, VG042: (i) could not remember the names of three alleged victims of the alleged incident; (ii) did not mention that her husband had disappeared on that day; (iii) did not identify Milan Lukić as a perpetrator; and (iv) did not mention having witnessed the crime (*see* Exh. 1D66, p. 6).

<sup>514</sup> Milan Lukić Appeal Brief, para. 78.

<sup>515</sup> Trial Judgement, para. 242.

<sup>516</sup> Trial Judgement, paras 242-243.

<sup>517</sup> Trial Judgement, para. 242, referring to VG042, T. 2812-2815, 2823 (private session), 2857-2858 (27 October 2008), Exh. 1D69 (confidential), p. 2.

<sup>518</sup> Trial Judgement, para. 242.

<sup>519</sup> Trial Judgement, para. 312.

<sup>520</sup> VG042 testified: "We took the body of Ibrišim Memišević in a wagon to just above his house where some relatives had dug a hole and we buried him there" (Exh. 1D69, para. 16 (confidential)). VG017 testified: "As we were digging a grave, someone started firing at us from the other riverbank" (VG017, T. 2706 (9 October 2008)). He further stated that he was assisted by Ismaela Jeta and Mustafa Memišević (VG017, T. 2711-2712 (9 October 2008)).

<sup>521</sup> VG017, T. 2706, 2711-2712 (9 October 2008); Exh. 1D69 (confidential), p. 3.

177. The Appeals Chamber therefore finds that Milan Lukić has not shown that the Trial Chamber was unreasonable in finding VG042 and VG017 credible.

### 3. Inconsistencies between the evidence of VG024 and VG042

178. Milan Lukić argues that the Trial Chamber erred in failing to address inconsistencies between the evidence of VG024 and VG042.<sup>522</sup> While VG042 testified that her husband and two other individuals were abducted from the Varda Factory earlier on the day of the incident, VG024 did not mention this event.<sup>523</sup> Milan Lukić also submits that the testimonies of VG024 and VG042 differed as to where the red Passat, in which he allegedly arrived, was parked.<sup>524</sup> Specifically, he contends that the witnesses identified the position of the car at different locations on photographs.<sup>525</sup>

179. The Appeals Chamber notes that VG024 was not cross-examined on the issue of the abduction of VG042's husband. Milan Lukić's mere assertion that VG024 should have known about this abduction is speculative. Consequently, the Appeals Chamber finds that Milan Lukić has not shown that the Trial Chamber erred in failing to consider the fact that VG024 did not mention the abduction of VG042's husband.

180. While the testimonies of VG024 and VG042 differed, by a few metres, as to the location of the red Passat,<sup>526</sup> the Appeals Chamber considers this minor inconsistency to be inconsequential. The Appeals Chamber therefore finds that the Trial Chamber did not err in failing to address it. In these circumstances, Milan Lukić has not shown that the Trial Chamber's failure to address minor inconsistencies in the evidence of VG024 and VG042 has any impact on its assessment of the credibility of these witnesses.

### 4. Conclusion

181. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber did not err in finding VG024 and VG042 to be credible. Milan Lukić's sub-grounds 2(D) and (G) are accordingly dismissed.

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<sup>522</sup> Milan Lukić Appeal Brief, paras 105-106; Milan Lukić Reply Brief, paras 51, 53.

<sup>523</sup> Milan Lukić Appeal Brief, para. 105. He argues that if VG042's husband had been abducted in the morning, the news "would have spread round a factory of only 200 people" (Milan Lukić Reply Brief, para. 51).

<sup>524</sup> Milan Lukić Appeal Brief, para. 106; Milan Lukić Reply Brief, para. 53.

<sup>525</sup> Milan Lukić Appeal Brief, para. 106. In Exh. P192, VG024 placed the red Passat at the river's edge; VG042, in Exh. P157, placed it at the guard's house (*see* Milan Lukić Reply Brief, para. 53).

<sup>526</sup> VG024 marked Exhs P190 and P192 (*see* VG024, T. 3222-3233 (3 November 2008)). VG042 marked Exh. P157 (VG042, T. 2794 (27 October 2008)). The Appeals Chamber notes that the position where VG024 placed the red Passat on Exh. P190 is consistent with the position indicated by VG042 on Exh. P157.

### **C. Identification of Milan Lukić**

182. In convicting Milan Lukić for the Varda Factory Incident, the Trial Chamber relied on the identification evidence of VG024 and VG042. It found that VG024 had sufficient prior knowledge of Milan Lukić to recognise him inside the Varda Factory.<sup>527</sup> While the Trial Chamber noted that VG024 did not observe the events without interruption and that she did not have an unobstructed view to the Drina River, it found that VG024's evidence supported that of VG042, who saw the whole Varda Factory Incident unfold.<sup>528</sup> It further found that VG042: (i) knew Milan Lukić before the incident; (ii) had a clear and unobstructed view from where she observed the events; and (iii) could recognise specific individuals during the incident.<sup>529</sup>

183. Milan Lukić submits that the Trial Chamber erred in assessing the identification evidence of VG024 and VG042.<sup>530</sup>

184. The Prosecution responds that the Trial Chamber properly relied on the recognition evidence of VG024 and VG042 when it found that Milan Lukić shot the seven victims.<sup>531</sup>

#### **1. VG024**

185. Milan Lukić submits that the Trial Chamber erred when it relied on VG024's in-court identification of him, arguing that she did not have sufficient prior knowledge of him to be considered a recognition witness.<sup>532</sup> With regard to prior knowledge, he specifically refers to VG024's testimony that, while she had seen him occasionally when he was a child, she could not recall when she had last seen him prior to the war, and argues that her knowledge of him and his family was not as strong as she suggested.<sup>533</sup> Milan Lukić further asserts that VG024's evidence that he was an almost "regular visitor" to the Varda Factory in 1992 does not "diminish the risk of a

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<sup>527</sup> Trial Judgement, para. 323.

<sup>528</sup> Trial Judgement, para. 304.

<sup>529</sup> Trial Judgement, paras 300, 320.

<sup>530</sup> Milan Lukić's sub-grounds 2(B) and (C). Milan Lukić Appeal Brief, paras 89-102; Milan Lukić Reply Brief, paras 47-50.

<sup>531</sup> Prosecution Response Brief (Milan Lukić), paras 74-97.

<sup>532</sup> Milan Lukić Appeal Brief, paras 79-83. He further argues that the in-court identification was not permissible because it took place 16 years after the incident and appearances change greatly over such a period (Milan Lukić Appeal Brief, para. 86). He also asserts that it is impossible to determine the prejudice of the Trial Chamber's analysis of VG024's evidence which resulted from the in-court identification and therefore, the Appeals Chamber should consider the identification evidence in the absence of VG024's evidence (Milan Lukić Appeal Brief, paras 87-88. *See also* Milan Lukić Reply Brief, paras 47-48).

<sup>533</sup> Milan Lukić Appeal Brief, paras 81 (referring to Exh. 2D34 (confidential), p. 3), 83. Milan Lukić mistakenly cites Exh. 1D78 in which VG024 does not mention the names of Milan Lukić's parents. The Appeals Chamber understands that Milan Lukić intends to refer to Exh. 1D79 which was ultimately removed from the trial record as it is duplicative of Exh. 2D34 (*see* Order of 27 April 2009). In Exh. 1D79, VG024 stated that the names of his parents were Rade and Rada (Exh. 1D79, p. 3).

mistaken recognition” of him during the incident.<sup>534</sup> In addition, Milan Lukić avers that VG024 misidentified him on at least two occasions.<sup>535</sup> In this regard, he contends that VG024 misidentified him on a photospread in a statement given to the Prosecution in December 1998,<sup>536</sup> as well as in a statement given to the Association in 2004, in which she stated that she and her brothers saw Milan Lukić in a jeep near Višegrad in April 2004.<sup>537</sup>

186. Milan Lukić further submits that the Trial Chamber erroneously failed to consider that VG024 only had a fleeting glance of the perpetrator during the Varda Factory Incident.<sup>538</sup> He also asserts that the Trial Chamber erred in finding that VG024 heard him introduce himself in the Varda Factory on the day of the incident, as VG024 in fact testified that this occurred on 25 May 1992.<sup>539</sup> Finally, Milan Lukić avers that, since VG024 did not observe the incident without interruption, the Trial Chamber also erred in failing to conclude that someone other than him could have shot the victims.<sup>540</sup>

187. The Trial Chamber noted that VG024 recognised Milan Lukić in court.<sup>541</sup> It rejected Milan Lukić’s alibi “[o]n the basis of the evidence *as a whole*, that is, the evidence of the Prosecution and the Defence in relation to the Varda factory incident” and found that the evidence as to “Milan Lukić’s presence, acts and conduct on or about 10 June 1992 was provided by credible and reliable witnesses.”<sup>542</sup> As the “evidence as a whole” includes VG024’s in-court identification, the Trial Chamber accorded some probative weight to it. The Appeals Chamber recalls that it is within a trial chamber’s discretion to accord weight to in-court identification.<sup>543</sup> In the present case, the Trial Chamber found that there was sufficient evidence based on VG024’s prior knowledge of Milan Lukić and her recollection of the events at the factory to find that she already knew him when she recognised him inside the Varda Factory.<sup>544</sup> In these circumstances, the Appeals Chamber considers that the Trial Chamber attributed nominal weight to VG024’s in-court identification. Milan Lukić’s arguments in this respect are thus dismissed.

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<sup>534</sup> Milan Lukić Appeal Brief, para. 82, referring to VG024, T. 3222-3223 (3 November 2008).

<sup>535</sup> Milan Lukić Appeal Brief, para. 83.

<sup>536</sup> Milan Lukić Appeal Brief, paras 83-84, referring to Exh. 1D80 (confidential). Milan Lukić submits that VG024 incorrectly identified him as being in a photograph.

<sup>537</sup> Milan Lukić Appeal Brief, para. 85, referring to Exh. 1D81 (confidential). *See also* Appeal Hearing, AT. 64 (14 September 2011).

<sup>538</sup> Milan Lukić Appeal Brief, para. 102.

<sup>539</sup> Milan Lukić Appeal Brief, para. 101, referring to VG024, T. 3223 (3 November 2008).

<sup>540</sup> Milan Lukić Appeal Brief, paras 103-104.

<sup>541</sup> Trial Judgement, paras 264, 323.

<sup>542</sup> Trial Judgement, para. 329 (emphasis added).

<sup>543</sup> *See supra* para. 120.

<sup>544</sup> Trial Judgement, para. 323.

188. As to VG024's prior knowledge of Milan Lukić, the Trial Chamber found that VG024 had known Milan Lukić since he was 12 or 13 years old, and that she knew him well.<sup>545</sup> The Trial Chamber was aware that VG024 was unable to say exactly when she had last seen him prior to the war, but noted that she said it had been when he left for military service.<sup>546</sup> The Trial Chamber also referred to the part of VG024's testimony in which she provided the correct names of Milan Lukić's parents and acknowledged that she may have been mistaken in this respect in her 1998 statement.<sup>547</sup> Moreover, the Trial Chamber considered VG024's testimony that in 1992 Milan Lukić had been an "almost [...] regular visitor" to the Varda Factory where she worked.<sup>548</sup> In these circumstances, Milan Lukić has not shown that the Trial Chamber erred in finding that VG024 had sufficient prior knowledge of Milan Lukić to recognise him during the incident.

189. With respect to VG024's alleged misidentifications of Milan Lukić on at least two occasions, the Appeals Chamber notes that the Trial Chamber explicitly took into account that "VG024 erroneously identified a man in the photospread presented to her in 1998 as Milan Lukić".<sup>549</sup> It accepted her explanation that the photos used in the photospread were blurry and took into account evidence that it had never been established whether the man in the photospread was in fact Milan Lukić or someone else who resembled him.<sup>550</sup> Furthermore, the Trial Chamber considered the inconsistency between VG024's statement to the Association in 2004 and her testimony in cross-examination as to whether she had seen Milan Lukić travelling in a jeep in April 2004.<sup>551</sup> While VG024 indicated in her statement that she and her two brothers saw Milan Lukić in the jeep, during cross-examination she testified that it was only her brothers who saw him.<sup>552</sup> The Trial Chamber considered this evidence and was not persuaded that her statement "regarding an incident that took place in 2004 ha[d] any bearing on her credibility" and found that she had no "reason to falsify her identification of Milan Lukić [...] in that statement."<sup>553</sup> Milan Lukić has not shown that the Trial Chamber erred in this respect.

190. In addition, Milan Lukić's argument that VG024's identification of him on the day of the Varda Factory Incident was based on a fleeting glance is without merit. The Trial Chamber found that VG024 observed Milan Lukić when he entered the factory late in the morning,<sup>554</sup> collected the

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<sup>545</sup> Trial Judgement, paras 263, 323.

<sup>546</sup> Trial Judgement, para. 263.

<sup>547</sup> Trial Judgement, fn. 977, referring to VG024, T. 3248-3249 (3 November 2008).

<sup>548</sup> Trial Judgement, para. 263.

<sup>549</sup> Trial Judgement, para. 322.

<sup>550</sup> Trial Judgement, paras 263, 322.

<sup>551</sup> Trial Judgement, para. 265.

<sup>552</sup> Trial Judgement, paras 265, 322.

<sup>553</sup> Trial Judgement, para. 322.

<sup>554</sup> Trial Judgement, paras 232, 234, 303, 323.



victims from inside the factory<sup>555</sup> - at one point passing “very near” to her<sup>556</sup> - and led them to the river.<sup>557</sup> As Milan Lukić has failed to show that the Trial Chamber erred in its assessment in this regard, his submissions in this respect are dismissed.

191. By contrast, the Appeals Chamber considers that the Trial Chamber erred in finding that VG024 testified that she overheard Milan Lukić introducing himself at the Varda Factory on the day of the incident, because VG024 unambiguously testified that this happened on 25 May 1992 and not on or about 10 June 1992.<sup>558</sup> However, the Appeals Chamber finds that this error does not undermine the Trial Chamber’s conclusion that, at the time of the Varda Factory Incident, VG024 recognised Milan Lukić as the perpetrator.

192. Finally, in light of the findings above, the Appeals Chamber considers that Milan Lukić has not shown that, when assessing VG024’s evidence that she did not observe the incident without interruption,<sup>559</sup> the Trial Chamber erred in finding “that another man was with Milan Lukić when he arrived at the Varda factory, but [...] that there is no evidence that this man or any other armed persons were with Milan Lukić at the river and could have shot the men.”<sup>560</sup>

193. In light of the foregoing, the Appeals Chamber finds that Milan Lukić has failed to demonstrate that the Trial Chamber erred in its evaluation of VG024’s identification evidence.

## 2. VG042

194. Milan Lukić argues that the Trial Chamber erroneously found that VG042 had sufficient prior knowledge to recognise him.<sup>561</sup> In particular, he submits that: (i) the last time VG042 saw him, he was a child; (ii) due to their age difference, VG042 could not have seen him before she was married; and (iii) VG042 erroneously estimated his age to be 40 years at the time of the incident.<sup>562</sup>

195. Milan Lukić also submits that the Trial Chamber did “not demonstrate extreme caution” in its assessment of VG042’s identification evidence, despite her testimony that she was on her balcony 50 metres away from the main gate of the Varda Factory at the time of the incident.<sup>563</sup> In

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<sup>555</sup> Trial Judgement, para. 307.

<sup>556</sup> Trial Judgement, para. 322.

<sup>557</sup> Trial Judgement, para. 304, referring to Trial Judgement, para. 246.

<sup>558</sup> Trial Judgement, paras 263 (referring to VG024, T. 3223 (3 November 2008)), 323.

<sup>559</sup> Trial Judgement, para. 304.

<sup>560</sup> Trial Judgement, para. 325.

<sup>561</sup> Milan Lukić Appeal Brief, paras 92-93; Milan Lukić Reply Brief, para. 49. *See also* Appeal Hearing, AT. 63-64 (14 September 2011).

<sup>562</sup> Milan Lukić Appeal Brief, paras 92-93; Milan Lukić Reply Brief, para. 49. *See also* Appeal Hearing, AT. 63-64 (14 September 2011).

<sup>563</sup> Milan Lukić Appeal Brief, paras 94-97, referring to Exh. P153. Milan Lukić asserts that, even accepting her testimony that her eye-sight was good, this is a considerable distance from which to make an identification. He adds that Defence expert witness Jenkins testified that he had determined during a site visit that the distance from which

particular, he asserts that: (i) the Trial Chamber's finding that a child standing on the balcony together with VG042 could recognise her father, and therefore VG042 could also correctly identify Milan Lukić, is flawed;<sup>564</sup> (ii) Exhibit P153 (a photo of the Varda Factory) was taken from such a distance that VG042 could not have recognised anyone on it;<sup>565</sup> and (iii) VG042 could not have seen that Milan Lukić's cap had a Serb flag on it.<sup>566</sup> Milan Lukić also notes that, according to VG042's testimony, earlier in the morning of the Varda Factory Incident, she witnessed her husband being taken away by a man she identified as Milan Lukić.<sup>567</sup> He argues that the Trial Chamber erred in failing to consider the impact of this traumatic event on her ability to later recognise the perpetrator of the killings in the Varda Factory Incident.<sup>568</sup> Finally, Milan Lukić points to VG042's testimony that he arrived with a "driver" of the red Passat, whom she believed to be Sredoje Lukić, and argues that this evidence provided no basis upon which the Trial Chamber could have concluded that he – as opposed to somebody else – had been identified as the shooter.<sup>569</sup>

196. With respect to VG042's prior knowledge of Milan Lukić, the Trial Chamber considered that at the start of the war VG042 had not seen Milan Lukić for a significant period of time and that it was not clear how regularly she saw him after the war began.<sup>570</sup> However, it noted that she consistently stated that the man she saw arriving at the Varda Factory on the morning of the incident was Milan Lukić.<sup>571</sup> The Trial Chamber concluded that it was not possible for VG042 to have seen Milan Lukić regularly on the bus before 1961, due to their age difference.<sup>572</sup> Despite this, the Trial Chamber accepted her evidence that Milan Lukić had been friends with her sons, that she knew his parents and that his grandfather was a friend of her father.<sup>573</sup> It also noted that she knew that Milan Lukić's family was from Rujište.<sup>574</sup> The Trial Chamber further considered that VG042 estimated Milan Lukić to be 40 years old at the time of the incident,<sup>575</sup> whereas he was actually 25 years old.<sup>576</sup> However, it took into account that "she appeared uncertain about this

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VG042 witnessed the events was closer to between 75 to 100 metres. He further asserts that these arguments are not weakened by VG042's testimony that a child on the balcony recognised her father among the victims because the probability of accurate recognition increases with familiarity. He submits that VG042's tendency to overstate her evidence is further exemplified in a previous statement she gave to the Prosecution in October 1998.

<sup>564</sup> Milan Lukić Appeal Brief, para. 97; Milan Lukić Reply Brief, para. 49.

<sup>565</sup> Milan Lukić Appeal Brief, para. 96, referring to VG042, T. 2793 (27 October 2008).

<sup>566</sup> Milan Lukić Appeal Brief, para. 96, referring to Exh. 1D68, p. 3.

<sup>567</sup> Milan Lukić Appeal Brief, para. 98.

<sup>568</sup> Milan Lukić Appeal Brief, para. 98, referring to Trial Judgement, para. 242. He adds that VG042 was "utterly confused about fundamental events" surrounding the incident and that she may have confused the man she saw take her husband in the morning with the man she saw kill the seven victims on the river bank (Milan Lukić Reply Brief, para. 49).

<sup>569</sup> Milan Lukić Appeal Brief, para. 103.

<sup>570</sup> Trial Judgement, paras 320-321.

<sup>571</sup> Trial Judgement, para. 321.

<sup>572</sup> Trial Judgement, para. 320.

<sup>573</sup> Trial Judgement, paras 257, 320.

<sup>574</sup> Trial Judgement, para. 257.

<sup>575</sup> Trial Judgement, para. 321.

<sup>576</sup> Trial Judgement, para. 1.

estimation.”<sup>577</sup> The Trial Chamber weighed these issues “in light of [VG042’s] other evidence about how she knew [Milan Lukić]” and held that VG042 was able to recognise him during the Varda Factory Incident.<sup>578</sup> In these circumstances, the Appeals Chamber finds that the Trial Chamber did not err in finding that VG042 had prior knowledge of Milan Lukić.

197. The Appeals Chamber turns to the argument that the Trial Chamber did “not demonstrate extreme caution” when it assessed VG042’s evidence, despite the fact that she observed the incident from a distance of at least 50 metres.<sup>579</sup> The Appeals Chamber is satisfied that the Trial Chamber carefully considered the relevant aspects of VG042’s evidence on the events. The Trial Chamber assessed her evidence that she witnessed the killings on the bank of the river from 50 to 100 metres away.<sup>580</sup> It was aware of Defence witness Jenkins’ doubt as to whether VG042 could have identified Milan Lukić from this distance, and accepted VG042’s evidence that she had good eyesight at the time and that she was able to see what happened from her balcony on the top floor of her house.<sup>581</sup> The Trial Chamber was also satisfied that video evidence taken from her balcony demonstrated that VG042 had an unobstructed view of the factory, the guardhouse, and the road to the river.<sup>582</sup> It further considered that VG042 was watching events involving people she knew and recognised.<sup>583</sup> It also took into account that, from a similar distance, the daughter of one of the victims was able to clearly recognise her father among the group of men on the river bank, and it found that this fact supported VG042’s evidence that she could see what was happening and recognise specific individuals during the incident.<sup>584</sup> The Appeals Chamber recalls its finding that the Trial Chamber did not err when it found that VG042 had sufficient prior knowledge of Milan Lukić.<sup>585</sup> In these circumstances, it was within the Trial Chamber’s discretion to take into account the fact that a child could recognise her father among the victims as one of several factors in support of its finding that VG042 could identify Milan Lukić from the same distance.

198. The Appeals Chamber notes that the Trial Chamber did not explicitly consider whether VG042 could indeed, as she testified, “recognise” people in Exhibit P153, an aerial view of the location by the Drina River where the victims were shot.<sup>586</sup> However, while VG042 stated that she could recognise that there were people in the photograph, she did not testify that she could identify

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<sup>577</sup> Trial Judgement, para. 321.

<sup>578</sup> Trial Judgement, para. 321.

<sup>579</sup> Milan Lukić Appeal Brief, paras 94-95.

<sup>580</sup> Trial Judgement, paras 262, 300.

<sup>581</sup> Trial Judgement, para. 300.

<sup>582</sup> Trial Judgement, para. 300.

<sup>583</sup> Trial Judgement, para. 300.

<sup>584</sup> Trial Judgement, para. 300.

<sup>585</sup> *See supra* para. 196.

<sup>586</sup> *See* Milan Lukić Appeal Brief, para. 96, referring to VG042, T. 2793 (27 October 2008).

them.<sup>587</sup> Hence, the Trial Chamber did not err in failing to consider this issue when assessing VG042's evidence.

199. Further, the Trial Chamber did not expressly consider whether it was possible that VG042 could have seen from a distance of 50 metres that Milan Lukić had "a rugby style camouflage cap, [with a] Serb flag as insignia".<sup>588</sup> The Appeals Chamber finds that this is ultimately a question of credibility which the Trial Chamber was in a better position to assess. The Appeals Chamber also notes that it is not clear from VG042's prior statement whether she stated that she saw Milan Lukić wearing this precise attire on the day of the incident or whether this information was part of her general description of him and unrelated to this specific day.<sup>589</sup> In any event, the Appeals Chamber finds that this detail does not undermine the Trial Chamber's finding that VG042 recognised Milan Lukić during the Varda Factory Incident.

200. The Appeals Chamber considers that Milan Lukić has not shown that the Trial Chamber erred in failing to consider whether the abduction of VG042's husband earlier on the day of the incident had a traumatic effect on VG042.<sup>590</sup> Milan Lukić's mere assertion that VG042 may have later confused him with the person who killed the victims of the Varda Factory Incident is unsubstantiated and speculative. Milan Lukić has therefore failed to demonstrate that the Trial Chamber erred in this regard.

201. Finally, the Appeals Chamber notes that the Trial Chamber found that Milan Lukić – as opposed to another individual – had been identified as the shooter during the incident.<sup>591</sup> The Appeals Chamber recalls that it has dismissed Milan Lukić's submissions that the Trial Chamber erroneously found that VG042 had prior knowledge of Milan Lukić and could identify him during the incident. In these circumstances, Milan Lukić has failed to show that the Trial Chamber erred in finding "that another man was with Milan Lukić when he arrived at the Varda factory, but [...] that there is no evidence that this man or any other armed persons were with Milan Lukić at the river and could have shot the men."<sup>592</sup>

202. For the foregoing reasons, the Appeals Chamber is satisfied that the Trial Chamber did not err in assessing the identification evidence of VG042.

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<sup>587</sup> VG042 did not name the individuals in the picture and merely stated that they were in the same location where she saw Milan Lukić during the Varda Factory Incident (VG042, T. 2793 (27 October 2008)).

<sup>588</sup> Exh. 1D68 (confidential), p. 3. *See* Milan Lukić Appeal Brief, para. 96.

<sup>589</sup> In Exh. 1D68, p. 3, VG042 stated that she knew Milan Lukić as "he was friends with my sons since childhood. He was taller than 180 cm, brown hair, about thirty years old. He was wearing camouflage uniform, with rugby style camouflage cap, Serb flag as insignia. I know that his family is from Rujište. Lukić left Višegrad when he was about eighteen or twenty to go work in Serbia."

<sup>590</sup> Milan Lukić Appeal Brief, para. 98.

### 3. Conclusion

203. The Appeals Chamber is satisfied that the Trial Chamber applied the correct legal standard when assessing the identification evidence and that it did not err in finding that Milan Lukić was properly identified as the man who shot the victims during the Varda Factory Incident. As a result, Milan Lukić's sub-grounds 2(B) and (C) are dismissed.

#### **D. Proof of death**

204. The Trial Chamber found that Nusret Aljošević, Nedžad Bektaš, Mušan Čančar, Ibrišim Memišević, Hamed Osmanagić, Lutvo Tvrtković, and Sabahudin Velagić were killed during the Varda Factory Incident.<sup>593</sup> In reaching this conclusion, the Trial Chamber primarily relied on the evidence of VG017, VG024, and VG042.<sup>594</sup>

205. Milan Lukić submits that the Trial Chamber erred in law and fact in finding that the death of the seven victims was proven beyond reasonable doubt.<sup>595</sup> He argues that with the exception of the findings in relation to Hamed Osmanagić, the Trial Chamber based its findings solely on the evidence of unreliable eye-witnesses whose testimonies are inconsistent with key documents.<sup>596</sup>

206. The Prosecution responds that the Trial Chamber correctly found that the death of the victims was proven beyond reasonable doubt and that the fact that the bodies were not recovered is irrelevant.<sup>597</sup>

207. Milan Lukić replies that the fact that the bodies were not discovered weakens the evidence of the victims' death, and that the remaining evidence and the inconsistencies between the unreliable eye-witness evidence and key documents do not show that the victims died as alleged.<sup>598</sup>

208. At the outset, the Appeals Chamber recalls that proof beyond reasonable doubt that a person was killed does not necessarily require proof that the dead body of that person has been recovered. Rather, a victim's death may be inferred circumstantially from all the evidence presented to the Trial Chamber.<sup>599</sup> Furthermore, the Appeals Chamber recalls that Milan Lukić has not shown that the Trial Chamber erred in finding that VG024 and VG042 were credible<sup>600</sup> and that they identified

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<sup>591</sup> Trial Judgement, para. 325.

<sup>592</sup> Trial Judgement, para. 325.

<sup>593</sup> Trial Judgement, para. 329.

<sup>594</sup> Trial Judgement, paras 307-319.

<sup>595</sup> Milan Lukić's sub-ground 2(A). Milan Lukić Appeal Brief, paras 76-78; Milan Lukić Reply Brief, paras 45-46.

<sup>596</sup> Milan Lukić Appeal Brief, para. 77; Milan Lukić Reply Brief, para. 46.

<sup>597</sup> Prosecution Response Brief (Milan Lukić), paras 72-73.

<sup>598</sup> Milan Lukić Reply Brief, paras 45-46.

<sup>599</sup> See *supra* para. 149.

<sup>600</sup> See *supra* para. 181.

Milan Lukić as the individual who shot the victims of the Varda Factory Incident.<sup>601</sup> The Appeals Chamber will now address Milan Lukić's specific allegations in relation to the murder of the seven victims.

### 1. Absence of bodies and death certificates

209. In relation to Lutvo Tvrtković, Nusret Aljošević, and Mušan Čančar, Milan Lukić submits that the Trial Chamber erred in finding that they had died as alleged since no body was found and no death certificate was presented.<sup>602</sup>

210. In determining that Milan Lukić killed Lutvo Tvrtković, Nusret Aljošević, and Mušan Čančar during the Varda Factory Incident, the Trial Chamber relied on the eye-witness evidence of VG024, VG042, and VG017.<sup>603</sup> VG024 testified that Milan Lukić collected Lutvo Tvrtković and Nusret Aljošević.<sup>604</sup> VG042 testified that she saw Milan Lukić collect Lutvo Tvrtković, Nusret Aljošević, and Mušan Čančar, whom she knew personally, from the Varda Factory<sup>605</sup> and walk them to the river bank.<sup>606</sup> The Trial Chamber found VG017 credible when stating that he recognised Nusret Aljošević among the victims.<sup>607</sup> VG042 testified that she saw Milan Lukić shoot Lutvo Tvrtković, Nusret Aljošević, and Mušan Čančar, among others.<sup>608</sup> This was corroborated by the evidence of VG017 and VG024 to the extent that they heard a burst of gunfire.<sup>609</sup> The Trial Chamber also noted VG042's testimony that on the following day she saw the dead bodies of Nusret Aljošević and Mušan Čančar.<sup>610</sup>

211. The Appeals Chamber recalls that Milan Lukić has not shown that the Trial Chamber erred in finding that these witnesses were credible and reliable.<sup>611</sup> Consequently, the Appeals Chamber is satisfied that the Trial Chamber did not err in finding that the deaths of Lutvo Tvrtković, Nusret

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<sup>601</sup> See *supra* paras 193, 202-203.

<sup>602</sup> Milan Lukić Appeal Brief, para. 78; Milan Lukić Reply Brief, paras 45-46.

<sup>603</sup> Trial Judgement, paras 299-305.

<sup>604</sup> Trial Judgement, paras 237, 310, 313, referring, *inter alia*, to VG024, T. 3225-3226, 3270 (3 November 2008), Exh. 2D34 (confidential), p. 5. The Trial Chamber held that VG024's reference to "Lutvo Tabaković" instead of "Lutvo Tvrtković" did not call into question the identity of the victim (see Trial Judgement, para. 239).

<sup>605</sup> VG042 testified that she knew them well, as Lutvo Tvrtković and Nusret Aljošević were her neighbours and she regularly saw Mušan Čančar, who "would always come by" (see Trial Judgement, paras 238, 309, referring, *inter alia*, to VG042, T. 2788, 2791, 2830 (27 October 2008), Exh. 1D68 (confidential), p. 3).

<sup>606</sup> Trial Judgement, paras 240, 246, 249, referring, *inter alia*, to VG042, T. 2789, 2828 (27 October 2008), VG024, T. 3227 (3 November 2008), VG017, T. 2700, 2704-2705 (9 October 2008).

<sup>607</sup> VG017 testified that he saw Milan Lukić bring six or seven workers from the factory and that he recognised among others Nusret Aljošević (see Trial Judgement, paras 236, 310-311, referring, *inter alia*, to VG017, T. 2735-2736 (9 October 2008), Exh. 1D64 (confidential), p. 2).

<sup>608</sup> Trial Judgement, paras 240, 309, referring, *inter alia*, to VG042, T. 2788-2789, 2828-2829 (27 October 2008), Exhs 1D68 (confidential), p. 3, 1D69 (confidential), p. 3.

<sup>609</sup> Trial Judgement, paras 246-247, 249, referring, *inter alia*, to VG024, T. 3228, 3265-3266 (3 November 2008), VG017, T. 2701 (9 October 2008).

<sup>610</sup> Trial Judgement, paras 245, 309.

<sup>611</sup> See *supra* paras 177, 181, 203.

Aljošević, and Musan Čančar were proven beyond reasonable doubt in spite of the absence of their bodies and their death certificates.

## 2. Alleged inconsistencies between the identification record and the autopsy report

212. Milan Lukić submits that the Trial Chamber erred in finding that Hamed Osmanagić was killed during the Varda Factory Incident.<sup>612</sup> He asserts that the death of the individual identified as Hamed Osmanagić was recorded as having occurred at an unknown place and on an unknown date and that his facial injuries were inconsistently described in the relevant identification record<sup>613</sup> and the autopsy report<sup>614</sup> (collectively, “Identification Documents”).

213. The Trial Chamber considered VG042’s evidence that she saw Milan Lukić shoot Hamed Osmanagić.<sup>615</sup> The Prosecution concedes that the Trial Chamber erroneously found that VG042 later recognised Hamed Osmanagić’s body, as this finding is not supported in the evidence.<sup>616</sup> The Trial Chamber further noted VG024’s evidence that Milan Lukić selected Hamed Osmanagić, who was also in the factory,<sup>617</sup> and that both VG024 and VG017 heard a burst of gunfire shortly thereafter.<sup>618</sup>

214. The Trial Chamber also took into account the Autopsy Report for a body referred to as case number 361B, as well the Identification Record, which identified a body as that of Hamed Osmanagić.<sup>619</sup> The Trial Chamber was aware that neither of these documents specified the time or place of death and noted that there was an inconsistency between the Autopsy Report and the Identification Record in respect of facial injuries present on the remains.<sup>620</sup> The Trial Chamber also noted that the identification of Hamed Osmanagić in the Identification Record was made by Azra Osmanagić, his daughter,<sup>621</sup> on the basis of a “pre-mortem nose fracture” and the clothing found, which included “dark trousers with white vertical stripes and a light blue plaid shirt”.<sup>622</sup>

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<sup>612</sup> Milan Lukić Appeal Brief, paras 76-78.

<sup>613</sup> Milan Lukić Appeal Brief, para. 78, referring to Exh. P124, record of identification of the body of Hamed Osmanagić (“Identification Record”).

<sup>614</sup> Milan Lukić Appeal Brief, para. 78, referring to Exh. P123, autopsy report from Slap grave site dated 6 November 2000 (“Autopsy Report”).

<sup>615</sup> Trial Judgement, paras 240, 309.

<sup>616</sup> See Trial Judgement, paras 245, 309, referring to Exh. 1D68 (confidential), p. 3. See also Third Corrigendum to Prosecution Response to Milan Lukić’s Appeal, 6 December 2010 (“Third Corrigendum to Prosecution Response (Milan Lukić)”), paras 3-6.

<sup>617</sup> Trial Judgement, paras 237, 313.

<sup>618</sup> Trial Judgement, paras 247, 249.

<sup>619</sup> Trial Judgement, para. 317.

<sup>620</sup> Trial Judgement, paras 254, 317.

<sup>621</sup> Trial Judgement, para. 254, referring to Identification Record, p. 2.

<sup>622</sup> Trial Judgement, para. 254, referring to Identification Record, p. 2.

215. The Trial Chamber considered the testimony of Prosecution expert witness John Clark who testified that the Identification Documents referred to the same body.<sup>623</sup> In so doing, he took into account the injuries of the victim, the clothing found with the body, and the fact that both documents bore the same case number.<sup>624</sup>

216. Despite the inconsistency between the Autopsy Report and the Identification Record in respect of facial injuries present on the remains,<sup>625</sup> the Trial Chamber accepted the Identification Documents as corroborating the evidence of VG042 and VG024 that Hamed Osmanagić had been shot during the Varda Factory Incident.<sup>626</sup> The Appeals Chamber considers that the Trial Chamber did not err in its assessment. In this regard, it notes that the Identification Record indicates that the identification of Hamed Osmanagić was based on the existence of a pre-mortem nose fracture,<sup>627</sup> while the Autopsy Report does not indicate such a fracture.<sup>628</sup> However, the Autopsy Report specifies that it only included main injuries and thus not all the injuries that may have been found on the body were recorded therein.<sup>629</sup>

217. The Trial Chamber was satisfied that the Identification Documents proved the death of the Hamed Osmanagić who was killed by Milan Lukić, in accordance with the evidence of VG024 and VG042.<sup>630</sup> However, as neither document specified the time or place of Hamed Osmanagić's death, the Trial Chamber considered that both documents "could only be used as corroborating evidence of VG042 and VG024 that Hamed Osmanagić was a victim of the Varda factory incident".<sup>631</sup>

218. In these circumstances, the Appeals Chamber finds that Milan Lukić has failed to demonstrate that the Trial Chamber erred in finding that Hamed Osmanagić was killed in the Varda Factory Incident.

### 3. Alleged inconsistencies between the dates on death certificates and the Varda Factory Incident

219. Milan Lukić submits that the Trial Chamber erred in finding that Nedžad Bektaš and Sabahudin Velagić were killed on 10 June 1992 as the dates indicated on their death certificates are inconsistent with the Varda Factory Incident.<sup>632</sup>

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<sup>623</sup> Trial Judgement, para. 254.

<sup>624</sup> Trial Judgement, para. 254.

<sup>625</sup> Trial Judgement, para. 317.

<sup>626</sup> Trial Judgement, para. 317.

<sup>627</sup> Identification Record, p. 1.

<sup>628</sup> Autopsy Report, p. 2.

<sup>629</sup> Autopsy Report, p. 2.

<sup>630</sup> Trial Judgement, paras 317, 319, 329.

<sup>631</sup> Trial Judgement, para. 317.

<sup>632</sup> Milan Lukić Appeal Brief, para. 78, referring to Exhs 1D241, 1D243. Milan Lukić argues that these dates are inconsistent with the Drina River Incident.



220. The Trial Chamber considered: (i) VG042's evidence that she saw Milan Lukić shoot Nedžad Bektaš;<sup>633</sup> (ii) VG017's evidence that he saw Milan Lukić walk a group of men, including Nedžad Bektaš, to the Drina River, and that he heard a burst of automatic fire shortly thereafter;<sup>634</sup> (iii) VG024's evidence that Milan Lukić selected, among others, Sabahudin Velagić and that she heard a burst of gunfire afterwards;<sup>635</sup> and (iv) VG024's further evidence that Sabahudin Velagić's father went down to the river and later confirmed to her that all seven men, including his son, had been killed.<sup>636</sup>

221. In addition, the Trial Chamber considered death certificates which recorded that Nedžad Bektaš and Sabahudin Velagić had died on 10 June 1992 and 30 May 1992, respectively.<sup>637</sup> While the English translation of Nedžad Bektaš's death certificate incorrectly stated his date of death as 19 June 1992, the original in B/C/S is consistent with the date of the incident, namely 10 June 1992.<sup>638</sup> Thus, the Appeals Chamber considers that the Trial Chamber did not err when it found that this death certificate supported the identification of Nedžad Bektaš as a victim.<sup>639</sup> The Trial Chamber further noted that Sabahudin Velagić's death certificate recorded his death on 30 May 1992, and observed that it "was issued in 1997 and it is possible that his death may have been notified well after he died."<sup>640</sup> Thus, the Appeals Chamber is satisfied that the Trial Chamber reasonably concluded that the date of death on the certificate did not undermine other consistent evidence that Sabahudin Velagić was a victim of the Varda Factory Incident.<sup>641</sup>

222. In light of the foregoing, the Appeals Chamber finds that Milan Lukić has not shown that the Trial Chamber erred in finding that Milan Lukić killed Nedžad Bektaš and Sabahudin Velagić during the Varda Factory Incident.

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<sup>633</sup> Trial Judgement, paras 240, 309, referring to, *inter alia*, VG042, T. 2788-2789, 2828-2829 (27 October 2008), Exhs 1D68 (confidential), 1D69 (confidential). The Prosecution concedes that the Trial Chamber erroneously found that VG042 identified Sabahudin Velagić as a victim of the incident (*see* Trial Judgement, paras 309-310, 316. *See also* Third Corrigendum to Prosecution Response (Milan Lukić), paras 7-10).

<sup>634</sup> Trial Judgement, para. 249.

<sup>635</sup> Trial Judgement, paras 237, 246-248, 313.

<sup>636</sup> Trial Judgement, para. 248.

<sup>637</sup> Trial Judgement, paras 314, 316.

<sup>638</sup> Exh. 1D241. *See also* Third Corrigendum to Prosecution Response (Milan Lukić), paras 11-13.

<sup>639</sup> Trial Judgement, para. 314.

<sup>640</sup> Trial Judgement, para. 316. The Trial Chamber noted Tabeau's evidence that while there is an obligation on a family to notify the authorities of the death of a family member within three days, after which a death certificate is issued, this process did not operate properly during the war (Trial Judgement, para. 253, referring to Tabeau, T. 6123 (24 March 2009)).

<sup>641</sup> Trial Judgement, para. 316.

4. Submission of request for the return of abandoned property by an alleged victim in 1999 and inconsistent witness evidence

223. Milan Lukić submits that the Trial Chamber erred in finding that Ibrišim Memišević was killed in the Varda Factory Incident as he submitted a request for the return of abandoned property on 14 May 1999.<sup>642</sup>

224. The Trial Chamber considered VG042's evidence that she saw Milan Lukić shoot Ibrišim Memišević<sup>643</sup> and that on the following day, she helped bury him.<sup>644</sup> In addition, it considered VG024's evidence that Milan Lukić selected Ibrišim Memišević together with four other victims from inside the Varda Factory<sup>645</sup> and that both VG024 and VG017 heard a burst of gunfire shortly thereafter.<sup>646</sup> The Trial Chamber further considered that the Property Records showed that "Ibrišim Memišević (son of Hamed), born on 5 February 1936 submitted a request for the return of property in Omeragići" on 14 May 1999.<sup>647</sup> It found that the Ibrišim Memišević named in the Property Records was not the Ibrišim Memišević who had died in the Varda Factory Incident.<sup>648</sup> Moreover, the Appeals Chamber observes that the death certificate admitted into evidence by the Trial Chamber in support of the death of Ibrišim Memišević records his date of birth as 5 April 1954.<sup>649</sup>

225. Consequently, the Appeals Chamber finds that Milan Lukić has not shown that that Trial Chamber erred in finding that Milan Lukić killed Ibrišim Memišević during the Varda Factory Incident.

5. Conclusion

226. For the foregoing reasons, the Appeals Chamber is satisfied that the Trial Chamber did not err in finding that Nusret Aljošević, Nedžad Bektaš, Mušan Čančar, Ibrišim Memišević, Hamed Osmanagić, Lutvo Tvrtković, and Sabahudin Velagić were murdered during the Varda Factory Incident. Therefore, Milan Lukić's sub-ground 2(A) is accordingly dismissed.

E. Conclusion

227. Consequently, Milan Lukić's sub-grounds 2(A) through (D) and (G) are dismissed.

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<sup>642</sup> Milan Lukić Appeal Brief, para. 78, referring to Property Records.

<sup>643</sup> Trial Judgement, paras 238, 240, 309, referring to, *inter alia*, VG042, T. 2788-2789, 2828-2829 (27 October 2008), Exhs 1D68, 1D69.

<sup>644</sup> Trial Judgement, paras 245, 309.

<sup>645</sup> Trial Judgement, paras 237, 248, 310, 313.

<sup>646</sup> Trial Judgement, paras 246-247, 249.

<sup>647</sup> Trial Judgement, para. 276, referring to Property Records, p. 2.

<sup>648</sup> Trial Judgement, para. 315.

<sup>649</sup> Trial Judgement, para. 275, referring to Exh. 1D242.

## VIII. KILLING OF HAJRA KORIĆ

### A. Introduction

228. The Trial Chamber found that on a day between 28 June 1992 and 5 July 1992, Hajra Korić was waiting with other Muslim women and children in a house in Potok, a settlement of Višegrad, to join a convoy heading for Macedonia.<sup>650</sup> The Trial Chamber held that Milan Lukić singled out Hajra Korić from this group and shot her twice, causing her death.<sup>651</sup> It based its findings on the eye-witness evidence of VG035 and CW2.<sup>652</sup>

229. The Trial Chamber found Milan Lukić guilty of murder as a violation of the laws or customs of war and as a crime against humanity.<sup>653</sup>

230. Milan Lukić contends that the Trial Chamber erred in finding that:<sup>654</sup> (i) VG035 and CW2 were credible witnesses;<sup>655</sup> (ii) VG035 and CW2 could identify him as the perpetrator of the murder of Hajra Korić;<sup>656</sup> and (iii) Hajra Korić died as a result of the shooting.<sup>657</sup>

### B. Credibility

231. The Trial Chamber found that both VG035 and CW2 were credible and that their testimony was not undermined during cross-examination.<sup>658</sup>

232. Milan Lukić submits that the Trial Chamber erred in: (i) finding that CW2 was credible despite stating in an interview to the Association (“CW2 Association Statement”) that someone other than Milan Lukić shot Hajra Korić;<sup>659</sup> (ii) failing to find that the credibility of both VG035 and CW2 was undermined by their inaccurate physical descriptions of him;<sup>660</sup> (iii) failing to give proper consideration to VG035’s evidence that he kicked Hajra Korić from behind when she attempted to hug him, which, according to Milan Lukić, is “impossible to picture unless Hajra

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<sup>650</sup> Trial Judgement, paras 742, 754, 758.

<sup>651</sup> Trial Judgement, paras 754, 758, 925.

<sup>652</sup> Trial Judgement, paras 742, 755-756, 758.

<sup>653</sup> Trial Judgement, paras 927, 1099.

<sup>654</sup> Milan Lukić’s fifth ground of appeal.

<sup>655</sup> Milan Lukić Appeal Brief, paras 295-298, 301; Milan Lukić Reply Brief, paras 109-112.

<sup>656</sup> Milan Lukić Appeal Brief, paras 283-294; Milan Lukić Reply Brief, para. 108. Milan Lukić has withdrawn sub-ground 5(A) (*see* Milan Lukić Appeal Brief, para. 282).

<sup>657</sup> Milan Lukić Appeal Brief, paras 299-300; Milan Lukić Reply Brief, para. 113.

<sup>658</sup> Trial Judgement, paras 755-756, 758.

<sup>659</sup> Milan Lukić Appeal Brief, para. 296, referring to CW2 Association Statement. *See also* Milan Lukić Reply Brief, para. 111.

<sup>660</sup> Milan Lukić Appeal Brief, paras 286, 296; Milan Lukić Reply Brief, paras 109-111. In particular, Milan Lukić argues that CW2’s description of him as having blond hair casts doubt upon her credibility. He further argues that VG035 erroneously described him as having blue eyes and birthmarks all over his body. He submits that such a doubt as to the credibility of the witness must be resolved in favour of the accused (Milan Lukić Appeal Brief, para. 296; Milan Lukić Reply Brief, para. 110).

Korić was walking backwards”;<sup>661</sup> and (iv) failing to find that material inconsistencies between the evidence of VG035 and CW2 undermine their credibility.<sup>662</sup>

233. The Prosecution responds that the Trial Chamber reasonably found that CW2’s evidence was credible, having taken into account the CW2 Association Statement.<sup>663</sup> The Prosecution further asserts that the Trial Chamber reasonably found that CW2 and VG035’s physical description of Milan Lukić did not render their testimony incredible.<sup>664</sup> Finally, it submits that Milan Lukić fails to demonstrate that the Trial Chamber erred in finding that VG035 and CW2 were credible in spite of the inconsistencies between their evidence.<sup>665</sup>

234. The Trial Chamber noted that Milan Lukić relied on the CW2 Association Statement, in which CW2 stated that another man had singled out Hajra Korić and killed her by shooting at her, to claim that someone other than Milan Lukić shot Hajra Korić.<sup>666</sup> The Trial Chamber took into account that, in a statement dated 6 August 2008, CW2 stated that Milan Lukić shot Hajra Korić twice.<sup>667</sup> The Trial Chamber further considered that in cross-examination, CW2 testified that “[t]o the best of my recollection, I always stated that Milan Lukić killed Hajra, which is the fact. I never said that it was somebody else who did it.”<sup>668</sup> In this regard, the Appeals Chamber notes that, on the same page of the CW2 Association Statement to which Milan Lukić referred at trial, CW2 also stated that Milan Lukić fired another gunshot at Hajra Korić.<sup>669</sup> Thus, while the CW2 Association Statement is ambiguous as to who fired the first shot, CW2’s statement of 6 August 2008 and her in-court testimony unambiguously indicate that Milan Lukić killed Hajra Korić. The Appeals Chamber recalls that “a trial chamber has the discretion to accept a witness’s testimony, notwithstanding inconsistencies between the said testimony and his or her previous statements, as it is for the trial chamber to determine whether an alleged inconsistency is sufficient to cast doubt on the evidence of the witness concerned.”<sup>670</sup> Having had the benefit of observing CW2’s demeanour during her testimony, the Trial Chamber found that “CW2 maintained in her testimony in court that

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<sup>661</sup> Milan Lukić Appeal Brief, para. 298.

<sup>662</sup> Milan Lukić Appeal Brief, paras 297-298, 301; Milan Lukić Reply Brief, para. 111. Milan Lukić avers that VG035’s evidence that Milan Lukić was in a “group” when he shot Hajra Korić is inconsistent with CW2’s evidence that he was with one other person. Further, he argues that there were inconsistencies in their evidence in relation to the manner in which Hajra Korić was shot and the conversation that occurred between Hajra Korić and her assailant regarding the whereabouts of her husband and son (Milan Lukić Appeal Brief, paras 297-298; Milan Lukić Reply Brief, para. 111).

<sup>663</sup> Prosecution Response Brief (Milan Lukić), paras 204-205.

<sup>664</sup> Prosecution Response Brief (Milan Lukić), paras 196-197, 203.

<sup>665</sup> Prosecution Response Brief (Milan Lukić), para. 206, referring to Trial Judgement, para. 756.

<sup>666</sup> Trial Judgement, para. 749, referring to CW2 Association Statement, p. 5.

<sup>667</sup> Trial Judgement, para. 750, referring to Exh. P336 (confidential), p. 43.

<sup>668</sup> Trial Judgement, para. 751, referring to CW2, T. 7070 (9 April 2009) (private session).

<sup>669</sup> CW2 Association Statement, p. 5: “And then another gunshot was fired at Hajra, it was by Milan Lukić”.

<sup>670</sup> *Hategekimana* Appeal Judgement, para. 190, referring to *Rukundo* Appeal Judgement, para. 86; *Kajelijeli* Appeal Judgement, para. 96.

it was Milan Lukić who shot Hajra Korić, and considers that she is a witness of truth.”<sup>671</sup> Milan Lukić has failed to show that this part of CW2’s evidence renders unreasonable the Trial Chamber’s finding that she was credible.

235. The Appeals Chamber turns to Milan Lukić’s assertion that the credibility of both CW2 and VG035 was affected by their incorrect physical description of him.<sup>672</sup> The Appeals Chamber notes that CW2 inaccurately testified that Milan Lukić had blond hair.<sup>673</sup> Notwithstanding her description of Milan Lukić’s physical appearance, the Trial Chamber was satisfied that CW2’s credibility was not undermined in cross-examination,<sup>674</sup> and that she had sufficient prior knowledge of Milan Lukić to recognise him when Hajra Korić was killed.<sup>675</sup> In this regard, it noted that she knew Milan Lukić, because in mid or late June 1992, he came several times to the house in which she was staying.<sup>676</sup> The Appeals Chamber recalls that a trial chamber has a broad discretion to assess the appropriate weight and credibility to be accorded to the testimony of a witness.<sup>677</sup> In these circumstances, Milan Lukić has not shown that the Trial Chamber’s failure to specifically address CW2’s recollection of his hair colour rendered unreasonable the Trial Chamber’s finding that CW2 was credible.

236. With respect to VG035, the Trial Chamber noted that in a statement from 1998, VG035 described Milan Lukić as having blue eyes and birthmarks on his body.<sup>678</sup> Milan Lukić confronted VG035 with her previous statement in cross-examination.<sup>679</sup> The Trial Chamber noted that VG035 responded that she did not recall stating that Milan Lukić had blue eyes<sup>680</sup> and that she maintained that Milan Lukić “had spots on his body.”<sup>681</sup> The Trial Chamber noted VG035’s evidence that she had not been given the opportunity to review the 1998 statement in B/C/S to ensure that it reflected her evidence.<sup>682</sup> Also, the Trial Chamber considered that VG035 had sufficient prior knowledge of Milan Lukić to recognise him when he shot Hajra Korić.<sup>683</sup> The Trial Chamber found that VG035’s credibility was not undermined by her description of Milan Lukić.<sup>684</sup> In these circumstances, Milan Lukić has not demonstrated that the Trial Chamber erred in finding that VG035 was credible.

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<sup>671</sup> Trial Judgement, para. 756.

<sup>672</sup> Milan Lukić Appeal Brief, paras 286, 296; Milan Lukić Reply Brief, paras 109-111.

<sup>673</sup> CW2, T. 7079-7080 (9 April 2009); Exh. P336 (confidential), p. 29.

<sup>674</sup> Trial Judgement, para. 755.

<sup>675</sup> Trial Judgement, para. 755. *See also* Trial Judgement, paras 699, 747.

<sup>676</sup> Trial Judgement, para. 699, referring to Exh. P336 (confidential), pp. 29-30. *See also* Trial Judgement, paras 747-748, 755.

<sup>677</sup> *See supra* para. 86.

<sup>678</sup> Trial Judgement, paras 697, 747.

<sup>679</sup> Trial Judgement, para. 697, referring to VG035, T. 1714-1715 (private session), 1718-1719 (15 September 2008).

<sup>680</sup> Trial Judgement, para. 697, referring to VG035, T. 1714-1715 (private session), 1718-1719 (15 September 2008).

<sup>681</sup> Trial Judgement, paras 697, 747, 755.

<sup>682</sup> Trial Judgement, paras 697, 747.

<sup>683</sup> Trial Judgement, para. 755.

<sup>684</sup> Trial Judgement, para. 755.

237. The Appeals Chamber turns to Milan Lukić's argument that VG035's evidence that Milan Lukić kicked Hajra Korić from behind when she attempted to hug him "is impossible to picture unless Hajra Korić was walking backwards."<sup>685</sup> The Appeals Chamber notes that the Trial Chamber considered this part of VG035's evidence,<sup>686</sup> and assessed it together with the remainder of VG035's detailed evidence on Milan Lukić's shooting of Hajra Korić.<sup>687</sup> On the basis of the totality of her evidence, the Trial Chamber found that she was credible and reliable.<sup>688</sup> Milan Lukić merely asserts that the Trial Chamber failed to interpret a limited part of VG035's evidence in a particular manner, without showing that the Trial Chamber's finding regarding VG035's credibility was unreasonable. In these circumstances, the Appeals Chamber finds that Milan Lukić has failed to show that the Trial Chamber erred in assessing VG035's evidence.

238. As to the alleged inconsistencies between the evidence of VG035 and CW2, the Trial Chamber did not address any inconsistency between VG035's testimony that Milan Lukić was with a group of people when he shot Hajra Korić and CW2's evidence that he was together with only one other person.<sup>689</sup> However, the Appeals Chamber finds that the two accounts are reconcilable. Both VG035 and CW2 testified that Milan Lukić and one other man went from woman to woman, looking for Hajra Korić.<sup>690</sup> Thus, there is no inconsistency in their evidence as to the presence of other people, and Milan Lukić's contention in this respect fails.

239. Furthermore, the Appeals Chamber notes that VG035 provided evidence that a conversation took place between Milan Lukić and Hajra Korić as to the whereabouts of her husband and son,<sup>691</sup> and that CW2 did not mention this conversation in her testimony. While the Trial Chamber did not explicitly consider this difference between their testimonies, the Appeals Chamber notes that CW2 was not cross-examined on this issue.<sup>692</sup> Thus, Milan Lukić has not shown that their testimonies were inconsistent in this regard. His arguments in this respect are therefore dismissed.

240. Accordingly, the Appeals Chamber finds that Milan Lukić has failed to demonstrate that the Trial Chamber erred in finding that the evidence of VG035 and CW2 was credible.

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<sup>685</sup> Milan Lukić Appeal Brief, para. 298.

<sup>686</sup> Trial Judgement, fn. 2419.

<sup>687</sup> Trial Judgement, paras 741-747.

<sup>688</sup> Trial Judgement, paras 755-756, 758.

<sup>689</sup> See Milan Lukić Appeal Brief, para. 297; Milan Lukić Reply Brief, para. 111.

<sup>690</sup> Trial Judgement, paras 744-745, referring to VG035, T. 1687, 1701, 1703 (15 September 2008), Exhs 1D44 (confidential), p. 6, P336 (confidential), pp. 42-43.

<sup>691</sup> VG035, T. 1687 (15 September 2008); Exh. 1D44 (confidential), p. 6.

<sup>692</sup> See CW2, T. 7062-7064 (9 April 2009).

### **C. Identification of Milan Lukić**

241. The Trial Chamber was satisfied that CW2 and VG035 had sufficient prior knowledge to recognise Milan Lukić when he shot Hajra Korić.<sup>693</sup> The Trial Chamber found that CW2 had prior knowledge of Milan Lukić and had various encounters with him in June 1992.<sup>694</sup> The Trial Chamber also found that, prior to the incident, Milan Lukić introduced himself to VG035 and raped her three times.<sup>695</sup> The Trial Chamber also noted VG035's evidence that Milan Lukić robbed her and CW2.<sup>696</sup>

242. With regard to VG035, Milan Lukić argues that the Trial Chamber erred in: (i) permitting VG035's in-court identification of him;<sup>697</sup> and (ii) relying on VG035's recognition of him given her failure to identify him in a 2001 photospread, although she had identified him in her statement given in 1998.<sup>698</sup> With regard to CW2, Milan Lukić submits that the Trial Chamber erred in finding that CW2 was able to recognise him as the killer of Hajra Korić on account of her limited prior knowledge of him.<sup>699</sup> In particular, Milan Lukić argues that CW2: (i) thought that he and Sredoje Lukić were brothers; (ii) did not know him personally; and (iii) could not recall what he was wearing, or who the other soldier was who accompanied him.<sup>700</sup>

243. The Prosecution responds that the Trial Chamber reasonably accepted VG035's explanation for failing to identify Milan Lukić in a photospread in 2001.<sup>701</sup> It asserts that the Trial Chamber reasonably found that VG035 and CW2 recognised Milan Lukić on the day Hajra Korić was killed.<sup>702</sup>

244. The Trial Chamber noted that VG035 identified Milan Lukić in court.<sup>703</sup> It ultimately concluded that VG035 "had sufficient prior knowledge of Milan Lukić to recognise him when he

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<sup>693</sup> Trial Judgement, para. 755. *See also* Trial Judgement, paras 695-699, 747-748.

<sup>694</sup> Trial Judgement, para. 755. *See also* Trial Judgement, paras 695-699, 747-748.

<sup>695</sup> Trial Judgement, para. 755. *See also* Trial Judgement, paras 695-699, 747.

<sup>696</sup> Trial Judgement, para. 696.

<sup>697</sup> Milan Lukić Appeal Brief, paras 283-284, 287, 290.

<sup>698</sup> Milan Lukić Appeal Brief, paras 288-289. Milan Lukić argues that the Trial Chamber erred in accepting VG035's explanation that she deliberately did not identify him out of safety concerns and that she "was waiting for this moment [...] to see [him] arrested". Milan Lukić submits that no reasonable trier of fact could have accepted that she waited for the "right moment" in 2001 to identify him as she had already identified him in her 1998 statement.

<sup>699</sup> Milan Lukić Appeal Brief, paras 292-293; Milan Lukić Reply Brief, para. 108.

<sup>700</sup> Milan Lukić Appeal Brief, para. 293.

<sup>701</sup> Prosecution Response Brief (Milan Lukić), para. 198. It further responds that this submission warrants summary dismissal because: (i) it ignores relevant factual findings; (ii) it repeats trial arguments without showing error; (iii) it asserts that the Trial Chamber failed to give sufficient weight to certain evidence; and (iv) Milan Lukić seeks to substitute his own evaluation of the evidence for that of the Trial Chamber (Prosecution Response Brief (Milan Lukić), para. 199).

<sup>702</sup> Prosecution Response Brief (Milan Lukić), paras 193-203.

<sup>703</sup> Trial Judgement, paras 698, 747.

shot Hajra Korić” based on her recognition of him from prior encounters.<sup>704</sup> The Appeals Chamber therefore finds that the Trial Chamber did not give undue weight to the in-court identification.<sup>705</sup> Milan Lukić’s submissions in this respect are accordingly dismissed.

245. The Trial Chamber found that Milan Lukić had come to VG035’s house in June 1992, introduced himself by name and raped her three times.<sup>706</sup> According to VG035’s evidence, he robbed both VG035 and CW2.<sup>707</sup> The Trial Chamber considered VG035’s failure to identify Milan Lukić when shown photographs of him in 2001 and accepted her explanation that she had been “genuinely very much afraid and distraught” when asked to identify Milan Lukić at that time, as she “was under a lot of stress[,] traumatised[,] fighting for [her] life[,] treated by doctors [and] literally struggling for [her] life.”<sup>708</sup> In these circumstances, Milan Lukić has failed to demonstrate that the Trial Chamber erred in relying on VG035’s identification evidence.

246. The Trial Chamber found that CW2 had sufficient prior knowledge to recognise Milan Lukić when Hajra Korić was killed.<sup>709</sup> In this context, the Trial Chamber considered CW2’s mistaken belief that Milan Lukić and Sredoje Lukić were brothers.<sup>710</sup> The Trial Chamber also noted CW2’s evidence that she knew Milan Lukić by sight.<sup>711</sup> In addition, CW2 had several encounters with Milan Lukić in June prior to the incident. In mid or late June, Milan Lukić came to the house where CW2 and her family were staying and told them to leave Serb-controlled territory.<sup>712</sup> Further, Milan Lukić came to the house where CW2 and VG035 were staying, and introduced himself by name.<sup>713</sup> The next day, Milan Lukić returned several times, raped VG035, and robbed both VG035 and CW2.<sup>714</sup>

247. Contrary to Milan Lukić’s contention,<sup>715</sup> CW2 did provide evidence on what Milan Lukić was wearing when he came to her house in late June 1992, namely a multicoloured uniform.<sup>716</sup> Although the Trial Chamber did not explicitly address the fact that CW2 could not remember the other soldier who accompanied Milan Lukić to her house,<sup>717</sup> the Appeals Chamber considers that her inability to do so does not undermine the Trial Chamber’s finding that she could recognise

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<sup>704</sup> Trial Judgement, paras 747, 755.

<sup>705</sup> *Cf. supra* para. 120.

<sup>706</sup> Trial Judgement, para. 755. *See also* Trial Judgement, paras 695-696, 747.

<sup>707</sup> Trial Judgement, para. 696.

<sup>708</sup> Trial Judgement, paras 697, 728.

<sup>709</sup> Trial Judgement, para. 699. *See also* Trial Judgement, paras 748, 755.

<sup>710</sup> Trial Judgement, paras 699 (referring to CW2, T. 7079-7080 (9 April 2009)), 748.

<sup>711</sup> Trial Judgement, para. 699, referring to Exh. P336, pp. 29-30.

<sup>712</sup> Trial Judgement, paras 699, 748, 755.

<sup>713</sup> Trial Judgement, paras 695-696, 699, 755.

<sup>714</sup> Trial Judgement, paras 695-696, 699, 755.

<sup>715</sup> Milan Lukić Appeal Brief, para. 293.

<sup>716</sup> Exh. P336 (confidential), p. 30.

<sup>717</sup> *See* Milan Lukić Appeal Brief, para. 293, referring to Exh. 336, p. 30.



Milan Lukić. In these circumstances, Milan Lukić has not shown that the Trial Chamber erred in relying on CW2's identification evidence.

#### **D. Proof of death**

248. Milan Lukić argues that the Trial Chamber erred in finding that Hajra Korić died as a result of the shooting because it exclusively based its findings on unreliable witnesses and, further: (i) no death certificate was tendered into evidence; (ii) her body was not found; and (iii) she was not included in the Prosecution's Victims Chart, a table of victims' data collected by the Prosecution's demographics expert, Tabeau.<sup>718</sup>

249. The Appeals Chamber considers that Milan Lukić's arguments are without merit. In this context, the Appeals Chamber recalls that there is no requirement that a death certificate is presented or that the body of a victim is recovered to prove death beyond a reasonable doubt.<sup>719</sup> Rather, a victim's death can be inferred circumstantially from all the evidence presented to the trial chamber.<sup>720</sup> In this instance, the Trial Chamber accepted VG035's testimony that "Hajra Korić did not show any signs of life after having been shot" and that VG035's mother-in-law had told her that she had seen Hajra Korić's body the next morning.<sup>721</sup> The Trial Chamber further accepted CW2's evidence that Milan Lukić shot Hajra Korić.<sup>722</sup> The Appeals Chamber also recalls that it has dismissed Milan Lukić's challenges to the credibility of VG035 and CW2.<sup>723</sup> In these circumstances, the Appeals Chamber finds that Milan Lukić has failed to demonstrate that the Trial Chamber erred in this respect.

250. Although the Trial Chamber relied on the Prosecution's Victims Chart for its findings concerning the victims of the Drina River Incident, the Varda Factory Incident, the Pionirska Street Incident, and the Bikavac Incident,<sup>724</sup> it did not rely on it to establish the killing of Hajra Korić. Instead, the Trial Chamber based its finding on the death of Hajra Korić on the evidence of VG035 and CW2.<sup>725</sup> The Appeals Chamber recalls that it is satisfied that the Trial Chamber did not err in finding that Milan Lukić shot and killed Hajra Korić on the basis of VG035 and CW2's eye-witness evidence. Milan Lukić has therefore failed to show that the fact that Hajra Korić is not listed in the

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<sup>718</sup> Milan Lukić Appeal Brief, paras 299-300; Milan Lukić Reply Brief, para. 113.

<sup>719</sup> See *supra* para. 149.

<sup>720</sup> See *supra* para. 149.

<sup>721</sup> Trial Judgement, paras 745-746, 758.

<sup>722</sup> Trial Judgement, paras 745 (referring to Exh. P336, pp. 43-44), 751 (referring to CW2, T. 7070, 7076-7077, 7084 (9 April 2009)), 758.

<sup>723</sup> See *supra* para. 240.

<sup>724</sup> See, *inter alia*, Trial Judgement, paras 199, 318, 389, 392, 396, 663, 710.

<sup>725</sup> Trial Judgement, paras 754, 758.

Prosecution's Victims Chart undermines the Trial Chamber's finding. Milan Lukić's argument is accordingly dismissed.

#### **E. Conclusion**

251. For the foregoing reasons, the Appeals Chamber dismisses Milan Lukić's fifth ground of appeal.

## **IX. PIONIRSKA STREET INCIDENT**

### **A. Introduction**

252. The Trial Chamber found that, on 14 June 1992, Milan Lukić and Sredoje Lukić were among a group of armed men present at the Memić House on Pionirska Street in Višegrad town where the Koritnik Group was held.<sup>726</sup> Members of the Koritnik Group were robbed and subjected to other criminal acts<sup>727</sup> and subsequently transferred by Milan Lukić, Sredoje Lukić, and the group of armed men to the Omeragić House on Pionirska Street, where they were locked inside.<sup>728</sup> Milan Lukić and other armed men then set the Omeragić House on fire, and shot at individuals who tried to escape, killing at least 59 people.<sup>729</sup> With regard to the Pionirska Street Incident, the Trial Chamber considered the identification evidence offered by Prosecution witnesses VG013, VG018, VG038, VG078, VG084, VG101, VG115, and Huso Kurspahić.<sup>730</sup> The Trial Chamber also considered the alibi evidence adduced by Milan Lukić and Sredoje Lukić as well as the alibi rebuttal evidence adduced by the Prosecution.<sup>731</sup>

253. The Appeals Chamber will first address the challenges of Milan Lukić and Sredoje Lukić with respect to the Trial Chamber's finding that Vasiljević was present during the Pionirska Street Incident and the credibility of the Prosecution witnesses who identified Vasiljević during the incident.<sup>732</sup> It will then consider the remainder of Milan Lukić and Sredoje Lukić's submissions in relation to the Pionirska Street Incident. Milan Lukić's submissions in relation to extermination will be addressed in Chapter XI.

### **B. Alleged errors relating to Vasiljević**

254. Having considered the evidence of VG013, VG038, VG078, and VG101, the Trial Chamber found by majority, Judge Robinson dissenting, that Vasiljević was present at Pionirska Street on 14 June 1992 during the robbery of the Koritnik Group ("Robbery"), the Transfer, and the fire at the Omeragić House.<sup>733</sup> It further found unanimously that the Defence had "not succeeded in

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<sup>726</sup> Trial Judgement, paras 631, 637.

<sup>727</sup> Trial Judgement, paras 555, 592-594, 596, 631, 637.

<sup>728</sup> Trial Judgement, paras 569, 606-607, 612, 631, 637.

<sup>729</sup> Trial Judgement, paras 569, 612-613.

<sup>730</sup> Trial Judgement, paras 578-613.

<sup>731</sup> Trial Judgement, paras 614-637.

<sup>732</sup> See Milan Lukić Appeal Brief, paras 172-190; Milan Lukić Reply Brief, paras 76-79; Sredoje Lukić Appeal Brief, paras 226-235; Sredoje Lukić Reply Brief, paras 82-85; Appeal Hearing, AT. 60-61, 111-112 (14 September 2011).

<sup>733</sup> Trial Judgement, para. 577.

challenging the credibility of witnesses who identified Milan Lukić and Sredoje Lukić during the events surrounding the Pionirska street incident.”<sup>734</sup>

### 1. Submissions of the parties

255. The Appellants submit that the Trial Chamber erroneously concluded that Vasiljević was present during the Pionirska Street Incident.<sup>735</sup> They argue that the Trial Chamber erred in law by reaching a different conclusion from the *Vasiljević* trial chamber, which, having considered Vasiljević’s alibi evidence, concluded that he was not present during the Pionirska Street Incident.<sup>736</sup> They contend that, even if a trial chamber’s findings are not binding, in this particular case, opposite conclusions based on identical evidence undermine the Tribunal’s legacy and internal consistency.<sup>737</sup> The Appellants also submit that the Trial Chamber erred when it found Exhibit 1D38.6, comprising medical records relating to Vasiljević’s treatment at the Užice Hospital on 14 June 1992 (“Užice Hospital Records”),<sup>738</sup> to be false, particularly as it had taken judicial notice of the *Vasiljević* trial chamber’s finding that this exhibit was reliable.<sup>739</sup> In addition, Milan Lukić argues that the Trial Chamber erred when it chose not to rely upon Exhibit 1D39, a logbook entry relating to Vasiljević’s treatment at the Višegrad Health Centre on 14 June 1992 (“Logbook Entry”), on the basis that it was not translated.<sup>740</sup> The Appellants contend that the Trial Chamber erred in its assessment of, and reliance on, Dr. Raby’s evidence at trial in the present case.<sup>741</sup> Sredoje Lukić avers that the Trial Chamber’s errors affected its assessment of the evidence and demonstrate its “apparent bias”.<sup>742</sup>

256. In addition, the Appellants both assert that, as the Prosecution witnesses erroneously identified Vasiljević as having been present at the Pionirska Street Incident, this should have been deemed to undermine the reliability of their identification of Milan Lukić and Sredoje Lukić.<sup>743</sup>

257. The Prosecution responds that the Trial Chamber expressly considered the finding in the *Vasiljević* Trial Judgement in relation to Vasiljević’s alibi evidence, but was entitled to reach a

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<sup>734</sup> Trial Judgement, para. 577.

<sup>735</sup> Milan Lukić’s sub-grounds 3(D) through (F); Sredoje Lukić’s seventh ground of appeal (in part).

<sup>736</sup> Milan Lukić Appeal Brief, para. 173; Milan Lukić Reply Brief, para. 79; Sredoje Lukić Appeal Brief, para. 226; Appeal Hearing, AT. 60 (14 September 2011).

<sup>737</sup> Milan Lukić Appeal Brief, para. 173; Milan Lukić Reply Brief, para. 79; Sredoje Lukić Appeal Brief, para. 226.

<sup>738</sup> Exh. 1D38.6 (confidential).

<sup>739</sup> Milan Lukić Appeal Brief, paras 175, 182-183; Sredoje Lukić Appeal Brief, paras 227-233; Sredoje Lukić Reply Brief, paras 81-83.

<sup>740</sup> Milan Lukić Appeal Brief, paras 177-181; Milan Lukić Reply Brief, para. 77.

<sup>741</sup> Milan Lukić Appeal Brief, paras 182-183; Sredoje Lukić Appeal Brief, paras 224-225.

<sup>742</sup> Sredoje Lukić Appeal Brief, para. 234.

<sup>743</sup> Milan Lukić Appeal Brief, paras 184-190; Milan Lukić Reply Brief, para. 78; Sredoje Lukić Reply Brief, para. 84; Appeal Hearing, AT. 60-61, 111-112 (14 September 2011).

different conclusion.<sup>744</sup> It points out that adjudicated facts that are admitted by a trial chamber may be rebutted by evidence introduced at trial and that, in the present case, the Trial Chamber based its findings on evidence showing that Vasiljević had submitted a false x-ray to substantiate his alibi.<sup>745</sup>

258. In relation to the Logbook Entry, the Prosecution argues that it is incumbent on the party seeking to rely on a document to provide the necessary translations thereof.<sup>746</sup> It further submits that Milan Lukić acknowledged that he did not file a translation of this exhibit.<sup>747</sup> According to the Prosecution, the Trial Chamber properly relied on the evidence of Dr. Raby and reasonably found that Vasiljević's medical documentation did not cast doubt on the credible and reliable recognition of Vasiljević by VG013, VG038, VG078, and VG101.<sup>748</sup> It also asserts that Sredoje Lukić fails to substantiate his allegation of bias.<sup>749</sup> Finally, the Prosecution argues that, even if the witnesses had been mistaken as to the presence of Vasiljević, this would not undermine the credibility of their identification of both Milan Lukić and Sredoje Lukić.<sup>750</sup>

259. In reply, Sredoje Lukić submits that the Prosecution did not present any relevant rebuttal evidence at trial and that the Trial Chamber erred when it failed to rely on the adjudicated facts from the *Vasiljević* case.<sup>751</sup>

## 2. Discussion

260. The Appeals Chamber recalls that decisions of trial chambers have no binding force on each other.<sup>752</sup> Rather, a trial chamber must make its own final assessment of the evidence on the basis of the totality of the evidence presented in the case before it.<sup>753</sup> Following an analysis of the documentary and witness evidence before it,<sup>754</sup> the Trial Chamber was entitled to reach a conclusion as to Vasiljević's presence that differed from that of the *Vasiljević* trial chamber. The Appellants have not shown that the Trial Chamber erred in its application of this principle. The argument that the Trial Chamber committed an error of law in so doing is therefore dismissed.

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<sup>744</sup> Prosecution Response Brief (Milan Lukić), paras 134-135; Prosecution Response Brief (Sredoje Lukić), paras 132-133; Appeal Hearing, AT. 87 (14 September 2011).

<sup>745</sup> Prosecution Response Brief (Milan Lukić), para. 137; Prosecution Response Brief (Sredoje Lukić), para. 134; Appeal Hearing, AT. 91 (14 September 2011).

<sup>746</sup> Prosecution Response Brief (Milan Lukić), para. 136.

<sup>747</sup> Prosecution Response Brief (Milan Lukić), para. 136. The Prosecution further argues that its own exhibits that contain other portions of the same logbook and on which the Trial Chamber relied had been translated by witnesses who spoke about their specific content during trial (Prosecution Response Brief (Milan Lukić), para. 136).

<sup>748</sup> Prosecution Response Brief (Milan Lukić), paras 134, 137; Prosecution Response Brief (Sredoje Lukić), para. 134.

<sup>749</sup> Prosecution Response Brief (Sredoje Lukić), para. 137.

<sup>750</sup> Prosecution Response Brief (Milan Lukić), paras 138-139; Prosecution Response Brief (Sredoje Lukić), paras 135-136; Appeal Hearing, AT. 91 (14 September 2011).

<sup>751</sup> Sredoje Lukić Reply Brief, paras 81-82.

<sup>752</sup> *Aleksovski* Appeal Judgement, para. 114.

<sup>753</sup> *Stakić* Appeal Judgement, para. 346.

<sup>754</sup> Trial Judgement, paras 572-577.

261. Further, the Appeals Chamber recalls that adjudicated facts of which a trial chamber takes judicial notice pursuant to Rule 94(B) of the Rules “are merely presumptions that may be rebutted [...] with evidence at trial”.<sup>755</sup> In this context, the Appeals Chamber emphasises that the final assessment of a piece of evidence is based on the totality of the evidence in a given case, as the same piece of evidence can be assessed differently in different cases because of other evidence on the record.<sup>756</sup> The mechanism of Rule 94(B) of the Rules does not allow a trial chamber to defer to the assessment of the evidence by another trial chamber on the ground that it was fashioned to favour consistency and uniformity in the Tribunal’s case-law.<sup>757</sup> The Trial Chamber therefore had the obligation to assess the evidence and reach its own conclusion.<sup>758</sup> The Appeals Chamber therefore finds that the Trial Chamber did not err in law in finding that the adjudicated fact in question, namely the accuracy of the Užice Hospital Records, was rebutted by the evidence presented at trial.

262. Milan Lukić submitted the Logbook Entry to the Trial Chamber without a translation into one of the working languages of the Tribunal.<sup>759</sup> The Logbook Entry, which related to 14 June 1992, was also admitted without a translation as part of Prosecution Exhibit P68, which comprised the whole logbook.<sup>760</sup> The Appeals Chamber emphasises that it is incumbent on the party seeking to admit an exhibit to provide a translation where necessary.<sup>761</sup> Milan Lukić failed to provide such a translation. However, the Appeals Chamber notes that the Trial Chamber admitted the Logbook Entry into evidence, as Exhibit 1D39, without noting or commenting on the lack of translation.<sup>762</sup> From this point, the document was part of the trial record, and was therefore before

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<sup>755</sup> See *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals Against Trial Chamber’s Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Prosecution’s Catalogue of Agreed Facts, 26 June 2007, para. 16, referring to *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 42.

<sup>756</sup> *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR 98-44-AR73.17, Decision on Joseph Nzirorera’s Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009 (“*Karemera et al.* Decision”), para. 19.

<sup>757</sup> *Karemera et al.* Decision, para. 21.

<sup>758</sup> See *Karemera et al.* Decision, para. 22.

<sup>759</sup> See Trial Judgement, para. 570.

<sup>760</sup> The logbook from the Višegrad Health Centre was initially admitted in its entirety without translation on 4 September 2008 as Exh. P68 (confidential) (see T. 1190 (4 September 2008)). On 10 September 2008, following the testimony of Vasiljević, the page from the logbook which comprises the Logbook Entry was admitted as Exh. 1D39 (see T. 1559-1561 (10 September 2008) (closed session)). This page had already been admitted as part of Exh P68 but was tendered by Milan Lukić as part of a set of documents in support of Vasiljević’s testimony that he was not present at Pionirska Street. Subsequently, on 27 October 2008, the Trial Chamber ruled that Exh. P68, as previously admitted, was no longer admitted in its entirety but that “the pages of the logbook which contain entries made on the 7<sup>th</sup> of June, 1992, [were] admitted into evidence as Exhibit P68 under seal [and that] these pages in their redacted form [were] admitted as Exhibit P70.” The Trial Chamber further clarified that “Exhibit 1D39 only comprises pages of the logbook which contain entries of 14<sup>th</sup> June 1992.” (T. 2766 (27 October 2008)). There was never an official translation submitted for any part of the logbook during trial.

<sup>761</sup> See *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 27 September 1996, paras 6, 10.

<sup>762</sup> T. 1559-1561 (10 September 2008) (closed session); T. 2766 (27 October 2008).

the Trial Chamber. Moreover, the Trial Chamber had the duty to consider all the evidence before it.<sup>763</sup>

263. In the Trial Judgement, the Trial Chamber stated that it had admitted the Logbook Entry “inadvertently” and was unable to attach any weight to it without a translation into one of the working languages of the Tribunal.<sup>764</sup> However, in its summary of the evidence in the Trial Judgement, the Trial Chamber demonstrated that, even without a translation, it was aware that the Logbook Entry showed that Vasiljević was registered at the Višegrad Health Centre on 14 June 1992.<sup>765</sup> Moreover, the Trial Chamber found that it was able to attach probative weight to Prosecution Exhibit P68, which had also been admitted into evidence without an official translation, but the substance of which had been commented on by a Prosecution witness.<sup>766</sup>

264. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber erred in failing to consider the substance of the Logbook Entry. However, the Appeals Chamber finds that this error has no impact.

265. The Prosecution introduced the evidence of Dr. Raby to rebut the veracity and accuracy of the Užice Hospital Records.<sup>767</sup> The Trial Chamber assessed and accepted the evidence of Dr. Raby that the fractured limb reflected in a 1992 x-ray submitted by Vasiljević did not match Vasiljević’s leg.<sup>768</sup> The Trial Chamber further found that, with the exception of the x-ray, the Prosecution did not present any evidence that Vasiljević’s other medical records presented at trial were forged or tampered with.<sup>769</sup> Notwithstanding this finding, the Trial Chamber, by majority, considered that Dr. Raby’s testimony was a “solid basis from which the reasonable inference may be drawn that [Vasiljević] sourced and tendered into evidence a false x-ray in order to substantiate a false alibi.”<sup>770</sup> As a result, it found that the credibility of the remaining Užice Hospital Records was also called into question.<sup>771</sup>

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<sup>763</sup> Cf. *Halilović* Appeal Judgement, para. 121, referring to *Kvočka et al.* Appeal Judgement, para. 23.

<sup>764</sup> Trial Judgement, para. 570.

<sup>765</sup> Trial Judgement, para. 439, referring to Logbook Entry.

<sup>766</sup> Trial Judgement, fn. 327. The Appeals Chamber notes that in relation to those portions of the logbook, witnesses discussed the contents of the pages and, to a certain extent, provided translations. However, the witness testimony was confined to discussing the specific patient and treatment on the corresponding page, and did not address specifically what the various columns meant (*see* Trial Judgement, fn. 327, referring to VG032, T. 1191-1193 (8 September 2008), VG133, T. 2963-2967 (28 October 2008)). Therefore, the Appeals Chamber does not accept Milan Lukić’s assertion that to the extent those portions of the logbook were translated, they also translated the Logbook Entry.

<sup>767</sup> Trial Judgement, para. 572.

<sup>768</sup> Trial Judgement, para. 572.

<sup>769</sup> Trial Judgement, para. 572.

<sup>770</sup> Trial Judgement, para. 572.

<sup>771</sup> Trial Judgement, para. 572.

266. The Appeals Chamber recalls that a trial chamber has broad discretion in its assessment of the evidence.<sup>772</sup> The Appeals Chamber notes that the Appellants disagree with the Trial Chamber's assessment of the evidence; however, it finds that they have failed to show that no reasonable trier of fact could have concluded that Dr. Raby's evidence showed that the medical evidence as a whole was falsified. Though part of the same logbook was relied on by the Trial Chamber, the Appeals Chamber finds that the Logbook Entry does not alter this conclusion. In the context of the evidence as a whole, this further medical document does not have an impact on the Trial Chamber's finding, considering that it had already assessed evidence indicating that Vasiljević had received medical treatment. For the foregoing reasons, the Appeals Chamber finds that the Appellants have failed to show that the Trial Chamber erred in finding that Vasiljević was present at Pionirska Street on 14 June 1992 during the Robbery, the Transfer, and the fire at the Omeragić House.

267. Since the Appeals Chamber has upheld the Trial Chamber's finding on Vasiljević's presence at the Pionirska Street Incident, the Appellants' submission that the credibility of the witnesses who erroneously identified Vasiljević as having been present is undermined, and that their identification of Milan Lukić and Sredoje Lukić is thus called into question,<sup>773</sup> is dismissed.

268. The Appeals Chamber dismisses Milan Lukić's sub-grounds 3(D) through (F). It also dismisses Sredoje Lukić's seventh ground of appeal insofar as it relates to the Trial Chamber's consideration of Vasiljević's alibi evidence.<sup>774</sup>

### C. Milan Lukić

269. In relation to the Pionirska Street Incident, the Trial Chamber was satisfied that Milan Lukić committed the crimes of murder<sup>775</sup> and cruel treatment<sup>776</sup> as violations of the laws or customs of war as well as extermination,<sup>777</sup> persecutions,<sup>778</sup> and other inhumane acts<sup>779</sup> as crimes against

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<sup>772</sup> See *supra* para. 86.

<sup>773</sup> Milan Lukić Appeal Brief, paras 184-190; Milan Lukić Reply Brief, para. 78; Sredoje Lukić Reply Brief, para. 84; Appeal Hearing, AT. 60-61, 111-112 (14 September 2011).

<sup>774</sup> The remainder of Sredoje Lukić's seventh ground of appeal is considered *infra* paras 355-366.

<sup>775</sup> Trial Judgement, paras 915-919, 1099. Milan Lukić was found guilty of the murder as a violation of the laws or customs of war of the 59 individuals who perished in the fire (Trial Judgement, para. 919).

<sup>776</sup> Trial Judgement, paras 967-971, 1099. Milan Lukić was found guilty of cruel treatment as a violation of the laws or customs of war in relation to: (i) the Robbery; (ii) the Transfer and subsequently setting the Omeragić House on fire; and (iii) shooting at the windows of the Omeragić House as VG013 and VG038 escaped, and wounding VG013 (Trial Judgement, paras 969, 971).

<sup>777</sup> Trial Judgement, paras 940-947, 1099. See also Partially Dissenting Opinion of Judge Van Den Wyngaert, paras 1123-1128. Milan Lukić was found guilty of extermination as a crime against humanity in relation to 59 victims who perished in the fire (Trial Judgement, para. 947).

<sup>778</sup> Trial Judgement, paras 1006-1015, 1026, 1099. Milan Lukić was found to have committed persecutions as a crime against humanity by the following acts: (i) the theft of personal property at the Memić House; (ii) the subjection of the vulnerable Koritnik Group to the harassment, humiliation, terrorisation, and psychological abuse occasioned by the theft of their only remaining possessions; (iii) unlawful detention under inhumane conditions at the Omeragić House; (iv) murder; and (v) the destruction of the Omeragić House (Trial Judgement, paras 1008, 1010-1012, 1015, 1026). The



humanity. The Trial Chamber concluded that Milan Lukić was among the armed men who went to the Memić House on Pionirska Street in the afternoon of 14 June 1992.<sup>780</sup> It was satisfied that Milan Lukić participated in: (i) robbing the Koritnik Group of their valuables inside the Memić House; (ii) removing several women from the group who later returned asserting that they had been raped; and (iii) transferring the Koritnik Group from the Memić House to the Omeragić House later in the evening.<sup>781</sup> The Trial Chamber further found that Milan Lukić placed an explosive device which ignited a fire inside the room in the Omeragić House where the group was detained, and shot at persons who attempted to escape from the fire.<sup>782</sup>

270. The Trial Chamber heard the evidence of seven eye-witnesses in relation to the Pionirska Street Incident. Six were survivors of the incident: VG013, VG018, VG038, VG078, VG084, and VG101.<sup>783</sup> The seventh eye-witness, VG115, was not involved in the incident but witnessed certain events from a distance.<sup>784</sup> The Trial Chamber also heard the evidence of Huso Kurspahić, who testified about the events as told to him by his late father, Hasib Kurspahić, who survived the incident,<sup>785</sup> and CW1, who was not involved in the incident but lost relatives in it.<sup>786</sup>

271. Milan Lukić argues that the Trial Chamber erred in:<sup>787</sup> (i) its assessment of his alibi;<sup>788</sup> (ii) its assessment of the identification evidence;<sup>789</sup> (iii) finding that the fire in the Omeragić House occurred;<sup>790</sup> and (iv) finding that the victims died as alleged.<sup>791</sup>

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Appeals Chamber notes that the Trial Chamber also listed placing “VG013, VG018, VG078 and VG101 in fear that they might be raped” as an underlying persecutory act committed by Milan Lukić (Trial Judgement, para. 1009). However, the Trial Chamber expressly held elsewhere that the persecutory acts in the present case were limited to those mentioned in paragraph 4 of the Second Amended Indictment (Trial Judgement, para. 997, fn. 2913, referring to Pre-Trial Conference, T. 201-202 (9 July 2008)), which makes no reference to rape or fear of rape. Therefore, the Appeals Chamber considers that the Trial Chamber did not include the removal of women, or the fear of rape, when considering Milan Lukić’s criminal liability for committing the crime of persecutions as a crime against humanity.

<sup>779</sup> Trial Judgement, paras 967-971, 1099. Milan Lukić was found guilty of other inhumane acts as a crime against humanity, in relation to: (i) the Robbery of VG013, VG018, VG038, VG078, VG084, VG101, and Hasib Kurspahić in the Memić House; (ii) the Transfer of VG013, VG018, VG038, VG084, and Hasib Kurspahić to the Omeragić House, and subsequently setting the house on fire; and (iii) shooting at the windows of the Omeragić House as VG013 and VG038 escaped through them, wounding VG013 in the process (Trial Judgement, paras 969, 971).

<sup>780</sup> Trial Judgement, paras 555, 631.

<sup>781</sup> Trial Judgement, paras 592, 596, 606, 631.

<sup>782</sup> Trial Judgement, paras 612, 631.

<sup>783</sup> Trial Judgement, paras 330-333, 389.

<sup>784</sup> Trial Judgement, para. 333.

<sup>785</sup> Trial Judgement, paras 334, 389.

<sup>786</sup> Trial Judgement, paras 388-389.

<sup>787</sup> Milan Lukić’s sub-grounds 3(A) through (D), (G), and (H).

<sup>788</sup> Milan Lukić Appeal Brief, paras 191-203; Milan Lukić Reply Brief, paras 80-86.

<sup>789</sup> Milan Lukić Appeal Brief, paras 146-171; Milan Lukić Reply Brief, paras 69-75; Appeal Hearing, AT. 49-68, 107-112.

<sup>790</sup> Milan Lukić Appeal Brief, paras 141-145; Milan Lukić Reply Brief, para. 68.

<sup>791</sup> Milan Lukić Appeal Brief, paras 137-140; Milan Lukić Reply Brief, paras 61-67.

## 1. Milan Lukić's alibi

272. At trial, Milan Lukić submitted that, between 13 and 15 June 1992, he was deployed to an area known as Kopito, outside Višegrad, with other members of the reserve police force and military personnel (collectively "Dispatch Force").<sup>792</sup> In support of his alibi, he called four witnesses: MLD4, MLD7, MLD24, and Goran Đerić ("Đerić").<sup>793</sup>

273. The Trial Chamber noted that Milan Lukić tendered into evidence a list of 15 police officers who were allegedly sent to Kopito as part of the Dispatch Force on 13 June 1992, which included Milan Lukić's own name.<sup>794</sup> The Trial Chamber also noted that MLD4 and MLD7 were both members of the Territorial Defence ("TO") and that they had testified that Milan Lukić was at the Bikavac Hotel on the morning of 13 June 1992.<sup>795</sup> MLD4 further testified that he stayed with Milan Lukić during the entire operation in Kopito.<sup>796</sup> Đerić gave evidence that, on 14 June 1992: (i) he went to Kopito to inform the forces about an attack and the resulting blockage of the Višegrad-Kopito road; (ii) he met Milan Lukić there;<sup>797</sup> and (iii) he and Milan Lukić spent the evening together.<sup>798</sup> MLD24 testified that on 13 June 1992 Milan Lukić's parents told him that Milan Lukić was involved in an operation in Kopito.<sup>799</sup> MLD24 also testified that the men dispatched to the Kopito operation had been unable to return before 15 June 1992 as a result of a blocked road.<sup>800</sup>

274. The Prosecution presented the evidence of VG089, VG136, Ferid Spahić ("Spahić"), and Mirsada Kahrman ("Kahrman") in rebuttal.<sup>801</sup> The Trial Chamber noted that Spahić and VG136 testified that, between 7:00 a.m. and 8:00 a.m. on 14 June 1992, they saw Milan Lukić outside the Višegrad Hotel where he boarded the bus on which they were riding.<sup>802</sup> VG089 testified that he was abducted by Milan Lukić on the afternoon of 13 or 14 June 1992 and saw him on various occasions over the following three days when he was detained at the Višegrad Ministry of Interior.<sup>803</sup> Finally,

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<sup>792</sup> Trial Judgement, para. 478.

<sup>793</sup> Trial Judgement, paras 481-488. In addition, MLD19, MLD21, MLD22, MLD23, Marković, and Stoja Vujičić testified in support of Milan Lukić's assertion that he was a member of the Višegrad reserve police force but did not provide any evidence as to his whereabouts during the relevant time period (*see* Trial Judgement, paras 489-511). The Trial Chamber was satisfied that Milan Lukić was a member of the reserve police force at the relevant time (Trial Judgement, para. 618).

<sup>794</sup> Trial Judgement, para. 512, referring to Exh. 1D25.

<sup>795</sup> Trial Judgement, para. 481.

<sup>796</sup> Trial Judgement, para. 497, referring to Exh. P236, p. 1.

<sup>797</sup> Trial Judgement, paras 483, 485.

<sup>798</sup> Trial Judgement, paras 483, 485.

<sup>799</sup> Trial Judgement, para. 488.

<sup>800</sup> Trial Judgement, para. 488.

<sup>801</sup> Trial Judgement, paras 529-550.

<sup>802</sup> Trial Judgement, paras 529-532.

<sup>803</sup> Trial Judgement, paras 535-538, 540.

Kahrman stated that she saw Milan Lukić in Višegrad on numerous occasions between 10 and 15 June 1992.<sup>804</sup>

275. Milan Lukić argues that the Trial Chamber erred in law and fact in its evaluation of his alibi for the Pionirska Street Incident.<sup>805</sup>

(a) Burden of proof for alibi

276. The Trial Chamber held that Đerić's evidence concerning his mission to Kopito lacked credibility.<sup>806</sup> It considered that "[i]t appears odd, to say the least" that the combat reports of the Rogatica Brigade did not mention the blocked road and that "[i]t is reasonable to expect" that such a blockage would have been mentioned.<sup>807</sup> The Trial Chamber further held that MLD24's evidence, "specifically that Milan Lukić's parents [...] and MLD24's wife would have been in a better position than he, as a mobilised soldier, to keep abreast of developments within the Serb armed forces", was "difficult to believe".<sup>808</sup>

277. Milan Lukić submits that the language used by the Trial Chamber shows that it did not consider whether his alibi was reasonably possibly true, but rather whether it had been proven beyond a reasonable doubt.<sup>809</sup>

278. The Appeals Chamber considers that the Trial Chamber explained its reasons for finding that the evidence of alibi witnesses lacked credibility and thus was not capable of raising reasonable doubt in the Prosecution's case.<sup>810</sup> The language used does not indicate a reversal of the burden of proof. To the contrary, it shows that the Trial Chamber conducted a detailed analysis of the evidence. Milan Lukić has therefore failed to show that the Trial Chamber erred.

(b) Assessment of the alibi evidence

(i) Milan Lukić's alibi evidence

279. The Trial Chamber found that the evidence of fundamental alibi witnesses, notably MLD4, MLD7, and Đerić, displayed manifest discrepancies and elements of implausibility on matters

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<sup>804</sup> Trial Judgement, paras 544-548.

<sup>805</sup> Milan Lukić's sub-grounds 3(G) and (H). Milan Lukić Appeal Brief, paras 191-203; Milan Lukić Reply Brief, paras 80-86.

<sup>806</sup> Trial Judgement, para. 623.

<sup>807</sup> Trial Judgement, para. 623.

<sup>808</sup> Trial Judgement, para. 626.

<sup>809</sup> Milan Lukić Appeal Brief, paras 191-193, referring to Trial Judgement, paras 623, 626; Milan Lukić Reply Brief, para. 80. Milan Lukić Appeal Brief, para. 192(b) mistakenly refers to MLD4 instead of MLD24.

<sup>810</sup> See Trial Judgement, paras 620, 623, 626, 630.

central to the alibi.<sup>811</sup> It also found the alibi rebuttal witnesses credible with regard to Milan Lukić's presence in Višegrad on or around 13 to 15 June 1992.<sup>812</sup> The Trial Chamber found that the alibi was not reasonably possibly true "[o]n the basis of the evidence as a whole, that is, the evidence led by the Prosecution and the evidence led by the Defence".<sup>813</sup>

280. Milan Lukić argues that the Trial 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."<sup>814</sup> He contends that the Trial Chamber erred because it applied "double standards in its assessment of the alibi evidence presented by the Prosecution and the defence."<sup>815</sup> In particular, Milan Lukić argues that the Trial Chamber erred in: (i) finding that the discrepancy between the testimonies of MLD7 and MLD4 regarding the time Vlatko Trifković ("Trifković"), commander for the area, left for Kopito was "fundamental to the integrity of the alibi as a whole" while in fact it was peripheral to Milan Lukić's alibi;<sup>816</sup> (ii) finding that the discrepancy between Đerić's testimony and the combat reports of the Rogatica Brigade regarding a blocked road was unexplained, and that Đerić's credibility was therefore undermined;<sup>817</sup> (iii) accepting part of MLD24's alibi evidence to discredit the alibi evidence in relation to the Drina River and Varda Factory Incidents while rejecting MLD24's alibi evidence in relation to the Pionirska Street Incident;<sup>818</sup> and (iv) finding that MLD24's evidence was not credible because of its hearsay nature, while it did not apply the same standard with respect to hearsay evidence presented by the Prosecution.<sup>819</sup>

281. With respect to Milan Lukić's assertion that the Trial Chamber applied "double standards in its assessment of the alibi evidence presented by the Prosecution and the defence",<sup>820</sup> the Appeals Chamber notes that he has failed to substantiate this argument or to articulate a specific error. The argument is therefore dismissed.

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<sup>811</sup> Trial Judgement, paras 630-631.

<sup>812</sup> Trial Judgement, paras 627-629.

<sup>813</sup> Trial Judgement, para. 631.

<sup>814</sup> Milan Lukić Appeal Brief, para. 194.

<sup>815</sup> Milan Lukić Appeal Brief, paras 194, 197; Milan Lukić Reply Brief, para. 83.

<sup>816</sup> Milan Lukić Appeal Brief, para. 198 (emphasis omitted), referring to Trial Judgement, paras 619-620; Milan Lukić Reply Brief, para. 83.

<sup>817</sup> Milan Lukić Appeal Brief, para. 199, referring to Trial Judgement, paras 622-623; Milan Lukić Reply Brief, para. 84. Milan Lukić argues that the Trial Chamber erroneously found that Đerić was unable to explain the discrepancy between his testimony and the absence of any mention of the road block in the Rogatica Combat Reports, as Đerić explained that this was normal, since the operation took place outside the Rogatica Brigade's area of responsibility (Milan Lukić Appeal Brief, para. 199).

<sup>818</sup> Milan Lukić Appeal Brief, para. 200, referring to Trial Judgement, paras 226, 625-626; Milan Lukić Reply Brief, para. 85. The Appeals Chamber notes that Milan Lukić also makes this argument in relation to his alibi for the Drina River Incident (*see* Milan Lukić's sub-ground 1(H)).

<sup>819</sup> Milan Lukić Appeal Brief, para. 200.

<sup>820</sup> Milan Lukić Appeal Brief, para. 197.

282. The Trial Chamber found that, since MLD4 was the only person who claimed to have been with Milan Lukić throughout the entire period of the alleged alibi, his evidence was “fundamental to the integrity of the alibi as a whole”.<sup>821</sup> The Trial Chamber therefore considered that it needed to carefully examine the contradictions between his evidence and the evidence of other alibi witnesses who claimed to have been with Milan Lukić for only parts of the relevant period.<sup>822</sup> The Trial Chamber took note of the evidence of MLD4 that Trifković was not present when the soldiers gathered at the Bikavac Hotel and that he only met Trifković once in Kopito.<sup>823</sup> It further noted that MLD7, who knew Trifković and had a familial relationship with him, testified that Trifković was present at the hotel and departed with the other men to Kopito.<sup>824</sup> The Trial Chamber considered that the number of men present at the Bikavac Hotel was not large and that it was thus “reasonable to infer that MLD4 would have seen Vlatko Trifković.”<sup>825</sup> Having considered the evidence, the Trial Chamber concluded that MLD7 was more reliable than MLD4 on the question of Trifković’s departure for Kopito.<sup>826</sup> It considered the inconsistency to be “important” and, as a result, found that MLD4’s evidence was unreliable.<sup>827</sup>

283. The Appeals Chamber recalls that a trial chamber has broad discretion in its assessment of the evidence.<sup>828</sup> It finds that it was within the discretion of the Trial Chamber to evaluate the highlighted inconsistency and to consider whether, when taken as a whole, MLD4’s evidence was reliable and credible.<sup>829</sup> Therefore, the Appeals Chamber finds that Milan Lukić has failed to show that the Trial Chamber unreasonably concluded that MLD4’s credibility was undermined by the inconsistency between his evidence and that of MLD7. Milan Lukić’s arguments in this respect are thus dismissed.

284. The Trial Chamber noted that Đerić testified that the Višegrad-Kopito road was closed due to an attack on 13 June 1992 and only opened again after a clearing operation on 15 June 1992 and that this was not mentioned in the combat reports of the Rogatica Brigade.<sup>830</sup> The Trial Chamber took note of Đerić’s explanation regarding this inconsistency, but found that he was unable to provide a satisfactory explanation.<sup>831</sup> The Appeals Chamber considers that the Trial Chamber acted

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<sup>821</sup> See Trial Judgement, para. 620.

<sup>822</sup> Trial Judgement, para. 620.

<sup>823</sup> Trial Judgement, para. 619.

<sup>824</sup> Trial Judgement, para. 620.

<sup>825</sup> Trial Judgement, para. 620.

<sup>826</sup> Trial Judgement, para. 620.

<sup>827</sup> Trial Judgement, paras 621, 630.

<sup>828</sup> See *supra* para. 86.

<sup>829</sup> Cf. *Mrkšić and Šljivančanin* Appeal Judgement, para. 265; *Kupreskić* Appeal Judgement, para. 31; *Čelebići* Appeal Judgement, paras 485, 496-498.

<sup>830</sup> Trial Judgement, paras 621-622.

<sup>831</sup> Trial Judgement, paras 622-623.

within its discretion when it found that the credibility of Đerić was undermined. Milan Lukić has failed to show any error in the Trial Chamber's reasoning.

285. The Appeals Chamber has already addressed and dismissed Milan Lukić's argument that the Trial Chamber erred in rejecting MLD24's alibi evidence for the Pionirska Street Incident, while accepting it in relation to the Drina River and Varda Factory Incidents.<sup>832</sup> Further, Milan Lukić's mere assertion that the Trial Chamber was inconsistent in its approach to hearsay evidence<sup>833</sup> is unsubstantiated. Therefore, he has not shown an error and his arguments with respect to the evaluation of MLD24's evidence are dismissed.

286. Based on the foregoing, the Appeals Chamber finds that Milan Lukić has failed to show that the Trial Chamber erred in its assessment of his alibi evidence.

(ii) Prosecution's rebuttal evidence

287. Milan Lukić submits that the Trial Chamber erred in relying on the Prosecution's rebuttal evidence.<sup>834</sup> He claims that none of the alibi rebuttal witnesses, Kahrman, Spahić, VG089, and VG136, had sufficient prior knowledge of him to recognise him.<sup>835</sup> He also argues that VG089 could not recall the precise dates on which he saw him in Višegrad.<sup>836</sup>

288. The Trial Chamber noted that Spahić and VG136 testified that between 7:00 a.m. and 8:00 a.m. on 14 June 1992, they saw Milan Lukić outside the Višegrad Hotel where he boarded the bus on which they were riding.<sup>837</sup> The Trial Chamber considered that Spahić and VG136 did not know Milan Lukić prior to 14 June 1992, but found that they learned of his identity from several people on the bus.<sup>838</sup> In assessing their evidence, the Trial Chamber considered that the source of their knowledge was known. It noted that Esad Kustura, a former schoolmate of Milan Lukić, identified Milan Lukić to Spahić<sup>839</sup> and that a number of people identified Milan Lukić to VG136, including: Spahić, Esad Kustura, Musan Celik, and women and girls who, VG136 thought, also knew Milan Lukić from school.<sup>840</sup> The Trial Chamber relied on their evidence in corroboration with the testimony of other alibi rebuttal witnesses.<sup>841</sup> In light of the foregoing, the Appeals Chamber

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<sup>832</sup> See *supra* para. 92.

<sup>833</sup> See Milan Lukić Appeal Brief, para. 200.

<sup>834</sup> Milan Lukić Appeal Brief, paras 196, 201-203.

<sup>835</sup> Milan Lukić Appeal Brief, para. 201; Milan Lukić Reply Brief, para. 86.

<sup>836</sup> Milan Lukić Appeal Brief, para. 202.

<sup>837</sup> Trial Judgement, paras 529-532.

<sup>838</sup> Trial Judgement, paras 531-532, 627.

<sup>839</sup> Trial Judgement, paras 531, 627.

<sup>840</sup> Trial Judgement, paras 532, 627.

<sup>841</sup> Trial Judgement, paras 628-629, 631.

finds that Milan Lukić has failed to show that the Trial Chamber was unreasonable in relying on the rebuttal evidence of Spahić and VG136.

289. The Trial Chamber found that Kahrman and VG089 knew Milan Lukić prior to 14 June 1992.<sup>842</sup> Milan Lukić merely asserts that Kahrman and VG089 did not have sufficient prior knowledge of him, without demonstrating any error in the Trial Chamber's evaluation of their evidence.<sup>843</sup> His undeveloped assertion has failed to meet the standard of review on appeal and is therefore dismissed.

290. Finally, the Appeals Chamber notes that the Trial Chamber was mindful of the inconsistencies in VG089's evidence as to the exact date of his abduction by Milan Lukić and subsequent detention.<sup>844</sup> The Trial Chamber noted that VG089 initially testified that he was abducted on 14 June 1992, whereas he later stated, "albeit [...] not with full certainty", that it occurred on a Saturday.<sup>845</sup> The Trial Chamber also considered VG089's evidence that he saw Milan Lukić during the three days of his detention.<sup>846</sup> It found that, while VG089's evidence was imprecise as to the date of his abduction, it showed that "Milan Lukić was in Višegrad during three consecutive days beginning either on 13 or 14 June 1992".<sup>847</sup> Milan Lukić has failed to show that the Trial Chamber was unreasonable in relying on the rebuttal evidence of VG089.

### (c) Conclusion

291. The Appeals Chamber has dismissed all challenges raised by Milan Lukić in relation to the Trial Chamber's assessment of his proffered alibi for the Pionirska Street Incident. The Appeals Chamber finds that the Trial Chamber conducted a careful analysis of the alibi and the alibi rebuttal evidence, together with the Prosecution evidence regarding Milan Lukić's presence, acts, and conduct on 14 June 1992, and reasonably found that the alibi was not reasonably possibly true. Hence, Milan Lukić's sub-grounds 3(G) and (H) are dismissed.

## 2. Identification of Milan Lukić

292. Milan Lukić submits that the Trial Chamber erred in law and fact in its assessment of the identification evidence placing him at the scene of the Pionirska Street Incident.<sup>848</sup> In particular, he argues that the Trial Chamber erred in: (i) allowing in-court identification of him by VG013,

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<sup>842</sup> Trial Judgement, paras 628-629.

<sup>843</sup> Milan Lukić Appeal Brief, para. 201.

<sup>844</sup> Trial Judgement, para. 628.

<sup>845</sup> Trial Judgement, para. 628. The Appeals Chamber notes that 14 June 1992 was a Sunday.

<sup>846</sup> Trial Judgement, para. 628.

<sup>847</sup> Trial Judgement, para. 628.

VG078, VG101, and VG115;<sup>849</sup> and (ii) concluding that he was identified on the basis of the evidence of VG013, VG078, VG101, and Huso Kurspahić.<sup>850</sup>

(a) In-court identification

293. With respect to VG013, VG078, and VG101, the Trial Chamber noted that these witnesses recognised Milan Lukić in the courtroom;<sup>851</sup> however, it did not refer to their in-court identification in its factual findings pertaining to the identification evidence.<sup>852</sup> Rather, it relied on the witnesses' prior knowledge of Milan Lukić and found that they were able to recognise him at the time of the incident.<sup>853</sup> Accordingly, the Appeals Chamber finds that the Trial Chamber did not place any weight on the in-court identifications of Milan Lukić by VG013, VG078, and VG101. Furthermore, the Trial Chamber did not rely on VG115's evidence identifying Milan Lukić as one of the perpetrators.<sup>854</sup> The Appeals Chamber finds that Milan Lukić has failed to show that the Trial Chamber erred in allowing in-court identification by these witnesses.

(b) Alleged error in the assessment of identification evidence

(i) VG013

294. Milan Lukić asserts that the Trial Chamber erred in: (i) finding that VG013 had "solid prior knowledge" of him, as her earlier evidence shows that she saw Milan Lukić for the first time on the day of the Pionirska Street Incident;<sup>855</sup> and (ii) failing to consider the conditions in which VG013 purportedly recognised him.<sup>856</sup>

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<sup>848</sup> Milan Lukić's sub-grounds 3(B) through (D). Milan Lukić Appeal Brief, paras 146-171; Milan Lukić Reply Brief, paras 69-75.

<sup>849</sup> Milan Lukić Appeal Brief, paras 146-150, 155-156, 161; Milan Lukić Reply Brief, paras 69-71.

<sup>850</sup> Milan Lukić Appeal Brief, paras 162-171; Milan Lukić Reply Brief, paras 72-75.

<sup>851</sup> Trial Judgement, paras 415, 424, 428, 433.

<sup>852</sup> Trial Judgement, paras 580-581, 592, 598-599, 606, 608, 612.

<sup>853</sup> Trial Judgement, paras 580-581, 592, 598-599, 606, 608, 612.

<sup>854</sup> Trial Judgement, paras 576, 592, 606, 611.

<sup>855</sup> Milan Lukić Appeal Brief, paras 148, 151-152, referring to VG013, T. 1055 (3 September 2008); Milan Lukić Reply Brief, para. 70. Milan Lukić submits that VG013's prior statements provide no support for the assertion that she knew him prior to the Pionirska Street Incident. He further submits that it was only after she identified him in court that she asserted that she had previously seen him twice a year at the Panos Hotel and that he was a neighbour in her community (Milan Lukić Appeal Brief, paras 151-152, 163. *See also* Appeal Hearing, AT. 64-65 (14 September 2011)).

<sup>856</sup> Milan Lukić Appeal Brief, paras 163-166; Milan Lukić Reply Brief, para. 73. Milan Lukić points to evidence that it was dark outside and there was no electricity in the house. He also refers to VG013's evidence that she had moved away from the door at the Omeragić House and that her view would have been blocked by the crowd (Milan Lukić Appeal Brief, paras 163-166). He further argues that the Trial Chamber failed to scrutinise inconsistencies in VG018's contradictory statements as to whether people in the Omeragić House were sitting or standing (Milan Lukić Reply Brief, para. 73).



295. The Trial Chamber found that VG013 had solid prior knowledge of Milan Lukić,<sup>857</sup> and that she had last seen him five years before the incident.<sup>858</sup>

296. The Appeals Chamber recalls that a trial chamber has the advantage of observing witnesses in person and is thus better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence.<sup>859</sup> It is therefore within the discretion of a trial chamber to evaluate discrepancies and to consider the credibility of the evidence as a whole, without explaining its decision in detail.<sup>860</sup> The Trial Chamber explicitly considered VG013's evidence that she had seen Milan Lukić for the first time on the day of the Pionirska Street Incident.<sup>861</sup> It also considered her subsequent testimony in cross-examination that she had last seen Milan Lukić in the area in which she lived, about five years before the incident.<sup>862</sup> It further noted her testimony that she had no specific personal knowledge of Milan Lukić but that "[h]e was a neighbour who was growing up in our proximity"<sup>863</sup> and that she saw him about twice a year "in passing" when she went to the Panos Hotel.<sup>864</sup> The Trial Chamber thus carefully considered the extent of VG013's knowledge of Milan Lukić prior to 14 June 1992 and the inconsistencies in her evidence on this issue. In these circumstances, the Appeals Chamber finds that Milan Lukić has failed to show that the Trial Chamber erred in finding that VG013 had prior knowledge of Milan Lukić at the time of the Pionirska Street Incident.

297. The Appeals Chamber is also of the view that the Trial Chamber considered the conditions in which VG013 recognised Milan Lukić as the person who placed a lit device in the Omeragić House which set it ablaze.<sup>865</sup> The Trial Chamber specifically considered that while there was no light in the Omeragić House, light from surrounding homes came in through the windows.<sup>866</sup> The

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<sup>857</sup> Trial Judgement, para. 612.

<sup>858</sup> Trial Judgement, para. 581.

<sup>859</sup> *Kupreškić et al.* Appeal Judgement, para. 32, referring to *Furundžija* Appeal Judgement, para. 37.

<sup>860</sup> *Kvočka et al.* Appeal Judgement, para. 23, referring to *Čelebići* Appeal Judgement, paras 481, 498; *Kupreškić et al.* Appeal Judgement, para. 32.

<sup>861</sup> Trial Judgement, para. 408, referring to VG013, T. 1055 (3 September 2008).

<sup>862</sup> Trial Judgement, paras 408 (referring to VG013, T. 1101 (3 September 2008)), 581.

<sup>863</sup> Trial Judgement, para. 408, referring to VG013, T. 1105 (3 September 2008).

<sup>864</sup> Trial Judgement, para. 408, referring to VG013, T. 1102 (3 September 2008).

<sup>865</sup> See Trial Judgement, para. 612.

<sup>866</sup> Trial Judgement, paras 366, 414, 597. The Trial Chamber stated that "[d]espite the fact that there were no lights inside Adem Omeragić's house, she was able to see the men by 'lights coming in from the street'" (Trial Judgement, para. 414, referring to Exh. P60 (confidential), p. 6) and that "[t]here was light coming into the room from the street lights outside" (Trial Judgement, para. 366). Further, the Trial Chamber considered that "[m]uch evidence was led concerning the lighting conditions between and around Jusuf Memić's house and Adem Omeragić's house. While some witnesses testified that the late hour and rain made observations more difficult, witnesses consistently testified that light from sources including neighbouring houses and flashlights carried by the men, or their close proximity to the men, allowed them to identify the men who carried out the transfer. The Trial Chamber [was] therefore satisfied that the lighting conditions at the scene of the transfer were sufficient to allow witnesses to see the men who transferred the Koritnik group from Jusuf Memić's house to Adem Omeragić's house." (Trial Judgement, para. 597).

Trial Chamber further referred to VG013's testimony that the room was extremely crowded.<sup>867</sup> It nevertheless accepted that VG013's view was unobstructed because the people in the Omeragić House were sitting down<sup>868</sup> and found that this "provided a logical explanation as to how she was able to see Milan Lukić in the doorway with the device".<sup>869</sup> The Trial Chamber also noted VG018's evidence that she saw that "a flame appeared as large as the door itself" but could not see "who was holding the flame; all the people were standing up."<sup>870</sup> The Trial Chamber did not specifically address this inconsistency between VG013 and VG018's evidence. However, a trial chamber need not explain every step of its reasoning or refer to every piece of evidence of the trial record.<sup>871</sup> Furthermore, the Appeals Chamber considers that different people in varying vantage points can see different things.<sup>872</sup>

298. Based on the foregoing, the Appeals Chamber finds that Milan Lukić has not shown that the Trial Chamber erred in relying on VG013's identification evidence at the Omeragić House.

(ii) VG078 and VG101

299. Milan Lukić submits that the Trial Chamber erred in its assessment of VG078 and VG101's prior knowledge of him and in failing to consider the "real risk of mistaken recognition".<sup>873</sup> With regard to VG101, he asserts that the Trial Chamber erred in finding that she attended school with him for a total of 11 years.<sup>874</sup> With regard to VG078, Milan Lukić asserts that: (i) she had limited prior knowledge of him;<sup>875</sup> and (ii) the hearsay character of her evidence increases the risk of mistaken recognition.<sup>876</sup>

300. The Appeals Chamber notes that, contrary to Milan Lukić's contention, the Trial Chamber did not find that VG101 attended primary and secondary school with Milan Lukić for 11 years. It took note of evidence to this effect;<sup>877</sup> however, in its factual findings the Trial Chamber merely concluded that VG101 had gone to school with Milan Lukić for "many years".<sup>878</sup> It noted that

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<sup>867</sup> Trial Judgement, para. 366, referring to VG013, T. 1093 (3 September 2008).

<sup>868</sup> Trial Judgement, paras 413 (referring to VG013, T. 1095 (3 September 2008)), 608. VG013 explained that the group was made up of the elderly, the infirm, and children who needed to sit as well as women who needed to feed their children.

<sup>869</sup> Trial Judgement, para. 608. *See also* Trial Judgement, paras 367-368.

<sup>870</sup> Trial Judgement, para. 371, referring to VG018, T. 1318-1319 (5 September 2008), Exhs P82, pp. 1597-1598, P83, p. 9.

<sup>871</sup> *See supra* para. 135.

<sup>872</sup> *Vasiljević* Appeal Judgement, para. 37; *Gacumbitsi* Appeal Judgement, para. 80.

<sup>873</sup> Milan Lukić Appeal Brief, paras 153-160; Milan Lukić Reply Brief, para. 71; Appeal Hearing, AT. 65 (14 September 2011).

<sup>874</sup> Milan Lukić Appeal Brief, paras 157-158.

<sup>875</sup> Milan Lukić Appeal Brief, para. 159.

<sup>876</sup> Milan Lukić Appeal Brief, paras 155, 159; Milan Lukić Reply Brief, para. 71.

<sup>877</sup> Trial Judgement, para. 425.

<sup>878</sup> Trial Judgement, para. 580.

during this time she saw him daily in the hallways and on the school grounds.<sup>879</sup> The Appeals Chamber notes that VG101's evidence shows that she attended primary school in Prelovo and secondary school in Višegrad from 1975 to 1986.<sup>880</sup> Contrary to Milan Lukić's assertion, the Trial Chamber did not ignore evidence demonstrating that the first school Milan Lukić attended was in Klačnik and not in Prelovo. It found that "[f]rom 1974, he attended primary school in Klačnik from grade 1 to grade 4, and then in Prelovo, near Višegrad, from grade 5 to grade 8".<sup>881</sup> The evidence relied on by the Trial Chamber shows that Milan Lukić attended the same schools as VG101 from 1978 to 1985.<sup>882</sup> The Trial Chamber further considered that, between the ages of 18 and 23, VG101 saw Milan Lukić at dances and parties.<sup>883</sup> The Appeals Chamber finds that Milan Lukić has failed to show that the Trial Chamber erred in finding that he and VG101 went to school together for many years. The Appeals Chamber also finds that Milan Lukić has failed to substantiate his claim of possible mistaken recognition. Consequently, Milan Lukić has not shown an error in the Trial Chamber's finding that VG101 was able to recognise him during the Pionirska Street Incident.

301. The Trial Chamber also noted that VG078 attended school with Milan Lukić for seven years in Prelovo and that Milan Lukić was a year older than the witness.<sup>884</sup> It concluded that VG078 "attended school with Milan Lukić."<sup>885</sup> It noted that VG078 saw Milan Lukić in the hallways during breaks as well as around the school building.<sup>886</sup> The Trial Chamber further found that VG078 "firmly recognised [Milan Lukić] as soon as VG101 reminded her of his identity."<sup>887</sup> The Appeals Chamber considers that Milan Lukić has failed to substantiate his claim that there was a "real risk of mistaken recognition, especially as VG078's '*recognition*' depended on [...] VG101's '*recognition*'".<sup>888</sup> Moreover, given that Milan Lukić does not challenge the Trial Chamber's findings that he and VG078 were schoolmates for seven years,<sup>889</sup> the Appeals Chamber finds that

<sup>879</sup> Trial Judgement, para. 425.

<sup>880</sup> Specifically, her evidence was that: (i) she was born in 1968 (Exh. P93 (confidential)); (ii) she attended school for 11 years (VG101, T. 1433 (9 September 2008)); and (iii) she was 18 years old when she finished school (VG101, T. 1433 (9 September 2008)).

<sup>881</sup> Trial Judgement, para. 2.

<sup>882</sup> Milan Lukić began grade one in 1974 in Klačnik (*see* Trial Judgement, para. 2, referring to Exh. 1D106), attended the school in Prelovo from grade five until grade eight (*see* Trial Judgement, para. 2, referring to VG024, T. 3207-3208, 3211 (3 November 2008), VG042, T. 2779-2780 (27 October 2008), VG078, T. 1378 (8 September 2008), MLD20, T. 4480, 4497-4498 (26 January 2009), MLD24, T. 5031 (4 March 2009), Exhs 1D106, P92 (confidential), p. 4. *See also* Exh. 1D203 (confidential), pp. 4-5) and registered at the Ivo Andrić school in Višegrad in 1982 where he completed three grades (*see* Trial Judgement, para. 2, referring to Exh. 1D105).

<sup>883</sup> Trial Judgement, para. 425; VG101, T. 1433-1434 (9 September 2008).

<sup>884</sup> Trial Judgement, paras 421.

<sup>885</sup> Trial Judgement, para. 580.

<sup>886</sup> Trial Judgement, para. 421.

<sup>887</sup> Trial Judgement, para. 580. *See also* Trial Judgement, para. 598.

<sup>888</sup> Milan Lukić Appeal Brief, para. 155.

<sup>889</sup> Trial Judgement, para. 421.

he has failed to demonstrate that the Trial Chamber erred in finding that VG078 had “solid prior knowledge of Milan Lukić”<sup>890</sup> and recognised him during the Pionirska Street Incident.<sup>891</sup>

(iii) Huso Kurspahić/Hasib Kurspahić

302. Milan Lukić submits that Hasib Kurspahić had no prior knowledge of him and only identified him on the basis that: (i) Vasiljević referred to him as “Milan” during the incident; and (ii) a woman in the group, one of Milan Lukić’s former schoolmates, identified him to Hasib Kurspahić.<sup>892</sup> Milan Lukić argues that the Trial Chamber erred when it found Hasib Kurspahić’s identification evidence reliable, as admitted through the hearsay testimony of Hasib Kurspahić’s son, Huso Kurspahić.<sup>893</sup>

303. At the outset, the Appeals Chamber recalls that hearsay evidence is in principle admissible,<sup>894</sup> although in assessing its probative value, the surrounding circumstances must be considered.<sup>895</sup> The Appeals Chamber notes that the Trial Chamber expressly considered the hearsay nature of Huso Kurspahić’s evidence.<sup>896</sup> It took into account that Huso Kurspahić testified about his father’s observations during the Pionirska Street Incident.<sup>897</sup> Moreover, the Trial Chamber did not solely rely upon the evidence of Huso Kurspahić to find that Milan Lukić was present during the incident.<sup>898</sup>

304. The Trial Chamber explicitly considered that Hasib Kurspahić did not know Milan Lukić prior to the Pionirska Street Incident.<sup>899</sup> However, it was satisfied that Hasib Kurspahić was able to identify Milan Lukić because: (i) a woman in the Koritnik Group, who had attended school in Prelovo with Milan Lukić, had identified him to Hasib Kurspahić;<sup>900</sup> and (ii) Vasiljević and Sredoje Lukić expressly addressed him as “Milan”.<sup>901</sup> The Trial Chamber clearly identified the source of Hasib Kurspahić’s hearsay evidence<sup>902</sup> and noted how the woman knew Milan Lukić.<sup>903</sup> With regard to Vasiljević, the Appeals Chamber recalls that it has found that the Appellants have failed to show that Trial Chamber erred in finding that Vasiljević was present during the Pionirska Street

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<sup>890</sup> Trial Judgement, para. 598.

<sup>891</sup> Trial Judgement, paras 592, 596, 598.

<sup>892</sup> Milan Lukić Appeal Brief, paras 169-170, referring to Trial Judgement, para. 435; Milan Lukić Reply Brief, para. 74.

<sup>893</sup> Milan Lukić Appeal Brief, para. 169.

<sup>894</sup> *Blaškić* Appeal Judgement, para. 656, fn. 1374.

<sup>895</sup> See *Haradinaj et al.* Appeal Judgement, paras 85-86.

<sup>896</sup> Trial Judgement, paras 591, 605.

<sup>897</sup> Trial Judgement, para. 591.

<sup>898</sup> Trial Judgement, paras 592, 596, 606, 612.

<sup>899</sup> Trial Judgement, para. 434.

<sup>900</sup> Trial Judgement, paras 435, 591, 605.

<sup>901</sup> Trial Judgement, paras 435, 591, 605.

<sup>902</sup> Trial Judgement, paras 435, 591.

<sup>903</sup> Trial Judgement, paras 435, 591.

Incident.<sup>904</sup> Further, as will be concluded later in this Judgement, Sredoje Lukić was present at the Memić House.<sup>905</sup> Both men were therefore in a position to address Milan Lukić by name.

305. In these circumstances, the Appeals Chamber finds that Milan Lukić has failed to show that the Trial Chamber erred in relying on the evidence of Hasib Kurspahić/Huso Kurspahić, in conjunction with the evidence of other witnesses, to identify Milan Lukić as a perpetrator of the Pionirska Street Incident.

(c) Conclusion

306. The Appeals Chamber finds that Milan Lukić has failed to show that the Trial Chamber erred in its treatment of the in-court identification evidence or in concluding that Milan Lukić was identified as a perpetrator of the Pionirska Street Incident on the basis of the evidence of VG013, VG078, VG101, VG115, and Huso Kurspahić. For the foregoing reasons, the Appeals Chamber dismisses Milan Lukić's sub-grounds 3(B) through (D).

3. Occurrence of the fire at the Omeragić House

307. The Trial Chamber found that: (i) Milan Lukić placed an explosive device in the room in which the Koritnik Group was being detained in the Omeragić House; (ii) accelerant on the floor of the room caught fire; and (iii) a fire then enveloped the room and the people in it.<sup>906</sup>

308. Milan Lukić submits that reasonable doubt remains as to the occurrence of the fire at the Omeragić House "as alleged".<sup>907</sup> He argues that the Trial Chamber failed to appreciate the significance of the evidence of three Defence expert witnesses that there could not have been a fire in the Omeragić House which enveloped the room, and which involved more than 60 victims.<sup>908</sup> He further submits that Mašović, the President of the Bosnia and Herzegovina State Commission for Tracing Missing Persons of Bosnia and Herzegovina, conceded that the reasonable possibility exists that the events did not occur as alleged and that witnesses were being untruthful.<sup>909</sup>

309. Milan Lukić further submits that no reasonable trial chamber could have found that he started the fire in the Omeragić House solely on the basis of VG013's evidence.<sup>910</sup> Milan Lukić argues that the Trial Chamber failed to consider that VG013 had not mentioned that Milan Lukić

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<sup>904</sup> See *supra* para. 266.

<sup>905</sup> See *infra* para. 404.

<sup>906</sup> Trial Judgement, paras 558-560, 608, 612.

<sup>907</sup> Milan Lukić's sub-ground 3(A). Milan Lukić Appeal Brief, paras 141-145; Milan Lukić Reply Brief, para. 68.

<sup>908</sup> Milan Lukić Appeal Brief, paras 141-145. Milan Lukić submits in particular that it would have been impossible to remove all evidence of the fire (see Milan Lukić Appeal Brief, paras 142(e), 143(d)).

<sup>909</sup> Milan Lukić Appeal Brief, para. 140; Milan Lukić Reply Brief, para. 68.

started the fire in a statement from 1995, but only mentioned it for the first time in a statement given in 1998.<sup>911</sup>

310. The Appeals Chamber notes that the Trial Chamber extensively considered the evidence of the Defence forensic experts Benjamin Dimas (“Dimas”), Martin McCoy, and Stephen O’Donnell (“O’Donnell”).<sup>912</sup> The Trial Chamber concluded “that under cross-examination these experts allowed for such a range of possibilities and qualifications to their initial conclusions as to render their overall findings about the lack of a fire of the kind alleged by the Prosecution practically without foundation”.<sup>913</sup> Although the Trial Chamber does not provide a specific reference to this particular finding, the Trial Chamber previously noted that Dimas agreed with the Prosecution “that if a fire, which had charred wood in one of the three locations, had spread, there could have been a ‘fully involved fire in that room’.”<sup>914</sup> It also noted a number of different instances where, according to the expert evidence, 17 years of exposure to the elements could explain the absence of fire damage.<sup>915</sup> The Trial Chamber particularly took into account O’Donnell’s testimony that the impact marks indicated “that the room may have been crowded when the explosive device detonated.”<sup>916</sup> It further found that “the experts agreed with the Prosecution that the fire could have taken place”.<sup>917</sup> The Trial Chamber was satisfied that their evidence did not cast doubt on the Prosecution’s evidence.<sup>918</sup> In these circumstances, the Appeals Chamber finds that Milan Lukić has failed to show that the Trial Chamber erred in finding that a fire occurred as alleged at the Omeragić House.

311. Although Mašović testified that it was “theoretically” possible that the events had not occurred, due to the absence of human remains,<sup>919</sup> his evidence must be read as a whole. Mašović asserted that to “imply that all those, and we are talking about hundreds of people or more, who came to the institute to report one of their own as missing were lying [...] is something that [he found] difficult to believe”.<sup>920</sup> Milan Lukić’s submissions in this respect are therefore dismissed.

312. Based on the evidence of VG013, the Trial Chamber found that Milan Lukić placed the explosive device in the Omeragić House.<sup>921</sup> The Appeals Chamber notes, however, that the Trial

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<sup>910</sup> Milan Lukić Appeal Brief, para. 163. *See also* Milan Lukić Reply Brief, paras 72-73; Appeal Hearing, AT. 65 (14 September 2011).

<sup>911</sup> Milan Lukić Appeal Brief, para. 167; Milan Lukić Reply Brief, para. 73.

<sup>912</sup> Trial Judgement, paras 450, 452-477, 551-553.

<sup>913</sup> Trial Judgement, para. 553.

<sup>914</sup> Trial Judgement, para. 460.

<sup>915</sup> Trial Judgement, paras 468-471, 474.

<sup>916</sup> Trial Judgement, para. 463.

<sup>917</sup> Trial Judgement, para. 553.

<sup>918</sup> Trial Judgement, paras 552-553.

<sup>919</sup> Mašović, T. 3185-3186 (30 October 2008).

<sup>920</sup> Mašović, T. 3185-3186 (30 October 2008).

<sup>921</sup> Trial Judgement, paras 608-612, referring to Trial Judgement, paras 365, 367.

Chamber did not explicitly consider that, in a statement from 1995,<sup>922</sup> VG013 did not identify Milan Lukić as the person who placed the explosive device in the Omeragić House.<sup>923</sup> The Appeals Chamber considers that the Trial Chamber erred in not addressing this discrepancy. However, it finds that the error has no impact on the Trial Chamber's finding that Milan Lukić placed the device in the Omeragić House. The Appeals Chamber notes that the 1995 statement<sup>924</sup> is less detailed than the one VG013 provided in 1998.<sup>925</sup> In the 1995 statement, as well as in her 2008 statement and her interview,<sup>926</sup> the witness frequently refers to the perpetrators as "they" without further specifying who set the house on fire.<sup>927</sup> Moreover, the Trial Chamber relied on the witness's testimony in the *Vasiljević* case and her testimony in examination-in-chief and cross-examination in the current case<sup>928</sup> in which she consistently maintained that it was Milan Lukić who started the fire. The Appeals Chamber finds that the 1995 statement, the 2008 statement, and the interview do not contradict this evidence or the Trial Chamber's finding. The Appeals Chamber therefore finds that Milan Lukić has not shown that the Trial Chamber erred in relying on VG013's testimony to prove that Milan Lukić started the fire at the Omeragić House. Milan Lukić's argument is therefore dismissed.

#### 4. Proof of death

313. The Trial Chamber found that 59 individuals died in the fire at the Omeragić House<sup>929</sup> after hearing the evidence of: (i) seven eye-witnesses, six of whom were survivors (VG013, VG018, VG038, VG078, VG084, VG101),<sup>930</sup> and one of whom witnessed the incident from a distance (VG115);<sup>931</sup> (ii) Huso Kurspahić, who was told about the events by his late father, Hasib Kurspahić, a survivor of the incident;<sup>932</sup> and (iii) CW1, who was not present during the incident but lost relatives in it.<sup>933</sup>

<sup>922</sup> Exh. 1D29 (confidential).

<sup>923</sup> The Appeals Chamber also notes that the Trial Chamber considered Exhs 2D6 (confidential), an interview of VG013, P62 (confidential), a statement of VG013 from 2008, in which the witness did not identify Milan Lukić as the person who placed the device in the Omeragić House (Trial Judgement, fn. 1274). Milan Lukić does not make the same argument in relation to these documents.

<sup>924</sup> Exh. 1D29 (confidential).

<sup>925</sup> Exh. P60 (confidential).

<sup>926</sup> Exh. 2D6 (confidential).

<sup>927</sup> Exhs 1D29 (confidential), p. 2 ("they [...] soon came back with flammable matter, which started burning immediately"); 2D6 (confidential), p. 2 ("[t]hey brought some kind of device and threw it among us"); P62 (confidential), p. 4 ("they threw something burning in through the door").

<sup>928</sup> Trial Judgement, paras 367, 608.

<sup>929</sup> Trial Judgement, para. 567.

<sup>930</sup> Trial Judgement, paras 330-333, 389.

<sup>931</sup> Trial Judgement, para. 333.

<sup>932</sup> Trial Judgement, paras 334, 389.

<sup>933</sup> Trial Judgement, paras 388-389.

314. Milan Lukić submits that the Trial Chamber erred in finding that the deaths of victims of the Pionirska Street Incident were proven with sufficient certainty. In particular, he argues that: (i) 25 of the 59 victims never existed as they lack a citizen identification number (“JMBG”) or other registration;<sup>934</sup> (ii) the Trial Chamber erred in failing to consider evidence that eight of the victims did not die as alleged;<sup>935</sup> and (iii) the Trial Chamber erred in failing to consider evidence showing that seven of the victims were alive after the fire.<sup>936</sup>

315. At the outset, the Appeals Chamber notes that in concluding that 59 people died in the fire, the Trial Chamber found that both Mina Kurspahić and Jasmina Delija were among the victims.<sup>937</sup> The Prosecution concedes that these women were one and the same person,<sup>938</sup> on the basis of Huso Kurspahić’s testimony in which he explained that the names Mina Kurspahić and Jasmina Delija refer to the same individual.<sup>939</sup> The evidence of other witnesses corroborates this fact.<sup>940</sup> Accordingly, the Appeals Chamber finds that the Trial Chamber erred when it listed Mina Kurspahić and Jasmina Delija as two different victims. The total number of victims at this juncture should therefore be reduced by one, to a total of 58.

316. As the Appeals Chamber noted above, proof beyond a reasonable doubt that a person is dead does not necessarily require that the body of that person was recovered.<sup>941</sup> A victim’s death can be inferred circumstantially from all of the evidence presented to a trial chamber.<sup>942</sup> The Appeals Chamber turns to the substance of the arguments. In doing so, it will only conclude as to

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<sup>934</sup> Milan Lukić Appeal Brief, paras 138-139, referring to Exhs 1D221, 1D233, which are responses to his request for information about the alleged victims from Bosnian authorities (collectively, “Registration Records”). Milan Lukić argues that “every person born after 1980 was provided with a JMBG at birth and everyone born before that year was given one retrospectively” (Milan Lukić Reply Brief, para. 66). He raises this argument in relation to: Hasena last name unknown (“LNU”), Tima Jasarević/Velić, Hajra Jasarević/Halilović, Mujo Jasarević/Halilović, Alija Kurspahić, Dzheva Kurspahić, first name unknown (“FNU”) Kurspahić, Hasa Kurspahić, Hana/Hasiba Kurspahić, Hata Kurspahić, Ifeta Kurspahić, Ismet Kurspahić, Izeta Kurspahić, Maida Kurspahić, Mejra Kurspahić, Mina Kurspahić, Munevera Kurspahić, Pašija Kurspahić, Ramiza Kurspahić, Sadeta Kurspahić, Sajma Kurspahić, Seila Kurspahić, Vahid Kurspahić, Fazila Memisević, and Haraga Šehić.

<sup>935</sup> Milan Lukić Appeal Brief, paras 138-139; Milan Lukić Reply Brief, para. 67. Milan Lukić raises this argument in relation to: Hasena LNU, Hajrija Kurspahić, Hana/Hasiba Kurspahić, Hasan Kurspahić, Izeta Kurspahić, Maida Kurspahić, Mina Kurspahić, and Seila Kurspahić.

<sup>936</sup> Milan Lukić Appeal Brief, paras 138-139; Milan Lukić Reply Brief, para. 65. Milan Lukić raises this argument in relation to: Meho Jasarević/Halilović, Ismet Kurspahić, Ismeta Kurspahić, Medo Kurspahić, Hasan Kurspahić and Redžo Memišević. Milan Lukić also makes this argument in relation to a victim who has the same name as one of the protected witnesses.

<sup>937</sup> Trial Judgement, para. 567.

<sup>938</sup> Prosecution Response Brief (Milan Lukić), para. 113.

<sup>939</sup> Prosecution Reponse Brief (Milan Lukić), para. 113, referring to Huso Kurspahić, T. 6871 (7 April 2009). Huso Kurspahić explained that the victim’s given name was Jasmina, her nickname was Mina, and her surname changed from Kurspahić to Delija when she married (*see* Huso Kurspahić, T. 6871 (7 April 2009)).

<sup>940</sup> No witness included *both* Mina Kurspahić *and* Jasmina Delija as a victim, but always one or the other; and both names were recorded as being the name of a daughter of Bisera Kurspahić (*see* Exhs 1D33 (confidential), p. 7; 1D36 (confidential), p. 6; P39; P60 (confidential), p. 8; P85; P90 (confidential), p. 2; P92 (confidential), p. 6; P333, p. 1). Further, CW1 testified that she knew a Jasmina Kurspahić, whose married name was Delija (CW1, T. 5572 (17 March 2009)).

<sup>941</sup> *See supra* para. 149.

<sup>942</sup> *See supra* para. 149.



the reasonableness of a finding that a particular victim died once all of the arguments relevant to that victim have been addressed.

(a) Lack of proof of registration

317. Milan Lukić argues that the lack of a JMBG or other proof of registration for 25 of the victims of the Pionirska Street Incident means that they never existed and thus could not have died in the fire.<sup>943</sup> He submits that, as a result, the Trial Chamber did not properly assess the death of these individuals.<sup>944</sup> According to Milan Lukić, the Prosecution's Victims Chart confirms a lack of any independent evidence as to the existence of certain alleged victims.<sup>945</sup>

318. The Appeals Chamber disagrees with Milan Lukić that the Trial Chamber erred when it did not consider that the lack of a JMBG in the Registration Records and the Prosecution's Victims Chart for certain victims was evidence that they never existed and thus could not have died in the fire. The fact that a JMBG was not provided for a particular victim shows only that the Prosecution and local authorities were unable to determine the JMBG, not that the individual never had a JMBG or that he or she never existed.<sup>946</sup> The Appeals Chamber considers that it was not unreasonable for the Trial Chamber to conclude that the victims existed despite the lack of a JMBG.<sup>947</sup>

319. Having concluded that there was no error in finding that the victims had existed despite the lack of a JMBG, the Appeals Chamber will address the reasonableness of the Trial Chamber's finding that the victims were killed. Milan Lukić raises no further challenges with regard to Hajra Jasarević/Halilović, FNU Kurspahić, Haša Kurspahić, Hata Kurspahić, Ifeta Kurspahić, Mejra Kurspahić, Munevera Kurspahić, Pasana/Pašija Kurspahić, Sadeta Kurspahić, Sajma Kurspahić, and Mujo Jasarević/Halilović. Given that the Trial Chamber relied on the evidence of multiple eye-witnesses, all of whom were relatives of the victims, as corroborated by the evidence of Huso Kurspahić and CW1,<sup>948</sup> the Appeals Chamber is satisfied that the Trial Chamber did not err when it found that these victims died despite lacking a JMBG. Contrary to Milan Lukić's submissions,<sup>949</sup> a

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<sup>943</sup> Milan Lukić Appeal Brief, paras 138-139; Milan Lukić Reply Brief, para. 66.

<sup>944</sup> Milan Lukić Appeal Brief, para. 138.

<sup>945</sup> Milan Lukić Appeal Brief, paras 138-139, referring to Prosecution's Victims Chart; Milan Lukić Reply Brief, para. 66.

<sup>946</sup> Stoja Vujičić, T. 6674-6675 (2 April 2009); Exh. P300, pp. 8-9.

<sup>947</sup> This finding is relevant in relation to: Hasena LNU, Tima Jasarević/Velić, Hajra Jasarević/Halilović, Mujo Jasarević/Halilović, Alija Kurspahić, Dzheva Kurspahić, FNU Kurspahić, Hasa Kurspahić, Hana/Hasiba Kurspahić, Hata Kurspahić, Ifeta Kurspahić, Ismet Kurspahić, Izeta Kurspahić, Maida Kurspahić, Mejra Kurspahić, Mina Kurspahić, Munevera Kurspahić, Pasija Kurspahić, Ramiza Kurspahić, Sadeta Kurspahić, Sajma Kurspahić, Seila Kurspahić, Vahid Kurspahić, Fazila Memisević, and Haraga Schić (*see* Trial Judgement, para. 392).

<sup>948</sup> Trial Judgement, paras 392, 567.

<sup>949</sup> Milan Lukić Appeal Brief, para. 139.

JMBG was provided for the following victims: Tima Jasarević/Velić,<sup>950</sup> Alija Kurspahić,<sup>951</sup> Dzheva Kurspahić,<sup>952</sup> Ramiza Kurspahić,<sup>953</sup> Vahid Kurspahić,<sup>954</sup> and Fazila Memisević.<sup>955</sup> In these circumstances, the Appeals Chamber considers that it was reasonable to conclude that these victims died.

320. In finding that an individual by the name of Haraga Šehić was killed in the Pionirska Street Incident, the Trial Chamber relied on a statement of VG018 (Exhibit P83) and Mašović's Missing Persons Chart.<sup>956</sup> The Appeals Chamber notes that in Exhibit P83, VG018 identified Haraga Šehić as a victim.<sup>957</sup> In that statement, VG018 also identified Kada Šehić, another victim, who shared the same surname.<sup>958</sup> In VG018's other witness statements, she lists as victims Kada Šehić and Faruk Šehić, whom the Trial Chamber also found to have perished in the Pionirska Street Incident.<sup>959</sup> However, VG018's other witness statements make no mention of Haraga Šehić.<sup>960</sup>

321. Mašović's Missing Persons Chart, the second exhibit relied on by the Trial Chamber, does not list a Haraga Šehić. It does, however, list Kada Šehić and Faruk Šehić.<sup>961</sup> The Appeals Chamber also notes that none of the other eye-witnesses name Haraga Šehić as one of the victims of the Pionirska Street Incident but they all include Kada Šehić<sup>962</sup> and Faruk Šehić<sup>963</sup> among the victims. Further, the Appeals Chamber notes that Huso Kurspahić testified that Kada Šehić was his sister and that Faruk Šehić was her son, and that the only Haraga Šehić he knew had died before the war.<sup>964</sup> In addition to Haraga Šehić, the Trial Chamber found that Kada and Faruk Šehić died in the

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<sup>950</sup> Prosecution's Victims Chart, p. 7. The Trial Chamber found that the alleged victim Tima Velić was the same person as Tima Jasarević (Trial Judgement, para. 395). A JMBG was provided for Tima Velić.

<sup>951</sup> Exh. 1D233, p. 2.

<sup>952</sup> Exh. 1D233, p. 2.

<sup>953</sup> Exhs 1D221, p. 2; 1D233, p. 3; Prosecution's Victims Chart, p. 6.

<sup>954</sup> Prosecution's Victims Chart, p. 7.

<sup>955</sup> Exh. 1D233, p. 4.

<sup>956</sup> Trial Judgement, paras 392, 567, fn. 1440.

<sup>957</sup> Exh. P83 (confidential), p. 5.

<sup>958</sup> Exh. P83 (confidential), p. 5.

<sup>959</sup> Exhs 1D33 (confidential) (daughter of Hasib Šehić, Kada (1947), and her son Faruk (1979)); P85 (Kada Šehić (approximate age 39), Faruk Šehić (approximate age 12)). The Trial Chamber found that Kada Šehić was the same person as Kada Kurspahić, and she is therefore listed as Kada Kurspahić/Šehić (Trial Judgement, paras 395, 567).

<sup>960</sup> Exhs. 1D33 (confidential) (daughter of Hasib Šehić, Kada (1947), and her son Faruk (1979)); P85 (Kada Šehić (approximate age 39), Faruk Šehić (approximate age 12)).

<sup>961</sup> Mašović's Missing Persons Chart, p. 15.

<sup>962</sup> The Trial Chamber found that Kada Šehić was the same person as Kada Kurspahić (Trial Judgement, para. 395).

<sup>963</sup> VG013 (Exhs 1D29 (confidential), p. 3 ("Kada, [...], Faruk"); P60 (confidential), p. 8 ("Šehić Kada (about 39 years old), Šehić Faruk (son of Kada; about 12 years old)"); VG038 (Exhs 1D26 (confidential), p. 6 ("Kada Šehić, Faruk"); 1D27 (confidential), p. 5 ("Kada Šehić, Faruk Šehić"); P85 ("Faruk Šehić, 12", "Kada Šehić, 39")); VG078 (Exhs P90 (confidential), p. 1 ("Kurspahić, Kada – daughter of Hasib. She was about 40 years", "Kurspahić, Faruk – son of Kada/father's first name Rasib. He was about 7 years old"); P92 (confidential), p. 5 ("Kurspahić, Kada – daughter of Hasib. She was about 40 years", "Kurspahić, Faruk – son of Kada/father's first name Rasib. He was about 7 years old"); VG101 (Exh. 1D36 (confidential), p. 6 ("Kurspahić Kada – daughter of Hasib. She was about 40 years." Kurspahić Faruk – son of Kada/father's first name Rasib. He was about 7 years old.")).

<sup>964</sup> Huso Kurspahić, T. 6952, 6961 (7 April 2009). *See also* Exhs P39 ("Šehić Kada (about 39 years old)", "Šehić Faruk (son of Kada, about 12 years old)"); P333, p. 2 ("Kada (Hasib) Šehić", "Faruk (Rasim) Šehić 1979").

fire.<sup>965</sup> In these circumstances, the Appeals Chamber finds that no reasonable trier of fact could have found that Haraga Šehić died in the Pionirska Street Incident.

322. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in finding that Haraga Šehić was a victim of the Pionirska Street Incident. Accordingly, the total number of victims should be further reduced by one to a total of 57.

(b) Evidence that certain victims did not die as alleged

(i) Evidence of CW1

323. CW1, who was not present during the Pionirska Street Incident, gave evidence about relatives who died in the fire.<sup>966</sup> Milan Lukić submits that her evidence raises reasonable doubt that the following individuals died in the Pionirska Street Incident:<sup>967</sup> Hasena LNU,<sup>968</sup> Hajrija Kurspahić,<sup>969</sup> Hana/Hasiba Kurspahić,<sup>970</sup> Hasan Kurspahić,<sup>971</sup> Izeta Kurspahić,<sup>972</sup> Maida Kurspahić,<sup>973</sup> Mina Kurspahić,<sup>974</sup> and Seila Kurspahić.<sup>975</sup>

324. In finding that Hasena LNU died in the Pionirska Street Incident, the Trial Chamber relied on a statement of VG101,<sup>976</sup> who identified this individual as being from Sase.<sup>977</sup> CW1 testified that she knew a Hasena, who was the daughter of Hasan Kurspahić, but that she was alive.<sup>978</sup> Although there is no indication that the Trial Chamber considered this evidence in finding that Hasena LNU died, the Appeals Chamber finds that this portion of CW1's evidence, by itself, is not capable of rendering unreasonable the Trial Chamber's finding. However, the Appeals Chamber notes that the other eye-witnesses to the Pionirska Street Incident did not include an individual with this name on their lists of victims. Moreover, neither Huso Kurspahić's evidence nor the Registration Records provide corroborating evidence that an individual named Hasena LNU existed prior to the fire or was killed during the incident. The Appeals Chamber finds that in light of the contradictory and

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<sup>965</sup> Trial Judgement, para. 567. The Trial Chamber found that Kada Šehić was the same person as Kada Kurspahić, and she is therefore listed as Kada Kurspahić/Šehić (Trial Judgement, paras 395, 567).

<sup>966</sup> Trial Judgement, paras 388-389.

<sup>967</sup> Milan Lukić Appeal Brief, paras 138-139; Milan Lukić Reply Brief, para. 67. The Appeals Chamber notes that Milan Lukić also argues that the Trial Chamber erred in not attributing more weight to the evidence of CW1 (Milan Lukić Appeal Brief, paras 342-343).

<sup>968</sup> Milan Lukić Appeal Brief, para. 139, referring to CW1, T. 5561 (17 March 2009).

<sup>969</sup> Milan Lukić Appeal Brief, para. 139, referring to CW1, T. 5565-5566 (17 March 2009).

<sup>970</sup> Milan Lukić Appeal Brief, para. 139, referring to CW1, T. 5568-5569 (17 March 2009).

<sup>971</sup> Milan Lukić Appeal Brief, para. 139, referring to CW1, T. 5566-5567 (17 March 2009).

<sup>972</sup> Milan Lukić Appeal Brief, para. 139, referring to CW1, T. 5569-5570 (17 March 2009).

<sup>973</sup> Milan Lukić Appeal Brief, para. 139, referring to CW1, T. 5570-5571 (17 March 2009).

<sup>974</sup> Milan Lukić Appeal Brief, para. 139, referring to CW1, T. 5572 (17 March 2009).

<sup>975</sup> Milan Lukić Appeal Brief, para. 139, referring to CW1, T. 5574 (17 March 2009).

<sup>976</sup> Trial Judgement, paras 392, 567, fn. 1380.

<sup>977</sup> Exh. 1D36 (confidential), p. 6.

<sup>978</sup> Milan Lukić Appeal Brief, para. 139, referring to CW1, T. 5561 (17 March 2009).

inconclusive evidence, the Trial Chamber could not have reasonably found that Hasena LNU died as alleged.

325. In finding that Hajrija Kurspahić died in the fire, the Trial Chamber relied on the evidence of five eye-witnesses, who were her relatives,<sup>979</sup> as well as the corroborating evidence of Huso Kurspahić.<sup>980</sup> The evidence that the Trial Chamber relied on identifies this person as a woman.<sup>981</sup> CW1 testified that she did not know anyone by the name of Hajrija Kurspahić but that she knew a man named Hajro, who had died of natural causes.<sup>982</sup> There is no indication that the Trial Chamber took CW1's testimony into account. However, the Appeals Chamber considers that it was not in any event capable of rendering unreasonable the Trial Chamber's finding that Hajrija Kurspahić died in the Pionirska Street Incident.

326. In finding that Hana/Hasiba Kurspahić died in the fire, the Trial Chamber relied on the evidence of five eye-witnesses, all of whom were her relatives, as well as the corroborating evidence of Huso Kurspahić.<sup>983</sup> CW1 testified that she did not know anyone named Hasiba Kurspahić, but she did know a woman named Hana Kurspahić, who was the sister of Huso and daughter of Hata.<sup>984</sup> She did not testify as to whether this person died in the fire. There is no indication that the Trial Chamber took into account CW1's evidence with regard to Hana/Hasiba Kurspahić. However, the Appeals Chamber considers that it was not in any event capable of rendering unreasonable the Trial Chamber's findings that Hana/Hasiba Kurspahić died in the fire.

327. In finding that Hasan Kurspahić died in the Pionirska Street Incident, the Trial Chamber relied on the evidence of five eye-witnesses, as well as the corroborating evidence of Huso Kurspahić.<sup>985</sup> The section of CW1's evidence referred to by Milan Lukić<sup>986</sup> indicated that there were two individuals named Hasan Kurspahić: one who left Višegrad in May 1992 while the other remained in Koritnik at the time<sup>987</sup> and was listed as number 26 on the list of alleged murder victims attached to the Indictment in annexes A and B ("Alleged Victims List").<sup>988</sup> The Appeals

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<sup>979</sup> Trial Judgement, paras 392, 562, fn. 1398.

<sup>980</sup> Trial Judgement, paras 392, 567, fn. 1398. The Trial Chamber also referred to Exh. P175 (confidential) and Mašović's Missing Persons Chart, which list her as a missing person.

<sup>981</sup> See Trial Judgement, para. 392, fn. 1398.

<sup>982</sup> CW1, T. 5565-5566 (17 March 2009).

<sup>983</sup> Trial Judgement, paras 392, 395, 567, fns 1400, 1402. The Trial Chamber also referred to Exh. P175 (confidential), which lists her as a missing person.

<sup>984</sup> CW1, T. 5566, 5568-5569 (17 March 2009).

<sup>985</sup> Trial Judgement, paras 392, 567, fn. 1401. The Trial Chamber also referred to Exh. P175 (confidential) and Mašović's Missing Persons Chart, which list Hasan Kurspahić as missing, and Exh. P300, indicating that there were two persons by the name of Hasan Kurspahić. The Trial Chamber further referred to CW1, T. 5544-5545 (17 March 2009) (private session), although the Appeals Chamber notes that Hasan Kurspahić is not mentioned in this section.

<sup>986</sup> Milan Lukić Appeal Brief, para. 139.

<sup>987</sup> CW1, T. 5566-5567 (17 March 2009) (private session).

<sup>988</sup> Indictment, Annex A; CW1, T. 5566 (12 March 2009) (private session).

Chamber notes that the Trial Chamber did not indicate whether it had specifically considered these portions of CW1's evidence in making its finding that Hasan Kurspahić perished in the fire. However, the Trial Chamber considered other parts of CW1's testimony together with other evidence and found that there were two individuals named Hasan Kurspahić.<sup>989</sup> The Trial Chamber found that the first person known as Hasan Kurspahić was married to a woman named Meva Kurspahić, while the second Hasan Kurspahić was married to Mejra Kurspahić.<sup>990</sup> It concluded that the second Hasan Kurspahić was the person who died in the fire.<sup>991</sup> According to CW1's evidence, the Hasan Kurspahić who left Višegrad was married to Meva Kurspahić.<sup>992</sup> CW1's evidence that Hasan Kurspahić left Višegrad in May 1992 thus concerns a person other than the Hasan Kurspahić whom the Trial Chamber found to have died, and is therefore not capable of undermining the Trial Chamber's finding. As Milan Lukić raises additional arguments in relation to Hasan Kurspahić, the Appeals Chamber will consider them below before determining whether the Trial Chamber erred in finding that Hasan Kurspahić died in the Pionirska Street Incident.<sup>993</sup>

328. In finding that an individual by the name of Izeta Kurspahić was killed, the Trial Chamber relied on the evidence of VG078, who identified Izeta Kurspahić as the 24-year old mother of an infant who was born days prior to the incident.<sup>994</sup> According to the section of CW1's evidence cited by Milan Lukić, CW1 did not know anyone by the name of Izeta Kurspahić.<sup>995</sup> Although it is unclear whether the Trial Chamber considered this evidence in finding that Izeta Kurspahić died in the fire, the Appeals Chamber finds that this section of CW1's evidence, by itself, is not capable of rendering unreasonable the Trial Chamber's finding that Izeta Kurspahić died in the Pionirska Street Incident. However, notwithstanding this finding, the Appeals Chamber considers that the Trial Chamber erred in finding that Izeta Kurspahić died in the fire. While there was indeed one young mother among the victims, it is clear from the evidence that, in fact, her name was Sadeta Kurspahić.<sup>996</sup> CW1 testified that there was a young mother with a newborn infant among the victims, named Sadeta Kurspahić.<sup>997</sup> Other eye-witnesses also mentioned one young mother with a

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<sup>989</sup> Trial Judgement, para. 396.

<sup>990</sup> Trial Judgement, para. 396.

<sup>991</sup> Trial Judgement, para. 396.

<sup>992</sup> CW1, T. 5552-5553, 5571, 5581-5582 (17 March 2009) (private session). *See also* Trial Judgement, para. 396. The Appeals Chamber notes that this Hasan Kurspahić was the son of Alija Kurspahić (*see* Prosecution's Victims Chart, p. 4).

<sup>993</sup> *See infra* paras 335-338.

<sup>994</sup> Trial Judgement, paras 392, 567, fn. 1409, referring to VG78, T. 1388 (8 September 2008), Exhs P90 (confidential), P92 (confidential).

<sup>995</sup> CW1, T. 5570 (17 March 2009).

<sup>996</sup> *See* Trial Judgement, paras 392, 567, fn. 1427 and references cited therein.

<sup>997</sup> CW1 testified that: "[Sadeta Kurspahić] had a [...] 2-day old baby. She stayed in Koritnik. She was pregnant when I left, but you could see that she was with-child as I was leaving" (CW1, T. 5565, 5574 (17 March 2009)).

newborn infant among the victims and consistently identified her as Sadeta Kurspahić.<sup>998</sup> The Appeals Chamber notes, in contrast, that none of the eye-witnesses, other than VG078, mentioned an individual named Izeta Kurspahić, as being among the victims. The Appeals Chamber further notes that Huso Kurspahić testified that he did not know anyone by this name.<sup>999</sup> In light of the foregoing, the Appeals Chamber finds that no reasonable trier of fact could have found that Izeta Kurspahić was among the victims of the Pionirska Street Incident.

329. In finding that an individual by the name of Maida Kurspahić was killed, the Trial Chamber relied on the evidence of VG018 who identified Maida Kurspahić as the daughter of Dzheva Kurspahić.<sup>1000</sup> VG018 also gave evidence that Dzheva Kurspahić had a son named Ismet Kurspahić.<sup>1001</sup> CW1 testified that she did not know any child by the name “Maida” in Koritnik.<sup>1002</sup> According to CW1, the name Maida was misspelled on the Alleged Victims List.<sup>1003</sup> The correct spelling was “Hasida” and this girl was in fact a close relative of CW1.<sup>1004</sup> There is no indication as to whether the Trial Chamber considered the section of CW1’s evidence referenced by Milan Lukić in this context. None of the other witnesses identified Maida Kurspahić as among the victims of the Pionirska Street Incident. Moreover, although the evidence of CW1 and other witnesses confirms that Dzheva Kurspahić had two children, they consistently identified her daughter as Mirela Kurspahić,<sup>1005</sup> whom the Trial Chamber found to have died in the fire.<sup>1006</sup> The Appeals Chamber notes that VG018 did not list Mirela Kurspahić as a victim of the incident. In these circumstances, the Appeals Chamber finds that no reasonable trier of fact could have found that Maida Kurspahić died in the fire.

330. Regarding Milan Lukić’s challenge to the finding on the death of Mina Kurspahić based on CW1’s evidence, the Appeals Chamber recalls that it has found that Mina Kurspahić was the same

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<sup>998</sup> VG013 referred to “KURSPAHIĆ [...] Sadeta and her three-day-old baby” (Exh. 1D29 (confidential)). VG018 provided evidence concerning “Sadeta’s child two days old” and stated that “[t]here was a young girl with us, who had a young baby a few days old. Her name was Kurspahic [sic] Sadeta; I don’t know the name of her child” (Exhs 1D33 (confidential); P83 (confidential)). VG038 similarly stated: “Sadeta and her three-day old daughter” (Exh. 1D26 (confidential)). VG101 testified that there was a three-day old baby among the victims and that her mother was Sadeta (VG101, T. 1149 (27 September 2001)). See also Exh. 1D36 (confidential)). Huso Kurspahić also testified that there was a two-day old child among the victims, whose mother was Sadeta Kurspahić (Huso Kurspahić, T. 6948 (7 April 2009)).

<sup>999</sup> Huso Kurspahić, T. 6952 (7 April 2009).

<sup>1000</sup> Trial Judgement, paras 392, 567, fn. 1413, referring to Exhs P82 (confidential), P83 (confidential).

<sup>1001</sup> Exh. P83 (confidential), p. 5.

<sup>1002</sup> CW1, T. 5570-5571 (17 March 2009) (private session).

<sup>1003</sup> CW1, T. 5570-5571 (17 March 2009) (private session).

<sup>1004</sup> CW1, T. 5570-5571, 5580-5581 (17 March 2009) (private session). CW1 concluded that Maida Kurspahić on the Alleged Victims List was in fact her close relative Hasida, based on the fact that CW1 did not know anyone named Maida and because the Alleged Victims List indicated that Maida, like Hasida, was also a “little girl” at the time (CW1, T. 5581 (17 March 2009) (private session)).

<sup>1005</sup> CW1, T. 5565, 5572-5573 (17 March 2009); Exhs 1D33 (confidential), p. 7; 1D36 (confidential), p. 5; P39; P60 (confidential), p. 8; P90 (confidential), p. 1; P92 (confidential), p. 5. See also Exhs 1D26 (confidential); 1D27 (confidential); 1D29 (confidential), p. 3; P61, p. 12.

<sup>1006</sup> Trial Judgement, paras 392, 567.

person as Jasmina Delija.<sup>1007</sup> The Appeals Chamber notes that CW1 testified that she did not know anyone named Mina Kurspahić.<sup>1008</sup> She further testified that she did know a Jasmina Kurspahić, but did not state whether this person died in the fire.<sup>1009</sup> The Trial Chamber considered this evidence<sup>1010</sup> but was nevertheless satisfied that Mina Kurspahić/Jasmina Delija died in the fire on the basis of the evidence of multiple eye-witnesses.<sup>1011</sup> The Appeals Chamber finds that Milan Lukić has not shown that CW1's evidence is capable of undermining the Trial Chamber's finding. The Trial Chamber thus reasonably found that Mina Kurspahić/Jasmina Delija died in the Pionirska Street Incident.

331. In finding that an individual by the name of Seila Kurspahić was killed, the Trial Chamber relied on the statement of VG013 and the corroborating testimony of Huso Kurspahić.<sup>1012</sup> In her statement, VG013 identified Seila Kurspahić as the two-year old daughter of Latifa Kurspahić and sister of Lejla Kurspahić and indicated that all three had died in the fire.<sup>1013</sup> However, VG013 testified at trial that Latifa Kurspahić and her two daughters had not died in the fire.<sup>1014</sup> CW1 testified that Latifa Kurspahić and her two daughters, to whom she was closely related, left Višegrad at the end of May 1992 and were not involved in the Pionirska Street Incident.<sup>1015</sup> Moreover, CW1 testified that Latifa Kurspahić did not have a daughter named Seila Kurspahić.<sup>1016</sup> Huso Kurspahić also testified that Latifa Kurspahić and her two daughters were alive after the fire.<sup>1017</sup> In light of this evidence, the Appeals Chamber finds that no reasonable trier of fact could have found that Seila Kurspahić died as alleged.

332. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in finding that Hasena LNU, Izeta Kurspahić, Maida Kurspahić, and Seila Kurspahić died in the Pionirska Street Incident. Accordingly, the total number of victims should be further reduced by four, bringing the total number of victims to 53.<sup>1018</sup>

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<sup>1007</sup> See *supra* para. 315.

<sup>1008</sup> CW1, T. 5572 (17 March 2009).

<sup>1009</sup> CW1, T. 5572 (17 March 2009).

<sup>1010</sup> Trial Judgement, para. 398.

<sup>1011</sup> Trial Judgement, paras 392, 567, fn. 1418. In finding that Jasmina Delija died, the Trial Chamber relied on two eye-witnesses (VG078: Exhs P90 (confidential), P92 (confidential); VG101: Exh. 1D36 (confidential)) as corroborated by Huso Kurspahić (T. 6944 (7 April 2009); Exh. P333). The Trial Chamber also referred to Exhs P175 (confidential) and Mašović's Missing Persons Chart, which list Jasmina Delija as a missing person. In finding that Mina Kurspahić died, the Trial Chamber relied on two eye-witnesses (VG018: Exh. P85; VG038: 1D27 (confidential)) as corroborated by Huso Kurspahić (Exh. P39). The Trial Chamber also cited the evidence of VG013 (Exh. 1D29 (confidential)). However, this statement refers to a Jasmina Vila, rather than a Mina Kurspahić, as having died in the fire.

<sup>1012</sup> Trial Judgement, paras 392, 567, fn. 1431.

<sup>1013</sup> Exh. P60 (confidential), p. 8.

<sup>1014</sup> VG013, T. 1106-1107 (3 September 2008).

<sup>1015</sup> CW1, T. 5546, 5555 (17 March 2009). See also Trial Judgement, para. 568.

<sup>1016</sup> CW1, T. 5574 (17 March 2009).

<sup>1017</sup> Huso Kurspahić, T. 6873 (7 April 2009); Exh. P333, pp. 2-3.

<sup>1018</sup> The Appeals Chamber recalls its initial reduction of the total number of victims by two (see *supra* paras 315, 322).

(ii) Evidence of Huso Kurspahić

333. Milan Lukić submits that the Trial Chamber failed to consider that the evidence of Huso Kurspahić “demonstrat[es] the inaccuracy of” the Alleged Victims List.<sup>1019</sup>

334. The Appeals Chamber notes that the Trial Chamber did not consider the evidence of Huso Kurspahić with regard to Hasena LNU, Izeta Kurspahić, Maida Kurspahić, and Haraga Sehić.<sup>1020</sup> The Appeals Chamber has found above that the Trial Chamber erred in finding that these individuals died in the fire.<sup>1021</sup> The Trial Chamber considered Huso Kurspahić’s evidence with regard to all other victims it found to have died in the Pionirska Street Incident.<sup>1022</sup> The Appeals Chamber further notes that Milan Lukić neither references the part(s) of Huso Kurspahić’s evidence that the Trial Chamber allegedly failed to consider, nor specifies the names of the individuals on the Alleged Victims List whose death he challenges. In these circumstances, Milan Lukić has failed to show that the Trial Chamber erred.

(c) Evidence that alleged victims were alive after the Pionirska Street Incident

(i) Registration Records and Property Records

335. Milan Lukić argues that certain alleged victims were alive after the Pionirska Street Incident as they: (i) registered a current address after the incident; or (ii) filed a request for the return of abandoned property after the Pionirska Street Incident.<sup>1023</sup>

336. As Milan Lukić has failed to substantiate his submission by specifying which of the alleged victims registered a current address after the occurrence of the fire, the Appeals Chamber dismisses his argument.

337. The Appeals Chamber will now turn to Milan Lukić’s argument that certain victims were alive as they had filed requests for the return of abandoned property after the Pionirska Street Incident. The Trial Chamber relied on the evidence of several eye-witnesses, all of whom were relatives of the victims, as corroborated by the evidence of Huso Kurspahić, in finding that Meho

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<sup>1019</sup> Milan Lukić Appeal Brief, para. 138, referring to Annex A of the Indictment.

<sup>1020</sup> Trial Judgement, fns 1380, 1409, 1413, 1440.

<sup>1021</sup> See *supra* paras 322, 324, 328-329, 332.

<sup>1022</sup> Trial Judgement, paras 392, 394-395, 567, fns 1376-1379, 1382-1389, 1391-1399, 1401-1402, 1404-1408, 1410, 1414-1416, 1418-1428, 1430-1437, 1439, 1442-1444, 1446, 1448, 1450, 1452-1453, 1455-1456, 1459.

<sup>1023</sup> Milan Lukić Appeal Brief, paras 138-139, referring to the Registration Records and the Property Records; Milan Lukić Reply Brief, para. 65. Milan Lukić specifically submits that Redžo Memisević, Ismet Kurspahić, Medo Kurspahić, Hasan Kurspahić and Meho Jasarević/Halilović filed a request for the return of abandoned property (Milan Lukić Appeal Brief, para. 139).



Jasarević/Halilović,<sup>1024</sup> Hasan Kurspahić,<sup>1025</sup> Ismet Kurspahić,<sup>1026</sup> Medo Kurspahić,<sup>1027</sup> and Redžo Memišević<sup>1028</sup> died in the Pionirska Street Incident.<sup>1029</sup> It did not expressly consider the Property Records in this context. The Appeals Chamber notes that the Property Records show that individuals by the same names claimed property after the Pionirska Street Incident.<sup>1030</sup> The Appeals Chamber finds that they are relevant to the Trial Chamber's finding that individuals with these names died and that the failure to consider the entries in the Property Records constitutes an error. The Appeals Chamber will accordingly assess the impact, if any, of this error.

338. In finding that Meho Jasarević, Hasan Kurspahić, and Ismet Kurspahić died, the Trial Chamber referred to Exhibit P300, a report by the Prosecution's Demographic Unit.<sup>1031</sup> This report indicates that, according to the population census of 1991 in Bosnia and Herzegovina, there were at least two individuals known by each name.<sup>1032</sup> Moreover, the Appeals Chamber notes that the identifying information included in the Property Records for Meho Jasarević,<sup>1033</sup> Hasan

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<sup>1024</sup> The Trial Chamber relied on the evidence of VG13 (Exh. P60 (confidential)), as corroborated by Huso Kurspahić (Exh. P39). The Trial Chamber also referred to Exh. P300, which indicates that there were two persons by the name of Meho Jasarević. *See also* Trial Judgement, para. 394.

<sup>1025</sup> The Trial Chamber relied on the evidence of five eye-witnesses (VG013: Exhs 1D29 (confidential), 2D8 (confidential), P60 (confidential); VG018: Exhs 1D33 (confidential), P83 (confidential); VG38: Exh. 1D26 (confidential); VG78: Exhs P90 (confidential), P92 (confidential); VG101: Exh. 1D36 (confidential)) as corroborated by Huso Kurspahić (T. 6950 (7 April 2009); Exhs P39; P333). The Trial Chamber also referred to Exh. P175 (confidential) and Mašović's Missing Person Chart, which list him as a missing person, and Exh. P300, which indicates that there were two persons by the name of Hasan Kurspahić. The Trial Chamber further referred to CW1, T. 5552-5553 (17 March 2009) (private session), 5571-5572 (17 March 2009) (Trial Judgement, paras 392, 396).

<sup>1026</sup> The Trial Chamber relied on the evidence of five eye-witnesses (VG013: Exhs 1D29 (confidential), 2D8 (confidential), P60 (confidential), P61; VG18: P83 (confidential); VG38: Exh. 1D26 (confidential); VG78: Exhs P90 (confidential), P92 (confidential); VG101: Exh. 1D36 (confidential)), as corroborated by Huso Kurspahić (*see* T. 6951-6952 (7 April 2009); Exhs P39; P333). The Trial Chamber also referred to Exh. P175 (confidential) and Mašović's Missing Person Chart, which list him as a missing person, in addition to Exh. P300, which indicates that there were at least four persons by the name of Ismet Kurspahić (Trial Judgement, para. 392).

<sup>1027</sup> The Trial Chamber relied on the evidence of five eye-witnesses (VG013: Exhs 1D29 (confidential), P60 (confidential); VG018: Exhs 1D33 (confidential), P83 (confidential); VG38: Exh. 1D26 (confidential); VG78: Exhs P90 (confidential), P92 (confidential); VG101: Exh. 1D36 (confidential)), as corroborated by Huso Kurspahić (T. 6954 (7 April 2009); Exhs. P39; P333). The Trial Chamber also referred to Exh. P175 (confidential) and Mašović's Missing Person Chart, which list him as a missing person (Trial Judgement, para. 392).

<sup>1028</sup> The Trial Chamber relied on the evidence of five eye-witnesses (VG013: Exhs 1D29 (confidential), P60 (confidential); VG018: Exhs 1D33 (confidential), P83 (confidential); VG38: Exh. 1D26 (confidential); VG78: Exhs P90 (confidential), P92 (confidential); VG101: Exh. 1D36 (confidential)), as corroborated by Huso Kurspahić (T. 6959-6960 (7 April 2009); Exh. P39; P333). The Trial Chamber also referred to Exh. P175 (confidential) and Mašović's Missing Person Chart, which list him as a missing person (Trial Judgement, para. 392).

<sup>1029</sup> Trial Judgement, paras 392, 567.

<sup>1030</sup> Property Records, p. 1.

<sup>1031</sup> Trial Judgement, fns 1383, 1401, 1407.

<sup>1032</sup> Exh. P300, pp. 14-17, 24-26. The population census of 1991 lists 24 persons named Meho Jasarević (Exh. P300, pp. 14-15, 24-25); three persons named Ismet Kurspahić (Exh. P300, pp. 17, 26); and at least two persons names Hasan Kurspahić (Exh. P300, pp. 16, 25-26).

<sup>1033</sup> The Property Records list a request for the return of property by Meho Jasarević (son of Ibro), born 15 March 1933 (*see* Property Records, p. 1). The Trial Chamber found that the actual name of the person listed as Meho Jasarević on the Alleged Victim's List was in fact Meho Halilović (Trial Judgement, para. 394, referring to Huso Kurspahić, T. 6945-6946 (7 April 2009)). *See also* Huso Kurspahić T. 6901-6902 (private session), 6911, 6921, 6925, 6949 (7 April 2009); Exhs 1D27; 1D33; P83; P300, pp. 14-15; P333). Furthermore, evidence was adduced that the person the Trial Chamber found to have died was about 42 to 50 years old (*see* Exhs 1D33; P60) and was the son of Yusuf (*see* Exh. P333, p. 2 (the translation erroneously states his name as Mujo)).

Kurspahić,<sup>1034</sup> and Ismet Kurspahić<sup>1035</sup> does not match the identifying information provided by the eye-witnesses for the individuals with the same names whom the Trial Chamber found to have been victims of the fire. Therefore, since the Property Records refer to different individuals from those found by the Trial Chamber to have died, the Appeals Chamber finds that they do not undermine the reasonableness of the Trial Chamber's finding that Meho Jasarević/Halilović, Hasan Kurspahić, and Ismet Kurspahić died in the fire.

339. As regards Medo Kurspahić and Redžo Memišević, the Appeals Chamber notes that the identifying information provided in the Property Records does match the identifying information provided by eye-witnesses for the victims with the same name.<sup>1036</sup> In determining whether a reasonable trial chamber could nevertheless have concluded that they were killed in the fire on Pionirska Street, the Appeals Chamber considers the evidence of Huso Kurspahić. When confronted with the Property Records, he explained that family members must have submitted a claim for property in the victims' names because the property had not yet gone through the probate process and therefore remained in the name of each deceased.<sup>1037</sup> The Appeals Chamber further notes that with regard to both individuals, the Trial Chamber relied on the evidence of five eye-witnesses, as corroborated by Huso Kurspahić and Exhibit P175 and Mašović's Missing Persons Chart.<sup>1038</sup> In these circumstances, the Appeals Chamber finds that Milan Lukić has failed to demonstrate that the Trial Chamber erred in finding that Medo Kurspahić and Redžo Memišević were killed during the fire.

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<sup>1034</sup> The Property Records include a reference to the request for the return of abandoned property filed by Hasan Kurspahić, son of Alija (*see* Property Records, p. 1). The Trial Chamber found that there were two individuals by the name of Hasan Kurspahić and that the individual who was married to Mejra Kurspahić was the victim of the Pionirska Street Incident (Trial Judgement, paras 396 (referring to Exhs 1D33, P90, P92), 567). This Hasan Kurspahić was the son of Hajro Kurspahić (*see* Exh. P119, p. 3; *see also* Registration Records, p. 2).

<sup>1035</sup> The Property Records include a request for the return of abandoned property filed by Ismet Kurspahić, son of Mehmed, born on 15 June 1944 (*see* Property Records, p. 1). The Appeals Chamber notes that the translation erroneously states that he was born in 1994. However, the witness evidence indicates that the Ismet Kurspahić who was a victim of the incident was the son of Fehrat (*see* CW1, T. 5580 (17 March 2009); Exh. P333. *See also* Exhs 1D36 (confidential); P60 (confidential); P83 (confidential); P90 (confidential); P92 (confidential), in which the witnesses indicate that Ismet Kurspahić is the son of Dzehva, the wife of Fehrat) and was approximately three years old at the time of the incident. Further, Exh. P300 indicates that there are at least three individuals listed in the population census of 1991 by the name of Ismet Kurspahić, including one born in 1944 and one born in 1990. The Prosecution contacted the Ismet Kurspahić referenced by the Property Records and "determined that he is not the Ismet KURSPAHIC [*sic*] whose murder is charged in the Indictment" (*see* Exh. P300, p. 17).

<sup>1036</sup> The Property Records identify Medo Kurspahić as being the son of Bego, born in 1927, which is consistent with the witness evidence describing him as the son of Bego and as having been approximately 50-60 years old at the time of the incident (*see* Huso Kurspahić, T. 6954 (7 April 2009); Exhs 1D33 (confidential); 1D36 (confidential); P39; P60 (confidential); P83 (confidential); P90 (confidential); P92 (confidential); P333). Likewise, the Property Records describe Redžo Memišević as the son of Halil/Nail, born on 15 May 1932 in the village of Omeragić (Property Records, p. 1), which is consistent with the witness evidence that Redžo Memišević was the son of Halil and was approximately 57-68 years old (Huso Kurspahić, T. 6959-6960 (7 April 2009); Exhs 1D33 (confidential); 1D36 (confidential); P39; P60 (confidential); P83; P90 (confidential); P92 (confidential); P333); *see also* Registration Records (Exhs 1D221, p. 2; 1D233, p. 4).

<sup>1037</sup> Huso Kurspahić, T. 6903-6904 (private session), 6964-6965 (7 April 2009).

<sup>1038</sup> *See supra* para. 337.

(ii) Ismeta Kurspahić

340. On the basis of the evidence of five eye-witnesses and other corroborating evidence, the Trial Chamber found that Ismeta Kurspahić was among the persons who died in the fire at the Omeragić House on 14 June 1992.<sup>1039</sup>

341. Milan Lukić argues that this constitutes an error since document 1D225 (marked for identification) (“Višegrad Health Centre logbook”) demonstrates that Ismeta Kurspahić received medical treatment after the incident and was therefore alive after the Pionirska Street Incident.<sup>1040</sup> In addition, Milan Lukić requested the admission of other evidence on appeal in further support of his argument that Ismeta Kurspahić did not perish in the Pionirska Street Incident.<sup>1041</sup> The Appeals Chamber, Judges Pocar and Agius dissenting, admitted six documents as additional evidence.<sup>1042</sup> Subsequently, the Appeals Chamber also admitted two documents presented by the Prosecution as rebuttal evidence.<sup>1043</sup>

342. The Appeals Chamber notes that the Press Statement, together with the Exhumation and Identification Documents suggest that: (i) Ismeta Kurspahić died on 17 June 1992;<sup>1044</sup> (ii) her body

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<sup>1039</sup> Trial Judgement, paras 392, 567. The Trial Chamber relied on the evidence of five eye-witnesses (VG013: Exhs 1D29 (confidential), 2D8 (confidential), P60 (confidential), P61; VG018: Exhs 1D33 (confidential), P83 (confidential); VG038: Exh. 1D26 (confidential); VG78: Exhs P90 (confidential), P92 (confidential); VG101: Exh. 1D36 (confidential)), as corroborated by Huso Kurspahić (T. 6952 (7 April 2009); Exhs P39; P333). The Trial Chamber also referred to Exh. P175 (confidential) and Mašović’s Missing Person Chart, which list Ismeta Kurspahić as a missing person, and Exh. P300, which indicates that there is no demographic information contradicting the account of eye-witnesses (see Trial Judgement, fn. 1408).

<sup>1040</sup> Milan Lukić Appeal Brief, paras 138-139.

<sup>1041</sup> Milan Lukic’s [sic] Fourth Motion to Introduce Additional Evidence Before the Appeals Chamber, 24 January 2011 (with public Annex B and confidential Annexes A and C) (“Milan Lukić’s Motion of 24 January 2011”), para. 19(b); Milan Lukic’s [sic] Supplemental Filing in Support of Fourth Motion to Introduce Additional Evidence Before the Appeals Chamber, 1 March 2011 (public with confidential Annexes A and B) (“Milan Lukić’s Supplemental Filing of 15 March 2011”), para. 15.

<sup>1042</sup> Decision on Milan Lukić’s Fourth and Fifth Motions for Admission of Additional Evidence on Appeal, 22 July 2011 (confidential) (“Decision of 22 July 2011”), paras 3, 33. See also Registry Memorandum, “Assignment of Exhibit Numbers to documents pursuant to 22 July 2011 Decision”, 4 August 2011 (confidential). The admitted documents are Exhs 1DA1, a press statement of 9 December 2010 on exhumation of, among others, Ismeta Kurspahić (“Press Statement”); 1DA2 (confidential), a letter from the Office of the Cantonal Prosecutor in Goražde in Bosnia and Herzegovina to Milan Lukić forwarding a number of documents regarding Ismeta Kurspahić; 1DA3 (confidential), a report of the exhumation of bodies of Bosniak ethnicity at the Stražište Cemetery, dated 23 October 2009; 1DA4 (confidential), a report on establishing the identity of persons by DNA analysis, dated 9 December 2010; 1DA5 (confidential), official record on establishing identity of Ismeta Kurspahić; 1DA6 (confidential), a report on forensic medical examination of 17 December 2009 (“Report on Forensic Medical Examination”). Exhs 1DA2-1DA6 are collectively referred to as “Exhumation and Identification Documents”.

<sup>1043</sup> Decision on Prosecution’s Motion to Present Rebuttal Material, 24 August 2011 (confidential) (“Decision on Rebuttal Evidence of 24 August 2011”), pp. 2-4. The first document, Exh. PA1 (confidential), is a statement by a relative of Ismeta Kurspahić, describing the source of her knowledge regarding the circumstances in which Ismeta Kurspahić perished, and the manner in which the date of death was recorded on the “Official Record on Establishing Identity” by the Missing Persons Institute of Bosnia and Herzegovina. The second document, Exh. PA2 (confidential), is a statement by Mašović explaining the manner in which documents such as the “Official Record on Establishing Identity” are compiled by the Missing Persons Institute of Bosnia and Herzegovina and recounting the circumstances in which the body of Ismeta Kurspahić was exhumed.

<sup>1044</sup> Press Statement; Exhs 1DA4 (confidential); 1DA5 (confidential).

was exhumed from a “primary mass grave” at the Stražište Cemetery;<sup>1045</sup> (iii) her identity was established on the basis of DNA analysis and was confirmed by her brother and sister;<sup>1046</sup> and (iv) her death was “possibly due to the condition caused by a firearm injury of the left thigh”.<sup>1047</sup>

343. With regard to the Višegrad Health Centre logbook, the Appeals Chamber notes that, while marked for identification, it was not admitted as an exhibit.<sup>1048</sup> Since the Appeals Chamber can take into consideration only material that is part of the trial record or that has been admitted on appeal pursuant to Rule 115 of the Rules,<sup>1049</sup> it therefore cannot consider the Višegrad Health Centre logbook as such. However, the Appeals Chamber notes that Exhibit P300, a report of the Prosecution’s Demographic Unit, addresses the Višegrad Health Centre logbook entry concerning Ismeta Kurspahić.<sup>1050</sup> Exhibit P300 indicates that the entry only provides a first name and family name and that “[w]ithout additional information, it is impossible to say whether Ismeta KURSPAHIC [*sic*] listed in the hospital admissions is the same as the Ismeta KURSPAHIC [*sic*] listed in the [Alleged Victims List].”<sup>1051</sup> Exhibit P300 further states that according to the population census of 1991 there were two individuals named Ismeta Kurspahić.<sup>1052</sup> The Trial Chamber considered this evidence and was satisfied that Ismeta Kurspahić died in the Pionirska Street Incident, relying on the evidence of eye-witnesses and other corroborative evidence.<sup>1053</sup> The Appeals Chamber finds that Milan Lukić has failed to show an error in this regard.

344. With regard to additional evidence admitted on appeal, the Appeals Chamber notes that Mašović also referred to the Višegrad Health Centre logbook in his statement.<sup>1054</sup> Specifically, he stated that although the logbook entry does not clarify what injuries the person concerned suffered, they “could find out that such medicine were [*sic*] meant to cure burns.”<sup>1055</sup> The Appeals Chamber finds that this statement from an individual with no medical background,<sup>1056</sup> without further supportive evidence, does not undermine the Trial Chamber’s finding that Ismeta Kurspahić died in the Pionirska Street Incident.

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<sup>1045</sup> Press Statement; Exhs 1DA3 (confidential); 1DA4 (confidential); 1DA5 (confidential).

<sup>1046</sup> Press Statement; Exhs 1DA3 (confidential); 1DA4 (confidential); 1DA5 (confidential).

<sup>1047</sup> Report of Forensic Medical Examination, pp. 1, 3.

<sup>1048</sup> See Confidential Witness List. On 7 April 2009, the Trial Chamber ruled that the document would be marked for identification pending an English translation (T. 6889 (7 April 2009)). The translation was, however, never provided.

<sup>1049</sup> See *Krajišnik* Appeal Judgement, para. 25; *Galić* Appeal Judgement, paras 311, 313.

<sup>1050</sup> Exh. P300, pp. 17-18.

<sup>1051</sup> Exh. P300, p. 18.

<sup>1052</sup> Exh. P300, p. 18. This exhibit also states that one Ismeta Kurspahić was born in 1946 and the other in 1960. Based on the date of birth, the person born in 1960 “is a closer match” to the Ismeta Kurspahić listed on the Alleged Victims List. It adds that for the person born in 1960 “there is no evidence that she survived the conflict.” It further adds that for “the Ismeta KURSPAHIC born in 1946 we know she voted in 1997-98 and 2000 elections” (Exh. P300, p. 18).

<sup>1053</sup> Trial Judgement, paras 392, 567, fn. 1408.

<sup>1054</sup> Exh. PA2 (confidential), para. 7.

<sup>1055</sup> Exh. PA2 (confidential), para. 7.

<sup>1056</sup> Exh. P185.

345. The Appeals Chamber notes that the information as to the date of Ismeta Kurspahić's death was provided by family members of Ismeta Kurspahić.<sup>1057</sup> One relative stated that she had heard "in the middle of June" from another family member that Ismeta had perished.<sup>1058</sup> She further stated that, when asked the date of Ismeta's death for the purpose of filling out the "official record on establishing identity", she did not know the exact date and that she and another relative "were only guessing" when they filled out the date of 17 June.<sup>1059</sup> Mašović confirmed that the "official record on establishing identity" is completed on the basis of information provided by family members.<sup>1060</sup> Moreover, he stated that the Missing Persons Institute of Bosnia and Herzegovina, where the "official record on establishing identity" is completed, considers that the precise date or place of disappearance is "not so important" and therefore does not "push the family members to [*sic*] much on this data".<sup>1061</sup>

346. In addition, the Appeals Chamber notes that one of the Exhumation and Identification Documents includes an indication – by Ismeta Kurspahić's own relatives – that she died at Pionirska Street.<sup>1062</sup> Furthermore, a family member of Ismeta Kurspahić stated that she had heard from another relative that Ismeta, together with other relatives, had been burnt to death by Serbs.<sup>1063</sup> These indications make it very likely that the date of 17 June 1992 in the Press Statement and on the Exhumation and Identification Documents<sup>1064</sup> was based on assumptions rather than facts. Moreover, these indications corroborate the Trial Chamber's findings. Therefore, the Appeals Chamber finds that Milan Lukić has failed to show that the inconsistency between the dates of death as recorded on the Press Statement and the Exhumation and Identification Documents undermines the Trial Chamber's finding that Ismeta Kurspahić died in the Pionirska Street Incident on 14 June 1992.

347. The Appeals Chamber turns to the manner in which Ismeta Kurspahić died. The Appeals Chamber notes that the Press Statement does not indicate the place or manner in which Ismeta Kurspahić died. Also, neither the Press Statement nor the Report on Forensic Medical Examination identifies any injury caused by fire to Ismeta Kurspahić's remains. However, the Appeals Chamber observes that the Report on Forensic Medical Examination indicates that the cause of death was possibly a firearm injury.<sup>1065</sup> The Appeals Chamber considers that this is not necessarily

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<sup>1057</sup> Exhs PA1 (confidential), paras 4, 7; PA2 (confidential), paras 6, 8.

<sup>1058</sup> Exh. PA1 (confidential), para. 4.

<sup>1059</sup> Exh. PA1 (confidential), para. 7.

<sup>1060</sup> Exh. PA2 (confidential), para. 6.

<sup>1061</sup> Exh. PA2 (confidential), para. 6.

<sup>1062</sup> Exh. 1DA5 (confidential) ("Perished on 17 JUNE 1992 at PIONIRSKA STREET – VIŠEGRAD").

<sup>1063</sup> Exh. PA1 (confidential), paras 3-4 ("I contacted another [relative] to inquire about [Ismeta, her three children and her parents-in-law]. At this time she told me that she had heard that they [were] all burnt to death by Serbs.").

<sup>1064</sup> Press Statement; Exhs 1DA4 (confidential); 1DA5 (confidential).

<sup>1065</sup> Report of Forensic Medical Examination, pp. 1, 3.

inconsistent with the Trial Chamber's finding that Ismeta Kurspahić died in the Pionirska Street Incident as it also found that "there were men outside who were shooting at persons trying to escape from the house."<sup>1066</sup> Thus, she may have been shot during her attempt to escape. In these circumstances, Milan Lukić has failed to show that this undermines the Trial Chamber's finding.

348. With respect to the additional evidence that Ismeta Kurspahić's remains, together with those of two others, were found in a primary mass grave at the Stražište Cemetery,<sup>1067</sup> the Appeals Chamber notes that Mašović stated that this cemetery is less than 500 metres from the crime scene on Pionirska Street.<sup>1068</sup> It further notes that Milan Lukić acknowledged this distance.<sup>1069</sup> Considering the close proximity between the crime site and the cemetery as well as the fact that the Trial Chamber did not draw any conclusion regarding the disposal of Ismeta Kurspahić's body, the Appeals Chamber finds that the additional evidence indicating that Ismeta Kurspahić's remains were found in a primary mass grave at the Stražište Cemetery does not undermine the Trial Chamber's findings.

349. The Appeals Chamber is satisfied that the additional evidence is consistent with the Trial Chamber's finding that Ismeta Kurspahić died in the Pionirska Street Incident. Consequently, based on the trial record and the additional and rebuttal evidence that was admitted on appeal, the Appeals Chamber is itself convinced beyond reasonable doubt that Ismeta Kurspahić died in the Pionirska Street Incident on 14 June 1992.

(iii) An alleged victim testified as a witness in the present case

350. Milan Lukić argues that the Trial Chamber erred when it did not consider that there was a person who testified as a witness in this case with the same name as one of the victims.<sup>1070</sup>

351. The Appeals Chamber considers that Milan Lukić has failed to demonstrate that the Trial Chamber erred in this regard. It is insufficient merely to point to individuals bearing identical or similar names as a basis for the argument that the Trial Chamber erred in finding that a certain person died. The Appeals Chamber considers that the Trial Chamber's finding is not rendered unreasonable simply because a witness with the same name as one of the victims testified. Since Milan Lukić has failed to further substantiate his argument in this regard, and in light of the other

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<sup>1066</sup> Trial Judgement, para. 562.

<sup>1067</sup> Exhs 1DA3 (confidential); 1DA4 (confidential).

<sup>1068</sup> Exh. PA2 (confidential), para. 9.

<sup>1069</sup> Milan Lukić's [sic] Supplemental Brief on Impact of Additional Evidence, 31 August 2011 (confidential) ("Milan Lukić's Supplemental Brief of 31 August 2011"), para. 6.

<sup>1070</sup> Milan Lukić Appeal Brief, paras 138-139; Milan Lukić Reply Brief, para. 64. This witness testified with the protective measures of pseudonym and face distortion (*see* Confidential Witness List, p. 1).

evidence relied on by the Trial Chamber to establish the death of the individual in question,<sup>1071</sup> Milan Lukić's argument is dismissed.

(d) Conclusion

352. The Appeals Chamber has found that the Trial Chamber erred in finding that Haraga Sehić, Hasena LNU, Sadeta Kurspahić, Maida Kurspahić, and Seila Kurspahić were killed in the Pionirska Street Incident. The Appeals Chamber has further found that the Trial Chamber erred in finding that both Mina Kurspahić and Jasmina Delija died in the fire, since these names refer to the same person. Milan Lukić has not shown in relation to the remaining victims that the Trial Chamber erred in finding that the only reasonable inference from the evidence was that they died in the Pionirska Street Incident. The Appeals Chamber therefore finds that the total number of victims should be reduced by six, bringing the total number of victims to 53.

353. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in concluding that 59 persons died in the Pionirska Street Incident and finds instead that 53 persons, as listed in Annex C to this Judgement, died. In all other respects, sub-ground 3(A) of Milan Lukić's appeal is dismissed.

5. Conclusion

354. For the foregoing reasons, the remainder of Milan Lukić's sub-ground 3(A), as well as his sub-grounds 3(B) through (D), (G) and (H) are dismissed.

**D. Sredoje Lukić**

1. Introduction

355. The Trial Chamber was satisfied that Sredoje Lukić aided and abetted the crimes of murder<sup>1072</sup> and cruel treatment<sup>1073</sup> as violations of the laws or customs of war as well as murder,<sup>1074</sup> persecutions,<sup>1075</sup> and other inhumane acts<sup>1076</sup> as crimes against humanity. The Trial Chamber

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<sup>1071</sup> The Trial Chamber relied on the evidence of two eye-witnesses (VG013: Exhs 1D29, P60; VG101: Exh. 1D37), as corroborated by Huso Kurspahić (Exh. P39) and the Prosecution's Victims Chart.

<sup>1072</sup> Trial Judgement, paras 928-934, 1105.

<sup>1073</sup> Trial Judgement, paras 982-986, 1104. Sredoje Lukić was found to have aided and abetted the crime of cruel treatment as a violation of the laws or customs of war through the treatment of the survivors of the Pionirska Street Incident, VG013, VG018, VG038, VG078, VG084, VG101, and Hasib Kurspahić.

<sup>1074</sup> Trial Judgement, paras 928-934, 1105.

<sup>1075</sup> Trial Judgement, paras 1027-1035, 1104. Sredoje Lukić was found to have aided and abetted persecutions as a crime against humanity by the following acts: (i) the theft of personal property at the Memić House and the subjection of the vulnerable Koritnik Group to the harassment, humiliation, terrorisation, and psychological abuse occasioned by the theft of their only remaining possessions; (ii) the harassment, humiliation, terrorisation, and psychological abuse of the survivors, VG013, VG018, VG038, VG078, VG084, VG101, and Hasib Kurspahić; (iii) unlawful detention under

concluded that Sredoje Lukić was among the armed men who went to the Memić House on Pionirska Street in the afternoon of 14 June 1992.<sup>1077</sup> It was satisfied that Sredoje Lukić entered the Memić House and introduced himself by name.<sup>1078</sup> The Trial Chamber concluded that, while the Robbery and strip searches were taking place inside the Memić House, Sredoje Lukić rendered practical assistance to the commission of those crimes through his armed presence at or around the house.<sup>1079</sup> The Trial Chamber also found that Sredoje Lukić returned to the Memić House in the evening and, by majority, found that he participated in the Transfer of the Koritnik Group from the Memić House to the Omeragić House.<sup>1080</sup> The Trial Chamber was not satisfied that Sredoje Lukić participated in setting fire to the Omeragić House.<sup>1081</sup>

356. Sredoje Lukić submits that the Trial Chamber erred in law and fact when it found that he was identified at the Memić House<sup>1082</sup> and during the Transfer.<sup>1083</sup> He also asserts that the Trial Chamber misapplied the principle of *in dubio pro reo* when concluding that he was present.<sup>1084</sup> Sredoje Lukić contests the reasonableness of the Trial Chamber's findings that his acts and conduct during the incident constituted the *actus reus* and *mens rea* required to aid and abet the crimes of murder, both as a violation of the laws or customs of war and as a crime against humanity, cruel treatment as violation of the laws or customs of war, and other inhumane acts as a crime against

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inhumane conditions of the Koritnik Group at the Omeragić House; (iv) murder; and (v) the destruction of the Omeragić House. The Appeals Chamber notes that the Trial Chamber also listed "causing VG013, VG018, VG078 and VG101 fear that they might be raped" as an underlying persecutory act aided and abetted by Sredoje Lukić (Trial Judgement, para. 1031). However, the Trial Chamber expressly held elsewhere that the persecutory acts in the present case were limited to those mentioned in paragraph 4 of the Second Amended Indictment (Trial Judgement, para. 997, fn. 2913, referring to Pre-Trial Conference, T. 202 (9 July 2008)), which makes no reference to rape or fear of rape. Therefore, the Appeals Chamber considers that the Trial Chamber did not include the removal of women, or the fear of rape, when assessing Sredoje Lukić's criminal liability for aiding and abetting the crime of persecutions as a crime against humanity.

<sup>1076</sup> Trial Judgement, paras 982-986, 1104. Sredoje Lukić was found to have aided and abetted the crime of other inhumane acts as a crime against humanity through the treatment of the survivors of the Pionirska Street Incident, VG013, VG018, VG038, VG078, VG084, VG101, and Hasib Kurspahić.

<sup>1077</sup> Trial Judgement, paras 637, 930.

<sup>1078</sup> Trial Judgement, paras 588, 590, 637.

<sup>1079</sup> Trial Judgement, paras 593 (finding "that Sredoje Lukić was armed and present at Jusuf Memić's house"), 637 (finding that Sredoje Lukić "was present at Jusuf Memić's house"), 932 (finding that Sredoje Lukić "was at Jusuf Memić's house [...], visibly carrying arms"), 984 (finding that Sredoje Lukić "was at Jusuf Memić's house [...], visibly carrying arms"), 1028 (finding "that Sredoje Lukić was present and armed at Jusuf Memić's house"), 1030 (finding that "Sredoje Lukić was armed and present around Jusuf Memić's house") (emphasis added).

<sup>1080</sup> Trial Judgement, paras 607, 637, 930, 984, 1032. See also Judge Robinson's dissenting opinion with regard to Sredoje Lukić's conviction for the crimes of murder and extermination (Trial Judgement, paras 1112-1113).

<sup>1081</sup> Trial Judgement, paras 613, 637, 1034.

<sup>1082</sup> Sredoje Lukić Appeal Brief, paras 38-91, 211-222; Sredoje Lukić Reply Brief, paras 9-37, 70-80.

<sup>1083</sup> Sredoje Lukić Appeal Brief, paras 92-136, 211-222; Sredoje Lukić Reply Brief, paras 38-45, 70-80.

<sup>1084</sup> Sredoje Lukić Appeal Brief, paras 297-300; Sredoje Lukić Reply Brief, paras 113-117.



humanity.<sup>1085</sup> He also challenges the Prosecution's claim that the legal requirements of the crime of persecutions as a crime against humanity were satisfied.<sup>1086</sup>

## 2. Sredoje Lukić's alibi

357. At trial, Sredoje Lukić raised an alibi according to which, on 14 June 1992, he was in Obrenovac, Serbia, visiting his brother-in-law, Miloško Popadić, during the Serbian Orthodox holiday of the Holy Trinity.<sup>1087</sup> He called two witnesses, Veroljub Živković ("Živković"), who the Trial Chamber considered had known Sredoje Lukić for approximately 20 years and was a "sound acquaintance", and Branimir Bugarski ("Bugarski"), who had an "excellent relationship" with Sredoje Lukić and his family.<sup>1088</sup> Živković and Bugarski gave evidence that they saw Sredoje Lukić in Obrenovac on 14 June 1992 and that he was involved in an altercation with a shopkeeper over a crate of beer.<sup>1089</sup> Bugarski also provided an alibi for Sredoje Lukić with respect to the Bikavac Incident.<sup>1090</sup>

358. The Trial Chamber found that:

[t]he evidence presented by the Prosecution as to Sredoje Lukić's presence, acts and conduct on 14 June 1992 was presented by credible and reliable witnesses, whereas the evidence led in support of Sredoje Lukić's alibi was characterised by inconsistencies and elements of implausibility. On the basis of the evidence as a whole, that is, the evidence led by the Prosecution and the evidence led by the Defence, the Trial Chamber finds [that] the alibi is not reasonably possibly true.<sup>1091</sup>

359. Sredoje Lukić argues that the Trial Chamber erred in law and fact in rejecting his alibi.<sup>1092</sup> He argues that the Trial Chamber failed to examine the totality of the evidence when rejecting his alibi,<sup>1093</sup> and did not provide a sufficiently reasoned opinion.<sup>1094</sup> He avers that the language used by the Trial Chamber indicates a misapplication of the burden of proof.<sup>1095</sup> He further argues that Živković and Bugarski were credible<sup>1096</sup> and that the Prosecution did not call rebuttal witnesses.<sup>1097</sup>

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<sup>1085</sup> Sredoje Lukić Appeal Brief, paras 137-210; Sredoje Lukić Reply Brief, paras 46-69. Sredoje Lukić raised challenges to the question of whether he was carrying arms in response to a question asked by the Appeals Chamber during the Appeal Hearing (AT. 124 (14 September 2011)).

<sup>1086</sup> Sredoje Lukić Appeal Brief, paras 282-296; Sredoje Lukić Reply Brief, paras 98-103.

<sup>1087</sup> Trial Judgement, para. 513.

<sup>1088</sup> Trial Judgement, paras 518, 523.

<sup>1089</sup> Trial Judgement, paras 514-528.

<sup>1090</sup> Trial Judgement, paras 693-694.

<sup>1091</sup> Trial Judgement, para. 637.

<sup>1092</sup> Sredoje Lukić's seventh ground of appeal (in part). Sredoje Lukić Appeal Brief, paras 211-222; Sredoje Lukić Reply Brief, paras 71-80.

<sup>1093</sup> Sredoje Lukić Appeal Brief, para. 212.

<sup>1094</sup> Sredoje Lukić Appeal Brief, paras 220-221. *See also* Sredoje Lukić Reply Brief, para. 80, referring to Trial Judgement, paras 632-635.

<sup>1095</sup> Sredoje Lukić Appeal Brief, paras 216, 218-220, referring to Trial Judgement, paras 632-635; Sredoje Lukić Reply Brief, para. 75.

<sup>1096</sup> Sredoje Lukić Appeal Brief, paras 213-215.

<sup>1097</sup> Sredoje Lukić Appeal Brief, para. 214.

Sredoje Lukić also asserts that the Trial Chamber should have considered its finding that Bugarski “endured cross-examination well” and precisely explained in which year a bomb fell in his village.<sup>1098</sup>

360. The Prosecution responds that the Trial Chamber correctly stated and applied the law applicable to alibi evidence.<sup>1099</sup> The Prosecution argues that Živković and Bugarski had a close relationship with Sredoje Lukić, and “overly precise recollections” of a minor incident that allegedly occurred 17 years prior to their testimony.<sup>1100</sup> Further, in response to Sredoje Lukić’s assertion that the Prosecution did not try to rebut his alibi, the Prosecution points to the identification evidence it adduced at trial, showing Sredoje Lukić’s presence during the Pionirska Street Incident.<sup>1101</sup> Finally, the Prosecution submits that the Trial Chamber provided a reasoned opinion for rejecting his alibi.<sup>1102</sup>

361. The Appeals Chamber finds that the Trial Chamber correctly articulated the burden of proof applicable to alibi evidence. It stated that “in putting forward an alibi, an accused need only produce evidence likely to raise a reasonable doubt in the Prosecution’s case” and that “it remains incumbent on the Prosecution to establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.”<sup>1103</sup>

362. The Appeals Chamber further finds that the Trial Chamber properly applied this burden of proof. Sredoje Lukić refers to the Trial Chamber’s finding that “certain aspects of the alibi evidence [were] difficult to believe”,<sup>1104</sup> as well as the finding that witness accounts were “implausible”.<sup>1105</sup> The Appeals Chamber is of the view that these considerations do not indicate a reversal of the burden of proof. On the contrary, the Appeals Chamber considers that they are indicative of the Trial Chamber’s assessment of the credibility of the alibi evidence, and evince a careful approach.<sup>1106</sup>

363. With respect to Sredoje Lukić’s challenges to the Trial Chamber’s finding that Živković and Bugarski lacked credibility, the Appeals Chamber recalls that a trial chamber has a broad discretion to assess the appropriate weight and credibility to be accorded to a witness’s testimony.<sup>1107</sup> The Appeals Chamber observes that, in reaching its conclusion that Živković and Bugarski were not

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<sup>1098</sup> Sredoje Lukić Appeal Brief, para. 217, referring to Trial Judgement, para. 738.

<sup>1099</sup> Prosecution Response Brief (Sredoje Lukić), paras 125, 127, 131.

<sup>1100</sup> Prosecution Response Brief (Sredoje Lukić), para. 128, referring to Trial Judgement, para. 634.

<sup>1101</sup> Prosecution Response Brief (Sredoje Lukić), para. 126.

<sup>1102</sup> Prosecution Response Brief (Sredoje Lukić), para. 130, referring to Trial Judgement, paras 330-637.

<sup>1103</sup> Trial Judgement, para. 28.

<sup>1104</sup> Trial Judgement, para. 633.

<sup>1105</sup> Trial Judgement, para. 634.

<sup>1106</sup> See Trial Judgement, para. 637.

credible, the Trial Chamber found that: (i) it was implausible that the witnesses could recall such a minor altercation over a crate of beer, and the alleged subsequent discussions about it two or three years later;<sup>1108</sup> (ii) Bugarski's explanation that his recollection of this altercation was facilitated by Miloško Popadić and Sredoje Lukić refusing to enter his house or join in the festivities that day, was unsatisfactory;<sup>1109</sup> (iii) Bugarski did not give a clear answer to the Prosecution's question on whether he was mistaken about the year of this incident, confusing it with the feast of Holy Trinity in 1999 when a bomb fell not far from the village;<sup>1110</sup> (iv) certain aspects of Živković's evidence were difficult to believe, in particular the fact that Sredoje Lukić allegedly spent two hours in the shop, while being a guest at his relative's house on the same day;<sup>1111</sup> and (v) Živković's imprecise answers to the questions about Sredoje Lukić's employment in Belgrade affected his credibility.<sup>1112</sup>

364. The Appeals Chamber is satisfied that the Trial Chamber carefully considered Živković and Bugarski's evidence when assessing their credibility.<sup>1113</sup> Sredoje Lukić has failed to show that no reasonable trier of fact could have come to the conclusion that they were not credible, and he merely asserts that the Trial Chamber has failed to interpret the evidence in a particular manner. Further, the Appeals Chamber finds that the Trial Chamber provided a sufficiently reasoned opinion in its detailed consideration of the alibi. In light of these findings, the Appeals Chamber is satisfied that the Trial Chamber acted within its discretion when it rejected the alibi on the basis that it was not reasonably possibly true.<sup>1114</sup> Sredoje Lukić has thus failed to demonstrate that the Trial Chamber erred in this respect.

365. Contrary to Sredoje Lukić's assertion, the fact that the Prosecution did not call alibi rebuttal witnesses does not undermine the Trial Chamber's finding that Sredoje Lukić's alibi witnesses were not credible. The Prosecution was under no obligation to call witnesses to rebut the alibi evidence. Further, the Appeals Chamber observes that the Prosecution did call several witnesses who testified that Sredoje Lukić was present at Pionirska Street on 14 June 1992, and who were found to be credible and reliable by the Trial Chamber.<sup>1115</sup>

366. For the foregoing reasons, the remainder of Sredoje Lukić's seventh ground of appeal is dismissed.

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<sup>1107</sup> See *supra* para. 86.

<sup>1108</sup> Trial Judgement, para. 634.

<sup>1109</sup> Trial Judgement, para. 634.

<sup>1110</sup> Trial Judgement, para. 634.

<sup>1111</sup> Trial Judgement, para. 633.

<sup>1112</sup> Trial Judgement, para. 635.

<sup>1113</sup> Trial Judgement, paras 513-528, 632-635.

<sup>1114</sup> Trial Judgement, para. 637.

### 3. Identification of Sredoje Lukić

367. Sredoje Lukić submits that the Trial Chamber erred in assessing the identification evidence related to his presence: (i) at the Memić House; and (ii) during the Transfer.<sup>1116</sup>

#### (a) Memić House

368. In finding that Sredoje Lukić was armed and present at the Memić House, the Trial Chamber relied on the testimonies of VG018, VG038, VG084, and Huso Kurspahić.<sup>1117</sup> The Trial Chamber was satisfied that VG018 heard both Milan Lukić and Sredoje Lukić introduce themselves upon entering the Memić House (“Introduction”).<sup>1118</sup> It found that this evidence was corroborated by VG084 who also testified to having heard the Introduction.<sup>1119</sup> The Trial Chamber also concluded that both VG084 and VG038 were told by “others” in the Memić House that Sredoje Lukić was present.<sup>1120</sup> Finally, the Trial Chamber relied on the hearsay evidence of Huso Kurspahić who testified as to what his father, Hasib Kurspahić, a survivor, now deceased, of the Pionirska Street Incident, had told him about the incident and the presence of Sredoje Lukić at the Memić House.<sup>1121</sup>

369. Sredoje Lukić submits that the Trial Chamber erred in assessing the evidence related to his presence at the Memić House.<sup>1122</sup> In this section, the Appeals Chamber considers whether the Trial Chamber erred in its assessment of: (i) the Introduction heard by VG018 and VG084; (ii) the hearsay evidence of VG038 and VG084; and (iii) the hearsay evidence of Huso Kurspahić.

#### (i) Whether VG018 and VG084 heard the Introduction

370. The Trial Chamber was satisfied that VG018 heard Milan Lukić and Sredoje Lukić introduce themselves by name, although she was in a different room and was unable to see them.<sup>1123</sup> The Trial Chamber also concluded that VG084, VG018’s son who was 13 years old at the time and was standing right beside his mother, heard the Introduction.<sup>1124</sup> The Trial Chamber noted in

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<sup>1115</sup> Trial Judgement, paras 593, 607. In light of these findings, the Appeals Chamber is satisfied that the Trial Chamber’s erroneous reliance on VG084 (*see infra* para. 374) is inconsequential to the conclusion that the Trial Chamber reasonably found that Sredoje Lukić’s alibi was not reasonably possibly true.

<sup>1116</sup> Sredoje Lukić Appeal Brief, paras 38-136.

<sup>1117</sup> Trial Judgement, paras 593, 637.

<sup>1118</sup> Trial Judgement, para. 588.

<sup>1119</sup> Trial Judgement, paras 589-590.

<sup>1120</sup> Trial Judgement, paras 585, 590.

<sup>1121</sup> Trial Judgement, paras 334, 591.

<sup>1122</sup> Sredoje Lukić’s first ground of appeal. Sredoje Lukić further argues under his fourteenth ground of appeal that the Trial Chamber erred in its assessment of in-court identifications with respect to the Pionirska Street Incident. Sredoje Lukić Appeal Brief, paras 38-91, 302-309; Sredoje Lukić Reply Brief, paras 12-37.

<sup>1123</sup> Trial Judgement, para. 588.

<sup>1124</sup> Trial Judgement, para. 590.

particular that VG084 had “maintained” this evidence under cross-examination.<sup>1125</sup> The Trial Chamber considered that, while VG018 and VG084 were not able to “visually distinguish between Milan Lukić and Sredoje Lukić”, since neither saw them introducing themselves or had any prior knowledge of either Lukić,<sup>1126</sup> their evidence was reliable “insofar as it place[d] Milan Lukić and Sredoje Lukić at the scene of the robbery”.<sup>1127</sup> For these reasons, the Trial Chamber placed no weight on the evidence of VG018 and VG084 as a basis for “the specific acts of either Milan Lukić or Sredoje Lukić during the Robbery.”<sup>1128</sup>

371. Sredoje Lukić submits that VG084 explicitly testified that he did not hear the Introduction.<sup>1129</sup> He argues that the Trial Judgement contains contradictory findings regarding his location during the incident as the Trial Chamber found that he entered the Memić House and introduced himself, but that he was not in the Memić House during the Robbery.<sup>1130</sup> Sredoje Lukić also argues that the Trial Chamber did not assess the contradictions raised by the evidence of other witnesses, namely VG013, VG038, VG101, and VG078, who did not hear the Introduction, but who were also present at the Memić House.<sup>1131</sup> He further submits that the Trial Chamber failed to consider VG018’s evidence in the *Vasiljević* trial to the effect that Milan Lukić had falsely introduced himself as Sredoje Lukić in the Memić House.<sup>1132</sup> In the alternative, Sredoje Lukić contends that, even if VG018 or VG084 did overhear the Introduction, this is an insufficient basis for identification as they had no prior knowledge of him and were not able to see the perpetrators.<sup>1133</sup>

372. The Prosecution responds that VG084 suggested under cross-examination that he was unsure if he had seen Sredoje Lukić, but maintained that he was sure he had heard him.<sup>1134</sup> It also asserts that since VG013 and VG038 were not standing right beside VG018 and VG084, the fact that they did not hear Sredoje Lukić introduce himself does not undermine the evidence that the

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<sup>1125</sup> Trial Judgement, para. 404, referring to VG084, T. 1274-1276 (5 September 2008).

<sup>1126</sup> Trial Judgement, paras 586-590.

<sup>1127</sup> Trial Judgement, para. 588.

<sup>1128</sup> Trial Judgement, paras 588, 590.

<sup>1129</sup> Sredoje Lukić Appeal Brief, paras 45-46, 74-76; Sredoje Lukić Reply Brief, para. 19. He also submits that the Trial Chamber inconsistently found that VG084 was simultaneously “near” but in another room than Sredoje Lukić at the time of the Introduction (Sredoje Lukić Appeal Brief, paras 72-77; Sredoje Lukić Reply Brief, para. 32).

<sup>1130</sup> Sredoje Lukić Appeal Brief, para. 139(a); Sredoje Lukić Reply Brief, para. 47(a). Sredoje Lukić specifically argues that the Trial Chamber’s finding that he was armed and present at the Memić House on 14 June 1992 while the Robbery was taking place inside the house (*see* Trial Judgement, para. 593) allows for the reasonable inference that Sredoje Lukić was outside the Memić House while the Robbery occurred inside the house (Sredoje Lukić Appeal Brief, para. 139(a)).

<sup>1131</sup> Sredoje Lukić Appeal Brief, paras 40, 68-69; Sredoje Lukić Reply Brief, paras 12-13, 28-30.

<sup>1132</sup> Sredoje Lukić Appeal Brief, paras 41-42; Sredoje Lukić Reply Brief, para. 15.

<sup>1133</sup> Sredoje Lukić Appeal Brief, paras 39, 44, 70, 76; Sredoje Lukić Reply Brief, para. 33. Sredoje Lukić argues in particular that, unlike VG084, VG018 did not hear “others” in the house discuss his identity: her identification evidence of Sredoje Lukić rests solely on the Introduction. Sredoje Lukić also calls into question the Introduction as a reliable basis for identification by VG084 (Sredoje Lukić Appeal Brief, paras 45, 48, 76; Sredoje Lukić Reply Brief, para. 33).

<sup>1134</sup> Prosecution Response Brief (Sredoje Lukić), para. 36.

Introduction occurred.<sup>1135</sup> Concerning VG018's testimony in the *Vasiljević* case, the Prosecution responds that in both the present case and the *Vasiljević* case, VG018 maintained that Sredoje Lukić and Milan Lukić had introduced themselves at the Memić House.<sup>1136</sup> Finally, the Prosecution asserts that the Trial Chamber placed limited reliance on VG018's evidence and that Sredoje Lukić failed to show an error in that respect.<sup>1137</sup>

373. The Trial Chamber noted that VG084 maintained during cross-examination that he had heard the Introduction.<sup>1138</sup> However, to the contrary, the Appeals Chamber observes that VG084 stated that he did not hear Sredoje Lukić introduce himself, but that he had learned of his identity through "other people" at the Memić House.<sup>1139</sup> When questioned by Judge Robinson, VG084 replied:

A: No, no, no. I didn't quote his words this way. This was upstairs. There were stairs there, and there were people there who knew him by name. [...] Judge Robinson: Did Sredoje Lukic [*sic*] say anything in your hearing to identify himself? A: **I didn't hear.** Judge Robinson: Did you at some time come to the understanding that that person was Sredoje Lukic [*sic*]? A: Yes. Judge Robinson: And how did you arrive at that knowledge? A: There were people in the house, the older ones, who knew him, and when they left they said, "That's the policeman who works at – in Visegrad [*sic*]." There were people there, including elderly women, who knew him.<sup>1140</sup>

374. The Appeals Chamber therefore finds that the Trial Chamber erred when stating that VG084 heard the Introduction.<sup>1141</sup> VG084's identification of Sredoje Lukić rests only upon what others in the Memić House told him.<sup>1142</sup>

375. The Appeals Chamber, Judge Morrison dissenting, does not consider, however, that this factual error undermines the Trial Chamber's finding that VG018 heard the Introduction. The Appeals Chamber observes that the Trial Chamber was satisfied that VG018 was credible with regard to the Introduction,<sup>1143</sup> after having carefully assessed her testimony, noting in particular her lack of prior knowledge of Sredoje Lukić and the inconsistencies in her account.<sup>1144</sup> As noted above, the Trial Chamber relied on VG018's evidence only to the extent that it placed Sredoje Lukić at the scene of the Robbery.<sup>1145</sup> The Appeals Chamber recalls that a trial chamber has a broad discretion to assess the appropriate weight and credibility to be accorded to the testimony of a

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<sup>1135</sup> Prosecution Response Brief (Sredoje Lukić), para. 31.

<sup>1136</sup> Prosecution Response Brief (Sredoje Lukić), para. 32.

<sup>1137</sup> Prosecution Response Brief (Sredoje Lukić), para. 34.

<sup>1138</sup> Trial Judgement, para. 404.

<sup>1139</sup> VG084, T. 1274 (5 September 2008).

<sup>1140</sup> VG084, T. 1274-1275 (5 September 2008) (emphasis added).

<sup>1141</sup> As the Appeals Chamber overturns the finding that VG084 overheard the Introduction, it will not consider the remainder of Sredoje Lukić's submissions with regard to VG084's evidence on the Introduction (*see* Sredoje Lukić Appeal Brief, paras 45, 48, 72-75; Sredoje Lukić Reply Brief, para. 76).

<sup>1142</sup> Trial Judgement, para. 590.

<sup>1143</sup> Trial Judgement, para. 588.

<sup>1144</sup> Trial Judgement, paras 586-588.

<sup>1145</sup> Trial Judgement, para. 588.

witness,<sup>1146</sup> and is at liberty to rely on the uncorroborated evidence of a single witness when making its findings, even if it is related to a material fact.<sup>1147</sup> As a result, the Appeals Chamber, Judge Morrison dissenting, finds that Sredoje Lukić has failed to show that, despite the Trial Chamber's error with regard to VG084, a reasonable trier of fact could not have reached the conclusion that VG018 identified Sredoje Lukić at the Memić House during the Introduction. Further, in the Appeals Chamber's view, Judge Morrison dissenting, even if the Trial Chamber itself had concluded that VG084 did not hear the Introduction, it would have been reasonable for the Trial Chamber to find that the Introduction took place based solely on the evidence of VG018. Moreover, the Appeals Chamber, Judge Morrison dissenting, considers that the main issue in this context is whether the Trial Chamber reasonably found that Sredoje Lukić was present at the Memić House; the Introduction is therefore merely a part of the evidence establishing his presence.

376. The Appeals Chamber notes that the Trial Chamber did not explicitly discuss whether the evidence of witnesses VG013, VG038, VG078, and VG101 confirmed, or conflicted with, VG018's evidence that the Introduction occurred. The Appeals Chamber, Judge Morrison dissenting, considers, however, that this does not mean that the Trial Chamber did not consider their evidence in the context of the Pionirska Street Incident.<sup>1148</sup> The Appeals Chamber observes that the evidence of VG013, VG038, VG078, and VG101 is summarised and discussed in several parts of the Trial Judgement.<sup>1149</sup> The Appeals Chamber recalls that a trial chamber is not required to expressly reference and comment upon every piece of evidence admitted onto the record.<sup>1150</sup> Nor is it required to articulate every step of its reasoning.<sup>1151</sup> The Appeals Chamber notes that VG013 and VG078 were not asked whether they had heard either Milan Lukić or Sredoje Lukić introduce themselves,<sup>1152</sup> while VG038 and VG101 testified that they did not hear the perpetrators introduce themselves upon entry into the Memić House.<sup>1153</sup> The Appeals Chamber notes that the Trial Chamber's findings indicate that VG101 was in the room into which the perpetrators entered, unlike VG018 who was in a different room.<sup>1154</sup> However, it notes further that there were about 60 people in the Memić House, and that variances among the testimonies may well have resulted from

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<sup>1146</sup> See *supra* para. 86.

<sup>1147</sup> *Haradinaj et al.* Appeal Judgement, para. 219; *Kupreškić et al.* Appeal Judgement, para. 33; *Aleksovski* Appeal Judgement, para. 62; *Tadić* Appeal Judgement, para. 65.

<sup>1148</sup> Cf. *Rukundo* Appeal Judgement, para. 217.

<sup>1149</sup> See e.g. Trial Judgement, paras 330-387, 399-436, 554-613.

<sup>1150</sup> *Haradinaj et al.* Appeal Judgement, para. 128; *Rukundo* Appeal Judgement, para. 217; *Muhimana* Appeal Judgement, para. 72.

<sup>1151</sup> See *supra* para. 110.

<sup>1152</sup> VG013, T. 998-1040 (2 September 2008), T. 1041-1133 (3 September 2008); VG078, T. 1375-1317 (9 September 2008).

<sup>1153</sup> VG101 was asked whether she heard the perpetrators introduce themselves and answered in the negative (VG101, T. 1474-1475 (9 September 2008)); VG038's testimony in the *Vasiljević* case also indicated that he did not hear Sredoje Lukić say anything in the Memić House (Exh. P44, p. 1373 (confidential)).

different vantage points that would reflect varying degrees of detail.<sup>1155</sup> The Appeals Chamber, Judge Morrison dissenting, therefore finds that Sredoje Lukić has failed to show an error that could invalidate the Trial Chamber's finding that VG018 heard the Introduction, placing Sredoje Lukić at the Memić House.

377. With respect to the contention that the Trial Chamber made contradictory findings as to Sredoje Lukić's location during the events at the Memić House, the Appeals Chamber observes that the Trial Chamber did not make a clear finding on this issue. The Trial Chamber found that Sredoje Lukić entered the Memić House and introduced himself.<sup>1156</sup> It further found that Sredoje Lukić was armed and present "at" the Memić House while the Robbery was taking place inside the house.<sup>1157</sup> The Trial Chamber also found that, during the Robbery, Sredoje Lukić was armed and present "around" the Memić House.<sup>1158</sup> In so doing, the Trial Chamber did not find exactly where Sredoje Lukić was during the Robbery. Nevertheless, it concluded that Sredoje Lukić aided and abetted the Robbery by being armed and present "at" and/or "around" the Memić House.<sup>1159</sup>

378. The Appeals Chamber is satisfied that Sredoje Lukić has not shown that the above findings are inconsistent. Indeed, it considers that these findings are compatible with various reasonable scenarios including one in which Sredoje Lukić could have entered the Memić House and introduced himself, before exiting and, subsequently, being at, or around, the house. Sredoje Lukić has thus failed to show a contradiction in the Trial Chamber's findings. The Appeals Chamber dismisses his arguments in this respect.

379. Turning to Sredoje Lukić's claim that VG018's evidence is inconsistent with her testimony in the *Vasiljević* trial, the Appeals Chamber finds that the apparent inconsistency to the effect that Milan Lukić had falsely introduced himself as Sredoje Lukić in the Memić House is of no material significance. When confronted in cross-examination with this allegation, VG018 maintained that she heard both men introduce themselves in the Memić House.<sup>1160</sup> Further, a trial chamber does not need to explain its reasoning in relation to every minor inconsistency in the evidence.<sup>1161</sup> Sredoje Lukić has thus failed to demonstrate that the Trial Chamber erred in relying on the evidence of VG018.

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<sup>1154</sup> Trial Judgement, para. 426, referring to VG101, T. 1432 (9 September 2008) ("VG101 saw Milan Lukić during the robbery in Jusuf Memić's house when he kicked open the door and entered the house").

<sup>1155</sup> Cf. *Vasiljević* Appeal Judgement, para. 37; *Gacumbitsi* Appeal Judgement, para. 80.

<sup>1156</sup> Trial Judgement, para. 637.

<sup>1157</sup> Trial Judgement, para. 593. See also Trial Judgement, paras 637, 1028.

<sup>1158</sup> Trial Judgement, paras 930, 1030.

<sup>1159</sup> Trial Judgement, paras 593, 637, 932, 1028, 1030.

<sup>1160</sup> VG018, T. 1364-1365 (8 September 2008).

<sup>1161</sup> See *supra* para. 110.



380. Based on the foregoing, the Appeals Chamber, Judge Morrison dissenting, is satisfied that a reasonable trier of fact could have found that VG018 placed Milan Lukić and Sredoje Lukić “at” and/or “around” the Memić House.

(ii) The hearsay evidence of VG038 and VG084

381. The Trial Chamber found that “other persons in the Memić House spoke of Sredoje Lukić by name to VG084, and they described him as a policeman.”<sup>1162</sup> In relation to VG038, the Trial Chamber relied on VG038’s prior statement to the effect that “other persons also told [him] who Sredoje Lukić was.”<sup>1163</sup> The Trial Chamber further found that neither witness had prior knowledge of Sredoje Lukić or was able to differentiate between him and Milan Lukić.<sup>1164</sup> While it concluded that no weight would be attributed to the evidence of VG084 and VG038 as to the specific acts of either Milan Lukić or Sredoje Lukić, it was nevertheless satisfied that their evidence was reliable “insofar as it place[d] both Milan Lukić and Sredoje Lukić at the scene of the robbery.”<sup>1165</sup> Both VG084 and VG038 were found to have been next to their respective mothers, VG018 and VG013, during the events.<sup>1166</sup>

382. Sredoje Lukić argues that the Trial Chamber erred in finding VG038 credible despite the fact that VG038’s evidence regarding his prior knowledge of Sredoje Lukić changed during the course of his testimony.<sup>1167</sup> In particular, Sredoje Lukić contends that it was unreasonable for the Trial Chamber to reject the portion of VG038’s evidence with respect to his prior knowledge but, at the same time, to rely on VG038’s evidence that others in the Memić House discussed Sredoje Lukić’s identity.<sup>1168</sup> He also submits that the Trial Chamber acted unreasonably when finding that others in the Memić House told VG038 and VG084 that he was present given the evidence of VG013, VG018, and VG101 that no such discussion occurred.<sup>1169</sup> He alleges a further contradiction in this regard between VG038’s evidence and the evidence of his mother, VG013, who knew Sredoje Lukić prior to the Pionirska Street Incident and did not see him in the Memić House.<sup>1170</sup>

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<sup>1162</sup> Trial Judgement, para. 590.

<sup>1163</sup> Trial Judgement, paras 417, 585, citing Exh. 2D4, p. 3.

<sup>1164</sup> Trial Judgement, paras 582, 585, 589-590.

<sup>1165</sup> Trial Judgement, paras 585, 590.

<sup>1166</sup> Trial Judgement, paras 584, 589.

<sup>1167</sup> Sredoje Lukić argues that, while VG038 testified on the first day of his testimony that he had known Sredoje Lukić for at least seven years prior to the incident, he admitted subsequently that he had no prior knowledge of Sredoje Lukić (Sredoje Lukić Appeal Brief, paras 49, 79-80, 82; Sredoje Lukić Reply Brief, para. 21).

<sup>1168</sup> Sredoje Lukić Appeal Brief, paras 80, 82; Sredoje Lukić Reply Brief, para. 22.

<sup>1169</sup> Sredoje Lukić Appeal Brief, paras 47, 77, 83, 103, 129; Sredoje Lukić Reply Brief, paras 17, 20, 22.

<sup>1170</sup> Sredoje Lukić Appeal Brief, paras 83-84; Sredoje Lukić Reply Brief, paras 12, 34.

Finally, he contends that the inability of either VG084 or VG038 to name the individuals who told them of Sredoje Lukić's identity renders their evidence unreliable.<sup>1171</sup>

383. The Prosecution responds that the Trial Chamber reasonably relied upon the portion of VG038's evidence which established that others in the Memić House named Sredoje Lukić.<sup>1172</sup> It submits that the Trial Chamber correctly rejected Sredoje Lukić's contention that conflicting evidence as to the existence of a discussion about Sredoje Lukić at the Memić House undermines the finding that VG038 and VG084 learned his identity from "others".<sup>1173</sup> The Prosecution contends that the lack of specificity as to the source of evidence does not call into question the reliability of the identification evidence, as at least 10 members of the Koritnik Group knew Sredoje Lukić, who was a publicly known figure in the municipality.<sup>1174</sup>

384. The Appeals Chamber notes that the Trial Chamber carefully considered the change in VG038's testimony under cross-examination regarding his prior knowledge of Sredoje Lukić.<sup>1175</sup> While VG038 had testified during his examination-in-chief that before 14 June 1992 he saw Sredoje Lukić on the streets of Višegrad and knew that he was a policeman, VG038 agreed in cross-examination with the proposition of the Sredoje Lukić Defence that his knowledge of Sredoje Lukić did not pre-date the incident.<sup>1176</sup> The Appeals Chamber recalls that it is primarily for a trial chamber to assess the credibility of a witness.<sup>1177</sup> The Appeals Chamber finds that Sredoje Lukić has not shown that it was outside the Trial Chamber's discretion to conclude, based on the evidence as a whole, that VG038's statement was credible when asserting that he heard from others of the presence of Sredoje Lukić at the Memić House, despite the change in his testimony.<sup>1178</sup> Sredoje Lukić's arguments in this respect are therefore dismissed.

385. The Appeals Chamber also rejects Sredoje Lukić's contention that the Trial Chamber acted unreasonably when relying on part of VG038's evidence while dismissing others. The Appeals Chamber recalls that it is within a trial chamber's discretion to do so.<sup>1179</sup> The Appeals Chamber notes that the Trial Chamber gave limited weight to VG038's evidence. It accepted that evidence only to the extent that it placed Sredoje Lukić at the Memić House, and not as a basis for

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<sup>1171</sup> Sredoje Lukić Appeal Brief, paras 77, 79, 103; Sredoje Lukić Reply Brief, para. 22.

<sup>1172</sup> Prosecution Response Brief (Sredoje Lukić), paras 40-41.

<sup>1173</sup> Prosecution Response Brief (Sredoje Lukić), paras 16-17, 37-38, 41.

<sup>1174</sup> Prosecution Response Brief (Sredoje Lukić), paras 17, 37, 41, fn. 82.

<sup>1175</sup> Trial Judgement, para. 582. *See also* Trial Judgement, para. 417, referring to VG038, T. 948-949 (1 September 2008), T. 977, 983-984, 986 (2 September 2008).

<sup>1176</sup> Trial Judgement, para. 582.

<sup>1177</sup> *Kupreškić et al.* Appeal Judgement, para. 32; *Kamuhanda* Appeal Judgement, para. 138.

<sup>1178</sup> Trial Judgement, paras 417, 585, referring to Exh. 2D4, p. 3.

<sup>1179</sup> *Haradinaj et al.* Appeal Judgement, para. 201; *Blagojević and Jokić* Appeal Judgement, para. 82; *Kupreškić et al.* Appeal Judgement, para. 333; *Ntagerura et al.* Appeal Judgement, para. 214; *Kamuhanda* Appeal Judgement, para. 248.

establishing his specific acts or location.<sup>1180</sup> The Appeals Chamber finds that Sredoje Lukić has failed to show that the Trial Chamber acted unreasonably in this respect and accordingly rejects his arguments.

386. The Appeals Chamber also finds that a reasonable trier of fact could have found that “others” in the Memić House named Sredoje Lukić as one of the perpetrators. The Trial Chamber did not specifically discuss the evidence of VG013, VG078, and VG101 with regard to the occurrence of a discussion of Sredoje Lukić’s identity. However, it generally considered their evidence in relation to the Pionirska Street Incident.<sup>1181</sup> Furthermore, the Appeals Chamber recalls that there were about 60 people in the Memić House at the time, and it was reasonable to assume that some discussions would be heard by some but not by others. The Appeals Chamber finds that Sredoje Lukić has failed to show that the evidence of VG013, VG078, and VG101 would undermine the Trial Chamber’s conclusion that VG038 and VG084 heard that Sredoje Lukić was present at the Memić House.

387. However, the Appeals Chamber finds that the Trial Chamber did not specifically address the reliability of the source of VG038’s hearsay evidence. The Trial Chamber simply stated that “others” at the Memić House told the witness who Sredoje Lukić was.<sup>1182</sup> Similarly, the Trial Chamber found that VG084 was told by “others” about Sredoje Lukić,<sup>1183</sup> but did not discuss the source of this hearsay evidence. The Appeals Chamber recalls that where the source of identification evidence is hearsay, a trial chamber must duly consider the relevant criteria in assessing the weight or the probative value to be accorded to this evidence.<sup>1184</sup> The Trial Chamber erred in failing to do so.

388. Nonetheless, the Appeals Chamber, Judge Morrison dissenting, is not convinced that this error undermines the reasonableness of the Trial Chamber’s reliance on this hearsay evidence to find that Sredoje Lukić was present at the Memić House. Elsewhere in the Judgement, the Trial Chamber noted VG084’s testimony that an estimated 20% to 25% of the Koritnik Group knew the two men who came into the room.<sup>1185</sup> This is further supported by the Trial Chamber’s consideration of the testimony of VG013, who had prior knowledge of Sredoje Lukić and stated

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<sup>1180</sup> Trial Judgement, paras 417, 583-585. The Trial Chamber considered that VG038 was mistaken when he testified that Milan Lukić had remained outside the house when Sredoje Lukić had entered it in light of VG078 and VG101’s evidence that they had seen Milan Lukić inside the house, and VG013’s evidence that she did not see Sredoje Lukić inside the house (Trial Judgement, paras 583-585).

<sup>1181</sup> Trial Judgement, paras 330-387, 399-436, 554-613.

<sup>1182</sup> Trial Judgement, paras 417, 585.

<sup>1183</sup> The Appeals Chamber has overturned the Trial Chamber’s finding that VG084 heard the Introduction (*see supra* para. 374).

<sup>1184</sup> *Karera* Appeal Judgement, para. 39 and references cited therein.

<sup>1185</sup> Trial Judgement, para. 405.

that Sredoje Lukić patrolled as a police officer through Koritnik village.<sup>1186</sup> Consequently, a number of individuals in the Memić House were in a position to identify Sredoje Lukić. The Appeals Chamber considers, Judge Morrison dissenting, that this provides a reasonable degree of reliability to the unidentified sources of hearsay evidence.<sup>1187</sup> Moreover, the Appeals Chamber notes that the Trial Chamber did not rely on the evidence of VG038 and VG084 to establish Sredoje Lukić's conduct or location during the Pionirska Street Incident. Further, the Appeals Chamber considers that, Judge Morrison dissenting, what is ultimately important is the fact that both Milan Lukić and Sredoje Lukić were reasonably found to be at the Memić House, regardless of whether or not the witnesses could distinguish between them. In these circumstances, the Appeals Chamber is satisfied, Judge Morrison dissenting, that the Trial Chamber did not err insofar as it relied on this hearsay identification evidence.

389. Finally, the Appeals Chamber is not convinced by Sredoje Lukić's submission that the Trial Chamber's findings regarding VG038 contradict those made in relation to the account of his mother, VG013. The Trial Chamber specifically scrutinised the evidence of these two witnesses and found that VG038's evidence was reliable despite the apparent contradiction presented by VG013's evidence.<sup>1188</sup> The Trial Chamber found that Sredoje Lukić was present at and/or around the Memić House while the Robbery was taking place inside.<sup>1189</sup> In this context, the Trial Chamber specifically limited the weight of VG038's testimony to account for Sredoje Lukić's presence at the Memić House.<sup>1190</sup> The Appeals Chamber discerns no error in this approach. This argument is therefore dismissed.

390. The Appeals Chamber, Judge Güney and Judge Morrison dissenting, finds that a reasonable trier of fact could have found that the hearsay evidence of VG038 and VG084 placed Milan Lukić and Sredoje Lukić "at" and/or "around" the Memić House.

(iii) The hearsay evidence of Huso Kurspahić

391. The Trial Chamber relied upon Huso Kurspahić's hearsay evidence recounting the experiences of his late father, Hasib Kurspahić, a survivor of the Pionirska Street Incident, to place Sredoje Lukić "at the scene of the robbery".<sup>1191</sup> The Trial Chamber was satisfied that Hasib Kurspahić would have been able to recognise Sredoje Lukić during the Pionirska Street Incident.<sup>1192</sup>

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<sup>1186</sup> Trial Judgement, para. 409.

<sup>1187</sup> Cf. *Rukundo* Appeal Judgement, paras 195-198.

<sup>1188</sup> Trial Judgement, paras 584-585. The Trial Chamber specifically noted that VG013 did not place Sredoje Lukić inside the Memić House (Trial Judgement, para. 584).

<sup>1189</sup> Trial Judgement, para. 593.

<sup>1190</sup> Trial Judgement, para. 585.

<sup>1191</sup> Trial Judgement, paras 350, 591, 593.

<sup>1192</sup> Trial Judgement, para. 591.

It considered that an interview given by Hasib Kurspahić to a journalist (“Interview”) shortly after the Pionirska Street Incident, in which he did not name Sredoje Lukić as a perpetrator, did not impact on the reliability and credibility of Huso Kurspahić’s hearsay evidence at trial.<sup>1193</sup>

392. Sredoje Lukić submits that the Trial Chamber failed to provide a reasoned opinion as to why it preferred the hearsay testimony given by Huso Kurspahić to the direct account provided by Hasib Kurspahić when he was interviewed shortly after the event.<sup>1194</sup> He does not dispute Hasib Kurspahić’s prior knowledge of him, but argues that Huso Kurspahić’s evidence at trial should be doubted as it directly contradicts the Interview in which his father did not name him.<sup>1195</sup> In support, he refers to the *Vasiljević* trial chamber’s finding that Huso Kurspahić was unreliable on the basis that his hearsay evidence contradicted the direct account of his father in the Interview.<sup>1196</sup> Finally, he submits that the Trial Chamber “split” its findings on Huso Kurspahić’s credibility, rejecting his testimony with respect to the Bikavac Incident, but relying on his hearsay account to find that he was present during the Pionirska Street Incident.<sup>1197</sup>

393. The Prosecution responds that the Trial Chamber acknowledged that Hasib Kurspahić did not mention Sredoje Lukić in the Interview, but reasonably found that this did not undermine the credibility of his son’s evidence at trial.<sup>1198</sup> It further contends that the Trial Chamber did not doubt Huso Kurspahić’s credibility in relation to the Bikavac Incident, but found the source of this information, Zehra Turjačanin, to be inconclusive.<sup>1199</sup> It also suggests that Hasib Kurspahić stated during the Interview that he “would not dare to say” if he recognised the perpetrators, which reasonably explains his omission to name Sredoje Lukić as a perpetrator.<sup>1200</sup> The Prosecution argues that the Trial Chamber reasonably relied on Huso Kurspahić’s hearsay evidence on the basis of his father’s established prior knowledge of Sredoje Lukić.<sup>1201</sup>

394. Sredoje Lukić replies that when Hasib Kurspahić used the phrase: “I am afraid I can’t say”, during the Interview, it was an expression used in B/C/S to show lack of knowledge, rather than

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<sup>1193</sup> Trial Judgement, para. 591.

<sup>1194</sup> Sredoje Lukić Appeal Brief, paras 53-54, 85-87, 131-134. Sredoje Lukić argues that Hasib Kurspahić’s evidence that he was “not present” should have been preferred in light of the evidence of VG013 who also had prior knowledge of him and did not see him among the perpetrators (Sredoje Lukić Appeal Brief, paras 63, 66, 91; Sredoje Lukić Reply Brief, para. 28).

<sup>1195</sup> Sredoje Lukić Appeal Brief, paras 53-54, 85-87.

<sup>1196</sup> Sredoje Lukić Appeal Brief, paras 57-58, 111-112; Sredoje Lukić Reply Brief, para. 43.

<sup>1197</sup> Sredoje Lukić Appeal Brief, paras 89-90; Sredoje Lukić Reply Brief, para. 35.

<sup>1198</sup> Prosecution Response Brief (Sredoje Lukić), para. 42, referring to Trial Judgement, para. 591.

<sup>1199</sup> Prosecution Response Brief (Sredoje Lukić), para. 58, referring to Trial Judgement, para. 735.

<sup>1200</sup> Prosecution Response Brief (Sredoje Lukić), para. 43, referring to Interview, p. 9.

<sup>1201</sup> Prosecution Response Brief (Sredoje Lukić), para. 43.

fear, and that the Prosecution's submission that Hasib Kurspahić was afraid to name Sredoje Lukić in the Interview is misguided because Hasib Kurspahić mentioned Vasiljević at this time.<sup>1202</sup>

395. The Appeals Chamber considers that the Trial Chamber was aware of the need to exercise caution when it discussed the source of Huso Kurspahić's hearsay evidence.<sup>1203</sup> It expressly considered that Hasib Kurspahić's failure to name Sredoje Lukić as a perpetrator in the Interview was not capable of undermining Huso Kurspahić's credibility on this issue.<sup>1204</sup> Although it would have been desirable for the Trial Chamber to address this inconsistency in greater detail, the Appeals Chamber, Judge Morrison dissenting, is not convinced that the Trial Chamber acted unreasonably when accepting Huso Kurspahić's testimony on this point. The Appeals Chamber considers that this discrepancy can easily be explained by the possible implications for Hasib Kurspahić when naming Sredoje Lukić in a public interview as opposed to privately sharing this information with his son. Further, a review of the Interview allows for the inference that Hasib Kurspahić was still fearful for his life at the time of the Interview and would have been afraid to name the perpetrators directly implicated in the Pionirska Street Incident.<sup>1205</sup> Consequently, the Appeals Chamber, Judge Morrison dissenting, finds that a reasonable trier of fact could have accepted the hearsay evidence of Huso Kurspahić over the account given in the Interview by his father, Hasib Kurspahić, in relation to the Memić House.

396. The Appeals Chamber notes that the *Vasiljević* trial chamber reached a different conclusion in relation to the same evidence, concluding that Hasib Kurspahić's failure to include Vasiljević as one of the perpetrators on Pionirska Street rendered Huso Kurspahić's trial evidence as to his presence unreliable.<sup>1206</sup> The Appeals Chamber recalls that two reasonable triers of facts may reach different but equally reasonable conclusions when assessing the reliability of a witness and determining the probative value of the evidence presented at trial.<sup>1207</sup> An error cannot be established by simply demonstrating that other trial chambers have exercised their discretion in a different way.<sup>1208</sup>

397. The Appeals Chamber considers Sredoje Lukić's assertion that the Trial Chamber reached inconsistent conclusions as to Huso Kurspahić's credibility at different crime sites to be a

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<sup>1202</sup> Sredoje Lukić Reply Brief, para. 25.

<sup>1203</sup> See Trial Judgement, paras 591, 605.

<sup>1204</sup> Trial Judgement, para. 591.

<sup>1205</sup> Interview, p. 7. Hasib Kurspahić expressed his fears by stating: "I did not dare to go up to that settlement. Again I did not dare. [...] Then a Serb woman appeared and I did not [dare] to go look for the daughter-in-law."

<sup>1206</sup> *Vasiljević* Trial Judgement, para. 147. During the Interview, Hasib Kurspahić mentioned having met "Mitar, a waiter" in the course of the day, but he did not list him as one of the perpetrators of the Pionirska Street Incident (see Interview, p. 4).

<sup>1207</sup> *Krnojelac* Appeal Judgement, paras 11-12.

<sup>1208</sup> Cf. *Krnojelac* Appeal Judgement, para. 12.

misrepresentation of the Trial Chamber's findings. The Trial Chamber chose not to rely on Huso Kurspahić's hearsay evidence with respect to the Bikavac Incident because it found the direct source of his evidence, Zehra Turjačanin, to be inconclusive,<sup>1209</sup> and not because it found him to be unreliable. With regard to the Pionirska Street Incident, the source of the direct evidence was Hasib Kurspahić, who had established prior knowledge of Sredoje Lukić, and was thus deemed reliable.<sup>1210</sup>

398. The Appeals Chamber, Judge Morrison dissenting, finds that Sredoje Lukić has failed to demonstrate that the Trial Chamber erred in relying upon Huso Kurspahić's hearsay evidence to place Milan Lukić and Sredoje Lukić "at" and/or "around" the Memić House.

(iv) Whether the Trial Chamber reasonably considered the evidence offered by other Prosecution witnesses

399. Sredoje Lukić asserts that the Trial Chamber erred in failing to consider that VG089, VG078, and VG101 provided consistent physical descriptions of perpetrators which did not match his own.<sup>1211</sup> He argues that these descriptions match another man, VGD4, who, according to Vasiljević, was the tall blond man accompanying Milan Lukić that day.<sup>1212</sup>

400. The Prosecution contends that VG078 and VG101 had no prior knowledge of Sredoje Lukić and offered vague descriptions of the perpetrators, which did not exclude Sredoje Lukić.<sup>1213</sup> It submits that the evidence of VG018, VG038, and VG084 identifying both Sredoje Lukić and Milan Lukić at the scene is not undermined by the testimony of VG078 and VG101.<sup>1214</sup> It finally argues that challenges in respect of VG089 should be summarily dismissed, as this witness did not give evidence in respect of the Pionirska Street Incident.<sup>1215</sup>

401. At the outset, the Appeals Chamber dismisses Sredoje Lukić's submission that the Trial Chamber failed to consider the evidence of VG089. This witness gave evidence in rebuttal of Milan

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<sup>1209</sup> Trial Judgement, para. 735.

<sup>1210</sup> Trial Judgement, paras 591, 605.

<sup>1211</sup> Sredoje Lukić Appeal Brief, paras 64-66. Sredoje Lukić also argues that "witness CW2 who had prior knowledge of the Appellant never heard from anyone that he was one of the perpetrators of the Pionirska street incident" (*see* Sredoje Lukić Appeal Brief, para. 64, fn. 53, referring to Exh. P336 (confidential), pp. 27-30). While the cited pages discuss Milan Lukić's involvement in the event, the witness was not present during the Pionirska Street Incident, makes no reference to Sredoje Lukić, and gives no evidence which would seem to exclude his involvement. The Appeals Chamber therefore dismisses Sredoje Lukić's submissions with regard to CW2.

<sup>1212</sup> Sredoje Lukić Appeal Brief, paras 64-66, fn. 56.

<sup>1213</sup> Prosecution Response Brief (Sredoje Lukić), paras 50-51, referring to VG078, T. 1382, 1386 (8 September 2008), VG101, T. 1432-1433 (9 September 2008), Exh. P44 (confidential), p. 1409.

<sup>1214</sup> Prosecution Response Brief (Sredoje Lukić), paras 27, 51.

<sup>1215</sup> Prosecution Response Brief (Sredoje Lukić), para. 52, referring to Trial Judgement, para. 330.

Lukić's alibi,<sup>1216</sup> and was not present during the Pionirska Street Incident. The Appeals Chamber therefore finds that a reasonable trier of fact was not required to expressly consider his evidence in relation to Sredoje Lukić.

402. The Appeals Chamber, Judge Morrison dissenting, is not convinced that Sredoje Lukić identified any inconsistency between the witnesses' accounts capable of undermining the Trial Chamber's finding that both Milan Lukić and Sredoje Lukić were present at the Memić House. The Appeals Chamber observes that VG078 and VG101 gave evidence in relation to the physical description of several perpetrators and that the Trial Chamber considered this evidence.<sup>1217</sup> Although Sredoje Lukić's appearance does not seem to match the descriptions provided by these two witnesses, the Memić House was very crowded at the time and it may be reasonably assumed that minor discrepancies between the accounts will be the result of different vantage points. In this context, the Appeals Chamber notes that the number of perpetrators present at the Memić House is unknown. The Trial Chamber noted that a group of armed men were responsible for perpetrating the Pionirska Street Incident.<sup>1218</sup> Consequently, the Appeals Chamber, Judge Morrison dissenting, is satisfied that, based on the evidence as a whole, the Trial Chamber has not erred in finding that Sredoje Lukić was present at the Memić House.

403. Finally, the Appeals Chamber finds that the evidence of Vasiljević that the perpetrator described as tall and blond accompanying Milan Lukić during the Pionirska Street Incident was VGD4 does not render unreasonable the conclusion that Sredoje Lukić was also identified as being present at the scene. The Trial Chamber did not make a specific finding on the number of perpetrators present at the Memić House. Sredoje Lukić's submissions in this respect are therefore dismissed.

#### (v) Conclusion

404. The Appeals Chamber recalls that it has found that the Trial Chamber did not err in:  
(i) finding that VG018 placed both Milan Lukić and Sredoje Lukić "at" and/or "around" the Memić

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<sup>1216</sup> Trial Judgement, paras 533-540, 628. The Trial Chamber found that VG089 was not consistent as to the date of the events he described (Trial Judgement, para. 628).

<sup>1217</sup> Trial Judgement, para. 360. The Appeals Chamber notes that VG101 testified that in addition to Milan Lukić, she saw three Serbs entering the Memić House: one man with a black moustache and black curly hair, one with blond hair, taller and heavier built than Milan Lukić, and one of 18 years or younger, who was tall and skinny (VG101, T. 1432 (9 September 2008); Exhs 1D36, p. 4; 1D37, p. 1164). VG078 testified that Milan Lukić was accompanied by several armed men at the Memić House, one of whom had a moustache (VG078, T. 1382, 1386 (8 September 2008)), and a boy of about 15 years (Exh. 1D35, p. 2). The Appeals Chamber also notes that it was the Prosecution case in the *Vasiljević* trial that the person with blond hair who was present during the Pionirska Street Incident was VGD4 (see Exh. 2D55 (confidential), p. 1). Other witnesses testified that the person with black hair and a moustache was Milan Šušnjar (Huso Kurspahić, T. 879 (1 September 2008); VG013, T. 1031 (2 September 2008)).

<sup>1218</sup> See, e.g., Trial Judgement, paras 555-556, 561, 569.



House;<sup>1219</sup> (ii) finding that the hearsay evidence of VG038 and VG084 corroborates VG018's evidence placing both Milan Lukić and Sredoje Lukić "at" and/or "around" the Memić House;<sup>1220</sup> (iii) relying upon Huso Kurspahić's hearsay evidence to corroborate further VG018's evidence that both Milan Lukić and Sredoje Lukić were present at the Memić House;<sup>1221</sup> and (iv) failing to consider the physical descriptions of perpetrators that were provided by VG089, VG078, VG101, and Vasiljević.<sup>1222</sup> Thus, based on the evidence as a whole, the Appeals Chamber, Judge Morrison dissenting, dismisses Sredoje Lukić's first ground of appeal in its entirety.

(b) Transfer

405. The Trial Chamber found that Sredoje Lukić returned in the evening to the Memić House, and participated in the Transfer of the Koritnik Group to the Omeragić House.<sup>1223</sup> The Trial Chamber relied on the evidence of VG038 and VG084 who both identified Sredoje Lukić during the Transfer,<sup>1224</sup> and on Huso Kurspahić's hearsay evidence that Sredoje Lukić was one of the men who participated in the Transfer.<sup>1225</sup> The Trial Chamber also placed corroborative weight upon the evidence of VG018 to link both Milan Lukić and Sredoje Lukić to the Transfer.<sup>1226</sup>

406. Sredoje Lukić argues that the Trial Chamber erroneously relied on the identification evidence of VG038, VG084, and Huso Kurspahić.<sup>1227</sup> He submits that the Trial Chamber failed to provide a reasoned opinion as to how, despite the "nebulous nature" of the identification evidence, it could still be satisfied that Sredoje Lukić participated in the Transfer.<sup>1228</sup> In particular, he argues that the Trial Chamber's conclusion as to his armed presence during the Transfer lacks factual basis and is the result of a "gradual shift" in the interpretation of the same evidence which triggered inconsistent findings regarding his presence throughout the Pionirska Street Incident.<sup>1229</sup>

407. Sredoje Lukić submits that the Trial Chamber, after expressing serious reservations in relation to VG038's ability to identify him, was still satisfied that VG038's evidence reliably placed him at the scene during the Transfer.<sup>1230</sup> Sredoje Lukić also argues that VG038's evidence should have been undermined by the inaccurate description the witness provided of his physical

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<sup>1219</sup> See *supra* para. 380.

<sup>1220</sup> See *supra* para. 390. Judge Morrison dissents to this finding.

<sup>1221</sup> See *supra* para. 398. Judge Morrison dissents to this finding.

<sup>1222</sup> See *supra* paras 401-403. Judge Morrison dissents with regard to VG078 and VG101.

<sup>1223</sup> Trial Judgement, paras 637, 930.

<sup>1224</sup> Trial Judgement, paras 601, 604, 607.

<sup>1225</sup> Trial Judgement, paras 605, 607.

<sup>1226</sup> Trial Judgement, para. 603.

<sup>1227</sup> Sredoje Lukić's second ground of appeal. Sredoje Lukić Appeal Brief, paras 92-136, 139-140; Sredoje Lukić Reply Brief, paras 38-45.

<sup>1228</sup> Sredoje Lukić Appeal Brief, para. 94.

<sup>1229</sup> Sredoje Lukić Appeal Brief, paras 139-140; Sredoje Lukić Reply Brief, paras 46-50.

<sup>1230</sup> Sredoje Lukić Appeal Brief, paras 97-98, 119, 122.

appearance, as well as by the fact that VG013, VG038's mother, did not see him during the Transfer.<sup>1231</sup> He also argues that this description stands in contrast with that provided by VG101 of the perpetrators.<sup>1232</sup> Further, he argues that VG038 had no opportunity to see the perpetrators and that the Trial Chamber should therefore have discounted his identification evidence for the same reasons it chose not to rely upon the evidence of VG018.<sup>1233</sup>

408. In relation to VG084 and Huso Kurspahić, Sredoje Lukić repeats the arguments he raises with respect to his presence at the Memić House.<sup>1234</sup> He further asserts that VG084's evidence with respect to his ability to distinguish between the perpetrators was so inconsistent as to render it unreliable.<sup>1235</sup> Sredoje Lukić also argues that the Trial Chamber clearly found that VG018 was unable to identify the men, and that her recognition of his voice was insufficient to link him to the Transfer.<sup>1236</sup> Finally, he argues that the Trial Chamber misapplied the principle of *in dubio pro reo*.<sup>1237</sup>

409. The Prosecution responds that the Trial Chamber provided adequate reasons for its conclusion that Sredoje Lukić was present and participated in the Transfer.<sup>1238</sup> It submits that the Trial Chamber reasonably relied upon the evidence of VG018, VG038, VG084, and Huso Kurspahić.<sup>1239</sup> It argues that the physical description offered by VG038 was not inconsistent with Sredoje Lukić's actual appearance,<sup>1240</sup> and that submissions in respect of a conflict between VG013 and VG038's evidence were reasonably dismissed at trial.<sup>1241</sup> The Prosecution also argues that, unlike VG018, VG038 did recognise the perpetrators during the Transfer.<sup>1242</sup> It further responds

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<sup>1231</sup> Sredoje Lukić Appeal Brief, paras 99-100, 123.

<sup>1232</sup> Sredoje Lukić Appeal Brief, paras 99-100.

<sup>1233</sup> Sredoje Lukić Appeal Brief, paras 98, 119-122.

<sup>1234</sup> Sredoje Lukić Appeal Brief, paras 99, 102-103, 107-112, 116-118, 131-136; Sredoje Lukić Reply Brief, para. 43. See *supra* paras 371, 391.

<sup>1235</sup> Sredoje Lukić Appeal Brief, paras 104-106, referring to VG084, T. 1275 (5 September 2008) (arguing that VG084 testified that he did not know who ordered the Transfer), T. 1284 (5 September 2008) (arguing that VG084 testified that he did not know which of the two perpetrators was at the door of the Omeragić House). Sredoje Lukić further submits that the Trial Chamber should have considered VG101's evidence that one of the perpetrators was blond, as this does not match his own appearance (Sredoje Lukić Appeal Brief, para. 115, referring to VG101, T. 1432, 1444-1446 (2 September 2008)).

<sup>1236</sup> Sredoje Lukić Appeal Brief, para. 120.

<sup>1237</sup> Sredoje Lukić's thirteenth ground of appeal (in part). Sredoje Lukić Appeal Brief, paras 297, 300; Sredoje Lukić Reply Brief, paras 113-115.

<sup>1238</sup> Prosecution Response Brief (Sredoje Lukić), para. 69.

<sup>1239</sup> Prosecution Response Brief (Sredoje Lukić), paras 71-74.

<sup>1240</sup> Prosecution Response Brief (Sredoje Lukić), para. 65, referring to VG038, T. 983-984 (2 September 2008) (arguing that VG038 agreed with VG013's evidence that Sredoje Lukić was about the same height as Milan Lukić, did not have a beard, was not fat and wore a flak jacket, and further noting VG013's "solid prior knowledge" of Sredoje Lukić).

<sup>1241</sup> Prosecution Response Brief (Sredoje Lukić), paras 65, 70-72.

<sup>1242</sup> Prosecution Response Brief (Sredoje Lukić), para. 63, referring to Trial Judgement, para. 601, VG038, T. 978-979 (2 September 2008), Exh. P44 (confidential), p. 1378. Accordingly, the Prosecution asserts that a comparison between the evidence of VG038 and VG018 is inapposite, as VG018 did not dare to look at the perpetrators and recognised them only by voice (Prosecution Response Brief (Sredoje Lukić), para. 71, referring to Trial Judgement, para. 603).

that the Trial Chamber considered the immaterial inconsistencies in VG084's evidence.<sup>1243</sup> Finally, the Prosecution responds that the Trial Chamber correctly applied the principle of *in dubio pro reo*.<sup>1244</sup>

410. The Appeals Chamber, Judge Güney and Judge Morrison dissenting, does not consider that the Trial Chamber erred in its assessment of the evidence regarding Sredoje Lukić's presence during the Transfer. In this respect, it is not convinced that the alleged inconsistencies pertaining to Sredoje Lukić's presence during the events are irreconcilable. On the basis of, *inter alia*, the evidence of VG038 and VG084, the Trial Chamber successively found that Sredoje Lukić was present "at" or "around" the Memić House during the Robbery and the removal of the women, and "outside" the Memić House during the strip searches.<sup>1245</sup> Likewise, based on the same two witnesses, it found that Sredoje Lukić was armed and present during the Transfer, without specifying his precise location.<sup>1246</sup> Contrary to Sredoje Lukić's submissions, these broad findings as to his location during the events show that while the Trial Chamber was unable to make a determination as to his precise whereabouts during the events, it was satisfied that Sredoje Lukić was armed and present on site. The Appeals Chamber, Judge Güney and Judge Morrison dissenting, considers that the Trial Chamber acted reasonably in making such a finding and considers that Sredoje Lukić has failed to show how the lack of specificity as to his precise location undermines his convictions. Thus, his submissions in this respect fail.

411. Similarly, the Appeals Chamber finds no merit in Sredoje Lukić's contention that the Trial Chamber's failure to consider VG101's description of the perpetrators undermines the conclusion that Sredoje Lukić was present during the Transfer. VG101's evidence was that she saw a perpetrator with blond hair, another one with a black moustache and a third one, who was 18 years old or younger.<sup>1247</sup> However, the Trial Chamber made no finding as to the precise number of perpetrators who were present at the Memić House or during the Transfer. The Trial Chamber explicitly considered evidence in respect of two perpetrators other than Sredoje Lukić and Milan Lukić and found, by majority, that Vasiljević was present.<sup>1248</sup> It further considered witness evidence that another man, Milan Šušnjar, was present.<sup>1249</sup> Thus, VG101's evidence could describe someone

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<sup>1243</sup> Prosecution Response Brief (Sredoje Lukić), para. 67, referring to Trial Judgement, para. 604. As to Sredoje Lukić's challenges to the Trial Chamber's reliance upon the evidence of Huso Kurspahić and VG101, the Prosecution submits that they should be summarily dismissed and refers to its corresponding submissions with regard to the Memić House (Prosecution Response Brief (Sredoje Lukić), paras 68, 70).

<sup>1244</sup> Prosecution Response Brief (Sredoje Lukić), paras 189-190.

<sup>1245</sup> Trial Judgement, paras 593, 637, 930, 1030-1031.

<sup>1246</sup> Trial Judgement, paras 601, 604, 607, 930, 1032.

<sup>1247</sup> See VG101, T. 1432 (9 September 2008).

<sup>1248</sup> Trial Judgement, para. 577. Judge Robinson dissented on this finding.

<sup>1249</sup> See Trial Judgement, para. 343, referring to VG013, T. 1031 (2 September 2008), VG038, T. 946 (1 September 2008), Exhs 2D6 (confidential), p. 1, P44 (confidential), pp. 1369-1371, 1408, P72, pp. 1664-1665, P82 (confidential), pp. 1582-1583, P83 (confidential), p. 7.

other than Sredoje Lukić. In these circumstances, the Appeals Chamber finds that, Judge Güney and Judge Morrison dissenting, considering the evidence as a whole, the Trial Chamber did not err in concluding that Sredoje Lukić was present during the Transfer.

412. The Appeals Chamber, Judge Güney and Judge Morrison dissenting, is also not convinced that the Trial Chamber failed to provide a reasoned opinion. When assessing the reliability of VG038, the Trial Chamber specifically considered that: (i) VG038 was unable to see specifically where the men were standing during the Transfer; (ii) VG038 was unable to look at the men closely; (iii) VG038's evidence about Sredoje Lukić is not very specific and he was unable to distinguish between the individual actions of the perpetrators; and (iv) VG038 was unable to distinguish between Milan and Sredoje Lukić.<sup>1250</sup> Having considered those limitations, the Trial Chamber also referred to VG038's testimony that the same four men, including Milan Lukić and Sredoje Lukić,<sup>1251</sup> who were present earlier that day, returned to the Memić House and participated in the Transfer.<sup>1252</sup> After considering all of these factors, the Trial Chamber was satisfied that VG038's evidence reliably established that both Milan Lukić and Sredoje Lukić were present during the Transfer. The Appeals Chamber, Judge Güney and Judge Morrison dissenting, therefore finds that Sredoje Lukić has failed to demonstrate that the Trial Chamber did not exercise appropriate caution in its assessment of VG038's evidence or that it did not take into consideration the elements impacting negatively on the reliability of the identification evidence.

413. Contrary to Sredoje Lukić's submission, the Trial Chamber did refer to VG038's description of Sredoje Lukić.<sup>1253</sup> The Appeals Chamber finds that Sredoje Lukić has failed to show that the Trial Chamber's overall reliance on VG038's evidence is undermined by his description, as it is not inconsistent with Sredoje Lukić's physical appearance. In relation to the alleged discrepancy with VG013's evidence, the Appeals Chamber notes that the Trial Chamber considered her evidence and concluded that she did not see Sredoje Lukić, but only heard of his presence during the Transfer,<sup>1254</sup> finding the source of her hearsay evidence to be unreliable.<sup>1255</sup> Although the Trial Chamber did not expressly refer to these findings when it assessed VG038's evidence, it is apparent from the organisation of the Trial Judgement that it considered VG013's evidence together with VG038's identification evidence.<sup>1256</sup> The Appeals Chamber also recalls that different vantage points account for differences in testimonies which may reasonably vary in their degree of

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<sup>1250</sup> Trial Judgement, para. 601.

<sup>1251</sup> Trial Judgement, para. 585.

<sup>1252</sup> Trial Judgement, para. 601.

<sup>1253</sup> See Trial Judgement, fn. 1538, referring to VG038, T. 984 (2 September 2008). VG038 agreed with the description provided by his mother, VG013, who described Sredoje Lukić as "a man of 40 years of age or so, dark hair, medium height, and stoutish." (VG038, T. 983-984 (2 September 2008)).

<sup>1254</sup> Trial Judgement, para. 600.

<sup>1255</sup> Trial Judgement, para. 600.

detail.<sup>1257</sup> The Appeals Chamber further recalls that the Trial Chamber did not rely on VG013's evidence to find Sredoje Lukić present during the Transfer.<sup>1258</sup> Accordingly, the Appeals Chamber, Judge Morrison dissenting, is not satisfied that Sredoje Lukić has demonstrated that the Trial Chamber erred in its assessment of VG038's evidence, placing Sredoje Lukić at the scene of the Transfer.

414. In relation to VG084, the Appeals Chamber, Judge Güney and Judge Morrison dissenting, also rejects Sredoje Lukić's arguments that the Trial Chamber erred in its assessment of this witness's identification evidence. The Appeals Chamber notes that the Trial Chamber specifically considered the inconsistencies in VG084's evidence and was satisfied that his evidence reliably established that both Milan Lukić and Sredoje Lukić were armed and present during the Transfer.<sup>1259</sup> While the Trial Chamber found that VG084, at the Memić House, was unable to distinguish Milan Lukić from Sredoje Lukić, the Appeals Chamber considers that this clearly allows for the conclusion that VG084 was exposed to both of them during the course of the events.<sup>1260</sup> In this context, the Appeals Chamber recalls that the Trial Chamber found that both Milan Lukić and Sredoje Lukić were present during the Transfer.<sup>1261</sup> The Appeals Chamber, Judge Güney and Judge Morrison dissenting, therefore finds that a reasonable trial chamber could have concluded that, notwithstanding his inability to distinguish between the two of them, VG084 recognised during the Transfer the same two perpetrators, Milan Lukić and Sredoje Lukić, who had earlier come to the Memić House.

415. The Trial Chamber further relied upon Huso Kurspahić's hearsay evidence that "Sredoje Lukić [was] among the persons who escorted the group" during the Transfer.<sup>1262</sup> The Appeals Chamber, Judge Güney and Judge Morrison dissenting, has found elsewhere that the Trial Chamber exercised appropriate caution when according probative weight to Huso Kurspahić's evidence.<sup>1263</sup> As Sredoje Lukić provides no further challenges in this respect, he fails to show an error in the Trial Chamber's reliance on Huso Kurspahić's evidence when it found that Sredoje Lukić was present during the Transfer.

416. The Trial Chamber accorded corroborative weight to VG018's evidence that she could recognise Sredoje Lukić's voice and that she heard other persons shouting "[t]he Lukić's [sic] are

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<sup>1256</sup> Trial Judgement, paras 600-601; cf. *Rukundo* Appeal Judgement, para. 217.

<sup>1257</sup> Cf. *Vasiljević* Appeal Judgement, para. 37; *Gacumbitsi* Appeal Judgement, para. 80.

<sup>1258</sup> Trial Judgement, para. 600.

<sup>1259</sup> Trial Judgement, para. 604.

<sup>1260</sup> Trial Judgement, paras 589-590. See also Trial Judgement, paras 404-407.

<sup>1261</sup> See also Trial Judgement, paras 606-607.

<sup>1262</sup> Trial Judgement, para. 605.

<sup>1263</sup> See *supra* para. 398.

coming again”.<sup>1264</sup> These findings indicate a familiarity of some of the members of the Koritnik Group with Sredoje Lukić, and this familiarity further supports the reliability of the evidence of VG038 and VG084 as to Sredoje Lukić’s presence during the Transfer. The Appeals Chamber, Judge Güney and Judge Morrison dissenting, finds that Sredoje Lukić has failed to show that the Trial Chamber erred in this respect.

417. The Appeals Chamber recalls that it has found, Judge Güney and Judge Morrison dissenting, that the Trial Chamber did not err in: (i) finding that both Milan Lukić and Sredoje Lukić were present during the Transfer based on the evidence of VG038 and VG084;<sup>1265</sup> (ii) failing to consider VG101’s description of the perpetrators;<sup>1266</sup> (iii) relying on Huso Kurspahić’s hearsay evidence to corroborate Sredoje Lukić’s presence during the Transfer;<sup>1267</sup> and (iv) according corroborative weight to VG018’s evidence to link both Milan Lukić and Sredoje Lukić to the Transfer.<sup>1268</sup> Consequently, the Appeals Chamber, Judges Güney and Morrison dissenting, finds that, based on the totality of the evidence, the Trial Chamber did not err in assessing the evidence finding Sredoje Lukić present during the Transfer. Thus, Sredoje Lukić’s second ground of appeal is dismissed, Judge Güney and Judge Morrison dissenting.

(c) Conclusion

418. The Appeals Chamber recalls that it has dismissed, Judge Morrison dissenting, Sredoje Lukić’s first ground of appeal. It has also dismissed, Judge Güney and Judge Morrison dissenting, Sredoje Lukić’s second ground of appeal. The Appeals Chamber also finds no error in the Trial Chamber’s application of the principle of *in dubio pro reo*. The Trial Chamber did not express any doubt when it found, based on the totality of the evidence, that Sredoje Lukić was present “at” and/or “around” the Memić House and during the Transfer.<sup>1269</sup> Thus, Sredoje Lukić’s thirteenth ground of appeal is dismissed insofar as it relates to the Pionirska Street Incident. Similarly, Sredoje Lukić has failed to show that the Trial Chamber erred in its assessment of in-court identification evidence with respect to the Pionirska Street Incident. Therefore, his fourteenth ground of appeal is dismissed in this respect.

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<sup>1264</sup> Trial Judgement, para. 603.

<sup>1265</sup> See *supra* paras 410, 412-412.

<sup>1266</sup> See *supra* para. 411.

<sup>1267</sup> See *supra* para. 415.

<sup>1268</sup> See *supra* para. 416.

<sup>1269</sup> Cf. *Boškoski and Tarčulovski* Appeal Judgement, para. 86.

#### 4. Alleged errors in finding that Sredoje Lukić aided and abetted the crimes

419. The Trial Chamber found Sredoje Lukić guilty of aiding and abetting the crimes of persecutions and other inhumane acts as crimes against humanity, murder both as a violation of the laws or customs of war and a crime against humanity as well as cruel treatment as a violation of the laws or customs of war.<sup>1270</sup> The Trial Chamber found that, through his armed presence at the Memić House and his participation in the Transfer to the Omeragić House, Sredoje Lukić provided practical assistance in respect of the crimes of other inhumane acts as a crime against humanity, and cruel treatment as a violation of the laws or customs of war, committed during the Pionirska Street Incident.<sup>1271</sup> With regard to the Omeragić House, the Trial Chamber further found that Sredoje Lukić knew that the survivors of the Omeragić House fire were subjected to serious mental and physical suffering, and that his acts and conduct facilitated the commission of the crimes of other inhumane acts as a crime against humanity, and cruel treatment as a violation of the laws or customs of war.<sup>1272</sup>

420. The Trial Chamber also found, by majority, that, by his armed presence at the Memić House and in particular by his participation in the Transfer, Sredoje Lukić practically assisted the crime of murder as a violation of the laws or customs of war and as a crime against humanity, and that the only reasonable inference was that Sredoje Lukić knew that the persons who had been locked into the Omeragić House would be killed as a result of the fire.<sup>1273</sup> With respect to the crime of persecutions, it found, by majority, that Sredoje Lukić knew that members of the Koritnik Group were Muslims and knew that the principal perpetrators, including Milan Lukić, locked members of the group in the Omeragić House and set the house on fire with the requisite discriminatory intent.<sup>1274</sup> It finally found, by majority, that Sredoje Lukić knew that by his acts he was rendering practical assistance to the commission of the underlying persecutory acts.<sup>1275</sup>

421. Sredoje Lukić argues that the Trial Chamber erred in: (i) relation to the applicable law on aiding and abetting; (ii) finding that he aided and abetted the crimes of cruel treatment as a violation

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<sup>1270</sup> Trial Judgement, paras 932-934, 983-986, 1030-1035, 1103-1105.

<sup>1271</sup> Trial Judgement, paras 983-984, referring to Trial Judgement, paras 969-970 ("The Trial Chamber is satisfied that Milan Lukić's acts of robbing VG013, VG018, VG038, VG078, VG084, VG101, and Hasib Kurspahić of their valuables at gunpoint in Jusuf Memić's house, and of placing VG013, VG018, VG038, VG084, and Hasib Kurspahić in Adem Omeragić's house and setting the house on fire are of a gravity similar to the other offences listed in Articles 3 and 5 of the Statute. The Trial Chamber is also satisfied that Milan Lukić's acts of shooting at the windows of Adem Omeragić's house as VG013 and VG038 escaped through them, and of wounding VG013 in the process, are of gravity similar to the other offences listed in these Articles. The only reasonable inference is that Milan Lukić intended a serious attack on the human dignity of the victims and that he willfully inflicted serious physical and mental suffering upon them.").

<sup>1272</sup> Trial Judgement, para. 985.

<sup>1273</sup> Trial Judgement, paras 932-933. *See also* Trial Judgement para. 1035 (same finding in relation to murder as a persecutory act).

<sup>1274</sup> Trial Judgement, para. 1035.

of the laws or customs of war, other inhumane acts as a crime against humanity, and murder as both a violation of the laws or customs of war and a crime against humanity; and (iii) finding that he aided and abetted the crime of persecutions as a crime against humanity.<sup>1276</sup> The Prosecution submits that the Trial Chamber erred in acquitting Sredoje Lukić of having aided and abetted the crime of extermination as a crime against humanity.<sup>1277</sup>

(a) Alleged errors in relation to the applicable law on aiding and abetting

422. The Trial Chamber set out the *actus reus* of aiding and abetting as “rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a crime provided for in the Statute”.<sup>1278</sup> It further stated that practical assistance “may occur before, during or after the principal crime has been committed” and considered that “tacit approval of an accused who is physically present at the scene and in a position of authority may amount to encouragement and thus meet the *actus reus* of aiding and abetting”.<sup>1279</sup>

423. Sredoje Lukić argues that the *actus reus* of aiding and abetting, as articulated by the Trial Chamber, was “incomplete and artificially construed”.<sup>1280</sup> He asserts that the Trial Chamber omitted the requirement that his conduct was “specifically directed” towards assisting the perpetrators,<sup>1281</sup> and failed to acknowledge that aiding and abetting by practical assistance requires physical presence at the scene of the crimes.<sup>1282</sup>

424. The Appeals Chamber has previously considered within the discussion of the *actus reus* of aiding and abetting the finding that an act or omission of an aider or abettor be “specifically directed” toward the furtherance of the crimes of the principal perpetrators.<sup>1283</sup> The Appeals Chamber recalls, however, that “specific direction has not always been included as an element of the *actus reus* of aiding and abetting.”<sup>1284</sup> It further recalls its conclusion that such a finding of specific direction “will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the

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<sup>1275</sup> Trial Judgement, para. 1035.

<sup>1276</sup> Sredoje Lukić’s third through sixth, eleventh, and twelfth grounds of appeal. Sredoje Lukić Appeal Brief, paras 142, 145-153, 155-157, 159, 161-162, 165-168, 178-180, 185-186, 191-196, 204-205, 208-210, 286, 288-296; Sredoje Lukić Reply Brief, paras 50, 53, 59, 65, 67-69; Appeal Hearing, AT. 136, 140-141 (14 September 2011).

<sup>1277</sup> Prosecution’s first ground of appeal. Prosecution Appeal Brief, paras 4-5, 7.

<sup>1278</sup> Trial Judgement, para. 901.

<sup>1279</sup> Trial Judgement, para. 901.

<sup>1280</sup> Sredoje Lukić Appeal Brief, paras 142, 146, 191.

<sup>1281</sup> Sredoje Lukić Appeal Brief, paras 155-156.

<sup>1282</sup> Appeal Hearing, AT. 136 (14 September 2011).

<sup>1283</sup> *Blagojević and Jokić* Appeal Judgement, para. 127; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, paras 45-46; *Vasiljević* Appeal Judgement, para. 102; *Tadić* Appeal Judgement, para. 229. See also *Rukundo* Appeal Judgement, para. 210; *Ntagerura et al.* Appeal Judgement, para. 370; *Muvunyi I* Appeal Judgement, para. 79; *Seromba* Appeal Judgement, para. 139.

<sup>1284</sup> *Blagojević and Jokić* Appeal Judgement, para. 189.



crime”.<sup>1285</sup> In *Mrkšić and Šljivančanin*, the Appeals Chamber has clarified “that ‘specific direction’ is not an essential ingredient of the *actus reus* of aiding and abetting”<sup>1286</sup> and finds that there is no “cogent reason”<sup>1287</sup> to depart from this jurisprudence.

425. The Appeals Chamber notes that the physical presence of an aider and abettor at or near the scene of the crime may be a relevant factor in cases of aiding and abetting by tacit approval.<sup>1288</sup> Further, the *actus reus* of aiding and abetting may be fulfilled remotely.<sup>1289</sup> It is also well established that the *actus reus* of aiding and abetting may be fulfilled before, during, or after the principal crime has been perpetrated.<sup>1290</sup> Thus, Sredoje Lukić’s submission that the Trial Chamber erroneously construed the *actus reus* of aiding and abetting is dismissed.

426. The Trial Chamber articulated the *mens rea* of aiding and abetting as follows:

The *mens rea* for aiding and abetting is knowledge that, by his or her conduct, the aider and abettor is assisting or facilitating the commission of the offence. [...] The aider and abettor need not share the *mens rea* of the principal perpetrator but must be aware of the essential elements of the crime ultimately committed by the principal, including of his state of mind.<sup>1291</sup>

427. Sredoje Lukić submits that the Trial Chamber misstated the applicable *mens rea*.<sup>1292</sup> He argues that in addition to knowledge of the crimes, an aider and abettor must have “intended” to aid and abet the occurrence and completion of the subsequent crimes.<sup>1293</sup> He further submits that the Trial Chamber did not correctly identify the requirements of an aider and abettor’s “knowledge” of the crimes.<sup>1294</sup>

428. It is well established that the *mens rea* of aiding and abetting requires that an aider and abettor know that his acts would assist in the commission of the crime by the principal perpetrator and must be aware of the “essential elements” of the crime.<sup>1295</sup> It does not require that he shares the intention of the principal perpetrator of such crime, as Sredoje Lukić submits. Thus, Sredoje

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<sup>1285</sup> *Blagojević and Jokić* Appeal Judgement, para. 189.

<sup>1286</sup> *Mrkšić and Šljivančanin* Appeal Judgement, para. 159, confirming *Blagojević and Jokić* Appeal Judgement, para. 189.

<sup>1287</sup> *Aleksovski* Appeal Judgement, para. 107.

<sup>1288</sup> *Brdanin* Appeal Judgement, paras 273, 277. See also *Kayishema and Ruzindana* Appeal Judgement, paras 201-202.

<sup>1289</sup> *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48.

<sup>1290</sup> *Blagojević and Jokić* Appeal Judgement, para. 132. See also *Blaškić* Appeal Judgement, para. 48; *Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 372.

<sup>1291</sup> Trial Judgement, para. 902 (footnotes omitted).

<sup>1292</sup> Sredoje Lukić Appeal Brief, paras 171, 198; Sredoje Lukić Reply Brief, para. 51.

<sup>1293</sup> Sredoje Lukić Appeal Brief, paras 175, 202; Sredoje Lukić Reply Brief, paras 51-52, 57, 60. At the Appeal Hearing, he also argued that an aider and abettor must have been found to have a “common purpose” with the principal perpetrators (Appeal Hearing, AT. 133 (14 September 2011)).

<sup>1294</sup> See Sredoje Lukić Appeal Brief, paras 182-184, 199-200.

<sup>1295</sup> *Blagojević and Jokić* Appeal Judgement, para. 221; *Aleksovski* Appeal Judgement, para. 162. See also *Blaškić* Appeal Judgement, para. 49; *Vasiljević* Appeal Judgement, para. 102; *Rukundo* Appeal Judgement, para. 53; *Karera* Appeal Judgement, para. 321.

Lukić's submission that the Trial Chamber misstated the *mens reus* of aiding and abetting is dismissed.

429. The Appeals Chamber therefore dismisses Sredoje Lukić's submission that the Trial Chamber erred in articulating the applicable law on aiding and abetting.

(b) Alleged errors in relation to the finding of aiding and abetting the crimes of other inhumane acts, cruel treatment, and murder

430. The Trial Chamber found Sredoje Lukić guilty of aiding and abetting the crimes of other inhumane acts as a crime against humanity, and cruel treatment as a violation of the laws or customs of war.<sup>1296</sup> The Trial Chamber further found, by majority, that Sredoje Lukić was guilty of aiding and abetting the crime of murder as a violation of the laws or customs of war and as a crime against humanity.<sup>1297</sup>

431. Sredoje Lukić submits that the Trial Chamber erroneously found that the *actus reus* of aiding and abetting had been established. He specifically argues that "tacit approval by physical presence" cannot by itself constitute practical assistance that substantially contributes to the commission of crimes.<sup>1298</sup> Sredoje Lukić argues that, even if the Trial Chamber had correctly assessed his behaviour as a possible case of encouragement or moral support, the contextual factors necessary to establish that he aided and abetted the crimes in such cases were not present.<sup>1299</sup> In particular, Sredoje Lukić argues that: (i) he held no authoritative or influential position *vis-a-vis* the principal perpetrators;<sup>1300</sup> (ii) he had not been involved in similar crimes in the past;<sup>1301</sup> and (iii) the principal perpetrators were not aware of his conduct during the Pionirska Street Incident.<sup>1302</sup> He further argues that Judge Robinson's separate opinion in this regard reflects "the correct standard and jurisprudential view".<sup>1303</sup>

432. Sredoje Lukić further submits that the Trial Chamber erred in concluding that his *mens rea* had been established. He argues that no reasonable trial chamber could have inferred that he knew that these particular crimes would probably be committed<sup>1304</sup> or that his conduct would facilitate

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<sup>1296</sup> Trial Judgement, paras 986, 1104.

<sup>1297</sup> Trial Judgement, paras 934, 1105. *See also* Trial Judgement, paras 1112-1113 (Separate Opinion of Judge Robinson).

<sup>1298</sup> Sredoje Lukić Appeal Brief, paras 145-146, 153, 157, 167, 191, 193-194; Sredoje Lukić Reply Brief, paras 50, 65.

<sup>1299</sup> Sredoje Lukić Appeal Brief, paras 147, 151, 153, 167, 192-195; Sredoje Lukić Reply Brief, para. 50.

<sup>1300</sup> Sredoje Lukić Appeal Brief, paras 148-149, 152, 159, 161-162, 168, 196; Sredoje Lukić Reply Brief, paras 67-69.

<sup>1301</sup> Sredoje Lukić Appeal Brief, paras 165-166.

<sup>1302</sup> Sredoje Lukić Appeal Brief, para. 150; Appeal Hearing, AT. 140 (14 September 2011).

<sup>1303</sup> Sredoje Lukić Appeal Brief, paras 168, 196.

<sup>1304</sup> Sredoje Lukić Appeal Brief, paras 185-186, 209-210; Sredoje Lukić Reply Brief, para. 53.

them.<sup>1305</sup> He argues that he was an “indirect spectator” to the crimes at the Memić House<sup>1306</sup> and that the Transfer lacked the “prerequisite elements” of the subsequent crimes.<sup>1307</sup> Sredoje Lukić also asserts that the Trial Chamber did not consider the reasonable possible inference that he intended to help house the Koritnik Group in advance of their transfer out of the area on the following day.<sup>1308</sup>

433. The Prosecution responds that the Trial Chamber did not find that Sredoje Lukić had provided “tacit approval” to the crimes, but that he had provided practical assistance with substantial effect upon the crimes.<sup>1309</sup> It also argues that this inference was reasonable as Sredoje Lukić was an armed member of a small group who mistreated the Koritnik Group in an “organised and deceptive manner” throughout the day.<sup>1310</sup> In the alternative, the Prosecution argues that the same findings indicate that Sredoje Lukić actively “encouraged” the crimes, arguing that the question of whether Sredoje Lukić held an authoritative position,<sup>1311</sup> or whether Milan Lukić was already determined to commit the crimes, is irrelevant to this conclusion.<sup>1312</sup>

434. The Prosecution also asserts that the Trial Chamber reasonably found that Sredoje Lukić knew that the victims would be killed and that the survivors would be subjected to other inhumane acts and cruel treatment by virtue of his participation in the incident as a whole.<sup>1313</sup> The Prosecution further responds that the Trial Chamber reasonably found that the idea that Sredoje Lukić had intended to help the civilians in advance of their transportation was a ruse<sup>1314</sup> and that he knew of Milan Lukić’s propensity to kill Muslim civilians.<sup>1315</sup>

435. Sredoje Lukić replies that the Prosecution’s argument that he knew of Milan Lukić’s violent nature in advance of the Pionirska Street Incident is not based on any Trial Chamber finding.<sup>1316</sup>

436. The Appeals Chamber will first consider the arguments relating to Sredoje Lukić’s convictions for aiding and abetting the crimes committed at the Memić House, before considering his challenges in relation to the crimes committed at the Omeragić House.<sup>1317</sup>

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<sup>1305</sup> Sredoje Lukić Appeal Brief, paras 185, 208; Appeal Hearing, AT. 141 (14 September 2011).

<sup>1306</sup> Sredoje Lukić Appeal Brief, paras 185, 208.

<sup>1307</sup> Sredoje Lukić Appeal Brief, paras 178, 208.

<sup>1308</sup> Sredoje Lukić Appeal Brief, paras 179-180, 204-205; Sredoje Lukić Reply Brief, para. 59. *See also* Sredoje Lukić Appeal Brief, para. 296.

<sup>1309</sup> Prosecution Response Brief (Sredoje Lukić), para. 115.

<sup>1310</sup> Prosecution Response Brief (Sredoje Lukić), para. 105.

<sup>1311</sup> Prosecution Response Brief (Sredoje Lukić), paras 92, 119.

<sup>1312</sup> Prosecution Response Brief (Sredoje Lukić), paras 94, 119.

<sup>1313</sup> Prosecution Response Brief (Sredoje Lukić), paras 107, 120-123.

<sup>1314</sup> Prosecution Response Brief (Sredoje Lukić), para. 108, referring to Trial Judgement, paras 342, 1013; Appeal Hearing, AT. 154 (14 September 2011).

<sup>1315</sup> Prosecution Response Brief (Sredoje Lukić), para. 106, referring to Trial Judgement, paras 286, 328, 542, 544, 629, 847-848, 851, 853, 862-865.

<sup>1316</sup> Sredoje Lukić Reply Brief, para. 56.

(i) Memić House – crimes of other inhumane acts as a crime against humanity and cruel treatment as a violation of the laws or customs of war

437. The Trial Chamber found that Sredoje Lukić, through his armed presence at and/or around the Memić House, provided practical assistance to the commission of the crimes committed at the Memić House and therefore found him guilty of aiding and abetting the crimes of cruel treatment as a violation of the laws or customs of war and other inhumane acts as a crime against humanity.<sup>1318</sup> The Trial Chamber correctly observed that the practical assistance of an aider and abetter must have a “substantial effect” upon the commission of the crimes in order for the *actus reus* to be established.<sup>1319</sup> However, in finding that the *actus reus* of aiding and abetting was established, the Trial Chamber did not explicitly find that Sredoje Lukić’s practical assistance had a “substantial effect” on the commission of the crimes of cruel treatment as a violation of the laws or customs of war and other inhumane acts as a crime against humanity.<sup>1320</sup> The Appeals Chamber considers that an explicit finding of “substantial effect” should have been made and that the Trial Chamber’s failure to do so constitutes an error. Nonetheless, the Appeals Chamber is not convinced that this error invalidates the Trial Judgement.

438. In this context, the Appeals Chamber recalls that the question whether an act has a substantial effect on the commission of a crime necessitates a fact-based inquiry.<sup>1321</sup> In reaching its conclusion that the *actus reus* of aiding and abetting had been established, the Trial Chamber considered the evidence of several witnesses showing that Sredoje Lukić was part of a group of visibly armed perpetrators at the Memić House.<sup>1322</sup> It also considered evidence that the Koritnik Group was composed of unarmed Muslim civilians - none of whom took part in hostilities<sup>1323</sup> - and

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<sup>1317</sup> The Appeals Chamber notes that the Trial Chamber also considered Sredoje Lukić’s role with respect to the crimes committed at the Memić House when finding him responsible for the crime of murder committed at the Omeragić House. The Appeals Chamber considers this issue below. *See infra* paras 448-451.

<sup>1318</sup> Trial Judgement, para. 986.

<sup>1319</sup> Trial Judgement, para. 901.

<sup>1320</sup> *See* Trial Judgement, para. 984.

<sup>1321</sup> *Blagojević and Jokić* Appeal Judgement, para. 134.

<sup>1322</sup> The Trial Chamber did not make a finding as to the total number of perpetrators present. It considered evidence in respect of two perpetrators other than Sredoje Lukić and Milan Lukić and found by majority that Vasiljević was present (Trial Judgement, para. 577). It also considered witness evidence which indicated that another man, Milan Šušnjar, was present (*see* Trial Judgement, para. 343, referring to VG013, T. 1031 (2 September 2008), VG038, T. 946 (1 September 2008), Exhs 2D6 (confidential), p. 1, P44 (confidential), pp. 1369-1371, 1408, P72, pp. 1664-1665, P82 (confidential), p. 1582, P83 (confidential), p. 7). Furthermore, the Appeals Chamber notes that Sredoje Lukić was not charged with respect to the incidents of violence or mistreatment prior to the Pionirska Street Incident, and the Appeals Chamber rejects the Prosecution’s assertion that the evidence it cites of prior acts should be taken into account in consideration of Sredoje Lukić’s *mens rea* for charged crimes. *See also* Trial Judgement, para. 37 (“During the trial, a very large amount of evidence has been presented of crimes that were committed in Višegrad during the indictment period, including specific instances of murders, rapes and beatings allegedly committed by Milan Lukić and Sredoje Lukić, but which [*sic*] are not charged in the indictment. [...] In view of the fact that Milan Lukić and Sredoje Lukić were not charged with any crimes arising out of these incidents [...] the Trial Chamber makes it clear that it has not made any determination of guilt in relation to these non-indicted crimes.”).

<sup>1323</sup> Trial Judgement, paras 943, 983, 1029.

that many members of the group knew Sredoje Lukić in his capacity as a local policeman.<sup>1324</sup> The Trial Chamber further found that the members of the Koritnik Group were robbed at gunpoint and threatened with death.<sup>1325</sup> On the basis of these findings, the Appeals Chamber is satisfied that it was reasonable for the Trial Chamber to find that Sredoje Lukić's armed presence fulfilled the *actus reus* of aiding and abetting the crimes of other inhumane acts and cruel treatment at the Memić House.

439. Since the Trial Chamber concluded that Sredoje Lukić practically assisted the commission of the Memić House crimes and did not find that he provided "tacit approval" in respect of those crimes, the Appeals Chamber dismisses his submissions with regard to aiding and abetting by encouragement or moral support.

440. The Appeals Chamber further recalls that an aider and abettor must know that his acts would assist the commission of the crime by the principal perpetrators and must be aware of the "essential elements" of the crime committed by the principal perpetrator.<sup>1326</sup> The Appeals Chamber notes that the Trial Chamber made no explicit finding on Sredoje Lukić's knowledge in relation to the crimes of other inhumane acts and cruel treatment committed at the Memić House. However, the Trial Chamber found that Sredoje Lukić: (i) was present at and/or around the Memić House;<sup>1327</sup> (ii) was there together with the Koritnik Group which included vulnerable, unarmed Muslim civilians, among them children and elderly persons;<sup>1328</sup> (iii) was armed;<sup>1329</sup> and (iv) continued to participate in the events.<sup>1330</sup> In these circumstances, the Appeals Chamber considers that the Trial Chamber's findings show that a reasonable trier of fact could have inferred that Sredoje Lukić knew that his acts were assisting the principal perpetrators and that the Koritnik Group would be subjected to mental and physical suffering.

441. The Appeals Chamber, Judge Morrison dissenting, is therefore satisfied that a reasonable trial chamber could have concluded that Sredoje Lukić was guilty of aiding and abetting the crimes of cruel treatment as a violation of the laws or customs of war and other inhumane acts as a crime against humanity committed at the Memić House.

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<sup>1324</sup> The Trial Chamber considered this as an aggravating factor in sentencing (Trial Judgement, paras 1088, 1090).

<sup>1325</sup> Trial Judgement, para. 1030.

<sup>1326</sup> *Aleksovski* Appeal Judgement, para. 162; *Blagojević and Jokić* Appeal Judgement, para. 221.

<sup>1327</sup> Trial Judgement, para. 1028.

<sup>1328</sup> Trial Judgement, paras 1029-1030.

<sup>1329</sup> Trial Judgement, para. 1028.

<sup>1330</sup> Trial Judgement, para. 1028.

(ii) Omeragić House

442. The Trial Chamber found that Sredoje Lukić was guilty, *inter alia*, of aiding and abetting (i) cruel treatment as a violation of the laws or customs of war as well as other inhumane acts as a crime against humanity; and (ii) murder as a violation of the laws or customs of war and as a crime against humanity, in relation to the crimes committed at Omeragić House.<sup>1331</sup>

a. Crimes of cruel treatment as a violation of the laws or customs of war and other inhumane acts as a crime against humanity

443. The Trial Chamber found that Sredoje Lukić, through his armed presence during the Transfer of the Koritnik Group, provided practical assistance to the commission of the crimes committed at the Omeragić House and found him guilty of cruel treatment as a violation of the laws or customs of war and other inhumane acts as a crime against humanity.<sup>1332</sup> However, the Trial Chamber failed to make a finding with respect to whether the assistance of Sredoje Lukić had a “substantial effect” on the commission of the crimes at the Omeragić House. The Appeals Chamber considers that a finding of “substantial effect” should have explicitly been made by the Trial Chamber and that its failure to make this finding constitutes an error. Nonetheless, the Appeals Chamber is not convinced that this error invalidates the Trial Judgement.

444. The Trial Chamber determined that the requisite *actus reus* for aiding and abetting the crimes was established on the basis of the evidence that Sredoje Lukić was armed and present as one of the men who “herded” the Koritnik Group into the Omeragić House, which was subsequently locked and set on fire.<sup>1333</sup> Only two members of the Koritnik Group escaped during the Transfer.<sup>1334</sup> The Transfer was a key precursory act to the crimes committed at the Omeragić House and, on the basis of the Trial Chamber’s findings, the Appeals Chamber finds that a reasonable trier of fact could have concluded that Sredoje Lukić’s armed presence during the Transfer fulfilled the *actus reus* of aiding and abetting the subsequent crimes of cruel treatment as a violation of the laws or customs of war and other inhumane acts as a crime against humanity.

445. Since the Trial Chamber reasonably concluded that Sredoje Lukić practically assisted the commission of crimes in the Omeragić House and did not find that Sredoje Lukić provided “tacit

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<sup>1331</sup> Trial Judgement, paras 1035, 1099.

<sup>1332</sup> Trial Judgement, para. 984.

<sup>1333</sup> Trial Judgement, paras 557-558, 637. However, the Appeals Chamber however notes that there is no finding that Sredoje Lukić was personally involved in setting the Omeragić House on fire or shooting at the windows of the Omeragić House as victims attempted to escape (*see* Trial Judgement, para. 613).

<sup>1334</sup> *See* Trial Judgement, paras 362, 968, 983, 1031.

approval” in respect of these crimes, the Appeals Chamber, Judge Morrison dissenting, dismisses his submissions with regard to aiding and abetting by encouragement or moral support.

446. When finding that Sredoje Lukić knew that his acts contributed to the crimes of cruel treatment as a violation of the laws or customs of war and other inhumane acts as a crime against humanity committed at the Omeragić House, the Trial Chamber stated that:

the only reasonable inference to be drawn from the evidence is that Sredoje Lukić knew that the survivors were subjected to serious mental and physical suffering and that his acts and conduct facilitated the commission of the crimes.<sup>1335</sup>

447. The Appeals Chamber considers that a reasonable trial chamber could have concluded that Sredoje Lukić had the requisite *mens rea* to aid and abet the crimes of cruel treatment as a violation of the laws or customs of war and other inhumane acts as a crime against humanity at the Omeragić House. The Trial Chamber considered that, when ordered to go to the Omeragić House,<sup>1336</sup> Milan Lukić told the Koritnik Group that they did not need to put on or bring their shoes and that they were told to leave their luggage so that it could be searched for weapons.<sup>1337</sup> While the Trial Chamber did not explicitly find that Sredoje Lukić heard this, it found that he was present during the Transfer.<sup>1338</sup> Therefore, he would have seen the Koritnik Group leave the Memić House without their shoes and luggage. The Appeals Chamber further recalls that Sredoje Lukić had already provided practical assistance to the commission of the crimes committed at the Memić House earlier in the day when the Koritnik Group was mistreated.<sup>1339</sup> In these circumstances, the Appeals Chamber, Judge Güney and Judge Morrison dissenting, considers that a reasonable trial chamber could have inferred that Sredoje Lukić knew that the vulnerable Koritnik Group would be subjected to further mental and physical suffering in the Omeragić House and that his armed presence would substantially assist in the commission of these crimes.

b. Crime of murder

448. In finding Sredoje Lukić responsible for aiding and abetting the crime of murder both as a violation of the laws or customs of war and as a crime against humanity, the Trial Chamber, by majority, found that:

Sredoje Lukić’s acts and conduct during the incident as a whole contributed to the commission of murder in Adem Omeragić’s house. He rendered practical assistance, which had a substantial effect on the commission of the crime of murder, when he was at Jusuf Memić’s house in the afternoon, visibly carrying arms and, in particular, when he participated in the transfer of the Koritnik group to Adem

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<sup>1335</sup> Trial Judgement, para. 985.

<sup>1336</sup> Trial Judgement, para. 359.

<sup>1337</sup> Trial Judgement, paras 359, 918.

<sup>1338</sup> Trial Judgement, para. 607.

<sup>1339</sup> Trial Judgement, paras 593, 982-986.

Omeragić's house.<sup>1340</sup>

[T]he only reasonable inference to be drawn from the evidence is that Sredoje Lukić knew that the persons whom he had helped place into, and who had been locked in, Adem Omeragić's house would be killed as a result of the fire when the house was set ablaze. [...] Sredoje Lukić also knew that his acts and conduct contributed to the commission of the murder.<sup>1341</sup>

449. The Appeals Chamber is of the view that the Transfer was a key precursory act to the crime of murder. In this regard, the Trial Chamber's finding that the vulnerable civilian Koritnik Group was forcibly transferred to and locked inside the Omeragić House is particularly relevant.<sup>1342</sup> Sredoje Lukić was armed and present during the Transfer. Through his participation in the Transfer, the Appeals Chamber, Judge Güney and Judge Morrison dissenting, finds that it was reasonable for the Trial Chamber to infer that Sredoje Lukić provided practical assistance with substantial effect to the commission of the crime of murder both as a violation of the laws or customs of war and a crime against humanity.

450. As regards Sredoje Lukić's *mens rea*, the Appeals Chamber recalls that an aider and abettor must know that his acts would assist in the commission of the crime by the principal perpetrators and must be aware of the "essential elements" of the crime committed by the principal perpetrator.<sup>1343</sup> It is not required, however, that the aider and abettor share the *mens rea* for such crime. The Trial Chamber found that Sredoje Lukić rendered practical assistance to the murders when he was present at the Memić House earlier in the day and when he participated in the Transfer of the Koritnik Group to the Omeragić House.<sup>1344</sup>

451. The Appeals Chamber further notes that the additional circumstances which indicated the essential elements of the crime of murder were fully apparent. As individuals amongst the Koritnik Group were leaving the Memić House, Milan Lukić told them that they did not need to put on or bring their shoes with them to the Omeragić House.<sup>1345</sup> In addition, the preparation of the Omeragić House with a sticky fire accelerant clearly suggests that a fire was intended, and although the Trial Chamber did not find that Sredoje Lukić was aware of the fire accelerant, the fact that the civilians were locked up in this house indicated that the aim was that no-one should escape.<sup>1346</sup> The Appeals Chamber finds no error in the inference that Sredoje Lukić knew that the individuals in the Omeragić House would be killed. It considers the Trial Chamber's finding on Sredoje Lukić's armed presence during the Transfer.<sup>1347</sup> It also considers that he would have seen the Koritnik

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<sup>1340</sup> Trial Judgement, para. 932.

<sup>1341</sup> Trial Judgement, para. 933.

<sup>1342</sup> Trial Judgement, paras 917-918, 933.

<sup>1343</sup> *Aleksovski* Appeal Judgement, para. 162; *Blagojević and Jokić* Appeal Judgement, para. 221.

<sup>1344</sup> Trial Judgement, para. 932.

<sup>1345</sup> Trial Judgement, para. 918.

<sup>1346</sup> See Trial Judgement, para. 1032.

<sup>1347</sup> Trial Judgement, paras 604, 607, 1028.



Group leave the Memić House without their shoes and luggage, and that he would not have been ignorant of the fact that a fire accelerant had been used inside the Omeragić House. The Appeals Chamber therefore finds, by majority, Judge Güney and Judge Morrison dissenting, that a reasonable trier of fact could conclude that Sredoje Lukić possessed the requisite *mens rea* for aiding and abetting the crime of murder. Sredoje Lukić's third and fourth grounds of appeal are therefore dismissed.

(c) The crime of persecutions as a crime against humanity

452. The Trial Chamber found Sredoje Lukić guilty of aiding and abetting persecutions as a crime against humanity based on his acts in relation to both the Memić House and the Omeragić House.<sup>1348</sup>

(i) Alleged errors relating to the *actus reus* of the crime of persecutions as a crime against humanity

453. The Trial Chamber articulated the *actus reus* of the crime of persecutions as a crime against humanity in the following terms:

The *actus reus* of the crime consists of an act or omission that *discriminates in fact* and which denies or infringes upon a fundamental right laid down in international customary or treaty law.<sup>1349</sup>

454. Sredoje Lukić argues, with reference to the *Vasiljević* and *Krnojelac* Trial Judgements, that: “the Prosecutor must also establish that there were discriminatory consequences. It is not sufficient to prove that the accused conducted an act with the intent to discriminate; it must also be shown that a victim was actually persecuted”.<sup>1350</sup> He submits that the Trial Chamber failed to acknowledge this element of the *actus reus* of persecutions as a crime against humanity.<sup>1351</sup> The Prosecution submits that the Trial Chamber recognised that the acts underlying the crime of persecutions must discriminate in fact, and made this clear in its statement of the applicable law.<sup>1352</sup>

455. The Appeals Chamber recalls that a persecutory act must be discriminatory in fact for the crime of persecutions to be established.<sup>1353</sup> The Trial Chamber clearly acknowledged this legal

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<sup>1348</sup> Trial Judgement, paras 1027-1035, 1040.

<sup>1349</sup> Trial Judgement, para. 992. *See also* Trial Judgement, para. 993 stating: “[a]lthough persecution often refers to a series of acts, a single act or omission may be sufficient, as long as it discriminates in fact and was carried out deliberately with the intention to discriminate on one of the listed grounds.”

<sup>1350</sup> Sredoje Lukić Appeal Brief, paras 286, 293, referring to *Vasiljević* Trial Judgement, para. 245, *Krnojelac* Trial Judgement, para. 432.

<sup>1351</sup> Sredoje Lukić Appeal Brief, paras 286, 293.

<sup>1352</sup> Prosecution Response Brief (Sredoje Lukić), paras 102, 122.

<sup>1353</sup> *Kvočka et al.* Appeal Judgement, para. 320; *Krnojelac* Appeal Judgement, para. 185.

requirement in its statement of the law, when it observed that a persecutory act or omission must “discriminate in fact”.<sup>1354</sup> Sredoje Lukić’s argument therefore fails.

(ii) Alleged errors in the inference that Sredoje Lukić knew of the discriminatory intent of the primary perpetrators

456. When considering Sredoje Lukić’s *mens rea*<sup>1355</sup> for aiding and abetting the crime of persecutions as a crime against humanity, the Trial Chamber found by majority:<sup>1356</sup>

that the only reasonable inference is that Sredoje Lukić knew that the persons who were locked in Adem Omeragić’s house were Muslims and that they would not only be unlawfully detained in Adem Omeragić’s house, but that they would subsequently die as a result of the fire. The Trial Chamber by majority, Judge Robinson dissenting, also finds that Sredoje Lukić knew that the perpetrators, including Milan Lukić, who locked the Koritnik group in Adem Omeragić’s house and set the house on fire, did so with discriminatory intent. The Trial Chamber by majority, Judge Robinson dissenting, also holds that Sredoje Lukić knew that by his acts he was rendering practical assistance to the commission of the underlying acts of murder, unlawful detention, harassment, humiliation, terrorisation and psychological abuse, and the theft of personal property and destruction of a house.<sup>1357</sup>

457. Sredoje Lukić argues that the Trial Chamber erred in concluding that there was evidence that he knew of the discriminatory intent of the principal perpetrators when they committed the crime of persecutions as a crime against humanity during the Pionirska Street Incident.<sup>1358</sup>

458. The Trial Chamber’s statement of the law with regard to the *mens rea* of aiding and abetting is correct.<sup>1359</sup> The special intent crime of persecutions requires in addition that:

[the aider and abettor] be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime. He need not share the intent but he must be aware of the discriminatory context in which the crime is to be committed and know that his support or encouragement has a substantial effect on its perpetration.<sup>1360</sup>

459. The Appeals Chamber notes that the Trial Chamber did not make an explicit finding in respect of his knowledge of the persecutory intent of the principal perpetrators covering the crimes

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<sup>1354</sup> Trial Judgement, para. 992.

<sup>1355</sup> Sredoje Lukić does not appeal the Trial Chamber’s finding that he had the *actus reus* to aid and abet the crime of persecutions. The Appeals Chamber notes, however, that as with the crimes of cruel treatment and other inhumane acts, the Trial Chamber did not expressly find that Sredoje Lukić’s armed presence had a substantial effect upon the persecutory acts committed during the Pionirska Street Incident. However, for the reasons outlined above the Appeals Chamber is satisfied that the Trial Chamber correctly applied the legal standard, and reached reasonable inferences having done so.

<sup>1356</sup> Judge Robinson’s dissent relates only to the crimes of murder and extermination (Trial Judgement, para. 1113). The Appeals Chamber considers that, with the exception of the persecutory act of murder, Sredoje Lukić’s responsibility for aiding and abetting the remaining persecutory acts was established by a unanimous Trial Chamber (Trial Judgement, para. 1104).

<sup>1357</sup> Trial Judgement, para. 1035.

<sup>1358</sup> Sredoje Lukić Appeal Brief, paras 288-296. He claims that the fact that the victims were subjected to insults by perpetrators other than himself is irrelevant in consideration of his own intent (Sredoje Lukić Reply Brief, paras 102, 106, 111(iii)), and that the Prosecution’s submission that he knew of Milan Lukić’s propensity to abuse Muslims is baseless (Sredoje Lukić Reply Brief, para. 56).

<sup>1359</sup> Trial Judgement, para. 902.

at the Memić House. Nevertheless, the Appeals Chamber, Judge Morrison dissenting, considers that the Trial Chamber's other findings show that a reasonable trier of fact could have inferred that Sredoje Lukić possessed the requisite *mens rea* in respect of acts of persecutions as a crime against humanity, including at the Memić House.

460. In its findings concerning the crime of persecutions committed during the Pionirska Street Incident, the Trial Chamber noted "the generally discriminatory atmosphere" during the incident and observed that the "Koritnik Group was comprised entirely of Muslim civilians."<sup>1361</sup> It then found that Sredoje Lukić was armed and present at and/or around the Memić House.<sup>1362</sup> The Trial Chamber had previously found that Sredoje Lukić personally knew some of the victims, who were from one Muslim family, the Kurspahić family.<sup>1363</sup> It also found that Sredoje Lukić had lived in or near Višegrad and had worked as a policeman in the area.<sup>1364</sup> The Appeals Chamber recalls that it has upheld that Sredoje Lukić knew that it was likely that criminal acts would occur and that the Muslim civilians would be subjected to mental and physical suffering.<sup>1365</sup> The Appeals Chamber, Judge Morrison dissenting, finds that based on the Trial Chamber's findings it was reasonable to conclude that Sredoje Lukić also knew of the discriminatory intent of the principal perpetrators at the Memić House.

461. The Appeals Chamber recalls that it has found that it was reasonable to infer that Sredoje Lukić knew that his acts had a substantial effect on the commission of the crimes by the principal perpetrators.<sup>1366</sup> The Appeals Chamber, Judge Morrison dissenting, therefore finds no error in the Trial Chamber's conclusion that Sredoje Lukić aided and abetted persecutions as a crime against humanity.

(d) The crime of extermination as a crime against humanity

462. The Trial Chamber acquitted Sredoje Lukić of having committed or aided and abetted extermination as a crime against humanity during the Pionirska Street Incident.<sup>1367</sup> In reaching its conclusion, the Trial Chamber recalled that the factual findings concerning Sredoje Lukić's participation in the Pionirska Street Incident were reached by majority, Judge Robinson dissenting, and that Judge Van den Wyngaert also partially dissented on the legal qualification of the crime as

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<sup>1360</sup> *Simić* Appeal Judgement, para. 86, referring to *Krnjelac* Appeal Judgement, para. 52, *Aleksovski* Appeal Judgement, para. 162.

<sup>1361</sup> Trial Judgement, para. 1029.

<sup>1362</sup> Trial Judgement, para. 1030.

<sup>1363</sup> Trial Judgement, paras 434, 581, 591.

<sup>1364</sup> Trial Judgement, paras 6-8.

<sup>1365</sup> See *supra* para. 440.

<sup>1366</sup> See *supra* para. 440.

<sup>1367</sup> Trial Judgement, para. 953.

extermination.<sup>1368</sup> It accordingly concluded that there was no majority to enter a conviction against Sredoje Lukić for extermination.<sup>1369</sup>

463. The Prosecution submits that the Trial Chamber erred in law when failing to convict Sredoje Lukić for aiding and abetting the extermination of 59 Muslim civilians at Pionirska Street.<sup>1370</sup> It asserts that all of the necessary elements of Sredoje Lukić's criminal responsibility for aiding and abetting extermination as a crime against humanity were established, as the Trial Chamber found that the murders committed by Milan Lukić at the Omeragić House constituted extermination and further found that Sredoje Lukić aided and abetted the same murders.<sup>1371</sup> In failing to convict Sredoje Lukić for this crime, the Prosecution argues that the Trial Chamber erroneously treated the Trial Judgement "as a bundle of opinions of individual judges".<sup>1372</sup>

464. Sredoje Lukić responds that the Trial Chamber correctly acquitted him of aiding and abetting extermination as a crime against humanity.<sup>1373</sup> He argues that his acquittal for aiding and abetting extermination was appropriate as Judge Van den Wyngaert considered that the killings at Pionirska Street did not amount to extermination as a crime against humanity, and Judge Robinson considered that Sredoje Lukić's presence during the Transfer was insufficient to constitute aiding and abetting murder and extermination.<sup>1374</sup> Sredoje Lukić asserts that Judges cannot be required to make findings which are inconsistent with their prior dissent on other counts, as this is contrary to the principle of judicial independence, and unsupported by international legal practice or academic authorities.<sup>1375</sup>

465. The Appeals Chamber notes that, in her partially dissenting opinion, Judge Van den Wyngaert stated "that the killings in Pionirska Street and Bikavac are [not] of the scale of massiveness required for extermination".<sup>1376</sup> Further, Judge Robinson dissented in relation to the

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<sup>1368</sup> Trial Judgement, para. 953.

<sup>1369</sup> Trial Judgement, para. 953.

<sup>1370</sup> Prosecution's first ground of appeal. Prosecution Appeal Brief, paras 4-5.

<sup>1371</sup> Prosecution Appeal Brief, paras 5, 7.

<sup>1372</sup> Prosecution Appeal Brief, para. 7, referring to *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.13, Decision on Jadranko Prlić's Consolidated Appeal Against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009 ("*Prlić et al.* Appeal Decision on Admission of Evidence of 12 January 2009"), para. 27. *See also* Prosecution Reply Brief, 23 December 2009 ("Prosecution Reply Brief"), paras 2-3.

<sup>1373</sup> Sredoje Lukić's Response to the Prosecution Appeal Brief, 14 December 2009 ("Sredoje Lukić Response Brief"), para. 19.

<sup>1374</sup> Sredoje Lukić Response Brief, paras 21, 33.

<sup>1375</sup> Sredoje Lukić Response Brief, paras 21-22, 24, 26. He further alleges that the Prosecution misinterprets the *Prlić et al.* Appeal Decision on Admission of Evidence of 12 January 2009 when it assumes that "the Chamber bears an obligation [to] deliver a judgement [...] merely for the purpose of unifying existing diverging votes" (Sredoje Lukić Response Brief, para. 23, referring to *Prlić et al.* Appeal Decision on Admission of Evidence of 12 January 2009).

<sup>1376</sup> Partially Dissenting Opinion of Judge Van den Wyngaert, Trial Judgement, para. 1114.

finding by the majority of the Trial Chamber “that Sredoje Lukić aided and abetted in the murder and extermination [committed during the Pionirska Street Incident]”.<sup>1377</sup>

466. Article 23(2) of the Statute and Rule 98 *ter*(C) of the Rules provide that a judgement shall be rendered by a “majority of the judges”. Rule 87(A) of the Rules specifies that a majority of judges must be satisfied that guilt has been proved beyond reasonable doubt. In the present case, there was no such majority as only Judge David was satisfied that Sredoje Lukić fulfilled the *actus reus* and *mens rea* of aiding and abetting extermination in the Pionirska Street Incident.<sup>1378</sup> As set out above, for different reasons neither Judge Van den Wyngaert nor Judge Robinson was satisfied that Sredoje Lukić should be convicted of this offence. Thus, to conclude that the Trial Chamber’s majority findings on Sredoje Lukić’s participation in the murders and on their characterisation as extermination support a finding of guilt would lead to Sredoje Lukić’s conviction, despite the fact that only one Judge was satisfied that all the necessary elements were fulfilled. Such a conclusion is incompatible with the principle that a finding of guilt may be reached only when a majority of the trial chamber is satisfied that guilt has been proved beyond reasonable doubt, as enshrined in Rule 87(A) of the Rules. Thus, the Prosecution has not shown that the Trial Chamber erred in failing to convict Sredoje Lukić for aiding and abetting extermination as a crime against humanity on Pionirska Street. The Prosecution’s first ground of appeal is therefore dismissed.

(e) Conclusion

467. For the foregoing reasons, the Appeals Chamber dismisses, by majority, Judge Morrison dissenting, Sredoje Lukić’s third through sixth, eleventh, and twelfth grounds of appeal insofar as they relate to the crimes of murder and cruel treatment as violations of the laws or customs of war, as well as murder, persecutions, and other inhumane acts as crimes against humanity committed at the Pionirska Street Incident. The Appeals Chamber further dismisses the Prosecution’s first ground of appeal.

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<sup>1377</sup> Separate Opinion of Judge Robinson, Trial Judgement, paras 1112-1113. While Judge Robinson’s individual opinion is titled “Separate Opinion”, the Appeals Chamber notes that he dissented on this issue.

<sup>1378</sup> Trial Judgement, paras 934, 953.

## **X. BIKAVAC INCIDENT**

### **A. Introduction**

468. The Trial Chamber found that, on or about 27 June 1992, Milan Lukić and a group of armed men herded a group of approximately 60 Muslim civilians into the Aljić House in Bikavac, a neighbourhood of Višegrad town, and fired at the house, throwing grenades into it and subsequently setting the house on fire.<sup>1379</sup> As a result, at least 60 individuals died,<sup>1380</sup> leaving Zehra Turjačanin the sole survivor.<sup>1381</sup> The Trial Chamber based its findings regarding the occurrence of the Bikavac Incident on the evidence of Zehra Turjačanin, CW2, VG035, VG058, VG094, VG115, and VG119.<sup>1382</sup> On the basis of these findings, the Trial Chamber convicted Milan Lukić of committing murder and cruel treatment as violations of the laws or customs of war<sup>1383</sup> as well as extermination, other inhumane acts, and persecutions as crimes against humanity.<sup>1384</sup>

469. Milan Lukić argues that the Trial Chamber erroneously found that:<sup>1385</sup> (i) the Bikavac Incident occurred;<sup>1386</sup> (ii) he was identified as a perpetrator of the Bikavac Incident;<sup>1387</sup> and (iii) the deaths of the alleged victims were proven.<sup>1388</sup>

470. The Appeals Chamber recalls its previous finding that the Trial Chamber erred in failing to explain why it considered VG094 and VG119 to be credible despite their involvement with the Association.<sup>1389</sup> The Appeals Chamber now considers the impact of the Trial Chamber's error, if any.

### **B. Impact of the Trial Chamber's error with regard to VG094 and VG119's involvement with the Association**

471. The Appeals Chamber notes that VG094 and VG119 were each involved, in varying capacities, with the Association headed by Hasečić.<sup>1390</sup> VG119 provided a statement to the

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<sup>1379</sup> Trial Judgement, paras 709, 921.

<sup>1380</sup> Trial Judgement, paras 715, 921, 973, 1017.

<sup>1381</sup> Trial Judgement, paras 973, 1017.

<sup>1382</sup> Trial Judgement, para. 709.

<sup>1383</sup> Trial Judgement, paras 923, 976, 1017, 1099.

<sup>1384</sup> Trial Judgement, paras 923, 951, 976, 1018-1020, 1099-1100. The conviction for persecutions is through the murder of the 60 Muslim civilians, the unlawful detention, harassment, humiliation, terrorisation, and psychological abuse of Zehra Turjačanin, and the destruction of a house. Judge Van den Wyngaert dissented in relation to the conviction for extermination.

<sup>1385</sup> Milan Lukić's sub-grounds 4(A) through (E). Milan Lukić has withdrawn sub-grounds 4(F) and (G) and has combined sub-grounds 4(H) and 3(I) (Milan Lukić Appeal Brief, paras 280-281).

<sup>1386</sup> Milan Lukić Appeal Brief, paras 277-280; *see also* Milan Lukić Reply Brief, paras 105-107.

<sup>1387</sup> Milan Lukić Appeal Brief, paras 234-280; Milan Lukić Reply Brief, paras 96-104.

<sup>1388</sup> Milan Lukić Appeal Brief, paras 228-233; Milan Lukić Reply Brief, paras 93-95.

<sup>1389</sup> *See supra* paras 62, 64.

<sup>1390</sup> *See supra* para. 62.

Association,<sup>1391</sup> but there is no indication that she was a member of the Association or received any benefits from it.<sup>1392</sup> In these circumstances, the Appeals Chamber considers that a reasonable trier of fact could have concluded that membership in the Association did not influence VG119's evidence. As to VG094, the Appeals Chamber notes that VG094 was a member of the Association and received benefits on account of her rape victim status.<sup>1393</sup> However, the Appeals Chamber is satisfied that such involvement had no material impact on her evidence. VG094 testified that, prior to the trial, she only spoke about the substance of her testimony with the Prosecution.<sup>1394</sup> The Appeals Chamber notes that VG094's evidence regarding her rape and Milan Lukić's actions on the night of the fire was consistent before and after her involvement with the Association.<sup>1395</sup> She also consistently stated that she was told about the fire the night that it occurred.<sup>1396</sup> Further, when confronted with her involvement with the Association, VG094 expressly explained that "[i]n order to exercise my rights as a civilian victim of the war and receive some benefits, I had to become a member of the [Association], but I am not activist [*sic*] of that association."<sup>1397</sup> The Appeals Chamber is satisfied that a reasonable trier of fact could have concluded that the credibility of VG094 and VG119 was not undermined by their involvement with the Association. Consequently, the Appeals Chamber is satisfied that the Trial Chamber's error does not invalidate the Trial Judgement.

### C. Occurrence of the Bikavac Incident

472. Milan Lukić submits that the Trial Chamber ignored fundamental inconsistencies in the accounts of VG058, VG094, and VG119, showing that the Bikavac Incident did not occur.<sup>1398</sup> He submits that: (i) VG119 and VG058 were unable to locate the Aljić House on an aerial photograph;<sup>1399</sup> (ii) VG058's testimony was inconsistent with Zehra Turjačanin's evidence as to the location of the Aljić House as well as Zehra Turjačanin's whereabouts on the night of the fire;<sup>1400</sup> (iii) VG119's descriptions of the location of the house differed markedly between her prior

<sup>1391</sup> VG119, T. 2459-2460 (1 October 2008).

<sup>1392</sup> See VG119, T. 2459-2460 (1 October 2008).

<sup>1393</sup> VG094, T. 7032-7033 (8 April 2009) (closed session).

<sup>1394</sup> VG094, T. 7029 (8 April 2009) (closed session).

<sup>1395</sup> VG094, T. 6986-6988, 6993-6997, 7000-7004 (8 April 2009) (closed session); Exhs 1D227 (confidential), pp. 2-6; 2D69 (confidential), pp. 2-3; P335 (confidential), pp. 3-8. VG094 did not indicate when her involvement with the Association began, but the Appeals Chamber notes that it could not have happened before 14 May 2003, the date on which the Association was formed (see Prosecution Response Brief (Milan Lukić) para. 264). Milan Lukić has not challenged this date.

<sup>1396</sup> VG094, T. 7004 (8 April 2009) (closed session); Exhs 1D227 (confidential), p. 6; 2D69 (confidential), p. 3; P335 (confidential), p. 8.

<sup>1397</sup> VG094, T. 7033 (8 April 2009) (closed session).

<sup>1398</sup> Milan Lukić's sub-ground 4(E). Milan Lukić Appeal Brief, paras 276-280. See also Milan Lukić Reply Brief, paras 105-107.

<sup>1399</sup> Milan Lukić Appeal Brief, paras 278-279. See also Milan Lukić Reply Brief, para. 103.

<sup>1400</sup> Milan Lukić Appeal Brief, para. 279, referring to Exhs P99, P133; Milan Lukić Reply Brief, para. 105.

statement and her in-court testimony;<sup>1401</sup> and (iv) the testimonies of VG094 and VG119 regarding the events after the fire are inconsistent, although the witnesses were together “at all times”.<sup>1402</sup>

473. The Prosecution responds that the Trial Chamber reasonably assessed the evidence, and that the Appeals Chamber should summarily dismiss Milan Lukić’s arguments because they merely repeat submissions that were unsuccessful at trial.<sup>1403</sup> In particular, it argues that the Trial Chamber considered the inability of VG058 and VG119 to identify the Aljić House on aerial photographs, as well as Milan Lukić’s argument raised at trial that descriptions as to the location of the house “differed markedly”.<sup>1404</sup> The Prosecution also contends that VG094’s evidence stating that she did not recall the aftermath of the fire is not necessarily inconsistent with VG119’s evidence.<sup>1405</sup>

474. The Appeals Chamber notes that the Trial Chamber considered VG058 and VG119’s inability to locate the Aljić House on aerial photographs.<sup>1406</sup> As to VG058, the Trial Chamber considered that she placed the house one block away from its actual location, and held that “there was nothing unusual or exceptional in her failure” to identify the Aljić House on an aerial photograph.<sup>1407</sup> With regard to VG119, the Trial Chamber observed that there was “no structure visible which VG119 could have circled.”<sup>1408</sup> The Appeals Chamber notes that the aerial photograph shown to VG058 was a magnified excerpt of the photograph shown to VG119 and, similarly, does not show the Aljić House.<sup>1409</sup> As the Aljić House was not visible in the photograph, Milan Lukić has not shown that the Trial Chamber erred.

475. Milan Lukić has not shown that the Trial Chamber failed to reasonably consider inconsistencies between VG058’s and Zehra Turjačanin’s evidence as to the location of the Aljić House. Both VG058 and Zehra Turjačanin testified as to the location of the Aljić House with reference to the same aerial photograph.<sup>1410</sup> As the Aljić House was not visible in this photograph, the Appeals Chamber is satisfied that the Trial Chamber did not err in accepting VG058’s evidence,

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<sup>1401</sup> Milan Lukić Appeal Brief, para. 278, referring to VG119, T. 2410, 2451-2452 (1 October 2008), Exh. 1D57 (confidential); Milan Lukić Reply Brief, para. 105.

<sup>1402</sup> Milan Lukić Appeal Brief, para. 280. Specifically, he argues that, while VG119 testified that they passed by the location of the Aljić House, which had burnt down by then, and that she smelled burnt human flesh, VG094 “did not recall such a sight, which she admitted would have been etched on her memory had she seen it” (Milan Lukić Appeal Brief, paras 277, 280, referring to VG094, T. 7029, 7032 (8 April 2009) (closed session), VG119, T. 2410 (1 October 2008); Milan Lukić Reply Brief, paras 105-106).

<sup>1403</sup> Prosecution Response Brief (Milan Lukić), paras 189-190.

<sup>1404</sup> Prosecution Response Brief (Milan Lukić), para. 190.

<sup>1405</sup> Prosecution Response Brief (Milan Lukić), para. 191. The Prosecution does not respond to the contention that VG058’s evidence was inconsistent with Zehra Turjačanin’s evidence (*see* Milan Lukić Appeal Brief, para. 279; Milan Lukić Reply Brief, para. 105).

<sup>1406</sup> Trial Judgement, paras 719 (VG058), 722 (VG119).

<sup>1407</sup> Trial Judgement, para. 719.

<sup>1408</sup> Trial Judgement, para. 722.

<sup>1409</sup> *See* Exhs 1D56 (VG119); P99 (VG058). *See also* Trial Judgement, para. 722.

<sup>1410</sup> Exhs P99 (VG058); P133 (Zehra Turjačanin). The Appeals Chamber notes that Exh. P99 is a slightly magnified version of Exh. P133.



despite the fact that VG058 and Zehra Turjačanin did not place the Aljić House at the exact same location.<sup>1411</sup> In addition, Milan Lukić does not substantiate his submission that VG058's evidence regarding Zehra Turjačanin's location on the night of the fire was inconsistent with Zehra Turjačanin's evidence.<sup>1412</sup> Thus, Milan Lukić's arguments in this respect are dismissed.

476. The Appeals Chamber further notes that VG119 was confronted in cross-examination with a prior statement in which she had stated that the Aljić House was "next door but one" to the house in which she was staying.<sup>1413</sup> In cross-examination, she testified that she did not "know what the distance was exactly, but the house was perhaps the second or the third house away."<sup>1414</sup> VG119 explained that she did not remember her prior statement and that she could not be more precise as to the location of the house as she passed by it after 2:00 a.m.<sup>1415</sup> The Appeals Chamber also notes that, in any event, the expression "next door but one" would imply the second house from the Aljić House. Thus, the Appeals Chamber finds that Milan Lukić has failed to demonstrate that the Trial Chamber erred in this respect.

477. Finally, the Appeals Chamber notes that VG119 testified that, on the night of the Bikavac Incident, she passed by the Aljić House and saw the house still smoking with a "dreadful stench coming out of human flesh burnt alive."<sup>1416</sup> However, VG094, who was with VG119 at the relevant time, stated: "I can't remember where we went and I can't recall [...] whether we passed [by the Aljić House]. Please take into account that on top of everything else, it was night-time."<sup>1417</sup>

478. Contrary to Milan Lukić's submission, the Trial Chamber did not ignore the difference between VG119 and VG094's evidence with regard to their recollection of events after the fire. The Trial Chamber expressly considered VG119's testimony, and observed that "VG094 did not recall passing by the burnt-down house with VG119".<sup>1418</sup> However, the Trial Chamber placed weight upon the fact that, in one of her prior statements, VG094 stated that "when we were leaving the house some people from our group said they felt [*sic*] the smell of the burning flesh".<sup>1419</sup> The Appeals Chamber notes that the Trial Chamber was in a position to examine the demeanour of VG094 and VG119 and thus could be "satisfied that VG094 and VG119 stood up well under cross-

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<sup>1411</sup> Exhs P99; P133.

<sup>1412</sup> In raising this argument, Milan Lukić refers to Exh. P99 (Milan Lukić Appeal Brief, para. 279). On this exhibit, however, VG058 marked Zehra Turjačanin's house, but not the location where she saw her on the night of the fire (VG058, T. 1603-1604 (11 September 2008)).

<sup>1413</sup> VG119, T. 2450-2451 (1 October 2008); Exh. 1D57 (confidential), p. 5.

<sup>1414</sup> VG119, T. 2451-2452 (1 October 2008).

<sup>1415</sup> VG119, T. 2452 (1 October 2008).

<sup>1416</sup> VG119, T. 2410 (1 October 2008).

<sup>1417</sup> VG094, T. 7032 (8 April 2009) (closed session).

<sup>1418</sup> Trial Judgement, para. 656.

<sup>1419</sup> Trial Judgement, para. 656, referring to Exh. P335, para. 47.

examination”.<sup>1420</sup> In addition, the Appeals Chamber notes that the Trial Chamber did not base its findings on the occurrence of the fire on the evidence of VG094 and VG119 alone, but also on the “compelling evidence” of Zehra Turjačanin, CW2, VG035, VG058, and VG115.<sup>1421</sup> In light of the totality of the evidence, it was open to a reasonable trier of fact to accept VG094 and VG119’s evidence on the occurrence of the fire despite their difference in recollection.

479. For the foregoing reasons, Milan Lukić has not shown an error in the Trial Chamber’s careful assessment of the evidence regarding the occurrence of the fire. Consequently, the Appeals Chamber rejects Milan Lukić’s sub-ground 4(E).

#### **D. Identification of Milan Lukić**

480. The Trial Chamber found that Zehra Turjačanin, VG058, VG094, VG115, and VG119 recognised Milan Lukić on the night of the Bikavac Incident.<sup>1422</sup>

481. Milan Lukić argues that the Trial Chamber erred in:<sup>1423</sup> (i) permitting VG058, VG094, VG115, and VG119 to identify him in the court room, and in placing probative weight upon their evidence;<sup>1424</sup> (ii) its assessment of Zehra Turjačanin’s identification evidence;<sup>1425</sup> and (iii) its assessment of the reliability of VG058 and VG115’s identification evidence.<sup>1426</sup> He also contends that, should his arguments as to the evidence of Zehra Turjačanin, VG058 and VG115 prove successful, the Trial Chamber erred in relying on the evidence of VG094 and VG119.<sup>1427</sup>

##### **1. In-court identification**

482. The Appeals Chamber recalls that in-court identifications are permissible, but should be accorded little to no probative value.<sup>1428</sup> While the Trial Chamber noted that VG058, VG094, VG115, and VG119 identified Milan Lukić in court,<sup>1429</sup> it ultimately concluded that the witnesses had sufficient prior knowledge of Milan Lukić to be able to recognise him during the Bikavac Incident.<sup>1430</sup> The Trial Chamber thus did not refer to the in-court identification of Milan Lukić in its findings.<sup>1431</sup> Accordingly, the Appeals Chamber finds that the Trial Chamber did not place

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<sup>1420</sup> Trial Judgement, para. 723.

<sup>1421</sup> Trial Judgement, para. 709.

<sup>1422</sup> Trial Judgement, paras 706, 708, 718, 721.

<sup>1423</sup> Milan Lukić’s sub-grounds 4(B) through (D).

<sup>1424</sup> Milan Lukić Appeal Brief, paras 234-243; Milan Lukić Reply Brief, para. 96.

<sup>1425</sup> Milan Lukić Appeal Brief, paras 245-257, 269-270; Milan Lukić Reply Brief, paras 97-99.

<sup>1426</sup> Milan Lukić Appeal Brief, paras 258-266, 271-274; Milan Lukić Reply Brief, paras 100-103.

<sup>1427</sup> Milan Lukić Appeal Brief, para. 275; Milan Lukić Reply Brief, paras 105-107.

<sup>1428</sup> See *supra* para. 120.

<sup>1429</sup> Trial Judgement, paras 674, 676, 683-684.

<sup>1430</sup> Trial Judgement, paras 718, 721.

<sup>1431</sup> Trial Judgement, paras 716-724.

probative weight on these in-court identifications, and dismisses Milan Lukić's submissions in this respect.

## 2. Zehra Turjačanin

483. The Trial Chamber found that Zehra Turjačanin was the sole survivor of the Bikavac Incident.<sup>1432</sup> It further found that she knew Milan Lukić before the war,<sup>1433</sup> and that she had seen him on two occasions in June 1992 - at a neighbour's house and at the "Alhos" factory - before she saw him again at the Aljić House, the site of the Bikavac Incident.<sup>1434</sup> It also considered that, when asked by the Prosecution whether she recognised anyone in the courtroom, she said that she did not.<sup>1435</sup> The Trial Chamber found her evidence, taken in its entirety, to be "coherent and reliable".<sup>1436</sup>

484. Milan Lukić submits that the Trial Chamber erred in finding that Zehra Turjačanin: (i) had prior knowledge of him before the war;<sup>1437</sup> (ii) had seen him on two occasions in June 1992 prior to the Bikavac Incident;<sup>1438</sup> (iii) identified him on the night of the incident;<sup>1439</sup> and (iv) was credible despite her failure to identify Milan Lukić in the courtroom.<sup>1440</sup>

### (a) Alleged error in finding that Zehra Turjačanin had prior knowledge of Milan Lukić before the war

485. The Trial Chamber found that Zehra Turjačanin had known Milan Lukić since before the war, because they had attended the same school, and she had seen him smoking there about once a week.<sup>1441</sup> The Trial Chamber considered the school records and noted that Zehra Turjačanin could not remember whether the dates indicated on her school record accurately reflected her school attendance.<sup>1442</sup> The Trial Chamber also considered that her brother Dževad Turjačanin stated that Zehra Turjačanin did not know Milan Lukić before the war, and that Dževad and Zehra Turjačanin both stated that they never saw Milan Lukić when together.<sup>1443</sup>

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<sup>1432</sup> Trial Judgement, paras 663, 973, 1017.

<sup>1433</sup> Trial Judgement, para. 706.

<sup>1434</sup> Trial Judgement, paras 669, 708.

<sup>1435</sup> Trial Judgement, para. 671.

<sup>1436</sup> Trial Judgement, para. 708.

<sup>1437</sup> Milan Lukić Appeal Brief, paras 250-251; Milan Lukić Reply Brief, para. 97.

<sup>1438</sup> Milan Lukić Appeal Brief, paras 245-257.

<sup>1439</sup> Milan Lukić Appeal Brief, paras 252, 269; Milan Lukić Reply Brief, para. 98.

<sup>1440</sup> Milan Lukić Appeal Brief, paras 245, 257; Milan Lukić Reply Brief, para. 98.

<sup>1441</sup> Trial Judgement, paras 668, 706, 708.

<sup>1442</sup> Trial Judgement, para. 668, referring to Zehra Turjačanin, T. 3322-3324 (4 November 2008). *See also* Exh. 1D82.

<sup>1443</sup> Trial Judgement, para. 668, referring to Exh. 1D84, p. 2, Zehra Turjačanin, T. 3335 (4 November 2008).

486. Milan Lukić argues that the Trial Chamber erred as: (i) the school records show that Zehra Turjačanin and Milan Lukić did not attend the same school during the same academic year;<sup>1444</sup> and (ii) it failed to give weight to the statement of Zehra Turjačanin's brother, Dževad Turjačanin, that she had not known Milan Lukić before the war.<sup>1445</sup>

487. The Prosecution responds that the Trial Chamber considered Milan Lukić's argument that Zehra Turjačanin did not attend school at the same time as him.<sup>1446</sup> It also argues that the Trial Chamber reasonably chose to rely on the fact that Zehra Turjačanin confirmed that she knew Milan Lukić before the war, over her brother's assertion to the contrary.<sup>1447</sup>

488. The Appeals Chamber notes that the school records indicate that both Zehra Turjačanin and Milan Lukić attended the Ivo Andrić school<sup>1448</sup> and that Zehra Turjačanin completed three years of education "in the period 1978/09 [*sic*] until 1981/82".<sup>1449</sup> Milan Lukić commenced his studies on 1 September 1982.<sup>1450</sup> The school records appear to show that Zehra Turjačanin attended the Ivo Andrić school for three years and that she had left by the time Milan Lukić started. However, Zehra Turjačanin was uncertain about the year she finished and testified that she was in her fourth year of school when Milan Lukić was in his first year.<sup>1451</sup> The Appeals Chamber finds that Milan Lukić has not shown that the Trial Chamber erred in this respect.

489. As to the contradiction between Zehra Turjačanin's evidence and that of her brother,<sup>1452</sup> both stated that they never saw Milan Lukić when together.<sup>1453</sup> In these circumstances, the Appeals Chamber finds that a reasonable trial chamber could have preferred Zehra Turjačanin's evidence over that of her brother.

490. Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in finding that Zehra Turjačanin had prior knowledge of Milan Lukić before the war.

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<sup>1444</sup> Milan Lukić Appeal Brief, para. 250, referring to Exhs 1D82, 1D105.

<sup>1445</sup> Milan Lukić Appeal Brief, para. 251, referring to Exh. 1D84.

<sup>1446</sup> Prosecution Response Brief (Milan Lukić), paras 177.

<sup>1447</sup> Prosecution Response Brief (Milan Lukić), para. 178.

<sup>1448</sup> Exhs 1D82; 1D105.

<sup>1449</sup> Exh. 1D82.

<sup>1450</sup> Exh. 1D105.

<sup>1451</sup> Trial Judgement, para. 668, referring to Zehra Turjačanin, T. 2291 (25 September 2008).

<sup>1452</sup> Trial Judgement, paras 668, 706, 708.

<sup>1453</sup> Trial Judgement, para. 668, referring to Exh. 1D84, p. 2. *See also* Zehra Turjačanin, T. 3335, 3350-3351 (4 November 2008).

(b) Alleged error in finding that Zehra Turjačanin saw Milan Lukić on two occasions in 1992 prior to the Bikavac Incident

491. The Trial Chamber found that Zehra Turjačanin recognised Milan Lukić at a neighbour's house in June 1992.<sup>1454</sup> The Trial Chamber further held that Zehra Turjačanin saw Milan Lukić at the "Alhos" factory in June 1992 while he was looking for a woman who worked there.<sup>1455</sup>

492. Milan Lukić argues that the Trial Chamber erred in finding that Zehra Turjačanin: (i) saw him in June 1992 at a neighbour's house, as she had insufficient prior knowledge to recognise him and because the man she claimed was Milan Lukić did not introduce himself;<sup>1456</sup> and (ii) saw him at the "Alhos" factory in June 1992, because she stated that he was looking for VG035, and VG035 worked at a different company.<sup>1457</sup>

493. The Prosecution argues that the woman working at the "Alhos" factory in June 1992 and whom Milan Lukić was looking for was not VG035.<sup>1458</sup>

494. Considering the Trial Chamber's finding that Zehra Turjačanin had prior knowledge of Milan Lukić,<sup>1459</sup> the Appeals Chamber is satisfied that Milan Lukić has failed to show that the Trial Chamber erred in finding that she recognised him in June 1992 at a neighbour's house, even though Milan Lukić did not introduce himself.

495. As to the sighting of Milan Lukić at the "Alhos" factory, Milan Lukić misstates Zehra Turjačanin's prior statement. Contrary to his submission, Zehra Turjačanin did not state that Milan Lukić visited VG035 at the "Alhos" factory in June 1992.<sup>1460</sup> Thus, Milan Lukić has failed to show that the Trial Chamber erred in relying on Zehra Turjačanin's evidence that she saw him at the "Alhos" factory. His submissions in this respect are therefore dismissed.

(c) Alleged error in Zehra Turjačanin's identification of Milan Lukić during the Bikavac Incident

496. Milan Lukić asserts that it was unreasonable for the Trial Chamber to rely upon Zehra Turjačanin's identification evidence, as: (i) her ability to recognise Milan Lukić was based upon her "scant" alleged exposure to him, ten years earlier;<sup>1461</sup> (ii) it was given in traumatic

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<sup>1454</sup> Trial Judgement, paras 669, 708.

<sup>1455</sup> Trial Judgement, paras 669, 708.

<sup>1456</sup> Milan Lukić Appeal Brief, paras 253-254.

<sup>1457</sup> Milan Lukić Appeal Brief, paras 253, 255.

<sup>1458</sup> Prosecution Response Brief (Milan Lukić), para. 180. The Prosecution does not respond to Milan Lukić's assertion that the Trial Chamber erred in finding that Zehra Turjačanin had also seen him at a neighbour's house in June 1992.

<sup>1459</sup> Trial Judgement, paras 668, 706, 708.

<sup>1460</sup> Exh. 2D38 (confidential), p. 2.

<sup>1461</sup> Milan Lukić Appeal Brief, para. 252.

circumstances;<sup>1462</sup> and (iii) she gave inconsistent evidence about Milan Lukić pulling a gold chain off her neck at the Aljić House.<sup>1463</sup>

497. The Prosecution responds that Zehra Turjačanin was able to properly recognise Milan Lukić,<sup>1464</sup> and argues that Milan Lukić has failed to show how Zehra Turjačanin's evidence regarding him pulling off her gold chain was inconsistent.<sup>1465</sup>

498. The Appeals Chamber recalls that it has found no error in the Trial Chamber's conclusion that Zehra Turjačanin knew Milan Lukić from school and saw him twice in June 1992, prior to the Bikavac Incident.<sup>1466</sup>

499. The Trial Chamber did not expressly consider whether Zehra Turjačanin's identification was made under traumatic circumstances. However, the Appeals Chamber recalls that identification under traumatic circumstances constitutes a factor that can be considered by a trial chamber when deciding what weight to place upon identification evidence.<sup>1467</sup> Further, the Appeals Chamber considers that the Trial Chamber has provided a reasoned opinion as it has carefully articulated the factors relied upon in support of the identification and addressed any significant factors impacting negatively on the reliability of the identification evidence.<sup>1468</sup> Milan Lukić has not shown that, in light of Zehra Turjačanin's established prior knowledge, her identification of him was unreliable

500. As to the alleged inconsistency in Zehra Turjačanin's evidence, the Appeals Chamber notes that, at trial, Zehra Turjačanin testified that Milan Lukić had "pulled the gold chain out from under [her] red T-shirt."<sup>1469</sup> The Appeals Chamber notes that during an interview given in 2000, Zehra Turjačanin claimed that Milan Lukić had "pulled her 'T-shirt' to check for jewellery."<sup>1470</sup> Because there is no substantial inconsistency between the oral testimony and the prior statement on this issue, Milan Lukić has failed to show that this evidence renders unreasonable the Trial Chamber's finding that Zehra Turjačanin could recognise Milan Lukić at the Bikavac Incident.

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<sup>1462</sup> Milan Lukić Appeal Brief, para. 252. Milan Lukić also argues that Zehra Turjačanin implicated him on the basis of "apparent notoriety" (Milan Lukić Appeal Brief, paras 246-247, referring to Exh. 2D36 (confidential), p. 1).

<sup>1463</sup> Milan Lukić Appeal Brief, para. 269, referring to Zehra Turjačanin, T. 2312 (25 September 2008), Exh. 2D38 (confidential), p. 2.

<sup>1464</sup> Prosecution Response Brief (Milan Lukić), para. 175.

<sup>1465</sup> Prosecution Response Brief (Milan Lukić), para. 181. The Prosecution does not respond to Milan Lukić's argument that Zehra Turjačanin's identification evidence was given under traumatic circumstances.

<sup>1466</sup> See *supra* paras 488, 490, 494-495.

<sup>1467</sup> See *supra* paras 136-137.

<sup>1468</sup> Cf. *Kupreškić et al.* Appeal Judgement, para. 39; *Haradinaj et al.* Appeal Judgement, para. 152.

<sup>1469</sup> Zehra Turjačanin, T. 2312 (25 September 2008).

<sup>1470</sup> Exh. 2D38 (confidential), p. 2.

(d) Alleged error with regard to failure to identify Milan Lukić in court

501. The Trial Chamber considered Zehra Turjačanin's testimony that she did not recognise anyone in the courtroom,<sup>1471</sup> but was satisfied that she had sufficient prior knowledge of Milan Lukić to identify him correctly both outside and inside the Aljić House, when Milan Lukić pulled a gold chain from her neck.<sup>1472</sup>

502. Milan Lukić argues that, when the Trial Chamber permits in-court identification, "there must be implications" when a witness fails to recognise him in the courtroom.<sup>1473</sup> The Prosecution responds that Milan Lukić merely seeks to substitute his own evaluation of the evidence for that of the Trial Chamber.<sup>1474</sup>

503. The Appeals Chamber recalls that the determination of the weight, if any, to be accorded to an in-court identification rests within the discretion of a trial chamber.<sup>1475</sup> It further notes that the failure to identify an accused in court can be a reason for declining to rely on the evidence of an identifying witness.<sup>1476</sup> However, the failure of a witness to identify a perpetrator in the courtroom does not necessarily prevent a reasonable trier of fact from relying on that witness's testimony.<sup>1477</sup> The Appeals Chamber notes that the Trial Chamber did not consider Zehra Turjačanin's failure to identify Milan Lukić in court in isolation. In reaching its conclusions, the Trial Chamber examined her evidence in its entirety, including her demeanour in court.<sup>1478</sup> Having considered the totality of her evidence, the Trial Chamber was satisfied that Zehra Turjačanin had sufficient prior knowledge of Milan Lukić to identify him during the Bikavac Incident.<sup>1479</sup> In particular, it found that Zehra Turjačanin knew Milan Lukić from school and that she recognised him shortly before the incident both at a neighbour's house as well as at the "Alhos" factory in June 1992.<sup>1480</sup> The Trial Chamber accorded little weight to the failed in-court identification.<sup>1481</sup> In these circumstances, the Appeals Chamber is satisfied that the Trial Chamber did not err in relying on Zehra Turjačanin's recognition evidence despite her failure to identify him in court 16 years after the fire.

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<sup>1471</sup> Trial Judgement, para. 671, referring to Zehra Turjačanin, T. 2342 (25 September 2008).

<sup>1472</sup> Trial Judgement, para. 724.

<sup>1473</sup> Milan Lukić Appeal Brief, para. 237 (emphasis omitted); Milan Lukić Reply Brief, para. 98.

<sup>1474</sup> Prosecution Response Brief (Milan Lukić), para. 176.

<sup>1475</sup> See *supra* para. 120.

<sup>1476</sup> *Limaj et al.* Appeal Judgement, fn. 68, referring to *Kvočka et al.* Appeal Judgement, para. 473.

<sup>1477</sup> Cf. *Kvočka et al.* Appeal Judgement, para. 473.

<sup>1478</sup> Trial Judgement, paras 705, 708.

<sup>1479</sup> Trial Judgement, paras 668, 706, 708.

<sup>1480</sup> Trial Judgement, paras 668, 706.

<sup>1481</sup> Trial Judgement, para. 724.

(e) Conclusion

504. For the foregoing reasons, the Appeals Chamber is satisfied that the Trial Chamber did not err in finding that Zehra Turjačanin had sufficient prior knowledge of Milan Lukić and that she was credible when testifying that she recognised him during the Bikavac Incident.

3. VG058 and VG115

505. The Trial Chamber found that VG058 and VG115 had sufficient prior knowledge of Milan Lukić to be able to recognise him as a participant in the Bikavac Incident.<sup>1482</sup> However, having considered certain “discrepancies” in their evidence, the Trial Chamber approached the identification evidence of VG058 and VG115 “with caution”.<sup>1483</sup>

(a) Alleged errors with regard to VG058

506. Milan Lukić does not dispute VG058’s prior knowledge of him *per se*.<sup>1484</sup> He argues, however, that the Trial Chamber erred in finding that VG058 identified him as a participant in the Bikavac Incident.<sup>1485</sup> In particular, he claims that the Trial Chamber did not give due weight to: (i) VG058’s failure to mention him in her first witness statement given in 1992, after the Bikavac Incident, or her evasiveness when cross-examined on this issue;<sup>1486</sup> and (ii) VG058’s inconsistent descriptions of his appearance on the night of the incident.<sup>1487</sup>

507. The Prosecution responds that Milan Lukić’s challenges should be summarily dismissed as unsubstantiated and irrelevant.<sup>1488</sup> It further argues that the Trial Chamber approached VG058’s evidence with caution and did not place significant weight upon it.<sup>1489</sup>

508. The Appeals Chamber notes that the Trial Chamber considered the fact that VG058 did not mention the Bikavac Incident in her statement from 1992. It was further aware of discrepancies between VG058’s trial testimony and her statement from 2008 with regard to Milan Lukić’s appearance on the night of the incident.<sup>1490</sup> It also considered the fact that VG058’s testimony

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<sup>1482</sup> Trial Judgement, paras 717-718.

<sup>1483</sup> Trial Judgement, para. 720.

<sup>1484</sup> Milan Lukić Appeal Brief, para. 258; Milan Lukić Reply Brief, para. 100.

<sup>1485</sup> Milan Lukić Appeal Brief, paras 258, 266; Milan Lukić Reply Brief, paras 100, 102-103

<sup>1486</sup> Milan Lukić Appeal Brief, paras 258-259; Milan Lukić Reply Brief, para. 102.

<sup>1487</sup> Milan Lukić Appeal Brief, para. 260, referring to VG058, T. 1611 (11 September 2008), Exhs 1D41 (confidential), pp. 11, 14-15, 1D43 (confidential), paras 28, 40.

<sup>1488</sup> Prosecution Response Brief (Milan Lukić), para. 184.

<sup>1489</sup> Prosecution Response Brief (Milan Lukić), para. 184.

<sup>1490</sup> Trial Judgement, para. 720. The Trial Chamber noted that VG058 stated in her 2008 statement that Milan Lukić had a stocking over his head but that she could recognise his eyes and voice, whereas she testified at trial that she had an unobstructed view of his face (Trial Judgement, para. 720).



contained certain discrepancies when considered in light of Zehra Turjačanin's evidence.<sup>1491</sup> Overall, it found that VG058's answers under cross-examination were "very evasive and defensive".<sup>1492</sup>

509. Having identified these discrepancies,<sup>1493</sup> the Trial Chamber approached VG058's evidence with caution, and only relied upon it when corroborated by reliable witnesses.<sup>1494</sup> In particular, the Trial Chamber found that VG058's observation that Milan Lukić fired at the Aljić House was consistent with Zehra Turjačanin's account of what happened inside the Aljić House.<sup>1495</sup> In light of the careful approach adopted, Milan Lukić has failed to show that the Trial Chamber erred in placing some reliance upon VG058's identification evidence, where corroborated by the evidence of other witnesses.

(b) Alleged errors with regard to VG115

510. With regard to VG115, Milan Lukić contends that the Trial Chamber erred in: (i) failing to consider that VG115 admitted that she did not know Milan Lukić prior to the war in her testimony in the *Vasiljević* case;<sup>1496</sup> (ii) relying on her identification evidence despite its finding that she "did not stand up well under cross-examination";<sup>1497</sup> and (iii) failing to dismiss VG115's identification of Milan Lukić on the same basis that it dismissed her identification of Sredoje Lukić during the Bikavac incident.<sup>1498</sup>

511. The Prosecution responds that Milan Lukić's challenges should be summarily dismissed as unsubstantiated and irrelevant.<sup>1499</sup> It also argues that the Trial Chamber reasonably approached VG115's evidence with caution and did not place significant weight upon it.<sup>1500</sup> It argues further that the Trial Chamber reasonably disregarded VG115's evidence with regard to Sredoje Lukić's presence as, unlike that of Milan Lukić, this was not supported by the evidence of other witnesses.<sup>1501</sup>

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<sup>1491</sup> Trial Judgement, para. 720.

<sup>1492</sup> Trial Judgement, para. 718.

<sup>1493</sup> Trial Judgement, para. 720.

<sup>1494</sup> Trial Judgement, para. 739.

<sup>1495</sup> Trial Judgement, para. 717.

<sup>1496</sup> Milan Lukić Appeal Brief, paras 262-264, referring to Exh. 1D19 (confidential), pp. 1014-1015; Milan Lukić Reply Brief, para. 101.

<sup>1497</sup> Milan Lukić Appeal Brief, paras 264, 271; Milan Lukić Reply Brief, para. 101.

<sup>1498</sup> Milan Lukić Appeal Brief, para. 265.

<sup>1499</sup> Prosecution Response Brief (Milan Lukić), para. 184.

<sup>1500</sup> Prosecution Response Brief (Milan Lukić), para. 184.

<sup>1501</sup> Prosecution Response Brief (Milan Lukić), para. 184.

512. The Appeals Chamber notes that, contrary to Milan Lukić's submission,<sup>1502</sup> VG115 did not "admit" in the *Vasiljević* case that she had no prior knowledge of Milan Lukić; rather, she provided ambiguous testimony.<sup>1503</sup> By contrast, in the present case, the Trial Chamber considered VG115's testimony that she regularly encountered Milan Lukić on the street during the war and, on this basis, found that she had prior knowledge of Milan Lukić, and could recognise him at the Aljić House.<sup>1504</sup> The Appeals Chamber finds no error in this regard.

513. As to the Trial Chamber's finding that VG115 "did not stand up well" under cross-examination,<sup>1505</sup> the Appeals Chamber notes that the Trial Chamber identified discrepancies in VG115's evidence, and found that these discrepancies should be treated with caution. The Trial Chamber noted that Zehra Turjačanin corroborated VG115's testimony.<sup>1506</sup> In light of the careful approach adopted, Milan Lukić has failed to show that the Trial Chamber erred in its assessment of VG115's evidence.

514. The Appeals Chamber notes that the Trial Chamber accepted VG115's evidence that she recognised Milan Lukić but rejected her evidence that she recognised Sredoje Lukić during the Bikavac Incident.<sup>1507</sup> The Trial Chamber was unable to rely on VG115's evidence regarding Sredoje Lukić's presence as no other witness gave evidence that Sredoje Lukić was there.<sup>1508</sup> By contrast, the Trial Chamber relied not only on VG115, but also on Zehra Turjačanin and VG058 to conclude that Milan Lukić was present during the Bikavac Incident.<sup>1509</sup> His submissions in this respect are therefore rejected.

#### 4. VG094 and VG119

515. The Trial Chamber found that VG094 and VG119 had sufficient prior knowledge of Milan Lukić to recognise him when he came to their house shortly after the fire.<sup>1510</sup> It held that VG094 and VG119 stood up well under cross-examination and it attached "great weight" to their testimony that Milan Lukić had been present near a fire prior to his arrival at their house.<sup>1511</sup>

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<sup>1502</sup> Milan Lukić Appeal Brief, para. 264.

<sup>1503</sup> Exh. 1D19 (confidential), pp. 1014-1015: "I didn't know Milan Lukic [*sic*] from before, when times from normal [*sic*] in Visegrad [*sic*]. [...] I had occasion to meet Milan personally at work, in the offices I worked in, both before the war and after the war".

<sup>1504</sup> Trial Judgement, paras 429, referring to VG115, T. 672 (27 August 2008); 718. *See also* Trial Judgement, para. 675.

<sup>1505</sup> Trial Judgement, para. 718.

<sup>1506</sup> Trial Judgement, para. 717.

<sup>1507</sup> Trial Judgement, paras 716, 718, 733.

<sup>1508</sup> Trial Judgement, paras 732-735.

<sup>1509</sup> Trial Judgement, paras 708, 716, 718.

<sup>1510</sup> Trial Judgement, para. 721.

<sup>1511</sup> Trial Judgement, paras 721, 723.

516. Milan Lukić contends that, if his challenges against the evidence of Zehra Turjačanin, VG058, and VG115 prove successful, his conviction must be overturned because no reasonable trier of fact could have relied only on the evidence of VG094 and VG119.<sup>1512</sup>

517. The Appeals Chamber recalls that it has rejected Milan Lukić's submissions with respect to Zehra Turjačanin, VG058, and VG0115.<sup>1513</sup> The Appeals Chamber therefore dismisses his argument in this respect.

## 5. Conclusion

518. For the foregoing reasons, the Appeals Chamber finds that Milan Lukić has not shown that the Trial Chamber erred in relying on Zehra Turjačanin, VG058, and VG115's identification of Milan Lukić during the Bikavac Incident. Milan Lukić's sub-grounds 4(B) through (D) are thus dismissed.

## E. Proof of death

519. Milan Lukić submits that the Trial Chamber erred in finding that 60 people died in the Bikavac Incident, because the death of these individuals was not proven beyond a reasonable doubt.<sup>1514</sup> He argues that, according to the evidence of Prosecution witness Mašović, 311 bodies were exhumed from 67 locations in Višegrad but none of these bodies were linked to the Bikavac Incident.<sup>1515</sup> He further argues that expert witness Jenkins stated that, if there had been a fire at the Aljić House in which 60 individuals died, there would be trace evidence in the soil.<sup>1516</sup> With respect to 11 of these victims, who were specified by name, Milan Lukić argues that there is serious doubt that they ever existed, because they had no JMBG numbers, their bodies were never found, and no death certificates were produced.<sup>1517</sup> He argues that the determination of their death was only based on information provided by expert witness Tabeau in the Prosecution's Victims Chart as well as by

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<sup>1512</sup> Milan Lukić Appeal Brief, para. 275. The Prosecution does not respond to this submission.

<sup>1513</sup> See *supra* paras 504, 509, 514.

<sup>1514</sup> Milan Lukić's sub-ground 4(A). Milan Lukić Appeal Brief, para. 228.

<sup>1515</sup> Milan Lukić Appeal Brief, para. 232, referring to Mašović, T. 3182-3183 (30 October 2008), Exhs P174, P183.

<sup>1516</sup> Milan Lukić Appeal Brief, para. 232, referring to Jenkins, T. 6477 (27 March 2009). Milan Lukić further submits that he could not challenge the exact number of the victims as they were not sufficiently identified in the Indictment (Milan Lukić Appeal Brief, para. 232).

<sup>1517</sup> Milan Lukić Appeal Brief, para. 231, referring to: FNU Aljić, father of Suhra Aljić; FNU Aljić, mother of Suhra Aljić; FNU Aljić, son of Suhra Aljić; Suhra Aljić; Dehva Tufekčić; Elma Tufekčić; Ensar Tufekčić; Selmir Turjačanin; Dulka Turjačanin; Sada Turjačanin; and Aida Turjačanin. Milan Lukić argues that no JMBG was produced by the Prosecution with respect to nine of the purported victims listed in the Alleged Victims List (Milan Lukić Appeal Brief, para. 231, fn. 387). See also Milan Lukić Reply Brief, paras 93-95. While Milan Lukić purportedly raises an alleged error of law, he substantially also raises an alleged error of fact in that he argues that no reasonable trial chamber could have concluded that the victims had died in the Bikavac Incident (Milan Lukić Appeal Brief, para. 233). The Appeals Chamber has considered the substance of his submissions accordingly.

Zehra Turjačanin, VG115, and VG058, who all lacked credibility.<sup>1518</sup> In relation to four of the victims – Sada Turjačanin, Dulka Turjačanin, Dehva Tufekčić, and Ensar Tufekčić – Milan Lukić raises additional arguments.<sup>1519</sup>

520. In response, the Prosecution submits that Milan Lukić has failed to show that no reasonable trial chamber could have found that the 60 victims died.<sup>1520</sup> The Prosecution further contends that Milan Lukić takes Mašović's testimony out of context and that Jenkins was not qualified to offer an expert opinion on the effect of fire on bodies.<sup>1521</sup> In relation to the 11 victims who were identified by name, the Prosecution argues that the Trial Chamber properly relied on witness testimony to find that their deaths were proven and that Milan Lukić's submissions with respect to these victims merit summary dismissal.<sup>1522</sup> The Prosecution further argues that Milan Lukić fails to substantiate his assertion that Sada Turjačanin and Dulka Turjačanin are alive<sup>1523</sup> and it submits that Milan Lukić merely refers to translation or transcription errors in relation to Dehva Tufekčić and Ensar Tufekčić which do not change the original meaning of Zehra Turjačanin's testimony.<sup>1524</sup>

521. The Trial Chamber concluded that at least 60 victims were killed in the Bikavac Incident, having considered the "compelling evidence" of, amongst others, VG058, VG115, and Zehra Turjačanin.<sup>1525</sup> The Appeals Chamber recalls its previous finding that Milan Lukić has failed to show that the Trial Chamber erred in relying on their identification of Milan Lukić during the Bikavac Incident.<sup>1526</sup> Milan Lukić has failed to further substantiate his submission that these witnesses were not credible. Moreover, contrary to Milan Lukić's submission, the Appeals

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<sup>1518</sup> Milan Lukić Appeal Brief, paras 229, 233.

<sup>1519</sup> Milan Lukić Appeal Brief, para. 231; Milan Lukić Reply Brief, para. 95. With respect to Sada Turjačanin, Milan Lukić argues that the archives of Bosnia and Herzegovina show that this person was alive after 1992 because she was registered with a permanent address in Sarajevo (Milan Lukić Appeal Brief, para. 231, referring to Exh. 1D220 (confidential)). In relation to Dulka Turjačanin, Milan Lukić argues that she is still alive and that the Trial Chamber denied his request to appoint an "independent law enforcement agency" to investigate the possibility of additional survivors (Milan Lukić Appeal Brief, para. 231, referring to *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Milan Lukić's Notice of Verification of Alleged Victim Survivors and Application for Stay of Proceedings with Exhibits A through H, 9 March 2009, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Milan Lukić's Notice of Verification of Alleged Victim Survivors and Application for Stay of Proceedings with Exhibits A through H, 12 March 2009). In relation to Dehva Tufekčić, Milan Lukić submits that "Zehra Turzacanin [*sic*] described a certain Dzehva Tufekcic [*sic*], who is a different person", and in relation to Ensar Tufekčić, he submits that Exh. P139 refers to *Emsar* Tufekčić (Milan Lukić Appeal Brief, para. 231). The Appeals Chamber notes that contrary to Milan Lukić's submission, Exh. P139 refers to *Emsad* Tufekčić (Exh. P139, p. 20).

<sup>1520</sup> Prosecution Response Brief (Milan Lukić), paras 164, 170.

<sup>1521</sup> Prosecution Response Brief (Milan Lukić), para. 171.

<sup>1522</sup> Prosecution Response Brief (Milan Lukić), paras 166-167.

<sup>1523</sup> Prosecution Response Brief (Milan Lukić), para. 169.

<sup>1524</sup> Prosecution Response Brief (Milan Lukić), para. 168.

<sup>1525</sup> Trial Judgement, paras 709, 715.

<sup>1526</sup> See *supra* paras 504, 509, 514, 517.

Chamber notes that the Trial Chamber did not rely on the Prosecution's Victims Chart for the purpose of determining the identity of the victims of the Bikavac Incident.<sup>1527</sup>

522. The Appeals Chamber further notes that Mašović testified that, while it was theoretically possible that the Bikavac Incident did not occur, this would imply that hundreds of people were lying when they reported victims and that he found this "difficult to believe".<sup>1528</sup> The Appeals Chamber considers that Milan Lukić has not shown that Mašović's testimony called into question the Trial Chamber's finding that at least 60 victims died in the fire. The Appeals Chamber also notes Jenkins' testimony that "if the allegations [in relation to the Bikavac Incident] are true, [he] should [find] some sort of trace evidence in that soil."<sup>1529</sup> However, Jenkins also testified that no crime site investigation had ever been conducted and that, as a result, "we have no way of knowing what is there."<sup>1530</sup> In light of this evidence, the Appeals Chamber finds that a reasonable trier of fact could have found that Jenkins' inability "to tell whether or not the fire [...] occurred"<sup>1531</sup> did not call into question the relevant eye-witness evidence of, among others, VG058, VG115, and Zehra Turjačanin, that at least 60 victims died in the fire.<sup>1532</sup> As the Trial Chamber found that this number of victims comprised the 11 victims whom the Trial Chamber identified by name,<sup>1533</sup> Milan Lukić has failed to show that the Trial Chamber erred in relying on this eye-witness evidence when it found that these 11 victims died in the fire.

523. The Appeals Chamber now turns to Milan Lukić's additional arguments regarding the death of four of the named victims. In relation to Sadeta Turjačanin, it notes that the Trial Chamber accepted Tabeau's evidence that the person listed in the Indictment as "Sada Turjačanin" was in fact "Sadeta Turjačanin", who was born in 1963.<sup>1534</sup> In arriving at this conclusion, the Trial Chamber considered Milan Lukić's submission that Sada Turjačanin was alive after the incident.<sup>1535</sup> The Appeals Chamber considers that Milan Lukić merely repeats an argument that was

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<sup>1527</sup> Trial Judgement, para. 710. Furthermore, irrespective of whether Milan Lukić has waived his right to challenge any insufficient identification of the victims in the Indictment, the Appeals Chamber is satisfied that the Indictment is not defective. The Appeals Chamber recalls that in some instances, "the sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity in such [a] matte[r] as the identity of the victims'" (*Kupreškić et al.* Appeal Judgement, para. 89). In the present case, the Prosecution pleaded with sufficient specificity the identity of the victims of the Bikavac Incident of which it was aware (*see* Milan Lukić Appeal Brief, para. 231; Milan Lukić Reply Brief, para. 95).

<sup>1528</sup> Mašović, T. 3185-3186 (30 October 2008).

<sup>1529</sup> Jenkins, T. 6477 (27 March 2009).

<sup>1530</sup> Jenkins, T. 6476 (27 March 2009).

<sup>1531</sup> Trial Judgement, para. 707.

<sup>1532</sup> Trial Judgement, paras 709, 715.

<sup>1533</sup> Trial Judgement, para. 715.

<sup>1534</sup> Trial Judgement, para. 711, referring to Tabeau, T. 6198-6201 (24 March 2009).

<sup>1535</sup> Trial Judgement, para. 711, referring to Exh. 1D221 (public redacted version of Exh. 1D220 to which Milan Lukić referred in Milan Lukić Appeal Brief, para. 231).

unsuccessful at trial without demonstrating that its rejection by the Trial Chamber constituted an error warranting the intervention of the Appeals Chamber.

524. The Trial Chamber further found that Dulka Turjačanin died in the Bikavac Incident.<sup>1536</sup> Milan Lukić argues that Dulka Turjačanin is still alive and that the Trial Chamber erred in rejecting his request to appoint an “independent law enforcement agency” to investigate this possibility.<sup>1537</sup> The Appeal Chamber considers that, without any further substantiation, this submission fails to meet the standard of review on appeal, and is therefore dismissed.

525. Finally, the Trial Chamber found that Ensar Tufekčić and Dehva Tufekčić were among the victims but noted that their names were also spelled “Emsar” and “Džehva” respectively.<sup>1538</sup> Milan Lukić argues that the different spellings create doubt that Dehva Tufekčić and Ensar Tufekčić ever existed.<sup>1539</sup> The Trial Chamber considered variations in the spelling of their names when it found that they were among the victims of the Bikavac Incident.<sup>1540</sup> Milan Lukić has failed to show that the Trial Chamber erred in this respect.

526. Consequently, Milan Lukić’s submission that the Trial Chamber erred in finding that at least 60 victims died in the fire is unfounded, and Milan Lukić’s sub-ground 4(A) is dismissed.

## **F. Conclusion**

527. For the foregoing reasons, the Appeals Chamber dismisses Milan Lukić’s sub-grounds 4(A) through (E).

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<sup>1536</sup> Trial Judgement, para. 715.

<sup>1537</sup> Milan Lukić Appeal Brief, para. 231; Milan Lukić Reply Brief, para. 95.

<sup>1538</sup> Trial Judgement, paras 665, 715, fns 2212, 2214. The Appeals Chamber notes that Exh. P139 spells the name “Emsad” (Exh. P139, p. 20).

<sup>1539</sup> Milan Lukić Appeal Brief, para. 231.

<sup>1540</sup> Trial Judgement, paras 665, 715, fns 2212, 2214.

## **XI. ALLEGED ERRORS IN RELATION TO EXTERMINATION**

### **A. Introduction**

528. The Trial Chamber held that, during the Pionirska Street Incident, Milan Lukić herded the Koritnik Group into the Omeragić House and threw an incendiary device into the house, starting a fire which resulted in the killing of 59 victims. It also found that Milan Lukić shot at the victims who tried to escape through the windows.<sup>1541</sup> As to the Bikavac Incident, the Trial Chamber found that Milan Lukić forced the victims into the Aljić House, threw in grenades, and set the house on fire, killing at least 60 victims.<sup>1542</sup>

529. The Trial Chamber, Judge Van den Wyngaert dissenting, found Milan Lukić guilty of extermination as a crime against humanity.<sup>1543</sup>

530. Milan Lukić argues that the Trial Chamber erred in law or in fact by convicting him of extermination as a crime against humanity in relation to both the Pionirska Street and the Bikavac Incidents.<sup>1544</sup> In particular, he argues that the Trial Chamber erred in its assessment of the element of “massiveness” required for extermination as a crime against humanity.<sup>1545</sup>

### **B. Definition of extermination**

531. Milan Lukić submits that massiveness refers to the number of victims, not their character or place of origin.<sup>1546</sup> He further submits that the Trial Chamber erred in considering population density and the origin of the victims as relevant factors when assessing the “massiveness” element.<sup>1547</sup> He argues that the Trial Chamber’s identification of the Koritnik village and the

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<sup>1541</sup> Trial Judgement, paras 944-945.

<sup>1542</sup> Trial Judgement, para. 949.

<sup>1543</sup> Trial Judgement, paras 947, 951, 1100.

<sup>1544</sup> Milan Lukić’s sub-grounds 3(I) and 4(H). Milan Lukić Appeal Brief, paras 227, 281; Appeal Hearing, AT. 69 (14 September 2011).

<sup>1545</sup> Milan Lukić Appeal Brief, paras 205-227, 281; Appeal Hearing, AT. 69 (14 September 2011).

<sup>1546</sup> Milan Lukić argues that reliance on population density would introduce a highly subjective element into the crime of extermination, leading to uncertainty in the law. He further asserts that population density depends on the reference area chosen and that considering this factor would lead to “legally untenable” results: the killing of 20 people in a small village would constitute extermination, whereas the killing of thousands of people in a large city would not. Moreover, Milan Lukić argues that extermination could be established in relation to some victims depending on their origin, but not others. Finally, he argues that the Trial Chamber was inconsistent when it focused on where the victims of the Pionirska Street Incident came from but provided no such analysis in relation to the Bikavac Incident (Milan Lukić Appeal Brief, paras 212, 214; Milan Lukić Reply Brief, para. 89; Appeal Hearing, AT. 69, 74-75, 113, 115 (14 September 2011)).

<sup>1547</sup> Milan Lukić Appeal Brief, para. 212; Milan Lukić Reply Brief, para. 90; Appeal Hearing, AT. 69 (14 September 2011).

Bikavac neighbourhood as the relevant reference areas was “artificial and narrow”.<sup>1548</sup> Milan Lukić further argues that if contextual factors such as population density are to be considered, an accused must also be aware of them, and there is no evidence that he had such knowledge.<sup>1549</sup>

532. Moreover, Milan Lukić asserts that the killings of the Pionirska Street and the Bikavac Incidents were charged under separate counts of extermination and that the Trial Chamber therefore erred in considering “an accumulation of separate and unrelated incidents” as a relevant factor in determining “massiveness”.<sup>1550</sup>

533. Milan Lukić finally submits that the Trial Chamber erred in finding that the deaths of 59 individuals in the Pionirska Street Incident and 60 individuals in the Bikavac Incident satisfied the element of “massiveness”.<sup>1551</sup> He contends that the Tribunal and the International Criminal Tribunal for Rwanda (“ICTR”) have ensured that the element of “massiveness” is maintained at a high level<sup>1552</sup> and have held that the element of “massiveness” is tied to the chapeau elements of crimes against humanity.<sup>1553</sup>

534. The Prosecution responds that the Trial Chamber correctly found that the Pionirska Street Incident and the Bikavac Incident involved killings on a large scale constituting extermination.<sup>1554</sup> It submits that the Trial Chamber considered the number of victims and correctly took into account contextual elements such as identity, origin, and vulnerability of the victims, as well as population density.<sup>1555</sup> The Prosecution finally responds that the Trial Chamber did not aggregate the incidents and that Milan Lukić’s submission in this regard should be summarily dismissed.<sup>1556</sup>

535. At the outset, the Appeals Chamber notes that the Trial Chamber found that the killings during the Pionirska Street Incident and during the Bikavac Incident each satisfied the element of massiveness required for extermination.<sup>1557</sup> While the Trial Chamber listed the accumulation of

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<sup>1548</sup> He argues that the Trial Chamber ignored the fact that some victims did not come from these reference areas and that other trial chambers have never chosen a reference area smaller than a municipality (Milan Lukić Appeal Brief, para. 213; Appeal Hearing, AT. 71 (14 September 2011)).

<sup>1549</sup> Appeal Hearing, AT. 113 (14 September 2011).

<sup>1550</sup> Milan Lukić Appeal Brief, para. 216; Milan Lukić Reply Brief, para. 92.

<sup>1551</sup> Milan Lukić Appeal Brief, paras 219-227; Milan Lukić Reply Brief, paras 87-89. *See also* Appeal Hearing, AT. 70-73 (14 September 2011).

<sup>1552</sup> Milan Lukić Appeal Brief, para. 224. *See also* Appeal Hearing, AT. 69-71 (14 September 2011).

<sup>1553</sup> Milan Lukić Appeal Brief, paras 225-226; Appeal Hearing, AT. 71 (14 September 2011).

<sup>1554</sup> Prosecution Response Brief (Milan Lukić), paras 148-152, 157, 159; Appeal Hearing, AT. 94-96 (14 September 2011), 183-187 (15 September 2011). When addressing Milan Lukić’s argument about the number of victims, the Prosecution indicated it would address this issue in more detail as part of the Prosecution Appeal, which is directed against Sredoje Lukić’s conviction (Appeal Hearing, AT. 96 (14 September 2011)). These submissions will be addressed in this section.

<sup>1555</sup> Prosecution Response Brief (Milan Lukić), paras 149-156; Appeal Hearing, AT. 96-97 (14 September 2011).

<sup>1556</sup> Prosecution Response Brief (Milan Lukić), para. 158.

<sup>1557</sup> Trial Judgement, paras 947, 951.



killings as a relevant factor,<sup>1558</sup> it did not consider the victims of the Pionirska Street and the Bikavac Incidents cumulatively. Instead, it found each incident separately constituted extermination as a crime against humanity. Milan Lukić's argument in this regard is therefore dismissed.

536. The Appeals Chamber recalls that the *actus reus* of extermination is “the act of killing on a large scale”.<sup>1559</sup> This element of “massiveness” is what distinguishes the crime of extermination from the crime of murder.<sup>1560</sup> The *mens rea* of extermination requires the intention of the perpetrator “to kill on a large scale or to systematically subject a large number of people to conditions of living that would lead to their deaths.”<sup>1561</sup>

537. The Appeals Chamber further recalls that “large scale” does not suggest a strict numerical approach with a minimum number of victims.<sup>1562</sup> While extermination as a crime against humanity has been found in relation to the killing of thousands,<sup>1563</sup> it has also been found in relation to fewer killings. The Appeals Chamber recalls that in *Brdanin*, the killing of between 68 to 300 individuals “in light of the circumstances in which they occurred, [met] the required threshold of massiveness for the purposes of extermination.”<sup>1564</sup> In *Stakić*, the trial chamber found that the killing of less than 80 individuals “independently would reach the requisite level of massiveness for the purposes of an evaluation under Article 5(b) of the Statute”.<sup>1565</sup> In *Krajišnik*, while the conviction for extermination as a crime against humanity was based on the killing of at least 1,916 individuals, the trial chamber found that the killing of approximately 66 individuals during the Pionirska Street Incident satisfied the element of massiveness.<sup>1566</sup> The ICTR and the Special Court for Sierra Leone (“SCSL”) have also found the killing of about 60 individuals and less to be sufficiently large-scale to amount to extermination.<sup>1567</sup>

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<sup>1558</sup> Trial Judgement, para. 938.

<sup>1559</sup> *Stakić* Appeal Judgement, para. 259, referring to *Ntakirutimana* Appeal Judgement, para. 516.

<sup>1560</sup> *Stakić* Appeal Judgement, para. 260, referring to *Ntakirutimana* Appeal Judgement, para. 516.

<sup>1561</sup> *Stakić* Appeal Judgement, para. 260.

<sup>1562</sup> *Stakić* Appeal Judgement, para. 260, referring to *Ntakirutimana* Appeal Judgement, para. 516. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 398. The ICTR Appeals Chamber accepted the Trial Chamber's finding that parallel killings were perpetrated at the same time and qualified as having occurred on a large scale, without ascertaining a precise numerical figure.

<sup>1563</sup> *See e.g. Krstić* Trial Judgement, paras 79, 84, 426, 505. *See also Ntakirutimana* Appeal Judgement, para. 521.

<sup>1564</sup> *Brdanin* Appeal Judgement, para. 472.

<sup>1565</sup> *Stakić* Trial Judgement, para. 653, referring to, *inter alia*, killings at Briševo where 77 Croats were killed (*see Stakić* Trial Judgement, para. 269). The Appeals Chamber did not address whether each incident would independently satisfy the requirement that the massiveness element had been met, but did uphold the conviction for extermination (*Stakić* Appeal Judgement, para. 264).

<sup>1566</sup> *Krajišnik* Trial Judgement, paras 699, 720, overturned on appeal for reasons other than the massiveness requirement (*Krajišnik* Appeal Judgement, para. 177). *See also* Trial Judgement, para. 938.

<sup>1567</sup> *Setako* Trial Judgement, para. 481 (30 to 40 victims) (this finding was upheld on appeal, *Setako* Appeal Judgement, para. 301); *Sesay et al.* Trial Judgement, paras 1107 (63 victims), 1271 (30 to 40 victims), 1449 (64 victims) (these findings were upheld on appeal, *Sesay et al.* Appeal Judgement, Chapter XII).

538. The assessment of “large scale” is made on a case-by-case basis, taking into account the circumstances in which the killings occurred.<sup>1568</sup> Relevant factors include, *inter alia*: the time and place of the killings;<sup>1569</sup> the selection of the victims and the manner in which they were targeted;<sup>1570</sup> and whether the killings were aimed at the collective group rather than victims in their individual capacity.<sup>1571</sup> In *Krstić*, the trial chamber qualified the victimised population and held that:

“extermination” could also, theoretically, be applied to the commission of a crime which is not “widespread” but nonetheless consists in eradicating an *entire population* [...] made up of only a relatively small number of people. In other words, while extermination generally involves a large number of victims, it may be constituted even where the number of victims is limited.<sup>1572</sup> [...] [T]here must be evidence that a *particular population* was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population.<sup>1573</sup>

The *Krstić* trial chamber also stated that the preparation and organisation of the crime could be considered when determining the *actus reus* of extermination as a crime against humanity.<sup>1574</sup> The International Law Commission articulated that “[e]xtermination is a crime which by its very nature is directed against a group of individuals” and qualified that the individuals do not have to share any common characteristics.<sup>1575</sup>

539. In the current case, the Trial Chamber, Judge Van den Wyngaert dissenting, held that the population density of a particular area can be considered as a factor when determining whether the *actus reus* of extermination as a crime against humanity has been met, and specifically whether the element of mass destruction has been fulfilled.<sup>1576</sup> In particular, the Trial Chamber held:

[i]n 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.<sup>1577</sup>

540. With regard to the Pionirska Street Incident specifically, the Trial Chamber held:

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<sup>1568</sup> *Martić* Trial Judgement, para. 63, referring to *Stakić* Trial Judgement, para. 640, *Brdanin* Trial Judgement, para. 391, *Blagojević and Jokić* Trial Judgement, para. 573, *Krajišnik* Trial Judgement, para. 716, *Nahimana et al.* Trial Judgement, para. 1061. See also *Brdanin* Appeal Judgement, para. 472, finding “that the scale of the killings, in light of the circumstances in which they occurred, meets the required threshold of massiveness for the purposes of extermination” (emphasis added).

<sup>1569</sup> *Krajišnik* Trial Judgement, para. 716. This finding was not overturned on appeal.

<sup>1570</sup> *Martić* Trial Judgement, fn. 120; *Krajišnik* Trial Judgement, para. 716; *Nahimana et al.* Trial Judgement, para. 1061. These findings were not overturned on appeal.

<sup>1571</sup> *Stakić* Trial Judgement, para. 653; *Vasiljević* Trial Judgement, para. 227. These findings were not overturned on appeal.

<sup>1572</sup> *Krstić* Trial Judgement, para. 501 (emphasis added). This finding was not appealed. The trial chamber in *Brdanin* adopted this finding (*Brdanin* Trial Judgement, para. 391), which was not appealed.

<sup>1573</sup> *Krstić* Trial Judgement, para. 503 (emphasis added). This finding was not appealed.

<sup>1574</sup> *Krstić* Trial Judgement, para. 501. This finding was not appealed. The trial chamber in *Brdanin* adopted this finding (*Brdanin* Trial Judgement, para. 391), which was not appealed.

<sup>1575</sup> *Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996*, Official Records of the General Assembly, Fifty-first session, Supplement No. 10 (UN Doc. A/51/10), Article 18, p. 48.

<sup>1576</sup> Trial Judgement, para. 938.

<sup>1577</sup> Trial Judgement, para. 938.

The Trial Chamber has considered, in particular, the number and type of victims of the fire, the area from which they came, and the manner in which the fire was prepared in the context of the other events that took place on 14 June 1992.<sup>1578</sup>

[...] Although a few persons merged with the villagers from Koritnik between Greben and Višegrad when the group passed through Sase, the victims of the Pionirska street incident were predominantly the elderly, female and children villagers of Koritnik.<sup>1579</sup>

Milan Lukić herded the Koritnik group into the lower room of Adem Omeragić's house in which the floor had been covered with an accelerant. He then closed the door. After a while, he opened the door and threw an incendiary device into the room which started the fire. Milan Lukić attempted to prevent any escape of the victims by shooting at the windows of the room.<sup>1580</sup>

On the basis of the above, the Trial Chamber finds that the killing of 59 persons is killing on a large scale and, Judge Van den Wyngaert dissenting, sufficient to meet the element of mass destruction required for extermination. In this respect, the Trial Chamber has particularly considered the characteristics of the place where the victims came from.<sup>1581</sup>

541. With regard to the Bikavac Incident, the Trial Chamber held:

[...] In relation to the charge of extermination, the Trial Chamber has considered, in particular, the manner in which Meho Aljić's house was prepared and the Muslim victims were herded into the house. The Trial Chamber has also considered the number and type of victims of the fire. The evidence shows that all the exits of the house had been blocked by heavy furniture when the people entered the house, thereby preventing anyone inside the house from escaping. Milan Lukić forced the Muslim persons into Meho Aljić's house. He blocked the last exit to the house, fired at it, threw in grenades and set the house on fire. The Trial Chamber recalls that at least 60 people were killed. The Trial Chamber finds that the killing of at least 60 people is killing on a large scale and, Judge Van den Wyngaert dissenting, meets the element of mass destruction required for extermination.<sup>1582</sup>

The victims were all extremely vulnerable, women, children and elderly persons who had left their homes and had taken refuge in Bikavac in the hope of leaving Višegrad on a convoy.<sup>1583</sup>

542. The Trial Chamber thus considered the number of victims when assessing whether the element of massiveness was met. It also took into consideration the specific circumstances of the case, such as the type of victims and, with regard to the Pionirska Street Incident, the area of origin of the victims.<sup>1584</sup> While these factors may be taken into consideration in the assessment of whether the element of massiveness for extermination is fulfilled, they do not constitute elements of the crime of extermination as a crime against humanity.<sup>1585</sup> Therefore, a trial chamber need not address these factors in its assessment. Milan Lukić's arguments that the Trial Chamber inconsistently considered population density in relation to the Pionirska Street and the Bikavac Incidents therefore fail. Furthermore, as these factors do not constitute elements of the crime of extermination, there is no *mens rea* requirement in relation to them as suggested by Milan Lukić.

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<sup>1578</sup> Trial Judgement, para. 942.

<sup>1579</sup> Trial Judgement, para. 943.

<sup>1580</sup> Trial Judgement, para. 944.

<sup>1581</sup> Trial Judgement, para. 945.

<sup>1582</sup> Trial Judgement, para. 949.

<sup>1583</sup> Trial Judgement, para. 950.

<sup>1584</sup> Trial Judgement, paras 943, 945, 950.

<sup>1585</sup> See *Stakić* Appeal Judgement, para. 259, referring to *Ntakirutimana* Appeal Judgement, para. 516.

543. When referring to population density regarding the Pionirska Street Incident, the Trial Chamber essentially considered the number of individuals killed in a specific area in relation to the overall population of that area.<sup>1586</sup> The Appeals Chamber notes that almost the entire Muslim population of Koritnik perished in the Pionirska Street Incident.<sup>1587</sup> In these circumstances, the Trial Chamber reasonably found that the killing of 59 persons amounted to extermination as a crime against humanity. The limited reduction of the number of victims by the Appeals Chamber does not affect this conclusion.<sup>1588</sup> Furthermore, the Appeals Chamber finds that using a single village as the reference area was not artificially narrow since Milan Lukić's conviction rests on one incident which involved victims who were predominantly from the same village.<sup>1589</sup>

544. The Appeals Chamber further finds that the Trial Chamber did not err in finding that extermination was established in relation to the Bikavac Incident. The Trial Chamber reasonably found that the killing of at least 60 persons was sufficiently large-scale.

545. Moreover, Milan Lukić's argument that the Tribunal and the ICTR have ensured that the element of massiveness is maintained at a high level<sup>1590</sup> is not supported by either the jurisprudence of the Tribunal or that of the ICTR. This argument is therefore dismissed.

546. Finally, Milan Lukić's argument that the element of massiveness is tied to the chapeau elements of crimes against humanity is dismissed as he fails to articulate an error.<sup>1591</sup>

### **C. Conclusion**

547. For the foregoing reasons, the Appeals Chamber is satisfied that the Trial Chamber did not err in law or fact in finding that Milan Lukić committed extermination as a crime against humanity in relation to the Pionirska Street Incident and the Bikavac Incident. Milan Lukić's sub-grounds 3(I) and 4(H) are therefore dismissed.

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<sup>1586</sup> The Trial Chamber considered the characteristics of Koritnik, particularly that it was a "small and less densely populated villag[e]" (Trial Judgement, para. 943). It noted that the Muslim area of Koritnik consisted of about 20 houses and was populated by approximately 60 people (Trial Judgement, para. 335. *See also* Trial Judgement, para. 945).

<sup>1587</sup> *Cf.* Trial Judgement, para. 335.

<sup>1588</sup> *See supra* para. 353. *See however* Separate Opinion of Judge Morrison.

<sup>1589</sup> *See* Trial Judgement, para. 943.

<sup>1590</sup> Milan Lukić Appeal Brief, para. 224.

<sup>1591</sup> Milan Lukić Appeal Brief, para. 225.

## **XII. UZAMNICA CAMP**

### **A. Introduction**

548. The Trial Chamber found that Milan Lukić beat Muslim detainees, including Islam Kustura (“Kustura”), Adem Berberović (“Berberović”), Nurko Dervišević (“Dervišević”), and VG025, at the Uzamnica Camp on several occasions between June 1992 and the beginning of 1993.<sup>1592</sup> In making these findings, it rejected Milan Lukić’s partial alibi, and relied on the evidence of Kustura, Berberović, Dervišević, and VG025.<sup>1593</sup> As to Sredoje Lukić, the Trial Chamber found that he came to the Uzamnica Camp on several occasions in the second half of 1992 and in the later months of 1993, and that he also beat the detainees, including Kustura and Dervišević.<sup>1594</sup> In reaching these findings, the Trial Chamber relied on the evidence of Kustura, Berberović, and Dervišević.<sup>1595</sup>

549. The Trial Chamber convicted Milan Lukić for committing the crimes of cruel treatment as a violation of the laws or customs of war as well as persecutions and other inhumane acts as crimes against humanity.<sup>1596</sup> Sredoje Lukić was convicted of committing the crimes of cruel treatment as a violation of the laws or customs of war as well as other inhumane acts as a crime against humanity,<sup>1597</sup> and of aiding and abetting persecutions as a crime against humanity.<sup>1598</sup>

### **B. Milan Lukić**

550. Milan Lukić argues that the Trial Chamber erred in:<sup>1599</sup> (i) rejecting his alibi;<sup>1600</sup> and (ii) concluding that he was identified at the Uzamnica Camp.<sup>1601</sup>

#### **1. Milan Lukić’s alibi**

551. The Indictment charged Milan Lukić with the beatings of Bosnian Muslim detainees at the Uzamnica Camp between August 1992 and 10 October 1994.<sup>1602</sup> At trial, Milan Lukić presented a partial alibi, claiming to have been in detention in Belgrade for some of the time period charged.<sup>1603</sup>

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<sup>1592</sup> Trial Judgement, paras 833, 977-981, 1024-1025.

<sup>1593</sup> Trial Judgement, paras 822-828, 833.

<sup>1594</sup> Trial Judgement, paras 989-991, 1038-1039, 1099. The Trial Chamber also found that Sredoje Lukić beat Berberović. However, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, finds that Sredoje Lukić was not charged with, nor convicted of, the beating of Berberović (*see* Indictment, para. 15).

<sup>1595</sup> Trial Judgement, paras 834-839, 841.

<sup>1596</sup> Trial Judgement, paras 981, 1025-1026, 1099.

<sup>1597</sup> Trial Judgement, paras 981, 991, 1025-1026, 1104.

<sup>1598</sup> Trial Judgement, paras 1039-1040, 1104.

<sup>1599</sup> Milan Lukić’s sixth ground of appeal.

<sup>1600</sup> Milan Lukić Appeal Brief, paras 319-322.

<sup>1601</sup> Milan Lukić Appeal Brief, paras 303-304.

<sup>1602</sup> Indictment, paras 3-4, 13-15.

<sup>1603</sup> Trial Judgement, para. 819.

In support, he tendered a letter from the Third Municipal Court in Belgrade (“Municipal Court Letter”).<sup>1604</sup>

552. The Trial Chamber found that the Municipal Court Letter showed that Milan Lukić was in detention for a few weeks only, from 10 to 13 March 1993, and from 27 March 1993 to 14 April 1993.<sup>1605</sup> It also found that “Prosecution witnesses testified that they heard that Milan Lukić was detained for a few months in 1994.”<sup>1606</sup> The Trial Chamber dismissed Milan Lukić’s alibi, finding that “[t]he evidence adduced to support the alibi, which in itself remained vague, is scarce”.<sup>1607</sup> It concluded that:

the evidence led in support of Milan Lukić’s imprisonment for some time in spring 1993 and possibly 1994 does 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.<sup>1608</sup>

553. Milan Lukić submits that the Trial Chamber erred in law and fact in reversing the burden of proof for alibi evidence, and by failing to meet the standard of due care.<sup>1609</sup> He argues that a correct reading of the Municipal Court Letter shows that he was imprisoned or detained not only for a few weeks in March and April 1993, as found by the Trial Chamber, but also from 29 June 1993 to 9 October 1993 and from 15 October 1993 to 6 June 1994.<sup>1610</sup> Milan Lukić further argues that the Trial Chamber’s erroneous reading of the Municipal Court Letter had an impact on its assessment of the credibility of Dervišević, Kustura, and Berberović, since they gave evidence that they saw him at the camp at times when he was detained in Belgrade.<sup>1611</sup>

554. The Prosecution responds that the Trial Chamber correctly applied the standard of proof for alibi evidence.<sup>1612</sup> During the appeal hearing, the Prosecution stated that “[t]here’s evidence that [Milan Lukić] was indeed in prison for parts of [1993] after late March”.<sup>1613</sup> It argues, however, that Milan Lukić’s submissions should be summarily dismissed because the periods of his imprisonment do not conflict with the Trial Chamber’s finding that he beat detainees in the camp between June 1992 and the beginning of 1993.<sup>1614</sup> The Prosecution also responds that minor inconsistencies

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<sup>1604</sup> Trial Judgement, para. 829, referring to Exh. 1D238.

<sup>1605</sup> Trial Judgement, paras 820, 829, 831.

<sup>1606</sup> Trial Judgement, para. 829.

<sup>1607</sup> Trial Judgement, para. 829.

<sup>1608</sup> Trial Judgement, para. 831.

<sup>1609</sup> Milan Lukić Appeal Brief, para. 319.

<sup>1610</sup> Milan Lukić Appeal Brief, para. 320; Milan Lukić Reply Brief, para. 118.

<sup>1611</sup> Milan Lukić Appeal Brief, para. 318; Milan Lukić Reply Brief, para. 117.

<sup>1612</sup> Prosecution Response Brief (Milan Lukić), para. 227.

<sup>1613</sup> Appeal Hearing, AT. 167-168 (14 September 2011).

<sup>1614</sup> Prosecution Response Brief (Milan Lukić), para. 228. *See also* Appeal Hearing, AT. 168 (14 September 2011).

in the statements of Dervišević, Kustura, and Berberović as to the dates on which they were beaten do not have an impact on the finding that Milan Lukić beat them in the camp.<sup>1615</sup>

555. The Appeals Chamber notes that the Municipal Court Letter reads as follows:

Further to your letter dated 8 October 2008, please be informed that Milan Lukić, son of Milo, born 6 September 1967 in Foča, has served sentences under the following judgements:

Judgement K.299/92 rendered by the Third Municipal Court in Belgrade; four-month's *[sic]* imprisonment in Belgrade District Prison from 29 June 1993 to 9 October 1993. Under this judgement he was in detention from 27 March 1993 to 14 April 1993. [...]

Judgement K.408/93 rendered by the First Municipal Court in Belgrade: eight-month's *[sic]* imprisonment in Padinska Skela KPD/Penal and Correctional Facility/from 15 October 1993 to 6 April 1994. Under this judgement he was in detention from 10 March 1993 to 13 March April *[sic]* 1993.<sup>1616</sup>

556. The Appeals Chamber observes that the Municipal Court Letter refers to Milan Lukić's "detention" in March and April 1993, which corresponds to the period of time for which the Trial Chamber found he was detained in Belgrade.<sup>1617</sup> However, the letter also refers to Milan Lukić's "imprisonment" from 29 June to 9 October 1993, and from 15 October 1993 to 6 April 1994.<sup>1618</sup> The Appeals Chamber notes that the Municipal Court Letter is unclear as to whether Milan Lukić served the entirety of the sentences imposed on him, or whether he was in custody only for the short periods during which it is specified that he was detained. The Appeals Chamber also notes that, at the Appeal Hearing, the Prosecution expressly acknowledged that Milan Lukić was imprisoned in Belgrade for parts of 1993 after late March.<sup>1619</sup>

557. However, even if it is assumed that the Trial Chamber misread the Municipal Court Letter, and Milan Lukić was in custody for the periods stipulated, the Appeals Chamber considers that this error would have no impact on the verdict. Had the partial alibi been accepted, the time period covered by it would not have overlapped with Milan Lukić's convictions, which relate to beatings committed between June 1992 and early 1993.

558. In relation to the impact of the alibi evidence on the credibility of the witnesses, the Trial Chamber noted that, based on the testimonies of Kustura, Berberović, and Dervišević, "[f]rom 1993 onwards, Milan Lukić was seen less and less, and he was not seen at all for a period of between two and eight months in 1994 because he was in custody in Belgrade."<sup>1620</sup> The Trial Chamber found in

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<sup>1615</sup> Prosecution Response Brief (Milan Lukić), para. 226.

<sup>1616</sup> Municipal Court Letter. The original B/C/S version of the Municipal Court Letter clarifies that it refers to "13 March" instead of "13 April".

<sup>1617</sup> See Trial Judgement, paras 829, 831, referring to the Municipal Court Letter.

<sup>1618</sup> Municipal Court Letter.

<sup>1619</sup> Appeal Hearing, AT. 167-168 (14 September 2011).

<sup>1620</sup> Trial Judgement, para. 768.

particular that the fact that Kustura, Berberović, and Dervišević could not “pinpoint the date and time of the beatings” did not impact upon the reliability of their evidence.<sup>1621</sup>

559. The Appeals Chamber is not convinced by Milan Lukić’s arguments that the credibility of the witnesses is undermined. The Appeals Chamber notes that, although the witnesses testified to having seen Milan Lukić at the camp during the alleged alibi periods, they also specified that he was seen less and less at the camp as he was in detention in Belgrade during some time in 1993 or 1994.<sup>1622</sup> Consequently, Milan Lukić has failed to show that the Trial Chamber erred in dismissing his alibi for the crimes committed at the Uzamnica Camp.

## 2. Identification of Milan Lukić

560. The Trial Chamber found that Milan Lukić beat detainees in Uzamnica Camp, based on the evidence of VG025, Berberović, Kustura, and Dervišević.<sup>1623</sup>

561. Milan Lukić submits that the Trial Chamber erroneously: (i) admitted VG025’s witness statements pursuant to Rule 92 *quater* of the Rules;<sup>1624</sup> (ii) relied upon evidence admitted pursuant to Rule 92 *quater* of the Rules when corroborated only by hearsay evidence;<sup>1625</sup> and (iii) relied upon the identification evidence of VG025, Kustura, Berberović, and Dervišević.<sup>1626</sup>

### (a) Alleged error in admitting VG025’s witness statements pursuant to Rule 92 *quater* of the Rules

562. The Trial Chamber admitted the witness statements of VG025 pursuant to Rule 92 *quater* of the Rules.<sup>1627</sup> The Trial Chamber, while “mindful of the fact that VG025’s evidence was not tested in cross-examination as his statements were admitted pursuant to Rule 92 *quater*” of the Rules, was satisfied that VG025 was able to recognise Milan Lukić on the basis of his prior knowledge.<sup>1628</sup>

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<sup>1621</sup> Trial Judgement, para. 830.

<sup>1622</sup> Trial Judgement, para. 768. Dervišević explained that he did not see Milan Lukić in the camp for an eight month period, but that he did not have a calendar at the camp (see T. 1985, 2005 (19 September 2008); Exh. P111, p. 7). Berberović testified that Milan Lukić visited the Uzamnica Camp every month in 1993, but he also stated that he was unable to record the exact dates and that Milan Lukić would not come to the camp for “a certain period of time” (see T. 2536, 2540 (2 October 2008)). Kustura asserted that he had seen Milan Lukić at the Uzamnica Camp “every other day” from October 1992 until the summer of 1994, but he also explained that Milan Lukić was in custody in Belgrade for several months in 1994 (see T. 2184-2186, 2197-2199 (23 September 2008)).

<sup>1623</sup> Trial Judgement, para. 833.

<sup>1624</sup> Milan Lukić Appeal Brief, paras 306-307.

<sup>1625</sup> Milan Lukić Appeal Brief, para. 308.

<sup>1626</sup> Milan Lukić Appeal Brief, paras 305-318.

<sup>1627</sup> Trial Judgement, para. 815.

<sup>1628</sup> Trial Judgement, para. 824.



563. Milan Lukić submits that the Trial Chamber erred in law when it admitted VG025's witness statements pursuant to Rule 92 *quater* of the Rules, as the relevant evidence went to Milan Lukić's "acts and conduct".<sup>1629</sup>

564. The Prosecution responds that the Trial Chamber correctly ruled that VG025's statements met the indicia of reliability required for Rule 92 *quater* of the Rules and that the Trial Chamber did not abuse its discretion by admitting the statements as they were "cumulative" to the in-court testimonies of Kustura, Berberović, and Dervišević.<sup>1630</sup>

565. Rule 92 *quater* of the Rules allows for the admission of written evidence when the person giving the statement is objectively unable to attend a court hearing - either because the person is deceased or because of a physical or mental impairment - even if the evidence goes directly to the accused's acts and conduct.<sup>1631</sup> However, Rule 92 *quater*(B) of the Rules counsels cautious scrutiny on the part of the trial chamber with respect to evidence that goes to the acts and conduct of the accused as charged in the indictment, as this may be a factor against the admission of such evidence, or of part of it.<sup>1632</sup>

566. Rule 92 *quater*(A)(ii) of the Rules further requires a trial chamber to be satisfied that there are sufficient indicia of reliability to justify the admission of the written evidence.<sup>1633</sup> Moreover, the general requirements for admissibility of evidence as set out in Rule 89 of the Rules must be fulfilled, namely that the proffered evidence must be relevant and have probative value as provided

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<sup>1629</sup> Milan Lukić Appeal Brief, paras 306-307.

<sup>1630</sup> Prosecution Response Brief (Milan Lukić), para. 219.

<sup>1631</sup> *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning Into Evidence, 23 November 2007 ("*Prlić et al.* Appeal Decision on Admission of Transcript of 23 November 2007"), para. 48. See also *Haradinaj et al.* Appeal Judgement, fn. 252; *Haraqija and Morina* Appeal Judgement, para. 61; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning, 14 December 2007, para. 48; *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006 ("*Martić* Appeal Decision on Admission of Materials of 14 September 2006"), para. 22.

<sup>1632</sup> See also *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 21 April 2008 ("*Popović et al.* Decision on Admission of Evidence of 21 April 2008"), para. 32.

<sup>1633</sup> Among the factors that chambers have considered as relevant in the assessment of the reliability of written evidence are: "(a) the circumstances in which the statement was made and recorded, in particular: (i) whether the statement was given under oath; or (ii) whether the statement was signed by the witness with an accompanying acknowledgement that the statement is true to the best of his or her recollection; and whether the statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal; (b) whether the statement has been subject to cross-examination; (c) whether the statement, in particular an unsworn statement that has never been subject to cross-examination, relates to events about which there is other evidence; and (d) other additional factors, such as the absence of manifest or obvious inconsistencies in the statements" (see *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007 ("*Milutinović et al.* Decision on Admission of Evidence of 16 February 2007"), para. 7; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92 *bis* and *quater* of the Rules, 2 November 2006 (confidential), paras 10, 15; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, para. 27).

in Rule 89(C) of the Rules. Finally, the probative value of the evidence must not be substantially outweighed by the need to ensure a fair trial under Rule 89(D) of the Rules and the evidence must therefore not be unduly prejudicial.<sup>1634</sup>

567. The Appeals Chamber considers that the Trial Chamber did not abuse its discretion in admitting VG025's statements. The Trial Chamber reasonably found that the requirements of Rule 92 *quater* of the Rules were fulfilled, having found that VG025 was unable to testify orally due to his health condition, and that the circumstances in which the statements were made rendered the evidence reliable.<sup>1635</sup> The Trial Chamber further found that VG025's statements were "to a large extent, cumulative to the evidence of other witnesses all of whom have testified *viva voce* and have been subjected to cross-examined [*sic*] by the Defence for each accused".<sup>1636</sup> The Trial Chamber also found that "if admitted, any inconsistencies between the Statements may be a factor to be considered by the Trial Chamber in determining the weight to be attached to the Statements in view of the trial record as a whole".<sup>1637</sup> The Appeals Chamber discerns no error in this careful approach and concludes that the Trial Chamber did not err in admitting VG025's statements.

(b) Alleged error in relying on evidence admitted pursuant to Rule 92 *quater* of the Rules corroborated only by hearsay evidence

568. The Trial Chamber found that both Berberović and Dervišević had no prior knowledge of Milan Lukić but were told on separate occasions by Šaban Muratagić that the man who had beaten them was Milan Lukić.<sup>1638</sup> After that, Berberović and Dervišević saw Milan Lukić on numerous occasions within the following two years of their detention and they acquired sufficient knowledge of Milan Lukić to enable them to recognise him.<sup>1639</sup> The Trial Chamber also noted that Kustura does not refer to Šaban Muratagić as a source of his knowledge of Milan Lukić, but testified that "he was told 'by others' who Milan Lukić was."<sup>1640</sup>

569. Milan Lukić argues that the Trial Chamber erred in attributing weight to VG025's Rule 92 *quater* statements as they were corroborated only by the hearsay evidence of Dervišević,

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<sup>1634</sup> See e.g. *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 *quater*, 20 August 2009, para. 6; *Popović et al.* Decision on Admission of Evidence of 21 April 2008, para. 30; *Milutinović et al.* Decision on Admission of Evidence of 16 February 2007, paras 4, 6.

<sup>1635</sup> The Appeals Chamber notes that VG025's statements (Exhs P168, P169, P171) were given to investigators from the Tribunal and signed by VG025, the investigator, and the interpreter.

<sup>1636</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution Motion to Admit Statements Pursuant to Rule 92 *quater* (VG-025), 22 October 2008 (confidential) ("*Lukić and Lukić* Decision on Admission of Evidence of 22 October 2008"), p. 4.

<sup>1637</sup> *Lukić and Lukić* Decision on Admission of Evidence of 22 October 2008, p. 4.

<sup>1638</sup> Trial Judgement, para. 825.

<sup>1639</sup> Trial Judgement, paras 825-827.

<sup>1640</sup> Trial Judgement, para. 825.

Berberović, and Kustura, who had no prior knowledge of him.<sup>1641</sup> The Prosecution responds that the Trial Chamber could rely on hearsay evidence to corroborate a Rule 92 *quater* statement.<sup>1642</sup>

570. The Appeals Chamber recalls that in order for evidence admitted pursuant to Rule 92 *quater* of the Rules to support a conviction, it must be corroborated.<sup>1643</sup> The Appeals Chamber notes that Milan Lukić's characterisation of the evidence of Dervišević and Berberović as hearsay evidence is correct to the extent that, at the very beginning of their detention, Šaban Muratagić, another detainee, identified Milan Lukić to them.<sup>1644</sup> The Trial Chamber found that this identification was reliable, observing that Šaban Muratagić went to school with Milan Lukić and was from a neighbouring village.<sup>1645</sup> The Trial Chamber also discussed Šaban Muratagić's special role in the camp, finding that he "acted as a kind of 'watchman' and that he told the detainees the names of the guards and other men who came to the camp".<sup>1646</sup> It further considered Dervišević's evidence that many other detainees knew Milan Lukić and confirmed who he was.<sup>1647</sup> In addition to the primary identification, which was based on hearsay evidence, the Trial Chamber found that Berberović and Dervišević acquired sufficient knowledge of Milan Lukić in the two years of their detention to be able to recognise him themselves.<sup>1648</sup> Their identification of Milan Lukić therefore ceased to be of an exclusively hearsay nature, and Milan Lukić's submission that VG025's Rule 92 *quater* evidence was only corroborated by hearsay evidence is thus dismissed.

(c) Alleged error in relying on the identification evidence of Kustura, Berberović, Dervišević, and VG025

571. Milan Lukić alleges that the Trial Chamber erred in its assessment of VG025's identification evidence. He submits that: (i) VG025 was unable to recognise him on a photospread; (ii) the Trial Chamber failed to address the inconsistency between VG025's statement of 1998, and his statement given in 2008;<sup>1649</sup> and (iii) the reliability of VG025's identification evidence was undermined by the fact that he was the only witness who saw Milan Lukić driving a red Passat car prior to the death of Behija Zukić, its former owner.<sup>1650</sup>

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<sup>1641</sup> Milan Lukić Appeal Brief, para. 308; Milan Lukić Reply Brief, para. 119.

<sup>1642</sup> Prosecution Response Brief (Milan Lukić), para. 219.

<sup>1643</sup> *Haradinaj et al.* Appeal Judgement, para. 101, fn. 252; *Haraqija and Morina* Appeal Judgement, paras 61-62; *Prlić et al.* Appeal Decision on Admission of Transcript of 23 November 2007, paras 53, 58-59; *Martić* Appeal Decision on Admission of Materials of 14 September 2006, para. 20.

<sup>1644</sup> Trial Judgement, para. 825.

<sup>1645</sup> Trial Judgement, para. 825.

<sup>1646</sup> Trial Judgement, para. 825.

<sup>1647</sup> Trial Judgement, paras 811 (referring to Exh. P112, p. 2), 826.

<sup>1648</sup> Trial Judgement, paras 826-827.

<sup>1649</sup> Milan Lukić Appeal Brief, paras 309-310.

<sup>1650</sup> Milan Lukić Appeal Brief, para. 316.

572. Milan Lukić also argues that the Trial Chamber erred in failing to consider that: (i) the detainees were beaten inside the dark barracks, where there was neither electricity nor light; (ii) Dervišević had problems with his eyesight; and (iii) Berberović's physical description of him could fit anyone.<sup>1651</sup> In addition, he argues that the Trial Chamber erred in placing reliance upon the in-court identifications provided by Berberović and Dervišević.<sup>1652</sup> Finally, Milan Lukić contends that in assessing Kustura's credibility, the Trial Chamber erred by failing to consider VG025's evidence on Sredoje Lukić's presence in the camp.<sup>1653</sup>

573. The Prosecution responds that it was not established that the photospread shown to VG025 included a photograph of Milan Lukić.<sup>1654</sup> It further asserts that the Trial Chamber reasonably found that the discrepancy between VG025's witness statements as to the length of his prior knowledge of Milan Lukić was immaterial.<sup>1655</sup> The Prosecution also argues that any inconsistency in VG025's testimony with respect to the date on which Milan Lukić killed Behija Zukić and stole her red Passat car is of minor significance in light of the finding that VG025 recognised Milan Lukić.<sup>1656</sup> Moreover, the Prosecution responds that the Trial Chamber reasonably found that Berberović and Dervišević had established prior knowledge of Milan Lukić which enabled them to recognise him.<sup>1657</sup> Finally, it submits that Milan Lukić's arguments are based on incorrect premises and that minor inconsistencies in the accounts of Kustura, Berberović, and Dervišević do not impact the findings of the Trial Chamber.<sup>1658</sup>

574. The Appeals Chamber notes that the Trial Chamber fully considered the inconsistency between VG025's 1998 and 2008 statements in relation to his prior knowledge of Milan Lukić.<sup>1659</sup> The Trial Chamber was also mindful that it was not established that an identification photospread shown to VG025 had actually contained a photo of Milan Lukić.<sup>1660</sup> The Appeals Chamber recalls that it is within a trial chamber's discretion to discount minor inconsistencies in witness testimony.<sup>1661</sup> Further, Milan Lukić has failed to show how the fact that only VG025 saw him driving a red Passat at a particular time would have undermined VG025's recognition of Milan Lukić. The Appeals Chamber finds that Milan Lukić has failed to show that the Trial Chamber erred in relying on VG025's identification evidence.

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<sup>1651</sup> Milan Lukić Appeal Brief, paras 313-318, referring to Trial Judgement, paras 761, 769, 804, Exh. P142, p. 9.

<sup>1652</sup> Milan Lukić Appeal Brief, paras 303-304.

<sup>1653</sup> Milan Lukić Appeal Brief, para. 315, referring to Exh. P171, p. 3. Milan Lukić further argues that Kustura learned the identity of Milan Lukić from an unidentified person in the camp (Milan Lukić Appeal Brief, para. 315).

<sup>1654</sup> Prosecution Response Brief (Milan Lukić), para. 220.

<sup>1655</sup> Prosecution Response Brief (Milan Lukić), para. 220.

<sup>1656</sup> Prosecution Response Brief (Milan Lukić), para. 225.

<sup>1657</sup> Prosecution Response Brief (Milan Lukić), paras 221, 224.

<sup>1658</sup> Prosecution Response Brief (Milan Lukić), paras 222, 225-226; Appeal Hearing, AT. 168 (14 September 2011).

<sup>1659</sup> Trial Judgement, para. 816, referring to Exhs P168 (confidential), p. 3, P171 (confidential), paras 1-2.

<sup>1660</sup> Trial Judgement, para. 824.

<sup>1661</sup> *See supra* para. 135.

575. With respect to Milan Lukić's submission that it was dark in the barracks when the beatings took place, the Trial Chamber found that the detainees were beaten "inside the warehouse in clear view of the others".<sup>1662</sup> The Trial Chamber also considered Berberović's evidence that the door was left open during the beatings he described, and that there was visibility in the hangar.<sup>1663</sup> As to the argument that Dervišević's identification was undermined by problems with his eyesight, the Appeals Chamber notes that the Trial Chamber considered that: (i) Dervišević was told by Šaban Muratagić who Milan Lukić was;<sup>1664</sup> (ii) many other detainees who knew Milan Lukić subsequently also told Dervišević who he was;<sup>1665</sup> and (iii) Dervišević described Milan Lukić as being "not yet thirty at that time [...] with brown to black hair, [...] about 180 centimetres, medium built".<sup>1666</sup> In these circumstances, Milan Lukić has failed to show that Dervišević's eyesight problems render unreasonable the Trial Chamber's finding that he identified Milan Lukić. In light of these findings, the Appeals Chamber finds that Milan Lukić has not demonstrated an error in the Trial Chamber's reliance on Dervišević's identification evidence.

576. The Trial Chamber held that Berberović's physical description of the perpetrator fit Milan Lukić's physical appearance.<sup>1667</sup> The Appeals Chamber finds that Milan Lukić has not shown that the description is flawed, or that the Trial Chamber erred in accepting it.

577. The Appeals Chamber notes that Kustura's ability to identify Milan Lukić was based upon hearsay evidence.<sup>1668</sup> The Appeals Chamber recalls that a Trial Chamber has "wide discretion as to the assessment of the weight and probative value of the hearsay evidence alongside with other factors relevant to the evaluation of the totality of the evidence."<sup>1669</sup> However, caution is warranted in the consideration of hearsay evidence, particularly where such evidence constitutes the primary basis for the identification of an accused. Relevant criteria in assessing the weight or the probative value to be accorded to hearsay evidence are the source of the information,<sup>1670</sup> the precise character of the information,<sup>1671</sup> and corroborative evidence.<sup>1672</sup>

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<sup>1662</sup> Trial Judgement, para. 769.

<sup>1663</sup> Trial Judgement, paras 769, 773, referring to Berberović, T. 2509-2510 (2 October 2008).

<sup>1664</sup> Trial Judgement, para. 811.

<sup>1665</sup> Trial Judgement, paras 811, 825.

<sup>1666</sup> Trial Judgement, para. 811.

<sup>1667</sup> Trial Judgement, para. 826.

<sup>1668</sup> Trial Judgement, para. 807, referring to Kustura, T. 2181 (23 September 2008).

<sup>1669</sup> *Milošević* Appeal Judgement, fn. 731. See also *Nahimana et al.* Appeal Judgement, para. 831; *Karera* Appeal Judgement, para. 39; *Naletilić and Martinović* Appeal Judgement, para. 217.

<sup>1670</sup> *Karera* Appeal Judgement, para. 39; *Nahimana et al.* Appeal Judgement, para. 831; *Ndindabahizi* Appeal Judgement, para. 115; *Semanza* Appeal Judgement, para. 159; *Rutaganda* Appeal Judgement, paras 154, 156, 159.

<sup>1671</sup> *Karera* Appeal Judgement, para. 39; *Ndindabahizi* Appeal Judgement, para. 115.

<sup>1672</sup> *Karera* Appeal Judgement, para. 39; *Nahimana et al.* Appeal Judgement, para. 473; *Gacumbitsi* Appeal Judgement, para. 115.

578. In the present case, the Trial Chamber explicitly noted the source of Kustura's hearsay evidence, taking into consideration his testimony that "[o]ther detainees identified Milan Lukić to him".<sup>1673</sup> The Trial Chamber relied on this testimony to identify Milan Lukić only to the extent that it was corroborated by other evidence.<sup>1674</sup> The Appeals Chamber therefore considers that the Trial Chamber exercised caution in weighing Kustura's identification evidence. In these circumstances, the Appeals Chamber is satisfied that Milan Lukić has not shown that the Trial Chamber erred.

579. Finally, the Appeals Chamber notes that the Trial Chamber accepted the in-court identification of Milan Lukić by Berberović and Dervišević as "reliable evidence".<sup>1675</sup> The Appeals Chamber recalls that it is within a trial chamber's discretion to determine whether to attach weight to an in-court identification, but that it must exercise caution in doing so.<sup>1676</sup> In any event, in-court identification cannot be the sole basis for the identification of an accused. In the present case, the Trial Chamber based its finding that Milan Lukić was identified in the Uzamnica Camp not only on the in-court identifications provided by Berberović and Dervišević, but also on the fact that both witnesses were told who Milan Lukić was by Šaban Muratagić, who knew Milan Lukić before the war.<sup>1677</sup> The Trial Chamber further found that, during the two years of their detention, Berberović and Dervišević acquired sufficient knowledge of Milan Lukić to recognise him themselves and even learned to recognise him by his voice.<sup>1678</sup> In light of these findings, the Appeals Chamber is satisfied that the Trial Chamber did not err in attaching some probative weight to Milan Lukić's in-court identification by Berberović and Dervišević.

580. The Appeals Chamber thus finds that Milan Lukić has failed to show that the Trial Chamber erred in giving weight to VG025's statements as corroborated by Kustura, Berberović, and Dervišević. In these circumstances, Milan Lukić's submissions are dismissed.

### 3. Conclusion

581. For the foregoing reasons, the Trial Chamber's finding that Milan Lukić was identified stands. The Appeals Chamber dismisses Milan Lukić's sixth ground of appeal.

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<sup>1673</sup> Trial Judgement, para. 807, referring to Kustura, T. 2181 (23 September 2008).

<sup>1674</sup> Trial Judgement, para. 834.

<sup>1675</sup> Trial Judgement, para. 828.

<sup>1676</sup> See *supra* para. 120.

<sup>1677</sup> Trial Judgement, paras 825-826. The Trial Chamber found that Šaban Muratagić and Milan Lukić were from neighbouring villages and went to school together.

<sup>1678</sup> Trial Judgement, paras 827, 833.

### C. Sredoje Lukić

582. The Trial Chamber found that Sredoje Lukić beat Bosnian Muslim detainees, including Kustura, Berberović, and Dervišević, at the Uzamnica Camp on several occasions in the second half of 1992 and in the later months of 1993.<sup>1679</sup> The Appeals Chamber, Judge Pocar and Judge Liu dissenting, finds that Sredoje Lukić was not charged with, or convicted of, beating Berberović; however, Berberović's evidence served as a basis in support of Sredoje Lukić's convictions for having beaten the Bosnian Muslim detainees at Uzamnica.<sup>1680</sup>

583. Sredoje Lukić argues that the Trial Chamber erred in finding that: (i) Kustura, Berberović, and Dervišević identified him in the Uzamnica Camp;<sup>1681</sup> (ii) he beat detainees in the Uzamnica Camp;<sup>1682</sup> and (iii) he was responsible for the crimes of cruel treatment as a violation of the laws or customs of war, as well as persecutions and other inhumane acts as crimes against humanity.<sup>1683</sup> The Prosecution alleges that the Trial Chamber erred in finding that Sredoje Lukić aided and abetted, as opposed to committed, the crime of persecutions as a crime against humanity at the Uzamnica Camp.<sup>1684</sup>

#### 1. Identification of Sredoje Lukić

584. The Trial Chamber found that Sredoje Lukić went to the Uzamnica Camp on several occasions in the second half of 1992 and the later months of 1993 and beat the detainees, including Kustura, Berberović, and Dervišević.<sup>1685</sup>

##### (a) Kustura

585. In reaching its conclusion that Sredoje Lukić went to the camp several times, the Trial Chamber relied on the evidence of Kustura who testified that, in October 1992, he and other detainees were beaten by Sredoje Lukić with wooden stakes.<sup>1686</sup> The Trial Chamber also considered that Sredoje Lukić beat Kustura for a second time on another occasion.<sup>1687</sup> The Trial Chamber further relied upon Kustura's evidence when finding that Sredoje Lukić was the perpetrator of

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<sup>1679</sup> Trial Judgement, para. 841.

<sup>1680</sup> See *supra* fn. 1594.

<sup>1681</sup> Sredoje Lukić's eighth ground of appeal (in part). Sredoje Lukić Appeal Brief, paras 239-242, 244-248, 250-253, 256, 260-265; Sredoje Lukić Reply Brief, paras 86-90.

<sup>1682</sup> Sredoje Lukić's eighth ground of appeal (in part). Sredoje Lukić Appeal Brief, paras 243, 248-249, 256-259, 266.

<sup>1683</sup> Sredoje Lukić's ninth and tenth grounds of appeal, as well as his eleventh and twelfth grounds of appeal (in part). Sredoje Lukić further argues under his thirteenth ground of appeal that the Trial Chamber misapplied the principle of *in dubio pro reo* with respect to the Uzamnica Camp. Sredoje Lukić Appeal Brief, paras 267-295, 297-301; Sredoje Lukić Reply Brief, paras 91-99, 104-112.

<sup>1684</sup> Prosecution's second ground of appeal. Prosecution Appeal Brief, paras 9-12.

<sup>1685</sup> Trial Judgement, paras 834-839, 841.

<sup>1686</sup> Trial Judgement, para. 835.

<sup>1687</sup> Trial Judgement, para. 782.

beatings of Dervišević, as well as the perpetrator of the beatings of other unnamed detainees.<sup>1688</sup> The Trial Chamber was satisfied that Kustura recognised Sredoje Lukić in the camp as he had known him as a police officer before the war, despite several inconsistencies in his evidence.<sup>1689</sup>

586. Sredoje Lukić argues that the Trial Chamber erred in relying on Kustura's identification evidence, considering the discrepancies the Trial Chamber itself identified, and argues that no explanation was offered as to "how and why the Trial Chamber overcame the identified discrepancies."<sup>1690</sup> In particular, he contends that Kustura's credibility and reliability were impacted by: (i) his "overstatement" that Sredoje Lukić was "always" with Milan Lukić;<sup>1691</sup> (ii) the unsatisfactory explanation Kustura offered for his failure to mention Sredoje Lukić as one of the perpetrators in his prior statement of 1994;<sup>1692</sup> and (iii) the incorrect description he provided of the physical characteristics of the perpetrator alleged to be Sredoje Lukić.<sup>1693</sup> Sredoje Lukić also argues that VG025's evidence that he never saw him in the camp contradicts the Trial Chamber's finding that he was there on multiple occasions.<sup>1694</sup>

587. The Prosecution responds that Sredoje Lukić simply repeats his trial submissions with regard to Kustura.<sup>1695</sup> It contends that Kustura's failure to mention Sredoje Lukić in his witness statement was addressed by the Trial Chamber and can be explained on the basis that the statement was brief and covered multiple topics over a number of years.<sup>1696</sup> It further argues that the Trial Chamber specifically addressed the discrepancies in Kustura's evidence relating to the physical description he provided of Sredoje Lukić.<sup>1697</sup> The Prosecution further responds that the Trial Chamber expressly took VG025's evidence into account and considered that it was not inconsistent with the witnesses who identified Sredoje Lukić.<sup>1698</sup>

588. In considering Kustura's evidence, the Trial Chamber identified several significant inconsistencies. It considered "as an overstatement Islam Kustura's testimony that Sredoje Lukić was 'always' with Milan Lukić since other evidence does not establish that Sredoje Lukić came to the camp as often as Milan Lukić".<sup>1699</sup> The Trial Chamber also considered the fact that Kustura had not mentioned Sredoje Lukić in a previous statement, and found his explanation that "whenever he

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<sup>1688</sup> Trial Judgement, paras 782, 789, 836.

<sup>1689</sup> Trial Judgement, para. 837.

<sup>1690</sup> Sredoje Lukić Appeal Brief, para. 256.

<sup>1691</sup> Sredoje Lukić Appeal Brief, para. 275.

<sup>1692</sup> Sredoje Lukić Appeal Brief, paras 243-244, referring to Trial Judgement, para. 834.

<sup>1693</sup> Sredoje Lukić Appeal Brief, paras 245-247, 260-261.

<sup>1694</sup> Sredoje Lukić Appeal Brief, paras 263-264.

<sup>1695</sup> Prosecution Response Brief (Sredoje Lukić), para. 148.

<sup>1696</sup> Prosecution Response Brief (Sredoje Lukić), para. 148.

<sup>1697</sup> Sredoje Lukić Appeal Brief, para. 153.

<sup>1698</sup> Prosecution Response Brief (Sredoje Lukić), para. 154, referring to Trial Judgement, para. 834.

<sup>1699</sup> Trial Judgement, para. 834.



mentioned Milan Lukić he ‘thought the other was implied’” to be “unsatisfactory”.<sup>1700</sup> Overall, the Trial Chamber considered that Kustura’s evidence could be relied upon to show that “Sredoje Lukić was seen at the camp a few times.”<sup>1701</sup>

589. The Appeals Chamber also notes that the Trial Chamber considered Kustura’s description of Sredoje Lukić, as well as the fact that his prior knowledge of Sredoje Lukić was based on his public function as a police officer.<sup>1702</sup> The Trial Chamber found that Kustura’s assessment of the difference in height between Sredoje Lukić and Milan Lukić did not “detract from the credible evidence that Islam Kustura had prior knowledge of Sredoje Lukić”.<sup>1703</sup> In this context, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, is not satisfied that the Trial Chamber exercised appropriate caution when basing Sredoje Lukić’s conviction on Kustura’s evidence despite Kustura’s overstatement in relation to Sredoje Lukić’s presence in the Uzamnica Camp and the other inconsistencies in his evidence noted above. Therefore, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, finds that no reasonable trier of fact could have found that Kustura’s identification evidence could be the sole basis for a conviction. Further, the Appeals Chamber dismisses Sredoje Lukić’s arguments with regard to VG025. Kustura’s testimony that he was beaten twice shortly after his arrival in the Uzamnica Camp in October 1992 is not inconsistent with VG025’s evidence that he never saw Sredoje Lukić, since VG025 only arrived in the Uzamnica Camp in November 1992.

590. In these circumstances, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, considers that no reasonable trier of fact could have relied upon Kustura’s identification evidence, absent corroboration. The Appeals Chamber, Judge Pocar and Judge Liu dissenting, will consider the impact of this conclusion upon the Trial Chamber’s findings as to Sredoje Lukić’s acts and conduct further below.

(b) Berberović

591. The Trial Chamber found that Berberović was told by Šaban Muratagić who Sredoje Lukić was, and found that Berberović subsequently learnt to recognise the voices of Sredoje Lukić and Milan Lukić over the course of his imprisonment.<sup>1704</sup> The Trial Chamber relied upon Berberović’s

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<sup>1700</sup> Trial Judgement, paras 808, 834, referring to Kustura, T. 2275 (24 September 2008).

<sup>1701</sup> Trial Judgement, para. 834.

<sup>1702</sup> Trial Judgement, para. 808. Kustura described Sredoje Lukić as being 20 centimetres shorter than Milan Lukić and having blondish hair (*see* Kustura, T. 2271 (24 September 2008); Exh. 2D52 (confidential)).

<sup>1703</sup> Trial Judgement, para. 837.

<sup>1704</sup> Trial Judgement, para. 802. The Appeals Chamber notes that in this finding, the Trial Chamber considered that Berberović was told Sredoje Lukić’s identity by Dervišević. Elsewhere, however, the Trial Chamber makes clear that both Dervišević and Berberović were told Sredoje Lukić’s identity by Šaban Muratagić (Trial Judgement, paras 811, 838).

identification evidence to find that Sredoje Lukić had beaten Dervišević and “other detainees” at the Uzamnica Camp.<sup>1705</sup>

592. Sredoje Lukić argues that Berberović had no prior knowledge of Sredoje Lukić and provided an “entirely incorrect” assessment of the height difference between Sredoje Lukić and Milan Lukić.<sup>1706</sup> Sredoje Lukić also submits that the Trial Chamber erred in not considering further the testimony of Ib Jul Hansen, who testified that a photograph of Sredoje Lukić was not included in a photospread in which Berberović purported to identify him.<sup>1707</sup> In addition, Sredoje Lukić asserts that VG025’s evidence undermines the reliability of Berberović’s evidence.<sup>1708</sup>

593. The Prosecution responds that Berberović gave evidence that he was unsure about the height difference between Milan Lukić and Sredoje Lukić.<sup>1709</sup> Further, the Prosecution submits that as the relevant photospread was not in evidence before the Trial Chamber, it was reasonable for the Trial Chamber not to consider it when assessing Berberović’s evidence.<sup>1710</sup> The Prosecution further argues that the Trial Chamber considered VG025’s evidence that he never saw Sredoje Lukić in the camp and reasonably found that it did not contradict the identification evidence of the other witnesses.<sup>1711</sup>

594. The Appeals Chamber notes that, in relying on Berberović’s identification evidence, the Trial Chamber was satisfied that, while Berberović did not have prior knowledge of Sredoje Lukić, he was able to reliably identify Sredoje Lukić as a perpetrator of the beatings on the basis that he was told by Šaban Muratagić who Sredoje Lukić was.<sup>1712</sup> The Trial Chamber also concluded that Berberović had subsequently learnt to recognise Sredoje Lukić’s voice for himself.<sup>1713</sup>

595. The Appeals Chamber observes that Berberović’s knowledge of Sredoje Lukić derives from Šaban Muratagić, who had solid prior knowledge of him.<sup>1714</sup> Sredoje Lukić has not shown that the Trial Chamber erred in relying on this part of Berberović’s evidence.

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<sup>1705</sup> Trial Judgement, paras 773, 776, 789. The Trial Chamber also made findings as to the beatings of Berberović himself by Sredoje Lukić. However, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, finds that Sredoje Lukić was not charged with, and thus not convicted for, such beatings (*see supra* fn. 1594).

<sup>1706</sup> Sredoje Lukić Appeal Brief, paras 250-251, 261-262.

<sup>1707</sup> Sredoje Lukić Appeal Brief, para. 252, referring to Ib Jul Hansen, T. 3120 (30 October 2008), Exh. 2D20, p. 3. *See also* Appeal Hearing, AT. 170 (14 September 2011).

<sup>1708</sup> Sredoje Lukić Appeal Brief, paras 263-264.

<sup>1709</sup> Prosecution Response Brief (Sredoje Lukić), para. 149, referring to Berberović, T. 2551-2552 (2 October 2008).

<sup>1710</sup> Prosecution Response Brief (Sredoje Lukić), para. 149.

<sup>1711</sup> Prosecution Response Brief (Sredoje Lukić), para. 154.

<sup>1712</sup> Trial Judgement, para. 838.

<sup>1713</sup> Trial Judgement, para. 802. After having testified about beatings by Milan Lukić and Sredoje Lukić, Berberović was asked: “Q: And after that day when you were told who they were, were you able to recognise them on your own? A: I was. Q: Did you come to recognise their voices? A: Yes.” (Berberović, T. 2510 (2 October 2008)).

<sup>1714</sup> Trial Judgement, paras 802, 812.

596. The Appeals Chamber notes that Berberović testified that Sredoje Lukić was: (i) “quite chubby of middle height” with light brown hair; (ii) a cousin of Milan Lukić; and (iii) “15 to 20 centimetres” shorter than Milan Lukić.<sup>1715</sup> The Trial Chamber was satisfied that this description “did not exclude” Sredoje Lukić.<sup>1716</sup> Although Sredoje Lukić and Milan Lukić are of approximately equal height,<sup>1717</sup> the Appeals Chamber considers that it was not unreasonable to consider Berberović’s description as “not excluding” Sredoje Lukić, in light of the Trial Chamber’s finding that Šaban Muratagić told Berberović who Sredoje Lukić was.

597. Berberović indicated to Prosecution investigator Ib Jul Hansen that he recognised Sredoje Lukić in a photospread.<sup>1718</sup> The photospread used with Berberović was in the possession of the Prosecution and subsequently went missing.<sup>1719</sup> In consideration of this issue, the Trial Chamber held that:

most probably the photospread did not contain any photos of Sredoje Lukić. The Trial Chamber notes with concern that the photospread used with Adem Berberović, an important piece of evidence, is missing. In the absence of the photospread the Trial Chamber is not in a position to assess whether Adem Berberović recognised Sredoje Lukić in the photospread or not.<sup>1720</sup>

598. The Appeals Chamber emphasises its concern at the failure of the Prosecution to locate and produce the photospread. The Appeals Chamber also notes that Prosecution investigator Ib Jul Hansen testified that photos of Sredoje Lukić were never used in a photo identification procedure.<sup>1721</sup> The Trial Chamber considered this part of Ib Jul Hansen’s evidence<sup>1722</sup> but refrained from factoring it into its assessment of Berberović’s identification evidence. Instead, it found that it was unable to opine further on the issue in light of the absent photospread.<sup>1723</sup> The Trial Chamber correctly concluded that it was not in a position to assess the photospread itself.<sup>1724</sup> However, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, finds that the Trial Chamber acted unreasonably when it failed to give weight to Ib Jul Hansen’s exculpatory evidence that Berberović misidentified Sredoje Lukić in the photospread, finding that in the absence of the photospread it was “not in a position to assess whether Berberović recognised Sredoje Lukić in the photospread, or

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<sup>1715</sup> Trial Judgement, para. 803, referring to Exh. P142, p. 9, Berberović, T. 2551-2552 (2 October 2008).

<sup>1716</sup> Trial Judgement, para. 838.

<sup>1717</sup> Exhs 2D64 and 2D52 (confidential) show that Sredoje Lukić and Milan Lukić are of approximately equal height.

<sup>1718</sup> Trial Judgement, para. 805.

<sup>1719</sup> Ib Jul Hansen, T. 3089, 3121, 3137-3138 (private session) (30 October 2008).

<sup>1720</sup> Trial Judgement, para. 838 (footnotes omitted).

<sup>1721</sup> Ib Jul Hansen, T. 3084-3085, 3118-3120 (private session) (30 October 2008). He testified that: “We decided not to show any photo of Sredoje Lukic [*sic*] because of the quality of the [...] original tape. [...] At the same time, this poor quality photo was used on the SFOR posters that were put up all over Bosnia after the indictment was [...] unsealed. [...] Because SFOR poster [*sic*] was known by each and everybody [...] in the former Yugoslavia, [...] in order to avoid any problems by identification, we decided not to show the photo from the poster in the photo array” (Ib Jul Hansen, T. 3085 (30 October 2008)).

<sup>1722</sup> Trial Judgement, para. 805.

<sup>1723</sup> Trial Judgement, para. 838..

<sup>1724</sup> Trial Judgement, para. 838.

not”.<sup>1725</sup> However, the Appeals Chamber does not consider that this misidentification, in and of itself, detracts from the reliability of Berberović’s identification of Sredoje Lukić. Thus, the Appeals Chamber considers that Sredoje Lukić has failed to demonstrate that the Trial Chamber erred in relying on Berberović’s identification of Sredoje Lukić.

599. Further, as the detainees were not at all times detained together in the camp,<sup>1726</sup> the Appeals Chamber considers that VG025’s evidence that he had never seen Sredoje Lukić in the camp does not show that the Trial Chamber erred in its assessment of Berberović’s evidence.

(c) Dervišević

600. The Trial Chamber relied upon Dervišević’s evidence that Sredoje Lukić had beaten him in the camp.<sup>1727</sup> The Trial Chamber was satisfied that Dervišević was able to recognise him, based on his prior knowledge of Sredoje Lukić.<sup>1728</sup>

601. Sredoje Lukić argues that the Trial Chamber erred in relying upon Dervišević’s identification evidence.<sup>1729</sup> In particular, he contends that: (i) Dervišević provided an incorrect description of his physical characteristics;<sup>1730</sup> (ii) Dervišević failed to mention him in direct examination<sup>1731</sup> and in three written statements given shortly after Dervišević’s release;<sup>1732</sup> (iii) the Trial Chamber erred in placing probative weight upon Dervišević’s in-court identification;<sup>1733</sup> and (iv) VG025’s evidence that he never saw him in the Uzamnica Camp undermines Dervišević’s reliability.<sup>1734</sup>

602. The Prosecution responds that minor discrepancies in Dervišević’s evidence as to the colour of Sredoje Lukić’s hair do not render his evidence unreliable.<sup>1735</sup> In addition, it submits that Dervišević clearly identified Sredoje Lukić, both in examination-in-chief and in prior written statements, as one of the men who beat him.<sup>1736</sup> In addition, the Prosecution argues that the Trial Chamber did not err in the consideration of in-court identifications.<sup>1737</sup> The Prosecution further contends that the Trial Chamber considered VG025’s evidence that he never saw Sredoje Lukić in

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<sup>1725</sup> Trial Judgement, para. 838.

<sup>1726</sup> See Trial Judgement, para. 765.

<sup>1727</sup> Trial Judgement, paras 788-789, 837.

<sup>1728</sup> Trial Judgement, para. 837.

<sup>1729</sup> Sredoje Lukić Appeal Brief, paras 238-242, 260.

<sup>1730</sup> Sredoje Lukić Appeal Brief, paras 238-242, 260.

<sup>1731</sup> Sredoje Lukić Appeal Brief, paras 240-241, referring to Dervišević, T. 1962 (19 September 2008).

<sup>1732</sup> Sredoje Lukić Appeal Brief, para. 239; Sredoje Lukić Reply Brief, para. 86.

<sup>1733</sup> Sredoje Lukić’s fourteenth ground of appeal (in part). Sredoje Lukić Appeal Brief, paras 304-305.

<sup>1734</sup> Sredoje Lukić Appeal Brief, paras 263-264.

<sup>1735</sup> Prosecution Response Brief (Sredoje Lukić), para. 153.

<sup>1736</sup> Prosecution Response Brief (Sredoje Lukić), para. 145.

<sup>1737</sup> Prosecution Response Brief (Sredoje Lukić), para. 191.

the camp and reasonably found that it did not contradict the identification evidence of the other witnesses.<sup>1738</sup>

603. With respect to the arguments relating to Dervišević's physical identification evidence, the Appeals Chamber notes that, in his statement from 1998, Dervišević identified Sredoje Lukić as having *blond hair*.<sup>1739</sup> At trial, Dervišević testified that Sredoje Lukić had *brown hair* and identified him in court.<sup>1740</sup> The Trial Chamber was satisfied that, despite the discrepancy relating to hair colour, Dervišević was able to recognize Sredoje Lukić at the Uzamnica Camp.<sup>1741</sup> The Appeals Chamber finds that Sredoje Lukić has failed to demonstrate that the Trial Chamber erred in discounting the minor discrepancy relating to hair colour, in light of the other evidence provided by Dervišević establishing his prior knowledge of Sredoje Lukić.

604. The Trial Chamber found that Dervišević knew Sredoje Lukić prior to the war and was able to recognise him in the camp.<sup>1742</sup> The Trial Chamber was satisfied with Dervišević's explanation in his *viva voce* testimony that he saw Sredoje Lukić only once at the camp, while addressing Dervišević's failure to mention Sredoje Lukić in some previous statements.<sup>1743</sup> The Appeals Chamber finds that Sredoje Lukić has not shown an error in this reasoning.

605. The Appeals Chamber notes that the Trial Chamber placed some probative weight on Dervišević's in-court identification.<sup>1744</sup> The Appeals Chamber recalls that although in-court identifications are permissible, a trial chamber should exercise caution in according weight to them.<sup>1745</sup> In the present instance, however, the Trial Chamber's reliance upon Dervišević's identification evidence is based primarily on Dervišević's solid prior knowledge of Sredoje Lukić.<sup>1746</sup> In these circumstances, the Appeals Chamber is satisfied that the Trial Chamber did not err when it accorded some probative value to Dervišević's in-court identification. Thus, Sredoje Lukić's fourteenth ground of appeal is dismissed with respect to the Uzamnica Camp.

## 2. Whether Sredoje Lukić beat detainees in the Uzamnica Camp

606. The Trial Chamber found that Sredoje Lukić came to the Uzamnica Camp on several occasions in the second half of 1992 and in the later months of 1993 and that he also beat Bosnian

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<sup>1738</sup> Prosecution Response Brief (Sredoje Lukić), para. 154.

<sup>1739</sup> Exh. P111, p. 5. *See also* Trial Judgement, para. 837.

<sup>1740</sup> Dervišević, T. 1969-1970, 1998-1999 (19 September 2008). *See also* Trial Judgement, paras 812, 814, 837.

<sup>1741</sup> Trial Judgement, para. 837.

<sup>1742</sup> Trial Judgement, paras 812, 837.

<sup>1743</sup> Trial Judgement, para. 813. *See also* Exhs 2D15; 2D16; 2D17.

<sup>1744</sup> Trial Judgement, para. 837.

<sup>1745</sup> *See supra* para. 120.

<sup>1746</sup> Trial Judgement, paras 812, 837.

Muslim detainees, including Kustura, Berberović, and Dervišević.<sup>1747</sup> However, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, finds that Sredoje Lukić was not charged with, nor convicted of, beating Berberović. The Trial Chamber convicted Sredoje Lukić for beating Muslim detainees in the Uzamnica Camp, including Kustura and Dervišević.<sup>1748</sup> In particular, the Trial Chamber found that Sredoje Lukić beat: (i) Kustura on two occasions shortly after his arrival in the Uzamnica Camp in October 1993, relying on Kustura's evidence;<sup>1749</sup> (ii) Dervišević on several occasions in the Uzamnica Camp, based on the evidence of Kustura, Berberović, and Dervišević;<sup>1750</sup> and (iii) other unnamed detainees on several occasions, having considered the evidence of Dervišević, Kustura, and Berberović.<sup>1751</sup>

(a) Beatings of Kustura

607. On the basis of Kustura's evidence alone, the Trial Chamber found that Sredoje Lukić, together with Milan Lukić, beat Kustura on two occasions.<sup>1752</sup> Specifically, the Trial Chamber held that:

Kustura saw Milan Lukić and Sredoje Lukić for the first time two or three days after his arrival in the Uzamnica camp, on which day they beat him and other detainees [...] First, [Sredoje Lukić] kicked Islam Kustura and then he beat him with a rifle and with wooden stakes. After the first beating, Islam Kustura was not able to move. Milan Lukić and Sredoje Lukić beat Islam Kustura for a second time on another occasion, after which Islam Kustura was unable to stand for about three weeks.<sup>1753</sup>

608. Sredoje Lukić submits that the Trial Chamber erroneously relied upon Kustura's evidence that he was beaten.<sup>1754</sup> He argues that Kustura's testimony lacked specific details as to the beating he allegedly received from him.<sup>1755</sup> The Prosecution contends that Kustura provided full details of the beatings he received from Sredoje Lukić, including the fact that he was kicked and beaten with a rifle and wooden stakes.<sup>1756</sup>

609. The Appeals Chamber, Judge Pocar and Judge Liu dissenting, recalls that no reasonable trier of fact could have relied on Kustura's identification of Sredoje Lukić without corroboration.<sup>1757</sup> Kustura's evidence as to his beating by Sredoje Lukić was uncorroborated. The Trial Chamber considered that Kustura was unable to provide specific details as to Sredoje Lukić's role in these

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<sup>1747</sup> Trial Judgement, para. 841.

<sup>1748</sup> Trial Judgement, paras 990-991, 1040.

<sup>1749</sup> Trial Judgement, paras 781-782.

<sup>1750</sup> Trial Judgement, paras 836, 841.

<sup>1751</sup> Trial Judgement, paras 782, 836, 841.

<sup>1752</sup> Trial Judgement, paras 782, 835, 841.

<sup>1753</sup> Trial Judgement, para. 782 (footnotes omitted).

<sup>1754</sup> Sredoje Lukić Appeal Brief, paras 243-248.

<sup>1755</sup> Sredoje Lukić Appeal Brief, para. 274.

<sup>1756</sup> Prosecution Response Brief (Sredoje Lukić), para. 165.

<sup>1757</sup> *See supra* para. 590.

beatings.<sup>1758</sup> Further, his explanation that ““whenever he mentioned Milan Lukić’ he ‘thought the other was implied’” was deemed to be unsatisfactory by the Trial Chamber.<sup>1759</sup> The Appeals Chamber, Judge Pocar and Judge Liu dissenting, considers that the Trial Chamber should have explained its reasons for accepting that Kustura’s evidence regarding Sredoje Lukić’s presence and acts was reliable to support a conviction by itself, when it found his explanation to be “unsatisfactory”.<sup>1760</sup> In this respect the Appeals Chamber, Judge Pocar and Judge Liu dissenting, finds that the Trial Chamber erred in convicting Sredoje Lukić for beating Kustura based on Kustura’s evidence only.

(b) Beatings of Dervišević

610. The Trial Chamber found that Sredoje Lukić beat Dervišević on several occasions at the Uzamnica Camp,<sup>1761</sup> relying on Dervišević’s prior witness statements, and on Kustura and Berberović’s evidence at trial.<sup>1762</sup> It reasoned as follows:

Nurko Dervišević testified that he was beaten by Sredoje Lukić only once and that he may not have mentioned Sredoje Lukić in statements given to Bosnian authorities because he was there only once. However, there is evidence given by Adem Berberović and Islam Kustura that Sredoje Lukić beat Nurko Dervišević on more than one occasion. Adem Berberović testified that Nurko Dervišević was beaten by Sredoje Lukić on several occasions and Islam Kustura testified that Nurko Dervišević suffered the same mistreatment by Sredoje Lukić as the other detainees. The Trial Chamber also takes into account that in his 1998 statement Nurko Dervišević himself stated that he was “regularly” beaten by Milan Lukić and Sredoje Lukić and that he provided further details in relation to Sredoje Lukić in his 2008 statement.<sup>1763</sup>

611. Sredoje Lukić argues that the Trial Chamber erred in concluding that Dervišević was beaten on multiple occasions. Specifically, he avers that the Trial Chamber erroneously based this finding on Dervišević’s 1998 witness statement when Dervišević himself clearly testified at trial that he was only slapped on one occasion.<sup>1764</sup> He further submits that the Trial Chamber erred in relying on Kustura and Berberović’s evidence, as these witnesses were neither reliable nor credible.<sup>1765</sup>

612. The Prosecution responds that the Trial Chamber was entitled to find, on the basis of Dervišević’s own prior statements, supported by the evidence of Berberović and Kustura, that Sredoje Lukić beat Dervišević on several occasions.<sup>1766</sup> The Prosecution argues that the Trial

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<sup>1758</sup> Trial Judgement, para. 782.

<sup>1759</sup> Trial Judgement, para. 807.

<sup>1760</sup> Trial Judgement, paras 808, 834, referring to Kustura, T. 2275 (24 September 2008).

<sup>1761</sup> Trial Judgement, paras 836, 841.

<sup>1762</sup> Trial Judgement, paras 789, 813, 836, 841.

<sup>1763</sup> Trial Judgement, para. 836 (footnotes omitted).

<sup>1764</sup> Sredoje Lukić Appeal Brief, paras 272, 277.

<sup>1765</sup> Sredoje Lukić Appeal Brief, paras 243-253.

<sup>1766</sup> Prosecution Response Brief (Sredoje Lukić), para. 146.

Chamber reasonably found that Berberović and Kustura identified Sredoje Lukić in the Uzamnica Camp.<sup>1767</sup>

613. The Trial Chamber found Dervišević to be credible and reliable.<sup>1768</sup> The Appeals Chamber notes that Dervišević stated at trial that he saw and was repeatedly beaten by Sredoje Lukić on one occasion at the Uzamnica Camp, and emphasised his desire to provide an honest account of the experience.<sup>1769</sup> Dervišević maintained this position in cross-examination and he specified that, on that occasion, Sredoje Lukić slapped him across the face.<sup>1770</sup>

614. However, the Appeals Chamber notes that in finding that Sredoje Lukić beat Dervišević on several occasions, the Trial Chamber preferred to give weight to his witness statements from 1998<sup>1771</sup> and 2008,<sup>1772</sup> and did not rely on Dervišević's *viva voce* evidence in this respect. The Appeals Chamber, Judge Pocar and Judge Liu dissenting, considers that in-court *viva voce* evidence is generally more reliable than prior statements.<sup>1773</sup> This is based on the indicia of reliability provided by cross-examination of in-court evidence. A trial chamber preferring a witness's prior statement to his or her *viva voce* evidence should provide reasons for doing so. The Trial Chamber, however, failed to provide such reasons. It not only found Dervišević's *viva voce* testimony credible, but relied on it to resolve inconsistencies in his evidence. The Trial Chamber placed reliance on Dervišević's *viva voce* evidence that he was beaten only once, when explaining why it did not consider there to be a conflict between Dervišević's *viva voce* evidence and that of VG025 who knew Sredoje Lukić and gave evidence that he never saw him there.<sup>1774</sup> Similarly, the Trial

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<sup>1767</sup> Prosecution Response Brief (Sredoje Lukić), paras 148-149.

<sup>1768</sup> Trial Judgement, para. 841.

<sup>1769</sup> Dervišević testified that: "Q. [D]id you ever see Sredoje Lukić at the Uzamnica detention facility? A. I recognised him only once. It was in the later months. It could have been July or perhaps August. He came once when there were few of us. Actually, at that time I was alone in that prison. He came with Milan. And when I saw him with Milan, I was surprised. Sredoje didn't look to me like a man of that kind. He hit me several times" (Dervišević, T. 1963 (19 September 2008)). The Appeals Chamber further notes that Dervišević testified: "A. I saw [Sredoje] only once when he came together with Milan. I hadn't seen Sredoje before. I am saying here without any coercion, and there were no secret conversations. I want to say this forthrightly here, the whole truth and nothing but the truth" (Dervišević, T. 1970 (19 September 2008)).

<sup>1770</sup> Dervišević testified that: "Q: I put it to you that Sredoje Lukic [*sic*] never mistreated or beat you in the Uzamnica camp during the time you have been there [...] A. No, he didn't. I know [Sredoje Lukić]. He came only once with Milan, the two of them [...] He slapped me a couple of times" (Dervišević, T. 1999-2000 (19 September 2008)).

<sup>1771</sup> In his 1998 statement, Dervišević stated that "Milan LUKIC, Sredoje LUKIC, Milos LUKIC (all from Rujiste) came to the hangars regularly and beat us all. [...] They would come inside the hangar, usually at night, and when they were finished beating us, there would be blood all over the floor. I and the other detainees were beaten by these men regularly. A couple of times I was beaten so badly by Milan Milos and Sredoje that my body looked like I was wearing a camouflage uniform. Once, Milan Lukic and Sredoje Lukic beat me and Poljo, the old man, very badly. It was around sunset" (Exh. P111, p. 5).

<sup>1772</sup> In Dervišević's 2008 witness statement, he stated that: "I recall being beaten by Milan, Sredoje and Miloš Lukić. I recall they beat me when Šemso Poljo was brought into Uzamnica. Milan beat Šemso and Sredoje beat me. He beat me on my back with something like a baton." (Exh. P112, p. 2).

<sup>1773</sup> Cf. *Akayesu* Appeal Judgement, para. 134; *Simba* Appeal Judgement, para. 103; *Renzaho* Appeal Judgement, para. 469.

<sup>1774</sup> Trial Judgement, para. 834. The Trial Chamber held that: "VG025's evidence that he never saw Sredoje Lukić at the camp [...] may be reconciled with other witness statements when the different periods of detention of the witnesses



Chamber relied on Dervišević's *viva voce* testimony that he only saw Sredoje Lukić once at the Uzamnica Camp when explaining why it was satisfied that Dervišević was credible even though he failed to name Sredoje Lukić as a perpetrator in several of his prior statements.<sup>1775</sup>

615. The Appeals Chamber further observes that the only specific incident referred to in Dervišević's prior statements relied on by the Trial Chamber is the incident during which Milan Lukić beat Šemso Poljo, and Sredoje Lukić beat Dervišević.<sup>1776</sup> The Appeals Chamber notes that the Trial Chamber did not explain whether it considered it to be a different incident from that mentioned by Dervišević at trial.<sup>1777</sup>

616. When finding that Dervišević was beaten on more than one occasion, the Appeals Chamber recalls that the Trial Chamber also relied on the evidence of Kustura and Berberović.<sup>1778</sup> With regard to Kustura, the Trial Chamber placed weight upon the fact that he:

[r]ecalled a particular incident when Nurko Dervišević was pulled out of a puddle after having been seriously beaten by Milan Lukić and Sredoje Lukić.<sup>1779</sup>

The Appeals Chamber, Judge Pocar and Judge Liu dissenting, considers that as no other witness corroborated the beating of Dervišević described by Kustura, and bearing in mind that this was contradicted by Dervišević's own clear *viva voce* testimony as to his own beating, no reasonable trier of fact could have found that this evidence supported the conclusion that Dervišević was beaten by Sredoje Lukić as described by Kustura.

617. As to Berberović's evidence on Sredoje Lukić's acts and conduct, the Trial Chamber observed that:

Adem Berberović stated under cross-examination that he and Nurko Dervišević were beaten by Sredoje Lukić on more than one occasion, and that Nurko Dervišević, who had been longer in the camp than Adem Berberović, had told him that Milan Lukić and Sredoje Lukić had come before Adem Berberović's arrival and had beaten and maltreated him.<sup>1780</sup>

618. The Appeals Chamber notes that the acts and conduct of Sredoje Lukić, as described by Berberović, are: (i) beatings of Berberović together with Dervišević on more than one occasion; and (ii) Dervišević's purported account of his own prior beatings by Sredoje Lukić. With regard to the beatings of Berberović and Dervišević, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, observes that Sredoje Lukić was neither charged with, nor convicted of, beating

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are taken into account. [...] Nurko Dervišević testified that he was beaten by Sredoje Lukić on one occasion in July or August, 'the later months', or at the end of 1993" (Trial Judgement, para. 834 (footnotes omitted)).

<sup>1775</sup> Trial Judgement, paras 786, 813. See also Exhs 2D15; 2D16; 2D17.

<sup>1776</sup> Exhs P111, p. 5; P112, p. 2.

<sup>1777</sup> See Dervišević, T. 1963, 1999-2000, 2007 (19 September 2008).

<sup>1778</sup> Trial Judgement, para. 836.

<sup>1779</sup> Trial Judgement, para. 789.

Berberović. It further notes that these beatings are not supported by the evidence in either Dervišević's *viva voce* testimony or his prior statements. Further, the prior beatings of Dervišević referred to by Berberović indicate that Dervišević himself was the source of information about the beatings. Although a trial chamber may rely on one witness to enter a conviction, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, considers that, in these circumstances, no reasonable trier of fact could have preferred Berberović's evidence regarding the number of times Dervišević was beaten to Dervišević's *viva voce* testimony on this issue.

619. The Appeals Chamber, Judge Pocar and Judge Liu dissenting, therefore finds that no reasonable trier of fact could have found that Dervišević was beaten several times. However, it recalls that it has dismissed Sredoje Lukić's challenges to Dervišević's identification of Sredoje Lukić in the Uzamnica Camp. Accordingly, the Appeals Chamber finds that Sredoje Lukić has failed to show that the Trial Chamber erred in finding that he slapped Dervišević once on the occasion Dervišević testified to *viva voce* at trial.

(c) Beatings of "other detainees"

620. The Trial Chamber found that Sredoje Lukić beat "other detainees" at the camp based on the evidence of Kustura, Berberović and Dervišević.<sup>1781</sup> The Trial Chamber did not name these detainees or make findings as to the specific nature of the beatings in question.

621. Sredoje Lukić's challenges to the Trial Chamber's reliance on the identification evidence of Kustura, Berberović, and Dervišević also relate to the beatings of unnamed "other detainees".<sup>1782</sup>

622. The Appeals Chamber, Judge Pocar and Judge Liu dissenting, has found that the Trial Chamber erred in finding that Dervišević was beaten on several occasions by Sredoje Lukić. The Appeals Chamber further notes that when Dervišević described the occasion on which he was slapped by Sredoje Lukić, he does not suggest that any other detainee was beaten by Sredoje Lukić at this time.<sup>1783</sup> Dervišević's evidence does not therefore support the finding that Sredoje Lukić beat "other detainees".

623. The Appeals Chamber, Judge Pocar and Judge Liu dissenting, observes that Berberović's evidence in relation to Sredoje Lukić's beatings of other detainees is vague and unspecific. In the parts of Berberović's testimony referenced by the Trial Chamber, he testified that: (i) Sredoje Lukić

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<sup>1780</sup> Trial Judgement, para. 789 (footnotes omitted).

<sup>1781</sup> Trial Judgement, paras 768-769, 776, 841, 991.

<sup>1782</sup> Sredoje Lukić Appeal Brief, paras 236, 256.

<sup>1783</sup> Dervišević, T. 1962-1963, 1970, 2000, 2007 (19 September 2008); Exh. P112, p. 2.

“came to beat us and maltreat us”;<sup>1784</sup> (ii) Sredoje Lukić “came four times”;<sup>1785</sup> and (iii) he “saw [Sredoje Lukić] four or five times”.<sup>1786</sup> The Trial Chamber also considered Berberović’s testimony that ten or fifteen days after his arrival in the camp in August 1992, Sredoje Lukić beat not only him, Dervišević, and Kustura, but other detainees as well.<sup>1787</sup> The Trial Chamber expressly found that Berberović was mistaken with respect to the beatings of Kustura and VG025, as they had not arrived at the camp at this time.<sup>1788</sup> In these circumstances, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, considers that no reasonable trier of fact could have relied upon this evidence to find that “other detainees” were beaten.

624. In relation to Kustura, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, recalls its conclusion that no reasonable trier of fact could have relied upon his evidence as to Sredoje Lukić’s acts and conduct, absent corroboration.<sup>1789</sup> The Appeals Chamber notes that his evidence with regard to Sredoje Lukić’s beatings of other detainees is again vague and unspecific. Kustura testified that Sredoje Lukić beat other detainees “a thousand times”, together with Milan Lukić.<sup>1790</sup> Furthermore, when specifically asked to describe any particular incidents where other detainees were beaten, he merely replied in a general manner that he “saw other detainees being beaten, and Milan and Sredoje beat this man”.<sup>1791</sup>

625. Considering that Dervišević did not indicate that other detainees were beaten by Sredoje Lukić, and that Kustura and Berberović’s evidence as to the occurrence of such beatings is vague and not mutually corroborative, the Appeals Chamber, Judges Pocar and Liu dissenting, finds that no reasonable trier of fact could have found that Sredoje Lukić beat other detainees in the Uzamnica Camp.

(d) Conclusion

626. For the foregoing reasons, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, grants Sredoje Lukić’s eighth ground of appeal to the extent that he challenges his conviction for having beaten Kustura and “other detainees”, and for having beaten Dervišević on several occasions at the Uzamnica Camp. Sredoje Lukić’s eighth ground of appeal is dismissed with regard to his slapping of Dervišević on one occasion.

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<sup>1784</sup> Berberović, T. 2515-2516 (2 October 2008), referred to in Trial Judgement, para. 776. *See also* Trial Judgement, para. 768, referring to Exh. P142, p. 9; Berberović, T. 2547 (2 October 2008).

<sup>1785</sup> Berberović, T. 2536 (2 October 2008).

<sup>1786</sup> Berberović, T. 2552 (2 October 2008).

<sup>1787</sup> Trial Judgement, para. 773, referring to Berberović, T. 2507 (2 October 2008).

<sup>1788</sup> Trial Judgement, para. 774.

<sup>1789</sup> *See supra* para. 590.

<sup>1790</sup> Kustura, T. 2189 (23 September 2008), T. 2283 (24 September 2008).

<sup>1791</sup> Kustura, T. 2189 (23 September 2008).

3. Whether Sredoje Lukić was reasonably convicted of the crimes of cruel treatment as a violation of the laws or customs of war, as well as persecutions and other inhumane acts as crimes against humanity

627. The Appeals Chamber recalls that it has upheld Sredoje Lukić's conviction for having slapped Dervišević at the Uzamnica Camp on one occasion.<sup>1792</sup> Thus, the Appeals Chamber will only consider the submissions of Sredoje Lukić and the Prosecution to the extent that they are relevant to this one incident.

628. Sredoje Lukić argues that "striking" Dervišević on one occasion does not satisfy the *actus reus* of cruel treatment as a violation of the laws or customs of war and other inhumane acts as a crime against humanity since the Prosecution failed to establish the seriousness of the slapping and its mental or physical impact.<sup>1793</sup> He avers that Dervišević only testified with regard to the injuries he suffered throughout the whole period of his detention and not from the beating of Sredoje Lukić, and that the Prosecution failed to present medical records showing that he mistreated Dervišević.<sup>1794</sup> He further argues that the Trial Chamber erred in failing to address these factors.<sup>1795</sup> Sredoje Lukić further submits that the Trial Chamber made erroneous findings as to the *mens rea* for cruel treatment as a violation of the laws or customs of war and other inhumane acts as a crime against humanity<sup>1796</sup> since the evidence does not show that he acted with the intent to inflict serious injuries or suffering on Dervišević.<sup>1797</sup> Sredoje Lukić also argues that the Trial Chamber erred in finding that he aided and abetted the crime of persecutions as a crime against humanity in relation to the beatings in the Uzamnica Camp.<sup>1798</sup>

629. The Prosecution responds that, given the circumstances, including the vulnerability of Dervišević as a detainee, even a single act of slapping meets the requisite threshold of seriousness.<sup>1799</sup> The Prosecution further responds that Sredoje Lukić's argument that he did not have the requisite *mens rea* should be summarily dismissed as it constitutes a mere assertion that the Trial Chamber could not have inferred this conclusion from the evidence.<sup>1800</sup> The Prosecution

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<sup>1792</sup> See *supra* para. 619.

<sup>1793</sup> Sredoje Lukić Appeal Brief, paras 268-270, 272-273, 276, 278, referring to *Čelebići* Appeal Judgement, paras 424, 426, *Blaškić* Appeal Judgement, para. 595.

<sup>1794</sup> Sredoje Lukić Appeal Brief, para. 277; Sredoje Lukić Reply Brief, para. 93.

<sup>1795</sup> Sredoje Lukić Appeal Brief, para. 278.

<sup>1796</sup> Sredoje Lukić Appeal Brief, para. 281; Sredoje Lukić Reply Brief, para. 96.

<sup>1797</sup> Sredoje Lukić Appeal Brief, paras 279-280; Sredoje Lukić Reply Brief, para. 96.

<sup>1798</sup> Sredoje Lukić Appeal Brief, paras 282, 288.

<sup>1799</sup> Prosecution Response Brief (Sredoje Lukić), para. 164.

<sup>1800</sup> Prosecution Response Brief (Sredoje Lukić), para. 167.

further responds that the Trial Chamber reasonably found that the underlying acts at Uzamnica Camp amounted to persecutions as a crime against humanity.<sup>1801</sup>

630. In its appeal, the Prosecution argues that the Trial Chamber erred in finding that Sredoje Lukić aided and abetted, as opposed to committed, the crime of persecutions as a crime against humanity.<sup>1802</sup>

631. The Appeals Chamber recalls that the crime of other inhumane acts as a crime against humanity is satisfied if the victim has suffered serious bodily or mental harm as a result of an act or omission and the perpetrator was motivated by the intent to inflict such harm upon the victim.<sup>1803</sup> The offence of cruel treatment as a violation of the laws or customs of war requires proof of an intentional act or omission causing serious mental or physical suffering or injury, or constituting a serious attack on human dignity.<sup>1804</sup>

632. The Appeals Chamber notes that the Trial Chamber found that Sredoje Lukić “repeatedly and severely” beat Dervišević in the Uzamnica Camp, and that the beatings delivered were of similar gravity to other crimes listed under Article 3 of the Statute as violations of the laws or customs of war and Article 5 of the Statute as crimes against humanity.<sup>1805</sup> The Appeals Chamber has upheld the Trial Chamber’s finding that Sredoje Lukić beat Dervišević at the Uzamnica Camp on one occasion when Sredoje Lukić slapped him across the face.<sup>1806</sup> The Trial Chamber made no specific finding as to the seriousness of this particular act of slapping, or its impact on Dervišević’s mental or physical health.

633. The Appeals Chamber notes that, at the time Dervišević was slapped, he was held as a detainee in a locked hangar in the Uzamnica Camp.<sup>1807</sup> He was 52 years old when brought to the camp.<sup>1808</sup> In the testimony referred to by the Trial Chamber, the Appeals Chamber notes that Dervišević described how he was beaten by Sredoje Lukić:

A. [...] Milan was spurring [Sredoje Lukić] on. He said hit him, hit him harder.

Q. Okay. Thank you, Witness.

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<sup>1801</sup> Prosecution Response Brief (Sredoje Lukić), para. 170.

<sup>1802</sup> Prosecution Appeal Brief, paras 9-12.

<sup>1803</sup> *Kordić and Čerkez* Appeal Judgement, para. 117. *See also Haradinaj et al.* Appeal Judgement, para. 94.

<sup>1804</sup> *Haradinaj et al.* Appeal Judgement, para. 94; *Blaškić* Appeal Judgement, para. 595.

<sup>1805</sup> Trial Judgement, para. 990.

<sup>1806</sup> *See supra* para. 619.

<sup>1807</sup> Trial Judgement, para. 786, referring to Exh. P111, p. 2.

<sup>1808</sup> *See* Trial Judgement, para. 786.

A. But I [*sic*] didn't. You know, I can't say that he did. He just hit me several times. He slapped me across the face.<sup>1809</sup>

634. The Appeals Chamber considers that not all acts committed in detention can be presumed to meet the requisite seriousness. The Prosecution asked no question to elicit further information as to whether this particular act caused serious bodily harm to Dervišević, nor was there any indication that such harm was, in fact, caused. Dervišević explained that Sredoje Lukić was urged to hit him harder, but did not.<sup>1810</sup> In these circumstances, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, finds that no reasonable trier of fact could have found that Sredoje Lukić's slapping of Dervišević caused serious bodily or mental harm so as to amount to cruel treatment as a violation of the laws or customs of war, and other inhumane acts as a crime against humanity or that Sredoje Lukić had the intent to inflict serious mental or physical suffering or serious bodily or mental harm. In light of this finding, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, is satisfied that no reasonable trier of fact could have found Sredoje Lukić responsible for aiding and abetting persecutions as a crime against humanity at the Uzamnica Camp.

635. For the foregoing reasons, Judge Pocar and Judge Liu dissenting, Sredoje Lukić's ninth ground of appeal is granted, in part, as far as it relates to Sredoje Lukić slapping Dervišević. The remainder of his ninth ground of appeal and his tenth ground of appeal, as well as his eleventh and twelfth grounds of appeal as far as they relate to the Uzamnica Camp, are moot. Further, the Prosecution's second ground of appeal is moot.

#### 4. Conclusion

636. For the foregoing reasons, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, grants Sredoje Lukić's eighth ground of appeal, in part, in relation to the beatings of Kustura and "other detainees" as well as Dervišević on several occasions. His eighth ground of appeal is dismissed with regard to slapping Dervišević on one occasion.

637. Sredoje Lukić's ninth ground of appeal, Judge Pocar and Judge Liu dissenting, is granted, in part, in relation to his slapping of Dervišević. The remainder of his ninth ground of appeal, as well as his tenth ground of appeal and his eleventh and twelfth grounds of appeal as far as they relate to the Uzamnica Camp, are moot. The Appeals Chamber further finds that the Trial Chamber did not misapply the principle of *in dubio pro reo* in its assessment of the evidence with respect to the Uzamnica Camp. Therefore, Sredoje Lukić's thirteenth ground of appeal is dismissed. Accordingly, Sredoje Lukić's fourteenth ground of appeal is dismissed. The Prosecution's second ground of

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<sup>1809</sup> Trial Judgement, para. 788, referring to Dervišević, T. 2006 (19 September 2008). *See also* Dervišević, T. 1961-1962, 1984 (19 September 2008).

<sup>1810</sup> Dervišević, T. 2007 (19 September 2008).

appeal is moot. Consequently, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, reverses Sredoje Lukić's convictions for aiding and abetting the crimes of cruel treatment as a violation of the law or customs of war as well as persecutions and other inhumane acts as crimes against humanity committed in the Uzamnica Camp.

### XIII. SENTENCING

638. The Trial Chamber found Milan Lukić guilty on 19 counts of crimes against humanity and violations of the laws or customs of war,<sup>1811</sup> and sentenced him to life imprisonment.<sup>1812</sup> Sredoje Lukić was found guilty on seven counts of crimes against humanity and violations of the laws or customs of war,<sup>1813</sup> and was sentenced to 30 years imprisonment.<sup>1814</sup> Both Appellants have appealed their sentences.<sup>1815</sup>

#### A. Applicable law and standard of review

639. Pursuant to Article 24 of the Statute and Rule 101 of the Rules, a trial chamber must take into account the following factors when determining an appropriate sentence: the gravity of the offence; the individual circumstances of the convicted person; the general practice regarding prison sentences in the courts of the former Yugoslavia; and aggravating and mitigating circumstances.<sup>1816</sup>

640. Trial chambers are vested with broad discretion in determining an appropriate sentence, including the determination of the weight given to mitigating or aggravating circumstances, due to their obligation to individualise penalties to fit the circumstances of the convicted person and the gravity of the crime.<sup>1817</sup> As a general rule, the Appeals Chamber will not substitute its own sentence for that imposed by the trial chamber unless the appealing party demonstrates that the trial chamber has made a “discernible error” in exercising its discretion or has failed to follow the applicable law.<sup>1818</sup>

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<sup>1811</sup> Persecutions as a crime against humanity (Count 1), murder as a crime against humanity (Count 2), murder as a violation of the laws or customs of war (Count 3), other inhumane acts as a crime against humanity (Count 4), cruel treatment as a violation of the laws or customs of war (Count 5), murder as a crime against humanity (Count 6), murder as a violation of the laws or customs of war (Count 7), extermination as a crime against humanity, (Count 8), murder as a violation of the laws or customs of war (Count 10), other inhumane acts as a crime against humanity (Count 11), cruel treatment as a violation of the laws or customs of war (Count 12), extermination as a crime against humanity (Count 13), murder as a violation of the laws or customs of war (Count 15), other inhumane acts as a crime against humanity (Count 16), cruel treatment as a violation of the laws or customs of war (Count 17), murder as a crime against humanity (Count 18), murder as a violation of the laws or customs of war (Count 19), other inhumane acts as a crime against humanity (Count 20), cruel treatment as a violation of the laws or customs of war (Count 21) (Trial Judgement, paras 1099-1100).

<sup>1812</sup> Trial Judgement, para. 1101.

<sup>1813</sup> Persecutions as a crime against humanity (Count 1), murder as a crime against humanity (Count 9), murder as a violation of the laws or customs of war (Count 10), other inhumane acts as a crime against humanity (Count 11), cruel treatment as a violation of the laws or customs of war (Count 12), other inhumane acts as a crime against humanity (Count 20), cruel treatment as a violation of the laws or customs of war (Count 21) (Trial Judgement, paras 1104-1105).

<sup>1814</sup> Trial Judgement, para. 1106.

<sup>1815</sup> Milan Lukić Appeal Brief, paras 372-389; Sredoje Lukić Appeal Brief, paras 310-341.

<sup>1816</sup> *Boškoski and Tarčulovski* Appeal Judgement, para. 203; *Krajišnik* Appeal Judgement, para. 733; *Blagojević and Jokić* Appeal Judgement, para. 320.

<sup>1817</sup> *Ntabakuze* Appeal Judgement, para. 264; *Haradinaj et al.* Appeal Judgement, para. 321; *Boškoski and Tarčulovski* Appeal Judgement, para. 204; *Milošević* Appeal Judgement, para. 297.

<sup>1818</sup> *Ntabakuze* Appeal Judgement, para. 264; *Haradinaj et al.* Appeal Judgement, para. 321; *Boškoski and Tarčulovski* Appeal Judgement, para. 204; *Milošević* Appeal Judgement, para. 297.



641. To demonstrate that the trial chamber committed a discernible error in exercising its discretion, an appellant is required to show that the trial chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the trial chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the trial chamber must have failed to exercise its discretion properly.<sup>1819</sup>

## **B. Milan Lukić's appeal against sentence**

### **1. Submissions**

642. Milan Lukić argues that the Trial Chamber failed to give weight to mitigating factors and apply the principle of proportionality.<sup>1820</sup> In particular, he contends that the Trial Chamber failed to assess factors such as: the manner in which he was “involuntarily thrust” into the war;<sup>1821</sup> his “very young” age of 25 years;<sup>1822</sup> and his status as a low-ranking inexperienced reserve policeman at the relevant time.<sup>1823</sup> Milan Lukić also asserts that the Trial Chamber failed to consider the evidence of his good character,<sup>1824</sup> such as his lack of criminal record,<sup>1825</sup> and further maintains that the Trial Chamber erroneously disregarded the expert evidence of Dr. George Hough as to his character.<sup>1826</sup>

643. Milan Lukić further submits that the Trial Chamber erroneously convicted and sentenced him twice for the persecutory nature of the murders committed during the Varda Factory Incident.<sup>1827</sup> He argues that he was convicted of persecutions through the act of murder as well as through the acts of harassment, humiliation, terrorisation, and psychological abuse of the victims,

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<sup>1819</sup> *Haradinaj et al.* Appeal Judgement, para. 322; *Boškoski and Tarčulovski* Appeal Judgement, para. 205; *Krajišnik* Appeal Judgement, para. 735.

<sup>1820</sup> Milan Lukić's eighth ground of appeal. Milan Lukić has withdrawn sub-ground 8(B) (Milan Lukić Appeal Brief, p. 109). Milan Lukić Appeal Brief, para. 372.

<sup>1821</sup> Milan Lukić Appeal Brief, paras 373, 378-379, 387.

<sup>1822</sup> Milan Lukić Appeal Brief, paras 373-374, 382; Milan Lukić Reply Brief, paras 135-136.

<sup>1823</sup> Milan Lukić Appeal Brief, paras 373, 382, 388; Milan Lukić Reply Brief, paras 135-137.

<sup>1824</sup> Milan Lukić Appeal Brief, para. 383.

<sup>1825</sup> Milan Lukić Appeal Brief, paras 383-384. In support of this assertion, Milan Lukić further argues that he was hard-working (Milan Lukić Appeal Brief, paras 374, 384(a)); showed no traces of intolerance towards persons of different ethnic groups prior to the war (Milan Lukić Appeal Brief, paras 375, 380, 387); and during the war assisted persons “inclusive of ethnic Muslims” (Milan Lukić Appeal Brief, para. 381).

<sup>1826</sup> Milan Lukić Appeal Brief, paras 378, 385-389; Milan Lukić Reply Brief, para. 137. Milan Lukić argues that while the Trial Judgement states that the psychological analysis of Dr. Hough was taken into account, the Trial Chamber's discussion in fact shows that it ignored the majority of Dr. Hough's findings (Milan Lukić Appeal Brief, para. 385, referring to Trial Judgement, paras 1074-1075).

<sup>1827</sup> Milan Lukić's sub-ground 2(H). Milan Lukić Appeal Brief, paras 132-135, referring to Trial Judgement, paras 1005, 1026; Milan Lukić Reply Brief, para. 60.

despite the Trial Chamber's earlier finding that it would not hold him separately responsible for these persecutory acts as they were indistinguishably intertwined with the murders.<sup>1828</sup>

644. In response, the Prosecution asserts that the extreme gravity of the crimes committed personally by Milan Lukić warrants a life sentence.<sup>1829</sup> The Prosecution maintains that Milan Lukić exploited the war in order to victimise Muslims, grew efficient in killing while maximising suffering, enjoyed himself, and was not dissuaded by the pleas of his victims.<sup>1830</sup> When balanced against these considerations, the Prosecution asserts that Milan Lukić has not shown that the Trial Chamber abused its discretion in sentencing him to life imprisonment.<sup>1831</sup>

## 2. Discussion

645. In relation to Milan Lukić's sentence, the Trial Chamber held that:

[h]aving considered all the evidence relating to sentencing, including matters of mitigation, the Trial Chamber maintains the position that on the basis alone of Milan Lukić's guilt for personally, physically and in cold blood killing [...] a total of at least 132 people, the maximum penalty is warranted. In respect of the findings of guilt with regard to the other crimes charged, the Trial Chamber is satisfied that a penalty in the highest range would be warranted.<sup>1832</sup>

646. With regard to Milan Lukić's submission that the Trial Chamber erred in failing to find that he involuntarily joined the war and that this constituted a mitigating factor, the Appeals Chamber considers that he merely repeats his trial submission without demonstrating that its rejection by the Trial Chamber constituted an error warranting the intervention of the Appeals Chamber.<sup>1833</sup>

647. The Appeals Chamber notes that Milan Lukić was between 24 and 26 years of age at the time relevant to the Indictment.<sup>1834</sup> The Trial Chamber observed that an accused's age could be a mitigating factor,<sup>1835</sup> but did not consider any impact of Milan Lukić's age on his sentence. The Appeals Chamber also notes that the Trial Chamber did not consider the status of Milan Lukić as

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<sup>1828</sup> Milan Lukić Appeal Brief, paras 132-135, referring to Trial Judgement, paras 1005, 1026; Milan Lukić Reply Brief, para. 60.

<sup>1829</sup> Prosecution Response Brief (Milan Lukić), para. 271. *See also* Prosecution Response Brief (Milan Lukić), para. 269, referring to Trial Judgement, paras 833, 1059-1061, 1064, 1084.

<sup>1830</sup> Prosecution Response Brief (Milan Lukić), para. 270, referring to Trial Judgement, paras 1063, 1065, 1068-1069, 1076.

<sup>1831</sup> Prosecution Response Brief (Milan Lukić), para. 271, referring to *Mrkšić and Šljivančanin* Appeal Judgement, para. 353.

<sup>1832</sup> Trial Judgement, para. 1084.

<sup>1833</sup> The Trial Chamber did "not agree with the Milan Lukić Defence that the fact that Milan Lukić did not join the war voluntarily should be a mitigating factor in his sentencing." (Trial Judgement, para. 1072).

<sup>1834</sup> Trial Judgement, para. 1 (Milan Lukić was born on 6 September 1967).

<sup>1835</sup> Trial Judgement, paras 1, 1053, referring to *Blaškić* Appeal Judgement, para. 696, *Jokić* Sentencing Judgement, para. 100.

reserve policeman in mitigation.<sup>1836</sup> The Appeals Chamber recalls that, while a trial chamber has the obligation to consider any mitigating circumstances when determining the appropriate sentence, it enjoys a considerable degree of discretion in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded to that factor.<sup>1837</sup> Milan Lukić has not shown that his age and status as reserve policeman at the time of the commission of the crimes constitute factors that the Trial Chamber erroneously failed to consider in mitigation. His submissions in this respect are thus dismissed.

648. The Appeals Chamber further notes that the Trial Chamber considered Milan Lukić's lack of a criminal record before the war not to be a mitigating factor in his sentencing.<sup>1838</sup> The Appeals Chamber recalls that a lack of a criminal record is accorded little, if any, weight in mitigation, absent exceptional circumstances.<sup>1839</sup> Considering that Milan Lukić has not pointed to any exceptional circumstances, the Appeals Chamber finds that Milan Lukić has failed to show that the Trial Chamber erred.

649. Contrary to Milan Lukić's submission, the Trial Chamber did consider evidence as to his good character; in particular, that he had been "kind" and "thoughtful" to all people before the war, and that he remained a "good man" during the war.<sup>1840</sup> However, it found that this evidence was "sharply contradict[ed]" by the "sheer brutality" of Milan Lukić's actions and the evidence of those who survived the attacks.<sup>1841</sup> The Appeals Chamber recalls that the gravity of the crime is the most important factor in determining the sentence.<sup>1842</sup> Therefore, the Appeals Chamber finds that Milan Lukić has not shown that the Trial Chamber erred in failing to attribute mitigating weight to the evidence of his good character.

650. The Appeals Chamber also rejects Milan Lukić's argument that the Trial Chamber did not adequately weigh the expert evidence of Dr. George Hough, a clinical psychologist who evaluated Milan Lukić on six occasions in November 2008 for a total of 24 hours.<sup>1843</sup> The Trial Chamber

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<sup>1836</sup> The Trial Chamber considered the jurisprudence of the Appeals Chamber that persons with low level of command in the overall structure of the conflict should not necessarily be subject to a low sentence (Trial Judgement, para. 1055, referring to *Čelebići* Appeal Judgement, para. 847, citing *Alesovski* Appeal Judgement, para. 181).

<sup>1837</sup> *Ntabakuze* Appeal Judgement, para. 264; *Kvočka et al.* Appeal Judgement, para. 715, referring to *Čelebići* Appeal Judgement para. 780.

<sup>1838</sup> Trial Judgement, para. 1076.

<sup>1839</sup> *Babić* Sentencing Appeal Judgement, paras 49-50.

<sup>1840</sup> Trial Judgement, paras 1077 (referring to Marković, T. 3844-3845 (17 December 2008), MLD7, T. 4274 (19 January 2009), MLD10, T. 3951-3955 (18 December 2008)), 1078 (referring to MLD17, T. 4698-4701 (4 February 2009)), 1079 (referring to Anka Vasiljević, T. 4192 (19 January 2009)).

<sup>1841</sup> Trial Judgement, para. 1080.

<sup>1842</sup> *Kordić and Čerkez* Appeal Judgement, para. 1079.

<sup>1843</sup> See Trial Judgement, para. 1074, referring to George Hough, T. 6211, 6286 (25 March 2009), 6351 (26 March 2009), Exhs 1D202, p. 10, 1D203, p. 1.

expressly stated that it had considered Dr. Hough's analysis in its sentencing evaluation.<sup>1844</sup> This is evident from the Trial Chamber's analysis of Dr. Hough's evidence that, *inter alia*, Milan Lukić was obedient to authority and "a follower and not a leader".<sup>1845</sup> Thus, Milan Lukić has not shown that the Trial Chamber failed to consider Dr. Hough's evidence.

651. The Appeal Chamber is equally unconvinced by Milan Lukić's argument that the Trial Chamber convicted and sentenced him twice for the persecutory nature of the murders committed during the Varda Factory Incident. The Trial Chamber considered that the harassment, humiliation, terrorisation, and psychological abuse of the seven men at the Varda Factory Incident were "so closely intertwined with the act of [their] murder that they [could] not be distinguished from that act".<sup>1846</sup> The Trial Chamber stated that, therefore, it would not hold Milan Lukić responsible for these acts as separate persecutory acts.<sup>1847</sup> Thus, Milan Lukić's conviction for persecutions as a crime against humanity through the murders comprised the harassment, humiliation, terrorisation, and psychological abuse. Under these circumstances, the Appeals Chamber considers that Milan Lukić has failed to show that the Trial Chamber convicted him twice for these acts.

652. The Appeals Chamber notes that, while the Trial Chamber stated that it would not hold Milan Lukić responsible for the harassment, humiliation, terrorisation, and psychological abuse as separate persecutory acts, it also stated that it would consider them for the purpose of sentencing as evidence of "the particularly ruthless and discriminatory manner" in which Milan Lukić killed the seven men during the Varda Factory Incident.<sup>1848</sup> The Appeals Chamber is of the view that a trial chamber may consider the scale and brutality of the offences for the purpose of determining the appropriate sentence.<sup>1849</sup> However, the Appeals Chamber recalls that the discriminatory intent of the accused cannot be used in sentencing where this is a constituent element of the crime.<sup>1850</sup> The Trial Chamber did not refer to the persecutory nature of the murders in the sentencing section.<sup>1851</sup> The Appeals Chamber therefore finds that Milan Lukić has failed to show that the Trial Chamber erred.

### 3. Conclusion

653. For the foregoing reasons, Milan Lukić's sub-ground 2(H) and eighth ground of appeal are dismissed.

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<sup>1844</sup> Trial Judgement, para. 1075.

<sup>1845</sup> Trial Judgement, paras 1074-1075, referring to George Hough, T. 6135 (25 March 2009).

<sup>1846</sup> Trial Judgement, para. 1005.

<sup>1847</sup> Trial Judgement, para. 1005.

<sup>1848</sup> Trial Judgement, para. 1005.

<sup>1849</sup> See *Mrkšić and Šljivančanin* Appeal Judgement, para. 400.

## C. Sredoje Lukić's appeal against sentence

### 1. Submissions

654. Sredoje Lukić argues that the Trial Chamber erred:<sup>1852</sup> (i) by ignoring and misapplying several mitigating circumstances;<sup>1853</sup> (ii) in its application of aggravating circumstances;<sup>1854</sup> and (iii) in imposing a disproportionate and excessive sentence.<sup>1855</sup>

655. With regard to the assessment of the mitigating factors, Sredoje Lukić argues that the Trial Chamber did not appropriately consider: (i) that Prosecution and Defence witnesses testified that he continued to have a positive character after having been captured by the TO in April 1992;<sup>1856</sup> (ii) that he rendered assistance to Muslims during the war;<sup>1857</sup> and (iii) his expressions of regret.<sup>1858</sup>

656. As to the aggravating circumstances, Sredoje Lukić argues that the Trial Chamber erred in finding that his position as a policeman constituted an aggravating factor.<sup>1859</sup> In particular, he argues that: (i) at the time of the Pionirska Street Incident, he was a “regular lowest policeman without any rank”;<sup>1860</sup> (ii) no victims recognised him as a policeman;<sup>1861</sup> and (iii) he was not a policeman for the whole period during which the beatings at the Uzamnica Camp were committed.<sup>1862</sup> He further argues that the Trial Chamber erred in failing to appropriately consider that his level of participation in the Pionirska Street Incident was that of an aider and abetter.<sup>1863</sup> He submits that it contradicted itself when considering that he did nothing to stop the burning of the

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<sup>1850</sup> *Kunarac et al.* Appeal Judgement, para. 357; *Tadić* Appeal Judgement, para. 305.

<sup>1851</sup> Trial Judgement, paras 1059-1069.

<sup>1852</sup> Sredoje Lukić's fifteenth ground of appeal.

<sup>1853</sup> Sredoje Lukić Appeal Brief, paras 323-341.

<sup>1854</sup> Sredoje Lukić Appeal Brief, paras 321-322.

<sup>1855</sup> Sredoje Lukić Appeal Brief, paras 310-312.

<sup>1856</sup> Sredoje Lukić Appeal Brief, paras 331-341. The Trial Chamber noted that, between 7 and 9 April 1992, Sredoje Lukić and eleven other Serb men were arrested “during a routine territorial inspection because they were armed without belonging to either the police or the TO.” During his detention, he “was subjected to violence at the hands of Muslims” (Trial Judgement, para. 7). In sentencing, the Trial Chamber considered evidence that his character changed after this experience (Trial Judgement, para. 1096). With reference to the testimony of VG115 that Sredoje Lukić “changed a lot” when the war started, Sredoje Lukić argues that the Trial Chamber did not accept her testimony in other aspects and that it should have considered the fact that the *Vasiljević* trial chamber found this witness's evidence to be unreliable (Sredoje Lukić Appeal Brief, para. 333, referring to *Vasiljević* Trial Judgement, paras 89-90, 159). Sredoje Lukić further argues that it was significant that positive character evidence was provided not only by Defence witnesses Bugarski, Živković, and Zorka Lukić (Sredoje Lukić Appeal Brief, para. 335), but ‘especially’ by Prosecution witnesses VG013, VG017, VG032, VG064, VG133, Spahić, and Mevsud Poljo (Sredoje Lukić Appeal Brief, paras 336-340). *See also* Sredoje Lukić Appeal Brief, para. 327.

<sup>1857</sup> Sredoje Lukić Appeal Brief, paras 323-329. Sredoje Lukić argues that the Trial Chamber ignored the testimony of Mevsud Poljo and VG064 (Sredoje Lukić Appeal Brief, paras 324-325).

<sup>1858</sup> Sredoje Lukić Appeal Brief, paras 329-330, referring to Trial Judgement, fn. 3054, *Orić* Trial Judgement, para. 752.

<sup>1859</sup> Sredoje Lukić Appeal Brief, paras 321-322.

<sup>1860</sup> Sredoje Lukić Appeal Brief, para. 321, referring to Exhs 2D60, P209, P210, P211, P212, P213, P214.

<sup>1861</sup> Sredoje Lukić Appeal Brief, para. 321.

<sup>1862</sup> Sredoje Lukić Appeal Brief, para. 322, referring to Exhs 2D60, 2D61, 2D62.

<sup>1863</sup> Sredoje Lukić Appeal Brief, paras 313-318.

Omeragić House or release the victims after having found that he did not participate in setting the house on fire and did not shoot at persons who attempted to escape.<sup>1864</sup>

657. Finally, Sredoje Lukić argues that his sentence was disproportionate and excessive in light of all the circumstances, including his conduct before and during the war, as well as in comparison with Milan Lukić's sentence.<sup>1865</sup> He contends that the difference between life imprisonment and 30 years' imprisonment is "fairly insignificant having in mind the age of [*sic*] Appellant", and that he was only convicted of seven counts of the Indictment, while Milan Lukić was convicted of 19 counts.<sup>1866</sup>

658. The Prosecution responds that the sentence was based on a full consideration of Sredoje Lukić's role and state of mind as an aider and abettor to the crimes at Pionirska Street and as a direct perpetrator of the beatings at the Uzamnica Camp.<sup>1867</sup> As to Sredoje Lukić's good character, the Prosecution argues that the Trial Chamber took the relevant evidence into account, and properly found that any change in demeanour following his hostage experience did not excuse his subsequent actions.<sup>1868</sup> In addition, the Prosecution responds that the Trial Chamber considered all evidence as to Sredoje Lukić's assistance to Muslim citizens, and did not abuse its discretion in placing limited weight upon this factor.<sup>1869</sup> Similarly, it asserts that the Trial Chamber properly weighed his expressions of regret.<sup>1870</sup> The Prosecution also argues that Sredoje Lukić's specific rank in the police force did not alter the duty he owed to the citizens by virtue of his role as a policeman.<sup>1871</sup> It contends that Sredoje Lukić was a police officer until at least 20 January 1993, not 20 January 1992, and beat detainees at the Uzamnica Camp during this time.<sup>1872</sup> The Prosecution further responds that the Trial Chamber appropriately sentenced Sredoje Lukić in light of the extreme gravity of the crimes.<sup>1873</sup> It contends that the Trial Chamber properly based his sentence on his own criminal acts and individual circumstances, correctly rejecting the idea that one accused's crimes could mitigate the sentence of another accused.<sup>1874</sup>

## 2. Discussion

659. In relation to Sredoje Lukić's sentence, the Trial Chamber found that:

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<sup>1864</sup> Sredoje Lukić Appeal Brief, para. 319, referring to Trial Judgement, paras 613, 1088.

<sup>1865</sup> Sredoje Lukić Appeal Brief, paras 310-312.

<sup>1866</sup> Sredoje Lukić Appeal Brief, para. 312.

<sup>1867</sup> Prosecution Response Brief (Sredoje Lukić), paras 202-204.

<sup>1868</sup> Prosecution Response Brief (Sredoje Lukić), paras 212, 215-216, referring to Trial Judgement, paras 8, 1092, 1095.

<sup>1869</sup> Prosecution Response Brief (Sredoje Lukić), paras 210, 213.

<sup>1870</sup> Prosecution Response Brief (Sredoje Lukić), paras 211, 214.

<sup>1871</sup> Prosecution Response Brief (Sredoje Lukić), para. 205.

<sup>1872</sup> Prosecution Response Brief (Sredoje Lukić), para. 207, referring to Exh. 2D61, p. 2, Trial Judgement, paras 8, 770, 773, 782, 835, 841.

[his] sentence [...] should take account of his role in the Pionirska street incident as an aider and abettor of a series of crimes that culminated in the barbaric killing of 59 people [and] should also reflect that while Sredoje Lukić visited the Uzamnica Camp on only a few occasions, he personally and physically beat detainees in a savage manner. Lastly, his sentence must reflect the mitigating factors that the Trial Chamber has identified.<sup>1875</sup>

660. With regard to the assessment of mitigating circumstances, the Trial Chamber considered the evidence of both Prosecution and Defence witnesses as to Sredoje Lukić's good character prior to the war.<sup>1876</sup> The Trial Chamber further noted that his character changed after his detention by the TO, during which he was allegedly subjected to violence.<sup>1877</sup> However, contrary to what Sredoje Lukić argues, the Trial Chamber did not disregard his positive character in mitigation since it negatively changed after his detention. Instead, the Trial Chamber found that the change in Sredoje Lukić's demeanour after his detention did not warrant a mitigation of his sentence, noting that "[a]n individual whose house has been attacked cannot expect, on this ground alone, any mitigation of his sentence for subsequent wrongdoings".<sup>1878</sup> The Appeals Chamber recalls that a trial chamber has discretion with regard to the factors it considers in mitigation.<sup>1879</sup> Sredoje Lukić has not shown that the Trial Chamber erred in failing to attribute mitigating weight to the evidence of his good character, or any change therein as a result of his detention.

661. Contrary to Sredoje Lukić's assertion, the Trial Chamber expressly considered the evidence of Mevsud Poljo and VG064, who indicated that Sredoje Lukić helped Muslims during the war.<sup>1880</sup> Further, it did not "underestimate that rendering assistance to Muslims might have been difficult for Sredoje Lukić, and would not negate the mitigating weight of his actions simply because he did not help more people."<sup>1881</sup> The Trial Chamber further indicated that it accorded some weight to the assistance he offered to Muslim civilians.<sup>1882</sup> However, in light of the "grave and heinous crimes in which Sredoje Lukić willingly participated as an aider and abettor" the Trial Chamber found that such assistance did not warrant "any substantial reduction" in sentencing.<sup>1883</sup> Considering that the

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<sup>1873</sup> Prosecution Response Brief (Sredoje Lukić), paras 196-199.

<sup>1874</sup> Prosecution Response Brief (Sredoje Lukić), paras 200-201.

<sup>1875</sup> Trial Judgement, para. 1097.

<sup>1876</sup> Trial Judgement, para. 1095, referring to Prosecution witnesses Spahić, T. 569-570 (26 August 2008), Mevsud Poljo, T. 580, 585 (26 August 2008), Huso Kuspahić, T. 913-914 (1 September 2008), VG013, T. 1005 (2 September 2008), VG017, T. 2761 (9 October 2008), VG024, T. 3279 (3 November 2008) (private session), VG042, T. 2836-2838 (27 October 2008), and Defence witness Bugarski (Exh. 2D47, p. 3).

<sup>1877</sup> Trial Judgement, paras 7, 1096, referring to Prosecution witnesses Huso Kurspahić (Exh. P38, p. 873), VG115, T. 718 (28 August 2008), and Defence witness Bugarski, T. 3730 (2 December 2008).

<sup>1878</sup> Trial Judgement, para. 1096, citing *Bralo Sentencing Appeal Judgement*, para. 18.

<sup>1879</sup> See *supra* para. 647.

<sup>1880</sup> Trial Judgement, para. 1092, referring to Mevsud Poljo, T. 580, 583-584 (26 August 2008), Exh. P159 (confidential), pp. 9-10.

<sup>1881</sup> Trial Judgement, para. 1092, referring to Mevsud Poljo, T. 580, 583-584 (26 August 2008), Exh. P159 (confidential), pp. 9-10.

<sup>1882</sup> Trial Judgement, para. 1092.

<sup>1883</sup> Trial Judgement, para. 1092. The Appeals Chamber recalls that Sredoje Lukić was found guilty of committing the crimes of cruel treatment as a violation of law or customs of war and other inhumane acts as a crime against humanity in Uzamnica Camp (Trial Judgement, para. 991).

gravity of the crime is the most important factor in determining the sentence,<sup>1884</sup> the Appeals Chamber finds that Sredoje Lukić has failed to show that the Trial Chamber erred in this respect.

662. The Appeals Chamber recalls that expressions of regret may be considered in mitigation, provided they are expressed sincerely.<sup>1885</sup> The Trial Chamber did not consider the statements by Sredoje Lukić's counsel to be expressions of remorse of the kind contemplated by law, but took "these statements into account as expressions of sympathy and compassion for the suffering of the victims of the crimes".<sup>1886</sup> The Trial Chamber found that in light of the gravity of the crimes, "the statements are not substantial enough to warrant great weight being placed upon them as a mitigating factor".<sup>1887</sup> Sredoje Lukić has not shown that the Trial Chamber erred in this respect.

663. The Appeals Chamber now turns to Sredoje Lukić's arguments relating to alleged errors in considering aggravating factors. With respect to his submissions relating to his position as a policeman, the Appeals Chamber recalls that while a trial chamber has discretion in determining the factors in aggravation, it must provide convincing reasons for its choice of factors.<sup>1888</sup> In relation to the Pionirska Street Incident, the Trial Chamber found that Sredoje Lukić abused his position as a police officer, as his participation "sanctioned the robbery, abuse and murder of his Muslim neighbours" and amounted to "a cruel inversion of the duty that he had to the citizens of Višegrad", and that this constituted an aggravating factor.<sup>1889</sup> The Appeals Chamber is not satisfied that Sredoje Lukić has shown that the Trial Chamber abused its discretion in making this finding.

664. Further, the Appeals Chamber considers that Sredoje Lukić's precise rank within the police force is irrelevant, as it was his overall status as a law enforcement official which compounded the betrayal of trust to the community he was intended to serve. In addition, contrary to Sredoje Lukić's submissions, some of the victims knew him by virtue of his role as a policeman.<sup>1890</sup> As to his submission that he was not a policeman for the whole period during which the beatings at the Uzamnica Camp were committed, the Appeals Chamber notes that the Trial Chamber considered that Sredoje Lukić was a policeman as of around May 1992 until 20 January 1993.<sup>1891</sup> Therefore, the Trial Chamber erred in considering Sredoje Lukić's status as a policeman as an aggravating

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<sup>1884</sup> See *supra* para. 649.

<sup>1885</sup> *Vasiljević* Appeal Judgement, para. 177; *Sikirica et al.* Sentencing Judgement, paras 152, 194, 230; *Todorović* Sentencing Judgement, paras 89-92; *Erdemović* Sentencing Judgement, para. 16(iii).

<sup>1886</sup> Trial Judgement, para. 1094.

<sup>1887</sup> Trial Judgement, para. 1094. See also Trial Judgement, para. 1098.

<sup>1888</sup> *Stakić* Appeal Judgement, para. 416.

<sup>1889</sup> Trial Judgement, para. 1090.

<sup>1890</sup> Trial Judgement, paras 808 (referring to Kustura, T. 2181 (23 September 2008)), 812 (referring to Dervišević, T. 1961 (19 September 2008), Exh. P112, p. 2.)

<sup>1891</sup> Trial Judgement, para. 8.



factor, with respect to the beatings committed “in the later months of 1993,”<sup>1892</sup> but not in relation to those committed in the second half of 1992.<sup>1893</sup> However, the Appeals Chamber finds that this error has no impact upon his sentence, when considered in light of the gravity of the crimes for which Sredoje Lukić was convicted.

665. The Appeals Chamber finds no merit in Sredoje Lukić’s assertion that the Trial Chamber did not appropriately consider the fact that he was found to have aided and abetted the crimes that were committed during the Pionirska Street Incident. In determining the appropriate sentence, the Trial Chamber explicitly took into account his role “*as an aider an abettor* of a series of crimes that culminated in the barbaric killing of 59 people.”<sup>1894</sup> This finding shows that the Trial Chamber fully considered the extent of Sredoje Lukić’s participation in these crimes when sentencing him.

666. The Trial Chamber found that Sredoje Lukić did not participate in setting the Omeragić House on fire and in shooting at the persons who attempted to escape.<sup>1895</sup> Contrary to Sredoje Lukić’s assertion, this finding does not contradict the Trial Chamber’s finding that he did nothing to stop the fire or to release the victims,<sup>1896</sup> as the Trial Chamber was also satisfied that Sredoje Lukić rendered practical assistance to the crimes by visibly carrying arms and participating in the Transfer.<sup>1897</sup> Sredoje Lukić has failed to show that the Trial Chamber erred.

667. With respect to Sredoje Lukić’s argument that his sentence is disproportionate and excessive in comparison to Milan Lukić’s sentence, the Appeals Chamber recalls that the range of a sentence is limited by the individual guilt of each accused.<sup>1898</sup> The Appeals Chamber has upheld Sredoje Lukić’s convictions with regard to the Pionirska Street Incident for aiding and abetting the crimes of murder and cruel treatment as violations of the laws or customs of war, as well as for murder, persecutions, and other inhumane acts as crimes against humanity. In light of the gravity of these crimes, Sredoje Lukić has failed to demonstrate that the Trial Chamber ventured outside its discretionary framework in imposing his sentence. Therefore, the Appeals Chamber finds that Sredoje Lukić’s sentence is not disproportionate and excessive.

### 3. Conclusion

668. For the foregoing reasons, the Appeals Chamber dismisses Sredoje Lukić’s fifteenth ground of appeal.

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<sup>1892</sup> Cf. Trial Judgement, para. 841.

<sup>1893</sup> Cf. Trial Judgement, para. 841.

<sup>1894</sup> Trial Judgement, para. 1097 (emphasis added).

<sup>1895</sup> Trial Judgement, para. 613.

<sup>1896</sup> See Trial Judgement, para. 1088.

<sup>1897</sup> Trial Judgement, paras 932, 984, 1035.

<sup>1898</sup> *Kordić and Čerkez* Appeal Judgement, para. 1087.

#### **D. Impact of the findings of the Appeals Chamber**

669. With regard to Milan Lukić, the Appeals Chamber recalls its finding reducing the number of victims of the Pionirska Street Incident from 59 to 53.<sup>1899</sup> However, the Appeals Chamber considers that the crimes for which Milan Lukić has been convicted are extremely grave. These crimes include extermination, persecutions, and other inhumane acts as crimes against humanity, as well as cruel treatment and murder as a violation of the laws or customs of war. In these circumstances, the Appeals Chamber finds that the reduction of the number of victims of the Pionirska Street Incident does not impact the sentence imposed by the Trial Chamber. Consequently, the Appeals Chamber affirms Milan Lukić's sentence of imprisonment for the remainder of his life.

670. With regard to Sredoje Lukić, the Appeals Chamber recalls the limited reduction in the number of victims of the Pionirska Street Incident and finds that the reduction of the number of victims of the Pionirska Street Incident does not impact the sentence imposed by the Trial Chamber.

671. The Appeals Chamber further recalls that it has reversed, Judge Pocar and Judge Liu dissenting, Sredoje Lukić's convictions in relation to the Uzamnica Camp pursuant to Article 7(1) of the Statute under Count 1 (persecutions as a crime against humanity), Count 20 (other inhumane acts as a crime against humanity), and Count 21 (cruel treatment as a violation of the laws or customs of war). The reversal of Sredoje Lukić's convictions results in a reduction of his culpability. Sredoje Lukić, however, remains convicted of very serious crimes. Thus, in the circumstances of this case, the Appeals Chamber reduces, Judge Pocar and Judge Liu dissenting, the sentence imposed by the Trial Chamber on Sredoje Lukić by three years.

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<sup>1899</sup> See *supra* paras 352-353.

#### **XIV. DISPOSITION**

672. For the foregoing reasons, **THE APPEALS CHAMBER,**

**PURSUANT TO** Article 25 of the Statute and Rules 117 and 118 of the Rules;

**NOTING** the respective written submissions of the Parties and the arguments they presented at the appeal hearing on 14 and 15 September 2011;

**SITTING** in open session;

**GRANTS**, in part, Milan Lukić's sub-grounds 7(D) and 3(A) and **REPLACES** the Trial Chamber's finding that 59 victims died at the Pionirska Street Incident with the finding that 53 victims died;

**DISMISSES** the remainder of Milan Lukić's appeal;

**DISMISSES**, Judge Morrison dissenting, Sredoje Lukić's first ground of appeal;

**DISMISSES**, Judge Güney and Judge Morrison dissenting, Sredoje Lukić's second ground of appeal;

**DISMISSES**, Judge Morrison dissenting, Sredoje Lukić's fifth, sixth, eleventh, and twelfth grounds of appeal insofar as they relate to his convictions for aiding and abetting the crimes of cruel treatment as a violation of the laws or customs of war as well as persecutions and other inhumane acts as crimes against humanity, all committed at the Memić House;

**DISMISSES**, Judge Güney and Judge Morrison dissenting, Sredoje Lukić's third, fourth, fifth, sixth, eleventh, and twelfth grounds of appeal insofar as they relate to his convictions for aiding and abetting the crimes of murder and cruel treatment as violations of the laws or customs of war, as well as murder, persecutions, and other inhumane acts as crimes against humanity, all committed at the Omeragić House;

**GRANTS**, in part, Judge Pocar and Judge Liu dissenting, Sredoje Lukić's eighth ground of appeal and **REVERSES**, Judge Pocar and Judge Liu dissenting, his convictions for the beatings of Kustura, Dervišević, and other detainees;

**GRANTS**, in part, Judge Pocar and Judge Liu dissenting, Sredoje Lukić's ninth ground of appeal and **REVERSES**, Judge Pocar and Judge Liu dissenting, his convictions for having aided and abetted the crimes of cruel treatment as a violation of the laws or customs of war, as well as

persecutions and other inhumane acts as crimes against humanity, all in relation to beatings in the Uzamnica Camp; and **DECLARES MOOT**, Judge Pocar and Judge Liu dissenting, the remainder of his ninth ground of appeal and his tenth ground of appeal, as well as his eleventh and twelfth grounds of appeal insofar as they relate to the beatings at the Uzamnica Camp;

**DISMISSES** Sredoje Lukić's appeal in all other respects;

**DISMISSES** the Prosecution's first ground of appeal and **DECLARES MOOT** the Prosecution's second ground of appeal;

**AFFIRMS** Milan Lukić's sentence of life imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period already spent in detention;

**REDUCES**, Judge Pocar and Judge Liu dissenting, Sredoje Lukić's sentence of 30 years' imprisonment to a sentence of 27 years' imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period already spent in detention;

**ORDERS**, in accordance with Rules 103(C) and 107 of the Rules, that Milan Lukić and Sredoje Lukić are to remain in the custody of the Tribunal pending the finalisation of arrangements for their transfer to the State where their sentences will be served.

Judge Güney appends separate and partially dissenting opinions.

Judge Agius appends a separate opinion.

Judge Pocar and Judge Liu append a joint dissenting opinion.

Judge Morrison appends separate and dissenting opinions.

Done in English and French, the English text being authoritative.

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Judge Mehmet Güney, Presiding

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Judge Carmel Agius

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Judge Fausto Pocar

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Judge Liu Daqun

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Judge Howard Morrison

Dated this fourth day of December 2012,  
At The Hague,  
The Netherlands

**[Seal of the Tribunal]**

## **XV. SEPARATE AND PARTIALLY DISSENTING OPINIONS OF JUDGE MEHMET GÜNEY**

### **A. Pionirska Street Incident**

1. The Appeals Chamber, by majority, upheld the Trial Chamber's finding that Sredoje Lukić was present during the Pionirska Street Incident, both at the Memić House and the Transfer.<sup>1</sup> Consequently, Sredoje Lukić's convictions for aiding and abetting the crimes of murder and cruel treatment as violations of the laws or customs of war, as well as murder, persecutions and other inhumane acts as crimes against humanity were maintained.<sup>2</sup> Unfortunately, though I joined the Majority as to the events that occurred at the Memić House, I am unable to concur with the Majority's opinion concluding that the Trial Chamber did not err when finding that Sredoje Lukić was present at the Transfer.<sup>3</sup> I believe the Trial Chamber committed an error of law when it made contradictory findings as to the credibility of witnesses VG084 and VG038 throughout the Pionirska Street Incident.<sup>4</sup> Also, I believe the Majority's analysis contains contradictions that, in my view, show how unreasonable the Trial Chamber's findings are in relation to supporting the relevant convictions.

2. In concluding that Sredoje Lukić was armed and present at the Memić House, the Trial Chamber relied on the evidence of VG018, VG084, VG038 and Huso Kurspahić.<sup>5</sup> I believe the Trial Chamber acted reasonably in its overall assessment when it limited the credibility and reliability of the witnesses to establishing Sredoje Lukić's presence at the Memić House only.<sup>6</sup> As stressed several times by the Majority, and used as a basis to dismiss Sredoje Lukić's arguments, the whereabouts and actions of Sredoje Lukić at the Memić House are unknown.<sup>7</sup> The number of perpetrators participating in the events is also unknown.<sup>8</sup> This does not detract from the

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<sup>1</sup> Appeal Judgement, para. 418.

<sup>2</sup> Appeal Judgement, paras. 467.

<sup>3</sup> See Appeal Judgement, para. 418.

<sup>4</sup> See Appeal Judgement, paras. 410-414.

<sup>5</sup> Trial Judgement, para. 593.

<sup>6</sup> Trial Judgement, paras. 585, 588, 590.

<sup>7</sup> Appeal Judgement, paras. 385 ("[i]t accepted that evidence only to the extent that it placed Sredoje Lukić at the Memić House, and not as a basis for establishing his specific acts or location"), 388 ("[m]oreover, the Appeals Chamber notes that the Trial Chamber did not rely on the evidence of VG038 and VG084 to establish Sredoje Lukić's conduct or location during the Pionirska Street Incident"), 389 ("[i]n this context, the Trial Chamber specifically limited the weight of VG038's testimony to account for Sredoje Lukić's presence at the Memić House"),

<sup>8</sup> Appeal Judgement, paras. 402 ("[i]n this context, the Appeals Chamber notes that the number of perpetrators present at the Memić House is unknown"), 403 ("[t]he Trial Chamber did not make a specific finding on the number of perpetrators present at the Memić House"), 411 ("[h]owever, the Trial Chamber made no finding as to the precise number of perpetrators who were present at the Memić House or during the Transfer." Also, I note the testimony of Huso Kurspahić, naming the alleged perpetrators of the Pionirska Street Incident and numbering them at seven (see T. 879, 1 September 2008).

reasonableness of the Trial Chamber's findings as to the presence of Sredoje Lukić at the Memić House, based on the evidence as a whole.

3. The Trial Chamber found that Sredoje Lukić was present during the Transfer based on the same evidence of VG038, VG084 and Huso Kurspahić.<sup>9</sup> However, and this is where I depart from the Majority's opinion, I believe that based on the findings restricting the credibility of VG084 and VG038 to solely establishing the presence of Sredoje Lukić at the Memić House, the Trial Chamber acted unreasonably when it found that the two witnesses were able to reliably identify Sredoje Lukić later at the site of the Transfer.

#### 1. Witness VG038

4. The Trial Chamber found that Witness VG038 had no prior knowledge of Sredoje Lukić before 14 June 1992.<sup>10</sup> However, the Trial Chamber still found VG038 credible to place Sredoje Lukić at the Memić House based on what he heard from others in the Koritnik Group.<sup>11</sup> This finding was challenged by Sredoje Lukić but upheld by the Appeals Chamber after it determined that some of the Koritnik Group could have been in a position to identify Sredoje Lukić.<sup>12</sup> Nonetheless, the evidence provided by the Prosecution was insufficient to allow the Trial Chamber to pinpoint Sredoje Lukić's location or actions at the Memić House. It is thus unknown whether VG038 ever saw Sredoje Lukić at the Memić House at all. As underscored by the Majority, the exact number of perpetrators present at the Memić House is unknown, but the evidence indicates that there were more than four.<sup>13</sup> Thus, it becomes questionable whether the account of VG038, according to which he saw the "same four men" later at the Transfer, should reliably include Sredoje Lukić.<sup>14</sup> This particular inconsistency was not addressed by the Trial Chamber and was ignored by the Majority.

5. I believe it was unreasonable for the Trial Chamber to conclude that the only reasonable inference was that one of the perpetrators VG038 saw earlier that day was Sredoje Lukić, particularly since the Trial Chamber attached no weight to his testimony to establish Sredoje Lukić's location or actions. For these reasons, I would have reversed the Trial Chamber's finding to the effect that VG038's evidence reliably established that Sredoje Lukić was present during the Transfer.

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<sup>9</sup> Trial Judgement, para. 607.

<sup>10</sup> Trial Judgement, para. 582.

<sup>11</sup> Trial Judgement, paras. 417, 585.

<sup>12</sup> Appeal Judgement, para. 388, *citing* Trial Judgement, para. 405.

<sup>13</sup> *See supra*, fn. 9.

<sup>14</sup> Appeal Judgement para. 412, *citing* Trial Judgement, para. 585.

## 2. Witness VG084

6. The Majority was also satisfied that the Trial Chamber did not err when it found that VG084 was reliable in placing Sredoje Lukić at the site of the Transfer. The Majority states:

While the Trial Chamber found that VG084, at the Memić House, was unable to distinguish Milan Lukić from Sredoje Lukić, the Appeals Chamber considers that this clearly allows for the conclusion that VG084 was exposed to both of them during the course of the events.<sup>15</sup>

As Judge Morrison notes in his dissent, this is top-down reasoning since “a finding that a witness was unable to distinguish between two perpetrators is meaningless, if not underpinned by findings supporting the inference that the witness in question had seen each.”<sup>16</sup> Thus, I believe the Majority’s interpretation of the Trial Judgement undermines the Majority’s previous findings that the number of perpetrators and the location of Sredoje Lukić at the Memić House was unknown. I also recall that the Trial Chamber attached weight to VG084’s testimony based on what VG084 *heard* from others regarding Sredoje Lukić’s presence at the Memić House, not on his capacity to actually *identify* him.<sup>17</sup> As the Majority pointed out, the Trial Chamber attached no weight to this testimony as a basis for establishing Sredoje Lukić’s conduct or location.<sup>18</sup> In these circumstances, it amounts to pure speculation whether VG084 ever saw Sredoje Lukić at the Memić House or whether the person he identified as Sredoje Lukić was in fact Sredoje Lukić, as opposed to VGD4 or any of the other perpetrators. On this basis, I would have reversed the Trial Chamber’s finding that VG084’s evidence demonstrated that Sredoje Lukić was armed and present during the Transfer to Adem Omeragić’s house.<sup>19</sup>

## 3. Huso Kurspahić

7. With respect to Huso Kurspahić in the context of the Transfer, I note that the Trial Chamber’s analysis of his credibility rests almost entirely on Hasib Kurspahić’s prior knowledge of Sredoje Lukić, which is not contested.<sup>20</sup> Huso Kurspahić admits having received his information regarding the events on Pionirska Street and the alleged perpetrators first from VG013, then from Hasib Kurspahić.<sup>21</sup> Huso Kurspahić provides the names of seven perpetrators suspected to be implicated in the Pionirska Street Incident, among which are Milan Lukić, Sredoje Lukić and Mitar

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<sup>15</sup> Appeal Judgement, para. 414.

<sup>16</sup> See Appeals Judgement, Dissenting Opinion of Judge Morrison, para. 57.

<sup>17</sup> Trial Judgement, para. 590. The finding as to VG084 having heard the Introduction was overturned unanimously on appeal, see Appeal Judgement, paras. 373-374.

<sup>18</sup> Appeal Judgement, para. 388.

<sup>19</sup> See Trial Judgement, para. 604.

<sup>20</sup> Trial Judgement, para. 591.

<sup>21</sup> Huso Kurspahić, T. 880 (1 September 2008).



Vasiljević.<sup>22</sup> According to what his father told him, all three men entered the Memić House while the four others stayed outside.<sup>23</sup>

8. First, as stressed by the Majority, the Trial Chamber found that Sredoje Lukić was around the Memić House during the event and not a direct participant in the Robbery, contrary to what Hasib Kurspahić allegedly told his son.<sup>24</sup> I also note the Trial Chamber's findings that VG013, contrary to what Huso Kurspahić reported, did not personally see Sredoje Lukić during the Transfer, despite her prior knowledge of him.<sup>25</sup> In fact, the basis of VG013's knowledge of Sredoje Lukić's presence during the Transfer was found to be unreliable by the Trial Chamber.<sup>26</sup> Finally, the Trial Chamber did not consider the character of the evidence: whether his father saw, or heard about Sredoje Lukić being present at the Transfer. Huso Kurspahić was also not questioned on this issue.<sup>27</sup> In my view, a reasonable trial chamber should have addressed those considerations and inconsistencies in its assessment of the reliability of Huso Kurspahić's hearsay evidence and in its overall conclusion. I believe, therefore, that a reasonable trial chamber could not have concluded that Sredoje Lukić was present at the Transfer based solely on the hearsay evidence of Huso Kurspahić.

#### 4. Conclusion

9. Consequently, I cannot agree with the Majority's opinion to uphold the Trial Chamber's finding that Sredoje Lukić was present during the Transfer. As it is apparent from the Judgement that the *mens rea* for the events at the Omeragić House did not precede the Transfer,<sup>28</sup> Sredoje Lukić's convictions for murder as a crime against humanity and as a violation of the laws and customs of war in relation to the events that took place at the Omeragić House cannot stand based solely on his presence at the Memić House.<sup>29</sup>

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<sup>22</sup> Huso Kurspahić, T. 879 (1 September 2008); Exh. P37, T. 804 (19 September 2001).

<sup>23</sup> Exh. P37, T. 791 (19 September 2001).

<sup>24</sup> Appeal Judgement, para. 377, *citing* Trial Judgement, para. 593.

<sup>25</sup> Trial Judgement, para. 600.

<sup>26</sup> Trial Judgement, para. 600.

<sup>27</sup> He gave evidence that his father "told me that on that date this was done by Sredoje Lukić, Milan Lukić, Mitar Vasiljević, and Bosko Djurić" (Huso Kurspahić, T. 879 (1 September 2008)) and "the three or four of them, Milan, Sredoje and Mitar entered the house whilst the rest were in the yard (Huso Kurspahić, T. 904 (1 September 2008)). I would like to emphasize that it was the burden of the Prosecutor to present such evidence (*see Ndindabahizi* Appeal Judgement, fn. 255 ("The fact that Defence counsel did not question Witness CGC as to how he could be sure that Nturusu had been killed five minutes after the witness had left the roadblock should not be held against the Appellant as it was the onus of the Prosecution to prove that the hearsay evidence was reliable and credible").

<sup>28</sup> *See* Appeal Judgement, paras. 449-451.

<sup>29</sup> This also includes all other convictions of Sredoje Lukić in relation to the events at Omeragić House.

## B. Aiding and Abetting

10. At paragraph 424 of the Appeals Judgement, the Majority states that:

In *Mrkšić and Šljivančanin*, the Appeals Chamber has clarified “that ‘specific direction’ is not an essential ingredient of the *actus reus* of aiding and abetting” and finds that there is no ‘cogent reason’ to depart from this jurisprudence.”<sup>30</sup>

As a separate opinion, I am not convinced by the Majority’s analysis on this issue. In I believe that, in this case, the finding that the armed presence of Sredoje Lukić was specifically directed to provide practical assistance to the principal perpetrators which had a substantial effect on the commission of the crimes at the Memić House<sup>31</sup> was implicit. It is therefore a non-issue in this context. However, when taking into consideration the jurisprudence as a whole in which: (i) the “specific direction” criterion is included in the definition of aiding and abetting in the *Tadić* Appeal Judgement,<sup>32</sup> *Vasiljević* Appeal Judgement,<sup>33</sup> *Simić* Appeal Judgement,<sup>34</sup> *Blajojević and Jokić* Appeal Judgement,<sup>35</sup> *Kalimanzira* Appeal Judgement,<sup>36</sup> *Rukundo* Appeal Judgement,<sup>37</sup> and *Ntawukulilyayo* Appeal Judgement;<sup>38</sup> (ii) the *Mrkšić* case remains the only case that departs from the jurisprudence without providing any cogent reasons for doing so, and, in any case, it should be considered as an *obiter dictum* which is not binding under the *stare decisis* doctrine;<sup>39</sup> (iii) the element of “specific direction” is likely implicit even without being express in the definition.

11. For the foregoing, I cannot agree with the reasons offered by the Majority for not departing from the *Mrkšić* Appeal Judgement, however, since it is a non-issue in this case for the reasons stated above, I believe this Judgement does not provide the proper circumstances to decide whether the element of “specific direction” should be excluded from the definition of aiding and abetting or not.

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<sup>30</sup> Appeals Judgement, para. 424, citing *Mrkšić and Šljivančanin* Appeal Judgement, para. 159, and *Blajojević and Jokić* Appeal Judgement, paras. 188-189.

<sup>31</sup> Appeals Judgement, para. 437.

<sup>32</sup> *Tadić* Appeal Judgement, para. 229.

<sup>33</sup> *Vasiljević* Appeal Judgement, para. 102.

<sup>34</sup> *Simić* Appeal Judgement, para. 85.

<sup>35</sup> *Blajojević and Jokić* Appeal Judgement, paras. 184–193.

<sup>36</sup> *Kalimanzira* Appeal Judgement, paras. 74–75; 86–87.

<sup>37</sup> *Rukundo* Appeal Judgement, para. 52.

<sup>38</sup> *Ntawukulilyayo* Appeal Judgement, paras. 214, 216.

<sup>39</sup> *Black’s Law Dictionary* 126 (9th ed. 2009), “A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).”

Done in English and French, the English text being authoritative.

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Judge Mehmet Güney

Done this 4th day of December 2012 at The Hague, The Netherlands.

**[Seal of the Tribunal]**

## XVI. SEPARATE OPINION OF JUDGE AGIUS

1. I wish to clarify very briefly my own position in relation to the issue of “specific direction” within the context of aiding and abetting. I refer to paragraph 424 of the Appeal Judgement, which states that:

The Appeals Chamber has previously considered within the discussion of the *actus reus* of aiding and abetting the finding that an act or omission of an aider or abettor be “specifically directed” toward the furtherance of the crimes of the principal perpetrators. The Appeals Chamber recalls, however, that “specific direction has not always been included as an element of the *actus reus* of aiding and abetting.” It further recalls its conclusion that such a finding of specific direction “will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime”. In *Mrkšić and Šljivančanin*, the Appeals Chamber has clarified “that ‘specific direction’ is not an essential ingredient of the *actus reus* of aiding and abetting” and finds that there is no “cogent reason” to depart from this jurisprudence.<sup>1</sup>

2. My disagreement is with the last sentence of this paragraph. In my opinion, while the *Mrkšić and Šljivančanin* Appeal Judgement categorically stated that “‘specific direction’ is not an essential ingredient of the *actus reus* of aiding and abetting”,<sup>2</sup> it did not “clarify” the situation at all. Rather, in my view, it appeared to represent a departure from the existing Appeals Chamber jurisprudence regarding specific direction.<sup>3</sup>

3. The Appeals Chamber in *Mrkšić and Šljivančanin* referred to the *Blagojević and Jokić* Appeal Judgement as its legal basis for stating that “the Appeals Chamber has confirmed” that specific direction is not an essential ingredient.<sup>4</sup> However, in so doing, it failed to explain how its conclusion could be based on the *Blagojević and Jokić* Appeal Judgement, which in fact did not confirm that specific direction is *not* an essential element of the *actus reus* of aiding and abetting.<sup>5</sup>

4. Indeed, the *Blagojević and Jokić* Appeal Judgement affirmed that the *Tadić* definition of aiding and abetting, which includes the notion of specific direction as an essential element, had never been explicitly departed from.<sup>6</sup> Further, the Appeals Chamber in *Blagojević and Jokić* explained that the reason why specific direction had not always been referred to as an element of the *actus reus* of aiding and abetting in the jurisprudence, was that it is “often implicit” in the conclusion “that the accused has provided practical assistance to the principal perpetrator which had

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<sup>1</sup> Appeal Judgement, para. 424 (internal citations omitted).

<sup>2</sup> *Mrkšić and Šljivančanin* Appeal Judgement, para. 159.

<sup>3</sup> See *Orić* Appeal Judgement, para. 43; *Blagojević and Jokić* Appeal Judgement, paras 127, 184-189; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para 45; *Vasiljević* Appeal Judgement, para. 102; *Tadić* Appeal Judgement, para. 229. See also *Seromba* Appeal Judgement, para. 44; *Ntagerura et al.* Appeal Judgement, para. 370; *Ntakirutimana* Appeal Judgement, para 530.

<sup>4</sup> See *Mrkšić and Šljivančanin* Appeal Judgement, para. 159, fn. 566, citing *Blagojević and Jokić* Appeal Judgement, paras 189, and referring also to *Blagojević and Jokić* Appeal Judgement, para. 188.

<sup>5</sup> See *Blagojević and Jokić* Appeal Judgement, paras 184-189. See also *Blagojević and Jokić* Appeal Judgement, para. 127.

a substantial effect on the commission of the crime”.<sup>7</sup> In addition, in an earlier part of the same judgement, the Appeals Chamber stated that:

The Appeals Chamber has explained that an aider and abettor carries out acts *specifically directed* to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime.<sup>8</sup>

In my view, therefore, *Blagojević and Jokić* does not stand for the categorical principle stated in *Mrkšić and Šljivančanin*.

5. For these reasons, I find myself unable to agree with the final part of the summary of the jurisprudence regarding specific direction contained in paragraph 424, or to consider that the *Mrkšić and Šljivančanin* Appeal Judgement does not at least require a thorough examination and further clarification.

6. However, in the circumstances of the present case, I am nonetheless satisfied that, although specific direction was not explicitly addressed by the Trial Chamber, such a finding is implicit – in a most obvious way – in its conclusions that Sredoje Lukić had provided practical assistance to the principal perpetrators which had a substantial effect on the commission of the crimes.<sup>9</sup>

Done in English and French, the English text being authoritative.

Done this fourth day of December 2012,  
at The Hague,  
The Netherlands.

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Judge Carmel Agius

**[Seal of the Tribunal]**

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<sup>6</sup> *Blagojević and Jokić* Appeal Judgement, para. 189.

<sup>7</sup> *Blagojević and Jokić* Appeal Judgement, para. 189.

<sup>8</sup> *Blagojević and Jokić* Appeal Judgement, para. 127 (emphasis added).

<sup>9</sup> See Trial Judgement, paras 932-934, 984-986, 1027-1035.

## **XVII. JOINT DISSENTING OPINION OF JUDGE POCAR AND JUDGE LIU**

1. In this Judgement, the Appeals Chamber, by majority, reverses Sredoje Lukić's convictions for committing cruel treatment as a violation of the laws or customs of war and other inhumane acts as a crime against humanity as well as for aiding and abetting persecutions as a crime against humanity for his crimes committed at the Uzamnica Camp.<sup>1</sup> We respectfully dissent. The Majority appears to conduct a *de novo* review of the evidence without demonstrating any error on the part of the Trial Chamber. Its approach in this regard is not, in our view, consistent with the Tribunal's consolidated standard of review on appeal. The Majority's reasoning is premised on the misconceived assumption that the Trial Chamber erred in its evaluation of the identification evidence of a single witness, Islam Kustura. The Majority justifies its reversal of Sredoje Lukić's convictions by relying on the domino effect created by this finding.

2. The Majority concludes that the Trial Chamber erred in relying on Kustura's identification evidence of Sredoje Lukić at the Uzamnica Camp, absent corroboration.<sup>2</sup> It claims that it "is not satisfied that the Trial Chamber exercised appropriate caution when basing Sredoje Lukić's conviction on Kustura's evidence despite Kustura's overstatement in relation to Sredoje Lukić's presence in the Uzamnica Camp".<sup>3</sup> However, this startling conclusion is without foundation. Having noted that the Trial Chamber considered minor inconsistencies in the evidence of Kustura, the Majority declines to explain why the Trial Chamber's careful and considered assessment of Kustura's testimony was unreasonable. The Majority's conclusion appears to come from nowhere.

3. The Trial Chamber reasonably relied on Kustura's identification evidence. In particular, it noted corroborative evidence that whenever Sredoje Lukić went to Uzamnica Camp, he was "always in the company" of Milan Lukić.<sup>4</sup> Kustura's evidence was only considered to contain an "overstatement" insofar as he suggested that Sredoje Lukić "always" accompanied Milan Lukić to the Uzamnica Camp, since Sredoje Lukić did not come to the camp as often as Milan Lukić.<sup>5</sup> The Trial Chamber relied on the evidence of Kustura as well as that of Adem Berberović and Nurko Dervišević to find that "Sredoje Lukić was seen at the camp a few times."<sup>6</sup> Moreover, the Trial Chamber noted that "Dervišević and Islam Kustura knew Sredoje Lukić as a police officer before the war" and was "convinced that, based on their prior knowledge of Sredoje Lukić, Nurko

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<sup>1</sup> Appeal Judgement, paras 637, 672.

<sup>2</sup> Appeal Judgement, paras 589-590.

<sup>3</sup> Appeal Judgement, para. 589.

<sup>4</sup> Trial Judgement, para. 834.

<sup>5</sup> Trial Judgement, para. 834.

<sup>6</sup> Trial Judgement, para. 834.

Dervišević and Islam Kustura were able to recognise Sredoje Lukić in the camp.”<sup>7</sup> In so doing, the Trial Chamber explicitly rejected Sredoje Lukić’s submission that Kustura’s assessment of the difference in height between Sredoje Lukić and Milan Lukić “detract[ed] from the credible evidence that Islam Kustura had prior knowledge of Sredoje Lukić, which enabled him to recognise Sredoje Lukić in the Uzamnica camp.”<sup>8</sup> Thus, the Trial Chamber carefully assessed Kustura’s identification evidence. The Trial Chamber was therefore entitled to rely on Kustura’s evidence, absent corroboration. Moreover, contrary to what the Majority appears to state,<sup>9</sup> the Trial Chamber did not find Kustura’s testimony “unsatisfactory” with respect to his account of Sredoje Lukić’s presence and acts at Uzamnica Camp. Consequently, there is no basis for finding that the Trial Chamber erred in convicting Sredoje Lukić for beating Kustura based on Kustura’s evidence alone.

4. The Majority proceeds to find that the Trial Chamber erred in holding Sredoje Lukić responsible for beating Dervišević several times based entirely on its finding that Kustura’s evidence cannot be relied upon without corroboration.<sup>10</sup> Given that the basis for undermining Kustura’s evidence is without foundation, the Majority’s finding with respect to Dervišević is equally unfounded. Moreover, in addition to Kustura’s evidence, the Trial Chamber explicitly considered testimony from Berberović “that Nurko Dervišević was beaten by Sredoje Lukić on several occasions”, as well as Dervišević’s own statements from 1998 and 2008.<sup>11</sup> In these circumstances, it was clearly within the Trial Chamber’s discretion to find that Sredoje Lukić was responsible for beating Dervišević on a number of occasions.<sup>12</sup>

5. The Majority also invokes its findings that the Trial Chamber erred in relying on Kustura’s evidence in the absence of corroboration and that Dervišević was beaten several times to undermine the finding that Sredoje Lukić beat “other detainees”.<sup>13</sup> Again, in our view, this is wrong. Furthermore, Berberović was also beaten by Sredoje Lukić,<sup>14</sup> and although he was not specifically named in the Indictment, we consider that he constitutes one of the “other detainees”.

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<sup>7</sup> Trial Judgement, para. 837.

<sup>8</sup> Trial Judgement, para. 837. Furthermore, the Majority appears to apply a higher standard in its review of Kustura’s evidence with respect to the Appellants’ height than that applied to the evidence of Berberović in this respect. See Appeal Judgement, para. 596. Moreover, we note that Sredoje Lukić merely reiterates the arguments he raised at trial, on appeal, without demonstrating that the Trial Chamber erred in this regard.

<sup>9</sup> Appeal Judgement, para. 609.

<sup>10</sup> Appeal Judgement, paras 616, 619.

<sup>11</sup> Trial Judgement, para. 836.

<sup>12</sup> In this regard, we note that it was within the Trial Chamber’s discretion to prefer relevant documentary evidence over witness testimony.

<sup>13</sup> Appeal Judgement, paras 622, 624-626. Moreover, we also disagree with the Majority’s evaluation of Berberović’s evidence in relation to Sredoje Lukić beating other detainees as we believe that his evidence is corroborated by that of Kustura. See Appeal Judgement, para. 623.

<sup>14</sup> Trial Judgement, paras 789, 841.

6. Consequently, we would have affirmed Sredoje Lukić's convictions for aiding and abetting the beatings of Kustura, and the other detainees. Moreover, we consider that the Trial Chamber did not err in finding that Dervišević was beaten several times by Sredoje Lukić at the Uzamnica Camp.

7. Furthermore, we disagree with the Majority's finding that the beating of Dervišević on one occasion was insufficient to support a conviction for cruel treatment as a violation of the laws or customs of war as well as persecutions and other inhumane acts as crimes against humanity.

8. First, we consider that the Majority misrepresents the nature of Dervišević's beating by Sredoje Lukić. Although the Majority professes to rely on Dervišević's *viva voce* testimony, its description of Dervišević's beating gives the distinct impression that he merely received a single slap from Sredoje Lukić.<sup>15</sup> By contrast, Dervišević testified that Sredoje Lukić "hit" him "several times".<sup>16</sup>

9. Second, contrary to the Majority's finding, we consider that in the context of a detention camp, Sredoje Lukić's beating of Dervišević caused him serious bodily or mental harm, including mental or physical suffering or injury, or constituted a serious attack on human dignity and, therefore, amounted to the crimes of other inhumane acts as a crime against humanity and cruel treatment as a violation of the laws or customs of war. In this regard, we note that the beating described by Dervišević in his testimony did not occur in isolation. Rather, it was inflicted in the confines of a detention camp where Dervišević was detained for 28 months.<sup>17</sup> Moreover, he was hit several times by Sredoje Lukić, a former policeman, whom he knew personally.<sup>18</sup> In these circumstances, we disagree that no reasonable trier of fact could have found that this beating did not cause serious bodily or mental harm and, consequently, could not also constitute the crime of persecutions as a crime against humanity.

10. In view of the above, we cannot agree with the Majority's decision to reverse Sredoje Lukić's convictions for committing cruel treatment as a violation of the laws or customs of war and other inhumane acts as a crime against humanity as well as for aiding and abetting persecutions as a crime against humanity for his crimes committed at the Uzamnica Camp. We would have consequently affirmed his convictions and his sentence.

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<sup>15</sup> See, e.g., Appeal Judgement, paras 627, 632-634.

<sup>16</sup> Dervišević, T. 1963, 2007 (19 September 2008).

<sup>17</sup> See Trial Judgement, para. 786.

<sup>18</sup> See Trial Judgement, paras 812, 837.



Done in English and French, the English text being authoritative.

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Judge Fausto Pocar

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Judge Liu Daqun

Done this fourth day of December 2012 at The Hague, The Netherlands.

**[Seal of the Tribunal]**

## **XVIII. DISSENTING OPINION OF JUDGE MORRISON**

1. In this Judgement, the Majority of the Appeals Chamber affirms Sredoje Lukić's convictions for crimes committed at the Memić House and the Omeragić House on Pionirska Street on 14 June 1992 ("Pionirska Street Incident").<sup>1</sup> For the reasons set out below, I respectfully disagree with the Majority of the Appeals Chamber's reasoning and conclusions in upholding the finding that Sredoje Lukić was identified during the Pionirska Street Incident, and, by consequence, believe that Sredoje Lukić's convictions in respect of this incident should have been overturned.

### **A. Introduction**

2. The Trial Chamber found that Sredoje Lukić was armed and present at the Memić House when crimes were committed during the afternoon of 14 June 1992.<sup>2</sup> It further found that, in the evening of the same day, Sredoje Lukić was amongst the men who returned to the Memić House and participated in the transfer of the group to the Omeragić House ("Transfer").<sup>3</sup> On the basis of these findings, the Trial Chamber found that Sredoje Lukić aided and abetted the crimes of murder<sup>4</sup> and cruel treatment<sup>5</sup> as violations of the laws or customs of war, as well as murder,<sup>6</sup> persecutions,<sup>7</sup> and other inhumane acts<sup>8</sup> as crimes against humanity. On appeal, Sredoje Lukić has argued that the Trial Chamber erred when it found that he was identified during the Pionirska Street Incident, first at the Memić House, and then during the Transfer.<sup>9</sup>

3. The Trial Chamber based its identification findings on the evidence of four witnesses.<sup>10</sup> Three of these witnesses, VG018, VG038 and VG084, were survivors of the incident;<sup>11</sup> the fourth, Huso Kurspahić, gave evidence regarding the recollections of his father, Hasib Kurspahić, a survivor who had died prior to trial.<sup>12</sup>

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<sup>1</sup> Appeal Judgement, para. 467.

<sup>2</sup> Trial Judgement, paras 593, 637.

<sup>3</sup> Trial Judgement, paras 607, 637.

<sup>4</sup> Trial Judgement, paras 928-934, 1105, Judge Robinson dissenting (Trial Judgement, para. 1113).

<sup>5</sup> Trial Judgement, paras 982-986, 1104.

<sup>6</sup> Trial Judgement, paras 928-934, 1104, Judge Robinson dissenting (Trial Judgement, para. 1113).

<sup>7</sup> Trial Judgement, paras 1027-1035, 1104, Judge Robinson dissenting as to the persecutory act of murder.

<sup>8</sup> Trial Judgement, paras 982-986, 1104.

<sup>9</sup> Sredoje Lukić Appeal Brief, paras 38-91, 211-222; Sredoje Lukić Reply Brief, paras 9-37, 70-80 (challenging the finding of identification at the Memić House); Sredoje Lukić Appeal Brief, paras 92-136, 211-222; Sredoje Lukić Reply Brief, paras 38-45, 70-80 (challenging the finding of identification during the Transfer).

<sup>10</sup> Trial Judgement, paras 593, 607.

<sup>11</sup> Trial Judgement, para. 332.

<sup>12</sup> Trial Judgement, para. 334.

4. The Trial Chamber found that none of the eyewitnesses had known Sredoje Lukić in advance of 14 June 1992.<sup>13</sup> When concluding that Sredoje Lukić was identified at the Memić House, it relied upon: (i) VG018 and VG084's evidence that they heard one of the perpetrators enter the house and introduce himself as Sredoje Lukić;<sup>14</sup> (ii) VG038 and VG084's evidence that unnamed persons in the house had told them that Sredoje Lukić was one of the men who came to the house;<sup>15</sup> and (iii) Huso Kurspahić's evidence that his father had told him that Sredoje Lukić was present.<sup>16</sup> When finding that Sredoje Lukić was identified during the Transfer, the Trial Chamber relied primarily upon: (i) VG038's and VG084's evidence that Sredoje Lukić was present;<sup>17</sup> and (ii) Huso Kurspahić's evidence that his father had told him that Sredoje Lukić was one of the men who returned to the Memić House in the evening.<sup>18</sup> It also placed some corroborative weight upon VG018's evidence that she had recognised Sredoje Lukić's voice during the Transfer, and heard people shouting that the "Lukic's [sic] were coming again."<sup>19</sup>

5. The Appeals Chamber has unanimously found that the Trial Chamber erred in concluding that VG084 heard Sredoje Lukić introduce himself at the Memić House, and by failing to treat VG038 and VG084's hearsay identification evidence with due caution.<sup>20</sup> According to the Majority of the Appeals Chamber, however, these errors did not impact upon the finding that Sredoje Lukić was identified at the Memić House.<sup>21</sup> The Majority has also found no error in the Trial Chamber's conclusion that Sredoje Lukić was identified during the Transfer.<sup>22</sup>

6. I must respectfully disagree with the Majority's conclusions and reasoning. By consequence of the errors found on appeal, there was only one piece of direct identification evidence locating Sredoje Lukić at the Memić House. This evidence, VG018's testimony that one of perpetrators introduced himself as Sredoje Lukić upon entry into the house, was *prima facie* weak, uncorroborated, and directly contradicted by the evidence of other witnesses deemed reliable by the Trial Chamber. As VG038 and VG084's hearsay identification evidence lacked any indicia of reliability, and considering the other inadequacies in the identification evidence that have been raised on appeal, it is my firm opinion that the finding that Sredoje Lukić was identified at the Memić House should have been overturned.

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<sup>13</sup> As to VG018, *see* Trial Judgement, para. 586; as to VG084, *see* Trial Judgement, para. 589; as to the Trial Chamber's finding that VG038's claim that he had recognised Sredoje Lukić was unreliable, *see* Trial Judgement, paras 583-585.

<sup>14</sup> Trial Judgement, paras 588-590.

<sup>15</sup> Trial Judgement, paras 585, 590.

<sup>16</sup> Trial Judgement, para. 591.

<sup>17</sup> Trial Judgement, paras 601, 604.

<sup>18</sup> Trial Judgement, para. 605.

<sup>19</sup> Trial Judgement, para. 603.

<sup>20</sup> Appeal Judgement, paras 374, 387.

<sup>21</sup> Appeal Judgement, paras 375, 388.

<sup>22</sup> Appeal Judgement, para. 417.

7. As to the identification of Sredoje Lukić as a participant in the Transfer, this rested primarily upon the hearsay identification made to VG038 and VG084 earlier that day, and was, in that sense, flawed *ab initio*. In addition, however, there is no finding or evidence to explain how what VG038 and VG084 were told about the perpetrators at the Memić House, had established their ability to recognise Sredoje Lukić independently by the evening of that day. Therefore, the finding that Sredoje Lukić was identified during the Transfer should also, in my view, have been overturned.

8. My dissent is unusual, first, in that it takes a firm position on the question of identification, and, further, reaches a conclusion that is entirely in opposition to the position reached by the Trial Chamber. Identification findings are, in their essence, findings of fact. It is well established that there is a very high threshold to be met before findings of fact will be overturned on appeal, due to the deference granted to trial chambers in this regard.<sup>23</sup> I am entirely in accordance with this principle: effective appellate proceedings are dependent upon it. However, deference to the Trial Chamber cannot be infinite. It is well established that the Appeals Chamber can, and must, step in where, as is the case here, factual findings are tainted by multiple errors of law and fact.<sup>24</sup>

9. This brings me to the second respect in which this dissent is unusual. A dissent, by its nature, tends to reflect a divergence; a position taken that is different from the norm. In the present case, in my view, it is the position taken by the Majority that is atypical. Most compelling in this regard is the Majority's consideration of VG038 and VG084's hearsay evidence: when finding this evidence to be reliable, the Majority reaches a conclusion that diverges significantly from historic jurisprudence, and does so almost entirely absent consideration of such jurisprudence. Consistency requires that any extreme shift in position in the jurisprudence be fully reasoned and considered; in the present case, with respect, it was not. Furthermore, it is well established that identification challenges on appeal should be assessed on the basis of whether, considering the totality of evidence before it, it was reasonable for a trial chamber to conclude that an accused was identified beyond reasonable doubt. However, this overall assessment must, as a matter of logic, take account of the impact of any trial chamber errors established on appeal. The Majority of the Appeals Chamber in the present case considers the impact of identified errors only on a piecemeal basis, and does not direct itself to the key question as to their composite impact on identification findings. Again, this represents a surprising, and unreasoned, shift from precedent.

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<sup>23</sup> *Boškoski and Tarčulovski* Appeal Judgement, para. 14, referring to *Mrkšić and Šljivančanin* Appeal Judgement, para. 14; *Kupreškić et al.* Appeal Judgement, para. 30.

<sup>24</sup> See Appeal Judgement, paras 12-14.

10. I will commence this dissent by recalling the standards governing questions of identification at trial and appeal, before proceeding to explain why, in my view, the Majority has erred in upholding the finding that Sredoje Lukić was identified during the Pionirska Street Incident.

## **B. The Assessment of Identification Evidence at Trial and Appeal**

### **1. Findings of identification at trial**

11. It is a truism that all criminal cases turn on the question of identification. If an accused, having not admitted to his/her involvement in a crime, cannot be identified beyond reasonable doubt in connection with that crime, the question of criminal liability becomes redundant. By consequence, the assessment of identification evidence is one of the most important tasks before any trial chamber.

12. Neither the Rules nor the jurisprudence of the Tribunal require a particular type of identification evidence.<sup>25</sup> However, whilst a chamber may “take the approach it considers most appropriate for the assessment of evidence”,<sup>26</sup> it must carefully evaluate identification evidence.<sup>27</sup> In recognition of this, strict standards have been developed to govern the assessment of identification evidence.

13. Identifications offered on the basis of direct evidence, *i.e.* on the basis of what a credible witness saw of or heard from an accused at the crime scene, are, *prima facie*, the most reliable. Of these, identifications based on an eyewitness’s ability to recognise an accused, due to his or her established prior knowledge of the accused, logically, tend to have the most probative value.<sup>28</sup> A witness’s ability to recognise an accused need not, however, precede the commission of a crime: “where a crime is committed over a long period of time and a witness has acquired sufficient knowledge of the accused during that period.”<sup>29</sup> An eyewitness might also reliably identify an accused on the basis of what he/she saw of or heard from the accused at the crime site.

14. Identifications may also be made on the basis of hearsay evidence, *i.e.* on the basis of what an out-of-court author said about an accused’s involvement in a crime. The operative principle in the realm of international criminal adjudication is that hearsay evidence is *prima facie* admissible, but the weight and probative value to be accorded to it “will usually be less than that accorded to

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<sup>25</sup> *Kalimanzira* Appeal Judgement, para. 96. See also *Kamuhanda* Appeal Judgement, para. 298.

<sup>26</sup> *Kalimanzira* Appeal Judgement, para. 96, referring to *Rutaganda* Appeal Judgement, para. 207.

<sup>27</sup> See *Kupreškić et al.* Appeal Judgement, para. 34.

<sup>28</sup> The distinction between categories of direct evidence is most usually discussed with regard to the permissible weight to be placed upon in-court identifications (see, *e.g.*, *Tadić* Trial Judgement, paras 545-546; Trial Judgement, paras 31-34).

<sup>29</sup> Trial Judgement, para. 34.

the evidence of a witness who has given it under oath and who has been cross-examined.”<sup>30</sup> In assessing the probative value of hearsay evidence, a trial chamber should consider indicia of reliability, which have been held to include the source of information,<sup>31</sup> the precise character of the information,<sup>32</sup> and whether other evidence corroborates the hearsay evidence.<sup>33</sup> Hearsay evidence is often accepted only in corroboration of strong direct evidence,<sup>34</sup> and significant caution will be exercised before a conviction is based solely on hearsay evidence.<sup>35</sup>

15. Regardless of the type of identification offered, direct or hearsay, one of the factors that should generally be considered when assessing the evidence is whether the evidence was given under “difficult circumstances.”<sup>36</sup> If so, it is well established that a trial chamber has a duty to apply extra rigour in providing a reasoned opinion.<sup>37</sup> In particular, the trial chamber must “carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence.”<sup>38</sup>

16. Finally, the ultimate weight to be attached to each piece of identification evidence is not to be determined in isolation.<sup>39</sup> It is the cumulative effect of the evidence, *i.e.* the totality of evidence bearing on the identification of an accused, which must be weighed.<sup>40</sup>

## 2. The assessment of identification errors on appeal

17. Alleged errors with regard to identification evidence on appeal are, most often, alleged errors of fact. It may be argued, for example, that a trial chamber erred in its consideration of witness reliability or credibility; by misinterpreting evidence, by ignoring inconsistencies in the

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<sup>30</sup> *Kalimanzira* Appeal Judgement, para. 96, citing *Karera* Appeal Judgement, para. 39. See also *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

<sup>31</sup> *Karera* Appeal Judgement, para. 39; *Nahimana et al.* Appeal Judgement, para. 831; *Ndindabahizi* Appeal Judgement, para. 115 (about “unverifiable hearsay” evidence); *Semanza* Appeal Judgement, para. 159; *Rutaganda* Appeal Judgement, paras 154, 156, 159.

<sup>32</sup> *Karera* Appeal Judgement, para. 39; *Ndindabahizi* Appeal Judgement, para. 115.

<sup>33</sup> *Karera* Appeal Judgement, para. 39; *Nahimana et al.* Appeal Judgement, para. 473 (for an illustration of hearsay testimonies corroborating each other); *Gacumbitsi* Appeal Judgement, para. 115.

<sup>34</sup> See, e.g., *Ndahimana* Trial Judgement, para. 138 (“[...] the Trial Chamber notes that it is reluctant to rely on hearsay evidence, and will only do so where such evidence corroborates first-hand evidence.”); *Milutinović et al.* Trial Judgement, Vol. 2, para. 427 (“The Trial Chamber finds that, although Sweeney’s evidence is based on hearsay to a great extent, it can rely on it since it corroborates other direct evidence concerning some of those involved in the attack.”).

<sup>35</sup> *Kalimanzira* Appeal Judgement, paras 99, 199; *Muvunyi I* Appeal Judgement, para. 70.

<sup>36</sup> *Haradinaj et al.* Appeal Judgement, paras 152, 156, referring to *Kupreškić et al.* Appeal Judgement, paras 39-40.

<sup>37</sup> *Kupreškić et al.* Appeal Judgement, para. 39.

<sup>38</sup> *Haradinaj et al.* Appeal Judgement, para. 152, referring to *Kupreškić et al.* Appeal Judgement, para. 39 (emphasis added).

<sup>39</sup> *Limaj et al.* Appeal Judgement, para. 153.

<sup>40</sup> *Limaj et al.* Appeal Judgement, para. 153.

witness's own account, or by failing to reconcile the account offered by one witness with the accounts of other, credible witnesses. When considering alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness.<sup>41</sup> The Appeals Chamber will “not lightly disturb findings of fact by a Trial Chamber”,<sup>42</sup> and will only substitute its own findings for that of a trial chamber when no reasonable trier of fact could have reached the original decision.<sup>43</sup> Further, only an error of fact that has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the trial chamber.<sup>44</sup>

18. Identification challenges on appeal may also, however, go to alleged errors of law. As in the present case, it may be alleged that a trial chamber erred in law in its failure to provide a reasoned opinion, or misapplied the appropriate legal standard when relying on hearsay evidence. If an error has been made in the legal standard applied, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.<sup>45</sup> If the factual findings are insufficient, the Appeals Chamber will then apply the correct legal standard to the evidence contained in the trial record in order to determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by an appellant.<sup>46</sup> In such a case, the Appeals Chamber will not review the entire trial record *de novo*. Instead, it will only take into account evidence referred to in the body of the Trial Judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, additional evidence admitted on appeal.<sup>47</sup>

### **C. The identification of Sredoje Lukić at the Memić House**

#### **1. The basis for identification**

19. The Trial Chamber found that Sredoje Lukić was armed and present “at” the Memić House when the persons inside were subjected to crimes.<sup>48</sup> When reaching this conclusion, the Trial

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<sup>41</sup> *Haradinaj et al.* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 13; *D. Milošević* Appeal Judgement, para. 15.

<sup>42</sup> *Boškoski and Tarčulovski* Appeal Judgement, para. 14, referring to *Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 14; *Simić* Appeal Judgement, para. 11; *Krnojelac* Appeal Judgement, para. 11.

<sup>43</sup> *Boškoski and Tarčulovski* Appeal Judgement, para. 13, referring to *inter alia* *Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 13.

<sup>44</sup> *Boškoski and Tarčulovski* Appeal Judgement, para. 13, referring to *inter alia* *Milošević* Appeal Judgement, para. 15; *Krajišnik* Appeal Judgement, para. 14.

<sup>45</sup> *Boškoski and Tarčulovski* Appeal Judgement, para. 11, referring to *inter alia* *Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12.

<sup>46</sup> *Boškoski and Tarčulovski* Appeal Judgement, para. 11, referring to *inter alia* *Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12.

<sup>47</sup> *Boškoski and Tarčulovski* Appeal Judgement, para. 12, referring to *inter alia* *Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12.

<sup>48</sup> Trial Judgement, paras 593, 637.

Chamber relied upon: (i) VG018's and VG084's evidence that one of the perpetrators introduced himself as Sredoje Lukić upon arrival at the house;<sup>49</sup> (ii) VG038's and VG084's evidence that other persons in the house told them that Sredoje Lukić was one of the perpetrators;<sup>50</sup> and (iii) Huso Kurspahić's evidence that his father, Hasib Kurspahić, had told him that Sredoje Lukić was one of the perpetrators.<sup>51</sup>

## 2. The findings on appeal

20. The Appeals Chamber has unanimously found that the Trial Chamber committed two errors in its evaluation of the identification evidence relating to Sredoje Lukić at the Memić House. First, it has found an error of fact in the Trial Chamber's conclusion that VG084 gave evidence that he heard Sredoje Lukić introduce himself, since, under cross-examination, VG084 retracted this evidence and explained that he was able to identify Sredoje Lukić only on the basis of what others had told him.<sup>52</sup> Second, the Appeals Chamber has found that the Trial Chamber erred in law, by failing to treat VG038 and VG084's hearsay evidence with due caution.<sup>53</sup>

21. Whilst I fully agree with these findings, I must respectfully diverge from the Majority in its assessment of the impact of the errors identified. First, as to VG038's and VG084's hearsay evidence, it is my view that the Majority fails to take the necessary steps to evaluate the impact of the error identified on appeal. Further, had appropriate steps been taken, it would have been observed that the error was not remediable: no reasonable trier of fact could have relied upon VG038's and VG084's hearsay evidence as an independent source of identification. Second, taking into account the errors found on appeal, it is my view that the Appeals Chamber should have concluded that the evidence, taken as a whole, did not identify Sredoje Lukić beyond reasonable doubt at the Memić House.

### 3. No reasonable trier of fact could have relied upon VG038 and VG084's hearsay evidence as an independent source of identification

22. In light of the findings at trial and appeal, the identification of Sredoje Lukić at the Memić House by VG038 and VG084 rested solely upon hearsay: *i.e.* upon what they were told about the perpetrators by other persons in the house.

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<sup>49</sup> Trial Judgement, paras 588-590.

<sup>50</sup> Trial Judgement, paras 585, 590.

<sup>51</sup> Trial Judgement, para. 591.

<sup>52</sup> Appeal Judgement, para. 374.

<sup>53</sup> Appeal Judgement, para. 387.



23. VG038 testified at trial that he recognised Sredoje Lukić at the Memić House, having known him in his capacity as a local policeman.<sup>54</sup> In light of VG038's subsequent change in testimony under cross-examination, and the fact that he had stated in a prior witness statement that he had not known Sredoje Lukić before 14 June 1992, the Trial Chamber found that VG038 had no prior knowledge of Sredoje Lukić.<sup>55</sup> It found, however, that VG038 reliably identified Sredoje Lukić, on the basis of his evidence that "[o]ther persons [...] told [him] who Sredoje Lukić was."<sup>56</sup> As to VG084, the Appeals Chamber has overturned the finding that VG084 heard a perpetrator introduce himself as Sredoje Lukić, as he changed his evidence on this issue under cross-examination.<sup>57</sup> However, the Trial Chamber also relied upon VG084's identification of Sredoje Lukić on the basis that "other persons in the [Memić] house spoke of Sredoje Lukić by name [...]."<sup>58</sup> This portion of VG084's evidence becomes, by consequence of the error identified on appeal, the entire basis for his identification of Sredoje Lukić.

24. The Appeals Chamber has found that the Trial Chamber erred in law in its treatment of VG038's and VG084's hearsay evidence, reasoning as follows:

[T]he Trial Chamber did not specifically address the reliability of the source of VG038's hearsay evidence. The Trial Chamber simply stated that "others" at the Memić House told the witness who Sredoje Lukić was. Similarly, the Trial Chamber found that VG084 was told by "others" about Sredoje Lukić, but did not discuss the source of this hearsay evidence. The Appeals Chamber recalls that where the source of identification evidence is hearsay, a trial chamber must duly consider the relevant criteria in assessing the weight or the probative value to be accorded to this evidence. The Trial Chamber erred in failing to do so.<sup>59</sup>

25. I concur that the Trial Chamber erred: indeed, I consider that it would have been preferable to couch this error in far stronger terms. The Majority's analysis presumes that the Trial Chamber recognised that it was considering hearsay identification evidence, but failed to render express the factors it assessed when so doing. In fact, the reasoning adopted by the Trial Chamber clearly indicates that it did not recognise that the identification offered by VG038 and VG084 rested upon hearsay at all. The evidence was not described as hearsay,<sup>60</sup> nor did the Trial Chamber apply any caution whatsoever in its treatment of it in practice.<sup>61</sup> The fact that the two witnesses were eyewitnesses to the events, and gave direct evidence as to their aural and visual experiences, seems to have led to the assumption on the part of the Trial Chamber that it was assessing direct, rather

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<sup>54</sup> Trial Judgement, para. 582.

<sup>55</sup> Trial Judgement, para. 582.

<sup>56</sup> Trial Judgement, para. 585.

<sup>57</sup> Appeal Judgement, para. 374.

<sup>58</sup> Trial Judgement, para. 590.

<sup>59</sup> Appeal Judgement, para. 387 (footnotes omitted).

<sup>60</sup> Compare, for example, the Trial Chamber's acknowledgement that Huso Kurspahić's evidence was hearsay evidence (*see, e.g.*, Trial Judgement, para. 605).

than hearsay, identification evidence. This was a serious error, rather than a mere oversight, and, with respect, should have been fully articulated as such on appeal.

26. However, it is in the steps taken to address the identified error, and in the conclusions reached following this process, that I diverge significantly from the Majority's position. As the Appeals Chamber has found that the Trial Chamber committed an error of law, it was first required to articulate the appropriate legal standard.<sup>62</sup> The Majority correctly, if briefly, articulates the legal standard, observing that a trial chamber must consider indicia of reliability when deciding the probative weight to be placed on hearsay evidence.<sup>63</sup>

27. In explaining why it considers the error to be remediable on appeal, the Majority then reasons as follows:

Elsewhere in the Judgement, the Trial Chamber noted VG084's testimony that an estimated 20% to 25% of the Koritnik Group knew the two men who came into the room. This is further supported by the Trial Chamber's consideration of the testimony of VG013, who had prior knowledge of Sredoje Lukić and stated that Sredoje Lukić patrolled as a police officer through Koritnik village. Consequently, a number of individuals in the Memić House were in a position to identify Sredoje Lukić. The [Majority] considers that this provides a reasonable degree of reliability to the unidentified sources of hearsay evidence.<sup>64</sup>

28. In accordance with the standard of appellate review, after articulating the appropriate legal standard, the Appeals Chamber was required to then review the relevant factual findings in the Trial Judgement, to ascertain whether it was satisfied that the Trial Chamber could have reached the conclusion it did, on the facts before it.<sup>65</sup>

29. The first problem with the analysis conducted by the Majority of the Appeals Chamber is that it fails to have recourse to any findings of the Trial Chamber. Instead, the conclusions therein are based upon extracts taken from the Trial Chamber's summaries of evidence contained in the Prosecution case,<sup>66</sup> portions of evidence which were not subject to findings of the Trial Chamber. The point is far from simply academic. Only once the Appeals Chamber has pronounced itself unable to remedy an error of law on the basis of the trial chamber's findings should it then proceed to apply the correct legal standard to the evidence contained in the trial record.<sup>67</sup> If it takes this

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<sup>61</sup> Compare, for example, the Trial Chamber's careful weighting of Hasib Kurspahić's ability to recognise Sredoje Lukić, when explaining its decision to find Huso Kurspahić's hearsay identification reliable (*see, e.g.*, Trial Judgement, paras 591, 605).

<sup>62</sup> *Haradinaj et al.* Appeal Judgement, para. 11; *Boškoski and Tarčulovski* Appeal Judgement, para. 11; *Milošević* Appeal Judgement, para. 14.

<sup>63</sup> Appeal Judgement, para. 387.

<sup>64</sup> Appeal Judgement, para. 388 (internal citations omitted).

<sup>65</sup> *Haradinaj et al.* Appeal Judgement, para. 11; *Boškoski and Tarčulovski* Appeal Judgement, para. 11; *Milošević* Appeal Judgement, para. 14.

<sup>66</sup> *See* Appeal Judgement, para. 388, referring to Trial Judgement, paras 405, 409.

<sup>67</sup> *See* Appeal Judgement, para. 12.

course of action, it will apply a different standard: considering whether it was, itself, convinced beyond reasonable doubt as to the finding challenged by the appellant.

30. Even if the factors referred to by the Majority had been the subject of Trial Chamber findings, however, a more fundamental issue arises in the question the Majority asks, and answers, in seeking to address the error identified on appeal.

31. The Majority focuses its analysis on what might be described as the “character” of the hearsay identification evidence: specifically, upon the claim to recognise Sredoje Lukić that was made by unnamed persons in the Memić House. It concludes, on the basis of VG013’s evidence that Sredoje Lukić had patrolled the village of Koritnik, that it was reasonable to assume that “a number of persons” in the house “were in a position” to identify Sredoje Lukić.<sup>68</sup> This analysis, in its view, provides a “reasonable” indicium of reliability to the hearsay identification.

32. It is my view that, on the basis of the evidence considered by the Majority, it is far from clear that a “number of persons”, let alone 20-25% of them, “were in a position” to identify Sredoje Lukić in the Memić House.<sup>69</sup> What is key, however, is that even if this evidence *had* shown that a percentage of persons from Koritnik village were likely to have known Sredoje Lukić, this conclusion does nothing to address the crux of the issue on appeal. As with any identification resting upon claimed recognition, whether such claim is accepted will depend upon careful evaluation of an author’s claim to connection with the accused: where, as is the case here, such authors are out of court, an extra standard of care must be applied before relying on the claimed recognition. What is indisputable, when considering claims to prior knowledge made by either eyewitness or out of court author, is that the heart of the matter will be whether the person(s) who actually *did* claim to recognise an accused, *did* in fact do so. This analysis must, self-evidently, be a subjective one. The Majority, with all due respect, entirely fails to ask itself the question necessary to address the error identified on appeal.

33. Further, upon review of the Trial Chamber’s findings, as well as, in their absence, the evidence, it emerges that it is impossible to remedy the error identified on appeal. There are, to put it simply, no subjective indicia of reliability whatsoever to support the hearsay identification. The

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<sup>68</sup> Appeal Judgement, para. 388.

<sup>69</sup> The relevant portion of VG013’s evidence indicates only that Sredoje Lukić had come to the village “more than once” (See Trial Judgement, para. 412. See also Trial Judgement, para. 409). This does not, in my view, establish a pattern of visitation that would lead to the expectation that 20-25% of persons from the village would have known him. I also note that the Trial Chamber makes no findings that would support the inference that it was part of Sredoje Lukić’s duties as a Višegrad policeman to patrol the village of Koritnik. The Trial Chamber observed only that he was part of Višegrad police force traffic department prior to the war (Trial Judgement, para. 5); briefly left the police force in April 1992 to join an armed group of 12 Serb men believed to be under the command and control of the Serbian Democratic

individuals who are alleged to have named Sredoje Lukić are entirely unidentified, other than by the village in which they reside: even VG084, who claimed that the persons who knew Sredoje Lukić were his relatives, was unable to name them, or provide any further detail in relation to them.<sup>70</sup> Trial chambers have almost uniformly tended to dismiss hearsay evidence offered by anonymous authors on the basis that it is impossible to assess.<sup>71</sup> Furthermore, there is no indication as to whether the persons who told VG038 and VG084 that Sredoje Lukić was present did so on the basis of their own personal knowledge of him, or on the basis of what others had told them: lack of information as to the layer of hearsay involved has proved a further factor prompting rejection of hearsay evidence in the past.<sup>72</sup> In addition, the fact that a number of persons may have given the same hearsay evidence does not offer further weight to the identification.<sup>73</sup>

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Party (Trial Judgement, para. 7); and was again listed as a member of the Višegrad police with “war assignments” from 4 August 1992 to 20 January 1993 (Trial Judgement, para. 8).

<sup>70</sup> See Trial Judgement, para. 406, and evidence cited therein.

<sup>71</sup> As to the statement of principle that un-sourced hearsay evidence will not be relied upon, *see, e.g., Krajišnik* Trial Judgement, para. 1190 (“[...] in those cases where a witness did not specify the source of the hearsay, the Chamber has generally not relied on the hearsay.”); *Kordić and Čerkez* Appeal Judgement, para. 190 (upholding the Trial Chamber’s decision to “exclude a large number of exhibits from admissibility for various reasons, *inter alia*: [...] (5) the material was based on anonymous sources or hearsay statements that were incapable of then being tested by cross-examination.” (footnotes omitted)) As to examples where un-sourced hearsay evidence has been disregarded as unreliable in practice, *see Gotovina et al.* Trial Judgement, fn. 2861 (“The Prosecution relies on P1290 (Survey report by Marker Hansen, 20 September 1995), p. 14, but the Trial Chamber considers it to be unsourced hearsay that does not warrant further consideration here.”); *Popović et al.* Trial Judgement, para. 1532 (“While the Trial Chamber, as noted previously, is satisfied as to the reliability of the evidence, given the lack of detail as to the content and source of PW-100’s information and the ambiguity of the statement made to PW-168, combined with the fact that both involve untested hearsay, the Trial Chamber finds the evidence is not sufficient [...].”); *Milutinović et al.* Trial Judgement, Vol. 2, para. 265 (“The Trial Chamber considers that anonymous hearsay from members of the ‘Islamic community’, is not an adequate basis [...].”), para. 1175 (“The Chamber gives little weight to anonymous hearsay from VJ and MUP officers about the reasons for the departure of Kosovo Albanians from their homes [...].”); *Haradinaj et al.* Trial Judgement, para. 196 (“Miloica Vlahović did not clarify the basis of Muhamet’s information. Thus, the evidence is unsourced, and possibly multiple hearsay.”), para. 357 (“Shaban Balaj could only provide hearsay evidence, with Metë Krasniqi as his source, that Idriz Balaj was involved in the reburial. The source of Metë Krasniqi’s information is unknown.”); *Strugar* Trial Judgement, para. 322 (“Although two witnesses, architects Lucjana Peko and Slobodan Vuković [...] vouched generally for the accuracy and reliability of the extracts from the Institute Report, the Chamber notes that the entries in the Institute Report were recorded on the basis of hearsay evidence. In most of the cases, information was collected from unknown persons who are described merely as neighbours or tenants.”).

<sup>72</sup> As to cases where absence of information as to the layers of hearsay involved has been a factor leading to hearsay evidence being discounted, *see, e.g., Haradinaj et al.* Appeal Judgement, paras 85-86, upholding the *Haradinaj et al.* Trial Chamber decision not to rely on hearsay evidence (“The Appeals Chamber does not doubt that Witness 61 was testifying of her own volition and in a sincere manner; however, [...] [h]er reported statement is second-hand hearsay, *i.e.*, she testified that KLA soldiers told her that Toger had admitted to committing the rape. [...] In these circumstances, it was reasonable for the Trial Chamber to treat the hearsay evidence of Toger’s purported confession with circumspection and ultimately not rely upon it.”); *Popović et al.* Trial Judgement, para. 1932 (“The Trial Chamber finds that the several layers of hearsay underlying this statement make it insufficiently reliable to establish that, by this point, Pandurević knew of the common plan to murder.” (footnotes omitted)); *Haradinaj et al.* Trial Judgement, para. 317 (“Moreover, it is multiple hearsay and Witness 68 does not specify her source. For these reasons the Trial Chamber will not rely on Witness 68’s hearsay account of the alleged abduction and subsequent events.”); *Kupreškić et al.* Trial Judgement, para. 507 (“In relation to Vladimir Šantić, the Trial Chamber is unable to accept the evidence of the conversation overheard by Witness B. As noted, this evidence is double hearsay and lacks any features which could confirm its reliability.”); *Rukundo* Trial Judgement, para. 89 (“In the instant case, however, the Chamber notes that the identification of Witness BLP’s source of information is not clear. Furthermore, it is not clear whether the evidence is firsthand or secondhand hearsay, as the Prosecution has not established whether the refugee from whom Witness BLP got his information was himself an eyewitness to the killing or was subsequently informed by another person.”);

34. Never before has hearsay evidence with so little by way of substantive indicia of reliability been accepted as reliable, and the Majority's conclusion, as well as its failure to explain its significant divergence from historic jurisprudence<sup>74</sup> in this regard, is, with respect, unfathomable.

35. I note, however, that the Majority also considers two additional factors which, in its view, further support its finding that it was reasonable to rely upon VG038 and VG084's evidence as a source of identification. Neither, with respect, does so.

36. First, the Majority contends that the Trial Chamber "did not rely on the evidence of VG038 and VG084 to establish Sredoje Lukić's conduct or location during the Pionirska Street Incident."<sup>75</sup> The implication appears to be that the Trial Chamber placed limited substantive weight upon VG038 and VG084's evidence, hence rendering any shortcomings in this evidence insignificant. In this finding, however, the Majority misrepresents the factual findings underpinning Sredoje Lukić's criminal responsibility. Whilst it is indeed true that the Trial Chamber did not rely upon VG038's and VG084's evidence to establish Sredoje Lukić's conduct or location during the Pionirska Street Incident, it did not rely upon any witness to make such findings.<sup>76</sup> Sredoje Lukić was found criminally responsible for aiding and abetting the Memić House crimes simply on the basis that he

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*Bagosora et al.* Trial Judgement, para. 1773 ("The witness's account is based on hearsay. Moreover, even though he received this information from a purported member of the Para Commando Battalion, he was not certain whether his source had first-hand knowledge of the incident. Therefore, the reliability of the witness's evidence on this point is questionable." (footnotes omitted)).

<sup>73</sup> See, e.g., *Haradinaj et al.* Trial Judgement, para. 19 ("the Trial Chamber clarified that it attached little, if any, weight to unexplained opinions and untested hearsay and that an accumulation of such evidence did not necessarily make it stronger").

<sup>74</sup> The Majority considers only one prior judgement on hearsay evidence (see Appeal Judgement, para. 311, referring to *Rukundo* Appeal Judgement, paras 195-198), which was an isolated incident where reliance on anonymous hearsay evidence was accepted. However, the hearsay evidence in that case can be distinguished from the evidence in the present case on the basis that there was a subjective nexus between the persons who identified the accused, and the accused himself (see *Rukundo* Appeal Judgement, para. 196: "Nonetheless, the Appeals Chamber is not convinced that this error invalidated the Trial Chamber's reliance on these witnesses' accounts. Specifically, Witness CSF testified that he learned of Rukundo's identity from religious personnel who knew him and attended his ordination. Therefore, although hearsay from unidentified sources, this additional and specific detail provides greater indicia of reliability."). A similar distinction can be drawn in respect of the ruling in the *Rutaganda* case, which also permitted reliance on anonymous hearsay evidence. In that case, there was again greater evidence going to the reliability of the evidence, and, further, the hearsay evidence did not go to a material fact in the case (see *Rutaganda* Appeal Judgement, para. 156: "[t]he Trial Chamber possessed several facts relating to the circumstances in which the statements were heard, and could thus assess the reliability of the information in question at the time it was admitted. In the circumstances, it does not appear that the Trial Chamber acted without caution, or that it exceeded its discretion in assessing the evidence by admitting the hearsay evidence. The Appeals Chamber considers that, in any event, even if the alleged error were to be proved, it would not be such as would invalidate the Judgement, inasmuch as the statements in question pertain to events not referred to in the Indictment.").

<sup>75</sup> Appeal Judgement, para. 388.

<sup>76</sup> See Trial Judgement, paras 585, 588, 590. In paragraph 591, the Trial Chamber refers to Huso Kurspahić's evidence as establishing Sredoje Lukić at the scene of the robbery and as a "participant in the robbery". As the Trial Chamber clearly finds overall that Sredoje Lukić was not involved in the robbery, however (see Trial Judgement, paras 592-593), this subsidiary finding appears to be a mistake, and adds no further specificity to the findings as to Sredoje Lukić's role.

was identified as armed and present “at” the house, without further specificity as to his acts, conduct, or location.<sup>77</sup>

37. Secondly, the Majority draws comfort from the fact that:

what is ultimately important is the fact that both Milan Lukić and Sredoje Lukić were reasonably found to be at the Memić House, regardless of whether or not the witnesses could distinguish between them.<sup>78</sup>

The Majority’s statement is, of course, true. However, with respect, it is not relevant to the question of whether VG038’s and VG084’s evidence does indeed show that both appellants were present, and adds no substance to the conclusion that they were.

38. For all of the reasons outlined above, I consider the Majority’s analysis with regard to VG038’s and VG084’s hearsay evidence to be significantly flawed. Absent any findings or evidence establishing subjective indicia of reliability, it is my view that, on the basis of precedent and reason, the Appeals Chamber should clearly have found that this evidence had no probative weight as an independent source of identification. I also consider, in this regard, that the fact that both VG038 and VG084 fundamentally changed their respective identification evidence under cross-examination,<sup>79</sup> whilst not detracting, necessarily, from the factual inference that the perpetrators’ identity was discussed, should have been found, in the circumstances, to further limit the probative weight of the evidence.<sup>80</sup>

39. As outlined earlier in this Dissent, however, findings of identification are reached not on the basis of isolated portions of evidence, but on the totality of the evidence before a trial chamber. In the present case, the finding that Sredoje Lukić was identified at the Memić House rested not only upon VG038 and VG084’s hearsay evidence, but also on the basis of the identifications offered by VG018 and Huso Kurspahić.<sup>81</sup> I also note that, in some cases where a chamber has rejected anonymous hearsay evidence, absence of corroboration has been mentioned as a factor.<sup>82</sup>

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<sup>77</sup> Trial Judgement, paras 593, 637. *See also* Appeal Judgement, paras 377-378.

<sup>78</sup> Appeal Judgement, para. 388.

<sup>79</sup> *See* Trial Judgement, para. 582; Appeal Judgement, para. 374.

<sup>80</sup> *See, e.g., Gatete* Trial Judgement, para. 446: “Considering that her identification of the Accused was based on hearsay, and recalling her close links to Witness BAR, as well as her evasiveness under cross-examination, the Chamber does not find Witness BAQ’s evidence sufficiently reliable for the purposes of supporting findings beyond reasonable doubt.”

<sup>81</sup> *See* Trial Judgement, para. 593.

<sup>82</sup> *See, e.g., Gotovina et al.* Trial Judgement, para. 51 (“The report contains un-sourced hearsay information, and neither Berikoff nor Williams specified the sources in their testimonies. The report was furthermore inconsistent with other evidence from Berikoff, notably with regard to timing. For these reasons, the Trial Chamber decided not to rely on the report in relation to information described therein if uncorroborated by other evidence.” (footnotes omitted)); *Delić* Trial Judgement, para. 222 (“One witness identified two individuals among the perpetrators as Zihnad Šejdić and Isak Aganović. [...] As this hearsay evidence is uncertain and uncorroborated, the Trial Chamber attaches only limited weight to it.” (footnotes omitted)); *Kalimanzira* Appeal Judgement, para. 100 (“The Appeals Chamber, Judge Pocar

40. I will now explain why, considering the identification evidence as a whole in the context of the errors identified on appeal, the composite finding that Sredoje Lukić was identified at the Memić House should have been overturned.

4. Considering the errors identified on appeal, the identification evidence was insufficient to identify Sredoje Lukić beyond reasonable doubt at the Memić House

41. In addition to finding that the Trial Chamber erred in failing to treat VG038 and VG084's hearsay evidence with due caution, the Appeals Chamber found a further error in the Trial Chamber's evaluation of identification evidence at the Memić House. The Trial Chamber found that both VG018 and VG084 heard a perpetrator introduce himself as Sredoje Lukić upon the arrival of the men at the Memić House.<sup>83</sup> Considering VG084's testimony under cross-examination, however, the Appeals Chamber has unanimously overturned the finding found that VG084 heard this introduction.<sup>84</sup>

42. The Majority found that this error had no impact, concluding that VG018's evidence, alone, supported the finding that Sredoje Lukić introduced himself in the Memić House.<sup>85</sup> In reaching this conclusion, it observed that:

the main issue in this context is whether the Trial Chamber reasonably found that Sredoje Lukić was present at the Memić House; the Introduction is therefore merely a part of the evidence establishing his presence.<sup>86</sup>

43. With all due respect, the Majority misapprehends the evidential picture before it, following the errors identified on appeal. As VG084's evidence as to the introduction has been discounted on appeal, and as VG038, VG084 and Huso Kurspahić offered identifications resting only upon hearsay, VG018's evidence was not "merely a part of the evidence establishing [Sredoje Lukić's] presence."<sup>87</sup> It was the sole piece of *direct* evidence identifying Sredoje Lukić at the Memić House. As outlined earlier, it is very well established that direct evidence will usually be preferred to hearsay evidence.<sup>88</sup> Furthermore, strong corroborative direct evidence may overcome identified

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dissenting, also notes that there is no indication as to the credibility of either individual who identified Kalimanzira to Witness BWK on the record. In these circumstances, the Appeals Chamber, Judge Pocar dissenting, considers that reliance on Witness BWK's uncorroborated identification evidence is unsafe."), para. 201 ("In sum, the Appeals Chamber, Judge Pocar dissenting, considers that given Witness BDK's reliance on hearsay evidence to identify Kalimanzira, the Trial Chamber erred in law by not providing additional explanation before relying on her uncorroborated testimony.")).

<sup>83</sup> Trial Judgement, paras 588, 590.

<sup>84</sup> Appeal Judgement, para. 374.

<sup>85</sup> Appeal Judgement, para. 375.

<sup>86</sup> Appeal Judgement, para. 375.

<sup>87</sup> Appeal Judgement, para. 375.

<sup>88</sup> See *supra*, para. 13.

weaknesses in hearsay evidence.<sup>89</sup> To fully evaluate the impact of the errors identified on appeal, therefore, the Appeals Chamber needed to scrutinise VG018's evidence particularly carefully.

44. First, and foremost, such scrutiny required particularly close examination of the errors in VG018's evidence that have been alleged on appeal. Sredoje Lukić argues that the Trial Chamber failed to consider the fact that other reliable witnesses contradicted VG018's evidence that any perpetrator introduced himself in the Memić House.<sup>90</sup> The Majority concedes the point, describing the issue as follows:

[...] VG013 and VG078 were not asked whether they had heard either Milan Lukić or Sredoje Lukić introduce themselves, while VG038 and VG101 testified that they did not hear the perpetrators introduce themselves upon entry into the Memić House. [...] [T]he Trial Chamber did not explicitly discuss whether the evidence of witnesses VG013, VG038, VG078, and VG101 confirmed, or conflicted with, VG018's evidence that the Introduction occurred.<sup>91</sup>

45. The Majority then proceeds to dismisses Sredoje Lukić's contention that these apparent contradictions in evidence detracted from the inference that he introduced himself in the Memić House. With respect, the reasoning adopted in considering this issue is, however, confusing and deficient. The Majority first observes that:

[T]his does not mean that the Trial Chamber did not consider Šother witnesses' evidence in the context of the Pionirska Street Incident. The Appeals Chamber observes that the evidence of VG013, VG038, VG078, and VG101 is summarised and discussed in several parts of the Trial Judgement. The Appeals Chamber recalls that a trial chamber is not required to expressly reference and comment upon every piece of evidence admitted onto the record. Nor is it required to articulate every step of its reasoning.<sup>92</sup>

46. This analysis suggests, erroneously, that the fact that these witnesses' evidence was considered at some stage in the Trial Judgement is sufficient assurance that all material contradictions in their evidence had been considered. Whilst it is indeed accepted that a trial chamber is not required to comment upon every part of the evidence, it is also well recognised that a trial chamber must expressly consider material contradictions in evidence.<sup>93</sup> Evidence corroborating, or conflicting with, what has become, by virtue of the errors identified on appeal, the sole portion of direct identification evidence is, to my mind, indisputably material. If the standard

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<sup>89</sup> See *supra*, para. 13.

<sup>90</sup> Sredoje Lukić Appeal Brief, paras 40, 68-69; Sredoje Lukić Reply Brief, paras 12-13, 28-30.

<sup>91</sup> Appeal Judgement, para. 376 (internal citations omitted).

<sup>92</sup> Appeal Judgement, para. 376 (internal citations omitted).

<sup>93</sup> See *Muhimana* Appeal Judgement, para. 58 ("The Appeals Chamber recalls that, while a Trial Chamber is required to consider inconsistencies and any explanations offered in respect of them when weighing the probative value of evidence, it does not need to individually address them in the Trial Judgement." (footnotes omitted)); *Niyitegeka* Appeal Judgement, para. 96, referring to *Kupreškić et al.* Appeal Judgement, para. 31 ("a Trial Chamber is bound to take into account inconsistencies and any explanations offered in respect of them when weighing the probative value of the evidence."). See also *Muvunyi I* Appeal Judgement, para. 144 (The Appeals Chamber noted that it could not conclude, based on the discussion of the evidence in the Trial Judgement, whether a reasonable trier of fact could have relied on the testimonies of two witnesses (YAI and CCP) to convict Muvunyi with respect to a particular event. It further noted



suggested by the Majority were indeed the standard to be applied on appeal, a large swathe of alleged errors of fact could simply be summarily dismissed.

47. The Majority then seems to change tack slightly, and allow for the fact that an apparent conflict in evidence exists. However, it reasons away divergent evidence on the question of whether an introduction occurred, on the basis that:

[...] there were about 60 people in the Memić House, and that variances among the testimonies may well have resulted from different vantage points that would reflect varying degrees of detail.<sup>94</sup>

48. This statement is correct as a statement of fact: it is self-evident that persons located in different parts of the house would, indeed, have seen and heard different things. However, in order to assess whether a material conflict in evidence impacted on VG018's evidence as to the introduction, the question was which of the respective vantage points was the most reliable. As VG038 and VG101, witnesses deemed credible by the Trial Chamber, were, unlike VG018, actually in the room into which the perpetrators entered,<sup>95</sup> I entirely fail to see how VG018's evidence could have been preferred in this regard. This is particularly the case in light of the finding on appeal that VG084, who was in the same room as VG018, and was "right beside her",<sup>96</sup> gave clear evidence that none of the perpetrators introduced themselves as Sredoje Lukić.<sup>97</sup>

49. I also consider that, in light of the errors identified on appeal, the Majority should have taken account of further *prima facie* weaknesses in VG018's evidence. Even absent the contradictions discussed above, the evidence that VG018 heard the perpetrators introduce themselves upon entry into the house seems very weak. VG018 was in another room from the men who arrived into the house,<sup>98</sup> and there are no findings in the Trial Judgement as to the layout of the house; specifically, as to the location of the room in which VG018 was standing, in relation to that into which the men entered. It has been suggested that overhearing a partial conversation – which, it seems, is the best that can have been expected of VG018 in such circumstances – should itself be classed as little better than hearsay evidence.<sup>99</sup> VG018's testimony was also confused, and

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its particular concern with respect to the "numerous inconsistencies" in the testimonies of these two witnesses and "the utter lack of any discussion of these inconsistencies in the Trial Judgement.").

<sup>94</sup> Appeal Judgement, para. 376.

<sup>95</sup> Trial Judgement, paras 580, 584.

<sup>96</sup> Trial Judgement, para. 589.

<sup>97</sup> Appeal Judgement, para. 374.

<sup>98</sup> Trial Judgement, para. 586.

<sup>99</sup> See, e.g., *Kalimanzira* Trial Judgement, para. 391 ("However, the Chamber is not entirely convinced of BDK's account either. [...] BDK testified to hearing part of a conversation, which amounts to little more than hearsay.").

frequently contradictory: the Trial Chamber itself, on the basis of the numerous inconsistencies in VG018's evidence, expressed caution in its reliance upon her evidence.<sup>100</sup>

50. I also note that the Trial Chamber's findings indicate an unresolved conflict between VG018 and VG038's evidence on a key question for the present purposes: namely, the issue of whether Sredoje Lukić actually entered the house at all. Whilst the Trial Chamber relied upon VG018 and VG084's evidence that a perpetrator had entered the house and introduced himself upon arrival,<sup>101</sup> it also relied upon VG038's evidence that he was in the room into which the perpetrators entered.<sup>102</sup> When considering the latter evidence, it found that VG038 had seen Milan Lukić enter the room, whilst Sredoje Lukić had been one of the perpetrators who remained outside.<sup>103</sup> Given the findings reached on appeal, this would seem to further weaken VG018's evidence that a perpetrator introduced himself as Sredoje Lukić in the house.

51. Overall, therefore, VG018's evidence was *prima facie* weak, uncorroborated, and contradicted by the evidence of other witnesses deemed reliable by the Trial Chamber. It is my view that this type of evidence could only have had extremely limited weight in any circumstances, and, more significantly, was palpably insufficient as the sole source of direct identification evidence. Recalling too that VG038 and VG084's hearsay evidence lacked any subjective indicia of reliability, for these reasons alone, it is my view that the Trial Chamber's finding that Sredoje Lukić was identified at the Memić House should have been overturned on appeal.

52. I also note, however, other weaknesses with the identification evidence that, despite being highlighted on appeal, have not been adequately considered by the Majority of the Appeals Chamber. In particular, I note the Trial Chamber's failure to consider: (i) the physical descriptions of the perpetrators by witnesses, which did not match Sredoje Lukić's appearance and may have indicated that a blonde man was present instead;<sup>104</sup> (ii) the fact that the source of Huso Kurspahić's hearsay evidence, Hasib Kurspahić, did not mention Sredoje Lukić in an interview given proximate to events at the Memić House;<sup>105</sup> and, in my view, the most significant factor, (iii) the evidence of VG013, who knew Sredoje Lukić, was with her son VG038 throughout the events in the house, and

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<sup>100</sup> The Trial Chamber held that: "In view of the many inconsistencies in VG018's evidence, the Trial Chamber finds that she was unable to visually distinguish between Milan Lukić and Sredoje Lukić and that she confused the two men. Accordingly, the Trial Chamber places no weight on VG018's evidence as it relates to the specific acts of either Milan Lukić or Sredoje Lukić in or around Jusuf Memić's house. Nevertheless, the Trial Chamber is satisfied that VG018 heard Milan Lukić and Sredoje Lukić introduce themselves by name. The Trial Chamber therefore only relies on VG018's evidence insofar as it places Milan Lukić and Sredoje Lukić at the scene of the robbery." (Trial Judgement, para. 588).

<sup>101</sup> Trial Judgement, paras 588, 590.

<sup>102</sup> Trial Judgement, paras 583-585.

<sup>103</sup> Trial Judgement, paras 583-585.

<sup>104</sup> Appeal Judgement, paras 399-403.

<sup>105</sup> Appeal Judgement, paras 391, 395.

clearly testified that she did not see or hear about Sredoje Lukić at any stage in the house.<sup>106</sup> Whilst not determinative when taken in isolation, considering the totality of evidence in light of the errors identified on appeal, it is my view that these considerations further call into question the reliability of the identification finding.

## 5. Conclusion

53. Taking into account the weakness of VG038 and VG084's anonymous hearsay evidence as a source of identification; the significant limitations in VG018's evidence that Sredoje Lukić introduced himself at the Memić House, which was the only portion of direct evidence before the Trial Chamber; and the other deficiencies in identification evidence, it is my view that no reasonable trier of fact could have found that Sredoje Lukić was identified at the Memić House. It is my view, therefore, that the finding that Sredoje Lukić was identified should have been overturned, and, with it, his convictions for aiding and abetting the Memić House crimes.

### **D. The identification of Sredoje Lukić during the Transfer**

#### 1. The basis for identification

54. Late in the evening of 14 June 1992, a group of men came to the Memić House and transferred the Koritnik Group to the Omeragić House.<sup>107</sup> The Omeragić House was then set ablaze, leading to the death of the majority of the group.<sup>108</sup> In light of inconsistencies in witness evidence, the Majority of the Trial Chamber found that Sredoje Lukić had no role in setting the house on fire, or in shooting at escaping persons.<sup>109</sup> However, the Majority of the Trial Chamber found that Sredoje Lukić had participated in the Transfer,<sup>110</sup> and, on the basis of this finding, Sredoje Lukić was convicted for aiding and abetting the Omeragić House.<sup>111</sup>

55. When finding that Sredoje Lukić was identified during the Transfer, the Trial Chamber relied upon VG038's and VG084's evidence that Sredoje Lukić was present;<sup>112</sup> as well as Huso Kurspahić's evidence that his father, Hasib Kurspahić, had told him that Sredoje Lukić was one of the men who returned to the Memić House in the evening.<sup>113</sup> The Trial Chamber also placed some

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<sup>106</sup> Appeal Judgement, paras 386, 389.

<sup>107</sup> Trial Judgement, paras 597-607, 631, 637.

<sup>108</sup> Trial Judgement, paras 608-613, 631, 637.

<sup>109</sup> Trial Judgement, para. 613.

<sup>110</sup> Trial Judgement, paras 607, 637. Judge Robinson dissents as to Sredoje Lukić's participation in the Transfer.

<sup>111</sup> Trial Judgement, 928-934, 1027-1035, 1104-1105, Judge Robinson dissenting as to the crime of murder.

<sup>112</sup> Trial Judgement, paras 601, 604.

<sup>113</sup> Trial Judgement, para. 605.

corroborative weight upon VG018's evidence that she had recognised Sredoje Lukić's voice and heard people shouting that the "Lukic's [sic] were coming again."<sup>114</sup>

56. The Majority of the Appeals Chamber has found no error in the Trial Chamber's conclusion that Sredoje Lukić was identified during the Transfer.<sup>115</sup> For the following reasons, I respectfully disagree with the Majority's reasoning and conclusions.

2. No reasonable trier of fact could have found that VG038 and VG084 recognised Sredoje Lukić during the Transfer

57. On appeal, Sredoje Lukić has argued that the Trial Chamber failed to provide a reasoned opinion when relying upon VG038 and VG084's identification of him during the Transfer, as well as erred in placing reliance upon this evidence.<sup>116</sup>

58. The Trial Chamber found that neither VG038 nor VG084 knew Sredoje Lukić in advance of 14 June 1992,<sup>117</sup> and relied upon their identification at the Memić House on the basis that "other persons" in the house had told them who Sredoje Lukić was.<sup>118</sup> When assessing their evidence with regard to the Transfer, the Trial Chamber did not consider the basis for their identification of Sredoje Lukić. Instead, the Trial Chamber focused upon consideration of the lighting conditions during the Transfer,<sup>119</sup> and in resolving inconsistencies in the two witnesses' visual identification evidence.<sup>120</sup> It seems, therefore, that the Trial Chamber was satisfied that, by virtue of their experiences in the Memić House, VG038 and VG084 were able to independently recognise Sredoje Lukić by sight by the evening of 14 June 1992.

59. It is not unreasonable to assume that a witness may, during the course of a crime, come to independently identify an accused, hitherto unknown. Indeed, the Trial Chamber in the present case had this precise scenario in mind when it outlined the following standard:

Other witnesses had no prior knowledge of them, but testified that other persons, who did have prior knowledge, identified Milan Lukić and Sredoje Lukić to them. Some of these witnesses, once having learned of their identities, were exposed to and observed Milan Lukić and Sredoje Lukić over long periods of time.<sup>121</sup> [...] [T]he Trial Chamber considers that the categories of "identification" and "recognition" cannot be so strictly interpreted as to require that a witness must have prior knowledge of the accused before the start of the commission of a crime in order to be classified as a recognition

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<sup>114</sup> Trial Judgement, para. 603.

<sup>115</sup> Appeal Judgement, para. 417.

<sup>116</sup> Sredoje Lukić Appeal Brief, para. 94.

<sup>117</sup> Trial Judgement, paras 582, 589.

<sup>118</sup> Trial Judgement, paras 585, 590. In VG084's case, the Trial Chamber also placed reliance on the fact that he had heard a perpetrator introduce himself as Sredoje Lukić (Trial Judgement, para. 589). As discussed earlier, this finding has been overturned on appeal.

<sup>119</sup> See Trial Judgement, para. 597.

<sup>120</sup> See Trial Judgement, paras 601, 604.

<sup>121</sup> Trial Judgement, para. 33.

witness. In particular, the Trial Chamber is satisfied that, where a crime is committed over a long period of time and a witness has acquired sufficient knowledge of the accused during that period, such a witness is a “recognition witness.”<sup>122</sup>

60. To answer a reasoned opinion challenge relating to a witness’s acquired ability to recognise an accused, the Appeals Chamber should have considered two questions. First, whether the underlying identification was reliable – whether the persons who told VG038 and VG084 that Sredoje Lukić was present, did so reliably; and, second, if so, whether following this initial identification, VG038 and VG084 had had sufficient exposure to Sredoje Lukić in the house, such as to be able to visually recognise him as one of the perpetrators who returned later that day.

61. In the preceding section, I have explained my views on the first question. It is my view that extremely limited weight, at best, could have been placed upon the anonymous hearsay identification of Sredoje Lukić at the Memić House offered by VG038 and VG084. The obvious deficiencies in this first identification should, in my view, have prompted the Majority to exercise considerable caution when considering the challenges to these witnesses’ evidence in respect of identification at the Transfer.

62. Leaving aside the reliability of the underlying identification, however, what is notable is that the Majority essentially disregards the second question, and, with it, the crux of the reasoned opinion challenge. The basis for the conclusion that VG038 was able to recognise Sredoje Lukić during the Transfer is ignored totally, and, with regard to VG084, is considered only in passing. The Majority refers to the Trial Chamber’s finding that VG084 was unable to distinguish between perpetrators at the Memić House,<sup>123</sup> considering that this lends credence to the argument that VG084 was “exposed” to both perpetrators during the proceedings at the Memić House.<sup>124</sup> Had the Majority’s reasoning with regard to VG084’s evidence been correct, the same logic could also, in fact, have been applied to VG038: the Trial Chamber made an identical finding with regard to this witness’s evidence at the Memić House.<sup>125</sup>

63. The Majority’s reasoning is, with respect, top-down. A finding that a witness is unable to distinguish between two perpetrators is meaningless if not underpinned by findings supporting the inference that such witness had, at some stage, seen each of the perpetrators. Such findings are

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<sup>122</sup> Trial Judgement, para. 34.

<sup>123</sup> Appeal Judgement, para. 414, referring to Trial Judgement, para. 590 (“The Trial Chamber concludes that while VG084 was near Sredoje Lukić when Sredoje Lukić introduced himself, VG084 did not actually see him as he did so. Consequently, the Trial Chamber is not satisfied that VG084 was able to visually distinguish between Milan Lukić and Sredoje Lukić. The Trial Chamber does not therefore place any weight on his evidence regarding the specific acts of either Milan Lukić or Sredoje Lukić during the robbery.”).

<sup>124</sup> Appeal Judgement, para. 414.

<sup>125</sup> See Trial Judgement, para 585 (“In view of these inconsistencies, the Trial Chamber finds that VG038 was unable to distinguish between Milan Lukić and Sredoje Lukić, and it does not place any weight on his evidence insofar as it relates to the specific acts of either Milan Lukić or Sredoje Lukić during the robbery.”).

entirely absent in the Trial Judgement, which leaves it impossible to conclude beyond reasonable doubt that VG038 and VG084 saw the perpetrator found to be Sredoje Lukić even once at the Memić House, let alone had sufficient exposure to him to clearly identify him in the dark confusion of the evening. With regard to VG038, the Trial Chamber considered his evidence that he had recognised Sredoje Lukić as the man who had entered the house and robbed the group, but found that he had, in fact, seen Milan Lukić at this time, whilst the other person(s) remained outside.<sup>126</sup> As to VG084, the Trial Chamber expressly found that he was in another room at the time he allegedly heard Sredoje Lukić introduce himself, and was thus unable to see him.<sup>127</sup> In these circumstances, it is my view that the Appeals Chamber had no choice but to find that the Trial Chamber erred in failing to provide a reasoned opinion when relying upon VG038 and VG084's identification of Sredoje Lukić during the Transfer. The Majority's decision not to enter this error is, in my opinion, mistaken

64. Nor is it possible to correct the error by way of absence of a reasoned opinion on appeal. There are no findings, or evidence, to explain how what VG038 and VG084 were told about the perpetrators at the Memić House, itself anonymous, unspecific hearsay identification, had translated, by the evening, into an ability to recognise Sredoje Lukić independently. In these circumstances, in my view, no reasonable trier of fact could have placed any reliance whatsoever upon VG038 and VG084's identification of Sredoje Lukić during the Transfer.

3. No reasonable trier of fact could have found, on the basis of the evidence as a whole, that Sredoje Lukić was identified beyond reasonable doubt during the Transfer

65. For the reasons outlined above, I adjudge that no reasonable trier of fact could have placed any weight upon VG038 and VG084's evidence to identify Sredoje Lukić during the Transfer.

66. I note, however, that the finding of identification also rested upon Huso Kurspahić's hearsay identification evidence, with some corroborative weight being placed upon VG018's "voice-recognition evidence". Recalling that considerable caution must be exercised before basing a conviction upon hearsay evidence alone, it is my view that this evidence was clearly not sufficient to support the conclusion that Sredoje Lukić was identified beyond reasonable doubt. Further, in my opinion, this conclusion is given additional support by the Trial Chamber's findings as to the Omeragić House fire. The Trial Chamber found that witness evidence was insufficient to show that Sredoje Lukić had "participated" in the crimes at the Omeragić House, which implies, as corollary,

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<sup>126</sup> Trial Judgement, paras 583-585.

<sup>127</sup> Trial Judgement, paras 589-590.

Sredoje Lukić's non-participatory presence.<sup>128</sup> In fact, however, the underlying findings indicate the Trial Chamber's doubt that Sredoje Lukić was even present when the crimes were committed at the second house.<sup>129</sup> As the fire took place immediately after the Transfer, this, in my view, would tend to suggest that he was not present at all during the evening.

67. The finding that Sredoje Lukić participated in the Transfer, and the convictions that rested upon this finding, should, in my view, have been overturned on appeal.

#### **E. Conclusion**

68. The findings that Sredoje Lukić was identified, first at the Memić House, and then during the Transfer, rest upon a compilation of errors of fact and law. When a trial chamber errs, repeatedly, in its most significant findings, this cannot, should not, and must not be obfuscated on appeal. The Majority's decision to take the opposite approach risks setting an extremely unfortunate precedent with regard to fundamental questions of identification, and, for the reasons set out above, I would like to distance myself from the approach adopted by the Majority in its reasoning and conclusions.

Done in English and French, the English text being authoritative.

Done this fourth day of December 2012  
at The Hague, The Netherlands.

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Judge Howard Morrison

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<sup>128</sup> Trial Judgement, para. 613.

<sup>129</sup> See Trial Judgement, paras 609 (finding reliable that beyond the Transfer, VG013 could not give further evidence as to the acts and conduct of Sredoje Lukić during the night), 610 (finding, in light of inconsistencies in VG038's evidence, that the Trial Chamber was "not satisfied that VG038 saw Sredoje Lukić at Adem Omeragić's house during the period of the fire"), 611 (finding that VG115's evidence did not identify either Milan Lukić or Sredoje Lukić as participants in the transfer or in burning of Adem Omeragić's house).

## **XIX. SEPARATE OPINION OF JUDGE MORRISON**

### **A. Introduction**

1. The Trial Chamber, Judge Van den Wyngaert dissenting, found Milan Lukić guilty of two counts of extermination, in respect of the deaths of 59 persons in the Pionirska Street Incident and the deaths of 60 or more persons in the Bikavac Incident.<sup>1</sup> On appeal, Milan Lukić raises a series of challenges in respect of his convictions for the crime of extermination.<sup>2</sup> The Majority has dismissed these arguments, finding no error.<sup>3</sup>

2. I must respectfully diverge from the Majority of the Appeals Chamber in its decision to uphold the Majority of the Trial Chamber's reasoning *in toto*. It is my view that certain of the factors considered by the Majority of the Trial Chamber; specifically, the vulnerability of the victims, and the population density of the area that the victims came from, should not be deemed relevant factors for the purposes of an assessment of "massiveness". I consider, however, that the quantity of persons killed during the Pionirska Street Incident and the Bikavac Incident was, in each case, numerically sufficient for the element of massiveness to be established. Accordingly, I concur that there is no error in the overall conclusion that Milan Lukić was correctly convicted for extermination.

### **B. An assessment of the element of massiveness should not involve taking into account certain subjective considerations**

3. The *actus reus* of extermination is "the act of killing on a large scale",<sup>4</sup> and the *mens rea* of extermination requires that the perpetrator intended "to kill on a large scale or to systematically subject a large number of people to conditions of living that would lead to their deaths."<sup>5</sup> It is the so-called element of "massiveness", therefore, that distinguishes the crime of extermination from other crimes.<sup>6</sup>

4. An assessment of whether the deaths in question are sufficiently "massive" to constitute extermination will be made on a case-by-case basis, taking account of the circumstances in which the killings occurred.<sup>7</sup> In the present case, along with the number of victims killed, the Majority of

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<sup>1</sup> Trial Judgement, paras 947, 951, 1100.

<sup>2</sup> Milan Lukić's sub-grounds 3(I) and 4(H). Milan Lukić Appeal Brief, paras 204-227, 281; Appeal Hearing, AT. 68-70 (14 September 2011).

<sup>3</sup> Appeal Judgement, para. 547.

<sup>4</sup> *Stakić* Appeal Judgement, para. 259, referring to *Ntakirutimana* Appeal Judgement, para. 516.

<sup>5</sup> *Stakić* Appeal Judgement, para. 260, referring to *Ntakirutimana* Appeal Judgement, para. 522.

<sup>6</sup> *Stakić* Appeal Judgement, para. 260, referring to *Ntakirutimana* Appeal Judgement, para. 516.

<sup>7</sup> *Martić* Trial Judgement, para. 63, referring to *Stakić* Trial Judgement, para. 640; *Brdanin* Trial Judgement, para. 391; *Blagojević and Jokić* Trial Judgement, para. 573; *Krajišnik* Trial Judgement, para. 716; *Nahimana et al.* Trial



the Trial Chamber considered various factors when finding that extermination had occurred. In particular, it considered: (i) the population density of the area from which the victims were taken;<sup>8</sup> (ii) the vulnerability of the victims;<sup>9</sup> and (ii) the extent to which the crimes had been pre-meditated.<sup>10</sup>

5. On appeal, Milan Lukić argues that the Majority of the Trial Chamber erred in considering certain “subjective factors”, specifically, victim type and population density, in its determination of the element of massiveness.<sup>11</sup>

6. The Majority of the Appeals Chamber has found no error, reasoning as follows:

While [the subjective factors considered by the Trial Chamber] may be taken into consideration in the assessment of whether the element of massiveness for extermination is fulfilled, they do not constitute elements of the crime of extermination as a crime against humanity. Therefore, a trial chamber need not address these factors in its assessment.<sup>12</sup> [...] The Appeals Chamber notes that almost the entire Muslim population of Koritnik perished in the Pionirska Street Incident. In these circumstances, the [Majority of the Appeals Chamber finds that the] Trial Chamber reasonably found that the killing of 59 persons amounted to extermination as a crime against humanity. The limited reduction of the number of victims by the Appeals Chamber does not affect this conclusion. Furthermore, the [Majority of the Appeals Chamber] finds that using a single village as the reference area was not artificially narrow since Milan Lukić’s conviction rests on one incident which involved victims who were predominantly from the same village.<sup>13</sup>

7. I note, as a preliminary matter, that the essence of the point raised on appeal is whether the Majority of the Trial Chamber legitimately considered certain factors as relevant circumstances in the determination of the element of massiveness. That these factors were not elements of the crime of extermination, and did not therefore *need* to be considered in an assessment of massiveness, is not, with respect, relevant to the issue on appeal.<sup>14</sup>

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Judgement, para. 1061. *See also* Brdanin Appeal Judgement, paras 472, finding “that the scale of the killings, in *light of the circumstances in which they occurred*, meets the required threshold of massiveness for the purposes of extermination.” (emphasis added).

<sup>8</sup> In its statement of the legal standard to be applied, the Majority of the Trial Chamber observed that “[a]nother 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” (Trial Judgement, para. 938). When making its findings on the Pionirska Street Incident, the Majority of the Trial Chamber said that it had considered, in particular, “the characteristics of the place where the victims came from” (Trial Judgement, para. 945). The Majority of the Trial Chamber did not consider this factor in its findings on the Bikavac Incident.

<sup>9</sup> The Majority of the Trial Chamber stated that it would consider the “type” of victims (Trial Judgement, paras 942, 949). Specifically, it placed weight upon the fact that the victims were predominantly the elderly, female, and children (Trial Judgement, paras 943, 950).

<sup>10</sup> Trial Judgement, paras 944, 950. *See also* Trial Judgement, paras 918, 1067.

<sup>11</sup> Milan Lukić Appeal Brief, paras 210-215, Milan Lukić Reply Brief, paras 89-90; Appeal Hearing, AT. 69-70, 113 (14 September 2011).

<sup>12</sup> Appeal Judgement, para. 542 (footnotes omitted).

<sup>13</sup> Appeal Judgement, para. 543 (footnotes omitted).

<sup>14</sup> I also note that the Majority of the Trial Chamber made an express statement as to the relevance of population density as a factor when outlining the scope of the relevant legal standards, which may have indicated its intention to establish a point of legal principle with regard to this issue (Trial Judgement, para. 938).

8. I will now explain why, in my opinion, the Majority of the Trial Chamber erred when it considered population density and victim vulnerability<sup>15</sup> as relevant factors in determination of the element of massiveness.

9. To my mind, “massiveness” rests on an inescapable numerical evaluation; it is the sheer volume of deaths that will remain, and indeed must remain, the determinative factor in the assessment of massiveness. Thus far, however, the Appeals Chamber has declined to enter a *de minimis* numerical threshold for the crime.<sup>16</sup> Instead, it has been held that the question of massiveness should be considered in light of “all the circumstances” of the case.<sup>17</sup>

10. Whilst seeming to steer the crime away from a numbers-based assessment, the “circumstances” appraisal has, in fact, performed a similar function. The factors that have been deemed relevant circumstances are varied, including the time and place of the killings, the manner in which the victims were targeted, and whether the killings were aimed at a group of individuals, rather than at victims in their individual capacity.<sup>18</sup> What unifies them, however, is the focus of the respective trial chambers on discerning whether the deaths in question took place on an *objectively* massive scale. The “circumstances” test has, until now, been applied to establish a benchmark that operates beyond the subjective considerations of the persons killed.

11. Population density and victim vulnerability, by contrast, are circumstances that are not only incompatible with an objective appraisal of massiveness; but are antithetical to its project. Take population density as an example. If population density is a relevant factor in determining massiveness, this opens the possibility that the killing of one or two persons from a tiny hamlet might be deemed extermination. Similarly, an assessment of victim vulnerability – whilst conceivably relevant to an analysis of whether an accused had *mens rea* to kill on a large scale – opens the prospect that the death of one or two, particularly vulnerable, victims might be deemed extermination. Subjective factors that threaten to erode the very *raison d’etre* of the crime of extermination should not be permissible factors for consideration in the determination of massiveness.

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<sup>15</sup> The Majority of the Appeals Chamber does not, in fact, directly address Milan Lukić’s arguments going to the consideration of victim vulnerability, concentrating only on the question of population density.

<sup>16</sup> See, e.g., *Brđanin* Appeal Judgement, para. 471; *Stakić* Appeal Judgement, paras 260-261; *Ntakirutimana* Appeal Judgement, para. 516.

<sup>17</sup> *Stakić* Trial Judgement, para. 640.

<sup>18</sup> *Martić* Trial Judgement, para. 63, fn. 120, referring to *Krajišnik* Trial Judgement, para. 716.; *Stakić* Trial Judgement, para. 653; *Vasiljević* Trial Judgement, para. 227. See also *Nahimana et al.* Trial Judgement, para. 1061, where the Trial Chamber held that “in order to be guilty of the crime of extermination, the Accused must have been involved in killings of civilians on a large scale but consider[ed] that the distinction is not entirely related to numbers. The distinction between extermination and murder is a conceptual one that relates to the victims of the crime and the manner in which they were targeted.”

12. For these reasons, I respectfully believe that the Majority of the Appeals Chamber should have found that the reasoning adopted by the Majority of the Trial Chamber, in consideration of the element of massiveness, was erroneous.

**C. In the present case, the number of victims was sufficient to find that the crime of extermination did occur**

13. In the analysis above, I have explained that, in my view, subjective considerations such as population density and victim vulnerability should be excluded from the determination of the element of massiveness. I do not seek to prescribe the factors that *can* be legitimately considered in such an assessment, other than to observe that invariably, the number of persons killed will be a foremost consideration.

14. As to the quantity of persons that must be killed before the crime is deemed massive, extermination has been associated with the killings of thousands.<sup>19</sup> At this juncture, I should note that I have considerable sympathy with the opinion proffered by Judge Van den Wyngaert in her dissent at trial in the present case; namely, that it may have been preferable to expressly require that the crime of extermination be predicated on a very large volume of deaths.<sup>20</sup>

15. However, on the basis of the jurisprudence of the Tribunal to date, it is my view that the quantity of deaths at the Pionirska Street Incident and Bikavac Incident were, respectively, sufficient to constitute extermination. In *Brdanin*, it was found that the killing of 68 to 300 persons “in light of the circumstances in which they occurred, [met] the required threshold of massiveness for the purposes of extermination”.<sup>21</sup> In *Stakić*, the Trial Chamber found that the killing of less than 80 persons “independently would reach the requisite level of massiveness for the purposes of an evaluation under Article 5(b) of the Statute”.<sup>22</sup> In *Krajišnik*, whilst the conviction for extermination was based on the killing of at least 1,916 persons, the Trial Chamber found in relation to the killing of approximately 66 persons “the element of mass scale [was] fulfilled”.<sup>23</sup> The ICTR and the SCSL have also found the killing of less than 60 persons to be sufficiently large scale to amount to extermination.<sup>24</sup>

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<sup>19</sup> See, e.g., *Krstić* Trial Judgement, paras 79, 84, 426, 505. See also *Ntakirutimana* Appeal Judgement, para. 521.

<sup>20</sup> See Trial Judgement, paras 1120-1122 (Partially Dissenting Opinion of Judge Van den Wyngaert).

<sup>21</sup> *Brdanin* Appeal Judgement, para. 472.

<sup>22</sup> *Stakić* Trial Judgement, para. 653. See also *Stakić* Trial Judgement, para. 269. The Appeals Chamber did not address whether each incident would independently satisfy the requirement that the massiveness element had been met, but upheld the overall conviction for extermination, *Stakić* Appeal Judgement, para. 260.

<sup>23</sup> *Krajišnik* Trial Judgement, paras 699, 720, overturned on appeal for reasons not related to the assessment of the massiveness requirement, *Krajišnik* Appeal Judgement, para. 177. See also Trial Judgement, para. 938.

<sup>24</sup> *Bagosora and Nsengiyumva* Appeal Judgement, para. 398; *Setako* Trial Judgement, para. 481 (30 to 40 victims) (this finding was upheld on appeal, *Setako* Appeal Judgement, para. 301); *Sesay et al.* Trial Judgement, paras 1107 (63

16. In the present case, therefore, I consider that the killing of 53 persons in the Pionirska Street Incident, and of 60 persons in the Bikavac Incident, were, in each case, sufficiently large scale to amount to extermination, despite the error of the Majority of the Trial Chamber in its reasoning when reaching this conclusion.

#### **D. Conclusion**

17. The Majority of the Appeals Chamber has, in my opinion, erred in failing to find that the Majority of the Trial Chamber inappropriately considered certain subjective factors in its assessment of the element of massiveness. However, it is my view that, in the present case, the crime was established on the basis of the number of persons killed and, by consequence, Milan Lukić was correctly convicted for committing the crime of extermination.

Done in English and French, the English text being authoritative.

Done this fourth day of December 2012  
at The Hague, The Netherlands.

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Judge Howard Morrison

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victims), 1271 (30 to 40 victims), 1449 (64 victims) (these finding were upheld on appeal, *Sesay et al.* Appeal Judgement, Chapter XII).

## **XX. ANNEX A - PROCEDURAL BACKGROUND**

### **A. Composition of the Appeals Chamber**

1. On 22 July 2009, the President of the Tribunal assigned the following Judges to form the Appeals Chamber's Bench in this case: Judge Mehmet Güney, Judge Fausto Pocar, Judge Liu Daqun, Judge Theodor Meron, and Judge Carmel Agius.<sup>1</sup> On 19 August 2009, Judge Mehmet Güney, who was elected to serve as presiding Judge, designated himself as pre-appeal Judge.<sup>2</sup> On 19 May 2011, Judge Bakone Justice Moloto was assigned to replace Judge Theodor Meron<sup>3</sup> and on 27 May 2011, Judge Howard Morrison was assigned to replace Judge Bakone Justice Moloto on the Bench.<sup>4</sup>

### **B. Notices of appeal**

2. On 19 August 2009, the pre-appeal Judge dismissed Milan Lukić's motion seeking an extension of time of 15 to 20 days beyond the due date of 19 August 2009 to file his notice of appeal.<sup>5</sup> Milan Lukić accordingly filed his notice of appeal on 19 August 2009.<sup>6</sup> Sredoje Lukić and the Prosecution also filed their respective notices of appeal on 19 August 2009.<sup>7</sup>

3. On 16 December 2009, the Appeals Chamber granted Milan Lukić's motion to amend his notice of appeal and accepted his amended notice of appeal as appended to his motion.<sup>8</sup>

### **C. Representation of Milan Lukić**

4. On 14 October 2009, the Deputy Registrar withdrew the assignment of Alarid as lead counsel to Milan Lukić and appointed Mr. Tomislav Višnjić as his new lead counsel.<sup>9</sup>

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<sup>1</sup> Order Assigning Judges to a Case Before the Appeals Chamber, 22 July 2009.

<sup>2</sup> Order Assigning a Pre-Appeal Judge, 19 August 2009.

<sup>3</sup> Order Replacing a Judge in a Case Before the Appeals Chamber, 19 May 2011.

<sup>4</sup> Order Replacing a Judge in a Case Before the Appeals Chamber, 27 May 2011.

<sup>5</sup> Decision on Milan Lukić's Urgent Motion for Enlargement of Time to File Notice of Appeal, 19 August 2009; Milan Lukić's Urgent Motion for Enlargement of Time to File Notice of Appeal, 17 August 2009.

<sup>6</sup> Notice of Appeal from Trial Judgement, 19 August 2009; Corrigendum to Milan Lukić's Amended Notice of Appeal, 4 December 2009.

<sup>7</sup> Notice of Appeal on Behalf of Sredoje Lukić, 19 August 2009; Prosecution Notice of Appeal, 19 August 2009.

<sup>8</sup> Decision on Milan Lukić's Motion to Amend his Notice of Appeal, 16 December 2009; Milan Lukić's [*sic*] Motion to Vary His Notice of Appeal, 26 November 2009.

<sup>9</sup> Decision by the Deputy Registrar Assigning Counsel to Milan Lukić, 14 October 2009.

## **D. Appeals**

5. On 30 October 2009, the Appeals Chamber granted Milan Lukić's motion seeking an extension of time of 45 days beyond the due date of 2 November 2009 to file his appeal brief.<sup>10</sup> It also granted the Prosecution's request for a 10-day extension of time to file its response brief should Milan Lukić's motion for extension of time be granted.<sup>11</sup> However, it dismissed Sredoje Lukić's request that, should Milan Lukić's motion for extension of time be granted, "all Appeal Briefs and Responses of the parties be submitted on the same date and time".<sup>12</sup> Accordingly, Sredoje Lukić filed his appeal brief on 2 November 2009,<sup>13</sup> to which the Prosecution responded on 14 December 2009.<sup>14</sup> Sredoje Lukić filed his brief in reply on 29 December 2009.<sup>15</sup>

6. The Prosecution filed its appeal brief on 2 November 2009,<sup>16</sup> to which Sredoje Lukić responded on 14 December 2009,<sup>17</sup> and its brief in reply on 23 December 2009.<sup>18</sup>

7. Milan Lukić filed his appeal brief on 17 December 2009.<sup>19</sup> The Prosecution responded on 5 February 2010.<sup>20</sup> Milan Lukić's request for an extension of time to file his brief in reply was denied on 2 February 2010.<sup>21</sup> He filed his brief in reply on 22 February 2010.<sup>22</sup>

## **E. Provisional release**

8. On 21 July 2009, Milan Lukić filed a motion seeking provisional release for a period of up to five days in order to spend time with his ailing and elderly parents in Belgrade.<sup>23</sup> On 24 July 2009, the Prosecution opposed the motion in its confidentially filed response, arguing that

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<sup>10</sup> Decision on Milan Lukić's Motion Seeking Extension of Time to File Appeal Brief and Motion for Stay of Proceedings, 30 October 2009 ("Decision on Milan Lukić's Motion for Extension of Time of 30 October 2009"); Defence Motion Seeking Extension of Time to File Appeal Brief, 19 October 2009. On 1 October 2009, Milan Lukić had filed a confidential motion for stay of proceedings, to which the Prosecution had responded on 6 October 2009.

<sup>11</sup> Decision on Milan Lukić's Motion for Extension of Time of 30 October 2009. *See also* Prosecution Response to Milan Lukić's Motion for Extension of Time to File Appeal Brief, 22 October 2009, paras 1, 4, 6.

<sup>12</sup> Decision on Milan Lukić's Motion for Extension of Time of 30 October 2009. *See also* Sredoje Lukić's Response to Milan Lukić's Motion for Extension of Time to File Appeal Brief, 23 October 2009, para. 4.

<sup>13</sup> Sredoje Lukić Appeal Brief.

<sup>14</sup> Prosecution Response Brief (Sredoje Lukić). A public redacted version was filed on 23 December 2009.

<sup>15</sup> Sredoje Lukić Reply Brief. A public redacted version was filed on 13 September 2010.

<sup>16</sup> Prosecution Appeal Brief.

<sup>17</sup> Sredoje Lukić Response Brief.

<sup>18</sup> Prosecution Reply Brief.

<sup>19</sup> Milan Lukić Appeal Brief. A public redacted version was filed on 18 March 2010.

<sup>20</sup> Prosecution Response Brief (Milan Lukić), 5 February 2010 (confidential). A public redacted version was filed on 6 May 2010. On 6 April 2010, the Prosecution filed the Corrigendum to Prosecution Response to Milan Lukić's Appeal (confidential). On 13 April 2010, it filed the Second Corrigendum to Prosecution Response to Milan Lukić's Appeal (confidential), and on 6 December 2010, it filed the Third Corrigendum to Prosecution Response (Milan Lukić).

<sup>21</sup> Decision on Milan Lukić's Motion to Enlarge Time for Filing Reply Brief, 2 February 2010; Milan Lukić's Motion to Enlarge Time for Filing Reply Brief, 28 January 2010.

<sup>22</sup> Milan Lukić's Reply Brief. A public redacted version was filed on 17 November 2010.

<sup>23</sup> Milan Lukić's Motion for Provisional Release on Humanitarian Grounds, 21 July 2009.

Milan Lukić had failed to meet any of the conditions under Rule 65(I) of the Rules.<sup>24</sup> On 28 August 2009, the Appeals Chamber denied Milan Lukić's motion for provisional release because it was not satisfied that, if released, Lukić would surrender into detention at the conclusion of the proposed period.<sup>25</sup> The Appeals Chamber further ordered the Prosecution to re-file a public redacted version of its response within 14 days.<sup>26</sup>

## **F. Evidentiary issues**

### **1. Additional evidence on appeal**

9. Milan Lukić filed his first motion for the admission of additional evidence before the Appeals Chamber on 8 February 2010;<sup>27</sup> his second motion for the admission of additional evidence on 9 February 2010;<sup>28</sup> his third motion for the admission of additional evidence on 22 February 2010;<sup>29</sup> his fourth motion for admission of additional evidence on 24 January 2011;<sup>30</sup> and a supplemental filing in support of the fourth motion on 1 March 2011.<sup>31</sup>

10. On 12 May 2011, the Appeals Chamber granted in part "Milan Lukic's [*sic*] Motion for Remedies Arising out of Disclosure Violations by the Office of the Prosecutor Including Stay of Proceedings", finding that the Prosecution had violated its Rule 68 disclosure obligations and

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<sup>24</sup> Prosecution Response to Milan Lukić's Motion for Provisional Release, 24 July 2009 (confidential), para. 12.

<sup>25</sup> Decision on Milan Lukić's Motion for Provisional Release, 28 August 2009 ("Decision of 28 August 2009"), para. 11.

<sup>26</sup> Decision of 28 August 2009, para. 13.

<sup>27</sup> Milan Lukić's Motion to Admit Evidence before the Appeals Chamber, 8 February 2010 (confidential). *See also* Prosecution Response to Milan Lukić's First Motion to Admit Additional Evidence, 26 February 2010 (confidential); Milan Lukić's Reply in Support of Motion to Admit Evidence Before the Appeals Chamber, 1 March 2010 (confidential).

<sup>28</sup> Milan Lukić's Second Motion to Admit Evidence before the Appeals Chamber, 9 February 2010 (confidential). *See also* Prosecution Response to Milan Lukić's Second Motion to Admit Additional Evidence, 12 March 2010 (confidential); Milan Lukić's Reply in Support of Second Motion to Admit Evidence Before the Appeals Chamber, 26 March 2010 (confidential).

<sup>29</sup> Milan Lukić's Third Motion to Admit Evidence Before the Appeals Chamber, 22 February 2010 (confidential). *See also* Prosecution Response to Milan Lukić's Third Motion to Admit Additional Evidence, 24 March 2010 (confidential); Milan Lukić's Reply in Support of Third Motion to Admit Evidence Before the Appeals Chamber, 7 April 2010 (confidential).

<sup>30</sup> Milan Lukić's Motion of 24 January 2011. *See also* Prosecution Response to Milan Lukić's Fourth Motion to Admit Additional Evidence, 9 February 2011 (confidential); Milan Lukić's Reply in Support of Fourth Motion to Admit Additional Evidence, 23 February 2011 (with confidential annex).

<sup>31</sup> Milan Lukić's Supplemental Filing of 1 March 2011. *See also* Prosecution Response to Milan Lukić's Fifth Motion to Admit Additional Evidence (Entitled "Supplemental Filing in Support of Fourth Motion to Introduce Additional Evidence"), 10 March 2011 (confidential); Milan Lukić's Reply to Supplemental Filing in Support of Fourth Motion to Introduce Additional Evidence Before the Appeals Chamber, 17 March 2011.

ordering Milan Lukić to file any Rule 115 motion by 26 May 2011.<sup>32</sup> Accordingly, Milan Lukić filed his fifth motion for admission of additional evidence on 26 May 2011.<sup>33</sup>

11. On 6 July 2011, the Appeals Chamber dismissed Milan Lukić's first motion to admit additional evidence on appeal as the evidence being sought to be admitted was already a part of the trial record.<sup>34</sup> On 6 July 2011, the Appeals Chamber also dismissed Milan Lukić's second motion for admission of additional evidence on appeal.<sup>35</sup> On 22 July 2011, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, granted the fifth motion and in part, the fourth motion.<sup>36</sup> On 15 August 2011, the Appeals Chamber dismissed Milan Lukić's third motion<sup>37</sup> and sixth motion for admission of additional evidence on appeal.<sup>38</sup>

12. On 28 July 2011, the Prosecution filed a motion for the admission of rebuttal evidence.<sup>39</sup> The Appeals Chamber granted this motion on 24 August 2011 and admitted two exhibits as rebuttal evidence.<sup>40</sup> On 31 August, 2011, Milan Lukić filed a supplemental brief on the impact of additional evidence admitted in rebuttal<sup>41</sup> to which the Prosecution filed its response on 5 September 2011.<sup>42</sup>

## 2. Other evidentiary matters

13. On 25 September 2009, the Appeals Chamber denied a motion by Radovan Karadžić requesting variance of protective measures.<sup>43</sup>

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<sup>32</sup> Decision on Milan Lukić's Motion for Remedies Arising Out of Disclosure Violations by the Prosecution, 12 May 2011 (confidential).

<sup>33</sup> Milan Lukić's Fifth Motion to Introduce Additional Evidence Before the Appeals Chamber, 26 May 2011 (confidential). *See also* Response to Milan Lukić's Sixth Motion to Admit Additional Evidence, 22 June 2011 (confidential); Reply Brief in Support of Milan Lukić's Fifth Motion Pursuant to Rule 115, 5 July 2011 (confidential).

<sup>34</sup> Decision on Milan Lukić's First Motion to Admit Additional Evidence on Appeal, 6 July 2011. On 27 June 2012, the Appeals Chamber instructed the Registry to provide a certified English translation of Exh. 1D39 by 20 July 2012 (Order for Translation, 26 June 2012). The Registry provided the certified English translation of Ex. 1D39 on 17 July 2012 (Registrar's Submission Pursuant to Rule 33(B) – Notice of Compliance with the Order for Translation, 17 July 2012).

<sup>35</sup> Decision on Milan Lukić's Second Motion for Admission of Additional Evidence on Appeal, 6 July 2011 (confidential).

<sup>36</sup> Decision of 22 July 2011. Judge Pocar and Judge Agius appended a joint partly dissenting opinion. *See also* Registry Memorandum "Assignment of Exhibit Numbers to documents pursuant to 22 July 2011 Decision", 4 August 2011 (confidential).

<sup>37</sup> Decision on Milan Lukić's Third Motion for Admission of Additional Evidence on Appeal, 25 August 2011 (confidential).

<sup>38</sup> Decision on Milan Lukić's Sixth Motion for Admission of Additional Evidence on Appeal, 25 August, 2011 (confidential).

<sup>39</sup> Prosecution Rebuttal of Evidence Admitted in the "Decision on Milan Lukić's Fourth and Fifth Motions for Admission of Additional Evidence on Appeal", 28 July 2011 (confidential with confidential annexes).

<sup>40</sup> Decision on Rebuttal Evidence of 24 August 2011. *See also* Registry Memorandum "Assignment of Exhibit Numbers to documents pursuant to 24 August 2001 Decision", 29 August 2011.

<sup>41</sup> Milan Lukić's Supplemental Brief of 31 August 2011.

<sup>42</sup> Prosecution Response to Supplemental Brief of Milan Lukić, 5 September 2011 (confidential).

<sup>43</sup> Decision on Radovan Karadžić's Motion for Variance of Protective Measures, 25 September 2009. *See also* Motion by Radovan Karadžić for Variance of Protective Measures, 24 August 2009; Prosecution's Response to Motion by Radovan Karadžić for Variance of Protective Measures, 3 September 2009.



14. On 4 November 2009, the Appeals Chamber granted in part a motion of the BiH Prosecutor for variation of protective measures pursuant to Rule 75(H) of the Rules.<sup>44</sup> On 1 December 2009, the Appeals Chamber granted in part a second motion of the BiH Prosecutor for variation of protective measures pursuant to Rule 75(H) of the Rules.<sup>45</sup> On 2 August 2011, the Appeals Chamber dismissed the third motion of the BiH Prosecutor pursuant to Rule 75(H) of the Rules.<sup>46</sup>

15. On 24 June 2011, the Prosecution filed a motion to rescind protective measures for two witnesses, augment protective measures for one witness, and vary the confidential status of documents.<sup>47</sup> On 5 September 2011, the Appeals Chamber granted this motion in part.<sup>48</sup>

### 3. Tabaković contempt proceedings

16. On 10 February 2010, the Prosecution filed an urgent *ex parte* motion to disclose confidential filings to defence counsel.<sup>49</sup> This was followed by a second and third motion on

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<sup>44</sup> Decision on Application of Prosecutor's Office of Bosnia and Herzegovina for Variation of Protective Measures Pursuant to Rule 75(H), 4 November 2009 (confidential and *ex parte*). On 25 November 2009, the Appeals Chamber filed the Corrigendum to Decision on Application of Prosecutor's Office of Bosnia and Herzegovina of 4 November 2009 (confidential and *ex parte*). See also Order Assigning a Chamber to Consider an Application by the Prosecutor's Office of Bosnia and Herzegovina pursuant to Rule 75(H), 4 November 2009; Rule 33(B) Submission in Compliance with the "Order on Application of Prosecutor's Office of Bosnia and Herzegovina Pursuant to Rule 75(H) dated 24 September 2009", 8 October 2009 (confidential and *ex parte*); Prosecution's Confidential and *Ex Parte* Response to Confidential and *Ex Parte* Application of the Prosecutor's Office of Bosnia and Herzegovina under Rule 75(H), 6 October 2009 (confidential and *ex parte*). On 24 September 2009, the Appeals Chamber issued a confidential and *ex parte* order on an application of the Prosecutor's Office of Bosnia and Herzegovina pursuant to Rule 75(H) of the Rules. See also Application of the Prosecutor's Office of Bosnia and Herzegovina for Variation of Protective Measure Pursuant to Rule 75(H) of the ICTY Rules of Procedure and Evidence, 9 September 2009 (confidential).

<sup>45</sup> Decision on Application of the Prosecutor's Office of Bosnia and Herzegovina pursuant to Rule 75(H), 1 December 2009 (confidential and *ex parte*); Rule 33(B) Submission in Compliance with the "Order on Application of Prosecutor's Office of Bosnia and Herzegovina pursuant to Rule 75(H)" Dated 10 November 2009, 20 November 2009 (confidential and *ex parte*); Prosecution's Confidential and *Ex Parte* Response to Confidential and *Ex Parte* Application of the Prosecutor's Office of Bosnia and Herzegovina under Rule 75(H), 20 November 2009 (confidential and *ex parte*); Order on Application of the Prosecutor's Office of Bosnia and Herzegovina pursuant to Rule 75(H), 10 November 2009 (confidential and *ex parte*).

<sup>46</sup> Decision on Application of the Prosecutor's Office of Bosnia and Herzegovina Pursuant to Rule 75(H), 2 August 2011 (confidential and *ex parte*). See also Order on Application of Prosecutor's Office of Bosnia and Herzegovina Pursuant to Rule 75(H), 29 June 2011 (confidential and *ex parte*); Further Rule 33(B) Submission in Compliance with the "Order on Application of Prosecutor's Office of Bosnia and Herzegovina Pursuant to Rule 75(H)" Dated 29 June 2011, 28 July 2011 (confidential and *ex parte*); Further Rule 33(B) Submission in Compliance with the "Order on Application of Prosecutor's Office of Bosnia and Herzegovina Pursuant to Rule 75(H)" Dated 29 June 2011, 13 July 2011 (confidential and *ex parte*); Rule 33(B) Submission in Compliance with the "Order on the Prosecution Motion to Rescind Protective Measures for Two Witnesses, Augment Protective Measures for One Witness and Vary the Confidential Status of Documents" Dated 30 June 2011, 4 July 2011 (confidential and *ex parte*).

<sup>47</sup> Prosecution Motion to Rescind Protective Measures for Two Witnesses, Augment Protective Measures for One Witness and Vary the Confidential Status of Documents, 24 June 2011 (confidential).

<sup>48</sup> Decision on the Prosecution's Motion for Variation of Protective Measures, 5 September 2011 (confidential). See also Rule 33(B) Submission in Compliance with the "Order on the Prosecution Motion to Rescind Protective Measures for Two Witnesses, Augment Protective Measures for One Witness and Vary the Confidential Status of Documents" Dated 30 June 2011, 4 July 2011 (confidential and *ex parte*); Further Rule 33(B) Submission in Compliance with the "Order on the Prosecution Motion to Rescind Protective Measures for Two Witnesses, Augment Protective Measures for One Witness and Vary the Confidential Status of Documents" Dated 30 June 2011, 5 July 2011 (confidential and *ex parte*); Order on Prosecution Motion to Rescind Protective Measures for Two Witnesses, Augment [*sic*] Protective Measures for One Witness and Vary the Confidential Status of Documents, 30 June 2011 (confidential).

22 February 2010 and 26 February 2010, respectively.<sup>50</sup> On 17 and 25 February 2010, the Pre-Appeal Judge issued orders in relation to the first and the second of these motions.<sup>51</sup> On 4 March 2010, the Registry filed a submission pursuant to Rule 33(B) of the Rules.<sup>52</sup> On 11 March 2010, the Appeals Chamber filed its decision with respect to these motions.<sup>53</sup> On 5 May 2010, the Appeals Chamber rendered a decision in relation to Milan Lukić's request for access to all confidential materials in the *Zuhdija Tabaković* case.<sup>54</sup>

#### 4. Rašić contempt proceedings

17. On 26 January 2011, Jelena Rašić filed a confidential motion requesting access to confidential materials<sup>55</sup> and on 22 March 2011, the Appeals Chamber ordered the Prosecution to file an itemised list of the confidential *inter partes* material it had disclosed to Rašić pursuant to Rules 66 and 68 of the Rules.<sup>56</sup> The Prosecution filed this list on 29 March 2011.<sup>57</sup> On

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<sup>49</sup> Urgent Motion to Disclose Confidential Filings to Defence Counsel, 10 February 2010 (confidential and *ex parte*).

<sup>50</sup> Urgent Motion for Variance of Protective Measures and Status of Confidential Material, 22 February 2010 (confidential and *ex parte*). See also Second Urgent Motion for Permission to Disclose Confidential Material, 26 February 2010 (confidential and *ex parte*).

<sup>51</sup> Order on the Prosecutor's Urgent Motion to Disclose Confidential Filings to Defence Counsel, 17 February 2010 (confidential and *ex parte*). See also Order on the Prosecutor's Urgent Motion for Variance of Protective Measures and Status of Confidential Material, 25 February 2010 (confidential and *ex parte*).

<sup>52</sup> Rule 33(B) Submission in Compliance with the "Order on the Prosecutor's Urgent Motion to Disclose Confidential Filings to Defence Counsel" Dated 17 February 2010 and "Order on the Prosecutor's Urgent Motion for Variance of Protective Measures and Status of Confidential Material" Dated 25 February 2010, 4 March 2010 (confidential and *ex parte*).

<sup>53</sup> Decision on Urgent Motions to Disclose Confidential Material to Defence Counsel, 11 March 2010 (confidential and *ex parte*).

<sup>54</sup> Decision on Milan Lukić's Motion for Access to All Confidential Materials in the *Zuhdija Tabaković* Case, 5 May 2010 (confidential); Motion by Milan Lukic [sic] for Access to All Confidential Materials in the *Zuhdija Tabakovic* [sic] Case, 30 March 2010 (confidential). Re-filed Prosecution Response to Milan Lukić's Motion for Access to All Confidential Materials in the *Zuhdija Tabaković* Case, 1 April 2010 (confidential); Registry Submission Pursuant to Rule 33(B) – Notice of Compliance with the Decision on Milan Lukić's Motion for Access to All Confidential Materials in the *Zuhdija Tabaković* case, 3 June 2010 (confidential).

<sup>55</sup> Motion of the Accused Jelena Rašić for Access to Confidential Materials in the *Lukić and Lukić* Case, 26 January 2011 (confidential); Prosecution Response to the Motion of the Accused Jelena Rašić for Access to Confidential Materials in the *Lukić & Lukić* Case, 7 February 2011 (confidential with confidential and *ex parte* Annex A); Reply to Prosecution's Response to the Motion of the Accused Jelena Rašić for Access to Confidential Materials in the *Lukić & Lukić* Case, 9 February 2011 (confidential).

<sup>56</sup> Order in Respect of Prosecution Disclosure of Rule 68 Material, 22 March 2011 (confidential).

<sup>57</sup> Prosecution Submission Pursuant to Order in Respect of Prosecution Disclosure of Rule 68 Material, 29 March 2011 (confidential). See also Order to the Prosecution in Respect of Jelena Rašić's Request for Confidential Material in the *Lukić and Lukić* case, 23 June 2011 (confidential and *ex parte*). On 4 July 2011, the Prosecution filed the "Prosecution Submission in Compliance with Appeals Chamber Order of 23 June 2011" (confidential and *ex parte* with confidential and *ex parte* annexes).

6 September 2011, the Appeals Chamber granted Rašić's motion in part,<sup>58</sup> to which the Registry filed a notice of compliance on 10 November 2011.<sup>59</sup>

### G. Other matters

18. On 12 October 2009, the Prosecution requested the Appeals Chamber to reconsider a decision of the Trial Chamber of 10 July 2009, and to rescind the order to disclose to Radovan Karadžić confidential material related to crimes allegedly committed in Višegrad.<sup>60</sup> The Appeals Chamber granted this motion on 7 December 2009.<sup>61</sup>

19. On 17 January 2012, the Appeals Chamber rendered the confidential "Decision on the Prosecution's Motion to Reconsider the Decision on the Prosecution's Motion for Variation of Protective Measures".<sup>62</sup>

20. On 3 December 2010, the Appeals Chamber rendered the "Order Regarding the Alteration of the Status of Exhibits Consisting of Transcripts from Other Cases".<sup>63</sup>

21. On 5 April 2011, Milan Lukić submitted that the Prosecution violated Rule 68 of the Rules by failing to disclose to him documents which he contended are exculpatory.<sup>64</sup> He was asking the Appeals Chamber, *inter alia*, to delay the appeal hearing until he had sufficient time to perform an

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<sup>58</sup> Decision on Jelena Rašić's Motion for Access to Confidential *Inter Partes* and *Ex Parte* Material from the *Lukić and Lukić* Case, 6 September 2011 (confidential). On 14 September 2011, the Prosecution filed the Prosecution Motion to Reconsider Decision on the Prosecution's Motion for Variation of Protective Measures (confidential). *See also* Corrigendum to Response to Prosecution Motion to Reconsider Decision on the Prosecution's Motion for Variation of Protective Measures, 26 September 2011 (confidential).

<sup>59</sup> Registry Submission Pursuant to Rule 33(B) - Notice of Compliance with the Decision on Jelena Rašić's Motion for Access to Confidential *Inter Partes* and *Ex Parte* Material from the *Lukić and Lukić* case, 10 November 2011 (confidential).

<sup>60</sup> Prosecution's Motion for Reconsideration and Rescission of the Order to Disclose Issued in Trial Chamber's "Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the *Lukić and Lukić* Case" of 10 July 2009, 12 October 2009.

<sup>61</sup> Decision on the Prosecution's "Motion for Reconsideration and Rescission of the Order to Disclose Issued in Trial Chamber's 'Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the *Lukić and Lukić* Case' of 10 July 2009", 7 December 2009. *See also* Prosecution's Notice of Compliance re "Decision on the Prosecution's Motion for Reconsideration and Rescission of the Order to Disclose Issued in Trial Chamber's 'Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the *Lukić and Lukić* Case' of 10 July 2009" (confidential and *ex parte*), 14 December 2009.

<sup>62</sup> *See also* Prosecution Motion to Reconsider Decision on the Prosecution's Motion for Variation of Protective Measures, 14 September 2011 (confidential); Corrigendum to Response to Prosecution Motion to Reconsider Decision on the Prosecution's Motion for Variation of Protective Measures, 26 September 2011 (confidential), Annex A.

<sup>63</sup> This order set aside the Appeals Chamber's previous Order Regarding the Status of Exhibits Consisting of Transcripts From Other Cases filed on 28 June 2010. On 9 December 2010, the Prosecution filed a Notice of Compliance with Order Regarding the Alteration of the Status of Exhibits. *See also* Chief of Court of Management and Support Services Certificate, 23 December 2010.

<sup>64</sup> Milan Lukić's [*sic*] Motion for Remedies Arising out of Disclosure Violations by the Office of the Prosecutor Including Stay of Proceedings, 5 April 2011 (with confidential annexes) ("Milan Lukić's Motion of 5 April 2011"). *See also* Response to "Milan Lukić's Motion for Remedies Arising out of Disclosure Violations", 15 April 2011 (confidential; a public redacted version was filed on the same day); Reply Brief in Support of Milan Lukić's [*sic*] Motion for Remedies Arising Out of Disclosure Violations by the Office of the Prosecutor Including Stay of Proceedings, 26 April 2011.

investigation in light of these documents and to seek the admission of these documents and possible other documents pursuant to Rule 115 of the Rules.<sup>65</sup> The Appeals Chamber issued its decision on this motion on 12 May 2011.<sup>66</sup>

22. On 4 August 2011, the Pre-Appeal Judge ordered that certain portions of private/closed session testimonies could be disclosed, without revealing the identity of protected witnesses.<sup>67</sup>

## **H. Status conferences**

23. The status conferences were held on 13 November 2009,<sup>68</sup> 16 March 2010,<sup>69</sup> 14 July 2010,<sup>70</sup> 11 November 2010,<sup>71</sup> 10 March 2011<sup>72</sup> 8 July 2011,<sup>73</sup> 23 January 2012,<sup>74</sup> 24 May 2012,<sup>75</sup> and 24 September 2012.<sup>76</sup>

## **I. Appeal Hearing**

24. The appeal hearing was held on 14 and 15 September 2011.<sup>77</sup>

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<sup>65</sup> Milan Lukić's Motion of 5 April 2011, para. 42.

<sup>66</sup> Decision on Milan Lukić's Motion for Remedies Arising Out of Disclosure Violations by the Prosecution, 12 May 2011 (confidential). The confidential status of this decision was lifted by the Order Lifting Confidentiality of the "Decision on Milan Lukić's Motion for Remedies Arising Out of Disclosure Violations by the Prosecution" Issued on 12 May 2011, 11 May 2012.

<sup>67</sup> Further Order on Disclosure of Portions of Private/Closed Session Transcripts, 4 August 2011. *See also* Order on Disclosure of Portions of Private/Closed Session Transcripts, 16 June 2011; Prosecution's Submission on the Pre-Appeal Judge's Order on Disclosure of Portions of Private/Closed Session Transcripts, 1 July 2011 (confidential); Clarification of Further Order on Disclosure of Portions of Private/Closed Session Transcripts, 6 September 2011.

<sup>68</sup> Scheduling Order, 10 November 2009.

<sup>69</sup> Scheduling Order, 22 February 2010.

<sup>70</sup> Scheduling Order, 30 June 2010.

<sup>71</sup> Scheduling Order, 2 November 2010; Order Rescheduling Hearing, 3 November 2010.

<sup>72</sup> Scheduling Order, 1 March 2011.

<sup>73</sup> Scheduling Order, 30 June 2011. On 8 July 2011, Milan Lukić filed a notice of absence from court and was represented by his counsel during the status conference. *See* Order for the Preparation of the Appeal Hearing, 6 September 2011; Assignment of Exhibit Numbers to Documents Pursuant to 6 September 2011 Order, 9 September 2011 (confidential).

<sup>74</sup> Scheduling Order, 5 December 2011. On 23 January 2012, Milan Lukić filed a notice of absence from court and was represented by his counsel during the status conference.

<sup>75</sup> Scheduling Order, 2 May 2012.

<sup>76</sup> Scheduling Order, 13 September 2012.

<sup>77</sup> Scheduling Order for Appeal Hearing, 8 July 2011. *See also* Corrigendum to Scheduling Order for Appeal Hearing Dated 8 July 2011, 12 July 2011.

## **XXI. ANNEX B – GLOSSARY OF TERMS**

### **A. List of Cited Judgements**

#### **1. ICTY**

##### **ALEKSOVSKI**

*Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 (“*Aleksovski Appeal Judgement*”)

##### **BABIĆ**

*Prosecutor v. Milan Babić*, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 (“*Babić Sentencing Appeal Judgement*”)

##### **BLAGOJEVIĆ AND JOKIĆ**

*Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005 (“*Blagojević and Jokić Trial Judgement*”)

*Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Judgement, 9 May 2007 (“*Blagojević and Jokić Appeal Judgement*”)

##### **BLAŠKIĆ**

*Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 (“*Blaškić Appeal Judgement*”)

##### **BOŠKOSKI AND TARČULOVSKI**

*Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Judgement, 19 May 2010 (“*Boškoski and Tarčulovski Appeal Judgement*”)

##### **BRALO**

*Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Judgement on Sentencing Appeal, 2 April 2007 (“*Bralo Sentencing Appeal Judgement*”)

## **BRDANIN**

*Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-T, Judgement, 1 September 2004 (“*Brdanin Trial Judgement*”)

*Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Judgement, 3 April 2007 (“*Brdanin Appeal Judgement*”)

## **“ČELEBIĆ”**

*Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. “Pavo”, Hazim Delić and Esad Landžo, a.k.a. “Zenga”*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelebići Appeal Judgement*”)

## **ERDEMOVIĆ**

*Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-*This*, Sentencing Judgement, 5 March 1998 (“*Erdemović Sentencing Judgement*”)

## **FURUNDŽIJA**

*Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (“*Furundžija Appeal Judgement*”)

## **GALIĆ**

*Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 (“*Galić Appeal Judgement*”)

## **HALILOVIĆ**

*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Judgement, 16 October 2007 (“*Halilović Appeal Judgement*”)

## **HARADINAJ *et al.***

*Prosecutor v. Ramush Haradinaj, Idriz Baraj and Lahi Brahimaj*, Case No. IT-04-84-T, Judgement, 3 April 2008 (“*Haradinaj et al. Trial Judgement*”)

*Prosecutor v. Ramush Haradinaj, Idriz Baraj and Lahi Brahimaj*, Case No. IT-04-84-A, Judgement, 19 July 2010 (“*Haradinaj et al. Appeal Judgement*”)

## **HARAQIJA AND MORINA**

*Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4-A, Judgement, 23 July 2009 (“*Haraqija and Morina Appeal Judgement*”)

## **M. JOKIĆ**

*Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-S, Sentencing Judgement, 18 March 2004 (“*Jokić Sentencing Judgement*”)

## **KORDIĆ AND ČERKEZ**

*Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez Appeal Judgement*”)

## **KRAJIŠNIK**

*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Judgement, 27 September 2006 (“*Krajišnik Trial Judgement*”)

*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009 (“*Krajišnik Appeal Judgement*”)

## **KRNOJELAC**

*Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgment, 15 March 2002 (“*Krnojelac Trial Judgement*”)

*Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003 (“*Krnojelac Appeal Judgement*”)

## **KRSTIĆ**

*Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001 (“*Krstić Trial Judgement*”)

## **KUNARAC *et al.***

*Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case Nos IT-96-23 and IT-96-23/1-T, Judgement, 22 February 2001 (“*Kunarac et al. Trial Judgement*”)

*Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23&IT-96-23/1-A, Judgement, 12 June 2002 (“*Kunarac et al.* Appeal Judgement”)

**KUPREŠKIĆ *et al.***

*Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 (“*Kupreškić et al.* Appeal Judgement”)

**KVOČKA *et al.***

*Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 (“*Kvočka et al.* Appeal Judgement”)

**LIMAJ *et al.***

*Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgement, 30 November 2005 (“*Limaj et al.* Trial Judgement”)

*Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Judgement, 27 September 2007 (“*Limaj et al.* Appeal Judgement”)

**MARTIĆ**

*Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgement, 12 June 2007 (“*Martić* Trial Judgement”)

**D. MILOŠEVIĆ**

*Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgement, 12 November 2009 (“*Milošević* Appeal Judgement”)

**MRKŠIĆ AND ŠLJIVANČANIN**

*Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Judgement, 5 May 2009 (“*Mrkšić and Šljivančanin* Appeal Judgement”)

**NALETILIĆ AND MARTINOVIĆ**

*Prosecutor v. Mladen Naletilić, a.k.a. “Tuta”, and Vinko Martinović, a.k.a. “Štela”*, Case No. IT-98-34-A, Judgement, 3 May 2006 (“*Naletilić and Martinović* Appeal Judgement”)



## **ORIĆ**

*Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgement, 30 June 2006 (“*Orić* Trial Judgement”)

## **SIKIRICA *et al.***

*Prosecutor v. Duško Sikirica, Damir Došen, and Dragan Kolundžija*, Case No. IT-95-8-S, Sentencing Judgement, 13 November 2001 (“*Sikirica et al.* Sentencing Judgement”)

## **B. SIMIĆ *et al.***

*Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Judgement, 28 November 2006 (“*Simić* Appeal Judgement”)

## **STAKIĆ**

*Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003 (“*Stakić* Trial Judgement”)

*Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006 (“*Stakić* Appeal Judgement”)

## **D. TADIĆ**

*Prosecutor v. Duško Tadić a.k.a. “Dule”*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997 (“*Tadić* Trial Judgement”)

*Prosecutor v. Duško Tadić a.k.a. “Dule”*, Case No. IT-94-1-A, Judgement, 15 July 1999 (“*Tadić* Appeal Judgement”)

## **TODOROVIĆ**

*Prosecutor v. Stevan Todorović*, Case No. 95-9/1-S, Sentencing Judgement, 31 July 2001 (“*Todorović* Sentencing Judgement”)

## **VASILJEVIĆ**

*Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgment, 29 November 2002 (“*Vasiljević Trial Judgement*”)

*Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgment, 25 February 2004 (“*Vasiljević Appeal Judgement*”)

## **2. ICTR**

### **AKAYESU**

*The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgment, 1 June 2001 (*Akayesu Appeal Judgement*”)

### **BAGOSORA AND NSENGIYUMVA**

*Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Judgment, 14 December 2011 (“*Bagosora and Nsengiyumva Appeal Judgement*”)

### **BIKINDI**

*Simon Bikindi v. The Prosecutor*, Case No. ICTR-01-72-A, Judgment, 18 March 2010 (“*Bikindi Appeal Judgement*”)

### **GACUMBITSI**

*Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgment, 7 July 2006 (“*Gacumbitsi Appeal Judgement*”)

### **HATEGEKIMANA**

*Ildephonse Hategekimana v. The Prosecutor*, Case No. ICTR-00-55B-A, Judgment, 8 May 2012 (“*Hategekimana Appeal Judgement*”)

### **KAJELIJELI**

*Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgment, 23 May 2005 (“*Kajelijeli Appeal Judgement*”)

## **KALIMANZIRA**

*Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010 (“*Kalimanzira Appeal Judgement*”)

## **KAMUHANDA**

*Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 (“*Kamuhanda Appeal Judgement*”)

## **KANYARUKIGA**

*Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTY-02-78-A, Judgement, 8 May 2012 (“*Kanyarukiga Appeal Judgement*”)

## **KARERA**

*The Prosecutor v. François Karera*, Case No. ICTR-01-74-A, Judgement, 2 February 2009 (“*Karera Appeal Judgement*”)

## **KAYISHEMA AND RUZINDANA**

*The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 (“*Kayishema and Ruzindana Appeal Judgement*”)

## **MUHIMANA**

*Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Judgement, 21 May 2007 (“*Muhimana Appeal Judgement*”)

## **MUSEMA**

*Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-A, Judgement, 16 November 2001 (“*Musema Appeal Judgement*”)

## **MUVUNYI**

*Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Judgement, 29 August 2008 (“*Muvunyi I Appeal Judgement*”)

*Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Judgement, 1 April 2011 (“*Muvunyi II Appeal Judgement*”)

## **NAHIMANA *et al.***

*The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 (“*Nahimana et al.* Trial Judgement”)

*Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 (“*Nahimana et al.* Appeal Judgement”)

## **NCHAMIHIGO**

*Siméon Nchamihigo v. The Prosecutor*, Case No. ICTR-2001-63-A, Judgement, 18 March 2010 (“*Nchamihigo* Appeal Judgement”)

## **NDINDABAHIZI**

*Emmanuel Ndindabahizi v. The Prosecutor*, Case No. ICTR-01-71-A, Judgement, 16 January 2007 (“*Ndindabahizi* Appeal Judgement”)

## **NIYITEGEKA**

*Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004 (“*Niyitegeka* Appeal Judgement”)

## **NTABAKUZE**

*Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-98-41A-A, Judgement, 8 May 2012 (“*Ntabakuze* Appeal Judgement”)

## **NTAGERURA *et al.***

*The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-A, Judgement, 7 July 2006 (“*Ntagerura et al.* Appeal Judgement”)

## **NTAKIRUTIMANA**

*The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 (“*Ntakirutimana* Appeal Judgement”)

## **RENZAHO**

*Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Judgement, 1 April 2011 (“*Renzaho Appeal Judgement*”)

## **RUKUNDO**

*Emmanuel Rukundo v. The Prosecutor*, Case No. ICTR-2001-70-A, Judgement, 20 October 2010 (“*Rukundo Appeal Judgement*”)

## **RUTAGANDA**

*Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003 (“*Rutaganda Appeal Judgement*”)

## **SEMANZA**

*Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005 (“*Semanza Appeal Judgement*”)

## **SEROMBA**

*The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgement, 12 March 2008 (“*Seromba Appeal Judgement*”)

## **SETAKO**

*The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Judgement and Sentence, 25 February 2010 (“*Setako Trial Judgement*”)

*Ephrem Setako v. The Prosecutor*, Case No. ICTR-04-81-A, Judgement, 28 September 2011 (“*Setako Appeal Judgement*”)

## **SIMBA**

*Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement, 27 November 2007 (“*Simba Appeal Judgement*”)

## **ZIGIRANYIRAZO**

*Protais Zigiranyizaro v. The Prosecutor*, Case No. ICTR-01-73-A, Judgement, 16 November 2009 (“*Zigiranyizaro Appeal Judgement*”)

### 3. SCSL

#### **SESAY *et al.***

*Prosecutor v. Issi Hassan Sesay, Morris Kallon, Augustine Gbao*, Case No. SCSL-04-15-T, Judgement, 2 March 2009 (“*Sesay et al.* Trial Judgement”)

*Prosecutor v. Issi Hassan Sesay, Morris Kallon, Augustine Gbao*, Case No. SCSL-04-15-A, Judgement, 26 October 2009 (“*Sesay et al.* Appeal Judgement”)

#### **B. List of abbreviations, acronyms, and short references**

Additional Witnesses	Alibi rebuttal witnesses and witnesses who would testify on substantive charges, as identified by the Prosecution on 12 March 2008
Alarid	Jason Alarid, Milan Lukić’s third lead counsel
Aljić House	The house of Meho Aljić in the Bikavac settlement
Alleged Victims List	List of alleged murder victims attached to the Indictment in annexes A and B
Appeals Chamber	The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991
Appellants	Milan Lukić and Sredoje Lukić
Association	Women Victims of War Association
AT.	Transcript page in the present case on appeal
Autopsy Report	Exh. P123, autopsy report from Slap grave site dated 6 November 2000
Berberović	Prosecution witness Adem Berberović
Bikavac Incident	The fire at Meho Aljić’s house on or about 27 June 1992, in which approximately 60 civilians were killed
Bugarski	Defence witness Branimir Bugarski
CW2 Association Statement	Exh. 1D228 (confidential), statement of witness CW2 to the Association

Defence Team	Defence team for Milan Lukić
Đerić	Defence witness Goran Đerić
Dervišević	Prosecution witness Nurko Dervišević
Dimas	Defence expert witness Benjamin Dimas
Dispatch Force	Members of the reserve police force and military personnel deployed to an area known as Kopito, outside Višegrad on 13 and 15 June 1992
Drina River Incident	The shooting of seven Muslim civilian men on the bank of the Drina River on 7 June 1992, in which five of the men were killed
Exhumation and Identification Documents	Exhs 1DA2 (confidential), a letter from the Office of the Cantonal Prosecutor in Goražde in Bosnia and Herzegovina to Milan Lukić forwarding a number of documents regarding Ismeta Kurspahić; 1DA3 (confidential), a report of the exhumation of bodies of Bosniak ethnicity at the Stražište Cemetery, dated 23 October 2009; 1DA4 (confidential), a report on establishing the identity of persons by DNA analysis”, dated 9 December 2010; 1DA5 (confidential), official record on establishing identity of Ismeta Kurspahić; 1DA6 (confidential), a report on forensic medical examination of 17 December 2009
FNU	First name unknown
Hasečić	Bakira Hasečić, President of the Association
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
Identification Documents	The Autopsy Report and the Identification Record
Identification Record	Exh. P124, record of identification of the body of Hamed Osmanagić
Indictment	<i>Prosecutor v. Milan Lukić and Sredoje Lukić</i> , Case No. IT-98-32/1-T, Second Amended Indictment, 27 February 2006
Interview	Exh. P41, an interview with Hasib Kurspahić
Introduction	Sredoje Lukić introducing himself upon entering

	the Memić House
Ivetić	Dragan Ivetić, Milan Lukić's co-counsel since 23 October 2008
JCE	Joint criminal enterprise
Jenkins	Defence expert witness Clifford Jenkins
JMBG	Citizen identification number
Kahrman	Prosecution witness Mirsada Kahrman
Koritnik Group	The group of approximately 66 Muslim civilians from Koritnik village and Sase village
Kustura	Prosecution witness Islam Kustura
LNU	Last name unknown
Logbook Entry	Exh. 1D39, a logbook entry relating to Vasiljević's treatment at the Višegrad Health Centre on 14 June 1992
Marković	Defence witness Željko Marković
Mašović	Prosecution witness Amor Mašović, President of the Bosnia and Herzegovina State Commission for Tracing Missing Persons of Bosnia and Herzegovina
Mašović's Missing Persons Chart	Exh. P184, a table of missing persons compiled by Mašović
Memić House	The house of Jusuf Memić located in the Pionirska neighbourhood
Milan Lukić Appeal Brief	<i>Prosecutor v. Milan Lukić and Sredoje Lukić</i> , Case No. IT-98-32/1-A, Milan Lukic's [sic] Appeal Brief, 17 December 2009 (confidential; public redacted version filed on 18 March 2010)
Milan Lukić Reply Brief	<i>Prosecutor v. Milan Lukić and Sredoje Lukić</i> , Case No. IT-98-32/1-A, Milan Lukic's [sic] Reply Brief, 22 February 2010 (confidential; public redacted version filed on 17 November 2010)
Municipal Court Letter	Exh. 1D238, a letter from the Third Municipal Court in Belgrade regarding sentences served by Milan Lukić
O'Donnell	Defence expert witness Stephen O'Donnell



Omeragić House	The house of Adem Omeragić located in the Pionirska neighbourhood, which was burned on 14 June 1992
Pionirska Street Incident	The incarceration, Robbery and forcible transfer of at least 66 Muslim civilians and the subsequent fire at the Omeragić House on 14 June 1992, in which at least 59 Muslim civilians were killed
Press Statement	Exh. 1DA1, press statement of 9 December 2010 on exhumation of, among others, Ismeta Kurspahić
Property Records	Exh. 1D226, a list of persons who filed a request for return of property
Prosecution	Office of the Prosecutor of the Tribunal
Prosecution Appeal Brief	<i>Prosecutor v. Milan Lukić and Sredoje Lukić</i> , Case No. IT-98-32/1-A, Prosecution Appeal Brief, 2 November 2009
Prosecution Response Brief (Milan Lukić)	<i>Prosecutor v. Milan Lukić and Sredoje Lukić</i> , Case No. IT-98-32/1-A, Prosecution Response to Milan Lukić's Appeal, 5 February 2010 (confidential; public redacted version filed on 6 May 2010); Corrigendum to Prosecution Response to Milan Lukić's Appeal, 6 April 2010 (confidential); Second Corrigendum to Prosecution Response to Milan Lukić's Appeal, 13 April 2010 (confidential); Third Corrigendum to Prosecution Response to Milan Lukić's Appeal, 6 December 2010 (confidential; public redacted version filed on 6 December 2010)
Prosecution Response Brief (Sredoje Lukić)	<i>Prosecutor v. Milan Lukić and Sredoje Lukić</i> , Case No. IT-98-32/1-A, Prosecution Response to Sredoje Lukić's Appeal, 14 December 2009 (confidential; public redacted version filed on 23 December 2009)
Prosecution Reply Brief	<i>Prosecutor v. Milan Lukić and Sredoje Lukić</i> , Case No. IT-98-32/1-A, Prosecution Reply Brief, 23 December 2009
Prosecution's Victims Chart	Exh. P119, a table prepared by Tabeau containing data from various sources indicating persons who remain missing
Registration Records	Exhs 1D221 and 1D233, responses to Milan Lukić's request for information about the

	alleged victims from Bosnian authorities
Report on Forensic Medical Examination	Exh. 1DA6 (confidential), a report on forensic medical examination of 17 December 2009
Robbery	The robbery during the Pionirska Street Incident
Rules	Rules of Procedure and Evidence of the Tribunal
SCSL	Special Court for Sierra Leone
Spahić	Prosecution witness Ferid Spahić
Sredoje Lukić Appeal Brief	<i>Prosecutor v. Milan Lukić and Sredoje Lukić</i> , Case No. IT-98-32/1-A, Appeal Brief on Behalf of Sredoje Lukić, 2 November 2009 (confidential; public redacted version filed on 3 November 2009)
Sredoje Lukić Reply Brief	<i>Prosecutor v. Milan Lukić and Sredoje Lukić</i> , Case No. IT-98-32/1-A, Sredoje Lukić's Reply to the Prosecution's Response Brief, 29 December 2009 (confidential; public redacted version filed on 13 September 2010)
Sredoje Lukić Response Brief	<i>Prosecutor v. Milan Lukić and Sredoje Lukić</i> , Case No. IT-98-32/1-A, Sredoje Lukić's Response to the Prosecution's Appeal Brief, 14 December 2009
Statute	Statute of the Tribunal
Sulejić	Bojan Sulejić, Milan Lukić's second lead counsel
T.	Transcript page from hearings at trial in the present case
Tabeau	Prosecution expert witness Ewa Tabeau
Third Corrigendum to Prosecution Response (Milan Lukić)	Third Corrigendum to Prosecution Response to Milan Lukić's Appeal, 6 December 2010
TO	Territorial Defence
Transfer	The transfer of the Koritnik Group from the Memić House to the Omeragić House during the Pionirska Street Incident
Trial Chamber	Trial Chamber III
Trial Judgement	<i>Prosecutor v. Milan Lukić and Sredoje Lukić</i> , Case No. IT-98-32/1-T, Judgement, 20 July 2009

Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991
Uncalled Prosecution Witnesses	Witnesses not called to testify by the Prosecution
Uzamnica Camp	Uzamnica military barracks in Višegrad
Užice Hospital Records	Exh. 1D38.6 (confidential), comprising medical records relating to Vasiljević's treatment at the Užice Hospital on 14 June 1992
Varda Factory Incident	The shooting of seven Muslim civilians from the Varda Factory on the bank of the Drina River on 10 June 1992
Vasiljević	Mitar Vasiljević
Vilić	Prosecution witness Hamdija Vilić
Višegrad Health Centre logbook	Document 1D225 (marked for identification), excerpt from logbook from Višegrad Health Centre
Yatvin	Alan Yatvin, Milan Lukić's first lead counsel
Živković	Defence witness Veroljub Živković

## XXII. ANNEX C – VICTIMS OF CHARGED KILLINGS IN RELATION TO PIONIRSKA STREET INCIDENT

Following the findings in this judgement it has been established that these 53 individuals died when the Omeragić House was set fire on 14 June 1992:

1.	Mula Ajanović	28.	Ismeta Kurspahić
2.	Adis Delija	29.	Kada Kurspahić/Sehić
3.	Ajnija Delija	30.	Medina Kurspahić
4.	Tima Jasarević/Velić	31.	Medo Kurspahić
5.	Hajra Jasarević/Halilović	32.	Mejra Kurspahić
6.	Meho Jasarević/Halilović	33.	Mina Kurspahić/Jasmina Delija
7.	Mujo Jasarević/Halilović	34.	Mirela Kurspahić
8.	Aiša Kurspahić	35.	Mujesira Kurspahić
9.	Aida Kurspahić	36.	Munevera Kurspahić
10.	Ajka Kurspahić	37.	Munira Kurspahić
11.	Alija Kurspahić	38.	Osman Kurspahić
12.	Almir Kurspahić	39.	Pašija Kurspahić
13.	Becar Kurspahić	40.	Ramiza Kurspahić
14.	Bisera Kurspahić	41.	Sabiha Kurspahić
15.	Bula Kurspahić	42.	Sadeta Kurspahić
16.	Dzheva Kurspahić	43.	Safa Kurspahić
17.	Enesa Kurspahić	44.	Sajma Kurspahić
18.	FNU Kurspahić	45.	Seniha Kurspahić
19.	Hasa Kurspahić	46.	Sumbula Kurspahić
20.	Hajrija Kurspahić	47.	Vahid Kurspahić
21.	Halida Kurspahić	48.	Fazila Memisević
22.	Hana/Hasiba Kurspahić	49.	Redžo Memisević
23.	Hasan Kurspahić	50.	Rabija Sadiković
24.	Hata Kurspahić	51.	Faruk Sehić
25.	Ifeta Kurspahić	52.	Nurka Velić
26.	Igabala Kurspahić	53.	Jasmina Vila
27.	Ismet Kurspahić		