UNITED NATIONS

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-95-5/18-AR98bis.1

Date: 11 July 2013

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IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Patrick Robinson
Judge Liu Daqun
Judge Khalida Rachid Khan
Judge Bakhtiyar Tuzmukhamedov

Registrar: **Mr. John Hocking**

Judgement of: **11 July 2013**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:
Mr. Peter Kremer QC

The Accused:
Mr. Radovan Karadžić

Standby Counsel:
Mr. Richard Harvey

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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 an appeal by the Office of the Prosecutor of the Tribunal ("Prosecution") against the judgement of acquittal as to Count 1 of the Indictment rendered orally by Trial Chamber III of the Tribunal ("Trial Chamber"), pursuant to Rule 98 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"), on 28 June 2012 in the case of *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T ("Judgement of Acquittal").[1]

I. INTRODUCTION

A. Background

2. The alleged events giving rise to this appeal took place between 31 March 1992 and 31 December 1992 in certain municipalities of Bosnia and Herzegovina ("BiH") claimed as Bosnian Serb territory (collectively, "Municipalities").[2] The Indictment alleges that during this period, Radovan Karadžić ("Karadžić"), the highest civilian and military authority in the Republika Srpska, participated in a joint criminal enterprise ("JCE") together with other members of the Serb and Bosnian Serb leadership[3] to permanently remove Bosnian Muslims and Bosnian Croats from the Municipalities through a campaign of persecutions, which included conduct that demonstrated an intent to destroy in part the national, ethnical, or religious groups of Bosnian Muslims or Bosnian Croats as such.[4] The genocidal acts allegedly committed against Bosnian Muslims and/or Bosnian Croats include: (i) killing; (ii) causing serious bodily or mental harm; and (iii) deliberately inflicting upon detainees conditions of life calculated to bring about their physical destruction.[5] Count 1 of the Indictment charges Karadžić with genocide in the Municipalities pursuant to Articles 4(3)(a), 7(1), and 7(3) of the Statute of the Tribunal ("Statute"), alleging that Karadžić was

[1] For ease of reference, two annexes are appended: Annex A – Procedural History and Annex B – Cited Materials and Defined Terms.
[2] Indictment, paras 38-40.
[3] Specifically, the Indictment alleges that Karadžić acted in concert with members of a JCE, including: Momčilo Krajišnik, Ratko Mladić, Slobodan Milošević, Biljana Plavšić, Nikola Koljević, Mićo Stanišić, Momčilo Mandić, Jovica Stanišić, Franko Simatović, Željko Ražnatović (aka "Arkan") and Vojislav Šešelj. Indictment, para. 11. Other alleged members of the JCE include: members of the Bosnian Serb leadership; members of SDS and Bosnian Serb government bodies at the republic, regional, municipal, and local levels, including Crisis Staffs, War Presidencies, and War Commissions; commanders, assistant commanders, senior officers, and chiefs of units of the Serbian Ministry of Internal Affairs, the Yugoslav People's Army, the Yugoslav Army, the army of the Serbian Republic of BiH (later the army of the Republika Srpska), the Bosnian Serb Ministry of Internal Affairs and the Bosnian Serb Territorial Defence at the republic, regional, municipal and local levels; and leaders of Serbian and Bosnian Serb paramilitary forces and volunteer units. Indictment, para. 12.
[4] Indictment, paras 4, 9-14, 37-40.
[5] Indictment, para. 40.

responsible as a superior for and committed in concert with others, planned, instigated, ordered, and/or aided and abetted genocide.[6]

3. On 11 June 2012, Karadžić moved for a judgement of acquittal pursuant to Rule 98 *bis* of the Rules on all Counts in the Indictment.[7] The Prosecution responded on 13 June 2012.[8] At a hearing on 28 June 2012, the Trial Chamber found, *inter alia*, that there was "*no* evidence, even taken at its highest, which could be capable of supporting a conviction for genocide in the municipalities as charged under Article 4(3) of the Statute".[9] Consequently, the Trial Chamber entered the Judgement of Acquittal.[10]

B. The Appeal

4. The Prosecution advances four grounds of appeal against the Judgement of Acquittal and requests that the Appeals Chamber reverse the Judgement of Acquittal and reinstate the charges under Count 1 of the Indictment.[11]

5. Karadžić responds that the Judgement of Acquittal should be affirmed.[12]

6. The Appeals Chamber heard oral submissions regarding this appeal on 17 April 2013.[13]

[6] Indictment, paras 36-40.
[7] T. 11 June 2012 pp. 28569-28626.
[8] T. 13 June 2012 pp. 28628-28728.
[9] T. 28 June 2012 pp. 28769-28770 (emphasis added). *See also* T. 28 June 2012 pp. 28764-28768.
[10] T. 28 June 2012 p. 28774.
[11] Notice of Appeal, paras 3-24; Appeal Brief, paras 4, 15-116.
[12] Response, paras 1, 27-312, 322. Karadžić also makes several ancillary applications, including a request that the Appeals Chamber conduct an oral hearing on the Prosecution's appeal. *See* Response, paras 313-319. The Appeals Chamber addressed these requests in the Scheduling Order issued on 22 March 2013.
[13] *See* T. 17 April 2013 pp. 4-67.

II. STANDARD OF REVIEW

A. Submissions

7. Karadžić contends that the Prosecution fails to discuss the applicable standard of review for its appeal.[14] He maintains that, as a general principle, the Appeals Chamber must treat a trial chamber's findings of fact with deference, including when the Prosecution appeals against an acquittal, and cites, *inter alia*, the *Halilović* Appeal Judgement in support of his submission.[15] On this basis, Karadžić submits that, in the context of an appeal of a Rule 98 *bis* judgement of acquittal, the standard of review is "whether no reasonable Trial Chamber could have concluded that there was no evidence upon which a reasonable trier of fact could be satisfied beyond reasonable doubt of the guilt of the accused".[16]

8. The Prosecution replies that Karadžić misapprehends the applicable standard of review.[17] Relying on the *Jelisić* Appeal Judgement, the Prosecution submits that a trial chamber's application of the Rule 98 *bis* standard is not a finding of fact to which deference is owed.[18] Rather, according to the Prosecution, the Appeals Chamber may reverse a Rule 98 *bis* judgement of acquittal "if it determines that there was evidence which could have provided a basis for any reasonable trial chamber to find the Accused guilty of the charged offense".[19]

B. Analysis

9. The Appeals Chamber recalls that an appeal against an acquittal entered at the Rule 98 *bis* stage of a case is an appeal against a judgement.[20] Thus, in an appeal of a Rule 98 *bis* judgement of acquittal, the proceedings are governed by Article 25 of the Statute and by the standards of appellate review for alleged errors of law and alleged errors of fact. The Appeals Chamber further recalls that the test to be applied by the trial chamber at the Rule 98 *bis* stage is "whether there is evidence (if accepted) upon which a reasonable [trier] of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question",[21] not whether an accused's guilt has been established beyond reasonable doubt.[22]

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[14] Response, para. 20.
[15] Response, para. 23, *citing Halilović* Appeal Judgement, para. 11. *See also* Response, paras 21-22.
[16] Response, para. 24.
[17] Reply, para. 20. *See also* Reply, n. 70 (arguing that the passage from the *Halilović* Appeal Judgement cited in the Response refers to an acquittal after a full trial and is not relevant to a Rule 98 *bis* acquittal).
[18] Reply, para. 20, *citing Jelisić* Appeal Judgement, paras 54-57.
[19] Reply, para. 20 (emphasis removed).
[20] Decision on Motion to Strike Prosecution's Brief, 9 November 2012, para. 8. *See generally* Rule 98 *bis* of the Rules.
[21] *Čelibići* Appeal Judgement, para. 434 (emphasis in original). *See also Jelisić* Appeal Judgement, para. 37.
[22] *See Jelisić* Appeal Judgement, para. 56.

10. The Appeals Chamber does not consider that the parties' relevant submissions impel adoption of a different standard of review. The passage in the *Halilović* Appeal Judgement which Karadžić discusses simply confirms that appeals challenging factual findings shall be subject to the same standard of deferential review whether the appeals are lodged by the Prosecution or by a convicted person.[23] The Appeals Chamber's holding in *Halilović* does not demonstrate that judgements of acquittal pursuant to Rule 98 *bis* of the Rules are *exclusively* reviewed under the standard of review for alleged errors of fact, as Karadžić appears to argue. Likewise, and contrary to the Prosecution's submission, the *Jelisić* Appeal Judgement does not hold that the Appeals Chamber must *always* engage in an evidentiary assessment *de novo* when reviewing a challenge to a Rule 98 *bis* judgement of acquittal. In *Jelisić*, the Appeals Chamber merely concluded that the trial chamber had erred as a matter of law at the Rule 98 *bis* stage of a trial by failing to take the evidence at its highest, and, in view of this conclusion, proceeded to articulate the correct standard and apply that standard to the evidence on the record.[24]

C. Standard of Review on Appeal

11. Having confirmed that this appeal is governed by Article 25 of the Statute and related jurisprudence, the Appeals Chamber will accordingly set out the relevant standards of appellate review. The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice.[25] 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 is nevertheless of general significance to the Tribunal's jurisprudence.[26]

12. Regarding errors of law, the Appeals Chamber has stated:

> 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. An allegation of an error of law which has no chance of changing the outcome of a decision may be rejected on that ground. 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.[27]

13. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal

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[23] *See Halilović* Appeal Judgement, para. 11.
[24] *Jelisić* Appeal Judgement, paras 55-72. *See also Jelisić* Appeal Judgement, para. 39.
[25] *Perišić* Appeal Judgement, para. 7; *Gotovina and Markač* Appeal Judgement, para. 10. *See also Mugenzi and Mugiraneza* Appeal Judgement, para. 11.
[26] *Perišić* Appeal Judgement, para. 7; *Lukić and Lukić* Appeal Judgement, para. 10.
[27] *Perišić* Appeal Judgement, para. 8 (internal citation omitted). *See also Lukić and Lukić* Appeal Judgement, para. 11; *Mugenzi and Mugiraneza* Appeal Judgement, para. 12.

standard and review the relevant factual findings of the trial chamber accordingly.[28] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record.[29] 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.[30]

14. Regarding errors of fact, the Appeals Chamber will apply a standard of reasonableness.[31] It is well established that the Appeals Chamber will not lightly overturn findings of fact made by the trial chamber:

> 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. [...] 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.[32]

15. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[33] Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[34]

16. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[35] Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[36] Finally, the Appeals Chamber has inherent discretion in selecting

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[28] *Perišić* Appeal Judgement, para. 9; *Lukić and Lukić* Appeal Judgement, para. 12. *See also Mugenzi and Mugiraneza* Appeal Judgement, para. 13.
[29] *Perišić* Appeal Judgement, para. 9; *Lukić and Lukić* Appeal Judgement, para. 12. *See also Mugenzi and Mugiraneza* Appeal Judgement, para. 13.
[30] *Perišić* Appeal Judgement, para. 9; *Lukić and Lukić* Appeal Judgement, para. 11.
[31] *Perišić* Appeal Judgement, para. 10; *Lukić and Lukić* Appeal Judgement, para. 13.
[32] *Perišić* Appeal Judgement, para. 10 (internal citation omitted). *See also Lukić and Lukić* Appeal Judgement, para. 13; *Mugenzi and Mugiraneza* Appeal Judgement, para. 14.
[33] *Perišić* Appeal Judgement, para. 11; *Gotovina and Markač* Appeal Judgement, para. 14. *See also Mugenzi and Mugiraneza* Appeal Judgement, para. 15.
[34] *Perišić* Appeal Judgement, para. 11; *Gotovina and Markač* Appeal Judgement, para. 14. *See also Mugenzi and Mugiraneza* Appeal Judgement, para. 15.
[35] Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002 ("Practice Direction on Formal Requirements"), paras 1(c)(iii)-(iv), 4(b). *See also Perišić* Appeal Judgement, para. 12; *Gotovina and Markač* Appeal Judgement, para. 15; *Mugenzi and Mugiraneza* Appeal Judgement, para. 16.
[36] *Perišić* Appeal Judgement, para. 12; *Gotovina and Markač* Appeal Judgement, para. 15. *See also Mugenzi and Mugiraneza* Appeal Judgement, para. 16.

which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.[37]

[37] *Perišić* Appeal Judgement, para. 12; *Gotovina and Markač* Appeal Judgement, para. 15. *See also Mugenzi and Mugiraneza* Appeal Judgement, para. 16.

III. PROSECUTION'S APPEAL

A. Alleged Errors Relating to Underlying Acts of Genocide (Ground 1)

17. In reaching the Judgement of Acquittal, the Trial Chamber assessed the evidence on the record concerning the underlying acts of genocide alleged in the Indictment.[38] The Prosecution submits that the Trial Chamber erred in law or in fact in addressing the *actus reus* of genocide in the Judgement of Acquittal.[39] In this section the Appeals Chamber considers whether the Trial Chamber erred in its assessment of the underlying acts charged in Count 1 of the Indictment, namely: (i) killing; (ii) causing serious bodily or mental harm; and (iii) deliberately inflicting conditions of life calculated to destroy.

1. Killing

18. The Trial Chamber noted evidence indicating that "a large number of Bosnian Muslims and/or Bosnian Croats were killed by Bosnian Serb forces" in the Municipalities.[40] The Trial Chamber also noted its earlier finding that this evidence was "capable of supporting a conclusion that Bosnian Muslims and/or Bosnian Croats were killed on a large scale with the intent to kill with persecutory intent in relation to Counts 3 to 6 of the indictment".[41] The Trial Chamber then concluded that this evidence:

> even if taken at its highest, [did] not reach the level from which a reasonable trier of fact could infer that a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of members of these groups were *targeted* for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such.[42]

(a) Submissions

19. The Prosecution asserts that the Trial Chamber erred by not finding that killings in the Municipalities constituted the *actus reus* of genocide.[43] More specifically, the Prosecution submits that the Trial Chamber erred in law by imposing a "group impact" requirement on the *actus reus* of killing.[44] In this respect, the Prosecution contends that the Trial Chamber erred by requiring that the killings at issue be "quantitatively and qualitatively substantial so as to impact the existence of the

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[38] T. 28 June 2012 pp. 28764-28768. In addition, the Trial Chamber considered whether evidence of forcible transfer could satisfy the requirement of Article 4(2)(b) of the Statute. *See* T. 28 June 2012 pp. 28766-28767. Given that forcible transfer was not charged as an underlying act of genocide in relation to Count 1 of the Indictment, the Prosecution did not pursue any appeal in relation to the Trial Chamber's findings in this regard. *See* Notice of Appeal, n. 4. *See also* Indictment, para. 40.
[39] Notice of Appeal, paras 3-10; Appeal Brief, paras 15-53. *See also* Reply, paras 5-9.
[40] T. 28 June 2012 p. 28764.
[41] T. 28 June 2012 p. 28765.
[42] T. 28 June 2012 p. 28765 (emphasis added).
[43] Appeal Brief, paras 17-24.
[44] Appeal Brief, paras 17-20.

[Bosnian Muslim and/or Bosnian Croat groups]" when such a requirement is not found in the text of the Statute, the Genocide Convention, or relevant Tribunal case law.[45] According to the Prosecution, but for this error, the Trial Chamber would have found that killings within the meaning of Article 4(2)(a) of the Statute had occurred.[46] In the alternative, the Prosecution argues that even if a group impact requirement applies, the Trial Chamber erred in fact in failing to find that there was evidence (if accepted) based upon which a reasonable trier of fact could conclude that killings as an underlying act of genocide had occurred.[47]

20. Karadžić notes the Trial Chamber's finding "that the [Prosecution] had established that a large number of Bosnian Muslims and/or Bosnian Croats were killed by Bosnian Serb forces in the [Municipalities]" and concedes that this is sufficient to meet the *actus reus* requirement of Article 4 of the Statute.[48] Nevertheless, he maintains that the Trial Chamber's further conclusion simply reflects its determination that the evidence was not sufficient to establish that the killings were carried out with genocidal intent.[49]

(b) Analysis

21. The Appeals Chamber recalls that a judgement of acquittal shall only be entered pursuant to Rule 98 *bis* of the Rules "if there is no evidence capable of supporting a conviction".[50] The test to be applied by the trial chamber is "whether there is evidence (if accepted) upon which a reasonable [trier] of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question".[51] Pursuant to Rule 98 *bis* of the Rules, a trial chamber is required to "assume that the prosecution's evidence [is] entitled to credence unless incapable of belief" and to "take the evidence at its highest"; it cannot "pick and choose among parts of that evidence" in reaching its conclusion.[52]

22. The Appeals Chamber further observes that Article 4(2) of the Statute defines genocide to encompass any of certain acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" and lists a number of prohibited acts, including "killing members of the group". Thus, for the crime of genocide, one or more of the prohibited acts enumerated in Article 4(2) of the Statute must be established. In addition, it must be established that

[45] Appeal Brief, para. 17. *See also* Appeal Brief, paras 18-20.
[46] Appeal Brief, para. 20. *See also* Reply, para. 7.
[47] Appeal Brief, paras 21-24.
[48] Response, para. 28. *See also* Response, paras 233, 252.
[49] Response, para. 29.
[50] Rule 98 *bis* of the Rules. *See also supra*, para. 9.
[51] *Jelisić* Appeal Judgement, para. 37 (emphasis in original and internal quotation marks omitted). *See also Čelebići* Appeal Judgement, para. 434.
[52] *Jelisić* Appeal Judgement, para. 55.

the prohibited act was committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, which is often referred to as either genocidal intent, *dolus specialis*, or specific intent.[53] The requirement of an underlying, prohibited act, or *actus reus*, of genocide is thus analytically distinct from the requirement of genocidal intent.[54]

23. The Appeals Chamber notes that while the Trial Chamber assessed whether a reasonable trier of fact could infer that "a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of members of these groups *were targeted for destruction* [...] *as such*",[55] its findings on this issue pertain not to the sufficiency of the evidence of the underlying genocidal acts of killing, but to the element of genocidal intent.[56] The Appeals Chamber accordingly discerns nothing in the Trial Chamber's ruling to suggest that it erred in law by imposing a "group impact" requirement on the *actus reus* of killing, as the Prosecution claims. Indeed, the Appeals Chamber observes that the Trial Chamber explicitly recognised that "the determination of whether there is evidence capable of supporting a conviction for genocide does *not* involve a numerical assessment of the number of people killed and does not have a numeric threshold".[57]

24. In the Judgement of Acquittal, the Trial Chamber stated that there was evidence indicating that a large number of Bosnian Muslims and/or Bosnian Croats were killed by Bosnian Serb forces in the Municipalities and recalled its earlier finding that this evidence was sufficient to support a conclusion that Bosnian Muslims and/or Bosnian Croats were killed on a large scale with persecutory intent.[58] The Appeals Chamber considers that the Trial Chamber was thus satisfied that, for purposes of ruling on a motion pursuant to Rule 98 *bis* of the Rules, there was evidence (if accepted) upon which a reasonable trier of fact could be satisfied beyond reasonable doubt that killings of Bosnian Muslims and/or Bosnian Croats in the Municipalities occurred and that these groups had been singled out on national, ethnical, racial or religious grounds.[59]

25. The Appeals Chamber notes that the Prosecution's relevant submissions are all premised on the incorrect assumption that the Trial Chamber *did not* find evidence of killings in the Municipalities sufficient to demonstrate the *actus reus* of genocide in the context of Rule 98 *bis* of the Rules.[60] As set out above,[61] the Judgement of Acquittal indicates that the Trial Chamber found

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[53] *Jelisić* Appeal Judgement, para. 45.
[54] *See, e.g.*, *Jelisić* Appeal Judgement, paras 45-46. *See also Stakić* Appeal Judgement, paras 33-35.
[55] T. 28 June 2012 p. 28765 (emphasis added).
[56] *See* Article 4(2) of the Statute ("Genocide means any of the following acts *committed with intent to destroy*, in whole or in part, *a national, ethnical, racial or religious group, as such* [...].") (emphasis added).
[57] T. 28 June 2012 p. 28765 (emphasis added).
[58] T. 28 June 2012 pp. 28764-28765.
[59] *See* T. 28 June 2012 pp. 28758-28761.
[60] *See* Appeal Brief, paras 17-24.

that evidence of these killings *was* sufficient. The Prosecution's contentions that the Trial Chamber erred with respect to underlying genocidal acts of killings are therefore moot.

26. Accordingly, the Appeals Chamber dismisses this sub-ground of the Prosecution's appeal.

2. Causing Serious Bodily or Mental Harm

27. In the Judgement of Acquittal, the Trial Chamber observed that it had received evidence which indicated that Bosnian Serb forces caused serious bodily or mental harm to many detained Bosnian Muslims and/or Bosnian Croats in multiple detention facilities.[62] The Trial Chamber noted, however, that in order to support a conviction for genocide, the bodily or mental harm inflicted on members of a protected group "must be of such a serious nature as to threaten its destruction in whole or in part".[63] The Trial Chamber proceeded to find that, taken at its highest, the evidence received could not support a conclusion by a reasonable trier of fact that the harm "reached a level where it contributed to or tended to contribute to the destruction of the Bosnian Muslims and/or Bosnian Croats in whole or in part".[64]

(a) Submissions

28. The Prosecution submits that the Trial Chamber erred in law by imposing a "group impact" requirement on the *actus reus* of causing serious bodily or mental harm.[65] In particular, the Prosecution argues that the Trial Chamber improperly added an *actus reus* element by requiring that the serious bodily or mental harm in question achieve a certain level of destructive impact on the group.[66] In support of its claim, the Prosecution points to the Trial Chamber's statements suggesting that the harm must "'be of such a serious nature as to threaten [the group's] destruction in whole or in part'" and have "'reached a level where it contributed to or tended to contribute to the destruction of the [Groups] in whole or in part'".[67]

29. According to the Prosecution, the Trial Chamber's error appears to arise from a misinterpretation of language found in the *Seromba* Appeal Judgement, in which the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") held that to support a conviction for genocide, "'the bodily harm or the mental harm inflicted on members of a group

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[61] *See supra*, para. 24.
[62] T. 28 June 2012 pp. 28765-28766.
[63] T. 28 June 2012 p. 28766.
[64] T. 28 June 2012 p. 28766.
[65] Appeal Brief, paras 26-35.
[66] Appeal Brief, para. 28.
[67] Appeal Brief, para. 26, *quoting* T. 28 June 2012 p. 28766 (alterations in original).

must be of such a serious nature as to threaten its destruction in whole or in part'".[68] The Prosecution submits that, notwithstanding the language in *Seromba*, no chamber has required bodily or mental harm to have an impact on the group itself, much less required the impact to have "contributed or tended to contribute" to the destruction of the group in whole or in part.[69]

30. The Prosecution further submits that even if the Trial Chamber correctly interpreted the language of the *Seromba* Appeal Judgement as requiring a certain level of destructive impact on a protected group, the Appeals Chamber is not obligated to follow that language because the Appeals Chamber is not bound by ICTR jurisprudence and the language at issue was, in any event, *obiter dicta*.[70] The Prosecution adds that although ICTR appeal judgements may have persuasive authority, the Appeals Chamber should not follow the *Seromba* precedent because the ICTR Appeals Chamber's holding in *Seromba* is not supported and confuses the *mens rea* of genocide with the *actus reus* elements.[71]

31. The Prosecution maintains that, but for the Trial Chamber's error, the Trial Chamber would have found that the elements of Article 4(2)(b) of the Statute were met.[72] In the alternative, the Prosecution submits that the Trial Chamber erred in fact in failing to find that there is evidence on the record that serious bodily or mental harm was inflicted on Bosnian Muslims and/or Bosnian Croats in the Municipalities.[73] In support of this contention, the Prosecution avers that there is evidence of, *inter alia*, beatings, sexual violence, and torture that occurred within detention facilities.[74] The Prosecution maintains that the evidence on the record "fits directly within the categories of abuses" that other trial chambers of the Tribunal, the ICTR Appeals Chamber, and ICTR trial chambers have found sufficient to demonstrate underlying genocidal acts of causing serious bodily or mental harm.[75]

32. Karadžić recognises that the Trial Chamber acknowledged evidence that Bosnian Serb forces caused serious bodily and mental harm to many Bosnian Muslims and/or Bosnian Croats while they were held in multiple detention facilities.[76] He submits, however, that the Trial Chamber then concluded that the evidence of acts of causing serious bodily or mental harm, taken at its highest, did not support a finding that these acts were committed with the intent to destroy the

[68] Appeal Brief, para. 28, *quoting Seromba* Appeal Judgement, para. 46.
[69] Appeal Brief, para. 28 (internal quotation marks omitted). *See also* Appeal Brief, para. 27.
[70] Appeal Brief, para. 29.
[71] Appeal Brief, paras 30-34. *See also* Reply, para. 8.
[72] Appeal Brief, para. 35. *See also* Reply, para. 6.
[73] Appeal Brief, paras 36-38.
[74] Appeal Brief, para. 36.
[75] Appeal Brief, para. 38, *citing*, *inter alia*, *Seromba* Appeal Judgement, para. 46.
[76] Response, para. 30. *See also* Response, paras 233, 252.

groups.[77] Karadžić adds in this respect that while the Trial Chamber opined that the alleged harm had not "reached a level" where it contributed to or tended to contribute to the destruction of the groups, "this statement was in the alternative to its finding of lack of *mens rea* and is not essential to its holding".[78] Karadžić also defends the contested holding in the *Seromba* Appeal Judgement as a logical limitation in the context of the crime of genocide.[79]

(b) Analysis

33. The Appeals Chamber recalls the principles previously articulated in this Judgement related to review of acquittals entered pursuant to Rule 98 *bis* of the Rules.[80] The Appeals Chamber further recalls that Article 4(2)(b) of the Statute provides that "causing serious bodily or mental harm to members of the group" constitutes an underlying act for purposes of the crime of genocide.[81] The ICTR Appeals Chamber has found that quintessential examples of serious bodily harm as an underlying act of genocide include torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.[82]

34. The Appeals Chamber first turns to the Prosecution's assertion that the Trial Chamber erred in assessing the relevant factual evidence before it.[83] The Trial Chamber noted evidence that was "illustrative of [...] conditions of detention, including cruel and inhumane treatment, torture, physical and psychological abuse, rape and sexual violence, inhumane living conditions, forced labour, [and] failure to provide adequate accommodation, shelter, food, water, medical care or hygienic facilities".[84]

35. More specifically, the Appeals Chamber notes evidence on the record[85] indicating that Bosnian Muslim and/or Bosnian Croat detainees were kicked,[86] and were violently beaten with a

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[77] Response, para. 30.
[78] Response, para. 31. *See also* Response, para. 37 (referring to the Trial Chamber's "alternative holding").
[79] Response, paras 32-36.
[80] *See supra*, para. 9.
[81] *See supra*, para. 22.
[82] *Seromba* Appeal Judgement, para. 46. *See also Seromba* Appeal Judgement, para. 48 (discussing "heinous crimes that obviously constitute serious bodily or mental harm, such as rape and torture").
[83] *See* Appeal Brief, paras 36-38.
[84] T. 28 June 2012 p. 28767.
[85] *See, e.g.*, T. 28 June 2012 pp. 28765-28766. *See also* Appeal Brief, paras 36-37 and citations contained therein.
[86] *See, e.g.*, Prosecution Exhibit 70, p. 14 (witness statement of Prosecution Witness Jusuf Avdispahić regarding detainees at the Ekonomija farm in Zvornik); Prosecution Exhibit 3881, p. 53 (testimony from Prosecution Witness Idriz Meržanić regarding detainees at Trnopolje camp in Prijedor); Prosecution Exhibit 3528, para. 23 (witness statement of Prosecution Witness Kerim Mešanović regarding detainees at Omarska Camp in Prijedor); Prosecution Exhibit 680, p. 7 (testimony from Prosecution Witness KDZ050 regarding detainees at Keraterm camp in Prijedor); Prosecution Exhibit 3212, pp. 34-35 (witness statement of Prosecution Witness Ibro Osmanović regarding detainees at Sušica camp in Vlasenica); Prosecution Exhibit 3568, pp. 17, 41 (testimony from Prosecution Witness KDZ017 regarding detainees at KP Dom in Foča); Prosecution Exhibit 718, para. 62 (witness statement of Prosecution Witness Ahmet Zulić regarding detainees at the Betonirka factory in Sanski Most); AF935 (regarding detainees in Ključ); AF1150-1151, AF1175, AF1184, AF1237 (regarding detainees in Prijedor); AF1326, AF1339 (regarding detainees in

range of objects, including, *inter alia*, rifles and rifle butts,[87] truncheons and batons,[88] sticks and poles,[89] bats,[90] chains,[91] pieces of cable,[92] metal pipes and rods,[93] and pieces of furniture.[94] Detainees were often beaten over the course of several days, for extended periods of time and multiple times a day.[95] Evidence on the record also indicates that in some instances detainees were thrown down flights of stairs,[96] beaten until they lost consciousness,[97] or had their heads hit against walls.[98] These beatings allegedly resulted in serious injuries, including, *inter alia*, rib fractures,[99]

Sanski Most). Throughout the Judgement, where original forms of exhibits are in B/C/S, citations refer to the relevant English translation.

[87] *See, e.g.*, Prosecution Exhibit 3528, para. 23 (witness statement of Prosecution Witness Kerim Mešanović regarding detainees at Omarska camp in Prijedor); Prosecution Exhibit 680, p. 7 (testimony from Prosecution Witness KDZ050 regarding detainees at Keraterm camp in Prijedor); Prosecution Exhibit 3212, p. 23 (witness statement of Prosecution Witness Ibro Osmanović regarding detainees at the municipality prison in Vlasenica); Prosecution Exhibit 718, para. 62 (witness statement of Prosecution Witness Ahmet Zulić regarding detainees at the Betonirka factory in Sanski Most); Prosecution Exhibit 3568, p. 17 (testimony from Prosecution Witness KDZ017 regarding detainees at KP Dom in Foča); T. 19 September 2011 p. 19078 (testimony from Prosecution Witness KDZ052 regarding detainees at the Krings facility in Sanski Most); AF935, AF939 (regarding detainees in Ključ); AF1260 (regarding detainees in Prijedor); AF1326 (regarding detainees in Sanski Most).

[88] *See, e.g.*, Prosecution Exhibit 70, p. 20 (witness statement of Prosecution Witness Jusuf Avdispahić regarding detainees at the Ekonomija farm in Zvornik); Prosecution Exhibit 3212, p. 23 (witness statement of Prosecution Witness Ibro Osmanović regarding detainees at the municipality prison in Vlasenica); Prosecution Exhibit 718, para. 69 (witness statement of Prosecution Witness Ahmet Zulić regarding detainees at the Betonirka factory in Sanski Most); T. 19 September 2011 p. 19078 (testimony from Prosecution Witness KDZ052 regarding detainees at the Krings facility in Sanski Most); Prosecution Exhibit 3336, p. 30 (testimony from Prosecution Witness KDZ239 regarding detainees at KP Dom in Foča); AF935 (regarding detainees in Ključ); AF1208 (regarding detainees in Prijedor); AF1354 (regarding detainees in Sanski Most).

[89] *See, e.g.*, Prosecution Exhibit 70, p. 19 (witness statement of Prosecution Witness Jusuf Avdispahić regarding detainees at the Ekonomija farm in Zvornik); Prosecution Exhibit 3881, p. 53 (testimony from Prosecution Witness Idriz Meržanić regarding detainees at Trnopolje camp in Prijedor); Prosecution Exhibit 3528, para. 23 (witness statement of Prosecution Witness Kerim Mešanović regarding detainees at Omarska camp in Prijedor); Prosecution Exhibit 3212, p. 23 (witness statement of Prosecution Witness Ibro Osmanović regarding detainees at the municipality prison in Vlasenica); AF939 (regarding detainees in Ključ); AF1173 (regarding detainees in Prijedor); AF1326 (regarding detainees in Sanski Most).

[90] *See, e.g.*, AF871 (regarding detainees in Foča); AF939 (regarding detainees in Ključ); AF1237 (regarding detainees in Prijedor).

[91] *See, e.g.*, AF1210 (regarding detainees in Prijedor); AF2699 (regarding detainees in Vlasenica).

[92] *See, e.g.*, Prosecution Exhibit 70, p. 20 (witness statement of Prosecution Witness Jusuf Avdispahić regarding detainees at the Ekonomija farm in Zvornik); Prosecution Exhibit 3303, p. 101 (testimony from Prosecution Witness Mirzet Karaberg regarding detainees at the prison in Sanski Most); AF1173, AF1210 (regarding detainees in Prijedor); AF1326 (regarding detainees in Sanski Most); AF1339 (regarding detainees in Sanski Most).

[93] *See, e.g.*, Prosecution Exhibit 3528, para. 23 (witness statement of Prosecution Witness Kerim Mešanović regarding detainees at Omarska camp in Prijedor); Prosecution Exhibit 3212, p. 23 (witness statement of Prosecution Witness Ibro Osmanović regarding detainees at the municipality prison in Vlasenica); AF1110 (regarding detainees in Prijedor); AF2699 (regarding detainees in Vlasenica).

[94] *See, e.g.*, Prosecution Exhibit 718, para. 69 (witness statement of Prosecution Witness Ahmet Zulić regarding detainees at the Betonirka factory in Sanski Most); AF935 (regarding detainees in Ključ); AF1339 (regarding detainees in Sanski Most).

[95] *See, e.g.*, Prosecution Exhibit 70, pp. 12-13, 19-20 (witness statement of Prosecution Witness Jusuf Avdispahić regarding detainees at the Ekonomija farm in Zvornik); Prosecution Exhibit 718, para. 74 (witness statement of Prosecution Witness Ahmet Zulić regarding detainees at the Betonirka factory in Sanski Most); AF862, AF870, AF880 (regarding detainees in Foča); AF1330 (regarding detainees in Sanski Most).

[96] *See, e.g.*, Prosecution Exhibit 718, para. 62 (witness statement of Prosecution Witness Ahmet Zulić regarding detainees at the Betonirka factory in Sanski Most); AF936 (regarding detainees in Ključ).

[97] *See, e.g.*, Prosecution Exhibit 70, pp. 14, 20 (witness statement of Prosecution Witness Jusuf Avdispahić regarding detainees at the Ekonomija farm in Zvornik); Prosecution Exhibit 718, para. 69 (witness statement of Prosecution Witness Ahmet Zulić regarding detainees at the Betonirka factory in Sanski Most).

[98] *See, e.g.*, AF1169 (regarding detainees in Prijedor).

skull fractures,[100] jaw fractures,[101] vertebrae fractures,[102] and concussions.[103] Long-term alleged effects from these beatings included, *inter alia*, tooth loss, permanent headaches, facial deformities, deformed fingers, chronic leg pain, and partial paralysis of limbs.[104]

36. The Trial Chamber also received evidence[105] that women and girls at several detention facilities in the Municipalities were repeatedly raped, often multiple times a day.[106] Additional evidence before the Trial Chamber details sexual assaults committed against men at detention facilities in Zvornik.[107]

37. The Appeals Chamber recalls that a judgement of acquittal shall only be entered pursuant to Rule 98 *bis* of the Rules "if there is no evidence capable of supporting a conviction".[108] Moreover, the Appeals Chamber recalls that pursuant to Rule 98 *bis* of the Rules, a trial chamber is required to "assume that the prosecution's evidence [is] entitled to credence unless incapable of belief" and "take the evidence at its highest".[109] The Appeals Chamber notes that the evidence reviewed by the Trial Chamber, taken at its highest, indicates that Bosnian Muslims and/or Bosnian Croats suffered injuries, including rape and severe non-fatal physical violence which are, on their face, suggestive of causing serious bodily harm.[110] While the commission of individual paradigmatic acts does not automatically demonstrate that the *actus reus* of genocide has taken place, the Appeals Chamber considers that no reasonable trial chamber reviewing the specific evidence on the record in this case, including evidence of sexual violence and of beatings causing serious physical injuries,[111] could have concluded that it was insufficient to establish the *actus reus*

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[99] *See, e.g.*, Prosecution Exhibit 718, para. 74 (witness statement of Prosecution Witness Ahmet Zulić regarding detainees at the Betonirka factory in Sanski Most); AF936 (regarding detainees in Ključ).
[100] *See, e.g.*, Prosecution Exhibit 70, p. 23 (witness statement of Prosecution Witness Jusuf Avdispahić regarding detainees at the Ekonomija farm in Zvornik).
[101] *See, e.g.*, Prosecution Exhibit 3336, pp. 21, 63 (testimony from Prosecution Witness KDZ239 regarding detainees at the Livade warehouses and KP Dom in Foča); Prosecution Exhibit 3528, para. 27 (witness statement of Prosecution Witness Kerim Mešanović regarding detainees at Omarska camp in Prijedor).
[102] *See, e.g.*, Prosecution Exhibit 63, p. 31 (testimony from Prosecution Witness Mirsad Kuralić regarding the effects of being beaten at detention facilities, including one in Vlasenica).
[103] *See, e.g.*, AF1260 (regarding detainees in Prijedor).
[104] *See, e.g.*, Prosecution Exhibit 70, p. 17 (witness statement of Prosecution Witness Jusuf Avdispahić regarding detainees at the Ekonomija farm in Zvornik); Prosecution Exhibit 3528, para. 23 (witness statement of Prosecution Witness Kerim Mešanović regarding detainees at Omarska camp in Prijedor); Prosecution Exhibit 3881, p. 53 (testimony from Prosecution Witness Idriz Meržanić regarding detainees at Trnopolje camp in Prijedor).
[105] *See, e.g.*, T. 28 June 2012 pp. 28765-28766. *See also* Appeal Brief, paras 36-37 and citations contained therein.
[106] *See, e.g.*, T. 16 September 2011 pp. 18946-18947 (testimony from Prosecution Witness KDZ239 regarding detainees at Partizan Hall in Foča); AF787, AF792-794, AF803, AF814, AF819, AF821 (regarding detainees in Foča); AF1168, AF1213, AF1238-1241 (regarding detainees in Prijedor).
[107] *See, e.g.*, Prosecution Exhibit 70, pp. 15-16 (witness statement of Prosecution Witness Jusuf Avdispahić regarding detainees at the Ekonomija farm in Zvornik); AF2749 (regarding detainees at the Čelopek Dom Culture facility in Zvornik).
[108] Rule 98 *bis* of the Rules. *See also supra*, para. 9.
[109] *Jelisić* Appeal Judgement, para. 55.
[110] *Seromba* Appeal Judgement, para. 46. *See also Seromba* Appeal Judgement, para. 48 (referring to "heinous crimes that obviously constitute serious bodily or mental harm, such as rape and torture").
[111] *See supra*, nn. 86-107.

of genocide in the context of Rule 98 *bis* of the Rules. Accordingly, the Trial Chamber failed to take the evidence at its highest.

38. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in fact in concluding that the evidence, taken at its highest, was insufficient for a reasonable trier of fact to conclude beyond reasonable doubt that underlying genocidal acts of causing serious bodily or mental harm occurred, and that this error resulted in a miscarriage of justice. The Appeals Chamber therefore grants this sub-ground of the Prosecution's appeal and finds that the Prosecution's remaining arguments relating to this sub-ground are moot. The impact of granting this sub-ground of the Prosecution's appeal will be considered below.

3. Deliberately Inflicting Conditions of Life Calculated to Destroy

39. In the Judgement of Acquittal, the Trial Chamber observed that:

> The evidence of the witnesses referred to earlier is also illustrative of the conditions of detention, including cruel and inhumane treatment, torture, physical and psychological abuse, rape and sexual violence, inhumane living conditions, forced labour, failure to provide adequate accommodation, shelter, food, water, medical care or hygienic facilities, in relation to which the Chamber already found there was sufficient evidence for the purpose of Count 3.[112]

40. The Trial Chamber recalled that in determining whether conditions of life imposed on a targeted group were calculated to bring about the group's physical destruction, it was required to focus on the "objective probability of these conditions leading to the physical destruction of the group in part".[113] The Trial Chamber further explained that it was required to assess factors including "the nature of the conditions imposed, the length of time that members of the group were subjected to that, and characteristics of the targeted group such as vulnerability".[114] The Trial Chamber affirmed that it had assessed these factors in reviewing the evidence relevant to Count 1 of the Indictment and observed that the charge of deliberately inflicting upon a group conditions of life calculated to bring about its physical destruction in whole or in part does not require proof of actual physical destruction.[115] Nonetheless, the Trial Chamber concluded that the evidence before it, taken at its highest, could *not* support the conclusion that the conditions in the scheduled detention facilities "reached a level which could support an inference that Bosnian Muslims and/or Bosnian Croats were detained in conditions of life calculated to bring about their physical destruction".[116]

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[112] T. 28 June 2012 p. 28767.
[113] T. 28 June 2012 p. 28767.
[114] T. 28 June 2012 p. 28767.
[115] T. 28 June 2012 p. 28767.
[116] T. 28 June 2012 p. 28768. *See also* T. 28 June 2012 p. 28767.

(a) Submissions

41. The Prosecution submits that the Trial Chamber erred by failing to provide a reasoned opinion in relation to its conclusion that the conditions of life in detention facilities in the Municipalities did not satisfy the requirements of Article 4(2)(c) of the Statute.[117] The Prosecution asserts that while the Trial Chamber invoked the legal standard of objective probability and identified the factors relevant thereto, it appears not to have applied this standard to the evidence on the record.[118] In particular, the Prosecution emphasises that the Trial Chamber did not discuss the application of the relevant factors to the evidence, and it adds that the trial chamber in the *Brđanin* case was satisfied beyond reasonable doubt that the *actus reus* of Article 4(2)(c) of the Statute had been established based on much of the same evidence on the record in this case.[119] The Prosecution also asserts that by holding that the evidence did not reach an unspecified "level", the Trial Chamber leaves the Prosecution and the Appeals Chamber to speculate as to whether the Trial Chamber was referring to a numerical threshold, the nature of the conditions, or "something else".[120]

42. Additionally, the Prosecution submits that the Trial Chamber erred in fact by failing to find that the evidence on the record satisfied the requirements of Article 4(2)(c) of the Statute.[121] In particular, the Prosecution contends that evidence accepted by the Trial Chamber demonstrates that the conditions in the camps in which Bosnian Muslims and/or Bosnian Croats were detained were "horrific" and supports a conclusion as to the objective probability of physical destruction.[122] Moreover, according to the Prosecution, the evidence accepted by the Trial Chamber shows that Bosnian Muslims and/or Bosnian Croats were routinely subjected to conditions of a nature commonly held by other trial chambers to satisfy the requirements of Article 4(2)(c) of the Statute.[123] The Prosecution adds that there is evidence which supports the conclusion that these conditions were deliberately imposed to destroy members of the targeted groups.[124]

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[117] Appeal Brief, paras 40-42.
[118] Appeal Brief, para. 41.
[119] Appeal Brief, para. 41, *citing Brđanin* Trial Judgement, paras 907-962.
[120] Appeal Brief, para. 41 (internal quotation marks omitted).
[121] Appeal Brief, paras 43-52.
[122] Appeal Brief, para. 43.
[123] Appeal Brief, paras 44-50. *See also* Appeal Brief, paras 41, 52.
[124] Appeal Brief, para. 51. In its Notice of Appeal, the Prosecution also asserts that the Trial Chamber failed to apply the correct Rule 98 *bis* standard by failing to take the evidence at its highest. Notice of Appeal, para. 9. The Prosecution has not made submissions concerning this aspect of its appeal in its Appeal Brief. *See* Appeal Brief, paras 40-53. The argument is therefore deemed abandoned. *See Mugenzi and Mugiraneza* Appeal Judgement, n. 15.

43. Karadžić does not respond to the Prosecution's arguments in relation to the deliberate infliction of destructive conditions of life.[125]

(b) Analysis

44. The Appeals Chamber recalls the principles previously articulated in this Judgement related to review of acquittals entered pursuant to Rule 98 *bis* of the Rules.[126] The Appeals Chamber further recalls that, pursuant to Article 4(2)(c) of the Statute, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" constitutes an underlying, prohibited act for purposes of the crime of genocide.[127] Finally, the Appeals Chamber underscores that 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 the appellant submits the trial chamber omitted to address and to explain why this omission invalidated the decision.[128]

45. The Appeals Chamber is not persuaded that the Trial Chamber failed to provide a reasoned opinion. The Trial Chamber articulated the legal test that it applied to the evidence and expressly affirmed that it had focused on and assessed the relevant legal factors in reviewing the evidence regarding the alleged underlying genocidal act of deliberately inflicting destructive conditions of life.[129] The Trial Chamber also identified the evidence that it considered in this context and made specific reference to an earlier and more detailed discussion of this same evidence in relation to Count 3 of the Indictment.[130] The Appeals Chamber recalls that a trial chamber need not explain every step of its reasoning or refer to every piece of evidence on the trial record.[131] The Appeals Chamber also recalls that the brevity or length of a decision depends upon a number of factors, including the nature of the issue in dispute and the quality of the parties' arguments.[132] In these circumstances, the Appeals Chamber considers that the Prosecution fails to demonstrate how the absence of an explicit discussion of the application of the legal standard or each of the underlying legal factors to the evidence invalidates the Trial Chamber's conclusion.[133] In view of the foregoing, the Appeals Chamber likewise considers that the Prosecution fails to show how the

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[125] *See* Response, paras 27-37.
[126] *See supra*, paras 9, 21.
[127] *See supra*, para. 22.
[128] *Perišić* Appeal Judgement, para. 9; *Lukić and Lukić* Appeal Judgement, para. 11. *See also supra*, para. 13.
[129] T. 28 June 2012 p. 28767.
[130] T. 28 June 2012 p. 28767. *See also* T. 28 June 2012 pp. 28758-28761.
[131] *Lukić and Lukić* Appeal Judgement, para. 139; *Krajišnik* Appeal Judgement, paras 139, 141; *Kvočka et al.* Appeal Judgement, para. 23.
[132] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009, para. 11. *See also Kvočka et al.* Appeal Judgement, para. 25.
[133] *Cf. Krajišnik* Appeal Judgement, para. 141.

conclusions reached by a different trial chamber establish that the Trial Chamber did not provide a reasoned opinion in assessing the evidence before it.

46. The Appeals Chamber acknowledges that the Trial Chamber's use of the phrase "reached a level"[134] in discussing relevant evidence may have been unclear. Nevertheless, the Appeals Chamber considers that, when read in context, this phrase reflects the Trial Chamber's view that the evidence on the record, taken at its highest, was not sufficient to support an inference that Bosnian Muslims and/or Bosnian Croats were detained in conditions of life calculated to bring about their physical destruction.[135] The Appeals Chamber thus is not convinced that the Trial Chamber erred in this regard.

47. By contrast, the Prosecution is convincing in asserting that the Trial Chamber erred in assessing the factual evidence before it.[136] The Trial Chamber noted evidence indicating that detained Bosnian Muslims and/or Bosnian Croats suffered "cruel and inhumane treatment, torture, physical and psychological abuse, rape and sexual violence, inhumane living conditions, [and] forced labour" and were not provided "adequate accommodation, shelter, food, water, medical care or hygienic facilities".[137]

48. More specifically, the Trial Chamber received evidence[138] indicating, *inter alia*, that Bosnian Muslims and/or Bosnian Croats were detained in overcrowded conditions, at times with hundreds of individuals confined to a single room.[139] For example, evidence before the Trial Chamber indicates that: at Keraterm camp in Prijedor 570 detainees were held in a single room;[140] at KP Dom in Foča, 18 detainees were kept in a room designed for solitary confinement;[141] at Omarska camp in Prijedor 200 individuals were held in a room of 40 square meters and were also crowded into lavatories;[142] and at the Betonirka factory in Sanski Most detainees had to sleep sitting upright as there was no room to lie down.[143] Other evidence before the Trial Chamber suggests that Bosnian Muslim and/or Bosnian Croat detainees were denied or received inadequate medical care;

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[134] T. 28 June 2012 p. 28768.
[135] T. 28 June 2012 p. 28768.
[136] *See* Appeal Brief, paras 43-52.
[137] T. 28 June 2012 p. 28767.
[138] *See, e.g.*, T. 28 June 2012 p. 28767. *See also* Appeal Brief, paras 44-51 and citations contained therein.
[139] *See, e.g.*, T. 1 September 2011 pp. 18159-18160 (testimony from Prosecution Witness KDZ603 that more than a thousand detainees were housed in a hall at Sušica camp in Vlasenica); Prosecution Exhibit 693, pp. 3-4 (testimony from Prosecution Witness Safet Taci regarding detention conditions at Keraterm camp in Prijedor). *See also* Prosecution Exhibit 3336, p. 38 (testimony from Prosecution Witness KDZ239 regarding detention conditions at KP Dom in Foča).
[140] *See* Prosecution Exhibit 680, pp. 8-9 (testimony from Prosecution Witness KDZ050 regarding detainees at Keraterm camp in Prijedor); AF1198-1199.
[141] AF843. *See also* AF842, AF844.
[142] AF1139.
[143] Prosecution Exhibit 718, para. 57 (witness statement of Prosecution Witness Ahmet Zulić regarding detainees at the Betonirka factory in Sanski Most); AF1333, AF1335.

for example, it was alleged that: there were no medical facilities for detainees at the Betonirka factory in Sanski Most;[144] at KP Dom in Foča, there was inadequate medical care and detainees who were kept in isolation cells were denied all access to medical care;[145] and at Keraterm camp in Prijedor many detainees suffered from dysentery as well as from injuries inflicted during beatings, but they were not provided with any medical care.[146] Finally, the Trial Chamber also received evidence indicating that Bosnian Muslim and/or Bosnian Croat detainees: were given insufficient or no food, leading to malnutrition, starvation, and severe weight loss;[147] were sometimes deprived of water;[148] and were not given access to proper toilet or bathing facilities, leading to the spread of disease.[149]

49. The Appeals Chamber recalls again that pursuant to Rule 98 *bis* of the Rules, the Prosecution's evidence is assumed to be credible and is taken at its highest[150] and that a judgement of acquittal shall be entered only if there is "no evidence capable of supporting a conviction".[151] The Appeals Chamber is satisfied that evidence adduced by the Prosecution, when taken at its highest, indicates that Bosnian Muslims and Bosnian Croats were subjected to conditions of life that would bring about their physical destruction, including severe overcrowding, deprivation of nourishment, and lack of access to medical care. This evidence is sufficiently compelling in its

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[144] AF1343.
[145] AF854-856.
[146] AF1201.
[147] *See, e.g.*, Prosecution Exhibit 678, p. 59 (testimony from Prosecution Witness KDZ048 that at the Omarska camp in Prijedor detainees were given one meal per day at most and were often were not fed at all); Prosecution Exhibit 3336, pp. 49-50, 134 (testimony from Prosecution Witness KDZ239 that non-Serb detainees at the KP Dom facility in Foča were deliberately given very little food, and the food was of poor quality); Prosecution Exhibit 680, p. 11 (testimony from Prosecution Witness KDZ050 that detainees at Keraterm camp in Prijedor were not given food); AF851-853 (at the KP Dom detention facility in Foča, non-Serb detainees were purposefully fed inadequate amounts of food, leading to severe weight loss and other health problems); AF1141-1142, AF1145 (detainees at Omarska camp in Prijedor were fed once a day and were only allowed one or two minutes to eat, causing some prisoners to lose at least 20-30 kilograms during their detention); AF1202 (detainees at Keraterm camp in Prijedor were inadequately fed or were not fed at all and thus suffered from malnutrition and starvation); AF1234 (detainees at Trnopolje camp in Prijedor were not provided with any food); AF1337 (detainees at the Betonirka facility in Sanski Most were provided with insufficient and low quality food).
[148] *See, e.g.*, Prosecution Exhibit 680, pp. 9, 11 (testimony from Prosecution Witness KDZ050 that during his first two days of detention at Keraterm camp in Prijedor he was not provided with any water); AF1146-1147 (detainees at Omarska camp in Prijedor were denied water or were provided with water not fit for human consumption); AF1233 (there was almost no water to drink at the Trnopolje camp in Prijedor).
[149] *See, e.g.*, Prosecution Exhibit 680, pp. 11-12 (testimony from Prosecution Witness KDZ050 that upon arriving at Keraterm camp in Prijedor, detainees were kept in a room without toilet facilities for two days, and then they were only provided with a single open barrel); Prosecution Exhibit 3336, pp. 49-50 (testimony from Prosecution Witness KDZ239 KDZ239 that detainees at the KP Dom facility in Foča could not bathe, which led to a lice outbreak); AF845, AF847 (at the KP Dom facility in Foča there was no access to bathing or laundry facilities, which led to the spread of lice); AF1148-1149 (Omarska camp in Prijedor lacked toilet and washing facilities, leading to the spread of skin disease, diarrhea, and dysentery among the detainee population); AF1200 (at Keraterm camp in Prijedor there were few toilet and washing facilities, leading to the spread of lice, and detainees were only permitted to use the toilet once a day); AF1232, AF1235 (Trnopolje camp in Prijedor lacked running water and there were limited toilet facilities, which created unsanitary conditions that led to the spread of lice, scabies, and dysentery); AF1338 (at the Betonirka facility in Sanski Most there were no bathing or laundry facilities, and detainees could use proper toilet facilities only at the whim of the guards, otherwise using buckets and bags).
[150] *Jelisić* Appeal Judgement, para. 55.

totality that no reasonable trial chamber could have concluded, in the context of Rule 98 *bis* of the Rules, that there is no evidence capable of demonstrating the *actus reus* of deliberately inflicting conditions of life calculated to destroy.

50. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in fact in concluding that there was no evidence, taken at its highest, based upon which a reasonable trier of fact could be satisfied beyond reasonable doubt that underlying genocidal acts of deliberately inflicting conditions of life calculated to destroy occurred, and that this error resulted in a miscarriage of justice. The Appeals Chamber therefore grants this sub-ground of the Prosecution's appeal. The impact of this conclusion will be considered below.

4. Conclusion

51. For the foregoing reasons, the Appeals Chamber grants Ground 1 of the Prosecution's appeal in part, reverses the Trial Chamber's finding that there was no evidence, if accepted, upon which a reasonable trier of fact could be satisfied beyond reasonable doubt that underlying genocidal acts of causing serious bodily or mental harm and deliberately inflicting conditions of life calculated to bring about the physical destruction of a protected group in whole or in part occurred, and dismisses the remainder of Ground 1 of the Prosecution's appeal.

B. Alleged Errors Relating to Genocidal Intent (Grounds 2 and 3)

52. The Trial Chamber concluded that the evidence, taken at its highest, was insufficient to allow a reasonable trier of fact to conclude beyond reasonable doubt that underlying acts of genocide were committed with genocidal intent.[152] The Prosecution submits that the Trial Chamber erred in law and in fact in assessing genocidal intent.[153] In this section the Appeals Chamber considers whether the Trial Chamber erred by: (i) segmenting its analysis of genocidal intent; (ii) assessing the substantiality of the groups intended for destruction; (iii) failing to correctly analyse whether genocidal intent was established within the framework of the first or basic category of JCE ("JCE I"); and (iv) improperly assessing the evidence that Karadžić and the other alleged JCE members shared an intent to commit genocide and failing to provide a reasoned opinion in this respect.

[151] Rule 98 *bis* of the Rules. *See also supra*, para. 9.
[152] T. 28 June 2012 pp. 28769-28770. *See also* T. 28 June 2012 pp. 28764-28768.
[153] Notice of Appeal, paras 11-21; Appeal Brief, paras 54-110. *See also* Reply, paras 10-18.

1. Segmentation of Analysis

53. In addressing the evidence of killing in relation to Count 1 of the Indictment, the Trial Chamber concluded that the evidence, taken at its highest:

> [did] not reach the level from which a reasonable trier of fact could infer that a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of members of these groups *were targeted for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such.*[154]

The Trial Chamber further found, in relation to the alleged acts of causing serious bodily or mental harm, that it had not heard evidence, taken at its highest, which could support a conclusion by a reasonable trier of fact that "the harm caused reached a level where it contributed to or tended to contribute to the destruction of the Bosnian Muslims and/or Bosnian Croats in whole or in part *or that it was committed with the intent to destroy those groups*".[155]

(a) Submissions

54. The Prosecution submits that the Trial Chamber erred in considering whether genocidal intent had been established *vis-à-vis* each individual category of underlying acts.[156] In particular, the Prosecution claims that the Trial Chamber erred by adopting a piecemeal approach instead of "holistically considering all relevant evidence of intent" in relation to Karadžić and the other alleged JCE members, including their statements and conduct, the "totality of underlying genocidal acts", and "other recognised indicators of genocidal intent".[157] The Prosecution also contends that the Trial Chamber's subsequent reference to the totality of evidence of the underlying genocidal acts must be understood in the context of its segmented assessment of these acts.[158] In the Prosecution's view, any assessment by the Trial Chamber of Karadžić's intent and the intent of others in leadership positions "must address the entirety of the crimes committed together rather than an isolated category-by-category assessment".[159]

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[154] T. 28 June 2012 p. 28765 (emphasis added).
[155] T. 28 June 2012 p. 28766 (emphasis added).
[156] Appeal Brief, paras 99-102. *See also* Appeal Brief, n. 335.
[157] Appeal Brief, para. 100. *See also* Appeal Brief, paras 101-102.
[158] Appeal Brief, para. 101, *citing* T. 28 June 2012 pp. 28768-28769. In its Notice of Appeal, the Prosecution also contends that the Trial Chamber failed to provide a reasoned opinion in relation to this sub-ground of appeal. *See* Notice of Appeal, para. 20. The Prosecution has not made submissions concerning this aspect of its appeal in its Appeal Brief. *See* Appeal Brief, paras 99-102. The argument is therefore deemed abandoned. *See Mugenzi and Mugiraneza* Appeal Judgement, n. 15.
[159] Appeal Brief, para. 102.

55. Karadžić responds that the Trial Chamber did not err in analysing each of the types of alleged genocidal acts, and adds that the Trial Chamber expressly stated that it had considered the totality of the circumstances.[160]

(b) Analysis

56. The Appeals Chamber recalls that, in the context of assessing evidence of genocidal intent, a compartmentalised mode of analysis may obscure the proper inquiry.[161] Rather than considering separately whether an accused intended to destroy a protected group through each of the relevant genocidal acts, a trial chamber should consider whether all of the evidence, taken together, demonstrates a genocidal mental state.[162] Thus, in the context of Rule 98 *bis* of the Rules, a trial chamber must both consider the evidence at its highest[163] and assess all of the evidence as a whole.

57. The Appeals Chamber observes that the Trial Chamber made findings concerning genocidal intent while assessing the evidence concerning alleged genocidal acts of killing and causing serious bodily or mental harm.[164] Having completed its analysis of this evidence, the Trial Chamber explained that:

> in the absence of direct evidence that the physical perpetrators of the crimes alleged to have been committed in the municipalities carried out these crimes with genocidal intent, the Chamber can infer specific intent from a number of factors and circumstances, including the general context of the case, the means available to the perpetrator, the surrounding circumstances, the perpetration of other culpable acts systematically directed against the same group, the numerical scale of atrocities committed, the repetition of destructive and discriminatory acts, the derogatory language targeting the protected group, or the existence of a plan or policy to commit the underlying offence. As stated earlier, the Chamber has heard evidence of culpable acts systematically directed against Bosnian Muslims and/or Bosnian Croats in the municipalities and of the repetition of discriminatory acts and derogatory language. However, *the nature, scale, and context of these culpable acts, be it in all the municipalities covered by the indictment or the seven municipalities in which genocide is specifically alleged, do not reach the level from which a reasonable trier of fact could infer that they were committed with genocidal intent.*[165]

The Trial Chamber then reiterated that, having reviewed "the totality of the evidence which the Chamber has received", it found that there was no evidence that the genocidal acts at issue "reached

[160] Response, para. 252.
[161] *Stakić* Appeal Judgement, para. 55
[162] *Stakić* Appeal Judgement, para. 55.
[163] *See supra*, para. 9.
[164] T. 28 June 2012 pp. 28764-28766. Although the Trial Chamber found that the evidence of the conditions of detention could not support an inference that Bosnian Muslims and/or Bosnian Croats were detained in "conditions of life calculated to bring about their physical destruction", T. 28 June 2012 p. 28768, the Appeals Chamber fails to discern how this finding constitutes a finding as to genocidal intent, as the Prosecution suggests. *See* Article 4(2)(c) of the Statute (concerning the underlying genocidal act of "deliberately inflicting on the group *conditions of life calculated to bring about its physical destruction* in whole or in part") (emphasis added). *See also supra*, paras 22, 39-40.
[165] T. 28 June 2012 p. 28768 (emphasis added).

a level from which a reasonable trier of fact could draw an inference that they were committed with an intent to destroy in whole or in part the Bosnian Muslims and/or Bosnian Croats as such".[166]

58. The Trial Chamber also noted that it had reviewed evidence of statements and speeches by Karadžić, *inter alios*, as well as other evidence related to Karadžić.[167] The Trial Chamber proceeded to find that:

> notwithstanding the statements of the accused, there is no evidence upon which, if accepted, a reasonable trier of fact could find that the acts of killing, serious bodily or mental harm, and conditions of life inflicted on the Bosnian Muslims and/or Bosnian Croats were perpetrated with the dolus specialis required for genocide.[168]

59. In view of the foregoing, the Appeals Chamber considers that although the Trial Chamber initially analysed genocidal intent in relation to each of the alleged genocidal acts of killing and causing serious bodily or mental harm, it thereafter proceeded to consider the totality of the evidence on the record, and that its findings concerning genocidal intent reflect this holistic analysis. The Appeals Chamber is therefore not persuaded that the Trial Chamber impermissibly segmented its analysis of genocidal intent.

60. Accordingly, the Appeals Chamber dismisses this sub-ground of the Prosecution's appeal.

2. Substantiality of the Groups

61. In assessing the alleged genocidal act of killing, the Trial Chamber observed that the determination of whether there is evidence capable of supporting a conviction for genocide does not involve a numerical assessment of the number of people killed and does not have a numeric threshold.[169] The Trial Chamber then concluded that the evidence, taken at its highest:

> [did] not reach the level from which a reasonable trier of fact could infer that *a significant section of the Bosnian Muslim and/or Bosnian Croat groups* and *a substantial number of members of these groups* were targeted for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such.[170]

(a) Submissions

62. The Prosecution asserts that in relation to the genocidal act of killing, the Trial Chamber erred in finding that a substantial part of the Bosnian Muslim and/or Bosnian Croat groups were not

[166] T. 28 June 2012 pp. 28768-28769.
[167] T. 28 June 2012 p. 28769.
[168] T. 28 June 2012 p. 28769.
[169] T. 28 June 2012 p. 28765.
[170] T. 28 June 2012 p. 28765 (emphasis added).

targeted for destruction.[171] In particular, the Prosecution submits that while a trial chamber has a margin of discretion in determining what constitutes a "substantial part" for purposes of the crime of genocide, the Trial Chamber erred in exercising such discretion at this stage of the case and thus incorrectly applied the Rule 98 *bis* standard.[172]

63. In addition, the Prosecution contends that the Trial Chamber erred in assessing the "in part" requirement of genocidal intent by referring to the number of victims of killings rather than looking to other factors and evidence.[173] The Prosecution also claims that the Trial Chamber applied an incorrect legal standard insofar as it required that the parts of the Bosnian Muslim and/or Bosnian Croat groups be both quantitatively and qualitatively substantial.[174]

64. Finally, the Prosecution submits that the Trial Chamber failed to provide a reasoned opinion because it did not discuss any of the factors which determine whether a substantial part of a group has been targeted.[175] According to the Prosecution, but for these errors, the Trial Chamber would have found that the genocidal intent of Karadžić and other alleged JCE members "encompassed a substantial part" of the Bosnian Muslim and/or Bosnian Croat groups.[176]

65. Karadžić responds that, contrary to the Prosecution's suggestion, the Trial Chamber never found that the targeted group was too small to constitute a substantial part of the Bosnian Muslim group.[177] Rather, according to Karadžić, the Trial Chamber found that the genocidal acts at issue were not perpetrated with the intent to destroy the group in whole or in part.[178]

(b) Analysis

66. The Appeals Chamber recalls that:

> The intent requirement of genocide under Article 4 of the Statute is [...] satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group. The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is

[171] Appeal Brief, paras 103-110. The Prosecution asserts that this sub-ground of appeal is in the alternative to its arguments in relation to the *actus reus* of killing. *See* Appeal Brief, para. 103. *See also supra*, Section III.A.1.
[172] Appeal Brief, paras 104-105.
[173] Appeal Brief, para. 106.
[174] Appeal Brief, para. 107 (referring to the Trial Chamber's discussion of "'a significant section [...] *and* a substantial number'" of members of the Bosnian Muslim and/or Bosnian Croat groups) (emphasis added), *quoting* T. 28 June 2012 p. 28765.
[175] Appeal Brief, para. 108.
[176] Appeal Brief, para. 109.
[177] Response, para. 253.
[178] Response, para. 253.

> emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4.[179]

67. The Appeals Chamber further recalls that paragraph 38 of the Indictment alleges that between 31 March 1992 and 31 December 1992, a campaign of persecutions in the Municipalities:

> included or escalated to include conduct that manifested an intent to destroy in part the national, ethnical and/or religious groups of Bosnian Muslims and/or Bosnian Croats as such. In such municipalities, *a significant section of the Bosnian Muslim and/or Bosnian Croat groups*, namely their leaderships, *as well as a substantial number of members of these groups* were targeted for destruction.[180]

The Prosecution thus made specific reference to the targeting for destruction of "a significant section of the Bosnian Muslim and/or Bosnian Croat groups [...] as well as a substantial number of members of these groups" in alleging genocidal intent in relation to Count 1 of the Indictment.[181]

68. The Appeals Chamber considers that, when read in the context of paragraph 38 of the Indictment and its particular wording, the Trial Chamber's conclusion referencing "a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of members of these groups"[182] does not imply that the Trial Chamber assessed the substantiality of the part of the groups that had been allegedly targeted for destruction. While the Trial Chamber does not explicitly refer to the Indictment, the Trial Chamber's statement suggests that it was considering whether genocidal intent, *as alleged in paragraph 38 of the Indictment*, had been established. Accordingly, the Appeals Chamber discerns nothing in this statement to indicate that the Trial Chamber misapplied either its discretion or the Rule 98 *bis* standard.

69. The Prosecution's remaining submissions are premised on the notion that the Trial Chamber assessed and reached conclusions concerning the substantiality of the part of the Bosnian Muslim and/or Bosnian Croat groups that had been targeted. In view of the foregoing analysis, the Appeals Chambers considers that these remaining contentions are moot.

70. Accordingly, the Appeals Chamber dismisses this sub-ground of the Prosecution's appeal.

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[179] *Krstić* Appeal Judgement, para. 12 (internal citation omitted). *See also Gacumbitsi* Appeal Judgement, para. 40; *Krstić* Appeal Judgement, para. 8.
[180] Indictment, para. 38 (emphasis added).
[181] Indictment, para. 38.
[182] T. 28 June 2012 p. 28765.

3. Analysis of Genocidal Intent within the Framework of JCE I

71. The Appeals Chamber recalls that the Trial Chamber, in assessing the alleged genocidal acts of killing and causing serious bodily or mental harm, made findings concerning genocidal intent.[183] The Trial Chamber then reiterated that:

> in the absence of direct evidence that the physical perpetrators of the crimes alleged to have been committed in the municipalities carried out these crimes with genocidal intent, the Chamber can infer specific intent from a number of factors and circumstances, including the general context of the case, the means available to the perpetrator, the surrounding circumstances, the perpetration of other culpable acts systematically directed against the same group, the numerical scale of atrocities committed, the repetition of destructive and discriminatory acts, the derogatory language targeting the protected group, or the existence of a plan or policy to commit the underlying offence.[184]

The Trial Chamber recalled that it had "heard evidence of culpable acts systematically directed against Bosnian Muslims and/or Bosnian Croats in the municipalities and of the repetition of discriminatory acts and derogatory language".[185] The Trial Chamber nonetheless concluded that the nature, scale, and context of these culpable acts, "be it in all the municipalities covered by the indictment or the seven municipalities in which genocide is specifically alleged, do not reach the level from which a reasonable trier of fact could infer that they were committed with genocidal intent".[186]

72. The Trial Chamber concluded its analysis of genocidal intent as follows:

> Finally, having reviewed the totality of the evidence which the Chamber has received with respect to the killing [of,] serious bodily or mental harm to, the forcible displacement of, and conditions of life inflicted on Bosnian Muslims and/or Bosnian Croats in detention facilities in the municipalities, the Chamber finds that there is no evidence that these actions reached a level from which a reasonable trier of fact could draw an inference that they were committed with an intent to destroy in whole or in part the Bosnian Muslims and/or Bosnian Croats as such.
>
> As stated earlier, the Prosecution in its response to the accused also refers to evidence of statements and speeches made by him and other members of the Bosnian Serb leadership which, according to the Prosecution, contained rhetorical warning of the disappearance, elimination, annihilation or extinction of the Bosnian Muslims in the event that war broke out. The Chamber has considered these examples as well as the other evidence received in relation to the accused in light of the scale and the context of the alleged crimes in the municipalities in 1992, and the inability to infer genocidal intent from other factors. Following this review, the Chamber finds that notwithstanding the statements of the accused, there is no evidence upon which, if accepted, a reasonable trier of fact could find that the acts of killing, serious bodily or mental harm, and conditions of life inflicted on the Bosnian Muslims and/or Bosnian Croats were perpetrated with the dolus specialis required for genocide.[187]

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[183] T. 28 June 2012 pp. 28764-28766. *See also supra*, paras 23-24.
[184] T. 28 June 2012 p. 28768.
[185] T. 28 June 2012 p. 28768.
[186] T. 28 June 2012 p. 28768.
[187] T. 28 June 2012 pp. 28768-28769.

(a) Submissions

73. The Prosecution submits that the Trial Chamber erred by failing to properly assess the genocidal intent of Karadžić and the other alleged JCE members within the framework of JCE I liability.[188] In particular, the Prosecution avers that the Trial Chamber's analysis appears to reflect the misconception that in order to enter a conviction for genocide, there must be proof of genocidal intent on the part of the physical perpetrators of the relevant underlying acts of genocide.[189] The Prosecution contends that while events at the level of the physical perpetrators may be relevant to assessing Karadžić's genocidal intent, the Trial Chamber never explicitly stated that it was examining the physical perpetators' genocidal intent in order to assess that of Karadžić and never considered the intent of other relevant individuals, including the other alleged JCE members.[190]

74. The Prosecution further submits that the Trial Chamber's ruling on other aspects of Karadžić's Rule 98 *bis* Motion reinforces the conclusion that the Trial Chamber incorrectly considered that the genocidal intent of physical perpetrators is a legal requirement.[191] In particular, the Prosecution notes that in relation to the charge of genocide in Srebrenica under Count 2 of the Indictment, the Trial Chamber specifically assessed the genocidal intent of the physical perpetrators.[192] According to the Prosecution, the Trial Chamber then separately addressed Karadžić's responsibility for genocide in relation to Count 2 of the Indictment without referencing the physical perpetrators' genocidal intent among the factors upon which it relied.[193]

75. The Prosecution avers that the Trial Chamber's erroneous view that the physical perpetrators are required to have genocidal intent caused it to improperly disregard the evidence of Karadžić's genocidal intent.[194] In this respect, the Prosecution stresses that the Trial Chamber's conclusions were reached "'*notwithstanding* the statements of the accused'".[195] In the Prosecution's view, this suggests that the Trial Chamber considered that Karadžić's statements demonstrated genocidal intent on their face but erroneously disregarded this evidence given its conclusion that the physical perpetrators did not possess genocidal intent.[196]

76. Finally, the Prosecution asserts that, regardless of whether the Trial Chamber considered the physical perpetrators' genocidal intent to be a pre-requisite for a conviction, it erred in law by

[188] Appeal Brief, paras 54, 86-92.
[189] Appeal Brief, paras 86-87, 91.
[190] Appeal Brief, para. 87.
[191] Appeal Brief, para. 88.
[192] Appeal Brief, para. 88, *citing* T. 28 June 2012 pp. 28750-28751, 28757.
[193] Appeal Brief, para. 88, *citing* T. 28 June 2012 pp. 28752-28758.
[194] Appeal Brief, paras 89-90. *See also* Appeal Brief, para. 87.
[195] Appeal Brief, para. 89, *quoting* T. 28 June 2012 p. 28769. *See also* Appeal Brief, para. 90.
[196] Appeal Brief, para. 90, *citing* T. 28 June 2012 p. 28769 (emphasis added).

failing to determine whether Karadžić and the other alleged JCE members possessed genocidal intent.[197] The Prosecution submits that the Trial Chamber made only passing reference to the statements of Karadžić, other members of the Bosnian Serb leadership, and unspecified "'other evidence received in relation to the accused'" without making any clear finding as to Karadžić's genocidal intent.[198] According to the Prosecution, given the Trial Chamber's explicit, positive findings as to Karadžić's genocidal intent with respect to other Counts in the Indictment and other specific intent crimes, it is unlikely that the Trial Chamber would have made a finding as to Karadžić's genocidal intent with respect to Count 1 of the Indictment "in such an ambiguous manner".[199]

77. Karadžić responds that, in finding that the evidence did not reach the level from which a reasonable trier of fact could infer genocidal intent, the Trial Chamber did not limit its conclusions to physical perpetrators, and he adds that the Trial Chamber specifically considered, *inter alia*, his own statements.[200] Karadžić maintains that the Trial Chamber, in reaching its conclusions "notwithstanding" his statements, was simply saying that "even if [his] words, taken at their highest, were expressions of his own genocidal wishes, the facts showed that those wishes were not implemented in the municipalities in 1992".[201] According to Karadžić, he could have had genocidal intent yet be acquitted "because no genocide in fact took place" and genocide is not an inchoate crime.[202]

78. The Prosecution replies, *inter alia*, that where a JCE I is established through the use of tools (physical perpetrators), the *actus reus* can be found in the acts of the tools and the *mens rea* can reside with the members of the JCE.[203] Given Karadžić's concession that underlying acts of genocide took place, the Prosecution asserts that Karadžić's explicit expressions of his genocidal intent are sufficient to complete the crime of genocide, which is not inchoate.[204] In the Prosecution's view, Karadžić's submissions merely repeat the Trial Chamber's apparent mistake by assuming that the genocidal intent of the physical perpetrators is a pre-requisite for any conviction.[205]

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[197] Appeal Brief, para. 92.
[198] Appeal Brief, para. 92, *quoting* T. 28 June 2012 p. 28769.
[199] Appeal Brief, para. 92.
[200] Response, paras 248-249.
[201] Response, para. 250.
[202] Response, para. 251. *See also* Response, paras 223-237, 250. According to Karadžić, genocide, as distinct from direct and public incitement to commit genocide or conspiracy to commit genocide, is not an inchoate crime because it "has to have been committed in order for an individual who wished it to come about to be liable for that crime". Response, para. 228, *citing Gatete* Appeal Judgement, para. 260.
[203] Reply, para. 5.
[204] Reply, para. 11. *See also* Reply, para. 5.
[205] Reply, paras 11-13.

(b) Analysis

79. The Indictment alleges that JCE members, including Karadžić, used others to carry out the crimes forming part of the JCE's common purpose, including members of the Bosnian Serb forces.[206] The Appeals Chamber recalls that members of a JCE can incur liability for crimes committed by principal perpetrators who were non-JCE members, provided that it has been established that the crimes can be imputed to at least one member of the JCE and that this member—when using the principal perpetrators—acted in accordance with the common objective.[207] Such a link is established by a showing that the JCE member used the non-JCE member to commit a crime pursuant to the common criminal purpose of the JCE.[208] The Appeals Chamber further recalls that the relevant question in the context of JCE I liability is whether the JCE member used the non-JCE member to commit the *actus reus* of the crime forming part of the common purpose; it is not determinative whether the non-JCE member shared the *mens rea* of the JCE member or that the non-JCE member knew of the existence of the JCE.[209] Therefore, in accordance with the allegations underlying Count 1 of the Indictment, it is the genocidal intent of Karadžić and other alleged JCE members, not the physical perpetrators of the underlying alleged genocidal acts, that is determinative for purposes of JCE I.

80. The Appeals Chamber also recalls that by its nature, genocidal intent is not usually susceptible to direct proof.[210] As recognised by the Trial Chamber,[211] in the absence of direct evidence, genocidal intent may be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, the repetition of destructive and discriminatory acts, or the existence of a plan or policy.[212]

81. The Appeals Chamber recalls that, in relation to Count 1 of the Indictment, the Trial Chamber made findings concerning genocidal intent in assessing the evidence of the alleged genocidal acts of killing and causing serious bodily or mental harm.[213] After noting that genocidal intent may be inferred from a variety of factors even where direct evidence of the physical

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[206] Indictment, paras 11-14. *See also* Indictment, para. 37; Appeal Brief, para. 91.
[207] *Krajišnik* Appeal Judgement, para. 225. *See also Brđanin* Appeal Judgement, paras 413, 430.
[208] *Krajišnik* Appeal Judgement, para. 225. *See also Brđanin* Appeal Judgement, para. 410.
[209] *Krajišnik* Appeal Judgement, para. 226. *See also Brđanin* Appeal Judgement, para. 410.
[210] *Gacumbitsi* Appeal Judgement, para. 40. *See also Rutaganda* Appeal Judgement, para. 525; *Kayishema and Ruzindana* Appeal Judgement, para. 159.
[211] T. 28 June 2012 p. 28768. *See also* T. 28 June 2012 p. 28751.
[212] *Jelisić* Appeal Judgement, paras 47-48. *See also Krstić* Appeal Judgement, para. 34; *Hategekimana* Appeal Judgement, para. 133; *Gacumbitsi* Appeal Judgement, paras 40-41.
[213] T. 28 June 2012 pp. 28764-28766. *See also supra*, paras 23-24.

perpetrator's intent is lacking, the Trial Chamber proceeded to consider evidence of culpable acts systematically directed against Bosnian Muslims and/or Bosnian Croats in the Municipalities and of the repetition of discriminatory acts and derogatory language.[214] It also explicitly considered the nature, scale, and context of these culpable acts.[215] The Trial Chamber further affirmed that it had reviewed the totality of the evidence with respect to the underlying acts alleged in relation to Count 1 of the Indictment, as well as evidence of statements and speeches made by Karadžić and other members of the Bosnian Serb leadership and other evidence in relation to Karadžić.[216] Following review of this evidence, the Trial Chamber concluded that there was no evidence (if accepted) based upon which a reasonable trier of fact could find that the alleged genocidal acts in the Municipalities were committed with the requisite genocidal intent.[217]

82. The Appeals Chamber notes that the Trial Chamber's analysis makes one explicit reference to evidence of the genocidal intent of the "physical perpetrators of the crimes".[218] However, the Trial Chamber also expressly considered evidence concerning Karadžić himself and other alleged JCE members.[219] Moreover, in reaching its conclusions as to genocidal intent, the Trial Chamber did not state that its holdings concerned the genocidal intent of the physical perpetrators alone but instead described the absence of evidence of genocidal intent more broadly.[220] In these circumstances, the Appeals Chamber is not persuaded that the Trial Chamber's conclusions on genocidal intent were restricted to the physical perpetrators of the underlying genocidal acts or that it failed to assess Karadžić's genocidal intent and that of other alleged JCE members.

83. The Appeals Chamber notes that the Trial Chamber, in ruling on Karadžić's Rule 98 *bis* Motion, explicitly considered the genocidal intent of the physical perpetrators in relation to the allegations of genocide in Srebrenica under Count 2 of the Indictment.[221] The Trial Chamber found that there was sufficient evidence to conclude, at the Rule 98 *bis* stage of the case, that genocide "was carried out by Bosnian Serb forces in Srebrenica" before proceeding to address Karadžić's responsibility.[222] The Appeals Chamber observes that the Trial Chamber, in making this finding, responded to specific arguments concerning the genocidal intent of physical perpetrators made by

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[214] T. 28 June 2012 p. 28768.
[215] T. 28 June 2012 p. 28768.
[216] T. 28 June 2012 pp. 28768-28769.
[217] T. 28 June 2012 pp. 28768-28769.
[218] T. 28 June 2012 p. 28768 (stating that "in the absence of direct evidence that the *physical perpetrators of the crimes* alleged to have been committed in the municipalities carried out these crimes with genocidal intent, the Chamber can infer specific intent from a number of factors and circumstances") (emphasis added).
[219] *See* T. 28 June 2012 p. 28769.
[220] *See* T. 28 June 2012 pp. 28768-28769.
[221] T. 28 June 2012 p. 28751.
[222] T. 28 June 2012 pp. 28751-28752. *See also* T. 28 June 2012 pp. 28753-28758.

Karadžić.[223] By contrast, Karadžić made no such arguments in relation to Count 1 of the Indictment. Rather, insofar as Karadžić addressed genocidal intent in relation to this Count, his arguments were more general in nature.[224] Moreover, the Appeals Chamber notes that, contrary to the Prosecution's suggestion, the Trial Chamber's analysis of Karadžić's genocidal intent in relation to Count 2 of the Indictment included an assessment of the relevant physical perpetrators' genocidal intent.[225] The Appeals Chamber recalls in this respect that genocidal intent may be inferred from a number of facts and circumstances, including the general context.[226] In light of the foregoing, the Appeals Chamber is not persuaded that the Trial Chamber's focus on physical perpetrators in relation to Count 2 of the Indictment demonstrates either that the Trial Chamber necessarily considered that liability under JCE I requires a showing of the physical perpetrators' genocidal intent or that, in assessing the evidence of Count 1 of the Indictment, the Trial Chamber failed to consider the genocidal intent of Karadžić and the other alleged JCE members.

84. The Appeals Chamber is similarly not persuaded that the Trial Chamber's use of the term "notwithstanding"[227] evinces disregard of Karadžić's statements, as the Prosecution claims. To the contrary, the Appeals Chamber considers that the Trial Chamber's express reference to these statements and its assessment of them along with other evidence demonstrate that it was considering the totality of the evidence on the record, including Karadžić's statements, in reaching its ultimate conclusion.

85. Turning to the Prosecution's remaining contentions, the Appeals Chamber observes that the Trial Chamber's abbreviated approach to its analysis of genocidal intent in relation to Count 1 of the Indictment is at times confusing In this respect, the Appeals Chamber notes the Trial Chamber's more extensive discussion of Karadžić's responsibility, including his genocidal intent, in relation to other Counts of the Indictment[228] in regard to which no judgement was entered.[229] While recalling that trial chambers enjoy considerable discretion in explaining their reasoning in relation to both legal and factual issues,[230] the Appeals Chamber considers that, particularly when addressing the touchstone issue of genocidal intent, clearer and more detailed reasoning in the Judgement of Acquittal would have been preferable.

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[223] T. 28 June 2012 p. 28751. *See also* T. 11 June 2012 pp. 28587, 28594.
[224] *See* T. 11 June 2012 pp. 28570-28578, 28580.
[225] T. 28 June 2012 p. 28757 (noting that the Trial Chamber "has heard evidence indicating that genocidal acts took place in the Srebrenica area in the summer of 1995 and that they were committed with the requisite specific intent for genocide" before proceeding to find, "[i]n light all the evidence", that Karadžić's genocidal intent may be inferred).
[226] *See supra,* para. 80.
[227] T. 28 June 2012 p. 28769.
[228] *See, e.g.*, T. 28 June 2012 pp. 28752-28758.
[229] T. 28 June 2012 p. 28774.
[230] *Kvočka et al.* Appeal Judgement, paras 23-24. *See also Blaškić* Appeal Judgement, para. 380.

86. Nevertheless, in light of the analysis set forth above, the Appeals Chamber is not persuaded that the truncated nature of the Trial Chamber's evidentiary analysis of Karadžić's and other alleged JCE members' genocidal intent demonstrates that the Trial Chamber failed to make a finding in this regard. The Appeals Chamber is likewise not convinced that the Trial Chamber erred by not explicitly noting that it was reaching findings concerning Karadžić's genocidal intent based upon, *inter alia*, the evidence relating to the physical perpetrators, given that this approach is evident from the structure of the Trial Chamber's analysis itself.

87. Accordingly, the Appeals Chamber dismisses this sub-ground of the Prosecution's appeal.

4. Genocidal Intent of Karadžić and Other Alleged JCE Members

88. In assessing whether Karadžić and other alleged JCE members possessed genocidal intent, the Trial Chamber explicitly considered evidence of: (i) the alleged genocidal acts of killing and causing serious bodily or mental harm;[231] (ii) culpable acts directed against Bosnian Muslims and/or Bosnian Croats in the Municipalities and the repetition of discriminatory acts and derogatory language;[232] and (iii) statements made by Karadžić and other members of the Bosnian Serb leadership.[233] With respect to this third category of evidence, the Trial Chamber noted that it had considered statements and speeches made by Karadžić and other members of the Bosnian Serb leadership, as well as other evidence received in relation to Karadžić, "in light of the scale and the context of the alleged crimes in the municipalities in 1992, and the inability to infer genocidal intent from other factors".[234] It further observed that the Prosecution had characterised these statements and speeches as containing "rhetorical warning of the disappearance, elimination, annihilation or extinction of Bosnian Muslims in the event that war broke out".[235] Having completed its review, the Trial Chamber found that:

> notwithstanding the statements of the accused, there is no evidence upon which, if accepted, a reasonable trier of fact could find that the acts of killing, serious bodily or mental harm, and conditions of life inflicted on the Bosnian Muslims and/or Bosnian Croats were perpetrated with the dolus specialis required for genocide.[236]

[231] T. 28 June 2012 pp. 28765-66, citing testimony from, *inter alia*, Prosecution Witnesses Sead Hodžić, KDZ610, KDZ239, KDZ075, KDZ048, Ivo Atlija, KDZ050, KDZ605, KDZ603, and Jusuf Avdispahić. *See also supra*, paras 23-24.
[232] T. 28 June 2012 p. 28768.
[233] T. 28 June 2012 p. 28769.
[234] T. 28 June 2012 p. 28769.
[235] T. 28 June 2012 p. 28769.
[236] T. 28 June 2012 p. 28769.

(a) Submissions

89. The Prosecution submits that insofar as the Trial Chamber conducted an assessment of genocidal intent, it erred in law by impermissibly weighing the evidence.[237] The Prosecution asserts that the Trial Chamber's holding reached "'*notwithstanding* the statements of the accused'" implies that Karadžić's statements are positive evidence of genocidal intent and that the Trial Chamber impermissibly weighed these statements against other evidence.[238] The Prosecution adds that the Trial Chamber's reference to considering the statements "'*in light of* the scale and context of the alleged crimes'" further demonstrates that the Trial Chamber impermissibly weighed the evidence.[239]

90. In addition, the Prosecution contends that the Trial Chamber committed a legal error by failing to take the evidence of genocidal intent at its highest, as evidenced by the Trial Chamber's characterisation of the statements of Karadžić and other members of the Bosnian Serb leadership as a "'rhetorical warning of the disappearance, elimination, annihilation or extinction of Bosnian Muslims in the event that war broke out'".[240] According to the Prosecution, the Trial Chamber's suggestion that the Prosecution itself described the statements as containing rhetorical warnings mischaracterises the record.[241] The Prosecution emphasises that Karadžić's statements are direct evidence of his genocidal intent and claims that, in an analogous context in the *Jelisić* case, the Appeals Chamber concluded that a trial chamber was not entitled to find that allegedly contrary evidence negated such direct evidence of genocidal intent.[242] In the alternative, the Prosecution asserts that the Trial Chamber failed to provide a reasoned opinion as to why Karadžić's statements could not establish genocidal intent, what factors it considered in relation to "'the other evidence received in relation to the accused'", and the basis upon which it reached any possible conclusion as to Karadžić's genocidal intent or that of the other alleged JCE members.[243]

91. Finally, the Prosecution submits that the Trial Chamber erred in fact by failing to find that Karadžić and other alleged JCE members shared the intent to commit genocide based upon the evidence on the record.[244] According to the Prosecution, there is ample evidence from which a reasonable trier of fact could infer genocidal intent, including statements made by Karadžić and other alleged JCE members before and during the alleged genocidal acts that explicitly threatened,

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[237] Appeal Brief, paras 54, 63, 86, 93-97. *See also* Reply, paras 16-17.
[238] Appeal Brief, para. 94, *quoting* T. 28 June 2012 p. 28769 (emphasis added).
[239] Appeal Brief, para. 94 (emphasis in original), *quoting* T. 28 June 2012 p. 28769.
[240] Appeal Brief, para. 95, *quoting* T. 28 June 2012 p. 28769. *See also* Appeal Brief, para. 63.
[241] Appeal Brief, para. 95, *citing* T. 13 June 2012 pp. 28706-28707, 28709, 28711-28714, T. 28 June 2012 p. 28769.
[242] Appeal Brief, para. 96, *citing Jelisić* Appeal Judgement, paras 69-72.
[243] Appeal Brief, para. 98, *quoting* T. 28 June 2012 p. 28769. *See also* Appeal Brief, para. 54.
[244] Appeal Brief, paras 55-85. *See also* Reply, paras 5, 10.

approved of, encouraged, praised, and attempted to justify the destruction of Bosnian Muslims and/or Bosnian Croats.[245] The Prosecution avers that the direct evidence of Karadžić's statements alone, taken at its highest, is sufficient to show that he had genocidal intent for purposes of a Rule 98 *bis* determination.[246] The Prosecution also asserts that additional evidence supports the conclusion that Karadžić and other alleged JCE members possessed genocidal intent, including evidence of, *inter alia*, the scale, repetitiveness, and nature of the genocidal and other culpable acts in the Municipalities and evidence that genocidal and other culpable acts were directed against and impacted virtually all members of the Bosnian Muslim and/or Bosnian Croat groups.[247] While acknowledging that the rulings of other chambers are not binding, the Prosecution contends that it is nonetheless significant that other chambers faced with overlapping or very similar evidence at the Rule 98 *bis* stage have found that genocidal intent could be inferred.[248]

92. Karadžić responds that the Prosecution fails to show any legal error on the part of the Trial Chamber.[249] Karadžić also asserts that the Trial Chamber reasonably concluded that genocide did not occur in the Municipalities, and he maintains that the Trial Chamber's conclusion is consonant with the underlying evidence.[250] In this respect, Karadžić argues, referencing judgements of the International Court of Justice ("ICJ") and the Tribunal, that "[t]wenty-seven international judges have come to the same conclusion" as the one reached by the Trial Chamber concerning allegations of genocide in the Municipalities, "mak[ing] it virtually impossible to conclude that the Trial Chamber's decision in this case was unreasonable".[251] Karadžić adds that, in his case, the Prosecution specifically relied upon evidence and adjudicated facts from other trials which resulted in acquittal, and he submits that what little new evidence was presented in his trial confirms that no genocide took place in the Municipalities in 1992.[252] Finally, Karadžić contends that if the events in the Municipalities in 1992 are compared with events "which have been found to constitute genocide

[245] Appeal Brief, paras 56-67.
[246] Appeal Brief, paras 56-59. *See also* Appeal Brief, para. 85.
[247] Appeal Brief, paras 68-83. *See also* Appeal Brief, para. 85.
[248] Appeal Brief, para. 84.
[249] Response, paras 223-246.
[250] Response, paras 38-246.
[251] Response, para. 40, n. 28. *See also* Response, paras 49-59 (discussing *Prosecutor v. Duško Sikirica et al.*, Case No. IT-95-8-T, Judgement on Defence Motions to Acquit, 4 September 2001), 60-65 (discussing the *Stakić* Trial Judgement and *Stakić* Appeal Judgement), 68-79 (discussing the *Brđanin* Trial Judgement), 80-86 (discussing the *Krajišnik* Trial Judgement), 87-95 (discussing 2007 ICJ Judgement, p. 43). *See also* Response, paras 41-48 (discussing the *Jelisić* Trial Judgement and *Jelisić* Appeal Judgement), 66-67 (discussing *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004). Karadžić also underscores that the 2007 ICJ Judgement and certain other cases at the Tribunal in which judgements of acquittal were entered involved allegations or evidence that overlap in whole or part with the allegations and evidence related to Count 1 of the Indictment in his case. *See* Response, paras 59, 65, 79, 86-87, 96.
[252] Response, paras 96-211.

in the 20th Century—the Holocaust, Rwanda, and Srebrenica—it is obvious that the events in the municipalities did not constitute genocide".[253]

93. In reply, the Prosecution asserts, *inter alia*, that the assessment and weighing of the evidence in trial judgements against other accused and issued at a different stage of the proceedings have no bearing on whether the Trial Chamber properly performed its function pursuant to Rule 98 *bis* of the Rules in this case.[254] The Prosecution also maintains that the crime of genocide is not limited to scenarios with the same level of killing and actual destruction as that which took place during the Holocaust or in Rwanda.[255] Finally, the Prosecution underscores that the Judgement of Acquittal addressed individual criminal responsibility, which was not the focus of the 2007 ICJ Judgement.[256]

(b) Analysis

94. As an initial matter, the Appeals Chamber observes that the parties have relied upon factual findings and evidentiary assessments by other chambers at this Tribunal and by the ICJ in support of their arguments.[257] The Appeals Chamber recalls that it is bound neither by the legal determinations nor by the evidentiary assessments reached by trial chambers of this Tribunal or by the ICJ.[258] In this latter respect, the Appeals Chamber underscores that findings of criminal responsibility made in a case before the Tribunal are binding only for the individual accused in that specific case.[259] The Appeals Chamber accordingly declines to address these submissions further.

95. Turning to the Prosecution's claims concerning alleged legal errors, the Appeals Chamber is not persuaded that the Trial Chamber impermissibly weighed the evidence by reaching a finding as to genocidal intent "notwithstanding" Karadžić's statements.[260] To the contrary, the Appeals Chamber considers that the Trial Chamber's ruling reflects that its consideration of Karadžić's statements in conjunction with all the other evidence could not lead it to conclude that the evidence could satisfy a reasonable trier of fact beyond reasonable doubt of the guilt of the accused. The Appeals Chamber finds similarly unconvincing the Prosecution's contention that the Trial Chamber, by considering Karadžić's statements and other evidence related to him "*in light of* the

[253] Response, para. 212. *See also* Response, paras 213-222.
[254] Reply, para. 18.
[255] Reply, para. 14. *See also* Reply, paras 13, 15.
[256] *See* AT. 17 April 2013 p. 57.
[257] *See* Appeal Brief, para. 84; Response, paras 40-211.
[258] *See, e.g.*, *Čelebići* Appeal Judgement, para. 24. *Cf. Aleksovski* Appeal Judgement, para. 114.
[259] *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Decision on Motion to Intervene and Statement of Interest by the Republic of Croatia, 8 February 2012, para. 12.
[260] T. 28 June 2012 p. 28769.

scale and the context of the alleged crimes",[261] impermissibly weighed Karadžić's statements against other evidence on the record. In this respect, the Appeals Chamber recalls that genocidal intent may be inferred from a number of facts and circumstances, including, *inter alia*, the general context and the scale of atrocities committed.[262] The Appeals Chamber accordingly fails to discern any error in the Trial Chamber's assessment of the evidence related to Karadžić's statements together with other evidence regarding the scale and the context of allegedly culpable acts.

96. The Prosecution also fails to demonstrate that the Trial Chamber erred by not having taken the evidence of genocidal intent at its highest. Contrary to the Prosecution's suggestion, the Trial Chamber did not itself characterise Karadžić's statements and speeches and that of other members of the Bosnian Serb leadership as rhetorical warnings but instead stated that the Prosecution had presented the statements and speeches as containing such warnings.[263] The Appeals Chamber further considers that the Prosecution has not shown that the Trial Chamber's summary depiction of the Prosecution's submissions at trial was objectively inaccurate.[264] In these circumstances, the Appeals Chamber finds no basis to conclude that the Trial Chamber failed to take the evidence at its highest. The Prosecution is similarly unconvincing in its claim that the Appeals Chamber's conclusion in the *Jelisić* case demonstrates any error by the Trial Chamber in this case.[265]

97. By contrast, the Appeals Chamber finds convincing the Prosecution's contentions regarding the Trial Chamber's interpretation of evidence on the record. The Appeals Chamber notes that the Trial Chamber received evidence that in meetings with Karadžić "it had been decided that one third of Muslims would be killed, one third would be converted to the Orthodox religion and a third will leave on their own" and thus all Muslims would disappear from Bosnia.[266] At the Appeal Hearing, Karadžić's legal advisor accepted that, taken at its highest, this statement could constitute evidence of genocidal intent.[267]

98. Other statements on the record[268] also suggest that Karadžić possessed genocidal intent. For example, Karadžić is alleged to have said that his goal was "to get rid of the enemies in our house, the Croats and Muslims, and not to be in the same state with them [anymore]"[269] and that if war started in Bosnia, Muslims would disappear and be annihilated.[270] Evidence on the record[271]

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[261] T. 28 June 2012 p. 28769 (emphasis added).
[262] *See supra*, para. 80.
[263] *See* T. 28 June 2012 p. 28769.
[264] *See* T. 13 June 2012 pp. 28706-28714.
[265] *See Jelisić* Appeal Judgement, paras 69-72.
[266] Prosecution Exhibit 3405, para. 95. *See also* Appeal Brief, para. 65.
[267] AT. 17 April 2013 p. 55.
[268] *See, e.g.*, Appeal Brief, paras 60-61 and citations contained therein. *See also* AT. 17 April 2013 pp. 14-16.
[269] Prosecution Exhibit 1394, p. 76.
[270] Prosecution Exhibit 3200, p. 2; Prosecution Exhibit 5846, p. 3; Defence Exhibit 279, pp. 3, 7-8.

also indicates that other senior members of the Bosnian Serb leadership, alleged to have been members of the JCE, possessed genocidal intent. For example, in discussing Bosnian Muslims and Bosnian Croats, Ratko Mladić ("Mladić"), the Commander of the Army of the Republika Srpska Main Staff, is alleged to have said that "[m]y concern is to have them vanish completely".[272] In addition, Slobodan Milošević, President of Serbia, stated that Momčilo Krajišnik, President of the Bosnian-Serb Assembly, wished to "kill off all the [Muslims and Croats]".[273]

99. Finally, the Appeals Chamber notes that the Trial Chamber received extensive indirect evidence[274] from which a reasonable trier of fact could infer genocidal intent. The Appeals Chamber recalls that specific intent may be inferred from "a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts".[275] In this regard, the Trial Chamber noted evidence of "culpable acts systematically directed against Bosnian Muslims and/or Bosnian Croats" in the Municipalities, as well as evidence of repetitive "discriminatory acts and derogatory language".[276] In particular, the Appeals Chamber observes that the record includes evidence of genocidal and other culpable acts committed against Bosnian Muslims and Bosnian Croats throughout the Municipalities, such as killings, beatings, rape, and sexual violence, as well as evidence of the large scale and discriminatory nature of these acts.[277]

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[271] *See, e.g.*, Appeal Brief, para. 67 and citations contained therein. *See also* AT. 17 April 2013 p. 17.
[272] Prosecution Exhibit 1385, p. 49. *See also* Prosecution Exhibit 1385, pp. 47-48.
[273] Prosecution Exhibit 1487, p. 17.
[274] *See, e.g.*, T. 28 June 2012 p. 28768. *See also* Appeal Brief, paras 68-75 and citations contained therein.
[275] *Jelisić* Appeal Judgement, para. 47. *See also Krstić* Appeal Judgement, para. 34; *Hategekimana* Appeal Judgement, para. 133; *Gacumbitsi* Appeal Judgement, paras 40-41.
[276] T. 28 June 2012 p. 28768.
[277] *See, e.g.*, Prosecution Exhibit 70, pp. 11-23 (witness statement of Prosecution Witness Jusuf Avdispahić regarding conditions at the Ekonomija farm in Zvornik, where detainees were severely beaten, sexually assaulted, forced to work, and killed while guards showed signs of religious and national animus); T. 29 March 2012 p. 27175 (testimony from Prosecution Witness KDZ610 regarding the mass killing of Muslims and detention of Muslim civilians in Zvornik); Prosecution Exhibit 3380, pp. 33-36 (testimony from Prosecution Witness Petko Panić regarding the detention of approximately 700 Muslim men at Karakaj Technical School in Zvornik and the killing of detainees); Prosecution Exhibit 64, pp. 3-5 (witness statement of Prosecution Witness Osman Krupinac, stating that Serbs shot and killed 36 men, women, and children during an attack on a village in Zvornik, as well as seven more men during other attacks on the village); T. 25 August 2011 pp. 17869-17870 (testimony from Prosecution Witness KDZ605 that thousands of Muslims from Bratunac were detained and that, at one detention location, men were beaten to death, stabbed, and shot); T. 22 August 2011 pp. 17637-17638 (testimony from Prosecution Witness Mušan Talović that Bosnian Serbs attacked a village in Bratunac and killed at least 68 people); Prosecution Exhibit 3263, paras 10-28 (witness statement of Prosecution Witness Suad Džafić about Serb attacks on Muslim villages in Bratunac, during which some villagers were killed and men of military age were transferred to detention centers); T. 20 October 2011 pp. 20308-20317 (testimony from Prosecution Witness Ivo Atlija that Bosnian Serb forces attacked villages in Prijedor and that more than 200 non-Serbs were killed, including men, women, and children); Prosecution Exhibit 3672, pp. 7-8 (testimony from Prosecution Witness Ivo Atlija that Bosnian Serb propaganda in Prijedor referred to non-Serbs using derogatory terms), 36-38 (testimony from Prosecution Witness Ivo Atlija regarding acts carried out by Bosnian Serbs with religious animus against a Catholic Croat); Prosecution Exhibit 3528, paras 25-33, 43-51 (witness statement of Prosecution Witness Kerim Mešanović regarding his experience at the Omarska detention camp in Prijedor, where detainees were beaten and killed and would be taken away, never to return again, particularly those who were leaders in the Muslim community);

100. The Appeals Chamber recalls again that pursuant to Rule 98 *bis* of the Rules, the Prosecution's evidence is assumed to be credible and is taken at its highest[278] and that a judgement of acquittal shall be entered only if there is "no evidence capable of supporting a conviction".[279] In the context of this appeal, the Appeals Chamber considers that the evidence on the record, taken at its highest, could indicate that Karadžić possessed genocidal intent. Other evidence on the record indicates that other alleged members of the JCE also possessed such intent.[280] The Appeals Chamber considers that this evidence, assessed in conjunction with evidence regarding the scale and nature of the alleged genocidal and other culpable acts,[281] is sufficiently compelling in its totality that no reasonable trial chamber could have concluded, in the context of Rule 98 *bis* of the Rules, that there was no evidence capable of demonstrating that Karadžić and other alleged JCE members possessed genocidal intent.

101. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in fact in concluding that there was no evidence, taken at its highest, based upon which a reasonable trier of fact could be satisfied that Karadžić and other alleged JCE members possessed genocidal intent, and

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Prosecution Exhibit 703, pp. 26-30 (testimony from Prosecution Witness KDZ092 regarding the beating and killing of Bosnian Muslim and Bosnian Croat men and women in a village in Prijedor); Prosecution Exhibit 674, pp. 14-35, 71-74 (testimony from Prosecution Witness KDZ014 regarding an attack on a village in Prijedor, during which Serb soldiers killed Muslim civilians and destroyed the village mosque); Prosecution Exhibit 693, pp. 13-17, 27-28, 31-32 (testimony from Prosecution Witness Safet Taci about detainees being killed at the Keratem camp in Prijedor); Prosecution Exhibit 705, pp. 36-41 (testimony from Prosecution Witness KDZ093 about killings of non-Serbs at Omarska camp in Prijedor); T. 16 September 2011 pp. 19012-19015 (testimony from Prosecution Witness KDZ075 that Bosnian Serb forces killed at least 144 Bosnian Muslims in a village in Ključ); Prosecution Exhibit 686, pp. 10-15, 18-21, 30-34 (testimony from Prosecution Witness KDZ056 regarding the killing of civilians from a village in Ključ); T. 15 September 2011 pp. 18907-18908 (testimony from Prosecution Witness KDZ239 regarding his detention at KP Dom in Foča, where Muslim detainees were abused, beaten, killed, forced to work, and subjected to sub-standard living conditions), 18917 (testimony from Prosecution Witness KDZ239 that most people at KP Dom were detained simply because they were Muslim); Prosecution Exhibit 3568, pp. 16-18, 53-63, 111-119 (testimony from Prosecution Witness KDZ017 that Muslim detainees at KP Dom in Foča were severely beaten); Prosecution Exhibit 718, paras 36, 72, 77-81, 84-85 (witness statement of Prosecution Witness Ahmet Zulić regarding 300 civilians who were killed during attacks on villages in Sanski Most and detainees at the Betonirka factory in Sanski Most who were beaten and executed); Prosecution Exhibit 3515, pp. 15-18 (testimony from Grgo Stojić about the killing of non-Serb men from a village in Sanski Most); T. 1 September 2011 pp. 18133-18135 (testimony from Prosecution Witness KDZ603 that Bosnian Serb forces killed Muslim men in a village in Vlasenica, that the Bosnian Serbs used derogatory language against Muslim villagers, that non-Serbs were detained, and that detainees were not fed and were beaten); T. 6 September 2011 pp. 18430-18433 (testimony from Prosecution Witness Sead Hodžić that Bosnian Serb forces attacked a village in Vlasenica and killed more than 60 Muslim men, women, and children, and that during an attack on another village people were killed and raped); Prosecution Exhibit 3212, pp. 21-23, 33-38 (witness statement of Prosecution Witness Ibro Osmanović regarding the municipality prison and Sušica camp in Vlasenica, where detainees were beaten, provided with little food, kept in poor living conditions, and killed); Prosecution Exhibit 1, pp. 106-108, 111-113 (testimony from Prosecution Witness Predrag Radić regarding the destruction of mosques in various municipalities); AF935 (in Ključ, Bosnian Muslim civilians who were arrested were subjected to ethnic slurs); AF1110 (detainees at the SJB building in Prijedor were subjected to ethnic slurs); AF1171 (detainees at Omarska camp in Prijedor were subjected to ethnic slurs). *See also supra*, paras 34-36, 48; Appeal Brief, paras 36-37, 44-51 and citations contained therein.

[278] *Jelisić* Appeal Judgement, para. 55.

[279] Rule 98 *bis* of the Rules. *See also supra*, para. 9.

[280] *See supra*, paras 97-98.

[281] *See supra*, para. 99.

that this error resulted in a miscarriage of justice. The Appeals Chamber therefore grants this sub-ground of the Prosecution's appeal. The impact of this conclusion will be considered below.

5. Conclusion

102. For the foregoing reasons, the Appeals Chamber grants Grounds 2 and 3 of the Prosecution's appeal, in part, reverses the Trial Chamber's finding that there was no evidence from which, if accepted, a reasonable trier of fact could infer genocidal intent on the part of Karadžić and other alleged JCE members, and dismisses as moot the remaining contentions in Grounds 2 and 3 of the Prosecution's appeal.

C. Alleged Errors Relating to Alternate Modes of Liability (Ground 4)

103. In preparing to rule upon Karadžić's Rule 98 *bis* Motion, the Trial Chamber explained that:

> Although the accused has challenged all of the modes of responsibility, this decision concentrates on assessing the responsibility of the accused on each of the 11 counts for commission under Article 7(1) of the Tribunal's Statute through his participation in the four alleged joint criminal enterprises. Only if there were no evidence under this mode of responsibility would the Chamber turn to the other modes under Articles 7(1) and 7(3) of the Statute.[282]

Following its consideration of the evidence in relation to Count 1 of the Indictment, the Trial Chamber concluded that there was no evidence, taken at its highest, "which could be capable of supporting a conviction for genocide in the municipalities as charged under Article 4(3) of the Statute".[283]

1. Submissions

104. The Prosecution submits that "[e]ven if the [Trial] Chamber was correct in finding that the elements" of the first form of JCE were not established, the Trial Chamber erred in law by failing to consider whether there was sufficient evidence of genocidal intent (if accepted) based upon which a reasonable trier of fact could be satisfied beyond reasonable doubt of Karadžić's guilt pursuant to other modes of liability.[284] The Prosecution contends that because the evidence is sufficient to establish Karadžić's genocidal intent, the Trial Chamber erred by failing to consider other modes of liability charged in the Indictment, including planning, ordering, and instigating genocide.[285] In

[282] T. 28 June 2012 pp. 28733-28734.
[283] T. 28 June 2012 pp. 28769-28770.
[284] Appeal Brief, para. 111. *See also* Notice of Appeal, paras 22-23; Appeal Brief, paras 112-115.
[285] Appeal Brief, paras 111-112.

support of this claim, the Prosecution notes evidence that Karadžić, *inter alia*, "directed and encouraged" the commission of "genocidal and other culpable acts".[286]

105. In the alternative, the Prosecution contends that even if the evidence is insufficient to establish Karadžić's genocidal intent, it is sufficient to show that Karadžić had the *mens rea* required for the remaining modes of liability alleged in the Indictment.[287] In this respect, the Prosecution maintains that there is sufficient evidence on the record to demonstrate that others, including other members of Bosnian Serb leadership such as Mladić possessed genocidal intent.[288] The Prosecution therefore asserts that the Trial Chamber should have considered the third category of JCE, aiding and abetting, and superior responsibility as alternate modes of liability.[289]

106. Karadžić responds, *inter alia*, that it was not necessary for the Trial Chamber to consider whether he could be convicted of genocide pursuant to any mode of liability "since the Trial Chamber reasonably concluded that the crime of genocide had not occurred".[290]

2. Analysis

107. The Appeals Chamber recalls that it has reversed the Trial Chamber's findings with respect to the *actus reus* of genocide and Karadžić's and other alleged JCE members' genocidal intent.[291] The Appeals Chamber also notes that the Prosecution's contentions regarding alternate modes of liability are premised on the assumption that the Trial Chamber's findings on *actus reus* and genocidal intent would be upheld.[292] Considering that the Trial Chamber's relevant findings have been reversed, the Appeals Chamber need not address the Prosecution's submissions concerning alternate modes of liability. In any event, the Appeals Chamber notes that the Trial Chamber's consideration of other individuals' genocidal intent appears to be premised on findings regarding the *actus reus* of genocide that have been reversed.[293] In these circumstances, the Appeals Chamber considers that the relevant analysis, including the analysis of the remaining modes of liability, will necessarily be reconsidered by the Trial Chamber in light of the present Judgement. Accordingly, the Appeals Chamber will not consider the Prosecution's contentions regarding alternate modes of liability.

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[286] Appeal Brief, para. 112 (internal quotation marks omitted).
[287] Appeal Brief, paras 111, 113-114.
[288] Appeal Brief, paras 111, 113.
[289] Appeal Brief, paras 111, 113-114. *See also* Appeal Brief, para. 112. In its Notice of Appeal, the Prosecution also asserts that the Trial Chamber failed to provide a reasoned opinion in relation to the applicability of other modes of liability. *See* Notice of Appeal, para. 22. The Prosecution has not made submissions concerning this aspect of its appeal in its Appeal Brief. Appeal Brief, paras 111-115. The argument is therefore deemed abandoned. *See Mugenzi and Mugiraneza* Appeal Judgement, n. 15.
[290] Response, para. 254.
[291] *See supra*, paras 37-38, 49-51, 101-102.

3. Conclusion

108. For the foregoing reasons, the Appeals Chamber dismisses Ground 4 of the Prosecution's appeal.

[292] *See supra*, para. 104.
[293] *See* T. 28 June 2012 p. 28768. *See also supra*, para. 51.

IV. KARADŽIĆ'S ALTERNATIVE CONTENTIONS

A. Submissions

109. In his Response, Karadžić suggests that insofar as the Trial Chamber found evidence indicative of both the *actus reus* of genocide and of his genocidal intent, it correctly concluded that there was no "confluence" between the acts and his intent,[294] and that "killings and serious harm in the municipalities were not done with the intent to destroy the Bosnian Muslims as a group".[295] In this regard, Karadžić notes references by the Judgement of Acquittal to the "totality" of evidence or "context" of the case.[296] Karadžić also submits that, in the interests of justice, the Appeals Chamber should not reverse the Judgement of Acquittal even if it determines that the Trial Chamber erred.[297] In support of his contention, Karadžić relies upon the *Jelisić* Appeal Judgement, in which the Appeals Chamber found that it had the discretion not to reverse a trial judgement even when it had concluded that the trial chamber committed a reversible error.[298] He adds that reversal of the Judgement of Acquittal would disrupt the ongoing trial on the remaining Counts of the Indictment and would represent an irresponsible use of public funds.[299]

110. The Prosecution replies, *inter alia*, that evidence on the record indicates that there is a confluence between genocidal intent and *actus reus*.[300] The Prosecution further maintains that it is in the interests of justice to proceed to a "proper full determination of [Count 1 of the Indictment] at the end of the trial".[301] The Prosecution underscores that, in any event, it is only in exceptional circumstances that the Appeals Chamber should decline to provide a remedy for a trial chamber's errors and that such exceptional circumstances do not exist in the present case.[302]

B. Analysis

111. The Appeals Chamber recalls that where the Prosecution relies on a particular ground to reverse an acquittal, the accused may seek to support the acquittal on additional grounds.[303] The Appeals Chamber further recalls that, having found that the Trial Chamber erred in its assessment

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[294] Response, para. 233 (emphasis omitted).
[295] Response, para. 237. *See also* AT. 17 April 2013 pp. 41-42, 45.
[296] Response, paras 233-236.
[297] Response, paras 303-312.
[298] Response, paras 303-309, *citing Jelisić* Appeal Judgement, paras 73-76.
[299] Response, paras 310-312.
[300] AT. 17 April 2013 pp. 58-59.
[301] Reply, para. 21.
[302] Reply, paras 22-23.
[303] Practice Direction on Formal Requirements, para. 5. *See also Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Decision on Ljube Boškoski's Defence Motion for Extension of Word Limit, 25 November 2008, p. 3; *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Order, 21 March 2000, p. 4.

of the evidence relating to Count 1,[304] the choice of remedy lies within the Appeals Chamber's discretion.[305] In exercising that discretion, the Appeals Chamber must balance factors such as fairness to the accused, the interests of justice, the nature of the offences, the circumstances of the case, and considerations of public interest.[306] These factors, and others, are to be assessed on a case by case basis.[307]

112. As an initial matter, the Appeals Chamber finds unconvincing Karadžić's assertion that the Trial Chamber's decision to acquit him of genocide in the Municipalities was premised on the lack of a confluence between killings and other harmful acts against Bosnian Muslims and/or Bosnian Croats and genocidal intent.[308] The Judgement of Acquittal was based on the Trial Chamber's separate findings, *inter alia*, that Karadžić and other alleged members of the JCE did not possess genocidal intent and that no evidence on the record indicated that Bosnian Muslims and/or Bosnian Croats suffered serious bodily or mental harm or conditions of life calculated to destroy.[309] In any event, the Appeals Chamber recalls again that it has reversed the Trial Chamber's findings with respect to genocidal intent, serious bodily or mental harm, and conditions of life calculated to destroy.[310] In this context, it would be premature for the Appeals Chamber to consider Karadžić's submissions regarding the confluence between genocidal intent and the alleged genocidal acts.

113. The Appeals Chamber is also unconvinced by Karadžić's contention that the Appeals Chamber should refrain from reversing the Judgement of Acquittal on prudential grounds. Karadžić's reliance on the *Jelisić* Appeal Judgement in this regard is unpersuasive. In the *Jelisić* case, the Appeals Chamber declined to reverse Jelisić's acquittal after considering the particular circumstances of Jelisić's situation, including, *inter alia*, that: (i) the accused had pleaded guilty to the acts underlying the count for which he was acquitted;[311] (ii) the accused had been convicted and sentenced for other crimes relating to those same acts;[312] and (iii) a retrial would delay the accused's transfer to prison, where he stood to benefit from long-term consistent mental health treatment.[313]

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[304] *See supra*, paras 37-38, 49-51, 101-102.
[305] *Jelisić* Appeal Judgement, para. 73. *See also* Article 25(2) of the Statute ("The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers."); Rule 117(C) of the Rules ("In appropriate circumstances the Appeals Chamber may order that the accused be retried according to law.").
[306] *Jelisić* Appeal Judgement, para. 73.
[307] *Jelisić* Appeal Judgement, para. 73.
[308] *Contra supra*, para. 109.
[309] *See* T. 28 June 2012 pp. 28765-28770.
[310] *See supra*, paras 37-38, 49-51, 101-102.
[311] *Jelisić* Appeal Judgement, para. 74.
[312] *Jelisić* Appeal Judgement, para. 74.
[313] *Jelisić* Appeal Judgement, paras 75-76.

114. The Appeals Chamber observes that no such exceptional circumstances exist in the present case. Specifically, Karadžić did not plead guilty to the acts underlying Count 1 of the Indictment, and there has been no final adjudication of the underlying acts of genocide through other counts of the Indictment. Moreover, the Appeals Chamber observes that no sentence has been pronounced against Karadžić at this stage of the trial, given that the proceedings for the remaining counts of the Indictment are ongoing. The Appeals Chamber is similarly unpersuaded by Karadžić's submission that a reversal of the Judgement of Acquittal would disrupt the ongoing trial on the remaining Counts of the Indictment and would represent an irresponsible use of public funds. Accordingly Karadžić's argument in this respect is rejected.

V. CONCLUSION

115. The Appeals Chamber has reversed the Trial Chamber's conclusion that the evidence on the record, taken at its highest, would not permit a finding that Bosnian Muslims and/or Bosnian Croats in the Municipalities suffered serious bodily or mental harm or were subjected to conditions of life calculated to destroy.[314] The Appeals Chamber has also reversed the Trial Chamber's conclusion that, taken at its highest, the evidence on the record was insufficient to find that Karadžić and other alleged members of the JCE possessed genocidal intent.[315] Finally, the Appeals Chamber has dismissed Karadžić's remaining contentions regarding the Judgement of Acquittal.[316] In these circumstances, the Appeals Chamber considers that the Trial Chamber erred by acquitting Karadžić of genocide in the Municipalities under Rule 98 *bis* of the Rules.

116. The Appeals Chamber underscores that its conclusions regarding evidence before the Trial Chamber are based on taking the evidence at its highest and did not involve any assessment of credibility. This is a task for the Trial Chamber to undertake in the first instance, after hearing evidence adduced by Karadžić with respect to Count 1 of the Indictment. Accordingly, the question regarding Karadžić's culpability with respect to the crimes of genocide committed in the Municipalities remains open.

[314] *See supra*, paras 37-38, 49-51.
[315] *See supra*, paras 97-102.
[316] *See supra*, paras 112-114.

VI. DISPOSITION

117. For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT TO Article 25 of the Statute and Rule 117 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the appeal hearing of 17 April 2013;

SITTING in open session;

GRANTS the Prosecution's First Ground of Appeal, in part;

GRANTS the Prosecution's Second and Third Grounds of Appeal, in part;

REVERSES the Trial Chamber's acquittal of Radovan Karadžić for genocide in the Municipalities under Count 1 of the Indictment; and **REINSTATES** the charges against Radovan Karadžić under Count 1 of the Indictment;

DISMISSES the Prosecution's remaining grounds of appeal; and

REMANDS the matter to the Trial Chamber for further action consistent with this Judgement.

Done in English and French, the English text being authoritative.

Judge Theodor Meron, Presiding

Judge Patrick Robinson

Judge Liu Daqun

Judge Khalida Rachid Khan

Judge Bakhtiyar Tuzmukhamedov

Dated this 11th day of July 2013,

At The Hague, The Netherlands.

[Seal of the Tribunal]

VII. ANNEX A – PROCEDURAL HISTORY

1. The Trial Chamber rendered the Judgement of Acquittal in this case on 28 June 2012. The main aspects of the appeal proceedings are summarised below.

A. Notice of Appeal and Briefs

2. The Prosecution filed its Notice of Appeal on 11 July 2012[1] and filed its Appeal Brief on 24 September 2012.[2] On 9 November 2012, the Appeals Chamber granted in part a motion filed by Karadžić to strike the Prosecution's Appeal Brief and ordered the Prosecution to file a corrigendum.[3] The Prosecution filed the corrigendum to the Appeal Brief on 19 November 2012.[4] Karadžić filed his Response on 5 November 2012,[5] to which the Prosecution replied on 20 November 2012.[6]

B. Assignment of Judges

3. On 12 July 2012, the President of the Tribunal assigned the following Judges to hear the appeal: Judge Theodor Meron, presiding; Judge Patrick Robinson; Judge Liu Daqun; Judge Khalida Rachid Khan; and Judge Bakhtiyar Tuzmukhamedov.[7]

C. Other Decisions and Orders

4. On 21 September 2012, the Appeals Chamber denied an application for leave to submit an *amicus curiae* brief concerning the Judgement of Acquittal, filed by counsel for Satko Mujagić, Fikret Alić, and the Association of Witnesses and Survivors and Genocide, finding that the proposed *amicus curiae* brief would not assist in the consideration of the appeal.[8]

5. Karadžić filed a motion to dismiss the appeal and requested the appointment of an *amicus curiae* prosecutor to investigate contempt on the part of the Prosecution on 18 March 2013.[9] The

[1] Prosecution Notice of Appeal of Judgement of Acquittal under Rule 98*bis*, 11 July 2012.
[2] Prosecution Rule 98*bis* Appeal Brief, 24 September 2012 (confidential). A public redacted version was filed on 25 September 2012.
[3] Decision on Motion to Strike Prosecution's Brief, 9 November 2012, para. 11.
[4] Corrigendum to Prosecution Rule 98*bis* Appeal Brief, 19 November 2012.
[5] Respondent's Brief, 5 November 2012 (confidential). An initial public redacted version was filed on 5 November 2012, and a revised public redacted version was filed on 26 November 2012.
[6] Prosecution Reply Brief for Rule 98*bis* Appeal, 20 November 2012 (confidential). A public redacted version was filed on 20 November 2012.
[7] Order Assigning Judges to a Case Before the Appeals Chamber, 12 July 2012, p. 1.
[8] Decision on Application for Leave to Submit an *Amicus Curiae* Brief, 21 September 2012, pp. 1-3.
[9] Motion to Dismiss Appeal and for Appointment of Amicus Curiae Prosecutor, 18 March 2013 ("Motion to Dismiss").

Prosecution responded on 28 March 2013,[10] and Karadžić filed a reply on 2 April 2013.[11] The Appeals Chamber denied the Motion to Dismiss on 4 July 2013.[12]

D. Hearing of the Appeal

6. On 22 March 2013, the Appeals Chamber in the Scheduling Order granted Karadžić's request to conduct an Appeal Hearing but denied his request that the hearing take place in Bosnia and Herzegovina.[13] In addition, the Appeals Chamber granted Karadžić's request that his legal advisor, Peter Robinson, be given the right of audience to address the Appeals Chamber during the Appeal Hearing.[14] The Appeal Hearing was held on 17 April 2013 in The Hague.

[10] Prosecution Response to Karadžić's Motion to Dismiss Appeal and for Appointment of *Amicus Curiae* Prosecutor, 28 March 2013.
[11] Reply re: Motion to Dismiss Appeal and for Appointment of Amicus Curiae Prosecutor, 2 April 2013.
[12] Decision on Motion to Dismiss Appeal and for Appointment of *Amicus Curiae* Prosecutor, 4 July 2013.
[13] Scheduling Order, p. 1.
[14] Scheduling Order, p. 2.

VIII. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. Tribunal

ALEKSOVSKI

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement").

BLAŠKIĆ

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement").

BRĐANIN

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement").

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement").

DELALIĆ *ET AL.* ("ČELEBIĆI")

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").

GOTOVINA AND MARKAČ

Prosecutor v. Ante Gotovina and Mladen Markač, Case No. IT-06-90-A, Judgement, 16 November 2012 ("*Gotovina and Markač* Appeal Judgement").

HALILOVIĆ

Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Judgement, 16 October 2007 ("*Halilović* Appeal Judgement").

JELISIĆ

Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement").

Prosecutor v. Goran Jelisić, Case No. IT-95-10-T, Judgement, 14 December 1999 ("*Jelisić* Trial Judgement").

KRAJIŠNIK

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik* Appeal Judgement").

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T, Judgement, 27 September 2006 ("*Krajišnik* Trial Judgement").

KRSTIĆ

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement").

KVOČKA *ET AL.*

Prosecutor v. Miroslav Kvočka, Mlađo Radić, Zoran Žigić, and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement").

LUKIĆ AND LUKIĆ

Prosecutor v. Milan Lukić and Sredoje Lukić, Case No. IT-98-32/1-A, Judgement, 4 December 2012 ("*Lukić and Lukić* Appeal Judgement").

PERIŠIĆ

Prosecutor v. Momčilo Perišić, Case No. IT-04-81-A, Judgement, 28 February 2013 ("*Perišić* Appeal Judgement").

STAKIĆ

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement").

Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgement").

2. ICTR

GACUMBITSI

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement").

GATETE

Jean-Baptiste Gatete v. The Prosecutor, Case No. ICTR-00-61-A, Judgement, 9 October 2012 ("*Gatete* Appeal Judgement").

HATEGEKIMANA

Ildephonse Hategekimana v. The Prosecutor, Case No. ITCR-00-55B-A, Judgement, 8 May 2012 ("*Hategekimana* Appeal Judgement").

KAYISHEMA AND RUZINDANA

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement, 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement").

MUGENZI AND MUGIRANEZA

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Judgement, 4 February 2013 ("*Mugenzi and Mugiraneza* Appeal Judgement").

RUTAGANDA

Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case No. ICTR-96-3-A, Judgement, filed in French on 26 May 2003, English translation filed on 9 February 2004 ("*Rutaganda* Appeal Judgement").

SEROMBA

The Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-A, Judgement, 12 March 2008 ("*Seromba* Appeal Judgement").

3. Other Jurisdictions

2007 ICJ JUDGEMENT

Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement of 26 February 2007, I.C.J. Reports 2007 ("2007 ICJ Judgement").

B. Defined Terms and Abbreviations

AF	Adjudicated Fact(s)
Appeal Brief	Prosecution Rule 98*bis* Appeal Brief, 24 September 2012 (confidential). A public redacted version was filed on 25 September 2012
Appeal Hearing	Oral submissions in the present case, held in The Hague on 17 April 2013
Appeals Chamber	Appeals Chamber of the Tribunal
AT.	Transcript from hearing on appeal in the present case
BiH	Bosnia and Herzegovina
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, entered into force on 12 January 1951
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
Indictment	*Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution's Marked-Up Indictment, 19 October 2009, Appendix A
JCE	Joint Criminal Enterprise
JCE I	The first or basic category of JCE
Judgement of Acquittal	*Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, T. 28 June 2012 pp. 28762-28770, 28774
Mladić	Ratko Mladić, Commander of the Army of the Republika Srpska Main Staff
Municipalities	Certain municipalities of BiH claimed as Bosnian Serb territory
n. (nn.)	Footnote(s)
Notice of Appeal	Prosecution Notice of Appeal of Judgement of Acquittal under Rule 98*bis*, 11 July 2012
p. (pp.)	Page(s)
para. (paras)	Paragraph(s)

Practice Direction on Formal Requirements	Practice Direction on Formal Requirements for Appeals From Judgement, IT/201, 7 March 2002
Prosecution	Office of the Prosecutor of the Tribunal
Reply	Prosecution Reply Brief for Rule 98*bis* Appeal, 20 November 2012 (confidential). A public redacted version was filed on 20 November 2012
Response	Respondent's Brief, 5 November 2012 (confidential). An initial public redacted version was filed on 5 November 2012, and a revised public redacted version was filed on 26 November 2012
Rule 98 *bis* Motion	T. 11 June 2012 pp. 28569-28626
Rules	Rules of Procedure and Evidence of the Tribunal
Scheduling Order	Scheduling Order for Appeal Hearing, 22 March 2013
Statute	Statute of the Tribunal
T.	Transcript from hearings at trial in the present case
Trial Chamber	Trial Chamber III of the Tribunal
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