

**UNITED  
NATIONS**

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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-95-5/18- AR98bis.1
	Date:	24 September 2012

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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

**THE PROSECUTOR**

**v.**

**RADOVAN KARADŽIĆ**

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**PUBLIC REDACTED VERSION**

**PROSECUTION RULE 98BIS APPEAL BRIEF**

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

**Case No. IT-95-5/18-AR98bis.1**

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**PUBLIC REDACTED VERSION<sup>1</sup>**

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**PROSECUTION RULE 98BIS APPEAL BRIEF**

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**I. INTRODUCTION**

1. This is an appeal against the Chamber's Judgement of Acquittal entered at the Rule 98bis stage in relation to Count 1 of the Indictment ("Judgement"),<sup>2</sup> which charged the Accused with genocide in relation to the events in certain municipalities ("Municipalities")<sup>3</sup> in 1992. The Chamber erred in law and in fact in concluding that "there is no evidence, even taken at its highest, [...] capable of supporting a conviction for genocide in the municipalities as charged under Article 4(3) of the Statute".<sup>4</sup> A reasonable trial chamber could conclude, taking the evidence at its highest, that (i) each underlying act of genocide within the meaning of Article 4(2)(a), (b) and (c) occurred and is attributable to the Accused and other JCE members, and (ii) the Accused and other JCE members had genocidal intent. Even if all the elements of JCE I were not met, the Chamber should have considered other modes of liability charged in the Indictment, but failed to do so.<sup>5</sup> The Chamber erred in acquitting the Accused of genocide in the Municipalities.

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<sup>1</sup> [REDACTED].

<sup>2</sup> Judgement, T.28762-28770.

<sup>3</sup> The seven municipalities specifically identified in relation to Count 1, namely Bratunac, Foča, Ključ, Prijedor, Sanski Most, Vlasenica and Zvornik, are listed in paragraph 38 of the Indictment.

<sup>4</sup> Judgement, T.28769-28770, challenged through Grounds 2, 3 and 4.

<sup>5</sup> Below Ground 4.

2. While the Chamber rendered its Judgement orally, it was still required to provide a reasoned opinion,<sup>6</sup> so as not to compromise the right to appeal.<sup>7</sup> The Chamber did not do so. In relevant parts, the Judgement is presented in a series of concluding statements, using ambiguous language, with little reference to evidence and with little, if any, insight into its reasoning.<sup>8</sup> Nevertheless, the Judgement reveals a number of legal and factual errors *en route* to its final conclusion. Because the Judgement does not explicitly identify its underlying reasoning in some critical respects, alternative grounds of appeal have been argued. A brief roadmap precedes the grounds of appeal to assist the Appeals Chamber in navigating the alternative errors.

3. On appeal from a R98*bis* acquittal, the proper lens through which the Appeals Chamber must view the evidence is not whether it is convinced that the Accused was guilty of genocide beyond reasonable doubt but, whether, giving credence to such evidence, a reasonable trial chamber could have found that he had such an intent.<sup>9</sup> If so, then the Appeal should be granted.

4. In the final analysis, it is clear that the Chamber reached the wrong conclusion. On the basis of the evidence, detailed briefly below, at the Rule 98*bis* stage a reasonable trial chamber could conclude that the Accused is responsible for genocide in the Municipalities in 1992. Regardless of which erroneous path it travelled, the Chamber arrived at the wrong place when it acquitted the Accused of genocide under the Rule 98*bis* standard. This Appeal should be granted.

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<sup>6</sup> A reasoned opinion is “an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute”: *Furundžija* AJ, para.69. The Chamber has a duty to safeguard the fairness of proceedings for both parties. *E.g.* *Haradinaj* AJ, para.46, Corrigendum to Judgement of 19 July 2010, 23 July 2010 (amending para.46). A judgement of acquittal under R98*bis* is a final trial judgement, to which there is a right of appeal. *E.g.* *Blagojević* R98*bis* Certification Decision, paras.10-14; R98*bis* Acquittal Certification Decision, para.10. The right to a reasoned opinion applies to all trial chamber judgements both final and interlocutory, as well as to oral decisions; *e.g.* *Brdanin* AJ, para.39; *Rutaganda* AJ, paras.217, 228; *Furundžija* AJ, para.69; *Prlić* Jurisdiction Appeal Decision, para.11; *Popović* Provisional Release Appeal Decision, paras.8, 24.

<sup>7</sup> *See Nchamihigo* AJ, para.165; *Karera* AJ, para.20; *Limaj* AJ, para.81.

<sup>8</sup> *See* Grounds 1C, 2B, 3A and 3B.

<sup>9</sup> *Jelisić* AJ, para.68.

**A. A reasonable trial chamber could conclude that the Accused is responsible for genocide – an overview of the evidence**

5. The evidence demonstrated that Bosnian Serb forces carried out underlying acts of genocide against Bosnian Muslims and Bosnian Croats (collectively, the “Groups”) in the Municipalities. They killed thousands, inflicted serious bodily and mental harm on countless more and imposed conditions of life calculated to bring about the physical destruction of the Groups in part, including starvation rations in filthy, dehumanising conditions of detention.

6. The Chamber found that “a large number of Bosnian Muslims and/or Croats were killed by Bosnian Serb forces...”,<sup>10</sup> and that “Bosnian Serb forces caused serious bodily or mental harm to many Bosnian Muslims and/or Croats during their detention in multiple detention facilities”<sup>11</sup> and committed other discriminatory, culpable acts against Bosnian Muslims and/or Croats.<sup>12</sup>

7. The Accused—the President of the SDS,<sup>13</sup> the President of the RS and the Supreme Commander of its armed forces<sup>14</sup>—was responsible for these acts, which were perpetrated across the Municipalities. The Chamber made findings indicating that these acts are attributable to the Accused and the other JCE members through their participation in a JCE.<sup>15</sup>

8. There was ample evidence of the specific intent of the Accused and other JCE members in connection with the underlying acts of genocide for which they were responsible. These acts occurred as part of the common plan by the Accused and other JCE members to create an ethnically homogenous Serb state separated from Bosnia’s other national groups and in which the security of the state could never be threatened

<sup>10</sup> Judgement, T.28764-28765.

<sup>11</sup> Judgement, T.28766.

<sup>12</sup> Judgement, T.28758-28760.

<sup>13</sup> Đerić, Exh.P4982, pp.7-8 (“This was a party state that was functioning in which the president of the party was carrying out all the functions practically.”).

<sup>14</sup> Milovanović, T.25444-25445 (“Dr. Radovan Karadžić was the supreme commander of the armed forces of Republika Srpska. That means the following -- the organisation of the armed forces is the following: The army of Republika Srpska, the police of Republika Srpska, and the civil protection of Republika Srpska.”).

<sup>15</sup> Even if the Appeals Chamber finds that Karadžić had genocidal intent but that other JCE members did not, he would still be responsible for genocide. *Below* Section IV.A; *also e.g.* *Popović* TJ, paras.1180 (“The Trial Chamber is satisfied beyond reasonable doubt that Popović participated in the JCE to murder with genocidal intent. He is therefore guilty of genocide.”), 1318 (Bearing).

from within by its perceived historical enemies.<sup>16</sup> The Accused warned his followers and subordinates that they were at risk of genocide at the hands of Muslims and Croats, and threatened Muslims and Croats with physical destruction if they dared to pursue a sovereign and independent Bosnia incompatible with his goals. When his threat was not heeded by Muslims and Croats, the Accused and other JCE members unleashed attacks on Muslims and Croats throughout the Municipalities. When these attacks were well underway, the Accused acknowledged to his followers and subordinates that the Groups were being physically destroyed and agreed with the assertion that the conflict had been “roused in order to eliminate the Muslims.”<sup>17</sup> The Accused selected Ratko Mladić as commander of his military forces. Mladić was a man who shared the Accused’s view on the destruction of the Groups and the Accused continued to rely on Mladić to implement his policies. The Accused also promoted and rewarded those involved in destructive and other culpable acts in the Municipalities.<sup>18</sup>

9. In short, the evidence revealed a massive number of underlying acts of genocide attributable to the Accused, who had threatened beforehand to destroy the Groups, acknowledged during the commission of those acts that destruction was taking place, and promoted those who participated in the implementation of those acts on the ground. In the context of Rule 98bis—which requires a Chamber to (a) take the evidence at its highest, unless it is wholly incapable of belief,<sup>19</sup> and (b) refrain from weighing the evidence establishing the charges against any evidence which might favour the Accused<sup>20</sup>—such evidence was more than sufficient to conclude that the Accused was responsible for genocide.

10. On the basis of the evidence, a reasonable trial chamber could conclude that the Accused is responsible for genocide, primarily as a JCE member, but also through other modes of liability. The Chamber erred in concluding that “there is no evidence,

<sup>16</sup> Exh.P956, pp.9-10; Okun, Exh.P776, pp.64, 79 (*Krajišnik*, T.4205, 4220); Okun, T.1474-1475; [REDACTED].

<sup>17</sup> Exh.D92, p.86.

<sup>18</sup> Below Section III.A.1.

<sup>19</sup> *Jelić* AJ, para.55. Also *S.Milošević* R98bis Decision, fn.24 (citing Watson, *Criminal Law*, p.5740) (“On a submission of no case the judge is concerned with the question whether there is evidence which is legally capable of leading to a conviction and not with the question whether the evidence is so lacking in weight that a conviction based upon it would be unsafe or unsatisfactory, except where the evidence is so inherently incredible that no reasonable person would accept its truth.”). Also *Mrkšić* R98bis Decision, T.11311-11312; *Kvočka* R98bis Decision, para.17.

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.”<sup>21</sup>

## **B. A roadmap to the Grounds of Appeal**

11. Although hampered by the Chamber’s failure to provide a clear and reasoned opinion,<sup>22</sup> the Prosecution has identified a series of errors and possible interconnected or alternative errors which, between them, explain the Chamber’s erroneous findings and overall conclusion. Frequently, there is more than one way of reading the Judgement and the nature of the error is different depending on which interpretation is adopted. Within this web of possible errors, in each case the Chamber’s analysis brought it to an incorrect conclusion.

12. Section II<sup>23</sup> of the Appeal Brief addresses the *actus reus* of genocide. In its Judgement, the Chamber dealt with each underlying act of genocide charged in Count 1—killings, serious bodily or mental harm, and destructive conditions of life—in turn.<sup>24</sup> The Chamber erred by imposing a group impact requirement for the *actus reus* elements. Alternatively, the Chamber’s ambiguous language in this part of the Judgement suggests it may instead have been looking at *mens rea* requirements. If so, then the Chamber erred by examining intent for each underlying act of genocide in isolation and failed to holistically consider intent based on the totality of the evidentiary record.

13. Section III<sup>25</sup> addresses the *mens rea* of genocide. Again, depending on which way the Judgement is read, the Chamber’s reasoning discloses a series of errors. Regardless of the interpretation adopted, the Chamber erred in fact in failing to find that, pursuant to the Rule 98bis standard, the Accused and other members of the JCE had genocidal intent. Consequently, in this portion of the Brief, the *mens rea*

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<sup>20</sup> *Brdanin* R98bis Decision, para.62; *Hadžihasanović* R98bis Decision, para.18.

<sup>21</sup> Judgement, T.28769-28770, challenged through Notice of Appeal, Grounds 2, 3 and 4.

<sup>22</sup> Notice of Appeal, Grounds 1C, 2B, 3A and 3B.

<sup>23</sup> Notice of Appeal, Ground 1.

<sup>24</sup> Judgement, T.28764-28768.

<sup>25</sup> Notice of Appeal, Grounds 2 and 3. To the extent required, the Prosecution seeks leave to deviate from paragraph 4 of the Practice Direction on Appeal Requirements. Addressing Grounds 2 and 3 together avoids unnecessary repetition, and permits the Prosecution to present the order of arguments in the most logical manner.



discussion begins with this factual error.<sup>26</sup> Sections III.B-D<sup>27</sup> discuss the Chamber's legal errors.

14. Section IV<sup>28</sup> addresses the Chamber's failure to determine whether a reasonable trial chamber could conclude that the Accused is liable pursuant to one of the other modes of liability charged, namely planning, ordering, instigating, JCE III, aiding and abetting and superior responsibility.

## **II. GROUND ONE: APPLYING THE RULE 98BIS STANDARD, A REASONABLE TRIAL CHAMBER COULD CONCLUDE THAT UNDERLYING ACTS OF GENOCIDE HAD OCCURRED**

15. In addressing the *actus reus* of genocide,<sup>29</sup> the Chamber erred in law by imposing unnecessary elements<sup>30</sup> and/or failing to provide a reasoned opinion. In the alternative, the Chamber erred in fact as a reasonable trial chamber could have found that each underlying act within the meaning of Article 4(2)(a)-(c) had occurred.

16. The Chamber erred in imposing a group impact requirement for the *actus reus* of genocide. In particular, the Chamber found that the killings "did not reach a level from which a reasonable trial chamber could infer that a significant section of the [Groups] and a substantial number of [their] members were targeted for destruction so as to have an impact on the[ir...] existence as such",<sup>31</sup> and that "the bodily or mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part".<sup>32</sup> By confusing the *actus reus* and *mens rea* requirements of genocide, the Chamber imposed an unnecessary element for the underlying acts of genocide. It is not necessary to prove that the underlying acts of genocide in fact have an impact on the existence of the group<sup>33</sup> and "there is no

<sup>26</sup> Notice of Appeal, Grounds 2B(i) and 3B.

<sup>27</sup> Notice of Appeal, Grounds 2A and B.

<sup>28</sup> Notice of Appeal, Ground 4.

<sup>29</sup> Judgement, T.28764-28768.

<sup>30</sup> This passage is alternatively, and/or in addition, alleged to contain errors with respect to *mens rea*. Below Section III.

<sup>31</sup> Judgement, T.28765.

<sup>32</sup> Judgement, T.28766.

<sup>33</sup> *Akayesu* TJ, para.497 (hard copy) ("Contrary to popular belief, the crime of genocide does not imply the actual extermination of group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy "in whole or in part" a national, ethnical, racial or religious group."). Also *Krstić* AJ, para.32 ("While intent must be supported by a factual matrix, the offence of genocide does not

numeric threshold of victims necessary to establish genocide.”<sup>34</sup> It is only necessary to prove that the perpetrator intended to have a destructive impact on the existence of the protected group in whole or in part,<sup>35</sup> provided that such intent materialises in one or more of the genocidal acts in Article 4(2).

**A. The Chamber erred in failing to find that members of the Groups were killed within the meaning of Article 4(2)(a) (Ground 1A)**

**1. The Chamber erroneously imposed a group impact requirement on the actus reus of killing within the meaning of Article 4(2)(a)**

17. The Chamber erred in law by imposing additional elements on the *actus reus* of killing. The Chamber commenced its analysis by examining the underlying acts of genocide charged in the Indictment.<sup>36</sup> With respect to killings, the Chamber found that the evidence showed that a large number of members of the Groups were killed by Bosnian Serb forces in the Municipalities.<sup>37</sup> However, the Chamber erred when it concluded that this evidence was not capable of supporting a conviction for genocide. It found that the evidence:

does 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[ir] existence [...] as such.<sup>38</sup>

The Chamber required that the killings be quantitatively and qualitatively substantial so as to impact the existence of the Groups. These additional elements are not elements found in the text of the Statute, the Genocide Convention or the case law. In

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require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted part. Even where the method selected will not implement the perpetrator’s intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent”); ICC *First Decision on Bashir Arrest Warrant*, para.120 (provided genocidal intent exists and materialises in one of the acts identified in Article 4(2), “the protection is triggered, regardless of whether the latent threat to the existence of the targeted group posed by the said intent has turned into a concrete threat to the existence in whole or in part of that group”).

<sup>34</sup> *Stakić* TJ, para.522 (citing *Semanza* TJ, para.316).

<sup>35</sup> *Akayesu* TJ, paras.497-497, 517 (hard copy) (“As stated above, the crime of genocide is characterized by its *dolus specialis*, or special intent . . .”); *Stakić* TJ, para.522; *Krstić* AJ, para.32. When inferring intent, killing, along with other genocidal acts and other culpable acts such as forcible transfer, should be collectively assessed: *below* paras.68, 99-102.

<sup>36</sup> Judgement, T.28764.

<sup>37</sup> Judgement, T.28764.

<sup>38</sup> Judgement, T.28765.

fact, the case law rejects any group impact threshold and looks instead to the specific intent accompanying the *actus reus*.

18. Because the Judgement does not expressly state that it was imposing a group impact requirement for the *actus reus*, it is possible that the Chamber was instead addressing *mens rea* requirements in this passage.<sup>39</sup> However, there are several indications that the Chamber was addressing the *actus reus* requirements. In particular, the Chamber introduced its discussion as one involving “genocidal acts”,<sup>40</sup> then went on to recall the other alleged forms of “the *actus reus* for genocide” in this case,<sup>41</sup> and considered the evidence relevant to those acts, before concluding that they were also not established.<sup>42</sup>

(a) The *actus reus* of genocide through killing does not have a qualitative or numerical requirement

19. The Chamber erred by requiring that the genocidal act of killing be committed against “a significant section [...] and a substantial number” of the protected group so as to have “an impact on the existence of the [protected group] as such.”<sup>43</sup> ICTY and ICTR trial chambers have consistently held that the *actus reus* of genocide requires killing, constituting murder, of members of the protected group,<sup>44</sup> and does not have a qualitative or numerical requirement.<sup>45</sup> As discussed above,<sup>46</sup> it is only necessary to show that the Accused intended to have an impact on a protected group.<sup>47</sup> While the

<sup>39</sup> Below paras.99-102, fn.299.

<sup>40</sup> Judgement, T.28764.

<sup>41</sup> Judgement, T.28765.

<sup>42</sup> See Judgement, T.28765-28768. The Chamber’s errors with respect to other genocidal acts are dealt with in Grounds 1B and 1C.

<sup>43</sup> See T.28765.

<sup>44</sup> *Akayesu* TJ, paras.497-499, 517 (hard copy). Also *Krajišnik* TJ, para.859(i); *Blagojević* TJ, para.642; *Jelić* TJ, para.63; *Seromba* TJ, para.317; *Semanza* TJ, para.319.

<sup>45</sup> *Semanza* TJ, para.316; Judgement, T.28703-28704 (citing *Stakić* TJ, para.522 (“It is not necessary to establish the size of the victimized population in numerical terms. It is the genocidal *dolus specialis* that predominantly constitutes the crime”)). Also *Akayesu* TJ, para.521 (hard copy) (“the act must have been committed against one or several individuals”); *S.Milošević* R98bis Decision, para.123, fn.226; *Muvunyi* TJ, para.483.

<sup>46</sup> Above para.16.

<sup>47</sup> *Akayesu* TJ, paras.498-499, 517 (hard copy) (“As stated above, the crime of genocide is characterized by its *dolus specialis*, or special intent”); *Stakić* TJ, para.522; *Krstić* AJ, para.32. When inferring intent killing, along with other genocidal acts and other culpable acts such as forcible transfer, should be collectively assessed. Below para.68, 99-102.

scale and impact of the genocidal acts may be indicators of genocidal *mens rea*, they do not form part of the *actus reus* requirements.<sup>48</sup>

(b) But for the error, the Chamber would have found that the elements of Article 4(2)(a) were met

20. But for this error, the Chamber would have found that killings within the meaning of Article 4(2)(a) occurred. When discussing Count 1, the Chamber confirmed that it had received evidence “that a large number of Bosnian Muslims and/or Bosnian Croats were killed by Bosnian Serb forces in the Municipalities during and after their alleged takeover and while in detention,”<sup>49</sup> citing evidence from each of the Municipalities charged under Count 1, namely Bratunac, Vlasenica, Zvornik, Foča, Ključ, Prijedor and Sanski Most.<sup>50</sup> The Chamber also found evidence of large-scale killings of members of the Groups by Bosnian Serb forces in its findings for Counts 4, 5 and 6.<sup>51</sup>

**2. In the alternative, a reasonable trial chamber, taking the evidence at its highest, could find that members of the Groups were killed within the meaning of Article 4(2)(a)**

21. In the event that the Chamber did not err in applying additional elements to the *actus reus* of genocide through killing, the Chamber erred in fact in failing to find that there was evidence upon which a reasonable trier of fact could conclude that members of the Groups were killed within the meaning of Article 4(2)(a).

22. As discussed above, the Chamber found evidence that a large number of Bosnian Muslims and Bosnian Croats in the Municipalities were killed by Bosnian Serb forces.<sup>52</sup> This finding alone shows that a reasonable trier of fact could find that members of the Groups were killed within the meaning of Article 4(2)(a).

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<sup>48</sup> Below Section III.A.2.

<sup>49</sup> Judgement, T.28764.

<sup>50</sup> Judgement, T.28761, 28764. Although the Chamber did not refer to the evidence regarding Sanski Most when discussing Count 1, it had previously found that, based on the evidence presented, killings occurred there: Judgement, T.28761.

<sup>51</sup> Judgement, T.28761.

<sup>52</sup> Above para.20.

23. In any event, the Chamber had before it evidence that thousands of members of the Groups were killed by Serb forces in the Municipalities.<sup>53</sup> Taking this evidence at its highest, a reasonable trier of fact could find that members of the Groups were killed within the meaning of Article 4(2)(a).

24. The Chamber erred by reaching a contrary conclusion.

### **3. Remedy**

25. The Prosecution requests that the Appeals Chamber correct these errors and find that, applying the Rule 98bis standard, a reasonable trial chamber could conclude that the underlying act of killing members of the protected groups under Article 4(2)(a) occurred.

#### **B. The Chamber erred in failing to find that serious bodily or mental harm was inflicted on members of the Groups within the meaning of Article 4(2)(b) (Ground 1B)**

##### **1. The Chamber erroneously imposed a group impact requirement on the actus reus of causing serious bodily or mental harm within the meaning of Article 4(2)(b)**

26. The Chamber erred in law by adding an unnecessary *actus reus* element that the serious bodily or mental 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”.<sup>54</sup> The plain language of Article 4(2)(b), which is derived from Article II(b) of the Genocide Convention,<sup>55</sup> requires only “serious bodily or mental harm to members of the group”. No additional element is suggested in the text of the Statute or the Genocide Convention.

27. There is a long line of ICTY and ICTR cases which have followed the plain wording of Article 4(2)(b) without requiring any additional element of threatening the

<sup>53</sup> Below para.70. Also Judgement, T.28761, 28764-28765.

<sup>54</sup> Judgement, T.28766. In addition or in the alternative, *below* Section III.

<sup>55</sup> The provisions of the Genocide Convention reflect customary international law on the crime of genocide. See *Brdanin* TJ, para.680; *Krstić* TJ, para.541; *Jelisić* TJ, para.60; ICJ *Reservations to Genocide Convention* Judgement, p.23.

destruction of a protected group. After conducting an extensive evaluation of the Genocide Convention's *travaux préparatoires*, the *Akayesu* Trial Chamber determined that the phrase "causing serious bodily or mental harm" does not require the harm to be either "permanent or irremediable".<sup>56</sup> The *Krstić* Trial Chamber adopted this approach, finding it sufficient if the harm results in "grave and long-term disadvantage to a person's ability to lead a normal and constructive life".<sup>57</sup> Acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution, sexual violence, rape, mutilations, deportation and interrogations combined with beatings and/or threats of death are sufficient to meet this underlying act.<sup>58</sup> Other ICTY and ICTR chambers have endorsed this approach, consistently repeating the plain language of Article 4(2)(b) without requiring anything further.<sup>59</sup> As noted by the ICC Pre-Trial Chamber:

[under] the case law of the ICTY and the ICTR, the crime of genocide is completed by [...] causing serious bodily harm to a single individual with the intent to destroy in whole or in part the group to which such individual belongs. As a result, according to this case law, for the purpose of completing the crime of genocide, it is irrelevant whether the conduct in question is capable of posing any concrete threat to the existence of the targeted group, or a part thereof.<sup>60</sup>

Thus, the case law does not support the Chamber's inclusion of an additional group impact requirement for the *actus reus* of serious bodily or mental harm.

28. The Chamber's error appears to arise from a misinterpretation or misapplication of language included in a minority of judgements—including the *Seromba* Appeals Judgement—that to support a conviction for genocide, "the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part."<sup>61</sup> The Chamber appears to

<sup>56</sup> *Akayesu* TJ, para.502 (hard copy). Also *Kayishema and Ruzindana* TJ, para.108; *Stakić* TJ, para.516; *Muvunyi* TJ, para.487; *Ntagerura* TJ, para.664; *Kamuhanda* TJ, para.634; *Bagilishema* TJ, para.59.

<sup>57</sup> *Krstić* TJ, para.513. Also *Krajišnik* TJ, para.862.

<sup>58</sup> *Krstić* TJ, paras.513-514; *Kayishema and Ruzindana* TJ, para.108; *Akayesu* TJ, paras.706-707, 711-712 (hard copy).

<sup>59</sup> *Blagojević* TJ, para.645; *Brdanin* TJ, para.690; *Stakić* TJ, para.516; *Sikirica* 98bis Decision, para.41; *Karadžić and Mladić* R61 Decision, paras.92-93; *Nyiramashuhuko* TJ, para.5731; *Gacumbitsi* TJ, para.291; *Ntagerura* TJ, para.664; *Semanza* TJ, paras.320-323; *Ntakirutimana* TJ, para.784; *Bagilishema* TJ, para.59; *Musema* TJ, para.156; *Rutaganda* TJ, p.29, para.51; *Bagasora* TJ, para.2117; *Kalimanzira* TJ, para.159; *Renzaho* TJ, para.762; *Ntawukuliwayo* TJ, para.452; *Bizimungu* TJ, para.1037.

<sup>60</sup> ICC First Decision on Bashir Arrest Warrant, para.119.

<sup>61</sup> *Seromba* AJ, para.46. Also *Popović* TJ, para.811; *Krajišnik* TJ, paras.861-862; *Karemura* TJ, para.1609; *Gatete* TJ, para.584; *Kanyarukiga* TJ, para.637; *Kajelijeli* TJ, para.814; *Rukundo* TJ, paras.259-262.

have erroneously interpreted this language as requiring the serious bodily or mental harm to achieve a certain level of destructive impact on the protected group as a whole. Despite the *Seromba* language, in the application of the law, no Chamber has required the harm to have an impact on the group itself, let alone that the impact must be shown to have “contributed or tended to contribute” to the destruction of the group in whole or in part.<sup>62</sup> The *Seromba* Appeals Chamber, for example, noted that crimes such as rape and torture “obviously constitute serious bodily or mental harm” for the purposes of Article 4(2)(b).<sup>63</sup> The *Krajišnik* Trial Chamber, which also used the same language, noted that the usual definition of “[h]arm amounting to ‘a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life’ has been said to be sufficient”.<sup>64</sup> In applying the law, it found that acts of murder and cruel or inhumane treatment “meet the requirements of the *actus reus* for genocide” with no mention of any impact on the group.<sup>65</sup>

29. Even if the Chamber correctly interpreted and applied the language from the *Seromba* Appeal Judgement, the ICTY Appeals Chamber is not bound by the *Seromba* Appeal Judgement nor requires cogent reasons to depart from it because, (i) the ICTY Appeals Chamber is not bound by ICTR jurisprudence,<sup>66</sup> and (ii) the language only has the force of *obiter dicta*.<sup>67</sup> The *Seromba* Appeals Chamber’s reference to the additional element was *dicta* because it was ultimately not concerned with whether the underlying acts could or could not result in the destruction of the group in whole or in part. The Chamber was concerned with the Trial Chamber’s failure to differentiate between the *actus reus* of the underlying crime and the *actus*

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<sup>62</sup> Judgement T.28766.

<sup>63</sup> *Seromba* AJ, para.48.

<sup>64</sup> *Krajišnik* TJ, para.862.

<sup>65</sup> *Krajišnik* TJ, para.867. Also *Karempera* TJ, paras.1609, 1666 (while recited the language in question (para.1609), in application, found that sexual assault, mutilation and rape of Tutsi women “certainly constituted acts of serious bodily or mental harm” in light of the nature of the crimes and the brutal and often public manner in which they were carried out with no mention of any group impact (para.1666); *Popović* TJ, paras.811, 844-847 (recited the language in question and in application examined the seriousness of the acts alleged with no mention of any group impact). *Gatete* TJ, paras.584-608, *Kanyarukiga* TJ, paras.637-641, and *Kajelijeli* TJ, paras.814-815, 844 (all three Chambers recited the language in question, but none actually applied it to the facts as they all based their genocide findings on the underlying act of killing members of the groups).

<sup>66</sup> *Kvočka* AJ, Separate Opinion of Judge Shahabuddeen, para.41.

<sup>67</sup> Trial chambers are bound by the *ratio decidendi* of Appeals Chamber decisions, but are not bound by *obiter dicta*. See *Krstić* TJ, para.642; *Milutinović* Jurisdiction Decision, Separate Opinion of Judge David Hunt, para.3 (citation omitted); *S.Milošević* R98bis Decision, paras.294-297; *Kvočka* AJ, Separate Opinion of Judge Shahabuddeen, para.41.

*reus* for aiding and abetting that crime.<sup>68</sup> The Appeals Chamber found that the Trial Chamber failed to define the underlying crime to which the Accused's actions allegedly contributed, and that it could not "equate nebulous invocations of 'weakening' and 'anxiety' [of the members of the group by Seromba] with the heinous crimes that obviously constitute serious bodily and mental harm, such as rape and torture".<sup>69</sup>

30. Further, even though ICTR appeals judgements are persuasive,<sup>70</sup> this Appeals Chamber should not follow any reference in *Seromba* to an additional element. First, to the extent that it supports the proposition applied by the Chamber in the present case, this proposition is not referenced with any persuasive authority.

31. Second, the *Seromba* Appeals Chamber cites *dicta* from *Krajišnik* and *Kajelijeli*,<sup>71</sup> which do not demonstrate that serious bodily and mental harm must threaten destruction of the group in whole or in part. As set out above, the *Krajišnik* Trial Chamber did not interpret the language or apply it in a way that required a group impact.<sup>72</sup> Similarly in *Kajelijeli*, the Trial Chamber referenced the additional requirement<sup>73</sup> but stated that serious bodily and mental harm need not be "permanent or irremediable",<sup>74</sup> and went on to find that it was not necessary to determine whether serious bodily and mental harm occurred.<sup>75</sup> Notably the small minority of other trial judgements<sup>76</sup> that reference the additional element applied by the Chamber also do not show that it is a requirement. All of these judgements merely recite this additional element, without the outcome turning upon it.<sup>77</sup>

32. Third, the language in the *Seromba* Appeals Judgement stems from the ILC Commentary on the Draft Articles on the Code of Crimes against the Peace and

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<sup>68</sup> *Seromba* AJ, para.47.

<sup>69</sup> *Seromba* AJ, paras.47-48.

<sup>70</sup> *Kvočka* AJ, Separate Opinion of Judge Shahabuddeen, para.41.

<sup>71</sup> *Seromba* AJ, para.46, fn.117.

<sup>72</sup> *Above* para.28.

<sup>73</sup> *Kajelijeli* TJ, para.814 (the *Seromba* Trial Chamber incorrectly cites para.184).

<sup>74</sup> *Kajelijeli* TJ, para.815.

<sup>75</sup> *Kajelijeli* TJ, para.844.

<sup>76</sup> *Seromba* AJ, para.46; *Popović* TJ, para.811; *Karemera* TJ, para.1609; *Gatete* TJ, para.584; *Kanyarukiga* TJ, para.637.

<sup>77</sup> *Above* fn.65.



Security of Mankind, which itself cites no supporting authority,<sup>78</sup> does not reflect customary international law<sup>79</sup> and “goes beyond the plain words of the text.”<sup>80</sup>

33. Fourth, the *travaux préparatoires* of the Genocide Convention suggest that the General Assembly rejected the approach adopted by the Chamber. In the context of discussing the scope of Article II(b) (the equivalent of Article 4(2)(b)), the General Assembly’s Sixth Committee considered and rejected a proposal by the Soviet Union to change the wording from “[i]mpairing the physical integrity of members of the group” to “[t]he physical destruction in whole or in part of such groups”.<sup>81</sup> Egypt criticised the proposal for confusing the *mens rea* element, already provided for in the first paragraph of Article II, with the *actus reus* elements.<sup>82</sup> The wording “serious bodily and mental harm” proposed by India was thereafter adopted.<sup>83</sup>

34. Finally, the Chamber’s approach confuses the *mens rea* of genocide with the *actus reus* elements of Article 4(2)(b). As discussed above, the crime of genocide is characterised by its specific intent, such that it is necessary to show that the perpetrators intended to have an impact on the group,<sup>84</sup> but not that the acts in fact had an impact on the group.

35. But for this error, the Chamber would have found that the elements of Article 4(2)(b) were met. The Chamber noted it had received evidence indicating that

<sup>78</sup> ILC Commentary, p.46. See *Seromba* AJ, fn.117.

<sup>79</sup> ICC *First Decision on Bashir Arrest Warrant*, paras.119-120. Also *Krstić* AJ, para.224: the ICC’s Elements of Crimes, which contains a similar element, do not reflect customary international law. In addition to the ICTY and ICTR case law, the ICJ did not apply this element in the ICJ *Bosnia* Judgement, para.319. Also *Tadić* AJ, para.290. (“[B]oth judicial practice and possibly evidence of consistent State practice, including national legislation, would be necessary to show that customary law has deviated from treaty law by adopting a narrower notion of crimes against humanity.”).

<sup>80</sup> Schabas *Genocide in International Law*, p.182. Also Jessberger *Commentary on Genocide Convention*, p.99 (“there are no indications in the definition [of causing serious bodily or mental harm] as to a requirement that the harm be of such a serious nature as to threaten the group with destruction.”); Brouwer *Prosecution of Sexual Violence*, pp.51-52, 56 (“Although sexual violence may lead to the destruction or partial destruction of the group, this is not strictly required under paragraph (b).”); Boot, *Nullum Crimen Sine Lege*, p.444 (“It is not required that the bodily harm or mental harm inflicted on the members of a group must be of such a serious nature as to actually threaten its destruction in whole or in part.”).

<sup>81</sup> UN GAOR 6th Committee, 81st Meeting (1948), UN Doc. A/C.6/223.

<sup>82</sup> UN GAOR 6th Committee, 81st Meeting (1948), UN Doc. A/C.6/SR.81.

<sup>83</sup> UN GAOR 6th Committee, 81st Meeting (1948), UN Doc. A/C.6/SR.81.

<sup>84</sup> *Above* para.19. Also *Akayesu* TJ, para.517 (hard copy) (“As stated above, the crime of genocide is characterized by its *dolus specialis*, or special intent”), also paras.518-522; Schabas *Commentary on Rome Statute*, p.153 (“[The ILC’s comment] simply confuses the *actus reus* and the *mens rea* of the offence. If bodily harm is caused, and if the intent is to destroy a group

“Bosnian Serb forces caused serious bodily or mental harm to many Bosnian Muslims and/or Bosnian Croats during their detention in multiple detention facilities.”<sup>85</sup> Indeed, the record is replete with such acts, including numerous instances of rape and torture,<sup>86</sup> which “obviously constitute serious bodily or mental harm” for the purposes of Article 4(2)(b).<sup>87</sup>

**2. In the alternative, a reasonable trial chamber, taking the evidence at its highest, could find that members of the Groups suffered serious bodily or mental harm within the meaning of Article 4(2)(b)**

36. The Chamber’s findings and the evidence presented show that serious bodily or mental harm within the meaning of Article 4(2)(b) was inflicted on members of the Groups. The Chamber erred in fact in failing to reach this conclusion. The evidence shows a pattern of widespread rape and sexual assault;<sup>88</sup> brutal beatings,<sup>89</sup> including stabbings,<sup>90</sup> which sometimes resulted in death;<sup>91</sup> torture and inhumane and degrading treatment;<sup>92</sup> and interrogations combined with beatings and threats of death.<sup>93</sup> For instance:

- Detainees in Bratunac detention facilities were severely beaten and stabbed and subjected to threats of death and injury.<sup>94</sup> [REDACTED].<sup>95</sup>

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in whole or in part, then the crime is made out; whether the harm was sufficient to threaten the destruction of the group is really irrelevant”).

<sup>85</sup> Judgement, T.28765-28766.

<sup>86</sup> Below paras.73-75.

<sup>87</sup> Seromba AJ, para.48.

<sup>88</sup> Avdispahić, Exh.P70, pp.15-16; [REDACTED]; KDZ080, T.20383; [REDACTED]; KDZ239, T.18946-18947; AF787, 792-794, 797, 800, 803-812, 814, 819, 821, 1037, 1167-1168, 1213, 1238-1241, 2256.

<sup>89</sup> Avdispahić, Exh.P70, pp.11-16, 19-23; Osmanović, Exh.P3212, pp.17-20, 33-37; Zulić, Exh.P718, paras.117-120, 125; KDZ017, Exh.P3568, pp.17-21, 39-46 (*Krnjelac*, T.2784-2788, 2806-2813); [REDACTED]; KDZ048, Exh.P678, p.46 (*Stakić*, T.3357); KDZ052, T.19078; KDZ239, Exh.P3336, pp.21-23, 30-31, 56-59, 67-70, 85-86 (*Krnjelac*, T.1200-1202, 1209-1210, 1235-1238, 1246-1249, 1264-1265); [REDACTED].

<sup>90</sup> [REDACTED]; KDZ605, T.17870; [REDACTED].

<sup>91</sup> Avdispahić, Exh.P70, pp.11-12, 16; Osmanović, Exh.P3212, pp.18-19, 33-34; Zulić, T.1033-1035; KDZ052, T.19078; KDZ605, T.17870; [REDACTED]; AF583-584, 780, 786, 860-864, 867-874, 879-899, 935-937, 939-942, 944, 946-947, 1051, 1053-1055, 1110, 1138, 1173-1189, 1205-1206, 1208-1212, 1215-1219, 1220-1222, 1242, 1259-1263, 1333-1343, 1347-1349, 2255-2256, 2326, 2328, 2359-2360, 2363-2364, 2399-2401, 2402-2404, 2490-2492, 2541-2542, 2699, 2701-2702, 2719, 2745-2747, 2749, 2754-2756, 2757-2758, 2762, 2764-2767, 2861.

<sup>92</sup> AF832, 940, 1090-1091, 1117, 1119, 1122, 1167-1168, 1170, 1182-1183, 1213, 2713.

<sup>93</sup> AF631-646, 940, 1138-1158, 1164-1165, 1169-1171, 1173-1175, 1177-1181 1197-1206, 1208-1209, 1326-1330, 2287. Also below paras.99-102.

<sup>94</sup> [REDACTED]; AF2326; Smajs, Exh.P43, pp.6, 10-11.

- At detention centres in Foča, women and children were separated from men and detainees were severely beaten,<sup>96</sup> including during interrogations.<sup>97</sup> At Karaman's house in Miljevina, the Worker's Huts at Buk Bijela, Partizan Hall and Foča High School, women, including young girls, were systematically and brutally raped, often by multiple perpetrators.<sup>98</sup>
- At the SJB Building in Ključ, detainees were beaten during and outside of interrogations with feet, fists, batons, rifle butts and chair legs,<sup>99</sup> causing serious and permanent injuries.<sup>100</sup>
- In detention facilities in Prijedor, detainees were subject to severe beatings, including by iron bars, electric cables, knives and weapons embedded with nails,<sup>101</sup> as well as sexual assault.<sup>102</sup> [REDACTED].<sup>103</sup> These abuses at times resulted in death.<sup>104</sup> At the Trnopolje camp, Serb soldiers used baseball bats, iron bars, rifle butts and anything else at their disposal to beat detainees.<sup>105</sup> Women, including a girl as young as 12, were repeatedly raped.<sup>106</sup> These brutal assaults on detainees caused long-term, sometimes permanent, physical and psychological injuries.<sup>107</sup>
- In Sanski Most, at the SJB building and prison and Betonirka, detainees were regularly subjected to beatings with cables, tables and spades, causing them to

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<sup>95</sup> [REDACTED].

<sup>96</sup> KDZ239, Exh.P3336, pp.21-23, 30-31, 56-59, 67-70, 85-86 (*Krnjelac*, T.1200-1202, 1209-1210, 1235-1238, 1246-1249, 1264-1265); AF786, 856-858, 860-864, 867, 869-874, 877.

<sup>97</sup> AF879-883, 886.

<sup>98</sup> KDZ239, T.18946-18947; AF790, 792-794, 797, 800-801, 803, 805-806, 808-812, 814, 819, 821.

<sup>99</sup> AF935-937; *also* Džafić, Exh.P3488, para.160.

<sup>100</sup> AF936.

<sup>101</sup> AF1110, 1113, 1150-1151, 1155-1156, 1158, 1173, 1205-1206, 1208-1212, 1237, 1258-1260, 1263; [REDACTED]; Mešanović, Exh.P3528, p.27; Sivać, Exh.P3478, pp.70-71 (*Stakić*, T.6620-6621); KDZ048, Exh.P678, p.46 (*Stakić*, T.3357).

<sup>102</sup> AF1168-1169, 1183, 1213, 1238-1241; [REDACTED]; KDZ050, Exh.P680, pp.12-13 (*Sikirica*, T.2506-2507).

<sup>103</sup> [REDACTED].

<sup>104</sup> AF1175, 1177, 1181, 1242; KDZ048, Exh.P678, pp.46-59 (*Stakić*, T.3357-3370); Merdžanić, Exh.P3881, p.72 (*Stakić*, T.7785); [REDACTED].

<sup>105</sup> AF1237, 1242; Merdžanić, Exh.P3881, p.72 (*Stakić*, T.7785).

<sup>106</sup> Merdžanić, T.21400-21401, Exh.P3881, pp.48, 51-55 (*Stakić*, T.7762, 7764-7768); AF1205-1206, 1208-1213, 1237-1241.

<sup>107</sup> AF1237, 1241, Merdžanić, Exh.P3881, p.72 (*Stakić*, T.7785); Mešanović, Exh.P3528, pp.24-30.

suffer serious injuries and, in at least two cases, death.<sup>108</sup> Prisoners were also beaten at the Hasan Kikić gymnasium<sup>109</sup> and the Magarice Military Facility.<sup>110</sup>

- At Sušica camp in Vlasenica men were taken away, [REDACTED] and severely beaten.<sup>111</sup> Nine detainees were killed or died from such mistreatment.<sup>112</sup>
- At two detention facilities in Zvornik, Ekonomija Farm and Ciglana Factory, detainees were severely beaten and threatened with death.<sup>113</sup> An elderly man died as a result of severe beatings and soldiers used instruments, such as wooden stakes and cables, to repeatedly beat and sexually assault detainees.<sup>114</sup> Detainees were forced to sexually assault one another<sup>115</sup> and, on one occasion, a soldier carved out a detainee's tattoo with a knife.<sup>116</sup> At Čelopek Dom, detainees were also severely abused—one having his ear cut off, others having fingers cut off and two others being sexually mutilated. Other detainees were forced to eat the severed body parts.<sup>117</sup>

37. These and other similar acts inflicted long-term, serious harm to members of the Groups. Those who survived these acts, as well as those who witnessed them, still suffer the consequences. The victims of severe beatings suffer from permanent physical injuries, including disabilities,<sup>118</sup> and psychological and emotional

<sup>108</sup> AF1326, 1328-1330, 1339-1341; [REDACTED]; Karabeg, Exh.P3303, pp.99-102 (*Brdanin*, T.6165-6168); Zulić, Exh.P718, paras.58, 62-74.

<sup>109</sup> [REDACTED]; Muhić, Exh.P700, p.27 (*Brdanin*, T.8122); AF1352-1353.

<sup>110</sup> Bišćević, Exh.P135, pp.39-40 (*Brdanin*, T.7042-7043); AF1354.

<sup>111</sup> [REDACTED]; AF2715.

<sup>112</sup> AF2717.

<sup>113</sup> Avdispahić, Exh.P70, pp.11-12.

<sup>114</sup> Avdispahić, Exh.P70, pp.11-16, 19-23.

<sup>115</sup> Avdispahić, Exh.P70, pp.15-16.

<sup>116</sup> Avdispahić, Exh.P70, p.22.

<sup>117</sup> AF2745, 2747, 2749.

<sup>118</sup> Karabeg, T.18681, 18708; Kuralić, Exhs.P84, pp.9-10, P63, pp.30-31 (*Krajišnik*, T.12578-12579); Stojić, T.19757-19758; KDZ017, Exh.P3568, p.39 (*Krnjelac*, T.2806); [REDACTED]; KDZ239, Exh.P3336, p.108 (*Krnjelac*, T.1287); Zulić, T.1037, Exh.P718, para.139; [REDACTED]. *Also Tadić* SJ, paras.12-13.

suffering.<sup>119</sup> Rape and sexual violence self-evidently exact severe physical and psychological trauma,<sup>120</sup> as illustrated by evidence in this case.<sup>121</sup>

38. The evidence before the Chamber fits directly within the categories of abuses which trial chambers have found to satisfy Article 4(2)(b).<sup>122</sup> ICTY case-law has consistently recognised that serious bodily or mental harm includes “acts of torture, inhuman or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death and deportation.”<sup>123</sup> ICTR case-law is similar.<sup>124</sup> Given the evidence of widespread and systematic torture, brutal beatings, sexual violence, and other cruel and inhumane treatment, a reasonable trial chamber could conclude that serious bodily or mental harm within the meaning of Article 4(2)(b) had occurred. In addition, the above categories of acts were found by the *Seromba* Appeals Chamber and *Popović* Trial Chamber to be sufficient to satisfy Article 4(2)(b), notwithstanding their inclusion of additional language in the legal test.<sup>125</sup>

### 3. *Remedy*

39. For the above reasons, the Prosecution requests that the Appeals Chamber correct these errors and find that, applying the Rule 98bis standard, a reasonable trial chamber could conclude that the underlying act of inflicting serious bodily or mental harm on members of the Groups under Article 4(2)(b) had occurred.

<sup>119</sup> Stojić, T.19757-19758; KDZ017, Exh.P3568, pp.151-152 (*Krnjelac*, T.2918-2919); KDZ239, Exh.P3336, pp.108-109 (*Krnjelac*, T.1287-1288). Also *Mrkšić* AJ, paras.409-413; Special Rapporteur 3 February 2011 Report, para.47 (“The Special Rapporteur notes, with deep regret, the long-term physical and psychological damage that torture inflicts on its victims.”).

<sup>120</sup> *Čelebići* TJ, para.495 (noting that acts of rape and sexual violence “strike[] at the very core of human dignity and physical integrity” and causes “acute and long lasting” psychological suffering upon the victim).

<sup>121</sup> AF1241; [REDACTED]; KDZ093, Exh.P705, pp.41-42 (*Kvočka*, T.6236-6237); [REDACTED].

<sup>122</sup> E.g. *Blagojević* TJ, para.646; *Popović* TJ, para.812; *Krstić* TJ, para.513; *Karadžić and Mladić* R41 Decision, para.93; *Kayishema and Ruzindana* TJ, para.109; *Akayesu* TJ, para.504 (hard copy); *Seromba* AJ, para.46.

<sup>123</sup> *Blagojević* TJ, para.646; *Krstić* TJ, para.513; *Karadžić and Mladić* R61 Decision, para.93.

<sup>124</sup> *Akayesu* TJ, para.504 (hard copy) (“acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution”). Also *Kayishema and Ruzindana* TJ, para.109.

<sup>125</sup> E.g. *Seromba* AJ, para.46 (“[t]he quintessential examples of serious bodily harm are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.”) *Popović* TJ, para.812 (“[e]xamples of acts causing serious bodily or mental harm include ‘torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to members of the targeted national, ethnical, racial or religious group.’”)

**C. The Chamber erred in failing to find that members of the Groups were subjected to destructive conditions of life within the meaning of Article 4(2)(c) (Ground 1C)**

***1. The Chamber failed to provide a reasoned opinion***

40. The Chamber provided little reasoning to support its conclusion that the horrific conditions of life in detention facilities in the Municipalities<sup>126</sup> did not satisfy the requirements of Article 4(2)(c).<sup>127</sup> Even though the Judgement was pronounced orally, the Chamber was required to provide a sufficient explanation of the approach it took.<sup>128</sup>

41. The Chamber purported to apply the approach taken by the *Brdanin* Trial Chamber, namely, focusing on the objective probability of the conditions leading to the physical destruction of the protected group in part, including factors such as the nature of the conditions, the duration of the conditions and the vulnerability of those subjected to the conditions.<sup>129</sup> However, the Chamber appeared not to actually apply these factors or the *Brdanin* approach generally. The Chamber recognised that the evidence established conditions of life which included 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.<sup>130</sup> There is also evidence that these conditions were imposed on members of the Groups for prolonged periods of time.<sup>131</sup> The evidence of these conditions of life overlapped significantly with evidence that the *Brdanin* Trial Chamber found satisfied the *actus reus* of Article 4(2)(c) beyond a reasonable doubt.<sup>132</sup> Nevertheless, the Chamber did not discuss the application of the *Brdanin* factors to this evidence. Instead, it simply concluded that the evidence did not reach a sufficient “level” to support an inference that members of the Groups were

<sup>126</sup> Below paras.44-51.

<sup>127</sup> Judgement T.28768. In the alternative, the Prosecution alleges this language to constitute an error with respect to the *mens rea* for genocide. Below Section III.A.

<sup>128</sup> Above para.2.

<sup>129</sup> *Brdanin* TJ, para.906 (cited by the Chamber, although without explicit reference to *Brdanin*, T.28767).

<sup>130</sup> Judgement, T.28767.

<sup>131</sup> E.g. below paras.45-49.

<sup>132</sup> *Brdanin* TJ, paras.907-962 (finding that conditions of detention met the *actus reus* elements for Article 4(2)(c) for four detention facilities that are among the scheduled facilities in the Municipalities: Omarska, Keraterm and Trnopolje in Prijedor, and Betonirka in Sanski Most).

detained in conditions of life calculated to bring about their physical destruction.<sup>133</sup> This left the Prosecution—and the Appeals Chamber—to guess at whether it was referring to a numerical threshold, the nature of the conditions or something else.

42. In light of the Chamber’s limited reasoning, it is not possible to discern the basis for the Chamber’s conclusion that the evidence was insufficient to meet the requirements of Article 4(2)(c). The Chamber erred in law by failing to provide a reasoned opinion.<sup>134</sup> As set out below, there was more than sufficient evidence for a reasonable trier of fact to conclude that conditions of life within the meaning of Article 4(2)(c) had been inflicted upon members of the Groups.

**2. A reasonable trial chamber, taking the evidence at its highest, could find that destructive conditions of life occurred**

43. The Chamber erred in fact by failing to find that the evidence satisfied the elements of Article 4(2)(c). The evidence accepted by the Chamber shows that conditions in the camps in which members of the Groups were detained were horrific and supports the objective probability of physical destruction.<sup>135</sup> However, objective probability is just one factor from which destructive intent may be inferred.<sup>136</sup> Here, there is additional evidence reinforcing the conclusion that the conditions were calculated to bring about physical destruction, such as statements by camp commanders.<sup>137</sup>

44. In any event, the evidence accepted by the Chamber shows that members of the Groups were routinely subjected to conditions in detention facilities of a nature commonly held to satisfy the elements of Article 4(2)(c)<sup>138</sup> including inadequate

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Some of the *Brdanin* Trial Chamber’s factual findings for these conditions of detention have been accepted as adjudicated facts in this case: AF1236, 1334-1338.

<sup>133</sup> Judgement, T.28767-28768.

<sup>134</sup> Above para.2.

<sup>135</sup> The *Brdanin* Trial Chamber evaluated “the objective probability of these conditions leading to the physical destruction of the group in part” by focusing on the “actual nature” of the conditions, the length of time that group members were subjected to them and the vulnerability of the victims. It did not require any group impact or impose any numerical threshold: *Brdanin* TJ, para.906.

<sup>136</sup> *Brdanin* TJ, para.906; *Popović* TJ, para.816 (acknowledging the relevance of both direct evidence and the objective probability of the conditions bringing about physical destruction”).

<sup>137</sup> Below para.51.

<sup>138</sup> *Brdanin* TJ, para.691; *Popović* TJ, para.815; *Stakić* R98bis Decision, para.25; *Akayesu* TJ, paras.505-506 (hard copy); *Rutaganda* TJ, para.51; *Musema* TJ, para.157.

food,<sup>139</sup> water<sup>140</sup> and medical supplies,<sup>141</sup> contaminated water<sup>142</sup> and over-crowded,<sup>143</sup> disease-infested and unsanitary accommodations.<sup>144</sup> Many were forced to work, notwithstanding their severely-deteriorated physical state.<sup>145</sup> The guards, and others, subjected detainees to regular beatings, with wooden poles, rifle butts, electric cables, iron bars, baseball bats, or weapons with nails embedded in them.<sup>146</sup> Many women, and some men, were subjected to rape and other forms of sexual violence (in some cases so often that the victims lost count).<sup>147</sup> Some detainees who were subjected to such conditions died.<sup>148</sup>

45. For example, Omarska Camp in Prijedor held as many as 3,000 prisoners,<sup>149</sup> 200 alone were held in a room of only 40 square metres.<sup>150</sup> Some detainees were held there up to two months.<sup>151</sup> The prisoners were so cramped that some were crowded together in the lavatories where they often had to lie in the midst of excrement.<sup>152</sup> Around 120 people were crammed in a garage such that two young men suffocated to death as a result.<sup>153</sup> Other prisoners remained outside regardless of the weather, with machine guns trained on them.<sup>154</sup> Drinking water was denied for long periods, and the only water given was destined for industrial use and was not fit for human consumption.<sup>155</sup> Some prisoners lost 20-30kgs during their time at Omarska due to the lack of food.<sup>156</sup> Skin disease, diarrhoea, intestinal problems and dysentery were prevalent,<sup>157</sup> as was the sight of dead prisoners piled in heaps on the grass outside.<sup>158</sup>

<sup>139</sup> AF1141-1144; KDZ239, Exh.P3336, pp.25, 41-42, 47-49, 133-134 (*Krnojelac*, T.1204, 1220-1221, 1226-1228, 1311-1312); KDZ603, T.18162-18163; KDZ603, T.18162-18163; [REDACTED].

<sup>140</sup> KDZ050, Exh.P680, pp.8-11 (*Sikirica*, T.2502-2505).

<sup>141</sup> KDZ239, Exh.P3336, pp.41-42 (*Krnojelac*, T.1220-1221).

<sup>142</sup> KDZ239, Exh.P3336, pp.47-49, 133-134 (*Krnojelac*, T.1226-1228, 1311-1312); AF1141-1144, 1178.

<sup>143</sup> KDZ050, Exh.P680, T.2502-2503; KDZ048, Exh.P678, pp.63, 65 (*Stakić*, T.3374, 3376); KDZ603, T.18159-18160, [REDACTED]; AF1172, 1198.

<sup>144</sup> KDZ603, T.18159-18160; KDZ050, Exh.P680, pp.8-11 (*Sikirica*, T.2502-2505); [REDACTED]; AF832, 834, 839-843, 1148-1149, 1164-1165, 1199-1203, 1231-1236.

<sup>145</sup> KDZ263, Exh.P718, para.127.

<sup>146</sup> AF1137, 1237.

<sup>147</sup> AF794, 1168, 1183, 1213, 1239-1241.

<sup>148</sup> Below para.50.

<sup>149</sup> AF1117.

<sup>150</sup> AF1139.

<sup>151</sup> AF1116. E.g. KDZ048, Exh.P678, p.59 (*Stakić*, T.3370).

<sup>152</sup> AF1139.

<sup>153</sup> AF1172.

<sup>154</sup> AF1164.

<sup>155</sup> AF1146-1147.

<sup>156</sup> AF1145. Also KDZ048, Exh.P678, p.59 (*Stakić*, T.3370).

<sup>157</sup> AF1149.



46. Keraterm Camp in Prijedor held 4,000 prisoners,<sup>159</sup> 570 of which were “packed like sardines” into Room 3. The camp was in operation from 25 May to 5 August 1992. Some detainees were held for up to a month and a half.<sup>160</sup> It was so hot that the detainees licked the walls for moisture due to lack of water. Detainees were not permitted to use the toilet and were instead forced to use a plastic vessel which had been placed in the room.<sup>161</sup>

47. At Trnopolje camp in Prijedor, there were no beds or blankets; detainees had to sleep on the floor, and some had to sleep outside.<sup>162</sup> Some detainees were held there as long as four months.<sup>163</sup> There was insufficient drinking water,<sup>164</sup> no running water and sanitary conditions were inadequate.<sup>165</sup> Due to a lack of food and unsanitary conditions, lice and scabies were rampant and up to 95 percent of the inmates suffered from dysentery.<sup>166</sup>

48. At Betonirka in Sanski Most, detainees were housed in garages for periods of time that varied from three days to over a month.<sup>167</sup> At some point, one of the garages was so crowded that the detainees had to sleep sitting up.<sup>168</sup> The garages were “insufferably hot”, had no ventilation and the air stank of excrement.<sup>169</sup> Sanitary conditions were “totally inadequate.”<sup>170</sup> Food and water were insufficient.<sup>171</sup> There were no medical facilities to treat injured detainees.<sup>172</sup>

49. Detainees were held in KP Dom in Foča for periods lasting from four months to over two and a half years.<sup>173</sup> Detainees were fed starvation rations.<sup>174</sup> Not all had a bed, a mattress or even a blanket.<sup>175</sup> They were locked in their rooms at all times

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<sup>158</sup> AF1178.

<sup>159</sup> AF1197.

<sup>160</sup> AF1196, 1220. *E.g.* Arifagić, Exh.P689, pp.34-35, 56 (*Stakić*, T.7083-7084, T.7105); Tači, Exh.P693, pp.3, 17 (*Kvočka*, T.3756, T.3770).

<sup>161</sup> KDZ050, Exh.P680, pp.8-9, 11 (*Sikirica*, T.2502-2503, 2505).

<sup>162</sup> AF1231, 1236.

<sup>163</sup> AF1223-1224. *E.g.* Merdžanić, Exh.P3881, pp.26-34, 87 (*Stakić*, T.7739-7747, T.7800).

<sup>164</sup> AF1233.

<sup>165</sup> AF1232.

<sup>166</sup> AF1235.

<sup>167</sup> AF1334.

<sup>168</sup> AF1335.

<sup>169</sup> AF1336; KDZ263, Exh.P718, paras.57-58.

<sup>170</sup> AF1338.

<sup>171</sup> AF1337; KDZ263, Exh.P718, para.58.

<sup>172</sup> AF1343.

<sup>173</sup> AF825.

<sup>174</sup> AF851.

<sup>175</sup> AF844.

except for meals and work duty.<sup>176</sup> During the harsh winter of 1992, no heaters were provided, windowpanes were left broken and clothes made from blankets to combat the cold were confiscated.<sup>177</sup> [REDACTED].<sup>178</sup>

50. The deaths that resulted from the starvation,<sup>179</sup> suffocation,<sup>180</sup> lack of medical care,<sup>181</sup> heat stroke or lack of water,<sup>182</sup> and horrible living conditions in the camps<sup>183</sup> illustrate the destructive nature of these conditions.

51. There is additional evidence, which supports the conclusion that these conditions were deliberately imposed to destroy members of the Groups. For example, the evidence establishes that detainees at KP Dom were deliberately housed in cramped conditions, and their suffering during the winter of 1992 and their starvation rations were the result of a deliberate policy of those in charge.<sup>184</sup> One witness stated the intention behind the conditions of life in KP Dom Foča was “to have a certain number of people go to their death in a different way.”<sup>185</sup> At Betonirka in Sanski Most, guards deliberately tainted the detainees’ food before forcing them to eat it, causing them to become ill.<sup>186</sup> Other detainees in the Municipalities were told that a bullet would be too expensive a way for them to die.<sup>187</sup>

52. A reasonable trier of fact, taking this evidence at its highest,<sup>188</sup> could conclude that members of the Groups were detained in conditions of life calculated to bring about their physical destruction.<sup>189</sup> In fact, the same conditions in some of the same detention centres, established by similar evidence, were found by the *Brdanin* Trial Chamber to have the objective probability of leading to physical destruction beyond reasonable doubt,<sup>190</sup> and were found by the *Stakić* Trial Chamber to meet the Rule

<sup>176</sup> AF844.

<sup>177</sup> AF848.

<sup>178</sup> [REDACTED].

<sup>179</sup> KDZ239, Exh.P3336, pp.50-51, 134 (*Krnjelac*, T.1229-1230, 1312); KDZ048, Exh.P678, p.59 (*Stakić*, T.3370).

<sup>180</sup> [REDACTED]; AF1172.

<sup>181</sup> AF854-856, 1201, 1343.

<sup>182</sup> AF585-588, 2754.

<sup>183</sup> KDZ239, Exh.P3336, p.51 (*Krnjelac*, T.1230).

<sup>184</sup> AF842, 850, 852.

<sup>185</sup> KDZ239, Exh.P3336, p.134 (*Krnjelac*, T.1312).

<sup>186</sup> KDZ263, Exh.P718, para.68.

<sup>187</sup> Osmanović, T.17946, Exh.P3212, p.33; AF1341.

<sup>188</sup> The Chamber made no findings that the Prosecution evidence, in whole or in part, was manifestly unreliable or incapable of belief. *E.g. Jelisić* AJ, paras.55-56.

<sup>189</sup> *Contra* Judgement, T.28767-28768.

<sup>190</sup> *Brdanin* TJ, paras.909, 930-945, 950-954; *also* para.691.

98bis standard.<sup>191</sup> Other chambers have also held that conditions of detention that include the failure to provide adequate accommodation, shelter, food, water, medical care or hygienic facilities satisfy Article 4(2)(c).<sup>192</sup> The Chamber erred in fact by failing to find that conditions of life within the meaning of Article 4(2)(c) had been inflicted upon members of the Groups.

### **3. Remedy**

53. For these reasons, the Prosecution requests that the Appeals Chamber correct these errors and find that, applying the Rule 98bis standard, a reasonable trial chamber could conclude that the underlying act of deliberately inflicting upon the Groups conditions calculated to bring about their destruction in whole or in part under Article 4(2)(c) had occurred.

## **III. GROUNDS TWO AND THREE: APPLYING THE RULE 98BIS STANDARD, A REASONABLE TRIAL CHAMBER COULD CONCLUDE THAT GENOCIDAL INTENT WAS ESTABLISHED**

54. As noted above, the Chamber made various legal errors assessing genocidal intent. These include erroneously requiring the physical perpetrators to have genocidal intent and failing to consider the Accused's genocidal intent. If the Chamber did assess the Accused's *men rea*, it failed to take the evidence at its highest and/or failed to view the evidence holistically. Alternatively, the Chamber erred in law by failing to provide a reasoned opinion.<sup>193</sup>

55. The conclusion reached by the Chamber is in error and should be reversed. A reasonable trier of fact could conclude—based on the evidence adduced and applying the Rule 98bis standard—that the Accused and the other JCE members had shared genocidal intent.<sup>194</sup> It is that fundamental error with which the Prosecution begins its analysis in this section.

<sup>191</sup> *Stakić* R98bis Decision, para.35; *also* para.25.

<sup>192</sup> *Popović* TJ, para.815; *Akayesu* TJ, paras.505-506 (hard copy); *Rutaganda* TJ, para.51; *Musema* TJ, para.157.

<sup>193</sup> *Below* Section III.B.

<sup>194</sup> As set out in Ground 4 below, alternatively the evidence shows that one or more of the other JCE members had or shared genocidal intent.

**A. The Chamber erred in fact in failing to find that the Accused and the other JCE members shared an intent to commit genocide (Grounds 2B and 3B)<sup>195</sup>**

56. Both direct and indirect evidence establish that the Accused and other JCE members intended to physically destroy the Groups. As outlined earlier and set out in more detail below, the Accused:

- (i) in the months before the conflict, threatened the Groups with physical destruction;
- (ii) after the war began and while the attacks on the Groups were underway in the Municipalities, acknowledged and expressed his approval of the destruction taking place at the hands of his forces;
- (iii) oversaw, as Supreme Commander, forces that swept through Bosnian Muslim and Bosnian Croat communities, killing thousands and imprisoning thousands more in inhuman conditions;
- (iv) selected a military commander who shared his destructive intent;
- (v) commended those who supported or conducted such attacks on Muslims and Croats in the Municipalities and continued to rely upon them to effectuate his policies; and
- (vi) repeatedly exhorted his followers that such actions against Muslims and Croats were necessary to prevent Serbs from themselves being the victims of genocide.

57. The Chamber had ample other evidence from which genocidal intent could be inferred. For example, the genocidal and other culpable acts relevant under the case law to discerning genocidal intent (including forcible transfer and destruction of religious and other property) were brutal, massive in scale and repeated across the Municipalities.

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<sup>195</sup> Notice of Appeal, para.20.  
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58. Based on this evidence a reasonable trial chamber, applying the Rule 98bis standard, could find that the Accused and other JCE members intended to destroy the Groups in part. Even assuming *arguendo* the existence of evidence to suggest otherwise, for a Rule 98bis determination direct evidence of intent from the statements of the Accused is sufficient.

**1. The genocidal intent of the Accused and other JCE members is reflected in their statements and conduct**

59. The direct evidence of the Accused's statements alone—taken at its highest—is sufficient to show that the Accused had genocidal intent.

60. He repeatedly insisted that should the Muslims<sup>196</sup> move forward with the independence of Bosnia, they would “disappear”;<sup>197</sup> be “annihilated”;<sup>198</sup> “disappear from the face of the earth”;<sup>199</sup> “five-six hundreds of thousands of them will disappear, they will disappear.”<sup>200</sup>

61. The record reveals that these were not rhetorical or metaphorical generalities but concrete references to physical destruction. As the Accused stated in October 1991 regarding what would happen if the Muslims advanced toward independence, “Sarajevo will be a *karakazan* / black cauldron/ where 300,000 Muslims will die” and they will “be up to their necks in blood”.<sup>201</sup>

62. A further reflection of the concrete nature of these threats to annihilate or physically destroy the Groups is that they were counterpoints to the Accused's repeated assertions that the Bosnian Serbs were at risk of genocide from the Muslims

<sup>196</sup> The Accused frequently referred only to the demographically predominant group of Muslims in such contexts. The record reveals, however, that he and other members of the Bosnian Serb leadership considered both Muslims and Croats as enemies who warranted the same response if they pursued a sovereign and independent Bosnia and that both groups were regarded as common enemies in the municipalities and both should be subjected to destructive treatment; e.g. Exh.P1394, p.76 (Karadžić, 42nd session, “We know for sure that we have to give something up, that is clear beyond a shadow of a doubt, if we wish to achieve our primary strategic aim, which is to get rid of the enemies in our house, the Croats and Muslims, and not to be in the same state with them any more); Exh.P1385, pp.47-49 (Mladić speaking about Muslims and Croats, “My concern is to have them vanish completely”); Exh.P1367, p.34 (Assembly delegate from Sanski Most referring to “the murderers of the Serbian people, the Muslims and Croats.”).

<sup>197</sup> Exh.P3200, p.2.

<sup>198</sup> Exh.P3200, p.2.

<sup>199</sup> Exh.D279, p.3.

<sup>200</sup> Exh.P5846, p.3. *Also above* para.8.

and Croats, just as they had been victimised in World War II.<sup>202</sup> The Accused's fixation on this theme was underscored by an international witness, who testified that "[Karadžić] said it so often, even before the fighting began, that I once said to him in a private meeting 'Dr Karadžić, if you keep talking about the genocide of the Serbs so much, you will commit a pre-emptive genocide.'"<sup>203</sup> Thus, the Accused made clear both the concrete existential risk that he wanted his followers to believe awaited them should Muslims and Croats be permitted to pursue a sovereign and independent Bosnia, as well as the concrete existential threat that the Bosnian Muslims and Croats would face at the hands of his forces should they continue efforts toward the establishment of an independent Bosnia.

63. Such evidence belies the Judgement's characterisation of his comments as mere "rhetorical warning[s...] in the event that war broke out,"<sup>204</sup> and suggests instead either a factual mischaracterisation or an impermissible weighing or assessment of allegedly contrary evidence rather than taking it at its highest.<sup>205</sup>

64. While these direct manifestations alone would be sufficient for a reasonable trial chamber to find the requisite intent, there is considerably more evidence of intent. Once the attacks on Muslim and Croat communities by the Accused's forces were underway, he acknowledged and signified his approval of the destruction, stating that there was "truth" in one Assembly Deputy's statement that "...this conflict was roused in order to eliminate the Muslims."<sup>206</sup> The Accused added that "[the Muslims] think that they are being nationally established, but in fact they are vanishing."<sup>207</sup>

<sup>201</sup> Exh.D279, pp.7-8.

<sup>202</sup> E.g. Exh.P5525, p.7 ("The wars of 1914, 1941, and 1991, were and remain above all, wars for the extermination of the Orthodox population. There were a lot of nationally unaware Muslims, even Muslims who in the ethnic sense declared themselves as Serbs, but they still participated in the genocide against the Serbs, lead exclusively by religious reasons.").

<sup>203</sup> Okun, Exh.P776, p.31 (*Krajišnik*, T.4165).

<sup>204</sup> See Judgement, T.28769. As discussed above, to the extent that the Chamber's comment can be viewed as a conclusion that the Prosecution characterized the comments as rhetorical, it is a misstatement of the Prosecution's submission.

<sup>205</sup> Below paras.93-97.

<sup>206</sup> Exh.D92, p.86. Also Exh.D92, p.41, although the Accused misidentified the speaker as Mr. Kuprešanin, it was in fact Miladin Nedić who had stated earlier in the session that "the Muslims have been planted to us as a people whose executioners we are to be."

<sup>207</sup> Exh.D92, p.86.

65. Consistent with this ratification of the “elimination” of the Muslims at the hands of their “executioners”, the Accused permitted,<sup>208</sup> encouraged<sup>209</sup> and attempted to justify<sup>210</sup> the widespread commission of crimes constituting the underlying acts of genocide against members of the Groups<sup>211</sup> by forces under his authority,<sup>212</sup> as the evidence cited by the Chamber demonstrates. The Accused also praised and rewarded others who supported and/or implemented the physical destruction of members of the Groups<sup>213</sup> such as:

<sup>208</sup> Judgement, T.28773-28774 (citing evidence that the Accused ordered that no arrests of Serbs should be made even at the expense of not punishing perpetrators of crimes (*see* Exh.P2848 para.54). *Also* Exh.P4982, paras.14-16 (evidence of the former RS Prime Minister, who stated that his requests for the problem of crimes committed by Serbs to be dealt with immediately were blocked by those at the “very top of the Serb republic”, particularly Karadžić who “was strictly in favour of leaving that for later.”); [REDACTED]; Ristanić, T.16736 (when asked about prosecutions for crimes committed at Luka camp in Brčko he stated, “[a]t the relevant time in 1992 and 1993, it was impossible. Nobody dared prosecute anybody.”).

<sup>209</sup> Judgement, T.28773. The Chamber noted evidence that the Accused encouraged municipal leaders to take actions to create a homogeneous territory, referring to Exh.P3405 (public redacted statement of KDZ051 which states at para.95 that, in September 1992, Sveto Veselinović, Municipal SDS President of Rogatica told KDZ051 that all the Muslims were going to disappear from the territory, that he had had meetings with Karadžić in Pale, and it had been decided that one third of Muslims would be killed, one third would be converted to the Orthodox religion and one third would leave on their own. In addition to this evidence of express encouragement, the obvious effect of the Accused’s policy of not prosecuting crimes against non-Serbs would be to encourage the commission of such crimes.

<sup>210</sup> Judgement, T.28772 (noting Okun’s evidence that the Accused never denied that his forces had conducted ethnic cleansing but rather attempted to justify their actions, claiming that Serbs had to be protected from the aggressiveness of the Muslims). *Also* Okun: T.1505-1506. “In fact, in all of the conversations about ethnic cleansing with the Bosnian Serb leadership, it was highly unusual, almost never the case, that they denied it. When they were asked about it, the almost invariable response was, ‘[l]ook what they’re doing to our people,’ or from Dr. Karadžić, ‘Sarajevo is a concentration camp where our people are being held prisoner, hostage.’ So that was the typical dialogue about ethnic cleansing. No denial on the part of the accused and others, but, rather, a finger pointing at the other parties.”

<sup>211</sup> *Above Ground 1.*

<sup>212</sup> Judgement, T.28773 (noting the evidence that the Accused told Vulliamy that he could order Omarska closed down in two days and that he ordered that no arrests of Serbs should be made). Although the Chamber referred to this evidence as support for the Accused’s knowledge of the existence of detention facilities in Prijedor, it is also evidence of control over the crimes committed in connection with those facilities. *Also* Okun, T.1510 (testifying that Karadžić stated that he controlled the Bosnian Serb forces including 95% of irregulars); Okun, T.1510; Exh.P785, p.25 (Okun Diaries) (in response to Vance’s question “What of your irregulars...” Karadzic responds that 5 per cent were not under control. As for the rest, “I control”. Then he said “[w]e can do anything. The army has a unified command. I have full power.”); Wilson, Exh.P1029, paras.124-129, 132-137 (explaining that Mladić claimed to have control over his forces and demonstrated effective control, that Mladić commanded not only VRS but also TO and some paramilitaries, and that Mladić consistently stated that he was under the political control of the Bosnian Serb leadership and responsive to their directions).

<sup>213</sup> Exh.P5525 (Transcript of the 9 January 1994 Ceremonial Session of the RS Assembly, pp.15-19).

- Dragan Kalinić, the RS Minister of Health who called for the liquidation of the Group's leaders and the destruction of the Sarajevo military hospital if it remained in Muslim hands;<sup>214</sup>
- Radoslav Brdanin, President of the ARK Crisis Staff, who declared following a visit to Prijedor and Omarska after thousands of Muslims and Croats had been killed or imprisoned in brutal and inhumane conditions that "what we have seen in Prijedor is an example of a job well done"<sup>215</sup> and [REDACTED];<sup>216</sup>
- Nedeljko Rašula, President of the Sanski Most Municipal Assembly<sup>217</sup> and Crisis Staff,<sup>218</sup> who [REDACTED],<sup>219</sup> [REDACTED]<sup>220</sup> and in one instance oversaw the massacre of 17 Bosnian Muslim men;<sup>221</sup>
- Simo Drljača,<sup>222</sup> the head of the Prijedor police who oversaw the notorious Omarska and Keraterm camps,<sup>223</sup> and whose subordinates participated in the massacre of approximately 200 Trnopolje detainees at Korićanske Stijene;<sup>224</sup> and
- Miroslav Deronjić, President of the SDS in Bratunac,<sup>225</sup> who on 6 May 1992 was reported within the highest circles of the Bosnian Serb leadership to be "killing all Muslims by slitting their throats" together with another Bratunac SDS representative.<sup>226</sup>

66. The record more than amply supports a conclusion within the Rule 98bis standard that the Accused possessed the requisite specific intent.

<sup>214</sup> Exh.P956, pp.17, 19.

<sup>215</sup> Exh.P11.

<sup>216</sup> [REDACTED].

<sup>217</sup> Exh.P3325; [REDACTED].

<sup>218</sup> Exh.P2614.

<sup>219</sup> [REDACTED].

<sup>220</sup> [REDACTED].

<sup>221</sup> AF1346-1349, 2541-2542; Zulić, Exh.P718, paras.75-85.

<sup>222</sup> Exhs.P2978; P4261.

<sup>223</sup> Exhs.P2640; P5528.

<sup>224</sup> AF1243-1256, 2490-2492; Exhs.P2969, P3929.

<sup>225</sup> Exh.P3204.

<sup>226</sup> Exh.P1477, p.253 (the Mladić Notebook names Roduljub Đukanović and Roduljub Deronjić as the two SDS representatives. However, the latter reference should be to Miroslav Deronjić. *See* Exh.P3204 (list of the Bratunac leadership, identifying Miroslav Deronjić as the Municipal SDS President, and Roduljub Đukanović as a member of the Bratunac SDS leadership).



67. The record also reflects the shared genocidal intent of other members of the JCE, in particular the man whom the Accused personally selected to command his military forces<sup>227</sup>—Ratko Mladić. The Accused not only selected Mladić in 1992 but continued to entrust him with carrying out the Accused's policies as the VRS carried out widespread genocidal acts.<sup>228</sup> Even after he had led the VRS in forcibly and dramatically altering Bosnia's demographics, Mladić warned that Serbs were still under threat from Muslims and Croats, and emphasised that the answer to the threat lay in their permanent destruction. Thus, in 1994 Mladić stated that this was an historical opportunity to create "[n]ot any kind of state, but an all-Serbian state [...] with [...] as little enemies as possible, those who could be our potential enemies, and raise against us in a few years" and explained that "[m]y concern is not that they will create the state. My concern is to have them vanish completely."<sup>229</sup> On another occasion in 1994, Mladić surveyed a panorama of destroyed Muslim homes in eastern Bosnia and told his companion—an ethnic Serb who had emigrated to North America—to film it to show "how we took care of the Turks," further explaining that if not for the internationals, "they (Muslims) would have disappeared from this area long ago." As Mladić explained, he routinely killed someone "in passing" when he came to Sarajevo because "who give a fuck for them (Turks)...I don't know whether you kill that kind over there in Canada and America, you ought to kill these Ustasha there..."<sup>230</sup>

## **2. The totality of the evidence confirms the Accused's and other JCE members' genocidal intent**

68. Beyond the evidence cited above, considerable additional evidence supports the conclusion that the Accused and other JCE members had genocidal intent. Tribunal case law establishes a number of accepted indicators of genocidal intent, such as the general context of crimes directed at the protected group,<sup>231</sup> the scale of atrocities,<sup>232</sup> the general nature of atrocities,<sup>233</sup> the repetition of discriminatory acts,<sup>234</sup>

<sup>227</sup> Exh.P970, p.317.

<sup>228</sup> E.g. AF1946-1947, 2446-2447 (describing the involvement of VRS soldiers in the massacre of 77 Muslim civilians at the Velegići School in Ključ); AF1056-1059, 1061-1062 (describing VRS involvement in the killings in Kozarac and Hambarine in Prijedor); AF930, 2439 (describing VRS involvement in the killing of 144 people in Biljani).

<sup>229</sup> Exh.P1385, pp.47-49.

<sup>230</sup> Exh.P4442.

<sup>231</sup> *Seromba* AJ, para.176; *Stakić* AJ, para.53; *Krstić* AJ, para.33.

<sup>232</sup> *Seromba* AJ, para.176; *Muhimana* TJ, para.516.

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the deliberate choice of victims because of their membership in a certain group,<sup>235</sup> the exclusion of members of other groups,<sup>236</sup> and the long-term impact of the elimination of certain group members on the survival of the larger community, particularly when coupled with the forcible transfer of other members.<sup>237</sup> In addition, genocidal intent can also be inferred from the occurrence of acts which target the very foundation of the protected groups, such as repeated rape and sexual assault, the destruction of religious sites and homes or targeting leaders for death and slander.<sup>238</sup> Many, if not all, of these indicators of genocidal intent, are present in this case.

(a) Scale and repetitiveness of genocidal and culpable acts

69. In this case, genocidal intent can be readily inferred from the scale, repetitiveness and nature of genocidal and other culpable acts occurring in the Municipalities.<sup>239</sup> Across the Municipalities, Serb Forces systematically and repeatedly subjected the entire Bosnian Muslim and Bosnian Croat population to genocidal and other culpable acts,<sup>240</sup> killing thousands, inflicting serious bodily and mental harm on thousands more, and detaining thousands of Group members in life-threatening conditions, often in lieu of allowing or forcing members of the Groups to leave.<sup>241</sup>

70. From April 1992, Serb Forces attacked Bosnian Muslim and Bosnian Croat villages, in some cases separating the men from women and children and carrying out a series of large-scale executions, a process which left thousands dead. With respect to Zvornik, there is evidence showing that thousands of Bosnian Muslim civilians

<sup>233</sup> *Seromba* AJ, para.176.

<sup>234</sup> *Seromba* AJ, para.176.

<sup>235</sup> *Seromba* AJ, para.176.

<sup>236</sup> *Seromba* AJ, para.176.

<sup>237</sup> *Krstić* AJ, paras.28, 31.

<sup>238</sup> See *Stakić* AJ, paras.53, 55; *Seromba* AJ, para.176; *Jelišić* AJ, para.47; *Karadžić and Mladić* R61 Decision, para.94.

<sup>239</sup> *Sikirica* R98bis Decision, paras.46, 61 (persecutory acts); *Krstić* AJ, para.33 (acts beyond just underlying acts of genocide); *Seromba* AJ, para.176 (scale and nature); *Muhimana* TJ, para.516 (scale).

<sup>240</sup> *Below* para.105. The widespread and systematic nature of the acts perpetrated against protected groups is indicative of genocidal intent: *Akayesu* TJ, para.523 (hard copy); also *Musema* TJ, para.166; *Rutaganda* TJ, paras.61, 398; *Bagilishema* TJ, para.62; *Sikirica* TJ, paras.46, 61 (wide-spread perpetration of acts). *Sikirica* TJ, paras.46, 61; *Kayishema and Ruzindana* TJ, para.93 (methodical planning). *Sikirica* TJ, paras.46, 61 (systematic killing and disposal of bodies).

<sup>241</sup> E.g. AF553, 669, 752, 754, 757, 813, 1053-1055, 2694, 2698; [REDACTED]; KDZ239, Exh.P3336, p.61 (*Krnojelac*, T.1240) (three brothers escaped to Montenegro, brought back, one evening called out of camp, never seen again).

were killed beginning in April 1992, many through a series of mass executions; their bodies were systematically collected and buried in mass graves, and traces of the executions were eliminated.<sup>242</sup> With respect to Prijedor, there is evidence that more than five thousand Bosnian Muslim and Bosnian Croat civilians were killed from April 1992 onwards.<sup>243</sup> Many were also killed in Bratunac,<sup>244</sup> Foča,<sup>245</sup> Ključ,<sup>246</sup> Sanski Most<sup>247</sup> and Vlasenica.<sup>248</sup>

71. During some attacks and killings, the perpetrators took extra steps to ensure there were no survivors, including by going body to body, firing a shot into the head of anyone showing signs of life.<sup>249</sup>

72. Bosnian Serb forces also condemned thousands of members of the Groups to brutal conditions in overcrowded detention centres and camps. Many hundreds of

<sup>242</sup> AF2742-2744, 2750, 2756, 2762; KDZ023, Exh.P65, pp.3-6, 9, 15-33 (*S.Milošević*, T.26118-26121, 26124, 26130-26132) Exh.P2919, pp.6-8; [REDACTED]; Panić, T.19142; Panić, Exh.P3380, pp.33, 36 (*Stanišić & Župljanin*, T.2899, 2902); Exh.P4842. Also Exh.P99; [REDACTED]; Exh.P70, pp.12-17; Krupinac, Exh.P64, pp.3-5; [REDACTED].

<sup>243</sup> Exh.P1483 (Mladić's Notebook), pp.154-155 – the Tomasica mine contained thousands of bodies and the authorities sought Mladić's input on the best way to conceal them. AF1039-1040, 1048, 1053, 1055-1059, 1061, 1063-1064, 1067-1071, 1074-1085, 1186-1188, 1220-1222, 1242, 1253-1256, 2490; [REDACTED]; Atlja, Exh.P3672, pp.13-16, 24-26, 37-74, 84-85 (*Stakić*, T.5555-5558, 5566-5568, 5579-5616, 5639-5640). Also Mesanović, Exh.P3528, paras.25-26, 29-33, 43-48, 65; Mesanović, T.19850-19855; [REDACTED]; KDZ092, Exh.P703, pp.26-30 (*Stakić*, T.3937-3949); [REDACTED]; KDZ014, Exh.P674, pp.16-35, 58, 71-74 (*Stakić*, T.5729-5748, 5771; *Brdanin*, T.12544-12547); [REDACTED].

<sup>244</sup> E.g. AF2316-2321, 2328; Talović, Exh.P3188, paras.20-25, 31-38; Talović, T.17640-17641.

<sup>245</sup> E.g. AF759, 761, 765, 2398-2401.

<sup>246</sup> AF922-930, 2437-2439; KDZ056, Exh.P686, pp.10-11, 13, 15, 18-21, 30-34 (*Brdanin*, T.10341-10342, 10344, 10346, 10349-10352, 10361-10365); [REDACTED].

<sup>247</sup> E.g. AF1303-1319, 1330, 1348, 2532, 2541; Begić, Exh.P691, pp.14, 21-33 (*Krajišnik*, T.2973, 2980-2992); [REDACTED]; Zulić, Exh.P718, paras.36, 72, 77-81, 84-85; Zulić, T.1029-1030; KDZ052, Exh.P3370, pp.15, 20-24, (*Brdanin*, T.8058, 8063-8067); Stojić, Exh.P3515, pp.15-18 (*Brdanin*, T.6775-6778); Exh.P3599.

<sup>248</sup> AF2695-2698, 2701-2702, 2717, 2719-2720; Hodžić, Exh.P3285, paras.2-3, 27-36, 38, 40-45; [REDACTED]; Hodžić, T.18430-18435; [REDACTED]; Džafić, T.18173-18176; Džafić, Exh.P3263, paras.10-11, 13, 15, 17, 22-23; KDZ603, T.18132-18135; Osmanović, Exh.P3212, pp.20-23, 33-38.

<sup>249</sup> BiH *Trbić* Judgement, para.824 ("targeting of survivors" as indicator of intent). E.g. [REDACTED]; KDZ048, Exh.P678, pp.46-59 (*Stakić*, T.3357-3370) (Omarska 180 detainees from Hambarine killed, went from one to the next shot in the head); KDZ052, Exh.P3370, pp.21-23 (*Brdanin*, T.8064-8066) (20 unarmed men from Kenjari/Blaževići, Sanski Most led into house, explosives thrown in, those trying to escape shot, bodies taken inside and burned with house); AF1254-1255 (200 detainees from Trnopolje killed at Mt. Vlasić, grenades thrown after the bodies to ensure no survivors); AF2701-2702 (Vlasenica Police station detainees, Nova Kasaba); AF2719 (Vlasenica: all remaining Sušica camp detainees (140-150) killed methodically). Also KDZ056, Exh.P686, p.15 (*Brdanin*, T.10346) (Prhovo, Ključ); Talović, Exh.P3188, para.34 (Bratunac: orders to "kill them all" during attack on Glogova. 18 men and two children of only 11 and 13 years of age were all lined up and shot).

them were killed in these camps in the Municipalities.<sup>250</sup> Those who were not killed were detained without the basic provisions necessary to sustain life. Many were starved, dehydrated, suffocated, beaten and made ill during detention, conditions which were reflected in severe weight loss, debilitation and illness.<sup>251</sup>

(b) The nature of the genocidal and culpable acts, including acts targeting the very foundation of the Groups

73. The level of brutality, methods employed and *animus* exhibited also support an inference of genocidal intent.<sup>252</sup> Across the Municipalities and detention facilities, brutality was commonplace.<sup>253</sup> For example, at Omarska camp in Prijedor, prisoners were severely beaten with iron bars, heavy electric cable and sticks embedded with nails to pierce the skin. Teeth, skin and blood remained on the floor after these beatings.<sup>254</sup> On one occasion, prisoners at Omarska were pushed into a bonfire as part of a celebration.<sup>255</sup> On another, over 150 men were executed.<sup>256</sup> Heaps of dead bodies routinely piled up outside the White and Red Houses at the camp,<sup>257</sup> which were then taken away in trucks.<sup>258</sup> At Čelopek Dom in Zvornik, some detainees were assaulted with spiked metal bars and chains. One detainee had his ear cut off and two men were sexually mutilated. Others were forced to beat each other and to eat the severed body

<sup>250</sup> Zvornik: AF2744, 2749-2750, 2752-2756; [REDACTED]. Prijedor: AF1174, 1178-1179, 1181-1191, 1209, 1215-1222; Tači, Exh.P693, pp.13-17, 27-28, 31-32 (*Kvočka* T.3766-3770, 3780-3781, 3784-3785); KDZ093, Exh.P705, pp.36-41, 54-55, 58 (*Kvočka* T.6231-6236, 6249-6250, 6253); [REDACTED]; KDZ048, Exh.P678, pp.46-60, 156, 168-169, 172-173, 180-181 (*Stakić*, T.3357-3371, 3484, 3496-3497, 3500-3501, 3508-3509). Bratunac: AF2328; [REDACTED]. Also Exh.P1477, p.253. Foča: AF878-901, 2402-2404; KDZ239, Exh.P3336, pp.33, 40-41, 54-87, 126-139 (*Krnjelac*, T.1212, 1219-1220, 1233-1266, 1306-1307, 1314-1317); KDZ239, [REDACTED], 18935, 18978-18981, 18999-19001, 19008. Also Exh.P3351; KDZ017, Exh.P3568, pp.51-63, 111-120, 159, 189-209 (*Krnjelac*, T.2818-2830, 2879-2887, 2926, 2956-2976); KDZ017, T.19900-19905. Ključ: AF946-947, 2446-2447. Also [REDACTED]; Exh.P1157, pp.84-93. Vlasenica: Osmanović, T.17940; Osmanović, Exh.P3212, pp.15-20, 22-23; AF2700, 2702, 2717-2720; Exh.P3261; Džafić, Exh.P3263, paras.33-66; [REDACTED]. Sanski Most: AF1346-1349, 2541-2542; Zulić, Exh.P718, paras.75, 77-81, 84.

<sup>251</sup> Above paras.44-50.

<sup>252</sup> E.g. *Kayishema and Ruzindana* TJ, paras.93, 537 (weapons employed and methods used), BiH *Trbić* Judgement, paras.815 (“persecutory cruelty”), 821 (“weapons employed”).

<sup>253</sup> See Grounds 1B and C. Also *Kayishema and Ruzindana* TJ, paras.93, 537 (weapons employed and methods used), BiH *Trbić* Judgement, paras.815 (“persecutory cruelty”), 821 (“weapons employed”). E.g. AF1215-1219 (Bosnian Serb army personnel massacred at least 190 Bosnian Muslims in Room 3 at Keraterm using heavy weaponry).

<sup>254</sup> AF1177.

<sup>255</sup> KDZ048, Exh.P678, pp.46-59 (*Stakić*, T.3357-3370).

<sup>256</sup> KDZ093, Exh.P705, pp.37-38 (*Kvočka*, T.6232-T.6233).

<sup>257</sup> AF1173-1181.

<sup>258</sup> [REDACTED]; Mesanović, Exh.P3528, para.50.

parts. Across the detention centres, many prisoners there were executed outright.<sup>259</sup> In one case, even dead bodies of members of the Groups were abused and defiled.<sup>260</sup> Thousands were exposed to such cruelty while they were held in inhuman, unhygienic conditions, where disease was rife and provided inadequate food and water.<sup>261</sup>

74. Religious or national *animus* routinely accompanied the acts of abuse.<sup>262</sup> In some instances, religious symbols were carved into bodies of detainees,<sup>263</sup> and in others Bosnian Muslims were forced to contravene their own religious tenets.<sup>264</sup> Immediately following attacks, religious property and symbols were systematically destroyed in order to eliminate any trace of the Groups' presence and history in those areas.<sup>265</sup>

75. Sexual violence, striking at the very core or foundation of the Groups,<sup>266</sup> was repeatedly perpetrated against women across detention facilities and camps.<sup>267</sup> Some were raped so often that they could not tell how many times it had occurred. One woman estimated that during her 40 day detention in Foča, she was raped approximately 150 times.<sup>268</sup> [REDACTED].<sup>269</sup> [REDACTED].<sup>270</sup> It is axiomatic that

<sup>259</sup> AF2745-2747, 2749.

<sup>260</sup> E.g. AF1185 (following the mass execution of 180 prisoners at Omarska, one soldier was seen firing rounds into the dead bodies).

<sup>261</sup> See Section II.C.

<sup>262</sup> E.g. KDZ093, Exh.P705, pp.16, 37 (*Kvočka*, T.6203, 6232); KDZ050, Exh.P680, p.14 (*Sikirica*, T.2508) (At Omarska, the guards would curse their "balija" and "Ustasha" mothers and threaten to kill them.); [REDACTED]; Merdžanić, Exh.P3881, pp.24-25 (*Stakić*, T.7737-7738); [REDACTED].

<sup>263</sup> E.g. [REDACTED]; AF1095.

<sup>264</sup> E.g. [REDACTED]. Radić, Exh.P11, p.2 (*Krajišnik*, T.7437-7438) (Radić visited Omarska as part of an official RS delegation and observed civilians confined in conditions that were clearly inappropriate for human beings being forced to sing Serbian national songs, which he thought "amounted to psychological and mental abuse.")

<sup>265</sup> Riedlmayer, Exhs.P4069-4070; AF911-913 (Foča); AF951-952, 2450-2451 (Ključ); AF1358, 2547-2548 (Sanski Most); AF1024, 1266, 1282-1293; K.Mesanović, Exh.P3528, paras.3, 67; Atljija, Exh.P3672, p.53 (*Stakić*, T.5595); (Prijedor: police radio references to destroying mosques and everything that belonged to "balijas", as well as the need to destroy the "balijas" themselves); AF2330-2331 (Bratunac); AF2768 (Zvornik); Radić, Exh.P1, pp.106-109, 111-113 (*Krajišnik*, T.7468-7471, 7473-7475); Merdžanić, Exh.P3880, pp.221-223 (*Stakić*, T.7856-7859).

<sup>266</sup> Acts striking at the very core or foundation of a protected group can indicate genocidal intent: *Karadžić and Mladić* R61 Decision, para.94; *Musema* TJ, paras.933-934; *Seromba* TJ, para.320; *Akayesu* TJ, para.524 (hard copy).

<sup>267</sup> AF787, 792-794, 797, 800, 803-812, 814, 819, 821 (Foča); AF1167-1168, KDZ093, Exh.P705, pp.34-35 (*Kvočka*, T.6229-6230) (Omarska); AF1213, KDZ093, Exh.P705, p.11 (*Kvočka*, T.6198) (Keraterm); AF1238-1241; [REDACTED] (Trnopolje); [REDACTED] (Zvornik). Atljija, Exh.P3672, p.85 (*Stakić*, T.5640) (in Briševo, a Croat village in Prijedor, women were taken to a house, where they were raped and abused), also p.68 (*Stakić*, T.5610) (the witness saw the body of woman who had been raped and beaten to death in the attack on the village).

<sup>268</sup> AF792-794.

rape has a profound effect not only on its direct victims but on their families<sup>271</sup> and ultimately—when many women are raped or subjected to sexual violence—on the entire community.<sup>272</sup>

(c) Genocidal and culpable acts were directed against and impacted virtually all members of the Groups in the Municipalities

76. Bosnian Serb forces victimised virtually all members of the Groups, regardless of sex, age or vulnerability.<sup>273</sup> Children as young as 11 years old were lined up and shot along with the adults.<sup>274</sup> Girls as young as 12 years old were raped in Trnopolje camp.<sup>275</sup> Women and children were separated from their husbands and fathers, and forced from their homes.<sup>276</sup> In addition, only members of the Groups were targeted, to the exclusion of Serbs (with the exception of a number of supporters of the Groups).<sup>277</sup>

<sup>269</sup> [REDACTED].

<sup>270</sup> [REDACTED].

<sup>271</sup> E.g. [REDACTED]; KDZ093, Exh.P705, pp.41-42 (*Kvočka*, T.6236-6237) (“I have to say that in 1992, my life stopped. First of all, I don’t feel like a woman anymore.”), p.59 (*Kvočka*, T.6254); [REDACTED]; Atljija, Exh.P3672, p.85 (*Stakić*, T.5640) (woman raped and abused in house in Briševo, in terrible state, some of them wished to kill themselves).

<sup>272</sup> See Ibrahimović, T.26683 (speaking of damage to families and therefore community from mass trauma in general). Also *Akayesu* TJ, paras.731-732 (hard copy) “Sexual violence was a step in the process of destruction of the [...] group – the destruction of the spirit, of the will to live, and of life itself.” Compare [REDACTED].

<sup>273</sup> See *Kayishema* TJ, para.532; BiH *Trbić* Judgement, para.823. KDZ048, Exh.P678, T.3369-3370 (women disappeared from Omarska, found in mass graves); Atljija, Exh.P3672, T.5587-5610, AF1090-1091 (Prijevor: Briševo attack - 14 women killed. One elderly man was forced to take his clothes off, was hit by a bible and then shot in the head); AF787, 792-794, 797, 800, 803-812, 814, 819, 821 (women and girls raped); AF2437-2438 (Prhovo, Sanski Most, commander ordered that the village be set on fire and the women and children be killed); AF940 (Ključ: 16 year old beaten); AF1308-1313, 2554 (Sanski Most, Hrustovo at least 15 members of Merdanović family in garage, only one was a man, the rest were women and children), AF2317 (Bratunac: Hranča attack, villagers killed including 6 year old girl); AF832, 1117, 1119, 1122, 1167-1168, 1170, 1182-1183, 1213, 1125, 2710 (all age ranges at camps, both genders and mentally impaired, all abused); Avdićpahić, Exh.P70, pp.11-12 (an old man died from beating in Ekonomija, Zvornik).

<sup>274</sup> E.g. Talović, Exh.P3188, paras.35-37; T.17640. The massacre in the garage at Hrustovo killed children aged one and three years: Exh.P4853, pp.45-47.

<sup>275</sup> E.g. AF1238-1241 (Trnopolje, counseling and treatment of rape victims, some as young as 12 years old); KDZ093, Exh.P705, T.6198-6199.

<sup>276</sup> E.g. AF551, 633, 757, 767, 953, 1303, 2321, 2356, 2401, 2772.

<sup>277</sup> See *Seromba* AJ, para.176. E.g. AF563 (Manjača held almost exclusively civilians of Bosnian Muslim and Bosnian Croat ethnicity), AF772 (Foča: restrictions on movement not imposed on Serbs); AF783-784 (Foča: Muslims and some Serbs arrested in centre of Foča – Serbs then released, Muslims held); AF841-856 (KP Dom conditions imposed on non-Serbs only, Serb prisoners well looked after – got heating in winter, not in cramped conditions, no weight loss for them); AF1267, 1272-1273, 1279 (Prijevor: care taken not to damage Serb property).

77. For example, in just a few months, virtually every Bosnian Muslim had been killed, detained in destructive conditions or expelled through force and fear from Serb-held territory in Zvornik,<sup>278</sup> and most of Zvornik's Muslim monuments had been damaged or destroyed.<sup>279</sup> After a brutal campaign of killings, detentions and expulsions in Vlasenica, on the night of 30 September 1992, MUP officers took away all 140-150 prisoners remaining at Sušica Camp and executed them. Around the same time, the last few Muslims living in the Vlasenica area, including an elderly woman, were killed; only a tiny handful from mixed marriages survived.<sup>280</sup> In Prijedor, in addition to the thousands of members of the Groups killed or subjected to serious bodily or mental harm and destructive conditions of life in detention facilities,<sup>281</sup> many thousands more were expelled or fled in fear,<sup>282</sup> while Prijedor's mosques and Catholic churches were systematically destroyed.<sup>283</sup>

78. In addition to religious property and symbols, other property, including the homes<sup>284</sup> and the livelihoods of members of the Groups, was systematically destroyed in order to eliminate any trace of the Groups' presence and history in those areas.<sup>285</sup>

(i) Group members essential for survival were singled out for particularly harsh treatment

<sup>278</sup> [REDACTED]. Panić, T.19139 (estimating that the Muslim population had been completely moved out of the Serbian Municipality of Zvornik by approximately the end of June); Exh.P2955, p.1 (on 17 December 1992, the Drina Corps Chief of Operations and Training reported that "with the arrival of paramilitary organisations to the Zvornik municipality, particularly the arrival of Arkan and his people, this territory was liberated from the Turks. Turks made up 60% of the municipality's population and it has now been cleansed and replaced with an ethnically pure Serb population.").

<sup>279</sup> AF2768.

<sup>280</sup> Above para.70.

<sup>281</sup> Above paras.36, 45-47, 70. Also e.g. AF1117 (Omarska held up to 3,000 prisoners at a time).

<sup>282</sup> E.g. AF1295, 1297, 2493; Exh.P10 (a May 1993 Banja Luka SJB report indicating that 42,000 Muslims and 2,000 Croats had "moved out" of the municipality), Exh.P3701 (in relation to pre-war populations of approximately 49,000 Muslims and 6,000 Croats).

<sup>283</sup> Above fn.265.

<sup>284</sup> AF752, 754, 761, 813, 902-910 (Foča); AF2694, [REDACTED] (Vlasenica – orders to destroy Muslim homes), AF948-950, 2448, (Ključ - on orders, 3,500 Muslim homes either completely destroyed or heavily damaged by fire), AF1036-1037, 1045, 1265, 1277, 1280-1281 (Prijedor); AF1357 (Sanski Most); AF2319-2320, 2329, 2331, 2316 (Bratunac).

<sup>285</sup> Riedlmayer, Exhs.P4069-4070; AF911-913 (Foča); AF951-952, 2450-2451 (Ključ), AF1358, 2547-2548 (Sanski Most), AF1024 (police radio references to destroying mosques and everything that belonged to "balijas", as well as the need to destroy the "balijas" themselves), 1266, 1282-1293, Mesanović, Exh.P3528, paras.3, 67, Atlija, Exh.P3672, p.53 (Stakić, T.5595) (Prijedor); AF2330-2331 (Bratunac); AF2768 (Zvornik); Radić, Exh.P1, pp.105-108, 110-113 (Krajišnik, T.7468-7471, 7473-7475); Merdžanić, Exh.P3881, pp.135-136 (Stakić, T.7856-7859).

79. Targeting a group's leadership figures has a recognised and predictable impact on the survivability of the group.<sup>286</sup> Bosnian Muslim and Bosnian Croat leadership figures were singled out for particularly sadistic violence and were often beaten to death or killed outright,<sup>287</sup> attacks that were advocated by a high-ranking RS official in the presence of the Accused.<sup>288</sup>

80. Beyond the targeting of those whose positions and authority rendered the community more vulnerable as a result of their loss, the separation of the men from their families, their life-threatening detention, their deaths and unknown fate all have a predictable and long-term impact on the survival of the Group.<sup>289</sup> In many instances the men and women from the Groups were separated,<sup>290</sup> leaving the women expelled from their homes and unprotected, fending for themselves in a patriarchal society.<sup>291</sup> Those separated from their families and expelled from the area faced life alone as refugees in another area or country, traumatised by the worry and fear of what had happened to their loved-ones.<sup>292</sup>

(ii) The acts had a destructive impact on the Groups in the Municipalities

<sup>286</sup> See Jelisić TJ, para.82; Brdanin R98bis Decision, para.54 citing Krstić TJ, para.595; Sikirica R98bis Decision, para.81.

<sup>287</sup> KDZ048, Exh.P678, pp.54-58 (Stakić, T.3365-3369); [REDACTED] (Bratunac); AF1025, 1119-1121, 1191, 1321, 2530, 2546, 2558; [REDACTED], Exhs.D470, P2589, para.96, P2732, P2769, P3928 (Sanski Most); AF2700, [REDACTED] (Vlasenica); [REDACTED] (Zvornik); AF941 (Ključ); Mesanović, Exh.P3528, paras.31, 33, 47, T.19850-19852; [REDACTED] (Omarska, Prijedor); KDZ239, Exh.P3336, pp.88-89 (Krnjelac, T.1267-1268) (Foča).

<sup>288</sup> Exh.P956, pp.17, 19.

<sup>289</sup> See Krstić TJ, para.595, Krstić AJ, paras.26-28.

<sup>290</sup> E.g. AF757-759, 767, 2401 (Foča); AF1303, KDZ052, Exh.P3370, p.15 (Brdanin, T.8058) (Sanski Most); AF953-954 (Ključ); AF2772, KDZ023, Exh.P65, pp.15-17 (S.Milošević, T.26130-26132), [REDACTED], Panić, Exh.P3380, pp.33, 36 (Stanišić & Župljanin, T.2899, 2902), [REDACTED] (Zvornik); KDZ603, [REDACTED], T.18132-18135 (Vlasenica). Also AF551.

<sup>291</sup> See Blagojević TJ, paras.674-675 ("shows the intent to segregate the community and ultimately to bring about the destruction").

<sup>292</sup> E.g. Bišćević, Exh.P135, pp.86-89 (Brdanin, T.7095-7098), from Sanski Most, lost two of his sons while they were being transported to Manjača camp (Schedule C.1.2) and they have been missing ever since. During his testimony in a prior case, Mr. Bišćević appealed for assistance in locating their remains; KDZ093, Exh.P705, pp.41-42, 59 (Kvočka, T.6236-6237, 6254)—her husband last seen at Omarska being threatened by a guard. She has registered him as missing with the ICRC. "I'm still waiting for their answer." Osmanović (T.17949-17950; Exh.P3212, para.193) is still searching for 33 members of his family, including his two brothers and his 16 year old sister. [REDACTED].



81. The resultant destruction of the genocidal and culpable acts is illustrated by the experiences of individual witnesses. For example, [REDACTED].<sup>293</sup>

82. KDZ093 was gang-raped at both Keraterm and Omarska camps in Prijedor. Her husband was also held in Omarska and she understands that he was killed there. She has registered him with the ICRC as missing. “I’m waiting for their answer.” She explained the impact of these events on her life: “I have to say that in 1992, my life stopped. First of all, I don’t feel like a woman anymore.”<sup>294</sup>

83. [REDACTED].<sup>295</sup>

(d) Other trial chambers have concluded that similar evidence provides an inference of genocidal intent

84. While not binding on the Chamber, it is nonetheless significant that other trial chambers, faced with overlapping and/or very similar evidence at the Rule 98bis stage, have found that genocidal intent could be inferred.<sup>296</sup> In particular, the *S.Milošević* Trial Chamber specifically relied upon statements by the Accused to support findings of genocidal intent.<sup>297</sup> Further, the *Stakić* Appeals Chamber, referring to evidence of, *inter alia*, widespread attacks involving killings, beatings and destructive conditions of life and “acts target[ing] the foundation of [the Groups’] identities,” found that this evidence “without question, [...] could, in principle, be taken as evidence that the Appellant intended to destroy the Bosnian Muslim group in part”.<sup>298</sup> Each of these factors is present in this case and established on the evidence before the Chamber and further supports the direct and other evidence of the Accused and other JCE members’ intent, particularly in the context of Rule 98bis.

<sup>293</sup> [REDACTED].

<sup>294</sup> KDZ093, Exh.P705, pp.11, 34-35, 41-42, 59 (*Kvočka*, T.6198, 6229-6230, 6236-6237, 6254).

<sup>295</sup> [REDACTED]. *Also e.g.* KDZ052, T.19084, the sole survivor of a massacre in Blaževići (Sanski Most) (Schedule A.12.3) lost three or four close relatives in 1992 and too many friends and neighbours to count. Sead Hodžić, T.18435-18436, described the effect on him of losing 28 family members in the Zaklopača massacre as “very profound”, explaining that “to this very day images keep coming back to me”. He had to leave his country to live far away in order to keep the events at a distance. [REDACTED]. Osmanović, T.17940, 17949-17950; Exh.P3212, para.193, was a victim from Vlasenica who survived 14 months’ detention and mistreatment at four different detention facilities. He also lost two brothers and his sixteen-year-old sister, all of whom were killed in 1992. He is still searching for 33 missing members of his extended family.

<sup>296</sup> *E.g.* *Stakić* R98bis Decision, paras.31-35; *Brdanin* R98bis Decision, para.60; *S.Milošević* R98bis Decision, paras.238-246; *Krajišnik* R98bis Decision, T.17120-17122, 17131-17132.

<sup>297</sup> *S.Milošević* R98bis Decision, paras.241, 245-246, 288-289.

<sup>298</sup> *Stakić* AJ, paras.53, 56.

85. Indeed, any number of indicators and factors, such as the direct evidence of the Accused's intent, would be individually sufficient for a reasonable trial chamber to find the requisite intent at the Rule 98bis stage. Taken collectively, they form a more than sufficient basis to allow a reasonable trial chamber to make such a conclusion and the Judgement's finding to the contrary was erroneous.

**B. The Chamber erred in failing to correctly analyse whether genocidal intent was established within the framework of JCE I (Grounds 2A and 2B(ii))**

86. The Chamber failed to properly analyse the Accused and other JCE members' intent within the framework of JCE I liability. The Chamber erred in law by requiring genocidal intent on the part of the physical perpetrators and/or by failing to assess the intent of the Accused and other JCE members, separate from its analysis of the physical perpetrators' intent. Alternatively, the Chamber impermissibly weighed the evidence before it and failed to take the evidence at its highest.

87. The Chamber's analysis appears to be grounded in a misconception that proof of genocidal intent on the part of the physical perpetrators of the underlying acts of genocide is a legal requirement for a genocide conviction. The Chamber began its analysis of *mens rea* by focusing on the intent of the physical perpetrators.<sup>299</sup> While considering whether genocidal intent can be inferred from the events on the ground or established at the level of the physical perpetrators can be relevant in assessing the Accused's intent, the Chamber never stated that it was looking at the physical perpetrator's intent in order to assess the Accused's intent and never looked at the intent of other relevant individuals, such as other alleged JCE members.<sup>300</sup>

<sup>299</sup> Judgement, T.28768. In its prior discussion of the *actus reus* of genocide under Count 1, the Chamber also did not limit itself to an assessment of whether the physical perpetrators carried out the *actus reus* of genocide under Article 4(2)(a)-(c), but also examined their *mens rea*. In assessing the underlying act of killing members of the Groups, the Chamber noted that, although it had found evidence that Bosnian Serb forces had killed members of the Groups on a large scale "with the intent to kill with persecutory intent" it concluded that the evidence did not support an inference that members of the Groups "were targeted for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such" (Judgement, T.28764-28765). Similarly, for serious bodily or mental harm, the Chamber held that, although Bosnian Serb forces caused serious bodily or mental harm to many members of the Groups, the evidence did not support a conclusion that the harm caused "was committed with the intent to destroy those groups" (Judgement, T.28765-28766). *But above* Ground 1.

<sup>300</sup> In contrast, *see Stakić* TJ, paras.547-551, where the Chamber considered whether the evidence that was presented in that case established genocidal intent on the part of the political leadership

88. Other parts of the Judgement reinforce the conclusion that the Chamber viewed the physical perpetrators' genocidal intent as a pre-requisite. In particular, in assessing the specific intent of the physical perpetrators in Srebrenica for Count 2, the Chamber found that the physical perpetrators committed the genocidal acts "with the *requisite* specific intent."<sup>301</sup> A similar approach is apparent when the Chamber addressed the Accused's "challenge as to the lack of genocidal intent of the physical perpetrators in relation to genocide in Srebrenica under Count 2."<sup>302</sup> Rather than stating that this is not a legal requirement, the Chamber listed factors pursuant to which the intent of the physical perpetrators could be inferred,<sup>303</sup> analysed the evidence of those factors<sup>304</sup> and concluded that "[a]ccordingly ... there is evidence on which, if accepted, a reasonable trier of fact could be satisfied beyond reasonable doubt that genocide ... was carried out by Bosnian Serb forces in Srebrenica."<sup>305</sup> The Chamber then separately addressed the Accused's responsibility for genocide under Count 2<sup>306</sup> without referencing the physical perpetrators' genocidal intent among the factors relied upon.<sup>307</sup> Thus, having found that the physical perpetrators had the "requisite" intent for Count 2, the Chamber moved on to assess the Accused's intent.

89. The language of the Chamber's *mens rea* conclusions under Count 1 appears to reflect its disregard of the evidence of the Accused's genocidal intent<sup>308</sup> due to its erroneous view that the physical perpetrators must have specific intent:

*notwithstanding* the statements of the accused, there is no evidence upon which, if accepted, a reasonable trier of fact could find that the [underlying

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above Stakić from which it could infer that Stakić shared this genocidal intent; and para.555, where the Chamber considered the intent of others on the horizontal level of the municipality as indirect evidence of the Accused's intent. *Also Stakić* AJ, paras.39-40.

<sup>301</sup> Judgement, T.28757 (emphasis added).

<sup>302</sup> Judgement, T.28750, 28751.

<sup>303</sup> Judgement, T.28751.

<sup>304</sup> Judgement, T.28751.

<sup>305</sup> Judgement, T.28751.

<sup>306</sup> Judgement, T.28752-28758.

<sup>307</sup> Judgement, T.28757. Throughout the Judgement, the Chamber signaled that it was assessing perpetrator intent for reasons independent of determining the intent of the Accused. For example, the Chamber held that a reasonable trier of fact could be satisfied "beyond reasonable doubt" that Bosnian Serb forces committed unlawful detention, forced labour and forcible transfer/deportation against members of the Groups "with specific intent to discriminate against them" (T.28760). It did not refer back to this finding when it later assessed the intent of the Accused and other JCE members, and concluded that they shared the intent to carry out the JCE's objective through the commission of crimes, including persecutions (T.28770-28774).

<sup>308</sup> Alternatively, as discussed below, this language indicates an improper weighing of evidence. *Below* paras.93-97.

acts of genocide] were perpetrated with the *dolus specialis* required for genocide.<sup>309</sup>

90. The Chamber's use of the term "notwithstanding"<sup>310</sup> indicates that it considered the statements of the Accused to suggest genocidal intent on their face,<sup>311</sup> but improperly disregarded this evidence in the absence of intent on the part of the physical perpetrators.<sup>312</sup> In this context, the Chamber's conclusion that there is no evidence that underlying acts of genocide "were perpetrated with the *dolus specialis* required for genocide"<sup>313</sup> cannot be viewed as a reference to the genocidal intent of the Accused and other JCE members.<sup>314</sup>

91. The JCE I pleaded by the Prosecution in the Indictment alleges that JCE members used others to carry out the crimes forming part of the criminal objective.<sup>315</sup> These tools of the JCE, including the physical perpetrators, need not have shared this objective or the intent for the crimes it encompassed.<sup>316</sup> Although the Chamber was entitled to consider the intentions of others for the purposes of other modes of liability or as indirect evidence of the Accused and other JCE members' intent,<sup>317</sup> it erred in viewing the physical perpetrators' specific intent for genocide as a legal requirement.<sup>318</sup>

92. Furthermore, it failed to determine whether the Accused and other JCE members had genocidal intent regardless of whether the Chamber viewed the physical perpetrators' intent as a pre-requisite. The Chamber made only passing reference to the genocidal statements of the Accused and other members of the Bosnian Serb

<sup>309</sup> Judgement, T.28769 (emphasis added). The term "perpetrated" here appears to refer to physical perpetration as this was the shorthand the Chamber used for "physical perpetrators" elsewhere in the Judgement. *E.g.* Judgement, T.28749 (referring to "perpetrators" in a manner that is clearly referring to Bosnian Serb forces as physical perpetrators); T.28750 and T.28751 (noting twice the same argument raised by the Accused, first referring to the "perpetrators' intent" and then to the "intent of the physical perpetrators").

<sup>310</sup> Judgement, T.28769.

<sup>311</sup> *Above* para.59-64.

<sup>312</sup> Alternatively, as discussed below, this language indicates an improper weighing of evidence. *Below* paras.93-97.

<sup>313</sup> Judgement T.28769.

<sup>314</sup> In addition, for the reasons discussed above, the term "perpetrated" in this passage appears to be a reference to physical perpetration.

<sup>315</sup> Indictment, para.13: "[m]embers of this criminal enterprise implemented their objective [...] through and by using others to carry out crimes committed in furtherance of their objective." *Also* Indictment, para.37.

<sup>316</sup> *Brđanin* AJ, para.410. *Also* *Krajišnik* AJ, para.226.

<sup>317</sup> *Stakić* AJ, paras.39-40.

leadership and unspecified “other evidence received in relation to the accused”<sup>319</sup> without making a clear finding on his genocidal intent. It is unlikely that the Chamber would have made a finding on the specific intent of the Accused in such an ambiguous manner. Indeed, the Chamber also did not consider the intent of other relevant individuals, such as other alleged JCE members.<sup>320</sup> This contrasts with the Chamber’s explicit positive findings on the Accused’s specific intent with respect to other counts and other specific intent crimes, separate from and in addition to its findings regarding intent of physical perpetrators.<sup>321</sup> The Chamber also erred in failing to assess the Accused’s and other JCE members’ genocidal intent.

93. Alternatively, if the Chamber found that the Accused did not have genocidal intent, it erred in impermissibly weighing the evidence. While the Chamber acknowledged that it was required under Rule 98bis to take the evidence at its highest without evaluating the credibility or strength of the evidence,<sup>322</sup> the Chamber’s language strongly suggests an impermissible weighing of evidence.<sup>323</sup>

94. First, the Chamber held that “notwithstanding the statements of the accused” there is no evidence that genocidal acts were perpetrated with genocidal intent.<sup>324</sup> As argued above, the Chamber’s use of the term “notwithstanding” implies that the Accused’s statements are positive evidence of genocidal intent. If the Chamber did not disregard that evidence as argued above, it impermissibly weighed the Accused’s statements against other evidence, such that “notwithstanding” those statements, it could not conclude that the Accused acted with genocidal intent. Additionally, the Chamber considered the statements of the Accused “*in light of* the scale and context of the alleged crimes”,<sup>325</sup> further indicating that it also weighed them against other evidence.

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<sup>318</sup> Although the Chamber appears to have treated the physical perpetrators’ intent in the same erroneous manner throughout the Decision, except for Count 1, this error has no impact because the Chamber found that this unnecessary element was established for all the other counts.

<sup>319</sup> Judgement, T.28769.

<sup>320</sup> In contrast, *see Stakić* TJ, paras.547-551, where the Chamber considered whether the evidence that was presented in that case established genocidal intent on the part of the political leadership above Stakić from which it could infer that Stakić shared this genocidal intent; and para.555, where the Chamber considered the intent of others on the horizontal level of the municipality as indirect evidence of the Accused’s intent. *Also Stakić* AJ, paras.39-40.

<sup>321</sup> *E.g.* Judgement, T.28758.

<sup>322</sup> Judgement, T.28732-28733. *Also above* fn.19.

<sup>323</sup> Ground 2B(iii).

<sup>324</sup> Judgement, T.28769.

<sup>325</sup> Judgement, T.28769 (emphasis added).

95. Second, the Chamber's characterisation of statements of the Accused and other members of the Bosnian Serb leadership as "rhetorical warning of the disappearance, elimination, annihilation or extinction of Bosnian Muslims in the event that war broke out"<sup>326</sup> indicates that it failed to take evidence of genocidal intent<sup>327</sup> at its highest.<sup>328</sup> The Chamber's assertion that "according to the Prosecution, [these statements] contained rhetorical warnings..." mischaracterises the Prosecution's submissions that these statements were concrete indicators of the intent of the Accused and other JCE members.<sup>329</sup>

96. The Accused's statements provide direct evidence of the Accused's genocidal intent and are sufficient for Rule 98bis purposes.<sup>330</sup> In an analogous context, the Appeals Chamber held that the *Jelisić* Trial Chamber was not entitled to conclude at the Rule 98bis stage that allegedly contrary evidence negated direct evidence of Jelisić's genocidal intent.<sup>331</sup>

97. But for these errors, the Chamber would have concluded that the Accused and other alleged JCE members had genocidal intent for the purposes of Rule 98bis. As discussed above, there is ample evidence of that intent to satisfy the Rule 98bis standard.

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<sup>326</sup> Judgement, T.28769.

<sup>327</sup> Above paras.56-83.

<sup>328</sup> Also above paras.61-63.

<sup>329</sup> E.g. Prosecution R98bis Submissions, T.28706 ("In the months leading up to the conflict, he threatened that Bosnian independence would result in the destruction of thousand [sic] of Muslims to the extent that the Muslim people would disappear"); T.28707 ("The accused's statements both during and after the commission of these crimes demonstrate his approval and encouragement of these crimes as part of a process of 'eliminating Bosnian Muslims and Croats'."); T.28709 ("Long before the conflict broke out, the accused acknowledged that the destruction, the physical destruction, of Muslims and Croats would be a means to achieve his goals. He repeatedly threatened the Bosnian Muslim and Croat groups with extinction if the circumstances, as he viewed them, required the use of force by the Bosnian Serbs."); T.28711 ("And as events marched on toward the independence of Bosnia, the accused continued to insist that physical destruction awaited those who sought it."); T.28712 ("Indeed, even after Mladić had led the VRS in forcibly and dramatically altering Bosnia's demographics, [...] Mladić continued to warn that Serbs were still under threat from Muslims and Croats. And emphasised that the answer to the threat lay in their permanent elimination."); T.28713-28714 ("Now, the accused also encouraged or authorised the elimination of Muslims and Croats by the organs under his authority and control. So, for example, at the 17th Assembly Session in July 1992, and that at -- that's a period when the violence against Muslims and Croats was particularly intense, [t]he accused stated there was 'truth' in one assembly deputy statement that: 'The Muslims have been planted to us as a people whose executioners we are to be.' [...] And the accused then added: 'This conflict was roused in order to eliminate the Muslims. They think that they are being nationally established, but, in fact, they are vanishing.'").

<sup>330</sup> There was also other evidence reinforcing this conclusion. Above paras.68-83.

<sup>331</sup> *Jelisić* AJ, paras.69-72.

98. Alternatively, the Chamber erred in law by failing to provide a reasoned opinion as to why the Accused's statements, alone or together with other evidence, could not establish genocidal intent. The Chamber's limited reasoning is unclear, ambiguous and does not clearly indicate whether it reached a conclusion that the Accused and other JCE members did not have genocidal intent, and if it did reach such a conclusion, the basis upon which it did so. Further, in addition to statements made by the Accused, the Chamber stated it considered "the other evidence received in relation to the accused",<sup>332</sup> but did not state what factors it considered.

**C. The Chamber impermissibly segmented its analysis of genocidal intent  
(Ground 3B)**

99. If the Appeals Chamber finds that the Chamber did not add unnecessary elements to the *actus reus* of genocide during its discussion of the underlying acts of genocide,<sup>333</sup> the Chamber nevertheless erred by serially considering whether genocidal intent had been established *vis-à-vis* each category of underlying acts.

100. While the cursory and imprecise nature of its conclusions again obscure the Chamber's approach,<sup>334</sup> the Chamber considered the "level" of each underlying act of genocide one at a time, in isolation from the evidence as a whole, to assess whether each category of acts supported an inference that they were committed with genocidal intent.<sup>335</sup> The Chamber erred by not holistically considering all relevant evidence of intent in relation to the Accused and other JCE members, including their statements and conduct, the totality of underlying genocidal acts and other recognised indicators of genocidal intent.

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<sup>332</sup> Judgement, T.28769.

<sup>333</sup> *Above* Ground 1.

<sup>334</sup> In particular, it is not clear whose genocidal intent is being considered in these passages.

<sup>335</sup> Judgement, T.28765: the killings did "not reach a level from which a reasonable trier of fact could infer that [...] 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." T.28766: the serious bodily or mental harm did not "support a conclusion by a reasonable trier of fact that the harm caused reached a level [...] that it was committed with the intent to destroy these groups." T.28767-28768: the conditions of detention in the scheduled detention facilities did not "reach [...] a level which could support an inference that the Bosnian Muslims and/or Bosnian Croats were detained in conditions of life calculated to bring about their physical destruction." The Chamber also appears to have focused solely on the volume of each of the genocidal acts. *Above* paras.16, 19, 26, 68.

101. Applying its serial, piecemeal approach,<sup>336</sup> the Chamber reached the erroneous conclusion that the underlying acts were not genocidal and could not support an inference of genocidal intent. If the Appeals Chamber finds that the Chamber subsequently assessed the Accused's intent,<sup>337</sup> then these errors contaminated that assessment. The Chamber's reference to "the totality of evidence which the Chamber has received with respect to the[se underlying acts]" must be understood in the context of its segmented assessment of these acts, particularly since at no point did the Chamber reveal a holistic consideration of all relevant evidence and indicators of genocidal intent.<sup>338</sup>

102. Yet it was those underlying acts as a whole, not to mention the other culpable acts, that were unleashed against the Groups by a political and military leader who had threatened the Groups with annihilation. Any effort to determine the intent of that leader or leadership must address the entirety of the crimes committed together rather than an isolated category-by-category assessment. In determining intent, the sum of isolated parts is not the same as the whole, because the underlying acts are not effected in that segmented manner. As demonstrated above in Section III.A (factual error), there was considerable direct and indirect evidence which supported the conclusion that the Accused and other JCE members had genocidal intent.<sup>339</sup>

**D. The Chamber also erred in law by incorrectly assessing the substantiality of the parts of the Groups intended for destruction (Ground 3A)**

103. In the alternative to Ground 1A, insofar as the Chamber found that a substantial part of the Groups was not targeted for destruction, this was an error. The Chamber stated that,

the evidence the Chamber received in relation to the Municipalities, even if taken at its highest, does 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.<sup>340</sup>

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<sup>336</sup> E.g. *Stakić* AJ, para.55; ICC *Second Decision on Bashir Arrest Warrant*, para.37.

<sup>337</sup> Above Ground 2A.

<sup>338</sup> T.28768-28769.

<sup>339</sup> Above paras.56-83.

<sup>340</sup> Judgement, T.28765.



104. A trial chamber has a “margin of discretion” in determining what constitutes a “substantial part” for the purposes of genocide.<sup>341</sup> At the Rule 98bis stage, the Trial Chamber should not exercise that discretion and determine whether it is satisfied beyond a reasonable doubt that a substantial part of the group was targeted. Rather, it should determine whether there is evidence falling within the broad boundaries of the discretion of a reasonable trier of fact, leaving the concrete exercise of discretion until the conclusion of the case.

105. There was sufficient evidence before the Chamber that the parts of the Groups living in the Municipalities constituted substantial parts of the Groups, whether the Municipalities are considered individually<sup>342</sup> or cumulatively.<sup>343</sup> The Chamber could not have been taking into account the broad margin of discretion involved in this determination, and therefore incorrectly applied the Rule 98bis standard.

106. In addition, if the Chamber determined that the targeted part of the Groups was not substantial, it erred in three other ways. First, it assessed the “in part” *mens rea* requirement by reference to the number of victims of killings rather than the

<sup>341</sup> *Krstić* TJ, para.590.

<sup>342</sup> See *Jelesić* TJ, para.83; *Stakić* TJ, para.523; *Sikirica* R98bis Decision, para.68. For example, at 49,351 persons, the Bosnian Muslim population of Prijedor constituted a substantial number of the Group: Exh.P4994, p.23 (Table 2).

<sup>343</sup> For example, at 162,395 persons (or 10.78% of the entire Bosnian Muslim population: see *Brdanin* TJ, fn.2440) the Bosnian Muslims in the Municipalities constituted a substantial number of the Group: see Exh.P4994, pp.29-31 (adding figures from Table 1.M); *Brdanin* TJ, para.967, fn.2440. They constituted roughly one third of the Bosnian Muslim population in the total Karadžić Indictment area of 481,109: Exh.P4994, p.29 (Table 1M). Since no census has been conducted since 1991 and the 1997 figures were calculated from the OSCE Voter Register, the figures contained in Exh.P4994 relate “[e]xclusively [to] individuals born before 1980”: Exh.P4994, pp.5-6. The municipalities were significant because they were located in strategically significant areas, for example, they were main entry points into Bosnia or were on major logistics or communications lines (Exh.P4994, pp.29-31 (Table 1.M); Exh.P956, pp.9-10, 45-47; Exh.P789, p.43; [REDACTED]; KDZ239, Exh.P3336, pp.120-121 (*Krnojelac*, T.1299-1300); KDZ239, T.18937-T.18938; [REDACTED]) and the towns within them were Bosnian Muslim or Bosnian Croat dominated (AF358, 724, 1034, 1316, 1355, 2316, 2398, 2437, 2528, 2694-2695, 2697; Zulic, Exh.P718, para.1; [REDACTED]; Banjanović, Exh.P104, p.18; Krupinac, Exh.P64, p.2; [REDACTED]; Exh.P4838; Glavas, Exh.P2296, paras.22, 24; Glavas, T.11934; KDZ017, T.19878-19879, 19907-19911; [REDACTED]; Exh.P4994, pp.32-34 (Table 1C); Atlija, Exh.P3672, pp.5-6 (*Stakić*, T.5547-5548)). Providing evidence in relation to one municipality or the collective municipalities is sufficient at the Rule 98bis stage. See *Gotovina* R98bis Decision, T.17612. Also *Lukić* R98bis Decision, T.3582; Judge Robinson’s statement in *D.Milošević* R98bis Decision, T.5640; *Prlić* R98bis Decision, T.27202, 27205-27206; *Brima* R98 Decision, para.12. Trial Chambers have only dismissed parts of counts where the Prosecution has conceded that it has not presented sufficient evidence on them (*Popović* R98bis Decision, T.21473-21474. Also *Popović* Prosecution Indictment Submission, p.1; *Martić* TJ, para.19; *Martić* R98bis Submission, T.5888-5890; *Martić* R98bis Decision, T.5960-5961, 5970-5971), and only in one such case has such a dismissal constituted an acquittal at the R98bis stage (*Orić* TJ, para.820; *Orić* R98bis Decision, T.9000-9003, 9012, 9032; *Orić* R98bis

part(s) of the Groups alleged in this case and the scope of the Accused's and other JCE members' genocidal intent. As discussed above, genocidal intent is determined by reference to all genocidal acts (rather than each individually), other culpable acts occurring within the same territory and other relevant factors.<sup>344</sup> Further, given it is not necessary to select the most efficient method of destruction to establish genocide, inferring intent by reference to the number of victims of genocidal acts is inappropriate, particularly where there is positive evidence that the continuation of acts of destruction was hampered by international attention.<sup>345</sup>

107. Second, the Chamber incorrectly identified and applied the wrong standard. It required that the parts of the Groups be substantial both quantitatively and qualitatively, because it required that they constitute "a significant section [...] and a substantial number"<sup>346</sup> of the Groups. The intention to destroy a substantial part of a group may be established by showing that, taking into account the perpetrators' area of activity and control, (i) a substantial number of members of the group were targeted, (ii) a significant section of the members of the group was targeted, or (iii) both.<sup>347</sup>

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Submission, T.8819, 8878-8879. *But see* Šešelj R98bis Decision, Dissenting Opinion of Judge Antonetti, T.16901-16908.

<sup>344</sup> Above paras.68, 99-102.

<sup>345</sup> E.g. Vulliamy, Exh.P3789, p.5, T.21056-21058, Exh.P4442 (In August 1994, Mladić declared that, although the Serbs had "thrashed the Turks" in Podrinje "they would have disappeared from this area long ago" if they had not been protected by the international community).

<sup>346</sup> Judgement, T.28765 (emphasis added).

<sup>347</sup> *Krstić* AJ, paras.8-9 (citing *Jelić* TJ, para.82; *Sikirica* R98bis Decision, paras.65, 77; *Kayishema and Ruzindana* TJ, para.97; *Bagilishema* TJ, para.64), 13-14. In its R98bis Judgement, the *Sikirica* Trial Chamber stated that a "substantial number" and a "significant section" could be alternative or cumulative, depending on the circumstances. It stated that "[i]f the quantitative criterion is not met, the intention to destroy in part may yet be established if there is evidence that the destruction is related to a significant section of the group, such as its leadership" (*Sikirica* R98bis Decision, para.76. Also *Jelić* TJ, para.82; *Stakić* TJ, para.525; *Brdanin* TJ, paras.701-703). On the other hand "there may be situations in which the inference as to the intent cannot be drawn on the basis of the evidence in relation to each element in isolation, but when [...] viewed as a whole, it would be perfectly proper to draw the inference" (*Sikirica* R98bis Decision, para.65). The *Krstić* Appeals Chamber approved of this reasoning. Each of the factors are "neither exhaustive nor dispositive" and "are only useful guidelines" (*Krstić* AJ, para.14). According to the *Krstić* Appeals Chamber "[t]he applicability of these factors, as well as their relative weight, will vary depending on the circumstances of a particular case" (*Krstić* AJ, para.14). It stated that, while "[t]he numeric size of the targeted part of the group is the necessary [...] starting point," it is not in "all cases the ending point of the inquiry" (*Krstić* AJ, para.12). If numeric size is not sufficient to establish intent to destroy a part of the group, regard should be had to the significance of the part of the group targeted.

108. Third, the Chamber failed to provide a reasoned opinion.<sup>348</sup> It should have made reference to the evidence supporting its conclusions on the “in part” requirement.<sup>349</sup> However, the Chamber did not discuss any of the constituent factors which determine whether a substantial part of a group had been targeted, such as the numerical size of the Groups in the targeted Municipalities (nor cite any relevant demographic evidence), the significance of those parts of the Groups or the perpetrators’ geographic area of activity and control.<sup>350</sup>

109. But for these errors, the Chamber would have found that the Accused and other JCE members’ genocidal intent encompassed a substantial part of the Groups.

#### **E. Remedy**

110. The Prosecution requests that the Appeals Chamber correct these errors and find that, applying the Rule 98*bis* standard, a reasonable trial chamber could conclude that the Accused and other JCE members had the intent to destroy the Groups in whole or in part.

### **IV. GROUND FOUR: THE CHAMBER ERRED IN FAILING TO CORRECTLY ANALYSE WHETHER GENOCIDAL INTENT WAS ESTABLISHED WITHIN THE FRAMEWORK OF OTHER MODES OF LIABILITY (GROUND 4)**

111. In addition to commission through JCE I, the Accused was charged with planning, ordering, instigating, JCE III and aiding and abetting under Article 7(1) and with failing to prevent or punish his subordinates’ participation in genocide under Article 7(3). Even if the Chamber was correct in finding that the elements of JCE I were not established, it should have considered whether there was sufficient evidence under the Rule 98*bis* standard to hold the Accused responsible under one of these other modes. In particular, correctly analysed, the evidence was sufficient to find that the Accused had genocidal intent, regardless of whether he participated in a JCE I. The Chamber should then have considered the corresponding modes of liability, namely planning, order and instigating genocide. Alternatively, even if the evidence

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<sup>348</sup> Above para.2.

<sup>349</sup> *Kordić* AJ, para.383. Also *Kajelijeli* AJ, para.60; *Kvočka* AJ, para.23.

<sup>350</sup> Above para.107.

was insufficient to establish the Accused's genocidal intent, it was sufficient to show that others, for example Mladić, had genocidal intent. The Chamber should then have considered the corresponding modes of liability, namely JCE III, aiding and abetting and superior responsibility.

#### **A. Planning, ordering and instigating genocide**

112. Using the Rule 98bis standard, the evidence of the Accused's acts and omissions establishes his responsibility for genocide based on one or more of the alternative modes of planning, ordering or instigating.<sup>351</sup> It is sufficient if the planner/instigator/orderer possesses genocidal intent<sup>352</sup> or, for the accessory form of this liability, that he has the awareness of the substantial likelihood that genocide would be committed in the execution of his plans, orders or instigated acts.<sup>353</sup> As found by the Chamber, the Accused issued a number of VRS directives for military operations<sup>354</sup> and "directed and encouraged Bosnian Serb political and governmental organs and Bosnian Serb forces to carry out acts [...]"<sup>355</sup> which constituted genocidal and other culpable acts.<sup>356</sup> He "disseminated and encouraged the dissemination of propaganda to Bosnian Serbs intended to engender fear and hatred of [the Groups]", which were implemented. The Accused also "failed, while under a duty to do so, to take adequate steps to ensure the Bosnian Serb political and governmental organs and Bosnian Serb forces would act to protect Bosnian Muslims and Bosnian Croats residing in areas under their control."<sup>357</sup>

#### **B. JCE III, aiding and abetting and superior responsibility for genocide**

113. Based on the evidence of the JCE members' statements and actions, or based upon the evidence from which genocidal intent can be inferred (namely the evidence set out in Section III.A(2) above), or both, a reasonable trial chamber could conclude that others, including other members of the Bosnian Serb leadership had genocidal intent. For example, as outlined above, there is evidence that Mladić had genocidal intent and thus committed genocide, for instance as a member of a JCE together with

<sup>351</sup> Also committing. *Above* fn.15.

<sup>352</sup> *Milutinović* TJ, para.181. *Also Boškoski* AJ, para.67; *Blaškić* TJ, para.282.

<sup>353</sup> *Below* para.114.

<sup>354</sup> Judgement, T.28772.

<sup>355</sup> Judgement, T.28772-28773.

<sup>356</sup> *See* Judgement, T.28773.

<sup>357</sup> Judgement, T.28773.

others, through the use of tools, or because his acts formed an integral part of the crime.

114. In addition to the evidence establishing the Accused's contributions discussed above, the Chamber found that there were "[communication] mechanisms through which the accused was informed regularly and in detail of the situation on the ground",<sup>358</sup> and, *inter alia*, that he was directing and encouraging acts in furtherance of the JCE. Furthermore, the Accused explicitly stated that perpetrators of crimes should not be punished to ensure that Serbs were "not [...] fight[ing] one another".<sup>359</sup> The Accused could foresee that the crimes falling within the common purpose of a JCE to forcibly remove the Bosnian Muslim and Bosnian Croat population might be committed with genocidal intent, and willingly took that risk. It also shows he acted with awareness that genocide would probably be committed and that his actions would aid and abet genocide, and/or that he knew his subordinates had participated or might participate in genocide and failed to prevent or punish them. Using the Rule 98bis standard, the evidence of these acts and omissions establishes the Accused's responsibility for genocide under JCE III, aiding and abetting and superior responsibility.

### C. Remedy

115. The Prosecution requests that the Appeals Chamber correct these errors and find that a reasonable trial chamber could conclude that there is evidence upon which the Accused could be liable for genocide under the other modes of liability, namely planning, ordering, instigating, JCE III, aiding and abetting or superior responsibility as appropriate.

## V. CONCLUSION

116. For the above reasons, the Appeals Chamber should reverse the Judgement, dismiss the Accused's Motion for Acquittal in full and reinstate the charges under Count 1.

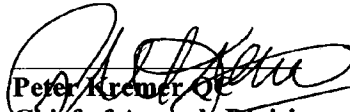
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<sup>358</sup> Judgement, T.28773-28774.

<sup>359</sup> Judgement, T.28774.

Dated this 24th day of September 2012  
At The Hague, The Netherlands



Peter Kremer, QC  
Chief of Appeals Division

## VI. GLOSSARY

### Pleadings, Orders, Decisions etc. from *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18

Abbreviation used in Prosecution Appeal	Full citation
Indictment	<i>Prosecutor v. Radovan Karadžić</i> , Case No.IT-95-5/18-PT, Prosecution's Marked-Up Indictment, 19 October 2009
Judgement	<i>Prosecutor v. Radovan Karadžić</i> , Case No.IT-95-5/18-T, Rule 98bis Judgement, 28 June 2012
Notice of Appeal	<i>Prosecutor v. Radovan Karadžić</i> , Case No.IT-95-5/18-AR98bis.1, Prosecution Notice of Appeal of Judgement of Acquittal Under Rule 98bis, 11 July 2012
Prosecution R98bis Submissions	<i>Prosecutor v. Radovan Karadžić</i> , Case No.IT-95-5/18-T, Prosecution Rule 98bis Submissions, 13 June 2012
R98bis Acquittal Certification Decision	<i>Prosecutor v. Radovan Karadžić</i> , Case No.IT-95-5/18-T, Decision on Prosecution Request for Certification to Appeal Judgement of Acquittal Under Rule 98 bis, 13 July 2012

### Other ICTY Authorities

Abbreviation used in Prosecution Appeal	Full citation
<i>Blagojević</i> TJ	<i>Prosecutor v. Vidoje Blagojević and Dragan Jokić</i> , Case No.IT-02-60-T, Judgement, 17 January 2005
<i>Blagojević</i> R98bis Certification Decision	<i>Prosecutor v. Vidoje Blagojević and Dragan Jokić</i> , Case No.IT-02-60-T, Decision on Request for Certification of Interlocutory Appeal of the Trial Chamber's Judgement on Motions for Acquittal Pursuant to Rule 98 Bis, 23 April 2004
<i>Brdanin</i> , T.	<i>Prosecutor v. Radoslav Brdanin</i> , Case No.IT-99-36-T, Transcript
<i>Brdanin</i> AJ	<i>Prosecutor v. Radoslav Brdanin</i> , Case No.IT-99-36-A, Judgement, 1 April 2007
<i>Brdanin</i> R98bis Decision	<i>Prosecution v. Radoslav Brdanin</i> , Case No.IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98 bis of

	the Rules, 28 November 2003
<i>Brđanin</i> TJ	<i>Prosecutor v. Radoslav Brđanin</i> , Case No.IT-99-36-T, Judgement, 1 September 2004
<i>Čelebići</i> TJ	<i>Prosecutor v. Zejnil Delalić et al.</i> , Case No.IT-96-21-T, Judgement, 16 November 1998
<i>D.Milošević</i> R98bis Decision	<i>Prosecutor v. Dragomir Milošević</i> , Case No.IT-98-29/1, Rule 98bis Judgement, 3 May 2007
<i>Furundžija</i> AJ	<i>Prosecutor v. Anto Furundžija</i> , Case No.IT-95-17/1-A, Judgement, 21 July 2000
<i>Gotovina</i> R98bis Decision	<i>Prosecutor v. Ante Gotovina et al.</i> , Case No.IT-06-90-T, Rule 98bis Judgement, 3 April 2009
<i>Hadžihasanović</i> R98bis Decision	<i>Prosecutor v. Enver Hadžihasanović et al.</i> , Case No.IT-01-47-T, Decision on Motions for Acquittal Pursuant to Rule 98 Bis of the Rules of Procedure and Evidence, 27 September 2004
<i>Haradinaj</i> AJ	<i>Prosecutor v. Ramush Haradinaj</i> , Case No.IT-04-84-A, Judgement, 19 July 2010
<i>Jelisić</i> AJ	<i>Prosecutor v. Goran Jelisić</i> , Case No.IT-95-10-A, Judgement, 5 July 2001
<i>Jelisić</i> TJ	<i>Prosecutor v. Goran Jelisić</i> , Case No.IT-95-10-T, Judgement, 14 December 1999
<i>Karadžić and Mladić</i> R61 Decision	<i>Prosecutor v. Radovan Karadžić and Ratko Mladić</i> , Case Nos.IT-95-5-R61 & IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996
<i>Kordić</i> AJ	<i>Prosecutor v. Dario Kordić and Mario Čerkez</i> , Case No. IT-95-14/2-A, Judgement, 17 December 2004
<i>Krajišnik</i> , T.	<i>Prosecutor v. Momčilo Krajišnik</i> , Case No.IT-00-39-T, Transcript
<i>Krajišnik</i> AJ	<i>Prosecutor v. Momčilo Krajišnik</i> , Case No.IT-00-39-A, Judgement, 17 March 2009
<i>Krajišnik</i> R98bis Decision	<i>Prosecutor v. Momčilo Krajišnik</i> , Case No.IT-00-39-A, Rule 98bis Judgement, 19 August 2005
<i>Krajišnik</i> TJ	<i>Prosecutor v. Momčilo Krajišnik</i> , Case No.IT-00-39-T, Judgement, 27 September 2006
<i>Krnojelac</i> , T.	<i>Prosecutor v. Milorad Krnojelac</i> , Case No.IT-97-25-T,



	Transcript
<i>Krstić</i> AJ	<i>Prosecutor v. Radislav Krstić</i> , Case No.IT-98-33-A, 19 April 2004
<i>Krstić</i> TJ	<i>Prosecutor v. Radislav Krstić</i> , Case No.IT-98-33-T, Judgement, 2 August 2001
<i>Kunarac</i>	<i>Prosecutor v. Dragoljub Kunara et al.</i> , Case No.IT-96-23 & 23/1-T
<i>Kvočka</i> , T.	<i>Prosecutor v. Miroslav Kvočka et al.</i> , Case No.IT-98-30/1-T, Transcript
<i>Kvočka</i> AJ	<i>Prosecutor v. Miroslav Kvočka et al.</i> , Case No.IT-98-30/1-A, Judgement, 28 February 2005
<i>Limaj</i> AJ	<i>Prosecutor v. Fatimir Limaj et al.</i> , Case No.IT-03-66-A, Judgement, 27 September 2007
<i>Lukić</i> R98bis Decision	<i>Prosecutor v. Milan Lukić and Sredoje Lukić</i> , Case No.IT-98-32/1, Rule 98 bis Judgement, 13 November 2008
<i>Martić</i> R98bis Decision	<i>Prosecutor v. Milan Martić</i> , Case No.IT-95-11-T, Rule 98bis Judgement, 3 July 2006
<i>Martić</i> R98bis Submission	<i>Prosecutor v. Milan Martić</i> , Case No.IT-95-11-T, Rule 98bis Oral Submissions, 26 June 2006
<i>Martić</i> TJ	<i>Prosecutor v. Milan Martić</i> , Case No.IT-95-11-T, Judgement, 12 June 2007
<i>Milutinović</i> Jurisdiction Decision	<i>Prosecutor v. Milan Milutinović et al.</i> , Case No.IT-99-37-AR72, Decision on Dragoljub Odjanić's Motion Challenging Jurisdiction–Joint Criminal Enterprise, 21 May 2003
<i>Mrkšić</i> AJ	<i>Prosecutor v. Mile Mrkšić and Veselin Šljivančanin</i> , Case No.IT-95-13/1-A, Judgement, 5 May 2009
<i>Mrkšić</i> R98bis Decision	<i>Prosecutor v. Mile Mrkšić and Veselin Šljivančanin</i> , Case No.IT-95-13/1-T, Decision on the Accused's Motion for Judgement of Acquittal, 28 June 2006
<i>Nikolić</i> R61	<i>Prosecutor v. Dragan Nikolić</i> , Case No.IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995
<i>Orić</i> R98bis Decision	<i>Prosecutor v. Naser Orić</i> , Case No.IT-03-68-T, Rule 98bis Judgement, 8 June 2005

<i>Orić</i> R98bis Submission	<i>Prosecutor v. Naser Orić</i> , Case No.IT-03-68-T, Rule 98bis Oral Submissions, 2 June 2005
<i>Orić</i> TJ	<i>Prosecutor v. Naser Orić</i> , Case No.IT-03-68-T, Judgement, 30 June 2006
<i>Popović</i> R98bis Decision	<i>Prosecutor v. Vujadin Popović et al.</i> , Case No.IT-05-88-T, Rule 98bis Decision, 3 March 2008
<i>Popović</i> TJ	<i>Prosecutor v. Vujadin Popović et al.</i> , Case No.IT-05-88-T, Judgement, 10 June 2010
<i>Popović</i> Prosecution Indictment Submission	<i>Prosecutor v. Vujadin Popović et al.</i> , Case No.IT-05-88-T, Prosecution Submission Concerning Paragraphs 31.1b and 31.1c of the Indictment, 15 February 2008
<i>Popović</i> Provisional Release Appeal Decision	<i>Prosecution v. Vujadin Popović et al.</i> , Case No.IT-05-88-AR65.7, Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on Popović's Motion for Provisional Release, 1 July 2008
<i>Prlić</i> Jurisdiction Appeal Decision	<i>Prosecutor v. Jadranko Prlić et al.</i> , Case No.IT-04-74-AR72.1, Decision on Petković's Interlocutory Appeal Against the Trial Chamber's Decision on Jurisdiction, 16 November 2005
<i>Prlić</i> R98bis Decision	<i>Prosecutor v. Jadranko Prlić et al.</i> , Case No.IT-04-74, Rule 98bis Decision, 20 February 2008
<i>S.Milošević</i> , T.	<i>Prosecutor v. Slobodan Milošević</i> , Case No.IT-02-54-T, Transcript
<i>S.Milošević</i> R98bis Decision	<i>Prosecutor v. Slobodan Milošević</i> , Case No.IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004
<i>Šešelj</i> , T.	<i>Prosecutor v. Vojislav Šešelj</i> , Case No.IT-03-67-T, Transcript
<i>Šešelj</i> R98bis Decision	<i>Prosecutor v. Vojislav Šešelj</i> , Case No.IT-03-67-T, Rule 98bis Judgement, 4-5 May 2011
<i>Sikirica</i> , T.	<i>Prosecutor v. Duško Sikirica et al.</i> , Case No.IT-95-8-T, Transcript
<i>Sikirica</i> R98bis Decision	<i>Prosecutor v. Duško Sikirica et al.</i> , Case No.IT-95-8-T, Judgement on Defence Motions to Acquit, 3 September 2001
<i>Simić</i> AJ	<i>Prosecutor v. Blagoje Simić</i> , Case No.IT-95-9-A, Judgement, 28 November 2006
<i>Stakić</i> , T.	<i>Prosecutor v. Milomir Stakić</i> , Case No.IT-97-24-T, Transcript

<i>Stakić</i> AJ	<i>Prosecutor v. Milomir Stakić</i> , Case No.IT-97-24-A, Judgement, 22 March 2006
<i>Stakić</i> R98bis Decision	<i>Prosecutor v. Milomir Stakić</i> , Case No.IT-97-24-T, Decision on Rule 98 Bis Motion for Judgement of Acquittal, 31 October 2002
<i>Stakić</i> TJ	<i>Prosecutor v. Milomir Stakić</i> , Case No.IT-97-24-T, Judgement, 31 July 2003
<i>Stanišić &amp; Župljanin</i> , T.	<i>Prosecutor v. Mićo Stanišić and Stojan Župljanin</i> , Case No.IT-08-91-T, Transcript
<i>Tadić</i> AJ	<i>Prosecutor v. Duško Tadić</i> , Case No.IT-94-1-A, Judgement, 15 July 1999
<i>Tadić</i> SJ	<i>Prosecutor v. Duško Tadić</i> , Case No.IT-94-1-Tbis-R117, Sentencing Judgement, 11 November 1999
<i>Vasiljević</i> AJ	<i>Prosecutor v. Mitar Vasiljević</i> , Case No.IT-98-32-A, Judgement, 25 February 2004

**ICTR Authorities**

<b>Abbreviation used in Prosecution Appeal</b>	<b>Full citation</b>
<i>Akayesu</i> TJ	<i>Prosecutor v. Jean-Paul Akayesu</i> , Case No.ICTR-96-4-T, Judgement, 2 September 1998
<i>Bagilishema</i> TJ	<i>Prosecutor v. Ignace Bagilishema</i> , Case No.ICTR-95-1A-T, Judgement, 7 June 2001
<i>Bagosora</i> TJ	<i>Prosecutor v. Théoneste Bagosora et al.</i> , Case No.ICTR-98-41-T, Judgement, 18 December 2008
<i>Bizimungu</i> TJ	<i>Prosecutor v. Augustin Nindiliyimana et al.</i> , Case No.ICTR-00-56-T, Judgement and Sentence, 17 May 2011
<i>Gacumbtsi</i> TJ	<i>Prosecutor v. Sylvestre Gacumbtsi</i> , Case No.ICTR-2001-64-T, 17 June 2004
<i>Gatete</i> TJ	<i>Prosecutor v. Jean-Baptiste Gatete</i> , Case No.ICTR-2000-61-T, Judgement and Sentence, 31 March 2011

<i>Kajelijeli AJ</i>	<i>Prosecutor v. Juvénal Kajelijeli</i> , Case No. ICTR-98-44A-A, App.Ch., Judgement, 23 May 2005
<i>Kajelijeli TJ</i>	<i>Prosecutor v. Juvénal Kajelijeli</i> , Case No. ICTR-98-44A-T, Judgement and Sentence, 1 December 2003
<i>Kalimanzira TJ</i>	<i>Prosecutor v. Callixte Kalimanzira</i> , Case No. ICTR-05-88-T, Judgement, 22 June 2009
<i>Kamuhanda TJ</i>	<i>Prosecutor v. Jean de Dieu Kamuhanda</i> , Case No. ICTR-95054A-T, Judgement, 22 January 2004
<i>Kanyarukiga TJ</i>	<i>Prosecutor v. Gaspard Kanyarukiga</i> , Case No. ICTR-2002-78-T, Judgement and Sentence, 1 November 2010
<i>Karempera TJ</i>	<i>Prosecutor v. Edouard Karempera and Matthieu Ndirumpatse</i> , Case No. ICTR-98-44-T, Judgement and Sentence, 2 February 2012
<i>Karera AJ</i>	<i>Prosecutor v. François Karera</i> , Case No. ICTR-01-74-A, Judgement, 2 February 2009
<i>Kayishema and Ruzindana TJ</i>	<i>Prosecutor v. Clément Kayishema and Obed Ruzindana</i> , Case No. ICTR-95-1-T, Judgment, 21 May 1999
<i>Muhimana TJ</i>	<i>Prosecutor v. Mikaeli Muhimana</i> , Case No. ICTR-95-1B-T, Judgement and Sentence, 28 April 2005
<i>Musema TJ</i>	<i>Prosecutor v. Alfred Musema</i> , Case No. ICTR-96-13-A, Judgement and Sentence, 27 January 2000
<i>Muvunyi TJ</i>	<i>Prosecutor v. Tharcisse Muvunyi</i> , Case No. ICTR-2000-55A-T, Judgement, 12 September 2006
<i>Nchamihigo AJ</i>	<i>Prosecutor v. Siméon Nchamihigo</i> , Case No. ICTR-2001-63-A, Judgement, 18 March 2010
<i>Ntagerura TJ</i>	<i>Prosecutor v. André Ntagerura et al.</i> , Case No. ICTR-99-46-T, Judgment, 1 September 2009
<i>Ntakirutimana TJ</i>	<i>Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana</i> , Case No. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence, 21 February 2003
<i>Ntawukulilyayo TJ</i>	<i>Prosecutor v. Dominique Ntawukulilyayo</i> , Case No. ICTR-05-82-T, Judgement and Sentence, 3 August 2010
<i>Nyiramashuhuko TJ</i>	<i>Prosecutor v. Pauline Nyiramashuhuko et al.</i> , Case No. ICTR-98-42-T, Judgement and Sentence, 24 June 2011

<i>Renzaho TJ</i>	<i>Prosecutor v. Tharcisse Renzaho</i> , Case No. ICTR-97-31-T, Judgement and Sentence, 14 July 2009
<i>Rukundo AJ</i>	<i>Prosecutor v. Emmanuel Rukundo</i> , Case No. ICTR-2001-70-A, Judgement, 20 October 2010
<i>Rutaganda AJ</i>	<i>Prosecutor v. Georges Anderson Nderubunwe Rutaganda</i> , Case No. ICTR-96-3-A, Judgement, 26 May 2003
<i>Rutaganda TJ</i>	<i>Prosecutor v. George Rutaganda</i> , Case No. ICTR-96-3-T, Judgement, 6 December 1999
<i>Semanza TJ</i>	<i>Prosecutor v. Laurent Semanza</i> , Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003
<i>Seromba AJ</i>	<i>Prosecutor v. Athanase Seromba</i> , Case No. ICTR-2001-66-A, Judgement, 12 March 2008
<i>Seromba TJ</i>	<i>Prosecutor v. Athanase Seromba</i> , Case No. ICTR-2001-66-I, Judgement, 13 December 2006

**Judgements and Decisions from other International and National Courts**

<b>Abbreviation used in Prosecution Appeal</b>	<b>Full citation</b>
BiH <i>Trbić</i> Judgement	<i>Prosecutor's Office of Bosnia and Herzegovina v. Milorad Trbić</i> , Case No. X-KR-07/386, First Instance Verdict, 29 April 2010
<i>Brima</i> R98 Decision	<i>Prosecutor v. Alex Tamba Brima et al.</i> , Case No. SCSL-04-16-T, Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006
ICC <i>First Decision on Bashir Arrest Warrant</i>	<i>Prosecutor v. Omar Hassan Ahmad al Bashir</i> , Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad al Bashir, 4 March 2009
ICC <i>Second Decision on Bashir Arrest Warrant</i>	<i>Prosecutor v. Omar Hassan Ahmad al Bashir</i> , Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010
ICJ <i>Bosnia</i> Judgement	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)</i> , International Court of Justice, Judgement, I.C.J. Reports 2007

ICJ <i>Reservations to Genocide Convention</i> Judgement	<i>Reservations to the Convention on the Prevention and Punishment of Genocide</i> , Advisory Opinion, I.C.J. Reports 1951
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**Other Sources**

<b>Abbreviation used in Prosecution Appeal</b>	<b>Full citation</b>
Boot <i>Nullum Crimen Sine Lege</i>	Machteld Boot, <i>Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes Against Humanity, War Crimes</i> (Antwerp: Intersentia, 2002)
Brouwer <i>Prosecution of Sexual Violence</i>	Anne-Marie L.M. de Brouwer, <i>Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR</i> (Antwerp: Intersentia, 2005)
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 and in force as of 12 January 1951
ICC Elements of Crimes	Elements of Crimes, ICC-ASP/1/3(part II-B), 9 September 2002
ILC Commentary	ILC Commentary on the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, Report for the International Law Commission on the work of its 48th session, UN Doc. A/51/10
Jessberger <i>Commentary on Genocide Convention</i>	Florian Jessberger, "The Definition and the Elements of the Crime of Genocide", in Paola Gaeta, ed., <i>The UN Genocide Convention: A Commentary</i> (New York: Oxford University Press, 2009)
Practice Direction on Appeal Requirements	Practice Direction on Formal Requirements for Appeal from Judgement, IT.201, 7 March 2002
Schabas <i>Commentary on Rome Statute</i>	William A. Schabas, Article 6: Genocide, in Otto Triffterer, ed., <i>Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article</i> , 2 <sup>nd</sup> Edition (Baden-Baden: Nomos Verlagsgesellschaft, 2008)
Schabas <i>Genocide in International Law</i>	William A. Schabas, <i>Genocide in International Law: The Crime of Crimes</i> , 2 <sup>nd</sup> Edition (United Kingdom: Cambridge, 2009)
Special Rapporteur 3 February	Report Submitted by the Special Rapporteur on Torture and

<b>Abbreviation used in Prosecution Appeal</b>	<b>Full citation</b>
2011 Report	Other Cruel, Inhuman or Degrading Treatment or Punishment, A/HRC/16/52, 3 February 2011
Statute	Statute of the International Criminal Tribunal for the former Yugoslavia
Watson <i>Criminal Law</i>	R. Watson, <i>Criminal Law</i> (New South Wales, 1996)

**Other Abbreviations**

<b>Abbreviation used in Prosecution Appeal</b>	<b>Full citation</b>
AF	Adjudicated Fact
AJ	Appeals Chamber Judgement
Bosnia	Bosnia and Herzegovina
Chamber	Trial Chamber in <i>Prosecutor v. Radovan Karadžić</i> , Case No. IT-95-5/18
Exh.	Exhibit
Exhs.	Exhibits
GAOR	General Assembly Official Records (United Nations)
Groups	Bosnian Muslim and Bosnian Croat groups
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
JCE	Joint criminal enterprise
JCE I	First category of joint criminal enterprise
JCE III	Third category of joint criminal enterprise
Municipalities	Seven municipalities listed in paragraph 38 of the Indictment:

	Bratunac, Foča, Ključ, Prijedor, Sanski Most, Vlasenica and Zvornik.
MUP	Bosnian Serb Ministry of Internal Affairs
p.	Page
para.	Paragraph
paras.	Paragraphs
pp.	Pages
R	Rule
RS	Republika Srpska
SDS	Serbian Democratic Party
T.	Trial Transcript
TO	Bosnian Serb Territorial Defence
TJ	Trial Chamber Judgement
UN	United Nations
VRS	Bosnian Serb Army