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**UNITED
NATIONS**



Mechanism for International Criminal
Tribunals

Case No: MICT-13-55-A

Date: 11 January 2017

Original: English

IN THE APPEALS CHAMBER

Before:

**Judge Theodor Meron, Presiding
Judge William Hussein Sekule
Judge Vagn Prüsse Joensen
Judge José Ricardo de Prada Solaesa
Judge Graciela Susana Gatti Santana**

Registrar:

Mr. Olufemi Elias

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**NOTICE OF FILING PUBLIC REDACTED VERSION OF
PROSECUTION APPEAL BRIEF**

The Office of the Prosecutor:

Laurel Baig
Barbara Goy
Katrina Gustafson

Counsel for Radovan Karadžić:

Peter Robinson
Kate Gibson

1. The Prosecution hereby files a public redacted version of its Appeal Brief.¹

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Katrina Gustafson
Senior Appeals Counsel

Dated this 11th day of January 2017
At The Hague, The Netherlands

¹ *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Prosecution Appeal Brief, 05 December 2016.

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I. OVERVIEW

1. The Trial Judgement is a testament to the extreme gravity of Radovan Karadžić's crimes. The Trial Chamber found that, through his position at the apex of Bosnian Serb civilian and military power, Karadžić played an essential role in four interconnected JCEs involving crimes committed throughout Bosnia and Herzegovina ("BiH") over the entire conflict. In relation to the Overarching JCE it held him criminally responsible for ethnic cleansing across much of BiH that was implemented through a persecutory campaign involving the murder, mistreatment and forcible displacement of many thousands of Muslims and Croats. It determined that his support was critical to the campaign of shelling and sniping in Sarajevo aimed at spreading terror among the civilian population. The Chamber found Karadžić guilty of the Srebrenica genocide. It also found him responsible for taking UN personnel hostage in response to international efforts to halt his criminal conduct. The Chamber's factual and legal findings leave no doubt that Karadžić is the most serious offender yet convicted by the ICTY.

2. For the most part, the Chamber's findings are detailed, comprehensive and sound. There are, however, discrete areas of the Judgement where the Chamber adopted a flawed approach to its analysis. As a result, the Judgement does not account for the entirety of Karadžić's criminal responsibility and insufficiently punishes him for his crimes.

3. On the basis of his significant contribution to all four JCEs, Karadžić was convicted under every count of the Indictment except Count 1 (genocide in the Municipalities). While the Chamber concluded that genocidal acts—killings and serious bodily or mental harm under Articles 4(2)(a) and 4(2)(b)—were committed in the Count 1 Municipalities, the Chamber was not satisfied that those acts were committed with genocidal intent.

4. Under Grounds 1 to 3, the Prosecution identifies errors of law and/or fact which each contributed to a flawed genocidal intent analysis with respect to Count 1. Under Ground 1, the Prosecution appeals the Chamber's finding that many of the crimes used to permanently remove vast numbers of Muslims and Croats from Serb-claimed territory in the Municipalities—such as murder, cruel treatment, sexual violence and wanton destruction—were merely foreseeable consequences of the execution of the Overarching JCE. The exclusion of these crimes from the common purpose—which effectively *removed violence* against non-Serbs from the scope of the common purpose—cannot be reconciled with the Chamber's own findings on the development and implementation of that common purpose. The incompatibility between those underlying findings on the one hand, and the Chamber's conclusion on the scope of the common purpose on the other, exposes an error of law or fact. The Chamber's erroneous exclusion of violent crimes from the

scope of the common purpose also resulted in a flawed Count 1 genocidal intent analysis based on an incorrect premise.

5. Under Ground 2, the Prosecution appeals the Chamber's conclusion that the deplorable conditions inflicted on Muslims and Croats detained in the Count 1 Municipalities did not constitute conditions of life calculated to bring about physical destruction under Article 4(2)(c). While the Chamber acknowledged the serious impact of these conditions, it incorrectly concluded that the elements of Article 4(2)(c) were not satisfied. This too contributed to a flawed genocidal intent analysis that failed to adequately capture the destructive impact that the mass incarceration in terrible conditions had on the targeted communities.

6. Under Ground 3, the Prosecution appeals the Chamber's conclusion that Karadžić and other JCE members did not possess genocidal intent as charged under Count 1. In addition to the flaws identified in Grounds 1 and 2, the Chamber's genocidal intent analysis is tainted by a fundamental misconception that forcible displacement and genocidal intent are mutually incompatible. As a result, the Chamber conducted an erroneously narrow and truncated assessment of genocidal intent which did not properly account for the intent reflected by the overall pattern of crimes in the Count 1 Municipalities. A correct understanding and application of genocidal intent leads to the conclusion that Karadžić and other JCE members used genocide as a means to implement their permanent removal objective in the Count 1 Municipalities.

7. Under Ground 4, the Prosecution appeals Karadžić's 40-year sentence. This sentence does not properly reflect the Chamber's own findings and analysis of the gravity of Karadžić's crimes. Karadžić's convictions for his key roles in the Overarching, Sarajevo and Srebrenica JCEs each separately warrants a life sentence. Considered together, they form the gravest set of crimes ever attributed to a single person at the ICTY and require the highest available sentence—a life sentence. Only the most exceptional mitigating circumstances could have warranted a reduction from a life sentence, and there are no such circumstances in this case. The unreasonableness of the sentence is compounded by the Chamber's failure to explain why it selected a 40-year sentence, which conveys the message that Karadžić's crimes do not warrant the stigma of the Tribunal's highest sentence. The manifestly inadequate sentence imposed by the Chamber demonstrates an abuse of discretion.

8. For the reasons set out in this brief, the Prosecution requests that the Appeals Chamber correct the Chamber's errors, substitute convictions for foreseeable crimes with convictions under JCE1, enter a conviction under Count 1 and increase Karadžić's sentence to life imprisonment.

II. GROUND 1: ALL CRIMES FOUND TO BE FORESEEABLE CONSEQUENCES OF THE COMMON PURPOSE FORMED PART OF IT

9. The Chamber found that Karadžić participated in a common criminal purpose to permanently remove, by criminal means, vast numbers of Bosnian Muslims and Croats from Serb-claimed territory and create an ethnically homogeneous Serb state (“Overarching JCE”).¹ However, it concluded that many of the crimes that formed part of a systematic pattern of crimes used to implement this permanent removal—including murder, cruel treatment, sexual violence and wanton destruction—were merely foreseeable consequences of its execution. The Chamber drew a line between JCE1 Crimes² on the one hand, and merely foreseeable crimes (“Excluded Crimes”)³ on the other, that effectively removed violence against Muslims and Croats from the scope of the common purpose.⁴

10. The removal of the Excluded Crimes—and the corresponding exclusion of violence—from the scope of the common purpose cannot be reconciled with the Chamber’s own findings on the development and implementation of that common purpose. These findings show that Karadžić and other JCE members shared the intent for the Excluded Crimes. In particular, the Chamber found that:

- Before the outbreak of the conflict, Karadžić threatened Muslims with the very types of crimes that the Chamber excluded from the common purpose.⁵
- Karadžić and the BSL were prepared to use force and violence against Muslims and Croats to achieve their permanent removal objective and knew that violence would be necessary to achieve it.⁶

¹ Judgement, para.3447(confidential).

² Crimes forming part of the common purpose (“JCE1 Crimes”) were deportation; inhumane acts (forcible transfer); and persecution through deportation, forcible transfer, unlawful detention and the imposition and maintenance of restrictive and discriminatory measures. Judgement, paras.3464-3466.

³ Crimes found to be foreseeable (“Excluded Crimes”) were extermination; murder; and persecution through killings, cruel and/or inhumane treatment (through torture, beatings, physical and psychological abuse, rape and other acts of sexual violence, and the establishment and perpetuation of inhumane living conditions in detention facilities), forced labour at the frontlines and use of human shields, appropriation or plunder of property, and the wanton destruction of private and public property, including cultural monuments and sacred sites. Judgement, para.3512.

⁴ While JCE1 Crimes such as forcible transfer and deportation can—and in this case did—involve violence, the Chamber excluded the violence used to effect these crimes from the scope of the common purpose. For instance, as discussed below, the Chamber found that Serb Forces forcibly transferred and deported Muslims and Croats by creating an environment of fear through the systematic commission of violent crimes. However, it excluded those violent crimes from the scope of the common purpose. *Below* paras.18, 30.

⁵ *Below* para.22.

⁶ *Below* paras.21-24.

- In implementing the common purpose, Serb Forces expelled a vast number of Muslims and Croats through a systematic and organised pattern of crimes involving the Excluded Crimes of murder, cruel treatment, sexual violence and wanton destruction.⁷
- These same Excluded Crimes formed part of the *actus reus* of forcible transfer and deportation.⁸
- Despite being promptly informed that Serb Forces were using Excluded Crimes to implement the common purpose, Karadžić did not use his immense authority to put a stop to them. Instead, he pursued a policy of non-punishment for JCE1 Crimes and Excluded Crimes alike and rewarded perpetrators.⁹
- Karadžić continued to pursue the common purpose for over three years without altering his policies.¹⁰

11. The incompatibility between these underlying findings on the one hand, and the Chamber's conclusion on the scope of the common purpose on the other, exposes an error of law or fact.

12. The Chamber erred in law in concluding that "another reasonable inference" to a finding that Karadžić shared the intent for the Excluded Crimes was that he "*did not care enough to stop pursuing the common plan* to forcibly remove the non-Serb population from the Municipalities."¹¹ As this alternative inference is consistent with shared intent, the Chamber erred by concluding that it foreclosed the possibility that Karadžić shared the intent for the Excluded Crimes.¹²

13. Alternatively, the Chamber erred in fact. Its own findings on Karadžić's and other JCE members' policies, objectives, knowledge and conduct—as well as on the implementation of the common purpose—lead to only one reasonable conclusion: the Excluded Crimes formed part of the common purpose, and Karadžić shared the intent for those crimes.¹³

14. The Chamber's erroneous conclusion on the scope of the common purpose caused it to incorrectly find Karadžić liable for the Excluded Crimes pursuant to the third category, rather than the first category, of JCE. This error also caused the Chamber to conduct a flawed genocidal intent

⁷ Below paras.27-32.

⁸ Below para.30.

⁹ Below paras.33-42.

¹⁰ Below para.43.

¹¹ Judgement, para.3466 (emphasis added).

¹² Below Sub-Ground 1(A).

¹³ Below Sub-Ground 1(B).

analysis based on an erroneous premise concerning the scope of the JCE members' common purpose.¹⁴

A. Sub-Ground 1(A): The Chamber's "[o]ther reasonable inference" does not preclude JCE1 liability

15. In analysing whether the Excluded Crimes came within the scope of the common purpose, the Chamber indicated that it had considered not only Karadžić's shared intent for the JCE1 Crimes but also that he had "received information" about the commission of Excluded Crimes by Serb Forces against non-Serbs "throughout the conflict" and that he "continued to act in furtherance of the common plan".¹⁵ Nevertheless, the Chamber concluded that there was "another reasonable inference" to a finding that the Excluded Crimes formed part of the common purpose—namely, that while Karadžić "did not intend for [the Excluded C]rimes to be committed, he did not care enough to stop pursuing the common plan to forcibly remove the non-Serb population from the Municipalities".¹⁶

16. That Karadžić "did not care enough to stop pursuing the common plan" while aware that it entailed the commission of Excluded Crimes—when framed positively—equates to the proposition that Karadžić was willing to continue pursuing the common purpose with the awareness that it involved the commission of Excluded Crimes. This is not inconsistent with shared intent. To the contrary, this scenario *permits* an inference of shared intent and JCE1 liability.¹⁷ Thus, the Chamber erred in law by concluding that its alternative inference precluded a finding of shared intent for the Excluded Crimes, rather than recognising it as an avenue by which shared intent could be inferred. The Chamber should have gone on to assess whether Karadžić's willingness to pursue the common purpose with the knowledge that it entailed the commission of the Excluded Crimes reflected his shared intent for those crimes. Had it done so, the Chamber's own factual findings compelled an affirmative conclusion.¹⁸

17. By concluding that the possible inference that Karadžić "did not care enough to stop pursuing the common plan" precluded a finding of Karadžić's shared intent for the Excluded Crimes, the Chamber adopted the wrong approach. Karadžić's intent for Excluded Crimes did not turn on his willingness or unwillingness to abandon the common purpose in order to put a stop to

¹⁴ Below paras.47-48.

¹⁵ Judgement, para.3466.

¹⁶ Judgement, para.3466.

¹⁷ *Popović* AJ, paras.1369, 1652. Also below para.20.

¹⁸ Below Sub-Ground 1(B).

them. The common purpose of a JCE must “amount[] to *or involve*[]” the commission of crimes.¹⁹ Where, as here, the objective (permanent removal) is pursued through a range of crimes, the relevant question for JCE1 liability is whether the JCE members’ shared state of mind was that those crimes “should be carried out” in order to achieve their shared objective.²⁰ In this case the Chamber’s own findings establish this shared state of mind beyond reasonable doubt.²¹

B. Sub-Ground 1(B): The Excluded Crimes formed part of the common purpose and Karadžić shared the intent for those crimes

18. The Chamber recognised that violent crimes were necessary to achieve the common purpose and found that Karadžić and other JCE members knew and accepted this.²² Yet it drew a line between JCE1 Crimes and Excluded Crimes that stripped the common purpose of violence. For instance, the Chamber included forcible transfer and deportation within the common purpose, but it excluded the violence that Serb Forces used to effect the forcible displacement—through crimes such as murder and cruel treatment.²³ Likewise, the Chamber included unlawful detention across the dozens of detention facilities in the Municipalities within the common purpose while excluding the systematic mistreatment of prisoners that was perpetrated in all these same facilities.²⁴

19. This line between JCE1 Crimes and Excluded Crimes cannot be reconciled with the Chamber’s own findings. Those findings demonstrate that:

- Before the conflict broke out, Karadžić threatened Bosnian Muslims with the very “bloodbath” and mass destruction²⁵ that his forces later wrought through the mass, systematic commission of Excluded Crimes.
- Karadžić and the BSL knew that they could not separate the ethnicities in BiH without employing violence against Muslims and Croats, and yet they pursued an objective aimed at achieving this separation through permanent removal.²⁶
- With this knowledge, Karadžić spearheaded preparations to forcibly implement the permanent removal objective.²⁷

¹⁹ *Tadić* AJ, para.227 (emphasis added). Also *Vasiljević* AJ, para.100; *Dorđević* AJ, paras.116-119.

²⁰ *Krajišnik* AJ, paras.200, 707. The JCE members need not view those crimes as goals or objectives in and of themselves. E.g. *Dorđević* AJ, paras.116-119.

²¹ *Below* Sub-Ground 1(B).

²² *Below* paras.21-24.

²³ As discussed below, the Chamber found that Excluded Crimes formed part of the *actus reus* of forcible transfer/deportation and were systematically used to implement the common purpose, but then excluded those crimes from its scope. *Below* paras.27-32.

²⁴ *Below* para.46(ii).

- Excluded Crimes were part of the organised, systematic pattern of crimes Serb Forces used to implement the objective.²⁸
- Karadžić reacted to a stream of reports of Excluded Crimes with lies, deflections and a non-punishment policy, all of which facilitated and encouraged the commission of Excluded Crimes.²⁹

In light of these findings, the Chamber's conclusion that the Excluded Crimes were merely "foreseeable consequences" of the implementation of the common purpose is untenable.

20. In assessing the scope of the common criminal purpose, the Chamber focused on Karadžić's knowledge that Serb Forces were perpetrating Excluded Crimes coupled with his continued participation in the common purpose.³⁰ Knowledge of crimes plus continued participation is a sufficient basis from which a Chamber can infer JCE1 intent for those crimes.³¹ However, this is not a case of mere knowledge plus continued participation. The Chamber's findings show that Karadžić and other JCE members knew that they could not achieve the common purpose without the commission of Excluded Crimes and—at every stage—embraced their use to achieve that purpose. The only reasonable conclusion available to the Chamber was that the Excluded Crimes formed part of the common purpose and that Karadžić and other JCE members shared the state of mind that the Excluded Crimes "should be carried out" in order to achieve their shared objective.³²

1. In the lead-up to the conflict, Karadžić threatened violence against non-Serbs and pursued an ethnic separation objective, knowing that Excluded Crimes were necessary to achieve it

21. The Chamber's findings show that well before the conflict broke out, Karadžić and other JCE members embraced the use of violence against Muslims and Croats and the mass destruction of property to achieve their objectives. Their shared intent for Excluded Crimes such as murder, cruel treatment and wanton destruction was manifest even at this early stage.

22. The Chamber found that, in the latter half of 1991, Karadžić reacted to moves towards independence for BiH by threatening a bloody conflict that would devastate the non-Serb

²⁵ Below para.22.

²⁶ Below paras.22-24.

²⁷ Below paras.25-26.

²⁸ Below paras.27-32.

²⁹ Below paras.33-42.

³⁰ Judgement, para.3466.

³¹ E.g. *Krajišnik* AJ, para.697; *Popović* AJ, para.1652; *Dorđević* AJ, para.512; *Stanišić & Župljanin* AJ, para.393. In drawing such inferences, chambers have emphasised the accused's position and ability to intervene. E.g. *Krajišnik* TJ, para.1119; *Dorđević* AJ, para.505.

population. He warned that such moves would take BiH down a “highway of hell and suffering”, involving the “possible extinction” of the “Muslim people”.³³ He threatened that Muslims would “disappear”,³⁴ “be annihilated in BiH”³⁵ and be “up to their necks in blood”³⁶ in a “war until their extinction”,³⁷ entailing thousands of deaths and “the complete destruction of several hundred towns”.³⁸ The Chamber found that these threats of “extreme bloodshed, annihilation and the disappearance or extinction of the Bosnian Muslims” underscored that Karadžić was “*fully aware* that a potential conflict would be *extremely violent* and result in *thousands of deaths, the destruction of property, and the displacement of people and that it would be particularly devastating for the Bosnian Muslim people*”.³⁹

23. The Chamber found that Karadžić followed up on his threats by formulating and promoting a policy of ethnic separation.⁴⁰ He developed an ideology “loaded with Serb nationalism” that emphasised “the importance of creating an ethnically homogeneous Serb state”.⁴¹ His speeches and propaganda “promote[d] the idea that the Bosnian Serbs could not live together with the Bosnian Muslims and Bosnian Croats and formed the foundation for the separation of the three people and the creation of a Serb state”.⁴² Karadžić “amplified” historic grievances of the Serb people to suggest that Serbs faced an “existential threat.”⁴³ His “constant references” to the historic suffering of Serbs “polarised the population in BiH and incited inter-ethnic hatred”.⁴⁴ The Chamber found that Karadžić and the BSL pursued this ethnic separation objective despite being “*aware and put on notice* that the objective of ethnic separation *would result in violence* given the extent to which the population in BiH was intermixed”.⁴⁵

24. These findings show that a common criminal purpose to carve out homogenous Serb territory from the ethnically intermixed BiH without violence against Muslims and Croats was a fantasy.⁴⁶ The reality—known to Karadžić and other JCE members—was that violence against Muslims and Croats was necessary to achieve their common purpose. And they were not just *aware*

³² *Krajišnik* AJ, paras.200, 707.

³³ Judgement, paras.2675, 2707.

³⁴ Judgement, paras.2677-2678.

³⁵ Judgement, para.2679.

³⁶ Judgement, para.2678.

³⁷ Judgement, para.2680. *Also* para.2700.

³⁸ Exh.D86, p.40 *relied on at* Judgement, para.2692. *Also* para.2719.

³⁹ Judgement, para.2708 (emphases added). *Also* para.2846.

⁴⁰ *E.g.* Judgement, paras.2841, 3476.

⁴¹ Judgement, para.3475.

⁴² Judgement, para.3485.

⁴³ Judgement, para.3485.

⁴⁴ Judgement, para.2660. *Also* paras.2670-2672, 3485-3486.

⁴⁵ Judgement, para.2846 (emphases added).

⁴⁶ *Also* Judgement, para.2823.

of this. The Chamber found they “were prepared to use force and violence against Bosnian Muslims and Bosnian Croats in order to achieve their objectives”.⁴⁷

2. Karadžić “played the most important role” in preparing the structures used to violently remove Muslims and Croats from Serb-targeted areas

25. Karadžić’s shared intent for violent crimes is reinforced by his key role in preparing structures to implement the permanent removal objective while aware that violence against Muslims and Croats was necessary to realise it. The Chamber found that Karadžić “played the most important role in laying the ground work for [its] criminal implementation”.⁴⁸ For instance: he distributed and promoted the Variant A/B instructions “to ensure preparations at the municipal level for the establishment of an ethnically homogeneous separate state”;⁴⁹ formulated and disseminated the “Strategic Goals”⁵⁰ at the “core” of which was forcible ethnic separation,⁵¹ and played a central role in establishing the Bosnian Serb MUP,⁵² TO⁵³ and municipal authorities.⁵⁴

26. As the Chamber found, Karadžić activated the second level of Variant A/B on 14 February 1992,⁵⁵ signalling that the structures he had been instrumental in establishing should be activated in order to take over power.⁵⁶ He did this while “envisag[ing] the use [of] force and violence to take-over power” and without any “genuine concern about the manner in which power was taken.”⁵⁷ This reinforces Karadžić’s intent for Excluded Crimes: he deliberately triggered the implementation of the common purpose while envisaging the use of force and violence, “fully aware” that the resulting conflict “would be extremely violent and result in thousands of deaths” and “destruction of property” and “would be particularly devastating for the Bosnian Muslim population.”⁵⁸

⁴⁷ Judgement, para.2599 (emphasis added).

⁴⁸ Judgement, para.3475. Also paras.3091, 3440, 3477-3480, 3488.

⁴⁹ Judgement, para.3437. Also paras.3074, 3077, 3079, 3081-3082, 3089, 3092, 3478.

⁵⁰ Judgement, paras.2895, 3483. Also para.3489.

⁵¹ Judgement, para.3439.

⁵² Judgement, para.3491. Also paras.2990-2991.

⁵³ Judgement, paras.3177, 3488.

⁵⁴ Judgement, paras.3091, 3477-3478.

⁵⁵ Judgement, para.3022.

⁵⁶ Judgement, paras.3083, 3089-3090, 3484.

⁵⁷ Judgement, paras.3084, 3436.

⁵⁸ Judgement, para.2708.

3. Just as Karadžić envisaged, Excluded Crimes were integral to the implementation of the common purpose

27. The Chamber's conclusion that Karadžić and others among the BSL knew that the pursuit of their ethnic separation objective "would result in violence" is borne out by the Chamber's findings showing that:

- From the outset, Serb Forces employed extreme violence—including mass and systematic Excluded Crimes—to displace non-Serbs.
- Excluded Crimes formed part of the *actus reus* of the JCE1 Crimes of forcible transfer and deportation.
- Excluded Crimes were part of an organised pattern of crimes committed by Serb Forces through well-planned and co-ordinated operations used to implement the common purpose.

28. From the outset, Serb Forces perpetrated Excluded Crimes on a massive scale and in a systematic manner. The implementation of the common purpose began in early April 1992 when Serb Forces attacked the non-Serb population in Bijeljina, murdering at least 45 non-Serb civilians.⁵⁹ Days later, the takeover of Zvornik was initiated with more executions, as well as the shelling, looting and burning of non-Serb houses in Zvornik town.⁶⁰ In surrounding villages, Serb Forces raped women and girls, burned houses and destroyed mosques, crimes that "prompted" Zvornik Muslims to flee.⁶¹ Over the following weeks, Serb Forces rounded up Zvornik Muslims from various settlements, detained them in several make-shift prisons and subjected them to acts of unspeakable cruelty.⁶² Hundreds of these detainees were murdered,⁶³ including through two organised mass executions.⁶⁴

29. This pattern of violent crimes continued throughout the Municipalities. For instance, "immense pressure" was put on Muslims and Croats to leave Rogatica, Prijedor and Sanski Most, including through armed attacks on their villages and homes, mistreatment and killings.⁶⁵ In Bratunac, paramilitaries triggered the flight of Muslims⁶⁶ by attacking and pillaging their settlements, setting villages ablaze, killing and harassing locals and telling survivors they had to

⁵⁹ Judgement, paras.622, 624.

⁶⁰ Judgement, paras.1250-1258.

⁶¹ Judgement, para.1269.

⁶² Judgement, paras.1298-1301, 1318-1320, 1324-1328, 1332-1333, 1341-1346, 1351-1353.

⁶³ Judgement, paras.1301, 1307, 1311, 1315, 1338, 1349.

⁶⁴ Judgement, paras.1315, 1335-1338. *Also* para.3415.

⁶⁵ Judgement, paras.1039 (Rogatica), 1912 (Prijedor), 2039 (Sanski Most). *Also* para.1561.

⁶⁶ *E.g.* Judgement, paras.729, 747, 785, 2470, fn.8339.

leave “with whatever they could carry”.⁶⁷ In Vlasenica, Serb Forces burned homes, and beat, killed and raped Muslim residents,⁶⁸ causing survivors to “flee[] the municipality out of fear for their lives.”⁶⁹ In a mass expulsion operation in Bosanski Novi, Bosnian Serb soldiers attacked Blagaj village, “firing infantry weapons at civilians in the village”, shooting at and burning houses, searching and robbing villagers and killing men.⁷⁰ Approximately 4,000-8,000 Bosnian Muslims were then “tightly packed” into train cars intended for cattle transport.⁷¹ In transit, detainees were mistreated and denied sufficient food, water and hygienic facilities.⁷² In August 1992, Bijeljina’s Bosnian Serb authorities implemented a “three phase” ethnic cleansing plan pursuant to which a Special Police Unit “instilled fear in the Bosnian Muslims who remained in Bijeljina” by “the killing of Bosnian Muslim families and looting of their homes”.⁷³

30. In this respect, the Chamber’s legal findings are consistent with its factual findings. Its factual findings, including those highlighted above, show the systematic use of Excluded Crimes to effect the permanent removal objective. In its legal findings, the Chamber held that Excluded Crimes formed part of the *actus reus* of the JCE1 Crimes of forcible transfer and deportation. It concluded that Serb Forces and Bosnian Serb authorities created an environment of fear through “ongoing violence and various crimes committed against non-Serbs including *inter alia*, killings, cruel and inhumane treatment, unlawful detention, rape and other acts of sexual violence, discriminatory measures, and wanton destruction of villages, houses and cultural monuments.”⁷⁴ In this environment of fear, Muslims and Croats had “no choice but to leave the Municipalities.” Thus, their flight constituted criminal acts of forcible transfer or deportation.⁷⁵ Similarly, the Chamber found that forcible transfer and deportation victims included Muslims and Croats who “were forced to leave following attacks against their villages”, referencing attacks involving the Excluded Crimes of murder, cruel treatment, sexual violence, wanton destruction and plunder.⁷⁶

⁶⁷ Judgement, paras.728-732, 747 *cross-referenced in* para.2470, fn.8339. *Also* paras.738-749 (A.3.2), 784-785.

⁶⁸ Judgement, paras.1128-1134, 1139-1151 *cross-referenced in* para.2470, fn.8339. *Also* paras.1135-1146 (A.15.2).

⁶⁹ Judgement, para.1219.

⁷⁰ Judgement, paras.1462-1464 *cross-referenced in* paras.2469-2470, fns.8335, 8339. *Also* paras.1456-1461.

⁷¹ Judgement, para.1465.

⁷² Judgement, para.1466.

⁷³ Judgement, paras.670-672 *especially* fn.2166. *Also* para.2478.

⁷⁴ Judgement, para.2468.

⁷⁵ Judgement, para.2475. While, theoretically, crimes that form part of the *actus reus* of JCE1 crimes of forcible displacement need not all fall within the common purpose (*see Stanišić & Župljanin* AJ, para.917), in this case, the organised and systematic use of Excluded Crimes to implement the common purpose, coupled with other findings showing that JCE members embraced the use of these Excluded Crimes to achieve their common purpose, demonstrate that these Excluded Crimes fell within the common purpose.

⁷⁶ Judgement, para.2470, fn.8339 *cross-referencing inter alia* paras.728-732, 747 (wanton destruction, plunder, murder); 1056 (wanton destruction); 1139, 1144-1145 (*cross-referencing* 1129-1130) (wanton destruction, cruel treatment, sexual violence, murder); 1151 (murder, cruel treatment); 1219 (wanton destruction); 1260 (wanton destruction); 1449 (plunder); 2313 (wanton destruction).

31. The Chamber's findings show further that Excluded Crimes were not random, unplanned or isolated. Rather, they formed part of an organised pattern of criminality used to effect permanent removal. The Chamber found a "systematic and organised pattern of crimes" committed in the Municipalities⁷⁷ that involved a combination of JCE1 and Excluded Crimes, "including *inter alia* killings, cruel and inhumane treatment, unlawful detention, rape and other acts of sexual violence, discriminatory measures, and wanton destruction of villages, houses and cultural monuments."⁷⁸ This pattern of crimes—"committed during the course of well planned and co-ordinated operations"⁷⁹—was used to "creat[e] an environment of fear in which Bosnian Muslims and Bosnian Croats had no choice but to leave the Municipalities."⁸⁰

32. These legal and factual findings demonstrate that Excluded Crimes were at the core of expulsion operations in the Municipalities as well as the common purpose, not merely foreseeable consequences of them. Logic supports the same conclusion: forcibly separating thousands of people from everything they have—their homes, communities, possessions and livelihoods—cannot realistically be accomplished without violence. This logic is reflected in the Chamber's findings that Karadžić and others in the BSL knew that violence was necessary to achieve ethnic separation; they were prepared to use it; and their forces acted accordingly.

4. Karadžić's reaction to reports of Excluded Crimes reinforces his intent

33. Karadžić's knowing facilitation of Excluded Crimes further underscores his shared intent.⁸¹ From the outset of the conflict, Karadžić received reports of Excluded Crimes. Just as he did with JCE1 Crimes, Karadžić falsely denied these crimes, or his responsibility for them, or falsely assured the international audience that he would address them. Meanwhile he instituted a policy of inaction that encouraged and enabled the commission of JCE1 Crimes and Excluded Crimes alike.

(a) Karadžić was promptly and repeatedly informed that Serb Forces were committing Excluded Crimes

34. The Chamber concluded that Karadžić was "well aware" of the "environment of extreme fear" involving "violence, killings, cruel and inhumane treatment, unlawful detention in terrible conditions, rape and other acts of sexual violence, discriminatory measures, and destruction of

⁷⁷ Judgement, para.3445.

⁷⁸ Judgement, para.3443.

⁷⁹ Judgement, para.3444.

⁸⁰ Judgement, para.3443.

⁸¹ By way of comparison, the Chamber concluded that in Sarajevo, the BSL was on notice that civilians were dying through indiscriminate and disproportionate fire "but allowed this type of fire to continue for a protracted period of time. Had it not been a part of their plan, this practice would not have persisted unabated for so long." Judgement, para.4649.

villages, homes and cultural monuments” in which non-Serbs were forced to leave the Municipalities.⁸² Based on numerous reports of crimes, and in light of the multiple reporting channels at Karadžić’s disposal, the Chamber found that Karadžić learned that Serb Forces were committing Excluded Crimes including “killings, rapes, and property related offences, from the beginning of April 1992 onwards”⁸³—in other words, as soon as the takeovers began.

35. For example, in early April 1992 a Bijeljina SDS Main Board member informed Karadžić that 42 individuals had been killed in the takeover of the town.⁸⁴ This news came as Karadžić was receiving media reports that Bijeljina town “had been set alight” and that “a massacre had been committed against the Muslims”.⁸⁵ Karadžić responded with “a public announcement referring to the ‘regrettable’ incidents in Bijeljina, but blamed the BiH Presidency for instigating chaos by calling for mobilisation.”⁸⁶ Days later, [REDACTED].⁸⁷ Karadžić responded by blaming paramilitaries who he claimed were not under SDS control.⁸⁸ In reality, co-JCE member Arkan,⁸⁹ who commanded paramilitaries during the Zvornik takeover,⁹⁰ had been “invited by the RS Presidency to operate in conjunction with local authorities and forces.”⁹¹

36. As Serb Forces continued to commit Excluded Crimes, the Chamber found that Karadžić continued to be informed of them. By “at least May 1992” Karadžić knew of the inadequate conditions in Bosnian Serb-run detention facilities⁹²—conditions so “deplorable” that they amounted to the crime of cruel and inhumane treatment⁹³—and these reports only mounted over time. For instance, on 17 July 1992, the MUP informed him that Muslim civilians were being detained in “poor” conditions with “no food” and where “international norms” were not observed.⁹⁴ Days later, the ICRC reported to Karadžić that it had observed “frequent and widespread traces” of “severe beatings” and “absolutely insufficient” conditions at Manjača and had obtained a list of

⁸² Judgement, paras.3515-3516.

⁸³ Judgement, para.3363.

⁸⁴ M.Kićanović:Exh.D3089, para.18 *relied on at* Judgement, para.3333.

⁸⁵ M.Kićanović:Exh.D3089, para.18 *relied on at* Judgement, para.3333.

⁸⁶ Judgement, para.3333 *citing* Exh.D394. The Chamber found this was one of the “many different ways” that Karadžić, “having been informed of crimes in the Municipalities, provided misleading information [...] in relation to these crimes.” Judgement, para.3503 *cross-referencing inter alia* para.3333.

⁸⁷ [REDACTED] Judgement, para.3336. [REDACTED].

⁸⁸ Judgement, para.3336.

⁸⁹ Judgement, para.3462.

⁹⁰ Judgement, paras.3183, 3322.

⁹¹ Judgement, para.3198. *Also* paras.1251, 3187, 3231.

⁹² Judgement, para.3375.

⁹³ Judgement, para.2511. *Also* paras.2507-2510.

⁹⁴ Exh.P1096, p.3 *relied on at* Judgement, para.3367.

“detainees who allegedly died during detention”.⁹⁵ At talks in London in August 1992, Karadžić acknowledged that civilians were held in “deplorable conditions”.⁹⁶

37. A 29 July 1992 MUP report to Karadžić described “massive” and “flagrant” crimes in Bijeljina carried out after the takeover by paramilitaries, particularly Arkan’s Serbian Volunteer Guard, including “frequent cases” of rape, theft and murder.⁹⁷ Likewise, he was informed of the killing of approximately 200 non-Serb men by Serb Forces at Korićanske Stijene in August 1992⁹⁸ and the execution of many non-Serb men at the Luka Camp in Brčko on 30 September 1992.⁹⁹ By the time he was confronted on 18 September 1992 with allegations of “atrocities” including “executions” and “brutal”, “Nazi-like” conditions in camps, Karadžić did not even attempt to deny these crimes. Instead, he deflected, claiming this was “probably” the case on all sides and denying only that such crimes were a policy because, as he put it, an “inter-ethnic” and “inter-religious” war does not require a command to kill.¹⁰⁰ That Karadžić had incited the very inter-ethnic hatred¹⁰¹ on which he blithely blamed these violent crimes is revealing as to his intent.

(b) Karadžić encouraged the commission of Excluded Crimes

38. The Chamber found that Karadžić responded to reports of Excluded Crimes with denials, deflections and a policy of inaction towards—and in some cases outright reward of—perpetrators. In addition to the denials and deflections noted above,¹⁰² over the summer and autumn of 1992, Karadžić “spent months denying that the conditions in [make-shift detention] centres were appalling” while failing to intervene to close such camps until such time as they “had already largely served their purpose of facilitating the process of the forcible removal of non-Serbs.”¹⁰³ In January 1993, he dismissed allegations that any Bosnian Serb soldier could have raped a woman in the presence of another soldier as “terrible lies.”¹⁰⁴ In April 1993, Karadžić claimed “he had only heard of 18 allegations of rape, but the propaganda had turned this into 18,000 cases”¹⁰⁵ and insisted that “their army could never have committed crime.”¹⁰⁶ In 1994, when meeting with UNPROFOR, he falsely described the organised, systematic campaign of atrocities carried out by

⁹⁵ Exh.P3758, pp.5-7 *relied on at* Judgement, para.3368.

⁹⁶ Judgement, para.3370 *citing* Exh.D1142, p.1.

⁹⁷ Exh.P2900, p.2 *relied on at* Judgement, para.3335. *Also* para.232.

⁹⁸ Judgement, para.3346.

⁹⁹ Judgement, para.3349 *citing* H.Okun:Exh.P776, pp.83-84 (T.4224-4225). *Also* Exh.P786, p.6.

¹⁰⁰ Exh.P809, p.3 *relied on at* Judgement, para.3348.

¹⁰¹ Judgement, paras.2670-2672, 3485-3486.

¹⁰² *Above* paras.35, 37. *Also* Judgement, para.3503.

¹⁰³ Judgement, para.3399.

¹⁰⁴ Judgement, para.3378.

¹⁰⁵ Judgement, para.3356.

¹⁰⁶ Judgement, para.3379. *Also* para.3380.

his forces against non-Serbs in Prijedor at the beginning of the war¹⁰⁷ as “civilians [...] slaughter[ing] each other”.¹⁰⁸

39. The Chamber concluded that Karadžić took no genuine steps to prevent or punish the mass commission of Excluded Crimes by Serb Forces. He responded to reports of “serious crimes committed by Serb Forces” with “generic orders” that he made “no efforts” to implement and that did not reflect any “genuine efforts to prevent such crimes.”¹⁰⁹

40. The Chamber found further that, rather than exercising his extensive authority towards ensuring Excluded Crimes were punished,¹¹⁰ Karadžić adopted a position of “delaying” the punishment of crimes against non-Serbs—a general policy not limited to JCE1 Crimes—while falsely assuring internationals that “war criminals” would be subjected to legal procedures.¹¹¹ This policy was reflected on the ground by a “systemic failure to investigate and prosecute criminal offences committed against non-Serbs in the Municipalities” such that “in most cases in 1992, absolutely nothing was done to investigate or prosecute the horrific crimes which were known to authorities.”¹¹² For instance, the Chamber found that well-known massacres of non-Serbs were ignored or covered up¹¹³ and notorious perpetrators of Excluded Crimes were not held accountable¹¹⁴ while Karadžić promoted and rewarded perpetrators of Excluded Crimes.¹¹⁵ The Chamber concluded that these rewards and promotions indicated that Karadžić “was indifferent to whether [the perpetrators] participated in criminal activity directed at non-Serbs during the conflict as long as the core objectives of the Bosnian Serbs were fulfilled.”¹¹⁶ However, as the Chamber’s own findings demonstrate, “criminal activity directed at non-Serbs”—including the mass, systematic commission of Excluded Crimes—was how those “core objectives” were actually fulfilled.¹¹⁷ By rewarding and promoting perpetrators of Excluded Crimes, Karadžić was expressing his support for, not “indifferen[ce] to”, the fulfilment of those objectives through Excluded Crimes.

41. The Chamber found that Karadžić’s failure to exercise his immense authority¹¹⁸ to adequately prevent or punish crimes against non-Serbs “signalled to Serb Forces and Bosnian Serb Political and Governmental Organs that criminal acts committed against non-Serbs were tolerated

¹⁰⁷ *E.g. below* paras.131-139.

¹⁰⁸ Judgement, para.3359.

¹⁰⁹ Judgement, para.3410.

¹¹⁰ *E.g. Judgement*, paras.3493, 3500.

¹¹¹ Judgement, paras.3413, 3425.

¹¹² Judgement, para.3425.

¹¹³ *E.g. Judgement*, para.3415.

¹¹⁴ *E.g. Judgement*, paras.3416, 3418.

¹¹⁵ Judgement, paras.3428-3432.

¹¹⁶ Judgement, para.3433.

¹¹⁷ *Above* paras.27-32.

¹¹⁸ Judgement, paras.3493, 6047.

throughout the period of the Overarching JCE.”¹¹⁹ Likewise, Karadžić’s false denials and “disingenuous portrayal of the reality on the ground [...] created an environment in which Bosnian Serbs could continue to commit the crimes through which the common purpose of the Overarching JCE was implemented.”¹²⁰ The Chamber appeared to limit this conclusion to JCE1 Crimes, presumably because it was assessing Karadžić’s JCE contributions. However, its predicate findings on Karadžić’s false denials and disingenuous statements apply equally to JCE1 Crimes and Excluded Crimes.¹²¹ Thus, its conclusion that Karadžić created an environment that permitted crimes logically also applies to the Excluded Crimes.

42. Karadžić’s reaction to reports of Excluded Crimes reflects and supports his longstanding intent. Prior to the conflict he knew such crimes were necessary to achieve the common purpose and was prepared to use them. It is therefore no surprise that, once the conflict broke out, he encouraged and enabled Excluded Crimes by falsely denying or minimising them and instituting a policy of inaction against the perpetrators.

5. Karadžić steadfastly pursued the common criminal purpose

43. Karadžić “persisted with promoting the objectives of ethnic separation and the territorial claims of the Bosnian Serbs into 1995.”¹²² He did so in the face of a steady stream of information demonstrating that Excluded Crimes were integral to the implementation of the common purpose, further illustrating his intent.

6. Other JCE members shared the intent for the Excluded Crimes

44. The Chamber’s findings demonstrate that other JCE members shared Karadžić’s intent for the Excluded Crimes.¹²³ Momčilo Krajišnik, Nikola Koljević, Biljana Plavšić, Ratko Mladić, Mićo Stanišić and Momčilo Mandić were at the senior-most levels of the BSL.¹²⁴ The Chamber found this leadership was collectively put on notice that the objective of ethnic separation would result in violence and was nevertheless prepared to use force and violence against Muslims and Croats to achieve it.¹²⁵ Other indications in the Judgement of JCE members’ shared intent for Excluded Crimes include:

¹¹⁹ Judgement, para.3501.

¹²⁰ Judgement, para.3504.

¹²¹ Above paras.35, 37-38.

¹²² Judgement, para.3487.

¹²³ Judgement, para.3462.

¹²⁴ E.g. Judgement, paras.3242, 3266, 3299, 3306-3307, 3450, 3453-3455.

¹²⁵ Above paras.23-24.

- Ratko Mladić commanded the VRS as it systematically committed Excluded Crimes. VRS forces murdered¹²⁶ and mistreated civilians,¹²⁷ forced detainees to work on the front lines¹²⁸ and plundered¹²⁹ and wantonly destroyed non-Serb property.¹³⁰ Mladić openly advocated the destruction of mosques,¹³¹ boasted that he “kicked the hell out of the Turks” and killed them “in passing” because “who gives a fuck for them!”¹³² and told the RS Assembly that his concern was to have the Muslims and Croats “vanish completely”.¹³³
- RS Presidency member Biljana Plavšić was warned by BiH MUP official and Defence witness Vitomir Žepinić that separating the ethnic communities would result in “violence and thousands of innocent civilians would be killed.”¹³⁴ This was no obstacle for Plavšić, who stated that “the Bosnian Muslims should be slaughtered or exterminated” and “if it takes the lives of 3 million people to solve this crisis, let’s get it done and move on.”¹³⁵ Plavšić openly supported and invited paramilitary units to the RS,¹³⁶ including JCE member Arkan,¹³⁷ whose men committed Excluded Crimes such as murder, cruel treatment, and property crimes.¹³⁸ Following Arkan’s brutal takeover of Bijeljina, Plavšić was filmed kissing Arkan and praising him for “liberat[ing]” the town.¹³⁹
- Mićo Stanišić, Interior Minister, commanded MUP forces responsible for committing mass, systematic Excluded Crimes. At MUP-operated detention facilities, detainees were systematically beaten, raped, killed and subjected to deplorable conditions and forced labour.¹⁴⁰ Well aware of mistreatment and poor conditions in detention facilities,¹⁴¹ Stanišić

¹²⁶ *E.g.* Judgement, paras.642, 644, 659-661, 1060-1065, 1619-1620, 1623-1624, 1636-1637, 1954-1960, 1975-1978, 2148-2149, 2156-2158.

¹²⁷ *E.g.* Judgement, paras.642, 644, 647, 649-654, 657, 970-971, 1071, 1986.

¹²⁸ *E.g.* Judgement, paras.642, 644, 655, 657, 2148-2149, 2267.

¹²⁹ *E.g.* Judgement, paras.642, 644, 647, 1060, 1620-1621, 2268.

¹³⁰ *E.g.* Judgement, paras.970-971, 1068, 1133, 1618-1621.

¹³¹ Judgement, para.3358.

¹³² Exh.P4442 *relied on at* Judgement, para.2771.

¹³³ Judgement, para.2766.

¹³⁴ Judgement, para.2823.

¹³⁵ Judgement, para.2727. *Also* paras.3259, 3449.

¹³⁶ Judgement, paras.3195, 3261, 3451, 3457.

¹³⁷ Judgement, para.3462. *Also* paras.3457, 3459.

¹³⁸ Judgement, para.3324.

¹³⁹ Judgement, paras.626, 3260, 3322, 3457.

¹⁴⁰ *E.g.* Kula Prison (murder; beatings; poor conditions; forced labour). Judgement, paras.2138-2140, 2143, 2145-2149, 2152-2155. Omarska (murder; beatings; sexual violence; poor conditions). Judgement, paras.1751, 1754-1768, 1774-1781. Sanski Most SJB Building and Prison (beatings; poor conditions). Judgement, paras.1981, 1983-1986, 1991. Krings Hall (murder; beatings; poor conditions). Judgement, paras.2013, 2015-2016, 2018. Sušica Camp (murder; beatings; rape and other sexual violence; poor conditions; forced labour; appropriation of property). Judgement, paras.1182, 1185-1186, 1188-1195, 1201, 1207, 1213. *Also* para.3456.

¹⁴¹ Judgement, para.3364 *citing* M.Mandić:Exh.C2, pp.278, 457 (T.8919, 9111). *Also* Exh.P1096, p.3 *relied on at* Judgement, para.3367.

failed to take adequate measures to address these crimes,¹⁴² and implemented the policy of not prosecuting crimes against non-Serbs.¹⁴³

- Momčilo Mandić, Deputy Interior Minister and later Justice Minister, together with Stanišić, was “closely involved with the units carrying out the operations to forcibly remove non-Serbs from the Municipalities as well as the commission of other crimes.”¹⁴⁴ Well aware of mistreatment and poor conditions in detention facilities,¹⁴⁵ Mandić failed to take adequate measures to address these crimes,¹⁴⁶ personally arranged for detainees to perform forced labour in Ilidža and Vogošća¹⁴⁷ and implemented the policy of not prosecuting crimes against non-Serbs.¹⁴⁸

7. All the Excluded Crimes fell within the common criminal purpose

45. All the Excluded Crimes¹⁴⁹ should be reclassified as JCE1 Crimes. While, theoretically, violent acts could be committed simultaneously with a permanent removal objective but not form part of its implementation, that is not the case with the Excluded Crimes. The Chamber’s own findings demonstrate that every category of Excluded Crimes formed part of a systematic pattern of violence that Karadžić and other JCE members embraced to accomplish their shared objective.¹⁵⁰

As discussed above, the Chamber found that:

- Karadžić and other JCE members were prepared to use violence against Muslims and Croats to achieve the common purpose and knew that violence was necessary to achieve it.¹⁵¹
- Murder, cruel and inhumane treatment, rape and other acts of sexual violence and wanton destruction formed part of the *actus reus* of deportation and forcible transfer.¹⁵²

¹⁴² Judgement, paras.3397, 3399, 3413.

¹⁴³ Judgement, para.3413.

¹⁴⁴ Judgement, para.3456.

¹⁴⁵ Judgement, para.3364 citing M.Mandić:Exh.C2, pp.278, 457 (T.8919, 9111). Also M.Mandić:Exh.C2, p.276 (T.8917).

¹⁴⁶ Judgement, paras.3384, 3397, 3399, 3413.

¹⁴⁷ Judgement, paras.2149, 2427, 3311.

¹⁴⁸ Judgement, para.3413.

¹⁴⁹ The Chamber found that the underlying acts of persecution that fall within the Excluded Crimes satisfied all the elements of persecution, including discriminatory intent (Judgement, paras.2483-2484, 2512-2518, 2536-2538, 2545-2547, 2555-2559), and found that the common purpose was expressly discriminatory (para.3447). Thus, a finding by the Appeals Chamber that Excluded Crimes form part of the common purpose equally demonstrates that persecution through those underlying acts also forms part of the common purpose.

¹⁵⁰ Given the broad geographic scope of the common purpose and the leadership roles of the JCE members, the analysis of shared intent is focused on the JCE members’ intent for the type or category of crime. See Šainović AJ, para.1491.

¹⁵¹ Above paras.21-24.

¹⁵² Above para.30.

- These same Excluded Crimes were “committed during the course of well planned and co-ordinated operations [...] follow[ing] a similar pattern across the Municipalities”.¹⁵³
- Karadžić learned of Excluded Crimes including “killings, rapes, and property related offences, from the beginning of April 1992 onwards”,¹⁵⁴ was “well aware” of the “environment of extreme fear” involving “killings, cruel and inhumane treatment, unlawful detention in terrible conditions, rape and other acts of sexual violence, [...] and [property] destruction” in which non-Serbs were forced to leave the Municipalities,¹⁵⁵ and “continued to receive information about [Excluded C]rimes” including “beatings, rapes, robberies, killing and forced labour” into 1994.¹⁵⁶
- Karadžić persistently denied and deflected Excluded Crimes, while he and other JCE members implemented a general non-punishment policy with the result that “in most cases in 1992, absolutely nothing was done to investigate or prosecute the horrific crimes which were known to authorities.”¹⁵⁷

46. These findings are sufficient to bring all Excluded Crimes within the common purpose. Additional findings reinforce this conclusion. For example:

- i. Murder/extermination: As noted above,¹⁵⁸ before the conflict began, Karadžić repeatedly threatened murder and extermination of non-Serbs,¹⁵⁹ warning, for instance, that Muslims would be “annihilated”,¹⁶⁰ face “possible extinction”,¹⁶¹ “and “disappear from the face of the earth” in a “real bloodbath”.¹⁶² Clearly, murder and extermination¹⁶³ were, from the outset, integral to Karadžić’s and the BSL’s strategy for protecting its interests and implementing its objectives.
- ii. Cruel/inhumane treatment and forced labour: The Chamber’s findings demonstrate that cruel treatment was at the heart of the permanent removal objective. Serb Forces deliberately¹⁶⁴ subjected Muslims and Croats to “an egregious level of mistreatment”¹⁶⁵

¹⁵³ Judgement, paras.3443-3444. *Also above* para.31.

¹⁵⁴ Judgement, para.3363. *Also* paras.3339, 3342-3345, 3356-3360, 3372-3373.

¹⁵⁵ Judgement, paras.3515-3516. *Also above* paras.34-37.

¹⁵⁶ Judgement, para.3360.

¹⁵⁷ Judgement, para.3425. *Also above* paras.38-41.

¹⁵⁸ *Above* para.22.

¹⁵⁹ *E.g.* Judgement, paras.2643, 2675-2681, 2691-2693, 2707-2708.

¹⁶⁰ Judgement, para.2677.

¹⁶¹ Judgement, paras.2675-2676, 2708.

¹⁶² Judgement, para.2678.

¹⁶³ The intended massive scale of the killings is evident from statements that deaths would be on the scale of “annihilation” or “extinction”. *E.g.* Judgement, paras.2675-2677, 2692, 2697.

¹⁶⁴ Judgement, paras.2498, 2505, 2511, 2512, 2536, 3518.

across the Municipalities, including through widespread and systematic torture, beatings and other forms of physical mistreatment;¹⁶⁶ verbal and mental abuse, humiliation, intimidation, and threats;¹⁶⁷ rape and other acts of sexual violence;¹⁶⁸ and the deliberate imposition¹⁶⁹ of “deplorable” conditions.¹⁷⁰ The unlawful detention of civilians—a JCE1 Crime¹⁷¹—went hand-in-hand with the establishment and perpetuation of inhumane living conditions “in the overwhelming majority of detention facilities referred to in the Indictment.”¹⁷² In every detention facility where the Chamber found unlawful detention, it also found cruel or inhumane treatment through some combination of torture, beatings, physical and psychological abuse; rape and other acts of sexual violence; and/or inhumane conditions.¹⁷³ Separating unlawful detention from the accompanying mistreatment of prisoners ignores the reality on the ground.

- iii. Wanton destruction and plunder: As noted above, in 1991, Karadžić both threatened and knew that a potential conflict would involve mass property destruction.¹⁷⁴ Once the conflict broke out, Serb Forces put Karadžić’s vision into practice, destroying entire Muslim and Croat villages and demolishing sacred sites across the Municipalities.¹⁷⁵ Karadžić acknowledged the prevalence of looting¹⁷⁶ and facilitated the use of abandoned non-Serb housing by Serb refugees, which “had the effect of ensuring that non-Serbs who had fled their homes did not return to Serb held territory.”¹⁷⁷ The destruction of mosques—a crime Mladić advocated in Karadžić’s presence¹⁷⁸—“was seen by Bosnian Serbs as a way in which Bosnian Muslims would ‘lose a motive to return to their villages.’”¹⁷⁹ Serb Forces in Vlasenica were “ordered to torch all Bosnian Muslim houses” to prevent their return.¹⁸⁰

¹⁶⁵ Judgement, para.2485.

¹⁶⁶ Judgement, paras.2486-2492.

¹⁶⁷ Judgement, paras.2492-2494.

¹⁶⁸ Judgement, paras.2500-2503.

¹⁶⁹ Judgement, para.3518.

¹⁷⁰ Judgement, paras.2507-2510. Also para.2511.

¹⁷¹ Judgement, para.3466.

¹⁷² Judgement, para.2510. Also para.2511.

¹⁷³ Compare detention facilities referenced in Judgement, paras.2485-2518 with detention facilities referenced in paras.2522-2530.

¹⁷⁴ Judgement, paras.2692 (citing Exhs.D86, pp.40-41; P1353, p.4; KDZ310:T.9191), 2708, 2719.

¹⁷⁵ E.g. Judgement, paras.2548, 2552.

¹⁷⁶ Judgement, para.3341. Also paras.3339, 3342-3345, 3357.

¹⁷⁷ Judgement, para.3401. Also para.2162.

¹⁷⁸ Judgement, para.3358.

¹⁷⁹ Judgement, para.1067.

¹⁸⁰ Judgement, para.2555. Also para.2472.

Plunder was agreed upon by the BSL as the “the price to pay” for Arkan’s engagement in Bijeljina and Zvornik.¹⁸¹

C. Impact on genocidal intent analysis

47. The Chamber’s erroneous conclusion on the scope of the common purpose resulted in a flawed genocidal intent analysis based on an erroneous premise.¹⁸² The Chamber acknowledged that the question of the JCE members’ genocidal intent “is intrinsically connected to all of the evidence on the record pertaining to the existence *and the scope of the Overarching JCE*”.¹⁸³ In analysing genocidal intent, the Chamber expressly relied on “its findings on the objectives of the [BSL]”.¹⁸⁴ It is self-evident that a common criminal purpose encompassing murder, extermination and cruel or inhumane treatment—corresponding to genocidal acts under Articles 4(2)(a)-(c)—is more reflective of JCE members’ genocidal intent than a common purpose where genocidal acts are unleashed not as an integral part of its execution, but merely as foreseeable consequences.

D. Remedy

48. The Appeals Chamber should correct the Chamber’s errors. It should find that the Excluded Crimes formed part of the common purpose of the Overarching JCE and that Karadžić shared the intent for those crimes with other JCE members. Accordingly, the Appeals Chamber should substitute the finding that Karadžić is responsible for the Excluded Crimes pursuant to the third category of JCE with a finding that he is responsible pursuant to the first category of JCE. The Appeals Chamber should also re-evaluate genocidal intent under Count 1 together with the re-evaluation of genocidal intent requested under Grounds 2 and 3. In accordance with the overall remedy requested under Ground 3, it should find that Karadžić and other JCE members shared the intent to commit genocide and enter a conviction under Count 1.¹⁸⁵ Finally, for both the substituted JCE1 convictions¹⁸⁶ and the Count 1 conviction, the Chamber should increase Karadžić’s sentence.

¹⁸¹ Judgement, para.616 *citing* M.Davidović:Exh.P2848, para.66.

¹⁸² *Also below* Sub-Ground 3(C).

¹⁸³ Judgement, para.2592 (emphasis added).

¹⁸⁴ Judgement, para.2625.

¹⁸⁵ *Below* para.147.

¹⁸⁶ Substituting a JCE3 conviction with a JCE1 conviction warrants an increased sentence in light of both the heightened *mens rea* and more direct relationship between the accused’s JCE contribution and the crimes. *E.g. Krstić* AJ, para.268 (replacing a conviction under JCE1 with an aiding and abetting conviction merits a lower sentence in part due to the lower *mens rea*).

III. GROUND 2: MUSLIMS AND CROATS WERE SUBJECTED TO DESTRUCTIVE CONDITIONS OF LIFE WITHIN THE MEANING OF ARTICLE 4(2)(C)

49. The Chamber found that across the Municipalities—including in every one of the Count 1 Municipalities—Serb Forces and Bosnian Serb Political and Governmental Organs detained thousands of members of the Bosnian Muslim and Bosnian Croat groups (collectively, the “Groups”) in make-shift detention facilities and prisons.¹⁸⁷ They subjected detainees to “egregious” mistreatment, including torture, beatings, harassment, constant humiliation and degradation,¹⁸⁸ rape and other “horrific” acts of sexual violence, causing the “utmost humiliation and degradation to the dignity of the victims”.¹⁸⁹ Many detainees were murdered—some were executed, while others died as a result of the cruel and inhumane treatment inflicted upon them.¹⁹⁰

50. Alongside the killings and abuse, Serb Forces and Bosnian Serb Political and Governmental Organs deliberately imposed “deplorable” conditions of detention.¹⁹¹ These conditions killed some detainees and had long-lasting and debilitating effects on others.¹⁹² The Chamber acknowledged the serious impact of these conditions of detention but nevertheless concluded—with virtually no analysis—that the elements of Article 4(2)(c) had not been established.¹⁹³ As a result, when the Chamber analysed genocidal intent, it considered the thousands of Muslims and Croats subjected to these appalling detention conditions in the Count 1 Municipalities as among those who were, for the Chamber, merely “displaced” (through their eventual release and expulsion) rather than among those subjected to genocidal acts under Article 4(2).¹⁹⁴ This categorisation fails to adequately capture the destructive impact that this mass incarceration in deplorable conditions had on the targeted communities in the Count 1 Municipalities.¹⁹⁵

¹⁸⁷ Judgement, paras.2522, 3465. *Also e.g.* paras.888 (Foča), 1174, 1187 (Vlasenica), 1305 (Zvornik), 1749, 1793, 1851-1852 (Prijedor), 1995 (Sanski Most).

¹⁸⁸ Judgement, para.2485. *Also* paras.2486-2494, 2497-2499 (incorporating factual findings from detention facilities in all Count 1 Municipalities).

¹⁸⁹ Judgement, paras.2504-2506. *Also* paras.2500-2503 (including findings relating to detention facilities in four of the seven Count 1 Municipalities—Foča, Prijedor, Vlasenica and Zvornik).

¹⁹⁰ Judgement, paras.2447-2448 (incorporating factual findings from detention facilities in all Count 1 Municipalities). *Also* para.2461.

¹⁹¹ Judgement, paras.2507-2511 (incorporating factual findings from detention facilities in all the Count 1 Municipalities). In addition, in at least two of the seven Count 1 Municipalities—Foča and Vlasenica—detainees were forced to perform exhausting labour. *Generally* Judgement, paras.2531-2538. *Also below* para.75 (6th bullet).

¹⁹² *Below* paras.74-75.

¹⁹³ Judgement, para.2587 (“While the conditions in the detention facilities in the Count 1 Municipalities were dreadful and had serious effects on the detainees, the Chamber is not convinced that the evidence before it demonstrates that they ultimately sought the physical destruction of the Bosnian Muslims and Bosnian Croats.”).

¹⁹⁴ Judgement, para.2624.

¹⁹⁵ *Below* paras.119-120, 135, 138.

51. In reaching its conclusion on the elements of Article 4(2)(c), the Chamber erred in law by failing to provide a reasoned opinion and/or improperly compartmentalising its analysis of the evidence. Alternatively, the Chamber reached a conclusion that no reasonable trial chamber could have reached.¹⁹⁶

A. Sub-Ground 2(A): The Chamber failed to provide a reasoned opinion

52. In determining whether the elements of Article 4(2)(c) were established, the Chamber summarised its earlier factual findings regarding deplorable and degrading conditions deliberately imposed on detainees.¹⁹⁷ The Chamber found that conditions in the detention facilities in the Count 1 Municipalities (“Count 1 Facilities”) were “dreadful and had serious effects on the detainees”, in some cases causing death.¹⁹⁸ Nevertheless, the Chamber concluded, without explanation, that the evidence did not demonstrate that “they ultimately sought the physical destruction of the Bosnian Muslims and Bosnian Croats”.¹⁹⁹

53. To provide a reasoned opinion, the Chamber was required to give some indication of the legal and/or factual basis for its conclusion that the elements of Article 4(2)(c) were not satisfied. This is particularly so given the Chamber’s recognition that conditions commonly identified as falling within the scope of Article 4(2)(c) were deliberately imposed in the Count 1 Facilities with serious consequences—including deaths—for those detained.²⁰⁰ Instead, the Chamber merely restated aspects of the Tribunal’s jurisprudence²⁰¹ “without explaining why” that jurisprudence supported its conclusion.²⁰²

54. Furthermore, the Chamber failed to discuss issues that it accepted were relevant. For example, despite acknowledging the relevance of direct evidence that conditions were aimed at

¹⁹⁶ The Prosecution does not proceed with its appeal under Ground 2 for the following facilities:

- Bratunac: football stadium (C.6.1);
- Foča: Karaman’s house (C.10.2), Buk Bijela Worker’s Huts (C.10.4), Livade TO warehouses (C.10.6);
- Ključ: SJB Building (C.15.1), Nikola Mačkić school (C.15.2), Velagići school (C.15.3);
- Prijedor: Ljubija football stadium (C.20.6);
- Sanski Most: Magarica military facility (C.22.5);
- Zvornik: Čelopek Dom Culture (C.27.1), Alhos Factory (C.27.3), Novi Izvor (Ciglan) (C.27.4), Drinjača Dom Culture (C.27.5), Ekonomija Farm (C.27.6), Standard Factory (C.27.7).

¹⁹⁷ Judgement, paras.2584-2585.

¹⁹⁸ Judgement, paras.2584, 2587.

¹⁹⁹ Judgement, para.2587.

²⁰⁰ See Judgement, paras.2507-2511 (incorporating factual findings from detention facilities in all the Count 1 Municipalities), 2584, 2587. Compare also para.547 with paras.2583-2585. Further below paras.74-75.

²⁰¹ See Judgement, paras.2583, 2586. Also paras.546-548.

²⁰² See *Uwinkindi* Decision, para.20 (merely restating Tribunal jurisprudence, without explaining why the jurisprudence supports the chamber’s decision, constitutes a failure to provide a reasoned opinion). Also *Prlić* Decision, para.16 (“a Trial Chamber must, at a minimum, provide reasoning in support of its findings on the substantive considerations relevant for a decision”).

physical destruction,²⁰³ the Chamber made no reference to direct evidence on the record. Such evidence includes that of a detainee who surmised that the dreadful conditions at KP Dom Foča were aimed at “hav[ing] a certain number of people go to their death in a different way”.²⁰⁴ This assessment is consistent with the Chamber’s own findings that: KP Dom Foča detainees were “deliberately housed in cramped conditions” despite adequate space being available;²⁰⁵ clothes made from blankets to combat the harsh winter temperatures were confiscated;²⁰⁶ detainees experienced “severe weight loss” as a result of a “deliberate policy” to feed them barely enough for their survival;²⁰⁷ and any attempts by detainees to improve their living conditions were punished.²⁰⁸ In its Article 4(2)(c) analysis, the Chamber did not discuss such findings and evidence,²⁰⁹ even though they go directly to a determination of whether the conditions were aimed at bringing about physical destruction. Nor did it explain why—in the face of such findings and evidence—it nevertheless considered that conditions at KP Dom Foča did not satisfy the elements of Article 4(2)(c).

55. The Chamber also failed to discuss the objective probability of the conditions leading to physical destruction, despite having held that this was relevant.²¹⁰ It did not discuss the “illustrative factors to be considered in evaluating the criterion of probability”²¹¹ aside from briefly appraising the actual nature of the conditions.²¹² The Chamber made no reference to the period of time detainees were subjected to such conditions, which in some cases was many months,²¹³ or to the acute vulnerability of the Group members subjected to those conditions—due to their status as detainees and other factors including gender, age, health status and regular exposure to torture, cruel treatment and killings.²¹⁴

56. Given the compelling evidence demonstrating the objective probability of the conditions leading to physical destruction of Groups in part,²¹⁵ the Chamber was obliged at least to state whether this criterion was established for any of the Count 1 Facilities, with some reference to

²⁰³ See Judgement, para.548.

²⁰⁴ KDZ239:Exh.P3336, p.133 (T.1312) *relied on at* Judgement, para.893 (fn.2941).

²⁰⁵ Judgement, para.889. *Also* paras.881, 888.

²⁰⁶ Judgement, para.891.

²⁰⁷ Judgement, paras.893-894. *Also* para.2514.

²⁰⁸ Judgement, para.892. *Also* para.2492.

²⁰⁹ See Judgement, paras.2507-2509 (making only summary findings on common conditions across Count 1 Facilities with some general cross-references to “C.10.1” (KP Dom Foča)).

²¹⁰ See Judgement, para.548.

²¹¹ Judgement, para.548.

²¹² Judgement, paras.2584-2585.

²¹³ *E.g.* Judgement, paras.881-882, 888 (KP Dom Foča operated between at least April and December 1992), 1181, 1184, 1200-1201 (Sušica operated between May and September 1992), 1818, 1821 (Trnopolje operated for over four months from May 1992).

²¹⁴ *E.g.* Judgement, paras.2523-2525, 2528-2529. *Also below* paras.63-64. *Compare* Judgement, paras.2583-2587 with para.2535.

²¹⁵ *Below* Sub-Ground 2(C).

factors relevant to that determination.²¹⁶ If this criterion was established, the Chamber was then obliged to state why it nevertheless considered that the elements of Article 4(2)(c) were not met. The objective probability assessment and the underlying “illustrative factors” are relevant considerations that a reasonable trial chamber “would have been expected to take into account before coming to a decision” regarding the elements of Article 4(2)(c) and therefore should have discussed.²¹⁷

57. The Chamber’s failure to explain how it applied the jurisprudence to the facts of this case and to analyse key factors and evidence relevant to assessing Article 4(2)(c) has left the parties to guess at the reasoning underpinning its conclusion. The Chamber therefore erred in law by failing to provide a reasoned opinion. To correct this error, the Appeals Chamber should consider the Chamber’s factual findings and relevant evidence and conduct its own Article 4(2)(c) analysis.²¹⁸ As set out below,²¹⁹ the only reasonable conclusion is that Group members were subjected to destructive conditions within the meaning of Article 4(2)(c).

B. Sub-Ground 2(B): The Chamber compartmentalised its analysis

58. The Chamber erred in law by compartmentalising its analysis of the evidence when assessing whether conditions in Count 1 Facilities satisfied the elements of Article 4(2)(c). The Chamber ignored evidence relevant to this assessment including the widespread killings and acts causing serious bodily or mental harm (together, “other genocidal acts”) that were a daily fact of life in these facilities, as well as other relevant evidence. Such an approach goes against Appeals Chamber jurisprudence requiring trial chambers to identify “all the legal implications of the evidence presented” and evaluate such evidence “holistically”.²²⁰ An assessment of the conditions in their full and proper context leads to the conclusion that the elements of Article 4(2)(c) are satisfied.

59. The Chamber was satisfied that Group members were subjected to killings and acts causing serious bodily or mental harm in the Count 1 Facilities, constituting genocidal acts under Articles 4(2)(a) and 4(2)(b).²²¹ In assessing whether those Group members were also subjected to destructive conditions, the Chamber explicitly “limit[ed] its assessment” to a subset of the

²¹⁶ Compare Judgement, paras.2583-2587 (the Chamber’s global Article 4(2)(c) analysis) with *Brđanin* TJ, paras.904-962 (providing an Article 4(2)(c) analysis for each facility for which sufficient evidence of inhumane conditions was presented). Also *Karadžić 98bis* AJ, paras.47-50 (finding the Chamber erred in concluding that the Rule 98bis standard was not met for Article 4(2)(c), referring specifically to Keraterm, Omarska, Trnopolje, KP Dom Foča, Betonirka and Sušica).

²¹⁷ *Šainović* Decision, para.6.

²¹⁸ See *Ndindiliyimana* AJ, paras.293, 316; *Tolimir* AJ, paras.10, 433; *Popović* AJ, para.1065. Also below para.77.

²¹⁹ Below Sub-Ground 2(C).

²²⁰ *Tolimir* AJ, paras.206, 210-211. Also e.g. *Halilović* AJ, para.128.

conditions alleged by the Prosecution²²²—namely, acts which had not already been found to cause “serious bodily or mental harm”.²²³ That subset of conditions included the imposition of inhumane living conditions, forced labour and the failure to provide adequate accommodation, shelter, food, water, medical care or hygienic sanitation facilities.²²⁴ The Chamber also excluded killings from the scope of its Article 4(2)(c) analysis.²²⁵ Even assuming the Chamber was correct to exclude other genocidal acts as conditions of detention *per se*, those acts were nevertheless relevant to an assessment of both the severity of the conditions, and whether they were aimed at physical destruction.²²⁶ Yet the Chamber failed to consider the implications of this evidence.

60. The Chamber’s compartmentalisation went beyond its disregard of other genocidal acts. The Chamber also analysed detention conditions without considering the particular circumstances of detainees. In discussing the applicable law, it acknowledged that the context in which conditions are imposed—including the “vulnerability” of those subjected to them—is relevant to an Article 4(2)(c) assessment.²²⁷ Yet when it conducted that assessment, the Chamber made no reference to findings and evidence demonstrating the acute vulnerability of detainees in Count 1 Facilities.²²⁸ This again reveals a failure to evaluate the evidence holistically.

1. The context of detention supports the conclusion that the Article 4(2)(c) elements were established

61. The context in which Group members were detained—including the commission of other genocidal acts—supports the conclusion that the elements of Article 4(2)(c) were satisfied in two ways. First, this context—including both the vulnerability of the detainees, as well as their constant exposure to other genocidal acts—exacerbated the effect of detention conditions, rendering them more destructive. Second, the systematic, deadly violence that was simultaneously inflicted on detainees in these facilities demonstrates that the inhumane conditions were aimed at physical destruction.

²²¹ Judgement, paras.2578-2582.

²²² Indictment, para.40(c).

²²³ Judgement, para.2583. Also para.546 (fn.1738). Further paras.2580-2582.

²²⁴ Judgement, para.2583.

²²⁵ Judgement, paras.546, 2586. Also fn.1738.

²²⁶ Below paras.61-69.

²²⁷ Judgement, para.548. Also above para.55.

²²⁸ Below paras.63-64.

(a) The context in which conditions were imposed amplified their destructive nature

62. The Chamber's compartmentalised approach to the evidence led it to analyse a sanitised version of events in detention facilities, without due regard to the way in which the surrounding circumstances amplified the destructive nature of detention conditions. This obscured the full picture of the misery, suffering and physical deterioration of detainees.

63. First, the evidence and the Chamber's factual findings demonstrate the acute vulnerability of detainees in Count 1 Facilities. They were unlawfully detained on the basis of their ethnicity, and found themselves at the whim of guards and commanders who operated entirely outside the law.²²⁹ Detainees included women, children, elderly, mentally impaired, sick and infirm individuals,²³⁰ who were often separated from their families and caregivers.²³¹ For example, elderly detainees included women and men in their 70s and 80s.²³² Omarska detainees included a 13-year-old boy "whose both arms had been freshly broken" and who was unable to feed himself.²³³ Numerous KP Dom Foča detainees suffered from mental²³⁴ or physical²³⁵ disorders including schizophrenia and serious heart conditions. It is self-evident that inhumane conditions would have a greater destructive impact on such detainees.

64. Moreover, many detainees were already physically or psychologically weakened before their detention due to prior mistreatment by Serb Forces, rendering them more vulnerable to the inhumane conditions subsequently imposed upon them.²³⁶ Likewise, being exposed to and victimised by other genocidal acts within the camps left detainees physically and mentally broken and therefore more susceptible to lack of adequate medical care and other basic necessities.²³⁷

65. Lastly, the evidence and the Chamber's factual findings show that the threat of death or mistreatment aggravated the conditions in Count 1 Facilities. While the Chamber recognised some

²²⁹ E.g. Judgement, paras.2523-2529. *Also above* paras.38-41.

²³⁰ E.g. Judgement, paras.767, 780 (Bratunac), 883, 896 (Foča), 1163-1164, 1167, 1184, 1186-1187, 1194, 1201 (Vlasenica), 1740, 1744, 1747, 1749, 1753 (Prijeedor), 1982, 1991 (Sanski Most). Trnopolje in particular was largely dedicated to the detention of women, children and elderly. Judgement, para.1818. *Also* paras.906, 1754, 1762, 2525, 2527, 3518.

²³¹ E.g. Judgement, paras.916-917 (Foča), 1186 (Vlasenica), 1628, 1818 (Prijeedor).

²³² E.g. KDZ017:Exh.P3568, p.54 (T.2821); I.Osmanović:Exh.P3212, para.114; [REDACTED]; Judgement, para.906 (fn.3005) (identifying Mensud Pašović as a detainee taken out of KP Dom Foča and killed); A.Mašović:Exh.P4853, p.107 (listing Pašović as being born in 1905).

²³³ M.Sejmenović:T.20495 *relied on at* Judgement, para.1754 (fn.6001).

²³⁴ KDZ239:Exh.P3336, pp.39-40 (T.1218-1219) and KDZ017:Exh.P3568, pp.27, 121 (T.2794, 2888) *relied on at* Judgement, para.906 (B.8.1).

²³⁵ E.g. KDZ239:Exh.P3336, p.41 (T.1220). *Also below* para.74 (2nd bullet) (detainee Ešad Hadžić died from internal bleeding after his ulcer medication ran out).

²³⁶ See Judgement, paras.2495-2496, 2499, 2512, 2525. *Further e.g.* paras.895 (Foča), 1883 (Prijeedor).

²³⁷ See Judgement, paras.2493, 2497, 2499, 2505, 2507, 2512, 2580-2582. *Further e.g.* paras.895 (Foča), 1986, 1997 (Sanski Most). *Below* paras.74-75.

limited interaction between cruel treatment and detention conditions in the context of forced labour,²³⁸ the record demonstrates a pervasive threat of death or abuse for detainees who attempted to avail themselves of the already meagre provision of necessities of life. For instance, the effect of insufficient food was exacerbated by the risk of being beaten during meals.²³⁹ Some detainees “didn’t dare” risk the exposure that accompanied attending meals at Omarska despite not having eaten for days “because they were afraid that they would be beaten up or killed at any moment”.²⁴⁰ Poor hygienic conditions were compounded by the risk of being beaten when using—or merely asking to use—toilet facilities or when accessing water.²⁴¹ For example, a Sušica detainee “was ordered by the guards to beat the men trying to go to the bathroom so that they couldn’t relieve themselves”.²⁴²

66. The Chamber’s anodyne list of poor conditions does not adequately capture the severity of the conditions of detention or their actual impact on detainees. A proper assessment of the context in which those conditions were inflicted reveals that they were not merely “dreadful” for those who endured them,²⁴³ but also aimed at their physical destruction.²⁴⁴

(b) The commission of other genocidal acts demonstrates that conditions were aimed at physical destruction

67. The Chamber’s compartmentalised approach led it to ignore its own findings showing that the same authorities who imposed deplorable detention conditions in Count 1 Facilities were simultaneously killing, raping and abusing detainees or enabling these other genocidal acts in the very same facilities. This further supports the conclusion that those conditions were aimed at physical destruction. For example:

- Serb Forces murdered over 200 of the 500-600 non-Serbs held at KP Dom Foča during the second half of 1992.²⁴⁵
- MUP officers executed all 140 prisoners remaining at Sušica camp in September 1992 after detainees there had endured months of appalling conditions and mistreatment.²⁴⁶

²³⁸ Judgement, para.2585.

²³⁹ Judgement, para.2492. *E.g.* paras.900 (Foča), 1754, 1798 (Prijeedor). Moreover, detainees working in the Omarska kitchen were warned they would be shot if they gave out too much bread. Judgement, para.1773 (Prijeedor).

²⁴⁰ KDZ074:Exh.P709, p.49 (T.2339).

²⁴¹ Judgement, para.2492. *E.g.* paras.1166, 1177, 1189 (Vlasenica), 1755, 1858 (Prijeedor).

²⁴² I.Osmanović:Exh.P3212, para.122 *relied on at* Judgement, para.1189 (fn.4083). *Also* KDZ273:Exh.P3528, pp.31, 70 (when Omarska detainees asked to use the toilet or drink water, “many of them didn’t return after that”; “[p]eople were afraid of dying all the time; every minute, every second”).

²⁴³ Judgement, para.2587.

²⁴⁴ *Below* paras.71-73.

²⁴⁵ *See* Judgement, paras.888, 904-911, 2447 (fn.8238), 2461 (B.8.1). *Also* paras.2578-2579.

- Serb Forces massacred at least 190 detainees held in Keraterm's Room 3 in late July 1992.²⁴⁷
- Police forces executed approximately 200 non-Serb men at Korićanske Stijene, including men taken from Trnopolje as camp officials rushed to "empty the camp" in advance of the arrival of journalists and ICRC representatives in August 1992.²⁴⁸
- Serb Forces beat to death or shot dead hundreds of Omarska detainees during the period of its operation,²⁴⁹ executed at least 150 non-Serb detainees from the Brdo region at Omarska in July 1992²⁵⁰ and shot dead at least 120 men and women taken from Keraterm and Omarska in August 1992.²⁵¹
- Serb Forces executed approximately 160 of the 750 men detained at Karakaj Technical School in Zvornik in June 1992,²⁵² while taking another "large number" to Gero's Slaughterhouse for execution.²⁵³
- In addition to detainees who died of suffocation at the Vuk Karadžić School in Bratunac, dozens of others were beaten to death or executed by Serb Forces.²⁵⁴

Moreover, beatings, sexual violence and other forms of mistreatment were hallmarks of detention in the Count 1 Facilities.²⁵⁵

68. The simultaneous commission by Serb Forces of mass executions and horrific acts of cruel treatment against detainees held in the Count 1 Facilities leads to the inference that the deplorable conditions of detention were equally aimed at physical destruction.

2. Conclusion

69. By analysing detention conditions in Count 1 Facilities without due regard to the totality of the circumstances, the Chamber failed to adequately account for the destructive impact of such conditions or properly assess whether the conditions were aimed at physical destruction. As set out

²⁴⁶ Judgement, paras.1208-1213, 2447 (fn.8246), 2461 (B.18.2). *Also* paras.1188-1197, 1200-1201 (C.25.1), 2578-2579.

²⁴⁷ Judgement, paras.1806-1815, 2447 (fn.8243), 2461 (B.15.1). *Also* paras.2578-2579.

²⁴⁸ Judgement, paras.1587, 1833-1847, 1850, 2447 (fn.8243), 2461 (B.15.6). *Also* paras.2578-2579.

²⁴⁹ Judgement, paras.1757, 1760-1764, 1766-1768, 1774, 2447 (fn.8243), 2461 (B.15.2). *Also* paras.2578-2579.

²⁵⁰ Judgement, paras.1779-1781, 2447 (fn.8243), 2461 (B.15.4). *Also* paras.2578-2579.

²⁵¹ Judgement, paras.1775-1778, 2447 (fn.8243), 2461 (B.15.3). *Also* paras.2578-2579.

²⁵² Judgement, paras.1304-1305, 1308-1309, 1311, 2447 (fn.8248), 2461 (B.20.3). *Also* paras.2578-2579.

²⁵³ Judgement, paras.1313-1315, 2446 (fn.8232), 2461 (A.16.3). *Also* paras.2578-2579.

²⁵⁴ Judgement, paras.769-780, 2447 (fn.8236), 2461 (B.4.1, C.6.2). *Also* paras.2578-2579.

in more detail below,²⁵⁶ a holistic analysis of the evidence leads to the conclusion that the elements of Article 4(2)(c) are established.²⁵⁷

C. Sub-Ground 2(C): The elements of Article 4(2)(c) are established on the findings and evidence

70. In the alternative to the legal errors discussed above, the Chamber erred in fact by concluding that the elements of Article 4(2)(c) were not established in relation to the Count 1 Facilities. Having regard to the totality of the evidence and the Chamber's factual findings, no reasonable trial chamber could have reached such a conclusion.

71. The Chamber correctly noted that while Articles 4(2)(a) and 4(2)(b) require proof of a result, Article 4(2)(c) does not require proof that the conditions "actually led to death or serious bodily or mental harm".²⁵⁸ All that is required is proof of the deliberate infliction of conditions of life that "do not immediately kill the members of the group, but ultimately seek their physical destruction".²⁵⁹ While Article 4(2)(c) refers to the deliberate infliction "on the group" of conditions calculated to bring about "its" physical destruction in whole or in part, such terms must be read "in their context" and in light of the object and purpose of the Genocide Convention and ICTY Statute.²⁶⁰ It is clear from the context that Article 4(2)(c) is aimed at capturing the infliction of conditions on a collection of *group members* calculated to bring about *their* physical destruction. This is the only way in which the terms of Article 4(2)(c) can be given their ordinary meaning in context, while remaining true to the object and purpose of the provision as a whole. Any other interpretation risks rendering part of the provision "redundant, illogical [or] superfluous".²⁶¹

72. Although no Tribunal jurisprudence addresses this issue directly, this understanding of Article 4(2)(c) is supported by the manner in which previous chambers have applied the provision. For example, the *Brdanin* Trial Chamber's analysis turned on the effect that conditions had on the

²⁵⁵ *Generally* Judgement, paras.2485-2494, 2497-2506 (incorporating findings relating to Count 1 Facilities). *Also* paras.2580-2582.

²⁵⁶ *Below* Sub-Ground 2(C).

²⁵⁷ *Below* para.77.

²⁵⁸ Judgement, para.546. *Also* *Tolimir* AJ, para.225; *Popović* TJ, para.814; *Brdanin* TJ, para.691; *Stakić* TJ, para.517.

²⁵⁹ *Tolimir* AJ, paras.225, 227-228. *Also* ICTY Statute, Art.4(2)(c).

²⁶⁰ *See* VCLT, Art.31(1); *Nyiramasuhuko* AJ, para.2137.

²⁶¹ *See* *Nyiramasuhuko* AJ, para.2137. *Also* *Tadić* AJ, para.284. For example, interpreting the provision to require that the conditions *in and of themselves* be inflicted on and calculated to destroy the entire group (or a substantial part thereof) would effectively transport the genocidal intent requirement from the *chapeau* of Article 4 into sub-paragraph (2)(c). Moreover, such an interpretation could unreasonably preclude the application of Article 4(2)(c) in cases where the perpetrators employ a range of different methods of destruction against different members of the group (and where destructive conditions form only one such method and therefore cannot be, by themselves, calculated to destroy the entire, or substantial part of, the group).

group members subjected to them.²⁶² Similarly, while there is ambiguity in the *Tolimir* Appeals Chamber's language on this point—which was not central to its analysis—the Chamber ultimately assessed whether the forcible transfer operations “were carried out in such a way so as to lead to the ultimate death of the displaced Bosnian Muslims”, that is the members of the protected group subjected to the alleged Article 4(2)(c) conditions.²⁶³

73. While it is “impossible to enumerate in advance the ‘conditions of life’ that would come within the prohibition”,²⁶⁴ examples include:

subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion.²⁶⁵

Where such conditions have been imposed in circumstances demonstrating an objective probability of those conditions leading to the group members' physical destruction, they have been found to satisfy the elements of Article 4(2)(c).²⁶⁶

74. The Chamber found that Serb Forces and Bosnian Serb Political and Governmental Organs deliberately imposed conditions in the Count 1 Facilities that resulted in the death of some detainees²⁶⁷ and caused lasting physical and psychological damage to others.²⁶⁸ Yet it unreasonably concluded that the conditions did not satisfy the elements of Article 4(2)(c) for any of the Count 1 Facilities.²⁶⁹ The totality of the evidence—and the Chamber's own findings—leave no doubt that the conditions imposed in the Count 1 Facilities satisfied the requisite standard. A summary of the

²⁶² *E.g. Brđanin* TJ, paras.906, 908-962.

²⁶³ *Tolimir* AJ, para.233 (emphasis added).

²⁶⁴ *Brđanin* TJ, fn.2257 quoting N.Robinson, *The Genocide Convention: A Commentary* (1960), p.64.

²⁶⁵ *Tolimir* AJ, para.225. Also *Tolimir* AJ, paras.226, 228, 234; ICJ *Croatia v. Serbia* Judgement, para.161; *Brđanin* TJ, para.691; Judgement, para.547. Further *Popović* TJ, para.815; *Akayesu* TJ, para.506; *Krajišnik* TJ, paras.861, 863; *Rutaganda* TJ, para.52; *Musema* TJ, para.157; *Kayishema* TJ, paras.115-116 (including rape); *Stakić* TJ, para.517; *Stakić 98bis* Decision, para.25 (the denial of “elementary means of existence enjoyed by other sections of the population”).

²⁶⁶ See *Brđanin* TJ, paras.906, 930-935 (Omarska), 936-939 (Keraterm), 940-945 (Trnopolje), 950-954 (Betonirka); *Karadžić 98bis* AJ, para.49 (finding for Rule 98bis purposes that Group members were subjected to conditions “that would bring about their physical destruction”).

²⁶⁷ See Judgement, para.2584. Also:

- Bratunac: paras.772-773, 780, 2448 (fn.8251), 2509;
- Foča: paras.895-896, 903, 2448 (fn.8252), 2509, 2578;
- Prijedor: paras.1756, 1774, 2448 (fn.8253), 2509, 2578; also para.1827;
- Zvornik: paras.1305, 1307, 2448 (fn.8256), 2509, 2578.

Further KDZ074:Exh.P709, p.48 (T.2338) (testifying that detainees in Omarska “were dying as a result of such bad conditions” and that those who “were lucky and fortunate survived, but they can only thank God for their survival”).

²⁶⁸ Judgement, paras.889 (Foča), 2509. Also paras.2584, 2587. Further KDZ239:T.18980-18981 (testifying that detainees released from KP Dom Foča were “all thin, exhausted, we were all on the brink of survival”).

²⁶⁹ The unreasonableness of the Chamber's findings is illustrated by *Brđanin* Trial Chamber findings that the imposition of these same conditions in Omarska, Keraterm, Trnopolje and Betonirka satisfied the elements of Article 4(2)(c) beyond a reasonable doubt. See *Brđanin* TJ, paras.930-935 (Omarska), 936-939 (Keraterm), 940-945 (Trnopolje), 950-954 (Betonirka). Similarly, at the Rule 98bis stage in this case, the Appeals Chamber—relying on evidence ultimately

conditions in three of the most deplorable facilities—Omarska, KP Dom Foča and Sušica—demonstrates the unreasonableness of the Chamber’s conclusion:

- Omarska camp in Prijedor (C.20.2) operated for approximately three months between May and August 1992, holding as many as 3,000 detainees at one time, including women, boys, elderly and physically or mentally impaired individuals.²⁷⁰ Conditions were “appalling”.²⁷¹ The “grossly insufficient” food resulted in many detainees losing between 20 and 30 kilograms during their detention, others considerably more.²⁷² Denial of potable drinking water caused intestinal problems, and poor hygiene facilities meant that “[s]kin diseases were prevalent as well as acute cases of diarrhoea and dysentery”.²⁷³ Omarska was “extremely crowded” and “stifling” in the summer heat such that two young men suffocated to death in a garage,²⁷⁴ while others were “packed one on top of the other” in the lavatories and “often had to lie in the midst of excrement”.²⁷⁵ Medical care was virtually non-existent,²⁷⁶ as evidenced by the improvised efforts of one medically-trained detainee to treat life-threatening injuries (until he was taken from the camp and killed).²⁷⁷ In such circumstances, detainees could do nothing but watch their loved ones suffer [REDACTED] as they slowly succumbed to their wounds.²⁷⁸ Alongside these conditions, detainees “constantly lived in fear of being killed at any time”.²⁷⁹ Many suffered severe and frequent beatings, sexual violence, humiliation and threats.²⁸⁰ Hundreds were beaten to death, shot or taken away for execution.²⁸¹ Detainees saw dead bodies strewn about the camp or being taken away by trucks, and were forced to clean cells where they found blood, teeth and

accepted by the Chamber—found that the conditions imposed in the Count 1 Facilities could satisfy that standard. *Karadžić 98bis* AJ, paras.47-50.

²⁷⁰ Judgement, para.1749.

²⁷¹ Judgement, para.1754.

²⁷² Judgement, para.1754. Also KDZ074:Exh.P709, p.49 (T.2339) (“We were hungry. We dreamt about food. We fantasised about eating.”); Exhs.P6686; P3797.

²⁷³ Hygiene conditions were so poor that detainees “were often forced to excrete and urinate in their rooms”. Judgement, paras.1754-1755.

²⁷⁴ Judgement, paras.1756, 1774, 2448 (fn.8253), 2509, 2578, 2584 (Prijedor).

²⁷⁵ Judgement, para.1756 (Prijedor).

²⁷⁶ See Judgement, para.1754.

²⁷⁷ For example, Dr. Sadiković attempted to treat detainees [REDACTED]. K.Mešanović:Exh.P3528, para.27; Nusret Sivac:Exh.P3478, pp.132-133 (T.6682-6683). Dr. Sadiković was taken away on 5 August 1992 and killed by Serb Forces. Judgement, paras.1766 (fn.6056), 1776-1778 (B.15.3).

²⁷⁸ KDZ392:Exh.P707, pp.73-76 (T.2737-2740) (confidential) *relied on at* Judgement, para.1760 (fn.6034).

²⁷⁹ Judgement, para.1766 *relying on* KDZ026:Exh.P2089, p.113 (T.1905) (confidential). [REDACTED]. KDZ026:Exh.P2089, pp.95-96 (T.1887-1888) (confidential) *relied on at* Judgement, para.1760 (fn.6030). Also para.2493.

²⁸⁰ *Generally* Judgement, paras.1757-1774. Also paras.2485-2486, 2489-2494, 2496-2499, 2500-2506, 2512-2518, 2580-2582.

²⁸¹ Judgement, paras.1757, 1760-1764, 1766-1768, 1774-1778, 1779-1781, 2447 (fn.8243), 2461 (B.15.2, B.15.3, B.15.4). Also paras.2578-2579. *Further above* para.67.

hair.²⁸² These other genocidal acts not only rendered the conditions of detention more deadly, they also reinforce the conclusion that the conditions themselves represented a further means of targeting Group members.²⁸³ That the surviving Omarska detainees were ultimately rescued from such conditions by the international outcry that forced Karadžić to intervene and close the Prijedor camps²⁸⁴ does not detract from the conclusion that these conditions were plainly leading to death.

- KP Dom Foča (C.10.1) held hundreds of Bosnian Muslim detainees between April and December 1992.²⁸⁵ They “were not suspected, charged, tried, or convicted for any crime before being detained or while detained”, and “[n]o consideration was given to age, state of health or civilian status”.²⁸⁶ Inadequate living conditions inflicted lasting physical and psychological damage on detainees.²⁸⁷ Solitary confinement cells designed to hold one person were packed with up to 18 people at a time.²⁸⁸ Hygiene conditions were “deplorable” and washing facilities “minimal”, causing a major lice problem.²⁸⁹ During the harsh winter of 1992, detainees were held in rooms with insufficient heating and broken windowpanes, despite the availability of sufficient raw material for furnaces; “clothes made from blankets to combat the cold were confiscated”.²⁹⁰ Non-Serb detainees were “fed starvation rations leading to severe weight loss and other health problems”, while Bosnian Serb detainees “received army rations with extra meat and vegetables and did not suffer the extreme weight loss of non-Serb detainees”.²⁹¹ Those in need of urgent medical attention were left unattended or given insufficient treatment, such as Ešad Hadžić, who died from internal bleeding after his ulcer medication ran out.²⁹² Detainees were forced to work in a variety of roles, including driving vehicles to detect landmines.²⁹³ These life-threatening conditions were imposed alongside appalling violence. Detainees were exposed to “frequent and

²⁸² *E.g.* Judgement, paras.1766, 1773. *Also* para.2493.

²⁸³ *Above* paras.64-65, 67-68.

²⁸⁴ Judgement, para.3498. *Also* paras.1782-1789, 3385-3386, 3399. *Also* Exh.P731, p.1 (Paddy Ashdown commented in 1992 that the closure of Omarska “probably saved many prisoners’ lives”).

²⁸⁵ Judgement, paras.881-882, 888.

²⁸⁶ Judgement, para.883. *Also* para.2523. *Further above* fn.232.

²⁸⁷ Judgement, para.889.

²⁸⁸ Judgement, para.889 (finding further that KP Dom Foča detainees were “deliberately housed in cramped conditions”, despite adequate space being available in the facility). *Also* paras.881, 888.

²⁸⁹ Judgement, para.890.

²⁹⁰ Judgement, para.891.

²⁹¹ Judgement, para.893. *Also* para.894 (finding “there was a deliberate policy to feed the non-Serb detainees barely enough for their survival while the Bosnian Serbs in the facility received normal meals”).

²⁹² Judgement, para.895, fn.2953 *relying on* AF854, KDZ017:Exh.P3568, pp.22-25 (T.2789-2792), KDZ239:Exh.P3336, p.51 (T.1230). *Also* Judgement, para.903. The Chamber concluded that “[t]he shortage of food, basic hygienic conditions, and medicine in KP Dom had a significant impact on detainees who were sick”, and that their conditions “deteriorated” during their detention. Judgement, para.896 *relying on* KDZ239:Exh.P3336, pp.41-42 (T.1220-1221). Poor living conditions and lack of medication also contributed to detainees suffering multiple bouts of pneumonia. Judgement, para.896.

systematic” beatings;²⁹⁴ over 200 detainees were killed by Serb Forces during the course of 1992.²⁹⁵ Those forced to witness such acts lived in constant fear of being next.²⁹⁶ [REDACTED].²⁹⁷

- Sušica camp in Vlasenica (C.25.3) operated for four months between late May and September 1992.²⁹⁸ Detainees were “insufficiently fed” and water was “very scarce”²⁹⁹ such that by September 1992, the CSCE observed that detainees were “haggard, pale and thin”.³⁰⁰ In the morning, detainees were taken to urinate in the Sušica river and defecate behind an improvised shelter, but at night inadequate toilet facilities meant they “simply relieved themselves in their pants and had no place to clean themselves”.³⁰¹ Detainees were forced to engage in physical labour for up to 10 or 11 hours per day, including burying bodies, digging trenches and carrying munitions at frontlines.³⁰² They were “afraid for their lives and of being beaten if they refused to work”.³⁰³ Alongside these deplorable conditions, prison authorities—including camp commander Dragan Nikolić, who introduced himself to detainees as “god and the law”³⁰⁴—subjected detainees “to all kinds of mistreatment”.³⁰⁵ Female detainees suffered sexual violence at the hands of Bosnian Serb guards, soldiers and other men given access to the camp.³⁰⁶ No medical care was provided; detainees were left to suffer or die in the arms of fellow prisoners.³⁰⁷ At the end of September 1992, MUP forces took out the remaining 140 detainees and executed them, following which the camp was closed.³⁰⁸

²⁹³ Judgement, para.902.

²⁹⁴ *Generally* Judgement, paras.899-903. *Also* paras.2485-2487, 2491-2493, 2497-2499, 2512-2518, 2580, 2582.

²⁹⁵ Judgement, paras.904-911, 2447 (fn.8238), 2461 (B.8.1). *Also* paras.2578-2579.

²⁹⁶ *See* Judgement, para.901. *Also* para.2493.

²⁹⁷ [REDACTED].

²⁹⁸ The vast majority of detainees were civilians. For instance, large numbers of Bosnian Muslim detainees were arrested in their homes and taken to the camp with their families. Judgement, paras.1181, 1184, 1186-1187, 1200-1201.

²⁹⁹ Judgement, para.1188.

³⁰⁰ Judgement, para.1200 *citing* Exhs.P3228, pp.1-2; P6131.

³⁰¹ Judgement, para.1189.

³⁰² Judgement, paras.1195-1196.

³⁰³ Judgement, para.1196.

³⁰⁴ Judgement, para.1183.

³⁰⁵ Judgement, paras.1190-1193. *Also* paras.2485, 2487-2489, 2491, 2493, 2497-2499, 2512-2518, 2580, 2582. In addition, nine detainees were killed by camp guards or died from mistreatment. Judgement, paras.1202-1207, 2447 (fn.8246), 2579 (B.18.1).

³⁰⁶ Judgement, para.1194. *Also* paras.2500, 2504-2506, 2512-2518, 2581-2582.

³⁰⁷ Judgement, para.1188. *E.g.* KDZ044:Exh.P107, p.12 (T.471) (confidential), KDZ044:Exh.P111, p.3 (confidential) *relied on at* Judgement, para.1204 (fn.4145).

³⁰⁸ Judgement, paras.1208-1213, 2447 (fn.8246), 2461 (B.18.2). *Also* para.2579. *Further* paras.1188-1197, 1200-1201 (C.25.1).

75. The Chamber's own findings and the underlying evidence demonstrate that detainees held in other Count 1 Facilities were also routinely and deliberately subjected to life-threatening conditions commonly accepted as falling within Article 4(2)(c).³⁰⁹ For example:

- Lack of proper food and water: At Keraterm, the quantity and quality of food was "totally inadequate" and detainees suffered from malnutrition or starvation.³¹⁰ On the single occasion when guards provided food to Vlasenica SJB detainees, it was spoiled.³¹¹ Similarly, little or no food was supplied to detainees at Trnopolje, and there was almost no potable water.³¹² Guards at Karakaj Technical School simply threw some loaves of bread among the detainees [REDACTED].³¹³ Prisoners in the over-heated Betonirka factory garage were given insufficient water, which was all they had to drink and dress their wounds after beatings.³¹⁴
- Insufficient sanitation facilities: Sanski Most SJB detainees went 62 days without washing or changing their clothing.³¹⁵ At the Prijedor SJB building "there was only a bag which was used in place of a toilet".³¹⁶ At Trnopolje "lice and scabies were rampant" due to the unsanitary conditions and "the majority of detainees suffered from dysentery".³¹⁷ Infestations of lice also appeared at Keraterm, where, in addition, dysentery "was rife".³¹⁸
- Severe over-crowding: At Karakaj Technical School 750 detainees were confined in a room so small that approximately 20 died from suffocation on the first night.³¹⁹ Sanski Most SJB prisoners were unable to sleep lying down, instead sitting "tightly with our legs very close to our bodies, next to each other", leaving them "almost disabled".³²⁰ Betonirka detainees were forced to sleep standing up.³²¹

³⁰⁹ Above fn.265.

³¹⁰ Judgement, para.1798 (Prijedor).

³¹¹ I.Osmanović:Exh.P3212, para.79 *relied on at* Judgement, para.1166 (fn.4003).

³¹² Judgement, para.1823 (Prijedor). *Also* Exhs.P3910; P3797.

³¹³ KDZ029:Exh.P3195, para.24 (confidential) *relied on at* Judgement, para.1305 (fn.4535).

³¹⁴ A.Zulić:Exh.P718, para.58 *relied on at* Judgement, para.1996 (fn.6795).

³¹⁵ F.Biščević:Exh.P135, pp.56-57 (T.7065-7066) *relied on at* Judgement, para.1984 (fn.6764) (Sanski Most).

³¹⁶ Judgement, para.1743 (Prijedor).

³¹⁷ Judgement, para.1823 (Prijedor) *relying on inter alia* Exh.P3903 and I.Merdžanić:Exh.P3881, p.65 (T.7778) (describing the detainee pictured in Exh.P3903, "I am sure that this was the result of his stay in Trnopolje. He suffered from dysentery. He must have been tortured, and he probably lost a lot of weight as a result of that. And that was the cause of his death.").

³¹⁸ Judgement, para.1797 (Prijedor).

³¹⁹ Judgement, paras.1305, 1307 (Zvornik). *Also* paras.2448 (fn.8256), 2509, 2578.

³²⁰ F.Biščević:Exh.P135, p.58 (T.7067). Similarly, detainees at Miška Glava Dom were held in a room so small and overcrowded that detainees had to sit in a crouching position. Judgement, para.1857 (Prijedor).

³²¹ Judgement, para.1996 (Sanski Most).

- Inadequate shelter: The windowless rooms at Keraterm were “intensely hot [...] with no ventilation”.³²² Sanski Most SJB cells were “very hot and damp, with a terrible stench, making it difficult to breathe”.³²³ At Trnopolje, detainees were initially forced to sleep outdoors “in makeshift shelters of plastic bags, sticks, and blankets”.³²⁴ Serb Forces covered the only window in one of the Betonirka factory garages with concrete blocks, such that it became “insufferably hot” causing detainees to faint.³²⁵
- Lack of medical care and supplies: Medical care in the Count 1 Facilities was “non-existent or inadequate, at best”.³²⁶ With no support from camp authorities, detainees with medical or veterinary training tried to assist fellow prisoners.³²⁷ For instance, dentist Faik Bišćević, together with a nurse, did his best to treat the wounded at the Sanski Most SJB “with [their] five fingers and the water [they] had at [their] disposal”.³²⁸ Detainees regularly succumbed to unattended injuries.³²⁹ At least two Trnopolje detainees died from lack of basic medical care.³³⁰
- Forced labour: Detainees at several facilities were forced to engage in excessive work or physical exertion, including in life-threatening circumstances, despite their deteriorated physical state.³³¹ Vlasenica prison detainees had to loot Bosnian Muslim homes, bury bodies and dig trenches on the frontline.³³² In multiple facilities detainees had to participate in transporting, burying and disposing of bodies of murdered detainees.³³³

76. The severity of these conditions—when considered in light of the totality of the evidence demonstrating the circumstances in which they were imposed³³⁴—confirms that the only reasonable conclusion was that the elements of Article 4(2)(c) were satisfied.

³²² Judgement, para.1796 (Prijeđor).

³²³ Judgement, para.1983 (Sanski Most).

³²⁴ Judgement, para.1822 (Prijeđor).

³²⁵ A.Zulić:Exh.P718, paras.57-58 *relied on at* Judgement, para.1996 (fn.6795) (Sanski Most). *Also* M.Karabeg:Exh.P3303, p.104 (T.6170) *relied on at* Judgement, para.1996 (fn.6800).

³²⁶ Judgement, para.2584. *Also* paras.2507, 2509.

³²⁷ *E.g.* Judgement, para.1823 (Prijeđor).

³²⁸ F.Bišćević:Exh.P135, p.55 (T.7064).

³²⁹ *E.g.* Judgement, paras.1760, 1801 (Prijeđor), 1204, 1206 (Vlasenica).

³³⁰ Judgement, para.1827 (Prijeđor) *relying on* I.Merdžanić:Exh.P3881, pp.72-73 (T.7785-7786), KDZ054:Exh.P684, p.8, Exh.P3908, p.2. *Also* KDZ054:Exh.P682, pp.26-28 (T.6250-6252). *Further above* fn.317.

³³¹ *E.g.* Judgement, paras.2531-2533, 2535. *Also* para.2585.

³³² Judgement, para.1176 (Vlasenica).

³³³ Judgement, para.2493. *E.g.* paras.777 (Bratunac), 1169, 1801, 1811-1812, 1827 (Prijeđor). *Also* paras.1204-1205 (Sušica), 1766, 1780 (Omarska).

³³⁴ *Above* Sub-Ground 2(B).

D. Remedy

77. The Appeals Chamber should correct the Chamber's errors and, applying the necessary holistic approach to the Chamber's own factual findings and the evidence, find that the elements of Article 4(2)(c) are met in relation to conditions in the Count 1 Facilities. This significantly impacts the genocidal intent analysis. Thousands of Muslims and Croats whom the Chamber categorised as merely "displaced"³³⁵ were in fact subjected to conditions of life aimed at their physical destruction.³³⁶ The Appeals Chamber should, accordingly, re-evaluate genocidal intent with respect to Count 1, together with the re-evaluation requested under Grounds 1 and 3. In conjunction with the overall remedy requested under Ground 3, the Appeals Chamber should find that Karadžić and other JCE members possessed and shared genocidal intent.³³⁷

³³⁵ Judgement, para. 2624.

³³⁶ See Judgement, para. 2624. *Also above* fn. 187.

³³⁷ *Below* para. 147.

IV. GROUND 3: KARADŽIĆ AND OTHER JCE MEMBERS HAD GENOCIDAL INTENT

78. The Chamber's analysis of genocidal intent in the Count 1 Municipalities is tainted by its fundamental misconception that forcible displacement and genocidal intent are mutually exclusive. As a result, the Chamber conducted an erroneous genocidal intent analysis and reached an incorrect and unreasonable conclusion.

79. ICTY case law makes clear that a course of criminal conduct involving large-scale forcible displacement can reflect genocidal intent. That case law also emphasises the importance of assessing the relationship between this displacement and the overall course of conduct in determining whether it supports an inference of genocidal intent.³³⁸

80. However, in assessing the pattern of crimes in the Count 1 Municipalities, the Chamber's genocidal intent analysis came down to a mathematical comparison of the numbers displaced versus the numbers subjected to genocidal acts. The Chamber did not assess the relationship between forcible displacement and the genocidal acts of killing or inflicting serious bodily or mental harm or the overall effect of the crimes on the parts of the Bosnian Muslim and Bosnian Croat groups (collectively, the "Groups") in the Count 1 Municipalities. Nor did it examine the nature and context of the displacement itself to consider whether, in combination with the genocidal acts, it reflected an intent to destroy those parts of the Groups.³³⁹ Rather, it viewed acts of displacement as automatically detracting from a possible inference of genocidal intent.

81. The Chamber's misconception about the relationship between forcible displacement and genocidal intent is also reflected in the Chamber's presumption that the objective of the Overarching JCE—to permanently remove Muslims and Croats from Serb-claimed territory through the commission of crimes—was incompatible with the use of genocide as a means to achieve that permanent removal. Again, this is incorrect. A genocidal course of conduct can be used to achieve a removal objective. By presuming the contrary, the Chamber failed to assess whether, in the Count 1 Municipalities, Karadžić and other JCE members used genocide as a means to implement their permanent removal objective.³⁴⁰ Here again, the fact that in pursuing this objective many members of the Groups were forcibly displaced, does not preclude a finding that the combined effect of genocidal acts, forcible displacement and other culpable acts directed against the targeted communities reflects genocidal intent.

³³⁸ Below paras.111-112, 117-119.

³³⁹ Below Sub-Ground 3(C).

³⁴⁰ Below Sub-Ground 3(B).

82. As a result of this basic misconception, the Chamber conducted an erroneously narrow and truncated assessment of genocidal intent.³⁴¹ A correct understanding and application of genocidal intent compels the conclusion that Karadžić and other JCE members intended to destroy parts of the Groups in the Count 1 Municipalities.

83. While the pattern of crimes in the Count 1 Municipalities was carried out in furtherance of an overarching objective of permanent removal, it involved thousands of genocidal acts against Group members committed alongside the widespread and brutal expulsion of others and the mass destruction of homes, towns and sacred sites. Those who survived were forced into exile; they lost family members, homes, communities and livelihoods and continue to endure the resulting long-term effects of this devastation. When the overall impact of the pattern of crimes on the targeted communities is assessed against the proper legal framework of genocidal intent, it reflects an intent to destroy those communities.³⁴² Other crimes, such as persecution, that form part of this pattern do not adequately capture its criminality because those other crimes concern the victimisation of individuals. Only genocide reflects the victimisation and devastation of the affected communities as separate and distinct entities.³⁴³

84. Karadžić and other JCE members possessed and shared genocidal intent. They not only oversaw the forces that carried out the pattern of violence and devastation in the Count 1 Municipalities, they also spoke in terms that evoked the destruction of the Groups, reflecting their intent to destroy part(s) of these Groups.

85. The Chamber made three legal errors in its genocidal intent analysis, any one of which requires a renewed assessment of genocidal intent by the Appeals Chamber:

- First, it failed to assess genocidal intent in relation to Prijedor Municipality considered separately, thereby failing to fully adjudicate or provide a reasoned opinion on the Prosecution's genocidal intent allegations.
- Second, by presuming that the objective of permanent removal precluded genocidal intent, the Chamber failed to properly assess whether Karadžić and other JCE members used genocide as a means to achieve the permanent removal objective and shared genocidal intent.

³⁴¹ Below Sub-Grounds 3(A)-(C).

³⁴² Below Sub-Grounds 3(C)-(D).

³⁴³ See *Brdanin* TJ, para.699; *Krstić* TJ, para.553.

- Third, in its pattern of crimes analysis, the Chamber applied an erroneous conception of genocidal intent that focused on the intent that could be inferred from the targeting of Group members for immediate physical destruction rather than on the impact the overall pattern of crimes had on the long-term survival of the targeted communities as such.

Alternatively, the Chamber erred in fact in concluding that Karadžić and other JCE members did not have genocidal intent.

86. The Appeals Chamber should correct the Chamber's errors and enter a genocide conviction under Count 1.³⁴⁴

A. Sub-Ground 3(A): The Chamber failed to adjudicate or provide a reasoned opinion on the Prosecution's genocidal intent allegations

87. After concluding that it could not infer genocidal intent with regard to the parts of the Groups in the Count 1 Municipalities cumulatively, the Chamber erred in law by failing to determine whether it could find such intent in relation to the parts of the Groups in Prijedor Municipality, a scenario the Prosecution highlighted in its pleadings. In doing so, the Chamber failed to fully adjudicate the case before it. Alternatively, if the Judgement is read as containing an implicit finding on genocidal intent for individual Count 1 Municipalities, the Chamber failed to provide a reasoned opinion explaining its reasons in reaching this conclusion.

88. Had the Chamber carried out a proper assessment of genocidal intent in relation to Prijedor and applied the correct legal framework,³⁴⁵ it would have concluded that Karadžić and other JCE members shared genocidal intent with respect to the parts of the Groups in Prijedor Municipality.³⁴⁶

1. The Chamber failed to adjudicate genocidal intent in relation to Prijedor Municipality considered individually

89. The Chamber only considered the Prosecution's Count 1 genocide charge cumulatively across the seven Count 1 Municipalities. The pleadings show, however, that the Prosecution's case also addressed these municipalities individually. The Prosecution argued that individual parts of the Groups within individual Count 1 Municipalities constituted a "part" for the purposes of assessing genocidal intent.³⁴⁷ It particularly emphasised that, in Prijedor, the scale and intensity of crimes

³⁴⁴ Below para.147.

³⁴⁵ Below Sub-Ground 3(C).

³⁴⁶ Below Sub-Ground 3(D).

³⁴⁷ E.g. Prosecution-FTB, p.214 (heading: "Karadžić intended to destroy the Bosnian Muslim and Bosnian Croat communities in *each of the seven identified municipalities*") (emphasis added), p.221 (heading: "Karadžić and the other

“reflect an unmistakable intent to destroy the Bosnian Muslim and Bosnian Croat communities of Prijedor.”³⁴⁸ The Chamber’s failure to engage fully with the Prosecution’s arguments constitutes a failure to adjudicate an essential issue.³⁴⁹

90. Although the Chamber acknowledged that the Prosecution employed Prijedor as its “primary example”,³⁵⁰ it nevertheless restricted its consideration of genocidal intent to a cumulative assessment of the parts of the Groups in the Count 1 Municipalities. The Chamber characterised the relevant parts of the groups as “a part of the Bosnian Muslims and/or Bosnian Croat groups, namely, the Bosnian Muslims and Bosnian Croats in the Count 1 Municipalities.”³⁵¹ Further, it analysed the pattern of crimes globally, referencing factual findings about each municipality³⁵² but drawing only the single conclusion that it could not infer that “there existed the intent to destroy the parts of the Bosnian Muslim and/or Bosnian Croat groups in the Count 1 Municipalities as such.”³⁵³

91. It was not incorrect for the Chamber to *commence* its analysis with a cumulative approach.³⁵⁴ However, having failed to find genocidal intent on this cumulative basis, the Chamber was obliged to assess whether genocidal intent could be established with regard to the parts of the Groups in Prijedor. In the JCE context, before concluding that a common criminal purpose has not been established, a trial chamber should “allow[] for the possibility that, based on the trial record, [the Accused’s] *mens rea* could have comprised a temporally and/or geographically reduced common criminal purpose [...]”³⁵⁵ This reasoning should apply equally when assessing genocidal intent, and with greater resonance where the Prosecution emphasised the strength of its case in relation to a reduced geographic scope within a potentially broader charge.

JCE members intended to destroy the parts of the groups *in each of the seven municipalities*”) (emphasis added), paras.582, 589; T.47583.

³⁴⁸ T.47579-47580. Also Prosecution-FTB, paras.583-585, 591-594.

³⁴⁹ *Stanišić & Simatović* AJ, paras.16, 78 relying on *A.Bizimungu* AJ, para.19.

³⁵⁰ Judgement, para.2593.

³⁵¹ Judgement, para.2594. Also paras.2593, 2605, 2612. Because the Chamber failed to find genocidal intent, it did not reach the question of whether the parts in question were substantial. See Judgement, para.555.

³⁵² See Judgement, paras.2615-2622.

³⁵³ Judgement, para.2625. Also paras.2623-2624 (analysing findings “in relation to the Count 1 Municipalities” to reach its conclusion).

³⁵⁴ Although the Prosecution argued genocidal intent in relation to Count 1 Municipalities individually, its pleadings also allowed for a collective case. See Indictment, paras.36-40; Prosecution-PTB, para.27.

³⁵⁵ *Stanišić & Simatović* AJ, para.86. ICTY trial chambers regularly enter convictions under a single count based upon findings covering a more limited geographical area than alleged. E.g. *Hadžihasanović* TJ, p.627 (disposition); *Delić* TJ, para.596 (disposition).

92. This failure to adjudicate resulted in the Chamber failing to assess Prijedor's Muslim and Croat communities as individual, distinct entities³⁵⁶ and failing to consider whether the scale and intensity of crimes in Prijedor reflected an intent to destroy its Muslim and Croat communities.³⁵⁷

2. Alternatively, the Chamber failed to provide a reasoned opinion

93. If the Judgement is read as containing an implicit negative conclusion regarding genocidal intent in individual Count 1 Municipalities, the Chamber did not set out its reasons for this conclusion, thereby failing to provide a reasoned opinion.³⁵⁸ While the Chamber "recall[ed] a few key factual findings" in relation to each Count 1 Municipality,³⁵⁹ the ensuing discussion does not address genocidal intent with regard to these municipalities individually. Rather, the Chamber appeared to recall these findings only as a basis on which to draw the cumulative conclusion that it was not satisfied that the "pattern of crimes" supports a finding of genocidal intent in relation to the Count 1 Municipalities.³⁶⁰ There is no explanation as to why genocidal intent was not made out with respect to Prijedor or any other individual Count 1 Municipality.

B. Sub-Ground 3(B): The Chamber erroneously concluded that the objective of permanent removal precluded a finding of genocidal intent

94. The Chamber erred in law by conflating the JCE members' *mens rea* with their shared objective. The Chamber concluded that another "reasonable inference" to genocidal intent was that the "intent behind" the pattern of crimes in the Count 1 Municipalities was "to ensure the removal of members of the Bosnian Muslim and Bosnian Croats" from these municipalities.³⁶¹ In doing so, the Chamber incorrectly assumed that because the JCE members' *objective* was to permanently remove non-Serbs,³⁶² the Chamber was precluded from finding genocidal *intent*. However, genocidal intent is not inconsistent with an objective of permanent removal. By assuming that it was, the Chamber failed to properly assess whether, in pursuit of their permanent removal objective, Karadžić and other JCE members possessed genocidal intent.³⁶³ Had it applied the correct analytical framework, it would have concluded in the affirmative.³⁶⁴

³⁵⁶ See Prosecution-FTB, para.589; T.47583.

³⁵⁷ See *Stakić* AJ, para.56 (finding that the Trial Chamber's factual findings on Prijedor crimes and Stakić's conduct were "[w]ithout question" ones that "could, in principle, be taken as evidence that [Stakić] intended to destroy the Bosnian Muslim group in part" but being unable to conclude that the Trial Chamber was obliged to infer that this intent was established). *Below* Sub-Ground 3(D) (discussing the genocidal intent reflected by crimes in Prijedor).

³⁵⁸ See *Uwinkindi* Decision, para.20; *Prljić* Decision, para.16.

³⁵⁹ Judgement, para.2615. *Also* paras.2616-2622.

³⁶⁰ Judgement, paras.2623-2625.

³⁶¹ Judgement, para.2624.

³⁶² Judgement, para.3447.

³⁶³ Judgement, para.2624.

³⁶⁴ *Below* Sub-Ground 3(C). *Also* Sub-Ground 3(D).

1. The permanent removal objective is compatible with genocidal intent

95. The JCE members' objective to permanently remove Muslims and Croats from the Count 1 Municipalities is compatible with genocidal intent. The means of achieving a permanent removal objective are not limited to a campaign involving displacement alone.³⁶⁵ Rather, permanent removal of an ethnic group can be achieved through a range of criminal means, including genocide.³⁶⁶ This was—and is—precisely the Prosecution's case.³⁶⁷ Indeed, genocide would be one of the most effective means of securing the *permanent* removal of a targeted community, because, if achieved, it would eliminate any future possibility of the group reconstituting itself.³⁶⁸

96. A perpetrator of genocide can be seeking to achieve any number of ultimate objectives. Tribunal case law distinguishes between the motive—or “goal” or objective—behind a criminal operation³⁶⁹ and intent, particularly with regard to the specific intent of genocide.³⁷⁰ This is consistent with the Genocide Convention drafters' decision to exclude motive from the crime's definition for fear that a “restrictive enumeration” of motives³⁷¹ would prohibit convictions where a perpetrator was driven by “motivations that are legally irrelevant” to genocide's specific intent.³⁷²

97. The Prosecution did not allege that Karadžić and other JCE members pursued a genocidal *objective* in the municipalities in the sense that genocide was their *motive* or *goal*. Rather, the Prosecution alleged that the JCE members' objective was permanent removal and that in certain municipalities the pattern of crimes—including the scale and intensity of killings and other genocidal acts—used to implement the removal objective demonstrates that JCE members used genocide as a *means* to achieve it. This is evident throughout the Prosecution's pleadings. The Indictment charged a common purpose “to permanently remove Bosnian Muslim and Bosnian

³⁶⁵ The Chamber's findings show that it was impossible to achieve the permanent removal objective without violence against Muslims and Croats. *Above* paras.22-24, 27-32.

³⁶⁶ *Stakić* AJ, para.45 (the goal of an operation and the methods employed to achieve that goal may be different). Moreover, a pattern of conduct that encompasses large-scale removal crimes can reflect genocidal intent. *Below* Sub-Ground 3(C). *E.g.* *Tolimir* AJ, para.254; *Popović* AJ, para.491; *Krstić* AJ, para.33.

³⁶⁷ *Below* para.97.

³⁶⁸ *Below* paras.104, 111-112.

³⁶⁹ *Stakić* AJ, para.45 (defining motive as “goal”). *Also* *Blaškić* AJ, para.694 (defining motive as “that which causes a person to act”).

³⁷⁰ *See* *Stakić* AJ, para.45 (“the Tribunal's jurisprudence distinguishes between motive and intent; in genocide cases, the reason why the accused sought to destroy the victim group has no bearing on guilt”); *Kayishema* AJ, para.161; *Jelisić* AJ, para.49; *Niyitegeka* AJ, paras.51-52; *Kvočka* AJ, para.367; *Krnjelac* AJ, paras.99-100; *Tadić* AJ, paras.268-269. *Also* Genocide Convention Travaux, p.1422 (Panama: there is a clear distinction between intent and motives; motives are not part of the definition of crimes), p.1428 (Brazil: the mere fact that an act was committed with the intent to destroy was sufficient to constitute genocide).

³⁷¹ Genocide Convention Travaux, p.1424 (Venezuela: “a restrictive enumeration would be a powerful weapon in the hands of the guilty”, helping them avoid genocide charges by maintaining that the crimes were “committed for other reasons”).

³⁷² *Niyitegeka* AJ, para.53. *Also* Genocide Convention Travaux, p.1422 (Panama: “a statement of motives [...] would allow the guilty parties to claim that they had not acted under the impulse of one of the motives held to be necessary to prove genocide”).

Croat inhabitants [...] *by means which included the commission of* a number of crimes, including genocide.³⁷³ It further pleaded that this common purpose was primarily achieved through a persecutory campaign, but that this campaign “included or escalated to include conduct that manifested [genocidal intent].”³⁷⁴ In its Rule 98*bis* submissions, the Prosecution argued:

[that] the desire to create a Serbian state [...] could have been achieved in other ways than with the intent to commit genocide is not relevant. What is relevant is whether the *dolus specialis* existed irrespective of the underlying motive it required or, indeed what that underlying motive was at all.³⁷⁵

The Prosecution’s Pre-Trial Brief, Final Trial Brief and Closing Argument also emphasise that JCE members sought to realise their permanent removal objective in part through genocide.³⁷⁶

2. The Chamber conflated the permanent removal objective with intent

98. The Chamber erroneously blurred the distinction between intent and objective by concluding that the permanent removal *objective* was a “reasonable inference” inconsistent with genocidal *intent*.³⁷⁷ The Chamber concluded that, as the “intent behind” the pattern of crimes in the Count 1 Municipalities was “to ensure the removal” of Muslims and Croats, the Chamber was thus precluded from finding genocidal intent.³⁷⁸ What the Chamber termed the “intent behind” this pattern is not legal intent, or *mens rea*, but rather the overarching objective or goal of those implementing that pattern. Thus, the Chamber erred by concluding that because genocide was not the JCE members’ overriding *goal* or ultimate *objective*, they could not have used genocide as a means to achieve their objective and could not have had genocidal *intent*.

99. The Chamber’s conflation of intent and objective is evident from its reasoning. First, the Chamber described the “intent behind” the pattern of crimes as an intent “to ensure the removal” of non-Serbs from the Count 1 Municipalities.³⁷⁹ However, it found that the pattern of crimes was one of “widespread intimidation, violence, killings, and expulsions”.³⁸⁰ With the exception of expulsions,³⁸¹ removal is unrelated to the *mens rea* of crimes within this pattern. So the phrase “intent behind” must refer to the objective underlying the pattern. Second, the Chamber’s finding that the “intent behind” the crimes was “to ensure the removal” of Muslims and Croats from the

³⁷³ Indictment, para.9 (emphasis added).

³⁷⁴ Indictment, paras.37-38.

³⁷⁵ T.28702-28703.

³⁷⁶ See Prosecution-PTB, para.27; Prosecution-FTB, para.47. Also para.570; T.47575.

³⁷⁷ Judgement, para.2624.

³⁷⁸ Judgement, para.2624.

³⁷⁹ Judgement, para.2624.

³⁸⁰ Judgement, para.2623.

³⁸¹ *Stakić* AJ, para.319; *Brdanin* TJ, para.545.

Count 1 Municipalities³⁸² corresponds to its finding that the JCE members' objective was "to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory."³⁸³ In the subsequent paragraph, the Chamber similarly referred to "this pattern of crimes" as "consistent with the Bosnian Serb leadership's *intent* to create ethnically pure territories through the removal of the Bosnian Muslims and Bosnian Croats" and observed that the "results on the ground [...] were consistent with these *goals*."³⁸⁴ Here again, the Chamber used the term "intent" to describe the JCE members' objective rather than their *mens rea*.

100. Likewise, the Chamber concluded that the BSL's "objective [...] to create an ethnically pure Bosnian Serb state [...] *would require* a redistribution—rather than the physical destruction—of the population."³⁸⁵ Thus, the Chamber implied that because there was a theoretical way to achieve the objective of removal without physical destruction, the Chamber was barred from inferring genocidal intent. Not only is this wrong in principle,³⁸⁶ but the killings and other violent crimes integral to achieving the removal objective in the Count 1 Municipalities³⁸⁷ demonstrate that this dichotomy between "redistribution" and "destruction" is indeed entirely theoretical. The Chamber's reliance on this theoretical point underscores its failure to grapple with the issue of whether genocide was used as a means to further the permanent removal objective.

101. The Chamber's view that the permanent removal objective precluded genocidal intent is further illustrated by its finding that two statements by JCE members were "consistent with the [BSL]'s intent to create ethnically pure territories through the removal of the Bosnian Muslims and Bosnian Croats", implying that they were inconsistent with genocidal intent.³⁸⁸ However, this is not the case for either statement: both Krajišnik's remark that Foča had become "a true Serbian town"³⁸⁹—which he followed with praise for Serbs who "managed to eliminate" "all that was coming from" Foča³⁹⁰—and Karadžić's announcement that Muslims "gave up on Foča" in peace negotiations³⁹¹ are compatible both with a permanent removal objective and with genocidal intent.

102. By erroneously presuming that the existence of the permanent removal objective precluded genocidal intent, the Chamber failed to assess whether, in pursuit of this objective, Karadžić and

³⁸² Judgement, para.2624.

³⁸³ Judgement, para.3447.

³⁸⁴ Judgement, para.2625 (emphases added). Compare with para.3463 (Karadžić and other JCE members "shared the objective of creating a Bosnian Serb state which was ethnically pure [...]").

³⁸⁵ Judgement, para.2625 (emphasis added).

³⁸⁶ See *Stakić* AJ, para.45.

³⁸⁷ Above paras.27-32.

³⁸⁸ Judgement, para.2625.

³⁸⁹ Judgement, para.2625 cross-referencing paras.2810-2811 citing Exh.P6204. The Chamber mistakenly attributes this statement to Karadžić.

³⁹⁰ Exh.P6204.

other JCE members intended to destroy part or parts of the Groups as such. Had it done so and applied the correct definition of genocidal intent, it would have reached an affirmative conclusion.³⁹²

C. Sub-Ground 3(C): The Chamber applied an incorrect legal standard for genocidal intent

103. The Chamber erroneously conceived of genocidal intent as the intent to target a large proportion of group members with physical destruction, as opposed to the intent to destroy the group as such. Further, in assessing the intent it could infer from the pattern of crimes in the Count 1 Municipalities, it looked only to conduct with immediate physically destructive effects.³⁹³ Under the Genocide Convention and customary international law, however, genocidal intent has a broader definition—the intent to physically or biologically destroy a group, or part of a group, “as such”.³⁹⁴ The inclusion of “as such” in this definition demonstrates that the criminal prohibition is against “the destruction of the protected group itself, as opposed to [...] a collection of the group’s individual members.”³⁹⁵ Although this necessarily entails the commission of crimes against individuals, the ultimate victim of genocide is the group itself “as a separate and distinct entity.”³⁹⁶ By applying an overly-narrow conception of intent, the Chamber failed to properly assess the intent reflected by the overall pattern of crimes in the Count 1 Municipalities and incorrectly concluded that genocidal intent was not established.³⁹⁷ Had it applied the correct legal framework, it would have concluded that Karadžić and other JCE members shared genocidal intent with respect to one or more parts of the Groups in the Count 1 Municipalities.³⁹⁸

1. Genocidal intent does not equate to an intent to target most group members for immediate physical destruction

104. Genocidal intent is not limited to intent to physically destroy most group members. Rather, in determining intent, a chamber must assess the intended impact of genocidal acts, together with other culpable conduct targeting the group, on the physical or biological survival of the group as a

³⁹¹ Judgement, para.2625 *cross-referencing* paras.2810-2811 *citing* Exh.P6205.

³⁹² *Below* Sub-Ground 3(C). *Also* Sub-Ground 3(D).

³⁹³ *Below* paras.114-116.

³⁹⁴ *See* Genocide Convention, Art.II; ICTY Statute, Art.4(2) (“intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”); *Krstić* AJ, para.25 *affirming* *Krstić* TJ, para.580. *Also* ILC Draft Code of Crimes, pp.45-46; *Krstić* AJ, paras.28, 31, 35.

³⁹⁵ *Tolimir* TJ, para.747 *citing* *Akayesu* TJ, para.521. *Also* *Sikirica* Judgement on Acquittal Motions, para.89; *Krstić* TJ, para.553.

³⁹⁶ *Brdanin* TJ, para.698; *Stakić* TJ, para.521. *Also* *Tolimir* AJ, para.236 (“all members of the protected group [...] are] victims of the genocidal acts [...] by virtue of being ‘within the targeted part of the protected group’”).

³⁹⁷ *Below* paras.114-124.

³⁹⁸ *Below* Sub-Ground 3(D).

“community”.³⁹⁹ The terms of Article 4 of the ICTY Statute as well as Tribunal case law show that genocidal intent can be reflected by conduct that: does not involve physical destruction of individual group members; has a long-term rather than immediate destructive impact; or targets social or familial bonds that bind group members together. These various manifestations of genocidal intent all capture conduct aimed at preventing the targeted community from surviving as a separate and distinct entity. This is consistent with the underlying focus of genocide on protecting human *groups*.

(a) The terms of Article 4 demonstrate that genocidal intent has a group-centric meaning

105. Genocidal intent is not limited to intended *physical* destruction. This is indicated most clearly by the recognition of biological destruction in its definition.⁴⁰⁰ It necessarily follows that acts that do not tend to contribute to physical destruction of the group or group members can nevertheless reflect genocidal intent. This is also clear from the list of genocidal acts under Article 4(2).⁴⁰¹ For instance, serious mental harm under Article 4(2)(b) need not have any physical—or even biological—impact on any group member. Rather, it must result “in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”⁴⁰²

106. The Article 4(2) acts also demonstrate that conduct with no *immediate* impact on the physical or biological existence of the group or its members can reflect genocidal intent. This includes serious mental harm under Article 4(2)(b),⁴⁰³ as well as imposing destructive conditions of life or measures intended to prevent births under Articles 4(2)(c) and 4(2)(d) respectively. These acts concern the long-term survival of the group.⁴⁰⁴

107. Moreover, “forcibly transferring children of the group to another group” under Article 4(2)(e) need not have any physical or biological impact—immediate or otherwise—on any *group member*. It nevertheless reflects intent to physically or biologically destroy the group due to its impact on the group’s capacity to survive as a separate and distinct entity.⁴⁰⁵

³⁹⁹ *E.g.* *Krstić* AJ, paras.28, 31, 35; *Krajišnik* TJ, para.854.

⁴⁰⁰ *Above* fn.394.

⁴⁰¹ Although the Prosecution only charged acts falling under Arts.4(2)(a)-(c), other genocidal acts are relevant in interpreting genocidal intent.

⁴⁰² *Krstić* TJ, para.513; *Tolimir* AJ, paras.201-202.

⁴⁰³ *Above* para.105.

⁴⁰⁴ *See Tolimir* AJ, para.225 *citing with approval Tolimir* TJ, para.740 (Article 4(2)(c) concerns “methods of destruction that do not immediately kill the members of the group, but ultimately seek their physical destruction”).

⁴⁰⁵ ICJ *Croatia v. Serbia* Judgement, para.136 (forcible transfer of children of the group to another group “can also entail the intent to destroy the group physically, in whole or in part, since it can have consequences for the group’s capacity to renew itself, and hence to ensure its long-term survival.”); Genocide Convention Travaux, p.1495 (Greece: forcible transfer of children to another group “constituted an effective means of committing genocide, since there was

108. Thus, the terms of Article 4 demonstrate that “physical or biological destruction” refers to the group, not its members. It encompasses conduct targeting the group’s ability to survive as a separate and distinct entity but allowing for the continued physical and biological existence of group members. And it includes conduct that targets the group’s long-term capacity to renew itself as a separate and distinct entity.

(b) Tribunal jurisprudence also supports a group-centric definition of genocidal intent

109. The group-centric understanding of genocidal intent that emerges from the terms of Article 4 is supported by ICTY and ICTR case law. This case law recognises that genocide is focused on protecting human groups, that genocidal intent concerns the intent to destroy the group “as a separate and distinct entity”⁴⁰⁶ and that conduct targeting the long-term existence of the group can reflect genocidal intent.⁴⁰⁷

110. This jurisprudence also recognises that acts targeting the foundational bonds that bind group members together into a separate and distinct entity can reflect genocidal intent.⁴⁰⁸ For instance, sexual violence has been found to have a destructive impact on not just direct victims but also their families, communities and the “group as a whole.”⁴⁰⁹ This broader destructive impact can only be understood as the destruction caused by the severance of familial and community bonds resulting from sexual violence. In this same vein, acts targeting community leaders can have a destructive impact on the broader community because it removes key mechanisms through which the community functions as such.⁴¹⁰ This broader impact is relevant in assessing intent.

no difference between sterilization, abortion and abduction.”). Also pp.1494 (Uruguay: “Since measures to prevent births had been condemned, there was reason also to condemn measures intended to destroy a new generation through abducting infants, forcing them to change their religion and educating them to become enemies of their own people.”; United States: asking the Committee to consider “what difference there was from the point of view of the destruction of a group between measures to prevent birth half an hour before the birth and abduction half an hour after the birth”), 1504 (Venezuela: “the Committee implicitly recognized that a group could be destroyed although the individual members of it continued to live normally without having suffered physical harm.”). Also ILC Draft Code of Crimes, p.46.

⁴⁰⁶ *Brđanin* TJ, para.698; *Stakić* TJ, para.521.

⁴⁰⁷ See *Krstić* AJ, para.28; *Tolimir* AJ, paras.211-212.

⁴⁰⁸ E.g. *Karadžić & Mladić* Rule 61 Decision, para.94 (intent may be inferred from “acts which violate [...] the very foundation of the group”, even if these acts are not acts of genocide listed in Art.4(2)); *Seromba* AJ, para.176 affirming *Seromba* TJ, para.320 (genocidal intent can be inferred from “the perpetration of acts which violate the very foundation of the group”); *Krajišnik* TJ, para.854 (a group may be destroyed by “severing the bonds among its members”).

⁴⁰⁹ *Akayesu* TJ, para.731 (holding that sexual violence against Tutsi women “was an integral part of the process of destruction, [...] specifically contributing to their destruction and to the destruction of the Tutsi group as a whole”) (emphasis added). Also *Karemura* TJ, para.1667; *Kayishema* TJ, para.95; *Karadžić & Mladić* Rule 61 Decision, para.94 (systematic rape can “dismember” a group through humiliation and terror).

⁴¹⁰ *Tolimir* AJ, para.263 and *Tolimir* TJ, para.777 quoting Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), U.N.Doc. S/1994/674, para.94. Also *Jejić* TJ, para.82.

111. The Appeals Chamber's findings in *Krstić* demonstrate that conduct—in that case forcible transfer—that impedes the long-term ability of the group to reconstitute itself as a “community” reflects genocidal intent. The forcible transfer of women, children and elderly men from Srebrenica “eliminat[ed] even the residual possibility that the Muslim community in the area could reconstitute itself”, thereby serving as an “additional means by which to ensure the physical destruction of [that community]”.⁴¹¹ Thus, conduct (forcible transfer) allowing for the continued physical and biological existence of *individual victims* can nevertheless have a physically destructive impact on—and reflect the corresponding genocidal intent towards—the *community*. This underscores that physical or biological destruction is concerned with the destruction of the group as a separate and distinct entity rather than the destruction of a collection of individual group members. It also shows that conduct allowing for the continued physical existence of individual group *members* does not preclude—and indeed can reinforce—an underlying intent to physically destroy *the group*.

112. The above discussion shows that whether or not a course of conduct permits the continued physical or biological existence of some proportion of group members is not determinative as to genocidal intent. Rather, genocidal intent is focused on the long-term ability of the targeted community to continue to exist as a separate and distinct entity.

113. This understanding of genocidal intent is distinct from ‘cultural genocide’, which is concerned with attacks on cultural or sociological characteristics of a group.⁴¹² Conduct that encompasses enumerated genocidal acts and is intended to prevent a group from continuing to *exist physically or biologically* as a separate and distinct entity is different from conduct that merely targets cultural or sociological characteristics of a group but allows for its continued physical and biological existence as a separate and distinct entity.

2. The Chamber's erroneous focus on immediate physical destruction of individual group members caused it to reach an incorrect conclusion on genocidal intent

114. In its analysis of the pattern of crimes in the Count 1 Municipalities, the Chamber relied on acts that immediately targeted group members for physical destruction as the only indicators of genocidal intent. It disregarded conduct that did not constitute underlying acts of genocide as potential reflections of intent. It also failed to consider the implications for intent flowing from the broader and long-term impact of the overall pattern of crimes—including underlying acts of genocide—regarding the ability of the targeted parts of the Groups to survive as separate and distinct entities. The Chamber's erroneously narrow approach caused it to conclude that genocidal

⁴¹¹ *Krstić* AJ, para.31.

⁴¹² E.g. *Krstić* AJ, para.25 affirming *Krstić* TJ, para.580.

intent was not established in the Count 1 Municipalities. When that pattern of crimes is properly and holistically⁴¹³ assessed, its scale and severity demonstrate an intent to destroy the parts of the Groups in the Count 1 Municipalities as separate and distinct entities and reflect genocidal intent on the part of Karadžić and other JCE members.⁴¹⁴

(a) The Chamber incorrectly focused on immediate physical destruction of Group members

115. In its intent analysis, the Chamber ignored the biological aspect of genocidal intent altogether; it focused exclusively on physical destruction.⁴¹⁵ Moreover, in considering genocidal intent in the context of the pattern of crimes, the crux of the Chamber's analysis was a comparison of the "total number" of Group members displaced versus those "allegedly targeted for destruction".⁴¹⁶ From this numerical comparison, it concluded that the "intent behind" the pattern of crimes in the Count 1 Municipalities was "removal" and not destruction.⁴¹⁷ Under this approach, the existence of large-scale expulsions only detracts from an inference of genocidal intent, even when, as here, the expulsions reinforced large-scale genocidal acts.⁴¹⁸

116. Further, the Chamber concluded that it could not infer genocidal intent because "physical destruction [...] of the population" was not required for JCE members to achieve their objective of "creat[ing] an ethnically pure Bosnian Serb state".⁴¹⁹ That the Chamber was seeking evidence of intent to physically destroy "the population" indicates that it equated genocidal intent with intent to target all or most Group members with immediate physical destruction.⁴²⁰ However, genocidal intent entails no numerical threshold, nor any requirement that a perpetrator seek to physically destroy the entire 'population' of the targeted group.⁴²¹ Immediate destruction is also not required.⁴²²

⁴¹³ *Karadžić* 98bis AJ, para.56; *Tolimir* AJ, paras.246-247 quoting *Tolimir* TJ, para.745.

⁴¹⁴ *Below* Sub-Ground 3(D).

⁴¹⁵ In its "Applicable Law" section, the Chamber recognised "biological destruction" as part of the genocidal intent definition. Judgement, para.553. However, in its application, the Chamber ignored biological destruction, instead assessing whether there existed an intent to "physically destroy" the parts of the Groups in question. Although the Chamber sometimes refers more broadly to "intent to destroy" or "genocidal intent" in its analysis, it does not use the word "biological". *E.g.* Judgement, paras.2596-2602, 2605, 2625.

⁴¹⁶ Judgement, para.2624.

⁴¹⁷ Judgement, para.2624.

⁴¹⁸ *Below* paras.118-120; Sub-Ground 3(D).

⁴¹⁹ Judgement, para.2625.

⁴²⁰ *See* Judgement, para.2624.

⁴²¹ *E.g.* *Krstić* AJ, para.32; *Stakić* TJ, para.522.

⁴²² *Above* paras.106, 111-112. *Also* *Krstić* AJ, para.32.

(b) The Chamber improperly excluded crimes that were not underlying acts of genocide as evidence of genocidal intent

117. The Chamber only considered underlying acts of genocide within the pattern of crimes as potentially reflecting genocidal intent. While “other culpable acts” systematically directed against the target group—including forcible displacement and destruction of cultural and religious property—can be indicators of genocidal intent,⁴²³ the Chamber disregarded or expressly discounted these acts in assessing intent. Properly assessed, the “other culpable acts” in the Count 1 Municipalities—particularly the brutal and traumatic expulsions—amplified the destructive impact of the overall pattern of crimes and should have been considered accordingly.

118. The Chamber’s findings do not account for the possibility that conduct involving large-scale forcible displacement alongside relatively fewer underlying acts of genocide can reflect genocidal intent. Extensive case law, however, supports this conclusion. Indeed, forcible displacement can be “an additional means by which to ensure [... a group’s] physical destruction”.⁴²⁴ The Chamber appeared to recognise this case law⁴²⁵ but did not apply it. Instead, it adopted a zero-sum approach whereby victims were targeted for either removal or destruction, with those placed in the removal category automatically detracting from the Chamber’s ability to infer genocidal intent.⁴²⁶ Thus, the Chamber erred by concluding that there were too many displacement victims for the pattern of crimes to be compatible with genocidal intent without assessing the relationship between forcible transfer and genocidal intent in this case. It did not assess whether, and to what extent, the forcible displacement augmented the destructive impact of the underlying acts of genocide inflicted on the targeted communities and did not turn its mind to the related question of whether JCE members used genocide as a means to achieve their overarching permanent removal objective.⁴²⁷

119. The Chamber’s simplistic numerical analysis of forcible displacement also disregards the violent and traumatic circumstances surrounding the expulsions, circumstances demonstrating that these crimes were intended as a further means “by which to ensure the physical destruction” of the targeted communities.⁴²⁸ As discussed below,⁴²⁹ expulsion operations were generally preceded by violent, terrifying attacks on homes, villages and towns. Family members were forcibly separated in traumatic circumstances. Victims were detained in life-threatening conditions, often for extended

⁴²³ *E.g.* Krstić AJ, para.33; Jelisić AJ, para.47; Tolimir AJ, paras.246-247; Seromba AJ, para.176; Krstić TJ, para.580; Popović TJ, para.823; Tolimir TJ, para.772.

⁴²⁴ Krstić AJ, para.31. Also Tolimir AJ, para.209.

⁴²⁵ Judgement, para.553 (holding that forcible transfer “is a relevant consideration” citing, *inter alia*, Krstić AJ, para.33).

⁴²⁶ See Judgement, para.2624.

⁴²⁷ Above Sub-Ground 3(B).

⁴²⁸ See Tolimir AJ, para.209. Also Krstić AJ, para.31.

⁴²⁹ Below Sub-Ground 3(D).

periods, before being expelled. Survivors of these expulsions continue to suffer from the loss of their homes, communities and livelihoods and from the pain of losing or not knowing the fate of loved ones. ICTY case law has recognised the harm caused to victims of forcible displacement in such traumatic circumstances as genocidal.⁴³⁰ However, here the Chamber merely merged these displacement victims into “[t]he total number of Bosnian Muslims and Bosnian Croats displaced” and determined that there were simply too many of them to allow for an inference of genocidal intent.⁴³¹

120. The Chamber’s forcible displacement analysis particularly discounts the widespread unlawful detention in appalling conditions. These detention-related crimes were central to displacement in the Count 1 Municipalities.⁴³² The Chamber not only failed to recognise that deplorable detention conditions were aimed at the physical destruction of detainees⁴³³ and constituted other culpable acts indicating genocidal intent; its intent analysis also does not account for its finding that Karadžić closed detention camps “only when the international media started reporting on the inhumane conditions”.⁴³⁴ Thus, detainees fortunate enough to be expelled from such camps before being killed or subjected to serious bodily or mental harm were counted among those “displaced” rather than those “allegedly targeted for destruction”.⁴³⁵ For the Chamber to consider these victims only as a figure in the subtraction column of its genocidal intent calculation underscores its erroneous approach to intent.

121. The Chamber also disregarded the destruction of cultural and religious property as a marker of genocidal intent.⁴³⁶ Although the Chamber recognised that this “may be considered evidence of intent to physically destroy the group”,⁴³⁷ it only gave this passing mention in its genocidal intent assessment.⁴³⁸ It failed to recognise that the virtual total destruction of homes and religious property

⁴³⁰ *E.g. Popović* TJ, paras.846-847 (finding that the harm caused to forcible transfer victims by separations, being “torn from their homes and all which was familiar to them” and living with the uncertainty of the fate of missing relatives constituted serious mental harm under Article 4(2)(b)); *Tolimir* TJ, paras.756-757, 759 (finding that the suffering of forcible transfer victims caused by separations, lack of permanent homes and basic necessities, continuing emotional distress caused by loss of loved ones and no hope of returning to homes, many of which were destroyed, constituted serious mental harm under Article 4(2)(b)); *Tolimir* AJ, paras.210-212. While in this case the Prosecution did not charge the mental harm caused by the forcible transfer and the traumatic surrounding circumstances under Article 4(2)(b), that such harm can qualify as a genocidal act supports a finding of genocidal intent.

⁴³¹ Judgement, para.2624.

⁴³² Judgement, para.3442. *Above* Ground 2.

⁴³³ *Above* Sub-Grounds 2(B)-(C).

⁴³⁴ Judgement, para.3498. *Also* paras.3499-3500.

⁴³⁵ Judgement, para.2624. *Also* Exh.P731, p.1. The Prosecution maintains that detainees not subjected to genocidal acts under Articles 4(2)(a) or 4(2)(b) were nevertheless victims of genocidal acts under Article 4(2)(c). *Above* Ground 2.

⁴³⁶ *Krstić* TJ, para.580.

⁴³⁷ Judgement, para.553.

⁴³⁸ *See* Judgement, paras.2614-2625.

of the targeted communities—resulting in the permanent removal of means of shelter and the essential physical infrastructure for community life—supports a finding of genocidal intent.⁴³⁹

(c) The Chamber did not consider the broader and longer-term impact of both genocidal acts and the pattern of crimes on the targeted communities

122. By hinging its intent analysis on a numerical comparison of those displaced versus those “allegedly targeted for destruction”, the Chamber also failed to account for the broader destructive impact of underlying acts of genocide on the targeted communities. For example, both sexual violence⁴⁴⁰ and the killing or other victimisation of group leaders⁴⁴¹ can have a destructive effect beyond their immediate victims. By dividing Group members into two simple categories—direct victims of genocidal acts versus victims of forcible displacement—the Chamber did not consider that the commission of genocidal acts against the first category may have had a destructive impact on individuals in the second category. An assessment of this broader destructive impact on the targeted community and its ability to survive as such was cut off by the Chamber’s narrow focus on the immediate victims of genocidal acts.

123. More generally, the Chamber’s simplistic division of victims into these two categories cut off any assessment of the broader and long-term destructive impact of the overall pattern of crimes on the targeted communities as such. This pattern of crimes included: thousands of incidents of killings and other forms of violence, including sexual violence; mass detention in appalling conditions; large-scale forcible displacement; and widespread destruction of homes, villages, towns and religious sites.⁴⁴² In addition to killing or inflicting lasting physical or mental trauma on thousands of Group members, the crimes destroyed livelihoods, tore apart families, severed social bonds, permanently exiled survivors, wiped away the traces of their communities and left remaining victims in a state of enduring trauma and uncertainty.⁴⁴³ However, for the Chamber, victims of this devastation who were not themselves subjected to genocidal acts were considered as merely contra-indications of genocidal intent. The Chamber gave no weight to their decimated families and social structures, broken lives and ongoing suffering as evidence of intent to destroy their communities as separate and distinct entities.

⁴³⁹ Below para.137.

⁴⁴⁰ Above para.110. The Chamber found that rape occurred in Foča, Prijedor, Vlasenica and Zvornik but merely “recall[ed]” some of these findings in its genocidal intent assessment. *Compare* Judgement, paras.913, 916-923, 1139, 1194, 1269, 1282, 1346, 1830-1831 with paras.2614-2626.

⁴⁴¹ Above para.110. The Chamber found that Serb Forces targeted prominent Muslims and Croats in the Count 1 Municipalities but its genocidal intent assessment makes no mention of this. *Compare* Judgement, paras.691, 723, 729, 769, 774, 876, 883, 898, 1119, 1162, 1165, 1276, 1309, 1502, 1504, 1587, 1740, 1749, 1766, 1950, 1979, 1982, 2580 with paras.2614-2626.

⁴⁴² Below Sub-Ground 3(D). *Also* Judgement, paras.2616-2623.

124. Evidence demonstrating the destructive impact that genocidal acts had on other members of the targeted communities and the long-term destructive impact of the overall pattern of crimes includes:⁴⁴⁴

- [REDACTED]⁴⁴⁵
- Faik Bišćević survived detention in Sanski Most prison; he never learned the fate of two of his sons who were taken away by Serb Forces.⁴⁴⁶ He described how, years after the events, he and his wife are “living as we have to do after experiencing the camp, the terror. [...] It’s as if we have been killed [...] The children are not present. [...] I don’t know where they were. If we could only bury them like normal people.”⁴⁴⁷
- Ibro Osmanović, a Vlasenica victim who, since the separation and detention of his family in 1992, is still searching for missing family members,⁴⁴⁸ referred to his experience as something that “cannot be described in words.” “You stay all alone. There is no one to open the door for you. You are picking though bones, hoping to find at least that.”⁴⁴⁹

Such evidence reveals the destructive impact that the scale and severity of the crimes in the Count 1 Municipalities had on the existence of the targeted communities as separate and distinct entities. A proper assessment of genocidal intent would have considered this.

(d) The Chamber’s overly-narrow conception of genocidal intent affected its analysis of direct evidence of intent

125. While the Chamber’s narrow view of genocidal intent is made explicit in its assessment of the intent it could infer from the pattern of crimes, it also informed the Chamber’s analysis of direct evidence of intent. The Chamber concluded that Karadžić’s and other JCE members’ statements about the disappearance,⁴⁵⁰ “eliminat[ion],”⁴⁵¹ “annihilation”⁴⁵² or “possible extinction”⁴⁵³ of the Bosnian Muslims “did not support a conclusion” that the JCE members possessed “the intent to

⁴⁴³ Below Sub-Ground 3(D). Also Judgement, para.6047 (victims of persecution, murder and extermination in the Municipalities “continue to suffer from the impact of these crimes to this day”).

⁴⁴⁴ Also below para.139.

⁴⁴⁵ [REDACTED].

⁴⁴⁶ F.Bišćević:Exh.P135, pp.87-89 (T.7096-7098).

⁴⁴⁷ F.Bišćević:Exh.P122, p.61 (T.5544).

⁴⁴⁸ I.Osmanović:Exh.P3212, para.193.

⁴⁴⁹ I.Osmanović:T.17950. Also I.Osmanović:Exh.P3212, para.193.

⁴⁵⁰ Judgement, para.2599. Also Exhs.P3200, p.2; P5846, p.3 cited at Judgement, paras.2677-2678.

⁴⁵¹ Judgement, para.2601 quoting Exh.D92.

⁴⁵² Judgement, para.2599. Also Exhs.P3200, p.2; P5846, p.3 cited at Judgement, paras.2677-2678; Exh.D377 cited at Judgement, para.2679.

physically destroy” the Groups.⁴⁵⁴ However, the Chamber considered this evidence “in the context of the pattern of crimes” in the Count 1 Municipalities.⁴⁵⁵ Having found—based on an overly narrow view of intent—that this pattern did not reflect genocidal intent, it concluded likewise in relation to the statements of those responsible for this pattern. However, when the JCE members’ statements are viewed in light of the true destructive impact of the pattern of crimes on the targeted communities, they match the outcome on the ground. These communities were indeed annihilated. Correctly assessed, both the statements of JCE members and the pattern of crimes they implemented in the Count 1 Municipalities reflect genocidal intent and are mutually reinforcing in that regard.

D. Sub-Ground 3(D): Karadžić and other JCE members possessed genocidal intent

126. A holistic consideration⁴⁵⁶ of the pattern of crimes in Count 1 Municipalities and the statements and conduct of the JCE members responsible for that pattern, viewed against the proper legal framework of genocidal intent,⁴⁵⁷ leads to only one reasonable conclusion: Karadžić and other JCE members possessed and shared genocidal intent.

1. The pattern of crimes in the Count 1 Municipalities reflects genocidal intent

127. The pattern of crimes in the Count 1 Municipalities reflects genocidal intent on the part of those most responsible for this pattern—Karadžić and other JCE members. Acting in furtherance of the common criminal purpose, Serb Forces perpetrated a campaign of violence against the parts of the Groups in the Count 1 Municipalities⁴⁵⁸ that included thousands of genocidal acts⁴⁵⁹ as well as other widespread crimes⁴⁶⁰—particularly forcible displacement⁴⁶¹ and property crimes.⁴⁶² The destructive impact of this overall pattern of crimes on the Bosnian Muslim and Croat communities in these municipalities reflects genocidal intent.

128. This criminal campaign was orchestrated to further the JCE’s permanent removal objective.⁴⁶³ However, the extreme violence with which that objective was pursued in the Count 1 Municipalities, and the resulting devastation of the targeted communities, demonstrates that JCE

⁴⁵³ Judgement, para.2599. Also Exh.D267 cited at Judgement, para.2675.

⁴⁵⁴ Judgement, para.2605. Also paras.2599-2604.

⁴⁵⁵ Judgement, para.2605.

⁴⁵⁶ Above para.114.

⁴⁵⁷ Above Sub-Ground 3(C).

⁴⁵⁸ Judgement, para.2468. Also para.3443.

⁴⁵⁹ See Judgement, paras.2578-2582.

⁴⁶⁰ See Judgement, paras.2614-2623.

⁴⁶¹ Judgement, paras.2465-2481, 2519-2521.

⁴⁶² Judgement, paras.2539-2559.

members used genocide as a means to implement the permanent removal objective.⁴⁶⁴ While many Group members were expelled without being subjected to pleaded genocidal acts, the violent and dehumanising manner in which Serb Forces effected the mass expulsion of Muslims and Croats from the Count 1 Municipalities⁴⁶⁵ exemplifies why forcible displacement may be “an additional means by which to ensure the physical destruction” of a community and can reflect genocidal intent.⁴⁶⁶ Indeed, the nature of the forcible displacement in the Count 1 Municipalities—conducted alongside large-scale killing and other genocidal acts, involving separation of families and the emotional distress caused by the loss of loved ones, and leaving victims with no hope of returning to destroyed homes and villages—is similar to forcible displacement operations that have been found to result in serious mental harm under Article 4(2)(b).⁴⁶⁷

129. The criminal campaign followed a similar pattern in each of the Count 1 Municipalities. However, as at trial,⁴⁶⁸ the Prosecution focuses here on Prijedor, where the scale and intensity of the crimes reflects an unmistakable intent to destroy, while providing additional references to other municipalities.

130. The Muslims and Croats of Prijedor constituted substantial parts of the Groups.⁴⁶⁹ These parts were substantial in size⁴⁷⁰ and symbolic of the region’s WWII legacy, including the victimisation of Serbs that Karadžić and other JCE members emphasised in speeches.⁴⁷¹ Prijedor was also key territory in relation to the strategic goal of creating a Serb corridor between Semberija and Krajina.⁴⁷²

131. Serb Forces launched their violent campaign in Prijedor in May 1992 with a wave of attacks against Muslims in the areas of Hambarine, Ljubija, Kozarac and Kamićani. These attacks involved sustained shelling and firing at civilians, homes and mosques.⁴⁷³ Houses were set ablaze with inhabitants still inside.⁴⁷⁴ Kozarac town “was completely destroyed”,⁴⁷⁵ and “entire villages were

⁴⁶³ Judgement, para.3443.

⁴⁶⁴ The permanent removal objective is compatible with genocidal intent. *Above* Sub-Ground 3(B).

⁴⁶⁵ *Below* paras.131-139. *Also above* paras.27-32.

⁴⁶⁶ *Krstić* AJ, paras.31, 33.

⁴⁶⁷ The Prosecution did not plead the forcible displacement and surrounding context as acts causing serious mental harm under Article 4(2)(b), but ICTY case law demonstrates that forcible displacement of this kind can fall within Article 4(2)(b). *Above* para.119, fn.430. *Below* paras.136-137.

⁴⁶⁸ *Above* para.89.

⁴⁶⁹ *See Krstić* AJ, paras.8, 12-13.

⁴⁷⁰ *See* Exh.P6684, p.2 (B/C/S).

⁴⁷¹ *See* Exhs.P6164, p.32 (Karadžić claimed Prijedor during negotiations based on a 1931 census, asserting: “This is a continuation of World War Two.”); P3703, p.15. *Below* para.141.

⁴⁷² AF1004; Exhs.P956, p.9; P781; P2561.

⁴⁷³ Judgement, paras.1618-1621, 1643, 1666, 1669.

⁴⁷⁴ Judgement, para.1621. *Also e.g.* *Bratunac*: paras.731, 748; *Foča*: paras.857, 2617; *Ključ*: paras.1512, 1514, 1553; *Sanski Most*: paras.1945, 1954; *Vlasenica*: paras.1119, 1129-1131, 1133; *Zvornik*: paras.1260, 1269, 1264.

'razed'."⁴⁷⁶ Serb Forces murdered dozens of inhabitants⁴⁷⁷ while wounding,⁴⁷⁸ shooting at,⁴⁷⁹ and mistreating others.⁴⁸⁰ In the midst of the Kozarac attack, a Serb commander told a doctor attempting to negotiate safe passage for the wounded, including two children, one of whose legs were shattered: "Let all of you baliija [...] die there. We'll kill you all anyway."⁴⁸¹

132. Within days of this initial violence, Serb Forces attacked Prijedor's historic, mainly Muslim-inhabited old town, Stari Grad.⁴⁸² While "Chetnik" songs calling for the killing of "Turks and other non-Serb people" played on the radio, Serb Forces attacked with tank and grenade fire, setting parts of Stari Grad ablaze⁴⁸³ and deliberately burning and destroying mosques.⁴⁸⁴ They searched and looted houses,⁴⁸⁵ taking many non-Serbs away to camps while subjecting remaining inhabitants to a "terrible state" involving harassment, beatings, evictions, looting, restrictions on movement, deprivation of utilities, and a propaganda campaign calling for the "lynch[ing]" of non-Serbs.⁴⁸⁶

133. On 20 July 1992, Serb Forces continued the pattern of violence with a brutal assault on villages in the Brdo area. They burned and destroyed mosques and homes⁴⁸⁷ while abusing and terrorising villagers.⁴⁸⁸ They murdered at least 300 non-Serbs, including women and children, in the course of a single day,⁴⁸⁹ and more in the ensuing days.⁴⁹⁰ Between 24 and 26 July, they carried out an equally bloody attack on the Croat village of Briševo, murdering at least 68 inhabitants, again including women and children, while burning down houses and the Catholic church.⁴⁹¹

⁴⁷⁵ Judgement, para.1626.

⁴⁷⁶ Judgement, para.1621. *Also e.g. Bratunac:* paras.728, 730, 2618; *Foča:* paras.857, 859-861; *Ključ:* paras.1514, 1519; *Sanski Most:* para.1946; *Vlasenica:* paras.1130-1131, 1134, 1139.

⁴⁷⁷ Judgement, paras.1619, 1624, 1631, 1636-1637, 1643-1649, 1651-1657, 1670, 1672, 1675, 1677.

⁴⁷⁸ Judgement, paras.1624, 1675.

⁴⁷⁹ Judgement, para.1669.

⁴⁸⁰ Judgement, paras.1634, 1672.

⁴⁸¹ Judgement, para.1625.

⁴⁸² AF1268.

⁴⁸³ Judgement, para.1606.

⁴⁸⁴ *See* Judgement, para.1606 *relying on* Exhs.P3528, pp.78-81; P3478, pp.142-143.

⁴⁸⁵ Judgement, para.1610. *Also e.g. Bratunac:* para.728; *Foča:* paras.857, 866; *Ključ:* paras.1511, 1512, 1566; *Sanski Most:* paras.1944, 1967, 2037; *Vlasenica:* paras.1119, 1126, 1134, 1176, 1196; *Zvornik:* paras.1264, 1282.

⁴⁸⁶ Judgement, paras.1607-1610.

⁴⁸⁷ Judgement, paras.1680-1681, 1683-1684, 1706.

⁴⁸⁸ Judgement, paras.1683, 1685, 1687, 1701-1702.

⁴⁸⁹ Judgement, para.1715. *Also* paras.1696-1699, 1701-1712.

⁴⁹⁰ Judgement, paras.1684-1692.

⁴⁹¹ Judgement, paras.1721-1735.

134. In the course of these attacks, Serb Forces rounded up Muslim and Croat civilians in violent and terrifying circumstances.⁴⁹² They forcibly separated families⁴⁹³ and detained thousands—men, women, children and elderly alike—in abysmal conditions, often for extended periods of time,⁴⁹⁴ primarily in three camps—Omarska, Keraterm and Trnopolje.⁴⁹⁵

135. At Omarska and Keraterm hundreds were killed by Serb Forces who executed and beat prisoners to death⁴⁹⁶ and conducted several mass executions.⁴⁹⁷ Across Prijedor's camp network, detainees were regularly murdered, tortured and abused.⁴⁹⁸ Prisoners were thrown into fire,⁴⁹⁹ gassed,⁵⁰⁰ forced to drink motor oil⁵⁰¹ and lie in excrement,⁵⁰² raped and otherwise sexually assaulted,⁵⁰³ cut and stabbed with knives,⁵⁰⁴ forced to dispose of bodies of murdered prisoners⁵⁰⁵ and clean up human remains.⁵⁰⁶ Community leaders and intellectuals were "earmarked for elimination".⁵⁰⁷ A series of Omarska killings in July 1992 targeted professionals and community leaders.⁵⁰⁸ Detainees were also subjected to deplorable conditions—severe overcrowding; meagre food and water; lack of bedding or toilets and other hygienic facilities, causing illness and infestations, which went untreated due to inadequate medical care.⁵⁰⁹ An Omarska survivor described the camp as "inhumane and pitiless machinery, which did not see anything human in

⁴⁹² E.g. Judgement, paras.1626-1629, 1633-1634 *relying on* KDZ392:Exh.P707, pp.22-26 (T.2624-2628) (confidential), 1672, 1688-1690, 1696-1698, 1719. *Also e.g.* Bratunac: paras.728, 732; Foča: paras.861, 868, 873; Ključ: para.1519; Sanski Most: paras.1948, 1955; Vlasenica: paras.1131, 1133-1134, 1139, 1144, 1151; Zvornik: paras.1267, 1271.

⁴⁹³ E.g. Judgement, paras.1628, 1672, 1837, 1864. *Also e.g.* Bratunac: paras.748, 759, 763, 767; Foča: paras.862, 873; Ključ: para.1546; Sanski Most: paras.1979, 2006, 2014; Vlasenica: paras.1131, 1144, 1186, 1199; Zvornik: paras.1256, 1273, 1304, 1333, 1363.

⁴⁹⁴ Judgement, paras.1774, 1805, 1832. *Also e.g.* paras.888, 922, 1179, 1201, 1301, 1536, 1991, 2011, 2018.

⁴⁹⁵ Judgement, paras.1738, 2620.

⁴⁹⁶ Judgement, paras.1760-1763, 1766-1767, 1774, 1801-1802.

⁴⁹⁷ Judgement, para.2461.

⁴⁹⁸ Judgement, paras.1747, 1774, 1805, 1832, 1834-1847, 1859 (fn.6405), 1861, 1871, 1873-1877, 1885.

⁴⁹⁹ Judgement, para.1764.

⁵⁰⁰ Judgement, para.1809.

⁵⁰¹ Judgement, para.1762.

⁵⁰² Judgement, para.1756.

⁵⁰³ Judgement, paras.1769-1772, 1803, 1830-1831. *Also* [REDACTED]; Judgement, para.1831 *relying on* AF1241; Judgement, para.2493, fn.8405 (hearing these screams was "mental abuse" for detainees). *E.g.* KDZ093:Exh.P705, p.42 (T.6237); I.Merdžanić:Exh.P3881, p.49 (T.7762). *Also e.g.* Foča: Judgement, paras.913, 916-917, 920-923; Vlasenica: paras.1139, 1194; Zvornik: para.1346.

⁵⁰⁴ Judgement, paras.1765, 1824.

⁵⁰⁵ Judgement, paras.1766, 1780, 1811-1812, 1827, 1869. *Also e.g.* Bratunac: para.777; Vlasenica: paras.1169, 1204-1205. *Further* Judgement, para.2493.

⁵⁰⁶ Judgement, para.1766.

⁵⁰⁷ E.g. AF1120-AF1121. *Also* Judgement, paras.1740, 1753, 1766, 2496, fn.8423.

⁵⁰⁸ AF1191. *Above* paras.110, 122 (targeting of community leaders can indicate genocidal intent). *Also e.g.* Bratunac: Judgement, paras.769, 774; Vlasenica: paras.1162, 1165; Zvornik: para.1309.

⁵⁰⁹ See Judgement, paras.1747, 1774, 1805, 1832, 1861, 1885 (Prijedor). *Also above* Sub-Ground 2(C). *Further e.g.* Bratunac: para.780; Foča: paras.903, 915; Sanski Most: paras.1991, 1998, 2011, 2018; Vlasenica: paras.1167, 1179, 1201; Zvornik: para.1307.

anyone.”⁵¹⁰ Those who survived the violence and deprivations of the camps—largely thanks to international exposure and pressure⁵¹¹—were expelled.⁵¹²

136. While some Prijedor Muslims and Croats escaped direct victimisation by genocidal acts and were instead expelled through the wave of violence,⁵¹³ the destructive impact on them and their communities is undeniable. They survived violent attacks on their homes and villages⁵¹⁴ and witnessed the murder⁵¹⁵ and cruel treatment⁵¹⁶ of loved ones and neighbours and the devastation of homes, villages⁵¹⁷ and places of worship.⁵¹⁸ They were forced to abandon their possessions, homes, communities and livelihoods⁵¹⁹ and were left agonising over the fate of missing loved ones.⁵²⁰

137. The Chamber recognised that this forcible displacement was “committed with the intent to inflict serious mental suffering, or with knowledge that these acts were likely to cause such suffering.”⁵²¹ However, the Chamber failed to recognise its destructive impact on Prijedor’s Muslim and Croat communities and corresponding destructive intent.⁵²² In the same vein, while the Chamber found that the destruction of homes and religious sites “affected indispensable and vital assets of the population,”⁵²³ it failed to recognise the destructive impact of the almost total

⁵¹⁰ M.Sejmenović:T.20495.

⁵¹¹ Above paras.74 (1st bullet), 120.

⁵¹² Judgement, paras.1902, 1912-1913, 2620. Also e.g. Bratunac: paras.728-732, 747; Foča: para.933; Ključ: para.1561; Sanski Most: para.2039; Vlasenica: para.1219.

⁵¹³ See Judgement, paras.1900, 2620. Also para.1907 citing Exh.P3852, p.2. By 1995, the combined Muslim and Croat populations of Prijedor had fallen from 50% to less than 7%. Judgement, para.1913. Also Exh.P6684, p.2 relied on at Judgement, para.1574; Exh.P5449, pp.6-7 relied on at Judgement, paras.1913, 2620. Also e.g. Bratunac: paras.728-731; Foča: paras.856, 2617; Ključ: paras.1563-1566, 1568; Sanski Most: paras.2035, 2039; Vlasenica: paras.1214-1222; Zvornik: paras.1268-1269, 1364.

⁵¹⁴ Judgement, paras.1897, 1900, 2620. Also para.2468.

⁵¹⁵ E.g. Judgement, paras.1619, [REDACTED], 1652-1654, 1670, 1675, 1686, 1689, 1696, 1698, 1701-1705, 1721-1732, 1760-1763, 1766, 1801-1802. Also para.2446, fn.8227. Further e.g. Bratunac: paras.728-729, 731, 734, 746-747; Foča: paras.868, 906-908; Ključ: paras.1517-1519, [REDACTED], 1551-1553; Sanski Most: paras.1956-1958, 1963, 1967, 1971, 1975, 2000; Vlasenica: paras.1140-1144, 1151-1152, 1155-1158, 1169, 1204-1206; Zvornik: paras.1256-1257, 1301, 1311, 1349.

⁵¹⁶ E.g. Judgement, paras.2485-2506, fns.8361-8362, 8367-8369, 8373, 8379-8380, 8385, 8390, 8393-8395, 8397, 8399-8400, 8404-8406, 8409, 8417, 8421-8423, 8425, 8427, 8430, 8437, 8442, 8449, 8453.

⁵¹⁷ E.g. Judgement, paras.1607-1608, 1621, 1638, 1666, 1669, 1672, 1675, 1680, 1683, 1722-1723, 1727, 2620. Also AF1037; Exh.P3852, p.2; Nusret Sivac:Exh.P3478, pp.60-61 (T.6610-6611); I.Merdžanić:Exh.P3881, pp.87-88, 115 (T.7800-7801, 7836); Exh.D4010, p.3.

⁵¹⁸ Judgement, para.1892 citing Exh.D4010, p.3. E.g. Judgement, paras.1639, 1643, 1666, 1684, 1701, 1706, 1727, 1886-1896, 2552, 2620. Also Exhs.P3852, p.2; P4070, pp.211-258; P586; I.Merdžanić:Exh.P3881, pp.87, 115 (T.7800, 7836). Also e.g. Bratunac: para.783; Foča: para.928; Ključ: para.1558; Sanski Most: para.2031; Vlasenica: para.1196; Zvornik: para.1359.

⁵¹⁹ E.g. Judgement, paras.1640, 1687, 1851, 1912, 2469, 2480, 2542. Also e.g. Bratunac: paras.762, 764; Foča: para.899; Ključ: paras.1524, 1538, 1548, 1566; Sanski Most: paras.1975, 2021; Vlasenica: paras.1152, 1157, 1174, 1186; Zvornik: paras.1266, 1273, 1277, 1290, 1313.

⁵²⁰ KDZ092:Exh.P703, p.28 (T.3947); S.Elkasović:Exh.P690, p.32 (T.4627). Also e.g. Sanski Most: [REDACTED]; F.Biščević:Exh.P135, p.89 (T.7098); Vlasenica: I.Osmanović:Exh.P3212, para.193.

⁵²¹ Judgement, para.2480.

⁵²² Above paras.118-120.

⁵²³ Judgement, para.2557.

destruction of sacred sites and personal property of Prijedor's Muslim and Croat communities⁵²⁴ and the intent that this reflects.⁵²⁵

138. The Chamber found that countless numbers of Prijedor's Muslims and Croats were subjected to the genocidal acts of killing⁵²⁶ and serious bodily and mental harm.⁵²⁷ It should also have recognised that thousands more were subjected to destructive conditions of life.⁵²⁸ However, the genocidal intent analysis does not boil down to a consideration of these acts alone.⁵²⁹ They were part of a broader campaign that targeted and destroyed the very fabric of these communities and their ability to exist as separate and distinct entities.

139. Certainly, victims do not distinguish between the suffering that flows from crimes falling within Article 4(2) versus other culpable acts. They experienced the combined impact of these crimes, which is reflected in their descriptions of their devastated lives, families and communities.⁵³⁰ Prijedor victims spoke of their lives "stopp[ing]" in 1992;⁵³¹ of experiencing "no more happiness";⁵³² of feelings of loss of loved ones, family structures⁵³³ and [REDACTED];⁵³⁴ of [REDACTED];⁵³⁵ and of never truly being able to return 'home'.⁵³⁶ Such evidence can only be understood as the victims considering that their communities have ceased to exist as separate and distinct entities and further supports the inference that the crimes were intended to have this effect.

2. Karadžić's and other JCE members' statements support an inference of genocidal intent

140. Karadžić and other JCE members repeatedly disseminated the view that Serbs faced genocide at the hands of Muslims and Croats, setting the stage for the use of extreme, and indeed genocidal, means to ward off this supposed existential threat. At the same time they spoke in terms

⁵²⁴ Above para.136.

⁵²⁵ Above para.121; *Tolimir* TJ, para.757 (inability of forcible transfer victims to return to homes and destruction of their homes are relevant to assessing serious mental harm under Art.4(2)(b)) *affirmed by Tolimir* AJ, paras.210-211.

⁵²⁶ Judgement, paras.2446-2448, fns.8227, 8243, 8253, para.2461. Also paras.2578-2579. Also e.g. *Bratunac*: fns.8223, 8236, 8251; *Foča*: fns.8224, 8238, 8252; *Ključ*: fns.8225, 8240; *Sanski Most*: fns.8228, 8245, 8255; *Vlasenica*: fns.8231, 8246; *Zvornik*: fns.8232, 8248, 8256.

⁵²⁷ E.g. Judgement, paras.2485-2506, fns.8361-8362, 8367-8369, 8373, 8379-8380, 8385, 8390, 8393-8395, 8397, 8399-8400, 8404-8406, 8409, 8417, 8421-8423, 8425, 8427, 8430, 8437, 8442, 8449, 8453. Also paras.2580-2582. Also e.g. *Bratunac*: fns.8361-8362, 8394, 8404, 8409, 8415, 8430; *Foča*: fns.8361, 8367, 8370-8372, 8394, 8396, 8400, 8402, 8404-8405, 8425, 8431, 8435, 8442-8445; *Ključ*: fns.8367, 8369, 8375-8376, 8378, 8391, 8394, 8397, 8404, 8407, 8409, 8414, 8427, 8430-8431; *Sanski Most*: fns.8367, 8394, 8397, 8427; *Vlasenica*: fns.8361, 8364, 8367-8369, 8376, 8388, 8394, 8396, 8399, 8404, 8406, 8427-8428, 8430, 8439; *Zvornik*: fns.8361, 8365-8367, 8369, 8380, 8384, 8389, 8394, 8396-8397, 8404, 8406, 8409-8410, 8412, 8421, 8427, 8429-8430, 8441, 8448, 8451.

⁵²⁸ Above Ground 2.

⁵²⁹ Above paras.114-124.

⁵³⁰ Above para.124.

⁵³¹ KDZ093:Exh.P705, p.42 (T.6237).

⁵³² KDZ093:Exh.P705, p.42 (T.6237).

⁵³³ E.g. KDZ038:Exh.P676, p.73 (T.6929); KDZ093:Exh.P705, p.59 (T.6254); [REDACTED]

⁵³⁴ [REDACTED].

⁵³⁵ [REDACTED].

evoking the destruction of the Groups. Such statements further reflect the JCE members' genocidal intent. This is particularly so when these statements are viewed in light of the scale and intensity of violence inflicted against Muslims and Croats in the Count 1 Municipalities, for which Karadžić and other JCE members were found responsible, and the true destructive impact of the crimes on these communities.

141. The Chamber found that Karadžić emphasised the WWII genocide against the Serbs to "incit[e] inter-ethnic hatred",⁵³⁷ rally his followers "to fight for what was portrayed as their survival",⁵³⁸ and justify his criminal objectives.⁵³⁹ He painted Muslims and Croats as posing an existential threat to Serbs and warned that a genocidal conflict was brewing.⁵⁴⁰ International negotiator Herbert Okun responded to Karadžić's "constant references" to the WWII genocide by warning Karadžić that this "obsess[ion]" might lead him to commit "pre-emptive genocide" because he viewed past crimes as "justif[ying] all of Bosnian Serb behaviour".⁵⁴¹

142. Karadžić also repeatedly foreshadowed the destruction of the Groups. His public statements⁵⁴² include:

- A pre-conflict speech before the Bosnian Assembly in which he proclaimed that Bosnian Muslims seeking independence would take Bosnia on a "highway of hell and suffering [...] and Muslim people in possible extinction."⁵⁴³
- A speech before the RS Assembly at the height of the violence in July 1992 in which he declared there was "truth in [the statement] that this conflict was roused to eliminate the Muslims" and noted "they are vanishing",⁵⁴⁴ acknowledging an earlier comment that the Serbs were assigned to be the Muslims' "executioners".⁵⁴⁵

In less public settings, Karadžić spoke more candidly about his willingness to use genocide as a means to pursue his objectives. In telephone conversations in late 1991, Karadžić warned, for

⁵³⁶ I.Merdžanić:Exh.P3881, p.88 (T.7801); [REDACTED].

⁵³⁷ Judgement, paras.2598, 2672.

⁵³⁸ Judgement, para.2672.

⁵³⁹ Judgement, paras.3485-3487.

⁵⁴⁰ Judgement, paras.2655, 2658, 2659, 2672, 3485.

⁵⁴¹ H.Okun:Exh.P776, pp.22, 31 (T.4156, 4165); T.1490; Exh.P779, p.43; Judgement, para.2662.

⁵⁴² The Chamber found that Karadžić was conscious of public perception and the image that he portrayed to the international community. *E.g.* Judgement, paras.2846-2847, 2900, 3095, 3381, 3484, 3503.

⁵⁴³ Exh.D267, pp.3-4 *relied on at* Judgement, para.2675.

⁵⁴⁴ Exh.D92, p.86.

⁵⁴⁵ Exh.D92, pp.40-41 (earlier speech: "we must admit that the Muslims have been planted to us as a people whose executioners we are to be"); T.28713 (Prosecution linking the speeches).

instance, that Bosnian Muslims would “disappear from the face of the earth,”⁵⁴⁶ “be annihilated”⁵⁴⁷ and be “up to their necks in blood”⁵⁴⁸ in a “war until their extinction”⁵⁴⁹ if they persisted in pursuing independence.

143. Statements by co-JCE members⁵⁵⁰ echo Karadžić’s, reflecting shared genocidal intent. Mladić told the RS Assembly that his focus was on the Muslims “vanish[ing] completely”⁵⁵¹ and commented to a film crew that he killed Muslims “in passing” because “who gives a fuck for them!”⁵⁵² Mladić also echoed Karadžić’s view that WWII-era crimes justified Serb actions.⁵⁵³ Šešelj likewise warned that action was necessary to prevent a “new genocide” against the Serbs,⁵⁵⁴ urging that “there should not be hesitating, waiting [...] the next time they strike, we should finish them off, so they never strike back.”⁵⁵⁵ Similarly, Plavšić said that “the Bosnian Muslims should be slaughtered or exterminated”⁵⁵⁶ and declared: “if it takes the lives of 3 million people to solve this crisis, let’s get it done and move on.”⁵⁵⁷

144. When JCE members visited Prijedor for an RS Assembly session in October 1992, following the decimation of Prijedor’s Muslim and Croat communities, Mladić told a reporter that he was proud of his soldiers’ contributions. Plavšić confirmed it was “not by chance” that Prijedor was chosen to host the session, explaining Krajišnik “bore in mind what had happened in Prijedor”.⁵⁵⁸ Karadžić subsequently promoted and commended Prijedor SJB Chief Simo Drljača, who oversaw Prijedor’s camps, and commanded those responsible for genocidal acts in Prijedor, including the Koričanske Stijene massacre.⁵⁵⁹

145. The Chamber found that JCE members’ statements demonstrated their willingness “to use force and violence against Bosnian Muslims and Bosnian Croats”⁵⁶⁰ to achieve the goal of ethnic separation. However, when such statements are assessed in the context of their use as justification

⁵⁴⁶ Judgement, para.2678. Also T.3490 (Karadžić cross-examining a witness on this statement: “I’m informing my friend [...] how [the Bosnian Muslims] would [...] disappear from the face of the earth” if they persisted in trying to create an independent state).

⁵⁴⁷ Judgement, para.2677.

⁵⁴⁸ Judgement, para.2678.

⁵⁴⁹ Judgement, para.2680.

⁵⁵⁰ Judgement, para.3462.

⁵⁵¹ Exh.P1385, p.49.

⁵⁵² Exh.P4442, p.1.

⁵⁵³ Judgement, paras.2662, 2669, 2832, 3272 citing Exhs.P1484, p.150, P792, p.49, P2566. Also Exhs.D232, para.2; D593, p.1; P1385, pp.47-48.

⁵⁵⁴ Judgement, para.2657 quoting Exh.P2527. Also para.3330.

⁵⁵⁵ Judgement, para.3329 quoting Exh.P6393.

⁵⁵⁶ Judgement, para.2727.

⁵⁵⁷ Judgement, para.2727 quoting C.Doyle:T.2672. Also paras.3259, 3449.

⁵⁵⁸ Exh.P1360, pp.4, 13.

⁵⁵⁹ Judgement, para.3432. Also paras.1833-1845.

⁵⁶⁰ Judgement, para.2599.

and support for the appalling and systematic violent acts committed in the Count 1 Municipalities⁵⁶¹ for which Karadžić and other JCE members were responsible⁵⁶²—and in light of the true destructive impact of the pattern of crimes on the targeted communities⁵⁶³—they affirm the inference that Karadžić and other JCE members possessed and shared genocidal intent.

146. JCE members shared a common purpose to permanently remove the Bosnian Muslims and Croats through the organised and systematic commission of crimes.⁵⁶⁴ The totality of the evidence shows that in the Count 1 Municipalities these crimes reflected an intent to destroy the parts of the Groups in the Count 1 Municipalities or at least parts of the Groups in individual Municipalities, especially Prijedor. The only reasonable conclusion to draw from this evidence, considered alongside the Chamber's own underlying findings, is that Karadžić and the other JCE members possessed genocidal intent.

E. Remedy

147. The Appeals Chamber should correct the Chamber's errors together with the errors alleged in Grounds 1 and 2 and find that Karadžić and other JCE members shared the intent to commit genocide in relation to the parts of the Bosnian Muslim and Bosnian Croat Groups: in the Count 1 Municipalities considered cumulatively or, alternatively, in individual Count 1 Municipalities, especially Prijedor. The Appeals Chamber should find accordingly that genocide formed part of the common criminal purpose of the Overarching JCE, enter a conviction under Count 1 under the first category of JCE liability pursuant to Article 7(1) and increase Karadžić's sentence.

⁵⁶¹ See Judgement, paras.2614-2622, 3441. *Above* paras.131-139.

⁵⁶² Judgement, paras.3524, 6047.

⁵⁶³ *Above* Sub-Ground 3(C).

⁵⁶⁴ Judgement, paras.3440-3447. *Above* Ground 1.

V. GROUND 4: KARADŽIĆ DESERVES LIFE IMPRISONMENT

148. Karadžić's leading role in crimes committed throughout BiH distinguishes him as the most serious offender convicted by the ICTY to date. From the top of the Bosnian Serb civilian and military hierarchies, Karadžić dedicated the vast resources under his control to further four interconnected JCEs. He is criminally responsible for the ethnic cleansing campaign across large parts of BiH that included persecution, extermination, murder and forcible displacement of many thousands of Muslims and Croats. Forces under his control sniped and shelled the besieged city of Sarajevo for more than three and a half years with the purpose of spreading terror among the civilian population. He is guilty of the Srebrenica genocide, arguably the worst single crime in Europe since WWII. And he is responsible for taking scores of UN personnel hostage in response to NATO's actions aimed at halting Karadžić's criminal conduct.

149. The Chamber failed to properly exercise its discretion when it imposed a fixed-term sentence of 40 years. The gravity of each of the case's three main JCEs—Overarching, Sarajevo and Srebrenica—individually warrants a life sentence. Four of Karadžić's subordinates received life sentences for participation in only one of these JCEs. Taken together, these three JCEs, along with the Hostages JCE, form the largest and gravest set of crimes ever attributed to a single person at the ICTY. This unprecedented gravity far surpasses the threshold required for the maximum sentence of life imprisonment.

150. Karadžić's 40-year sentence does not properly reflect the gravity of his criminal responsibility. His sentence conveys that his crimes do not warrant the stigma of the Tribunal's highest sentence.

151. It is impossible to understand why the Chamber did not impose a life sentence. The Chamber's sentencing opinion does not explain why the Chamber selected a fixed-term sentence of 40 years. The Chamber failed to address or even acknowledge the Prosecution's submission that life imprisonment was the only appropriate sentence. Nor did it consider the Tribunal's sentencing practice in comparable cases or explain the impact of mitigating circumstances on the sentence.

152. The Chamber also erred in its treatment of aggravating and mitigating circumstances. It failed to properly consider and weigh abuse of authority as an aggravating factor that increased the gravity of the crimes. The Chamber did not explain the effect of the mitigating factors it accepted. If mitigation was the Chamber's reason for imposing a sentence below life imprisonment, then it gave too much weight to insignificant mitigating circumstances.

153. By imposing a 40-year sentence, the Chamber abused its discretion. Through one or a combination of errors, the Chamber reached an unreasonable outcome incommensurate with the gravity of Karadžić's criminal responsibility.

154. The Appeals Chamber should increase Karadžić's sentence to life imprisonment.

A. Karadžić's 40-year sentence is unreasonable and inadequately reasoned

155. The sentence imposed in this case is so unreasonable that it shows that the Chamber failed to give sufficient weight to the gravity of the crimes or otherwise failed to exercise its discretion properly.⁵⁶⁵ Karadžić's crucial role in any one of the three main JCEs warranted a life sentence. Together, the gravity of Karadžić's crimes in the Overarching, Sarajevo and Srebrenica JCEs is unprecedented and far surpasses the threshold for a life sentence. Yet the Chamber sentenced Karadžić to a fixed-term of 40 years. In light of the massive scale of the crimes and Karadžić's central role in them, the limited mitigating factors recognised by the Chamber cannot justify anything less than the maximum available sentence of life imprisonment.

1. The Chamber's gravity findings require a life sentence

156. The Chamber failed to give appropriate weight to its own findings on the extreme gravity of Karadžić's crimes and his crucial role in them. On the Chamber's findings, Karadžić's responsibility is at the highest level in relation to both aspects of the gravity analysis: (i) the inherent gravity of the crimes; and (ii) the form and degree of his participation in those crimes.⁵⁶⁶

157. The Chamber determined that Karadžić's crimes were "among the most egregious of crimes in international criminal law and include extermination as a crime against humanity and genocide."⁵⁶⁷ As the ICTR Appeals Chamber has observed, most convictions for extermination and genocide have resulted in life sentences unless there were "especially significant mitigating

⁵⁶⁵ E.g. *Galić* AJ, paras.394, 455; *Popović* AJ, para.1962.

⁵⁶⁶ *Galić* AJ, para.409; *Mrkšić* AJ, para.375; *Čelebići* AJ, para.741; *Aleksovski* AJ, para.182 citing *Kupreškić* AJ, para.852.

⁵⁶⁷ *Judgement*, para.6046.

circumstances”⁵⁶⁸ such as a guilty plea or a violation of the accused’s rights.⁵⁶⁹ There were no such circumstances in this case.⁵⁷⁰

158. The Chamber found that Karadžić was involved in “a wide range of criminal acts throughout the entire period of the conflict in BiH.”⁵⁷¹ It noted the “sheer scale” of Karadžić’s crimes “as well as their systematic cruelty and their continued impact on the victims who have survived”.⁵⁷² The Chamber’s findings highlight the extreme gravity of Karadžić’s crimes and his “essential”⁵⁷³ role in them:

- Karadžić was “at the apex of power and played an integral role”⁵⁷⁴ in the Overarching JCE. He “established the institutions” used to carry out this plan and “created a climate of impunity” for these crimes.⁵⁷⁵ He was responsible for “atrocious crimes”⁵⁷⁶ against thousands of victims. Those who survived “continue to suffer from the impact of these crimes to this day”,⁵⁷⁷ two decades later.
- Karadžić’s contribution to the Sarajevo JCE was “so instrumental that without his support the SRK attacks on civilians could not have in fact occurred.”⁵⁷⁸ He was criminally responsible for subjecting many thousands of trapped civilians to a campaign of sniping and shelling designed to terrorise the city’s inhabitants for three and a half years.⁵⁷⁹ Many civilians were killed and wounded; “no place in the city was safe”.⁵⁸⁰
- In relation to the Srebrenica JCE, Karadžić was “the sole person in the RS with the power to prevent the Bosnian Serb Forces from moving the Bosnian Muslim males to Zvornik to be killed.” Instead, he ordered their transfer to Zvornik, thereby “agree[ing] to and enabl[ing] the implementation of a systematic, organised, and large scale murder operation”.⁵⁸¹

⁵⁶⁸ *Gacumbitsi* AJ, para.204.

⁵⁶⁹ *Gacumbitsi* AJ, para.204 (“unlike in most of the other cases in which those convicted for genocide have received less than a life sentence, there were no especially significant mitigating circumstances here.”), fn.446 (referring to cases involving genocide and extermination). Also *Semanza* AJ, para.389 (“[C]onvictions for perpetrating genocide, at least those not reached after a guilty plea, have generally resulted in life sentences.”). The ICTY Appeals Chamber has also singled out genocide as an “especially grievous and reprehensible violation” requiring “special condemnation and opprobrium”. *Krstić* AJ, paras.36, 275.

⁵⁷⁰ *Below* paras.176-179.

⁵⁷¹ Judgement, para.6046.

⁵⁷² Judgement, para.6046.

⁵⁷³ Judgement, para.6052.

⁵⁷⁴ Judgement, para.6047.

⁵⁷⁵ Judgement, para.6047.

⁵⁷⁶ Judgement, para.6047.

⁵⁷⁷ Judgement, para.6047.

⁵⁷⁸ Judgement, para.6048.

⁵⁷⁹ Judgement, para.6048.

⁵⁸⁰ Judgement, para.6048.

⁵⁸¹ Judgement, para.6049. The Chamber also found that Karadžić “was the driving force” behind the hostage-taking of UN personnel. Judgement, para.6050.

Karadžić was responsible for genocide, extermination and other crimes that included the “killing of at least 5,115 Bosnian Muslim men and the forcible transfer of 30,000 Bosnian Muslim women, children, and elderly”.⁵⁸² The Chamber recalled its earlier findings “describ[ing] in harrowing detail the systematic brutality”⁵⁸³ of these crimes.

159. Karadžić’s responsibility for any one of the three main JCEs warranted a life sentence. Cumulatively, Karadžić’s conviction far surpasses the threshold for a life sentence,⁵⁸⁴ leaving no room for any other sentence. Only the most exceptional of mitigating circumstances could serve to reduce his sentence below life imprisonment. No such circumstances are present here.⁵⁸⁵ Anything less than a life sentence does not adequately reflect the crimes for which Karadžić is responsible and the crucial role that he played in their commission.⁵⁸⁶

2. A life sentence is greater than 40 years

160. A life sentence is both qualitatively and quantitatively greater than a fixed-term sentence. The MICT President has confirmed that a life sentence is “qualitatively distinct from and greater than a sentence of a fixed term in years.”⁵⁸⁷

161. Qualitatively, as the highest sentence available in this jurisdiction, a life sentence carries special significance. It conveys a unique stigma as the strongest condemnation that the international community can express.⁵⁸⁸ In contrast, the Chamber’s 40-year sentence indicates that Karadžić’s conduct does not deserve the Tribunal’s strongest condemnation.

162. Quantitatively, a life sentence is considered “more” than the highest fixed-term sentence handed down by the *ad hoc* Tribunals.⁵⁸⁹ Conversely, a fixed-term sentence is “by its nature a reduced sentence from that of life imprisonment”.⁵⁹⁰ ICTY and ICTR Appeals Chambers have repeatedly confirmed that life sentences are longer than high fixed-term sentences by *reducing* life sentences to fixed-term sentences of 40 years or more to account for partial appellate acquittals or violations of the accused’s rights.⁵⁹¹ These cases further show that Karadžić’s sentence is not even in the top range of ICTY and ICTR fixed-term sentences. In *Nyiramasuhuko*, for example, the

⁵⁸² Judgement, para.6049. Karadžić was also convicted as a superior for failing to punish some of these killings.

⁵⁸³ Judgement, para.6049.

⁵⁸⁴ Below para.163.

⁵⁸⁵ Below paras.176-179.

⁵⁸⁶ E.g. *Kamuhanda* AJ, para.351.

⁵⁸⁷ *Galić* Early Release Decision, para.29.

⁵⁸⁸ Regarding sentencing as an expression of international condemnation: E.g. *Bralo* SAJ, para.82; *Aleksovski* AJ, para.185. Regarding life sentences in particular: E.g. *Nahimana* TJ, para.1097 affirmed by *Nahimana* AJ, paras.1059-1060; *Duch* AJ, para.380.

⁵⁸⁹ *Galić* Early Release Decision, paras.29, 34-36.

⁵⁹⁰ *Gatete* AJ, para.286.

⁵⁹¹ E.g. *Stakić* AJ, para.428; *Nchamihigo* AJ, paras.402-404; *Gatete* AJ, paras.286-287.

ICTR Appeals Chamber reduced three life sentences to fixed-term sentences of 47 years.⁵⁹² In *Kajelijeli*, a life sentence was reduced to 45 years for “serious violations of the Appellant’s fundamental rights during his arrest and detention”.⁵⁹³

163. Moreover, other partial appellate acquittals show that some life sentences reflect gravity beyond the threshold required for imposing the maximum sentence. For example, the ICTY Appeals Chamber maintained Zdravko Tolimir’s life sentence, even after reversing several significant convictions involving genocide and extermination.⁵⁹⁴ When the ICTR Appeals Chamber reversed convictions for “very serious crimes” in the *Renzaho* case, it nevertheless found that there was no impact on his life sentence given the remaining convictions.⁵⁹⁵ Dissenting Judges Pocar and Liu would have likewise maintained Théoneste Bagosora’s life sentence, notwithstanding a partial reversal of his convictions on appeal. They found that the majority’s substitution of a 35-year sentence was a “monumental reduction” of his sentence, unwarranted in light of the remaining “catalogue of convictions” upheld on appeal.⁵⁹⁶

3. Sentences in related cases demonstrate the Chamber’s discernible error

164. Related cases indicate that Karadžić’s 40-year sentence is an outlier in the Tribunal’s sentencing practice. Karadžić received a 40-year sentence while four of his subordinates, three of whom were co-JCE members, received life sentences. Each of these men was involved in only one of the three main JCEs and was convicted for only a fraction of Karadžić’s crimes. Others with even less responsibility received fixed-term sentences comparable to Karadžić’s. The disparity illustrates the Chamber’s error.⁵⁹⁷

165. The Appeals Chamber approved life sentences for three VRS officers subordinate to Karadžić for crimes committed in Srebrenica in July 1995: Vujadin Popović, Ljubiša Beara and Zdravko Tolimir.⁵⁹⁸ The Chamber found that Popović and Beara, together with Karadžić, were Srebrenica JCE members.⁵⁹⁹ Although aiding and abetting generally warrants lower sentences than

⁵⁹² See *Nyiramasuhuko* AJ, paras.3523, 3526, 3538.

⁵⁹³ *Kajelijeli* AJ, para.324.

⁵⁹⁴ *Tolimir* AJ, para.648.

⁵⁹⁵ *Renzaho* AJ, para.620. Also *Karemera* AJ, para.749; *Kamuhanda* AJ, paras.362-363; *Karera* AJ, paras.393, 396.

⁵⁹⁶ *Bagosora* AJ, Joint Dissenting Opinion of Judges Pocar and Liu, para.1.

⁵⁹⁷ Although there are relevant individual factors in every case, “a disparity out of reasonable proportion between an impugned sentence and another sentence rendered in a like case may give rise to an inference that the Trial Chamber failed to exercise its discretion properly”. *D.Milošević* AJ, para.327.

⁵⁹⁸ See *Popović* AJ, para.2117; *Tolimir* AJ, para.649.

⁵⁹⁹ Judgment, paras.5737, 5755, 5814.

commission,⁶⁰⁰ VRS subordinates Radislav Krstić and Drago Nikolić were sentenced to 35 years for, *inter alia*, aiding and abetting genocide.⁶⁰¹

166. The Appeals Chamber sentenced another of Karadžić's subordinates, Stanislav Galić, SRK commander from September 1992 to August 1994, to life imprisonment for crimes committed during only part of the three-and-a-half-year siege of Sarajevo.⁶⁰² Dragomir Milošević, Galić's successor, was sentenced to 29 years for his role in Sarajevo crimes, which was limited to the period from August 1994 until November 1995.⁶⁰³ These commanders, along with Karadžić, were Sarajevo JCE members.⁶⁰⁴

167. Karadžić's leadership role in the Overarching JCE far eclipses those of others convicted of overlapping and connected subsets of crimes. Although they were involved in only a small portion of Karadžić's Overarching JCE crimes, lower-level officials received sentences of up to 40 years. For example:

- Milomir Stakić, the leading political figure in the Prijedor municipal government from April to September 1992, was initially sentenced to life imprisonment for crimes committed in this single municipality.⁶⁰⁵ This sentence was reduced to 40 years on appeal.⁶⁰⁶
- Radoslav Brđanin was convicted for aiding and abetting crimes in 13 ARK municipalities in 1992. The Trial Chamber sentenced him to 32 years' imprisonment,⁶⁰⁷ which was reduced to 30 years on appeal after reversals of certain convictions.⁶⁰⁸
- Dragan Nikolić, commander of the Sušica camp in Vlasenica municipality from June to September 1992, was sentenced to 23 years, which was reduced to 20 years on appeal.⁶⁰⁹ The Appeals Chamber upheld the Trial Chamber's conclusion that the only possible "starting point", given the gravity of Nikolić's offences, was a life sentence, which was then reduced based on mitigating factors including a guilty plea to all charges.⁶¹⁰

⁶⁰⁰ See *Krstić* AJ, para.268; *Vasiljević* AJ, para.182.

⁶⁰¹ Krstić was initially sentenced to 46 years, reduced to 35 years on appeal. *Krstić* TJ, paras.726-727; *Krstić* AJ, p.87. *Popović* TJ, p.833 (Nikolić); *Popović* AJ, para.2117.

⁶⁰² *Galić* AJ, paras.455-456, p.185.

⁶⁰³ *D.Milošević* AJ, paras.5, 337 (reducing his sentence from 33 to 29 years).

⁶⁰⁴ Judgement, paras.4680, 4892.

⁶⁰⁵ *Stakić* TJ, p.253.

⁶⁰⁶ *Stakić* AJ, para.428.

⁶⁰⁷ *Brđanin* TJ, para.1153.

⁶⁰⁸ *Brđanin* AJ, p.157.

⁶⁰⁹ *D.Nikolić* SJ, p.73; *D.Nikolić* SAJ, p.44.

⁶¹⁰ *D.Nikolić* SAJ, paras.21-22.

Karadžić's Overarching JCE conviction is far broader than those in each of these cases in terms of geographic scope, duration and the numbers of crimes and victims.

168. Moreover, each of these previous cases relates to only one of the three main JCEs for which Karadžić has been convicted. The unprecedented combination of the crimes in the Overarching, Sarajevo and Srebrenica—plus Hostages—JCEs in a single case far surpasses the threshold of gravity required for a life sentence.⁶¹¹

4. The Chamber failed to provide a reasoned opinion

169. The Chamber also failed to provide a reasoned opinion⁶¹² as to why, in light of its own gravity findings, it imposed a sentence of less than the maximum. The Chamber does not mention the Prosecution's recommended sentence of life imprisonment, let alone explain why it did not accept it. Nor did the Chamber attempt to situate Karadžić's crimes in relation to previous cases, an exercise that would have compelled the conclusion that a life sentence was the only reasonable outcome. The Chamber's failure to provide sufficient reasons for the sentence leaves the parties—and the public—to guess why the Chamber selected a 40-year sentence.

170. The Chamber failed to provide an explanation for the disconnect between its findings on the extreme gravity of Karadžić's crimes and its failure to impose a life sentence. Given the Chamber's own gravity findings, the only reasonable starting point was life imprisonment. Where the Chamber's own analysis points so strongly towards the maximum penalty, the Chamber's obligation to clearly articulate its reasons for a different conclusion is heightened. Yet the Chamber did not explain why it decided to impose a 40-year sentence instead of a life sentence.

171. The Chamber failed to acknowledge the Prosecution's submission that, even if Karadžić was only convicted for a substantial portion of just one of the three main JCEs, he deserved a life sentence.⁶¹³ The Chamber offered no explanation as to why the Prosecution's recommendation was not accepted.

172. The Chamber also failed to consider the Tribunal's sentencing practice in prior comparable cases.⁶¹⁴ In its sentencing analysis, the Chamber addressed only two cases—*Plavšić* and *Krajišnik*—both raised in Karadžić's arguments. It rightly distinguished both cases, finding *Plavšić* to be of no guidance and *Krajišnik* to be of only limited assistance.⁶¹⁵ However, the Chamber failed

⁶¹¹ Above para.163. Also *Nahimana* AJ, para.1060.

⁶¹² E.g. *Stanišić & Simatović* AJ, para.78.

⁶¹³ Prosecution-FTB, para.1122.

⁶¹⁴ E.g. *Čelebići* AJ, para.757.

⁶¹⁵ Judgement, paras.6066-6067.

to examine other comparable cases, such as those discussed above,⁶¹⁶ that provide more relevant guidance.

B. The Chamber failed to assess and give weight to Karadžić's abuse of authority as an aggravating factor

173. The Chamber committed a discernible error in the exercise of its discretion by failing to expressly consider the impact of Karadžić's abuse of authority on the gravity of his crimes and declining to address this abuse as an aggravating factor.⁶¹⁷

174. In declining to address abuse of authority as an aggravating factor, the Chamber stated that it had taken Karadžić's power and authority "into consideration in relation to the gravity of the crimes for which he has been found responsible."⁶¹⁸ In its gravity analysis, however, the Chamber failed to make the critical finding that Karadžić *abused* his authority, thereby increasing the gravity of his crimes.⁶¹⁹ Although the Chamber recognised Karadžić's position of authority in discussing his participation in the four JCEs and indicated that Karadžić used his position to further his (criminal) objectives,⁶²⁰ it never assessed how his *abuse* of authority made his crimes more grave. Considering an accused's position and authority in relation to his involvement in the crimes is not the same as finding that he *abused* his authority.⁶²¹ While it may be permissible to consider aggravating factors together with gravity,⁶²² trial chambers are nevertheless required to determine whether the aggravating factor makes the crime graver. This was not done.

175. The Chamber also failed to address the nature and scope of Karadžić's massive and sustained abuse of authority. For example, the Chamber failed to consider that this abuse constituted a serious betrayal of the trust vested in him in his high-level positions, including as RS President.⁶²³ As President, he was under an obligation to prevent and punish crimes and protect the population.⁶²⁴ Karadžić not only failed to fulfil that duty,⁶²⁵ but he also used the army, police and other government organs to carry out crimes.⁶²⁶ In doing so, he transformed these organs—to which people would normally turn for help in times of crisis—into tools of destruction, persecution,

⁶¹⁶ Above paras.165-167.

⁶¹⁷ Prosecution-FTB, para.1120.

⁶¹⁸ Judgement, para.6052.

⁶¹⁹ Judgement, paras.6046-6050.

⁶²⁰ Judgement, para.6052.

⁶²¹ *E.g. Stanišić & Župljanin* AJ, para.1139; *Tolimir* AJ, para.643; *M.Nikolić* SAJ, para.61 ("abuse of his position is distinct from his role in the crimes").

⁶²² *Krajišnik* AJ, para.787.

⁶²³ Abuse of trust placed in the accused by the population is a recurring element used to establish abuse of authority as an aggravating factor. *E.g. Kambanda* AJ, paras.118, 126 *relied on in Deronjić* SAJ, para.67; *Ndindabahizi* AJ, paras.133-134.

⁶²⁴ Judgement, paras.3493, 3501. *Also Kambanda* AJ, paras.118, 126.

⁶²⁵ Judgement, paras.3493, 3501.

murder, abuse and expulsion. These elements warranted significant weight in sentencing because they make his crimes graver.

C. The Chamber failed to give a reasoned opinion on mitigation or erred in crediting mitigating factors

176. The Chamber accepted mitigating factors that warranted little, if any, weight in light of the extreme gravity of Karadžić's convictions.⁶²⁷ But the Chamber neither provided a starting point for the appropriate sentence based on gravity alone, nor explained the weight that the mitigating circumstances had on the sentence. Without a reasoned opinion, the parties and the public can only speculate as to whether the mitigating factors are the Chamber's explanation for dropping Karadžić's sentence below a life sentence. If they are, then the Chamber erred by giving too much weight to relatively insignificant mitigating factors that did not warrant any sentencing reduction.

1. The Chamber erred in weighing insignificant mitigating factors

177. One possible reading of the Judgement is that the Chamber allowed the mitigating factors to reduce Karadžić's sentence below life imprisonment. If this is so, then the Chamber erred in giving too much weight to mitigating factors that merited little or no reduction in sentence.⁶²⁸ It is well established that "the existence of mitigating circumstances does not automatically result in a reduction of sentence or preclude the imposition of a sentence of life imprisonment where the gravity of the offence so requires."⁶²⁹ The factors recognised by the Chamber have consistently been afforded little weight, if any, in cases involving grave crimes:⁶³⁰

- Good conduct in court and detention⁶³¹ has regularly been found not to mitigate serious crimes.⁶³²
- Expression of sympathy for the victims—which the Chamber noted was not remorse⁶³³—has not been accorded significant weight.⁶³⁴
- Advanced age⁶³⁵ has consistently been given limited weight in comparable cases.⁶³⁶

⁶²⁶ *E.g.* Judgement, paras.3511, 4938, 5818.

⁶²⁷ Judgement, paras.6054-6065.

⁶²⁸ Judgement, paras.6058-6062.

⁶²⁹ *Popović* AJ, para.2053. Also *Niyitegeka* AJ, para.267; *Musema* AJ, para.396.

⁶³⁰ *E.g.* *Stanišić & Župljanin* AJ, para.1132; *Tolimir* AJ, para.644; *Nizeyimana* AJ, paras.446, 448; *Kordić* AJ, para.1053; *Krajišnik* AJ, paras.816-817.

⁶³¹ Judgement, para.6058.

⁶³² See *Tolimir* AJ, para.644; *Nizeyimana* AJ, paras.446, 448; *Kordić* AJ, para.1053.

⁶³³ Judgement, paras.6059-6060.

⁶³⁴ *Stanišić & Župljanin* AJ, para.1157; *Musema* AJ, para.396.

- Lack of a previous criminal record⁶³⁷ has been accorded little, if any, weight in mitigation, absent exceptional circumstances.⁶³⁸

2. The Chamber erred in crediting Karadžić's resignation from public life as a mitigating factor

178. The Chamber erred in crediting Karadžić's 1996 decision to resign from all public and party offices—while refusing to consider Karadžić's reasons for doing so—as a mitigating circumstance.⁶³⁹ Karadžić's self-serving motives are incompatible with mitigation.⁶⁴⁰ If the Chamber reduced Karadžić's sentence on this basis, then the Chamber erred in giving this factor too much weight.

179. Post-conflict conduct can constitute a mitigating factor when it goes to the good character of the accused or reveals a desire to make amends for wrongful conduct.⁶⁴¹ However, in this case Karadžić resigned in mid-1996, after his criminal objectives were achieved and six months after the Dayton Agreement was signed.⁶⁴² Any mitigating value of his resignation at this late point is substantially undermined by his admission that he stepped down in order to gain supposed immunity from criminal prosecution.⁶⁴³ This does not show good character or the intention to make amends for wrongful conduct.

D. Remedy

180. Karadžić's unprecedented criminal responsibility calls for a commensurate sentence. The sentence imposed by the Chamber is manifestly inadequate, insufficiently reasoned and an abuse of discretion. The Prosecution requests the Appeals Chamber to correct the Chamber's errors and increase Karadžić's sentence to life imprisonment.

Word count: 29,595

⁶³⁵ Judgement, para.6061.

⁶³⁶ *Stanišić & Zupljanin* AJ, para.1170 (“limited weight given to advanced age as mitigating factor in the jurisprudence of the Tribunal”); *Popović* AJ, paras.2052-2053 affirming *Popović* TJ, para.2169 (giving “minimal weight” in mitigation to Beara's age of 70 years); *Tolimir* AJ, para.644 (approving “little to no weight” in mitigation to Tolimir's age of 64 years).

⁶³⁷ Judgement, para.6062.

⁶³⁸ *Lukić* AJ, para.648; *Nahimana* AJ, para.1069.

⁶³⁹ Judgement, para.6057.

⁶⁴⁰ During trial, the Chamber indicated that Karadžić's motives for resigning would be relevant to sentencing. *Karadžić* Decision on Admission of Sentencing Information, para.11.

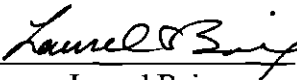
⁶⁴¹ E.g. *Blagojević* AJ, paras.328-330; *Babić* SAJ, paras.55-61.

⁶⁴² Judgement, paras.312, 436-437, 6057.

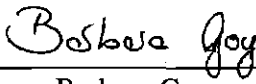
⁶⁴³ Judgement, paras.6054-6057.

DECLARATION PURSUANT TO RULE 138


The Prosecutor will exercise due diligence to comply with his continuing Rule 73 disclosure obligations during the appeal stage of this case. As of the date of this filing, the Prosecutor has disclosed to the Accused all material under Rule 73(A) which has come into the Prosecutor's actual knowledge and, in addition, has made available to him collections of relevant material held by the Prosecutor.



 Laurel Baig
 Senior Appeals Counsel



 Barbara Goy
 Senior Appeals Counsel



 Katrina Gustafson
 Senior Appeals Counsel

Dated this 5th day of December 2016
 At The Hague, The Netherlands

VI. PROSECUTION'S GLOSSARY

Pleadings, Orders, Decisions etc. from Prosecutor v. Radovan Karadžić, Case No. IT-95/5/18 / MICT-13-55-A

Abbreviation used in Prosecution Appeal Brief	Full citation
Chamber	Trial Chamber in <i>Prosecutor v. Radovan Karadžić</i> , Case No. IT-95/5/18-T
Judgement	<i>Prosecutor v. Radovan Karadžić</i> , Case No. IT-95/5/18-T, T.Ch., Judgement, 24 March 2016
Indictment	<i>Prosecutor v. Radovan Karadžić</i> , Case No. IT-95/5/18-PT, Prosecution's Marked-Up Indictment, 19 October 2009, Appendix A
Prosecution-PTB	<i>Prosecutor v. Radovan Karadžić</i> , Case No. IT-95/5/18-PT, Prosecution's Submission Pursuant to Rule 65ter(E)(i)-(iii), 18 May 2009
Prosecution-FTB	<i>Prosecutor v. Radovan Karadžić</i> , Case No. IT-95/5/18-T, Prosecutions's Final Trial Brief, 29 August 2014 (Public Redacted Version filed 23 September 2014)
<i>Karadžić 98bis AJ</i>	<i>Prosecutor v. Radovan Karadžić</i> , Case No. IT-95-5/18-AR98bis.1, App.Ch., Judgement, 11 July 2013
<i>Karadžić & Mladić Rule 61 Decision</i>	<i>Prosecutor v. Radovan Karadžić and Ratko Mladić</i> , Case No. 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>Karadžić Decision on Admission of Sentencing Information</i>	<i>Prosecutor v. Radovan Karadžić</i> , Case No. IT-95-5/18-T, T.Ch., Decision on Admission of Information Relating to Sentencing, 26 February 2014

Other ICTY authorities

Abbreviation used in Prosecution Appeal Brief	Full citation
<i>Aleksovski</i> AJ	<i>Prosecutor v. Zlatko Aleksovski</i> , Case No. IT-95-14/1-A, App.Ch., Judgement, 24 March 2000
<i>Babić</i> SAJ	<i>Prosecutor v. Milan Babić</i> , Case No. IT-03-72-A, App.Ch., Judgement on Sentencing Appeal, 18 July 2005
<i>Blaškić</i> AJ	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-A, App.Ch., Judgement, 29 July 2004
<i>Blagojević</i> AJ	<i>Prosecutor v. Vidoje Blagojević & Dragan Jokić</i> , Case No. IT-02-60-A, App.Ch., Judgement, 9 May 2007
<i>Boškovski</i> AJ	<i>Prosecutor v. Ljube Boškovski & Johan Tarčulovski</i> , Case No. IT-04-82-A, App.Ch., Judgement, 19 May 2010
<i>Bralo</i> SAJ	<i>Prosecutor v. Miroslav Bralo</i> , Case No. IT-95-17-A, App.Ch., Judgement on Sentencing Appeal, 2 April 2007
<i>Brđanin</i> AJ	<i>Prosecutor v. Radoslav Brđanin</i> , Case No. IT-99-36-A, App.Ch., Judgement, 3 April 2007
<i>Brđanin</i> TJ	<i>Prosecutor v. Radoslav Brđanin</i> , Case No. IT-99-36-T, T.Ch., Judgement, 1 September 2004
<i>Čelebići</i> AJ	<i>Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić & Esad Landžo, a.k.a. "Zenga"</i> , Case No. IT-96-21-A, App.Ch., Judgement, 20 February 2001
<i>Delić</i> TJ	<i>Prosecutor v. Rasim Delić</i> , Case No. IT-04-83-T, T.Ch., Judgement, 15 September 2008
<i>Deronjić</i> SAJ	<i>Prosecutor v. Miroslav Deronjić</i> , Case No. IT-02-61-A, App.Ch., Judgement on Sentencing Appeal, 20 July 2005
<i>Đorđević</i> AJ	<i>Prosecutor v. Vlastimir Đorđević</i> , Case No. IT-05-87/1-A, App.Ch., Judgement, 27 January 2014
<i>Furundžija</i> AJ	<i>Prosecutor v. Anto Furundžija</i> , Case No. IT-95-17/1-A, App.Ch., Judgement, 21 July 2000

<i>Galić</i> AJ	<i>Prosecutor v. Stanislav Galić</i> , Case No. IT-98-29-A, App.Ch., Judgement, 30 November 2006
<i>Galić</i> Early Release Decision	<i>Prosecutor v. Galić</i> , Case No. MICT-14-83-ES, Reasons for the President's Decision to Deny the Early Release of Stanislav Galić and Decision on Prosecution Motion, 23 June 2015 (Public Redacted Version)
<i>Hadžihasanović</i> TJ	<i>Prosecutor v. Enver Hadžihasanović & Amir Kubura</i> , Case No. IT-01-47-T, T.Ch., Judgement, 15 March 2006
<i>Halilović</i> AJ	<i>Prosecutor v. Sefer Halilović</i> , Case No. IT-01-48-A, App.Ch., Judgement, 16 October 2007
<i>Jelisić</i> AJ	<i>Prosecutor v. Goran Jelisić</i> , Case No. IT-95-10-A, App.Ch., Judgement, 5 July 2001
<i>Jelisić</i> TJ	<i>Prosecutor v. Goran Jelisić</i> , Case No. IT-95-10-T, T.Ch., Judgement, 14 December 1999
<i>Kordić</i> AJ	<i>Prosecutor v. Dario Kordić & Mario Čerkez</i> , Case No. IT-95-14/2-A, App.Ch., Judgement, 17 December 2004
<i>Krajišnik</i> AJ	<i>Prosecutor v. Momčilo Krajišnik</i> , Case No. IT-00-39-A, App.Ch., Judgement, 17 March 2009
<i>Krajišnik</i> TJ	<i>Prosecutor v. Momčilo Krajišnik</i> , Case No. IT-00-39-T, T.Ch., Judgement, 27 September 2006
<i>Krnojelac</i> AJ	<i>Prosecutor v. Milorad Krnojelac</i> , Case No. IT-97-25-A, App.Ch., Judgement, 17 September 2003
<i>Krstić</i> AJ	<i>Prosecutor v. Radislav Krstić</i> , Case No. IT-98-33-A, App.Ch., Judgement, 19 April 2004
<i>Krstić</i> TJ	<i>Prosecutor v. Radislav Krstić</i> , Case No. IT-98-33-T, T.Ch., Judgement, 2 August 2001
<i>Kupreškić</i> AJ	<i>Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović & Vladimir Šantić</i> , Case No. IT-95-16-A, App.Ch., Judgement, 23 October 2001
<i>Kvočka</i> AJ	<i>Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić & Dragoljub Prcać</i> , Case No. IT-98-30/1-A, App.Ch., Judgement, 28 February 2005
<i>Lukić</i> AJ	<i>Prosecutor v. Milan Lukić & Sredoje Lukić</i> , Case No. IT-98-32/1-A, App.Ch., Judgement, 4 December 2012

<i>D.Milošević</i> AJ	<i>Prosecutor v. Dragomir Milošević</i> , Case No. IT-98-29/1-A, App.Ch., Judgement, 12 November 2009
<i>Mrkšić</i> AJ	<i>Prosecutor v. Mile Mrkšić & Veselin Šljivčanin</i> , Case No. IT-95-13/1-A, App.Ch., Judgement, 5 May 2009
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Genocide Convention Travaux	Hirad Abtahi and Phillipa Webb, <i>The Genocide Convention: The Travaux Préparatoires</i> , 1 st Edition (Leiden: Martinus Nijhoff, 2008)
ILC Draft Code of Crimes	International Law Commission, <i>Draft Code of Crimes against the Peace and Security of Mankind with commentaries</i> , Report of the International Law Commission on the work of its 48 th Session, 6 May-26 July 1996, UN Doc. A/51/10 (1996)
VCLT	Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980)

Other Abbreviations

Abbreviation used in Prosecution Appeal Brief	Full citation
ARK	Autonomous Region of Krajina
Art.	Article
BiH	Bosnia and Herzegovina
Bosnian Serb Political and Governmental Organs	Members of SDS and Bosnian Serb government bodies at the republic, regional, municipal, and local levels, including Crisis Staffs, War Presidencies, and War Commissions
BSL	Bosnian Serb Leadership

CIL	Customary International Law
Count 1 Facilities	Detention facilities in the Count 1 Municipalities
Count 1 Municipalities	Bratunac, Foča, Ključ, Prijedor, Sanski Most, Vlasenica and Zvornik, collectively
CSCE	Commission on Security and Cooperation in Europe
Excluded Crimes	Crimes found foreseeable to be committed in the implementation of the common purpose: extermination; murder; and persecution through killings, cruel and/or inhumane treatment (through torture, beatings, physical and psychological abuse, rape and other acts of sexual violence, and the establishment and perpetuation of inhumane living conditions in detention facilities), forced labour at the frontlines and use of human shields, appropriation or plunder of property, and the wanton destruction of private and public property, including cultural monuments and sacred sites
Exh.	Exhibit
Exhs.	Exhibits
fn.	footnote
fns.	footnotes
Groups	The Bosnian Muslims and Bosnian Croat groups
ICRC	International Committee of the Red Cross
ICTY Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia established by the Security Council Resolution 827 (1993)
ILC	International Law Commission
JCE	Joint criminal enterprise
JCE1	First category of joint criminal enterprise
JCE1 Crimes	Crimes forming part of the common purpose: deportation; inhumane acts (forcible transfer); and persecution through deportation, forcible transfer, unlawful detention and the imposition and maintenance of restrictive and discriminatory measures
JCE3	Third category of joint criminal enterprise

MUP	Ministry of the Interior Police
NATO	North Atlantic Treaty Organisation
Overarching JCE	The joint criminal enterprise existing from at least October 1991 to 30 November 1995 with the objective of permanently removing Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory through the commission of crimes charged in the Indictment
para.	Paragraph
paras.	Paragraphs
p.	Page
pp.	Pages
RS	<i>Republika Srpska</i> (before 12 August 1992, named Serbian Republic of Bosnia and Herzegovina (SerBiH))
SDS	Serbian Democratic Party
Serb Forces	Members of the MUP, VRS, JNA, VJ, TO, the Serbian MUP, Serbian and Bosnian Serb paramilitary forces and volunteer units, and local Bosnian Serbs
SJB	Public Security Station
SRK	Sarajevo Romanija Corps
T.	Trial Transcript
TO	Territorial Defence
UN	United Nations
UNPROFOR	United Nations Protection Forces
VRS	Army of Republika Srpska
WWII	World War II