**THE MECHANISM FOR
INTERNATIONAL CRIMINAL TRIBUNALS**

No. MICT-13-55-A

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron**
Judge William Hussein Sekule
Judge Vagn Prusse Joensen
Judge Jose Ricardo de Prada Solaesa
Judge Graciela Susana Gatti Santana

Registrar: **Mr Olufemi Elias**

Date Filed: **15 March 2017**

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public Redacted Version

RADOVAN KARADZIC'S RESPONSE BRIEF

Office of the Prosecutor:
Laurel Baig
Barbara Goy
Katrina Gustafson

Counsel for Radovan Karadzic
Peter Robinson
Kate Gibson

TABLE OF CONTENTS

I. INTRODUCTION

1. The Prosecution and Defence agree on one thing: the Trial Chamber's *Judgement* was flawed. The Prosecution has excelled at pointing out errors in the Trial Chamber's approach and reasoning, in a well-researched and well-argued brief.

2. While serious, those deficiencies are not fatal to President Karadzic's acquittal of genocide in the Municipalities—a verdict consistent with 14 years of jurisprudence at the ICTY and ICJ by judges who have examined the same facts and reached the same conclusion.

3. But the Prosecution's appeal confirms that the *Judgement* warrants careful scrutiny.

II. THE PROSECUTION'S APPEAL[1]

1. The Excluded Crimes were Rightly Excluded

In Brief

The Trial Chamber was not unreasonable in finding that the Excluded Crimes were foreseeable, rather than intended.

Introduction: Ground 1 suffers from a fatal flaw

4. The Prosecution is asking the Appeals Chamber to find that the Excluded Crimes were part of the Overarching JCE's common criminal purpose.[2]

5. This could have occurred in two possible ways. Either the Excluded Crimes formed part of the JCE when it came into existence in October 1991, or the JCE expanded to include the Excluded Crimes after war broke out in April 1992.

6. The Prosecution gives no indication which approach it is advocating. It provides no assistance to the Appeals Chamber on whether it is being asked to find that the Excluded Crimes were part of the JCE from its inception or that the JCE later expanded to encompass these crimes.[3] The Prosecution submissions fail to identify the findings necessary to support either conclusion.

7. Such findings, in fact, do not exist.

8. The JCE came into existence in October 1991.[4] The Trial Chamber found that President Karadzic learnt of the forcible displacement and deportation in April 1992.[5] The findings the Prosecution cited to support its assertion that JCE members embraced a

[1] The footnotes in this brief contain standard abbreviations found in the Glossary in *Radovan Karadzic's Appeal Brief*. A new Glossary has not been included in this brief. Instead, the full citations of newly cited material appear in the footnotes. As with the *Appeal Brief*, the sources for the confidential version are hyperlinked to folders provided on DVD to the Chamber and parties, while the sources to the public version are hyperlinked to public internet sites, when available.
[2] *Prosecution Appeal Brief*, paras. 14, 45, 48.
[3] *Id.*
[4] *Judgement*, para. 3447.
[5] *Id*, para. 3495.

pattern of violence, post-date the JCE's formation, and arise out of the forcible displacement and deportation itself.[6] The idea that the common criminal purpose agreed upon in October 1991 included, *inter alia*, murder, extermination, and persecution through rape, torture, and sexual violence has no basis in the Trial Chamber's findings. It was not the only reasonable conclusion available to the Trial Chamber.

9. Turning to the second possibility, a JCE can evolve over time, and can come to embrace additional crimes.[7] Again, the Prosecution is silent if this is the course it is asking the Appeals Chamber to adopt. In any event, it is not a path that is open to it.

10. A JCE can come to embrace expanded criminal means, as long as the evidence shows that JCE members **agreed** on this expansion of means.[8] Neither the evidence, nor the Trial Chamber's findings, reveal any such agreement among JCE members to expand the JCE to encompass the additional Excluded Crimes.

11. Nor did the Trial Chamber make the necessary findings identifying the point in time the JCE's common objective expanded to include other crimes that were not included in it.[9] While the Prosecution repeats adverse findings for other JCE members and asserts their preparedness to use violence to carry out the common criminal purpose,[10] the critical findings that would support an expanded JCE are missing. No matter how they are re-assembled, the Trial Chamber's findings do not support the conclusion the Prosecution is asking the Appeals Chamber to draw.

12. The Prosecution's submissions are anchored in the Trial Chamber findings.[11] The Prosecution arguments centre on the idea that existing factual findings are sufficient to find that the Excluded Crimes formed part of the JCE. The Prosecution makes no request that the Appeals Chamber revisit factual findings, make additional factual findings, or give evidence more (or less) weight. Rather, the Prosecution request is for the Excluded Crimes' "reclassification" as Intended Crimes.

---

[6] *Prosecution Appeal Brief*, para. 45.
[7] *Krajisnik AJ*, para. 163.
[8] *Id* (emphasis added).
[9] *Id*, para. 175.
[10] *Prosecution Appeal Brief*, para. 44.
[11] *Id*, para. 13. See also paras. 4, 10-11, 18, 20-21, 27, 44-46.

13. The Trial Chamber found that President Karadzic's involvement in these crimes was most accurately characterised as commission through JCE III. The Prosecution disagrees. This is insufficient to warrant appellate intervention.

14. But in addition to this fundamental flaw, the Prosecution arguments give rise to other difficulties, addressed in turn below.

A. The Trial Chamber committed no legal error in identifying another reasonable inference

15. The Prosecution asserts that the Trial Chamber's finding that JCE I intent for the Excluded Crimes was not the only reasonable inference "foreclosed" or "precluded" the possibility of shared intent for the Excluded Crimes,[12] and that in doing so, the Trial Chamber erred in law.[13]

16. This argument is based on a mistaken premise. Nowhere does the Trial Chamber, either directly or indirectly, indicate that identifying an alternative inference precluded or foreclosed the possibility of shared intent for the Excluded Crimes.

17. The Trial Chamber considered whether President Karadzic intended that the Excluded Crimes be committed. Considering "all of the relevant evidence", the Trial Chamber concluded that a finding of intent for the Excluded Crimes was not the only reasonable one available. [14] In doing so, the Trial Chamber was within its discretion as the trier of fact. Nothing was "foreclosed". Nothing was "precluded". The Trial Chamber neither misinterpreted the law, nor applied the wrong legal standard, on this point.[15]

18. The Prosecution argues that the Trial Chamber failed to assess whether "Karadzic's willingness to pursue the common purpose with knowledge that it entailed the commission of the Excluded Crimes reflected his shared intent."[16] This submission is only possible after the Prosecution reformulates a critical finding.

[12] *Id*, paras. 12, 16-17.
[13] *Id*, para. 16.
[14] *Judgement*, para. 3466.
[15] *Prosecution Appeal Brief*, para. 17. The Trial Chamber did apply the wrong legal standard when concluding that JCE III liability could be predicated on a crime that "might" be committed. See *Radovan Karadzic's Appeal Brief,* Ground 29.
[16] *Id*, para. 16.

19. That Karadzic "did not care enough to stop pursuing the common plan" is not equivalent to being "willing to pursue the common purpose".[17] Ambivalence does not equate to willingness. Being "willing" embodies volition on the actor's part; an active engagement or readiness, rather than passive acquiescence. This is an important distinction, both in the Trial Chamber's findings and in criminal law theory more generally.[18]

20. For example, the UK Supreme Court considered this issue when determining the criteria to be a knowing participant in war crimes and crimes against humanity committed by an organisation, where the organisation's purpose went beyond the commission of crimes. After analysing customary international law sources and ICTY precedent, the Court held that passive continued involvement in the relevant organisation is not enough:

> Common to all these expositions is that there should be a participation that went beyond mere passivity or continued involvement in the organisation after acquiring knowledge of the war crimes or crimes against humanity.[19]

21. Such reasoning lends support to Trial Chamber's conclusion in this case that another reasonable inference, besides JCE I intent, was available on the facts.

22. A finding that foreseeability + inaction = intent not only undermines the intent requirement under JCE I, but swallows up JCE III liability. Every foreseeable crime eventually would become intended. This would reduce intentionality "to the most innocuous sense of the word to mean actions that are done voluntarily or without compulsion".[20]

23. Had the Trial Chamber wanted to frame President Karadzic's approach to the common purpose as a "willingness" to pursue it against the backdrop of the Excluded Crimes, it would have done so. Instead, the evidence did not exclude that President Karadzic "did not care enough to stop pursuing the common plan".[21] That this choice of language was deliberate, and not accidental, is borne out by its consonance with the Trial

---

[17] *Id.*
[18] J. Hall, *General Principles of Criminal Law*, (2nd ed.) (The Lawbook Exchange, Ltd 1960), p.78: "if anyone does anything unintentionally, the case is entirely different from that of one who acts deliberately"; p. 82: "The consent of the will is that which renders human acts either commendable or culpable."
[19] *Regina (JS (Sri Lanka)) v Secretary of State for the Home Department*, [2010] UKSC 15.
[20] J.D. Ohlin, *Joint Intentions to Commit International Crimes*, 11 Chi. J. Int'l L. 693 (2011), p. 707.
[21] *Judgement*, para. 3466.

Chamber's finding that it was not the only reasonable inference that the Excluded Crimes were included in the common plan.

24. This language also reflects the Trial Chamber's earlier conclusions that President Karadzic planned to take over power without any "genuine concern about the manner in which power was taken."[22] The Trial Chamber consistently found that the evidence reflected, rather than intent, ambivalence towards the means of achieving the agreed plans.

25. In any event, even accepting the Prosecution's "reformulation", the Trial Chamber performed the assessment that the Prosecution says it failed to conduct. The Trial Chamber was explicit that in coming to its conclusion, it considered that President Karadzic "received information" about the Excluded Crimes and "continued to act in furtherance of the common plan."[23]

26. The Trial Chamber had regard to the legal standard whereby knowledge of crimes and continued participation in the common plan may be a sufficient basis from which to infer intent. But knowledge and continued participation, even if present, are insufficient basis to automatically find intent. When intent is inferred in this manner, "it must be the only reasonable inference".[24] Even when the accused's knowledge and continued participation might suggest that he shared the intent to further the common purpose, it "does not necessarily compel such a conclusion" if another reasonable inference is available.[25]

27. In this case, another reasonable inference was available. The Trial Chamber committed no legal error in identifying it as such.

28. The Prosecution correctly states the relevant question for JCE I liability as whether JCE members' shared state of mind was that the crimes "should be carried out" to achieve the shared objective.[26] The Trial Chamber did not think that the evidence allowed for only that conclusion. Thinking that something "should" happen, is very different from not caring either way if it occurs. In the Trial Chamber's view, the evidence did not exclude this ambivalence towards the Excluded Crimes. The Prosecution has not

[22] *Id*, paras. 3084, 3436.
[23] *Id*, para. 3466.
[24] *Popovic AJ*, para. 1369; *Sainovic et al. AJ*, para. 995; *Krajisnik AJ*, para. 202; *Brdjanin AJ*, para. 429; *Vasiljevic AJ*, para. 120.
[25] *Blagojevic AJ*, paras. 272-73.
[26] *Prosecution Appeal Brief*, para. 17.

demonstrated that this conclusion was unwarranted, let alone that it was a finding that no reasonable Trial Chamber could draw.

B. The finding that the Excluded Crimes did not form part of the JCE was reasonable

29. The Prosecution's submissions on the alleged error of fact, in essence, re-package the Trial Chamber's adverse factual findings, and then urge the Appeals Chamber not only to draw a different inference, but to find that it was the only inference reasonably available.

30. The Prosecution asserts that it is "untenable" that a Trial Chamber could find that the Excluded Crimes were a foreseeable consequence of the JCE, rather than a part of it. [27] Bearing in mind the burden on the Prosecution to show that "all reasonable doubt of the accused's guilt has been eliminated" when appealing an acquittal, [28] the Prosecution - from the outset - has set itself a momentous task. For the reasons set out below, it was unable to meet it.

1. The Trial Chamber never found that President Karadzic knew the Excluded Crimes were necessary to achieve the common criminal purpose

31. At the heart of the Prosecution arguments is a finding that does not exist.

32. According to the Prosecution, no reasonable Trial Chamber could have found that President Karadzic did not intend the Excluded Crimes, given its finding that he and the other JCE members "**knew** that violence was **necessary** to achieve" the common criminal purpose.[29] This is not correct.

33. At no point in the Judgement did the Trial Chamber find that President Karadzic **knew** that the Excluded Crimes were a **necessary** or **integral** component of the JCE. And while the Prosecution repeats this assertion throughout its submissions, it never cites to a passage in the judgement where this finding exists.

[27] *Id*, para. 19.
[28] *Popovic AJ*, paras. 21, 1398.
[29] *Prosecution Appeal Brief*, paras. 18, 20, 21, 24, 32, 43, 45.

34. In reality, after an assessment of the evidence, the Trial Chamber concluded that it was convinced beyond reasonable doubt that it was **foreseeable** to President Karadzic that Serb Forces **might** commit the Excluded Crimes while executing the common plan.[30]

35. The other findings to which the Prosecution points are not inconsistent with JCE III liability, nor do they make the conviction on this basis unreasonable. The findings that JCE members were "prepared to use force and violence" to achieve their objective,[31] or knew that "a potential conflict would be extremely violent",[32] do not equate to the idea that President Karadzic **knew** that the Excluded Crimes were **necessary** to achieve the common objective. Awareness that a potential conflict in this region would be extremely violent (a view shared by others in the international community at the time) is not the same as knowing that forcible transfer and deportation would **necessarily** result in the Excluded Crimes. Moreover, being "prepared" to do something necessarily denotes uncertainty if it will be necessary to actually do it.

36. A finding elsewhere in the Judgement that JCE members were "aware and put on notice that the objective of ethnic separation would result in violence",[33] is the kind of finding which supports the conclusion that the crimes were "foreseeable" giving rise to JCE III liability. It is not a finding that **compelled** the conclusion that JCE members possessed the requisite intent for murder, extermination, or persecution through rape, torture, or sexual violence. The Prosecution's pivotal reliance on a finding that the Trial Chamber never reached undermines its assertion of a factual error.

2. President Karadzic's "most important role" does not make his conviction for the Excluded Crimes through JCE III unreasonable

37. The Trial Chamber had full regard of President Karadzic's role in carrying out the JCE. The Prosecution points to no evidence that was overlooked, nor challenges the Trial Chamber's conclusions. Repeating and re-packaging the Trial Chamber's own findings is insufficient to demonstrate an error in its conclusion.

[30] *Judgement*, paras. 3521-24.
[31] *Prosecution Appeal Brief*, para. 24.
[32] *Id*, para. 22.
[33] *Id*, paras. 23, 26.

38. The Prosecution characterises the conflict in BiH as "resulting" from carrying out the common purpose.[34] The Trial Chamber never held that President Karadzic's implementing the common purpose "resulted in" the conflict. A general finding that President Karadzic was aware that a "potential conflict" would be violent[35] is not the same as a specific finding of awareness that forcible transfer and deportations would necessarily result in the Excluded Crimes, let alone intent for them to occur.

39. For a conviction under the JCE's first category, the accused must share both the intent to commit the crimes that form part of the JCE's common purpose, and the intent to participate in a common plan aimed at their commission.[36]

40. The Prosecution fails to specify the Trial Chamber's factual findings that support the requisite *mens rea* for **each** type of Excluded Crime. The Prosecution's analysis is limited to repeating general findings about an awareness of "violence" from the *Judgement's* other sections.

41. This is insufficient. Awareness that the common criminal plan "would result in violence"[37] does not equate to intent for **each** Excluded Crime for which a blanket "reclassification" is now sought.

42. A general knowledge by an accused that violence will occur is insufficient to establish his intent to exterminate, for example, which requires a finding that the accused "had the intention to kill persons on a massive scale";[38] that he intended "the annihilation of a mass of people".[39] Nor does an awareness that violence will occur equate to specific intent for persecution through torture, or persecution through rape, or sexual violence.[40]

43. As such, the Trial Chamber's findings are insufficient to allow the Appeals Chamber to "reclassify" these crimes in a blanket manner by lifting them *en masse* from JCE III and inserting them into JCE I. The Prosecution would have first needed to

[34] *Id*, para. 26: "[…] 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 […]."
[35] *Judgement*, para. 2708.
[36] *Popovic AJ*, para. 1369.
[37] *Prosecution Appeal Brief*, paras. 23, 26.
[38] *Brdjanin TJ*, para. 395.
[39] *Stakic TJ*, para. 638.
[40] *Kvocka AJ*, para. 110.

identify the requisite *mens rea* findings for each crime that it sought to reclassify. This was an impossible task. The findings do not exist.

3. The concurrent occurrence of the Excluded Crimes does not require a finding that they were part of the JCE

44. That the Excluded Crimes were systematic, organised, or even at the "core" of the forcible transfer and deportation does not mean that the JCE members intended them.[41]

45. The manner that ultimate perpetrators later carry out the common criminal purpose does not serve to *post facto* alter the JCE members' *mens rea* at the time the common criminal purpose came into being.

46. It could be the case that on every occasion agreed Crime A is committed, Crime B also occurs. This does not mean that a reasonable Trial Chamber must find that Crime B was also part of the common criminal purpose. But it might support a finding that Crime B was foreseeable.

47. The Trial Chamber was well aware that the Excluded Crimes existed, the scope of their occurrence, and the manner in which they were carried out.[42] Yet it was not convinced that their inclusion in the common plan was the only reasonable inference available. This was a legitimate and reasonable finding on the entirety of the evidence. The Prosecution's disagreement with the Trial Chamber's conclusion does not demonstrate a factual error occasioning a miscarriage of justice.

4. The Trial Chamber took into account President Karadzic's reaction to the Excluded Crimes

48. In its concluding paragraph on President Karadzic's JCE I intent, the Trial Chamber noted that it considered "that the Accused received information about the perpetration of crimes committed by Serb Forces against non-Serbs throughout the conflict, [including killings] […] and continued to act in furtherance of the common plan."[43] President Karadzic's reaction to information concerning the Excluded Crimes was at the forefront of the Trial Chamber's mind when it found that another reasonable inference which differs from the one on which the Prosecution now insists.

[41] *Prosecution Appeal Brief*, paras. 30-32.
[42] *Judgement*, paras. 3441-45, 3465.
[43] *Id*, para. 3466.

49. Denying the Excluded Crimes' existence and failure to punish them is consistent with the alternative inference that President Karadzic's was ambivalent towards them.[44] It does not make the Trial Chamber's conclusion unreasonable.

5. President Karadzic's "steadfast" pursuit of the common purpose does not equate to intent to commit crimes that fell outside it

50. A JCE's temporal span does not determine its scope. Even an unwavering and long-term commitment to a common plan does not establish intent for crimes that fell outside it.[45] No principle or practice links the common purpose's duration to the likelihood of it expanding to embrace other crimes.

51. In any event, as discussed above, the findings necessary to support an expanded JCE are missing. The Prosecution points to no finding, for example, on the critical agreement by JCE members to "expand" the common criminal purpose in the manner now alleged.[46] The Trial Chamber was reasonable in identifying another available inference. The Prosecution has not demonstrated any error in the Trial Chamber's approach.

6. The Trial Chamber's findings regarding the other JCE members suffer from the same flaws

52. Asserting that the other JCE members were prepared to use violence to carry out the common purpose, or were aware that ethnic separation would result in violence,[47] does not make the Trial Chamber's finding of an alternative inference unreasonable. Neither awareness nor preparedness equates to intent, much less a **shared criminal intent by all those** who take part in the common enterprise.[48]

53. The JCE members' acts repeated by the Prosecution were considered by the Trial Chamber in concluding the Excluded Crimes might be committed when carrying out the common criminal purpose. These findings were not ignored, nor were they ascribed insufficient weight; rather, they formed the basis of a conviction under JCE III.[49] The

[44] *Judgement*, para. 3466.
[45] *Prosecution Appeal Brief*, para. 43.
[46] *Krajisnik AJ*, paras. 163, 175.
[47] *Prosecution Appeal Brief*, para. 44.
[48] See, e.g. A. Casesse, *"The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise",* 5 JICJ 109 (2007), p. 126.
[49] *Judgement*, paras. 3521-23.

Prosecution disagrees with that conclusion. This is insufficient to warrant appellate intervention.

7. Concluding that the Excluded Crimes fell outside the JCE reflected the Trial Chamber's findings and the purpose of JCE liability

54. At the heart of JCE I liability is the participants' shared intent to commit the agreed crime. This shared intent for a particular criminal purpose is the key to criminal culpability.[50]

55. Recognising that in the chaos and turmoil of conflict, an agreed criminal purpose is unlikely to rest within its intended bounds, the expanded form of JCE liability exists to criminalise conduct that was a foreseeable consequences of the original criminal enterprise. Although the JCE members did not intend these additional crimes, their foreseeability is sufficient for criminal liability.

56. An agreement for a population's forcible transfer and deportation that results in additional crimes such as murder, property destruction and sexual violence, is a textbook example of when JCE I and JCE III liability can arise. Criminal law texts often use forcible transfer and additional crimes to illustrate the way in which the two forms of liability interact,[51] as have Chambers of the ICTY.[52]

57. While each case turns on its facts, in the present case, the Trial Chamber found this is precisely what occurred. While JCE members shared the intent to deport and forcibly transfer, the additional crimes – *inter alia* murder, extermination, persecution through torture and rape – were not included in the common criminal plan, nor intended by President Karadzic.[53]

58. The Prosecution fails to show any error in the Trial Chamber's approach. The Appeals Chamber should dismiss Ground 1.

---

[50] See, e.g. H. Olasolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Hart Publishing Ltd., Oxford 2010), p. 170: "the case law of the *ad hoc* Tribunals is clear in requiring that the aim of specifically causing the objective elements of the core crimes of the enterprise (along with any requisite ulterior intent or *dolus specialis* required by such crimes) must be shared by all co-perpetrators."
[51] See, e.g. A. Cassese, *International Criminal Law* (Oxford University Press, 2013), p. 168; N. Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Bloomsbury Publishing, 2014), p. 63.
[52] See, e.g. *Tadic AJ*, paras. 204; *Kordic TJ*, para. 396; *Vasiljevic AJ*, para. 99.
[53] *Judgement*, para. 3466.

C. The Prosecution's arguments have no impact on the Trial Chamber's analysis of President Karadzic's genocidal intent

59. The Trial Chamber did not err when it concluded that finding President Karadzic intended the Excluded Crimes was not the only reasonable inference. Therefore, its analysis of genocidal intent in the Municipalities is not affected by Ground 1.[54] Nor would the Excluded Crimes' "reclassification" as JCE I crimes warrant appellate interference in the findings on genocidal intent. The threshold for specific intent is rigorous. Convictions for genocide "can be entered only where that intent has been unequivocally established."[55] It is not sufficient that the perpetrator knew that the underlying crime would inevitably or likely result in the destruction of the group.[56] The destruction, in whole or in part, must be the aim of the underlying crime(s). [57]

60. Thus, even if the JCE's common criminal purpose was found to encompass murder, extermination, or cruel or inhumane treatment, this is insufficient to impute genocidal intent to its members. Suggesting otherwise is a leap unsupported by the law and the Trial Chamber's factual findings.

[54] *Contra*, *Prosecution Appeal Brief*, para. 47.
[55] *Krstic AJ*, para. 134.
[56] *Blagojevic TJ*, para. 656.
[57] See, e.g. *Stakic TJ*, para. 530: "in order to 'commit' genocide, the elements of that crime, including the *dolus specialis* must be met. The notions of 'escalation' to genocide, or genocide as a 'natural and foreseeable consequence' of an enterprise not aimed specifically at genocide are not compatible with the definition of genocide under Article 4(3)(a)."

2. The Actus Reus of Genocide under Article 4(2)(c) was not established

In Brief

The Trial Chamber was not unreasonable in concluding that events in the detention facilities were not calculated to destroy the Bosnian Muslims as such, despite its failure to provide a reasoned opinion.

A. The Trial Chamber failed to provide a reasoned opinion

61. President Karadzic agrees that the Trial Chamber failed to provide a reasoned opinion for its conclusion that:

> 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.[58]

62. But when the Appeals Chamber makes its own assessment, it will conclude that a reasonable trier of fact could have a reasonable doubt that the conditions in the detention facilities were calculated to destroy the Bosnian Muslims.[59]

B. Acts Falling under 4(2)(a) and 4(2)(b) may be considered

63. Since the Trial Chamber failed to provide a reasoned opinion, and the Appeals Chamber will have to make its own assessment, whether the Trial Chamber failed to consider Article 4(2)(a) and (b) acts as part of the context is moot.

64. President Karadzic agrees that while acts falling under Articles 4(2)(a) and 4(2)(b) cannot also serve as acts under Article 4(2)(c), they may be considered as part of the context when determining whether conditions of life were calculated to destroy the group.

---

[58] *Judgement*, para. 2587.

[59] *Stanisic and Zupljanin AJ*, para. 142 (applying reasonable trier of fact test). President Karadzic refers only to Bosnian Muslims in this brief because each group must be separately considered (*Stakic AJ*, para. 28) and few Bosnian Croats were in the detention facilities.

C. Article 4(2)(c) was not violated in the Detention Facilities

1. Scope of Article 4(2)(c)

65. The Prosecution raises the issue of whether the conditions must be calculated to destroy the group itself or to destroy individual group members. The Prosecution argues for the latter, contending that Article 4(2)(c) is aimed at capturing inflicting conditions on a collection of *group members* calculated to bring about *their* physical destruction.[60]

66. Article 4(2)'s plain language, however, suggests that the former interpretation is the better view. Article 4(2) provides:

> Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) killing **members** of the group;
> (b) causing serious bodily or mental harm to **members** of the group;
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) imposing measures intended to prevent births within the group;
> (e) forcibly transferring children of the group to another group.
> (emphasis added)

67. While under (a) and (b), acts against members of the group are specified, the language of (c) speaks only of the group. If the Prosecution's interpretation is correct, one would have expected that (c) would read "deliberately inflicting on **members of** the group conditions of life calculated to bring about **their** physical destruction, in whole or in part." Given the extent to which the Genocide Convention's language was debated, this difference in terms between (a) and (b) on the one hand, and (c) on the other, must have been intentional.

68. One can imagine a scenario where conditions of life are calculated to destroy individual members of the group, but not the group itself. Withholding insulin from diabetics could create conditions of life designed to destroy those individuals suffering from diabetes, but not the group itself. Creating conditions of detention that were designed to destroy the elderly or physically infirm may also not be designed to destroy the group itself.

[60] *Prosecution Appeal Brief*, para. 71.

69. While it makes no difference to the analysis in our case, should the Appeals Chamber wish to pronounce itself on the issue, the better approach would be to remain faithful to the words of the drafters of the Genocide Convention.

70. Such an approach is also consistent with the intent behind those words.

71. In the Genocide Convention's drafting phase, the words "calculated to bring about its physical destruction" replaced the phrase "aimed at causing death" proposed by Belgium in the UN General Assembly's Sixth (Legal) Committee for Article 4(2)(c).[61] This supports the notion that destroying the group, rather than the individuals, was what was intended.

72. During the *Ad Hoc* Committee on Genocide's 81st Meeting, while discussing what became II(c) of the Genocide Convention, one representative restated the view that "the death of an individual could be considered an act of genocide if it was part of a series of similar acts aiming at the destruction of the group to which that individual belonged."[62]

73. In his commentary on the Genocide Convention, Nehemiah Robinson notes:

> The main characteristic of Genocide is its object: the act must be directed toward the destruction of *a group.* Groups consist of individuals, and therefore destructive action must, in the last analysis, be taken against individuals. However, these individuals are important not *per se* but only as members of the group to which they belong.[63]

74. Professor William Schabas has pointed to a Secretariat note to the *Ad Hoc* Committee commenting: "The victim of the crime of genocide is a human group. It is not a greater or smaller number of individuals who are affected for a particular reason (execution of hostages) but a group as such."[64]

75. Professor Schabas also noted: "The commentary [to the Genocide Convention] stressed the importance of a narrow definition, so as not to confuse genocide with other crimes, and to ensure the success of the convention by facilitating ratification by a large number of States."[65]

---

[61] UN Doc. A/C.6/217 (Belgian proposal); UN Doc. A/C.6/SR.82 (Soviet amendment), cited in *Stakic TJ*, para. 518.
[62] Comment by Mr. Perez Oeronzo (Venezuela), A/C.6/SR.81, TP Vol. 2, p.1479.
[63] N. Robinson, *The Genocide Convention: a Commentary* (Institute of Jewish Affairs, New York, 1960), p. 58.
[64] W. Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge University Press, 2000)("Schabas"), p. 231.
[65] *Id*, p. 53.

76. Therefore, the better interpretation of Article 4(2)(c) is that the conditions must be calculated to destroy the group itself, rather than individual group members upon whom they are inflicted.

2. Application of Article 4(2)(c)

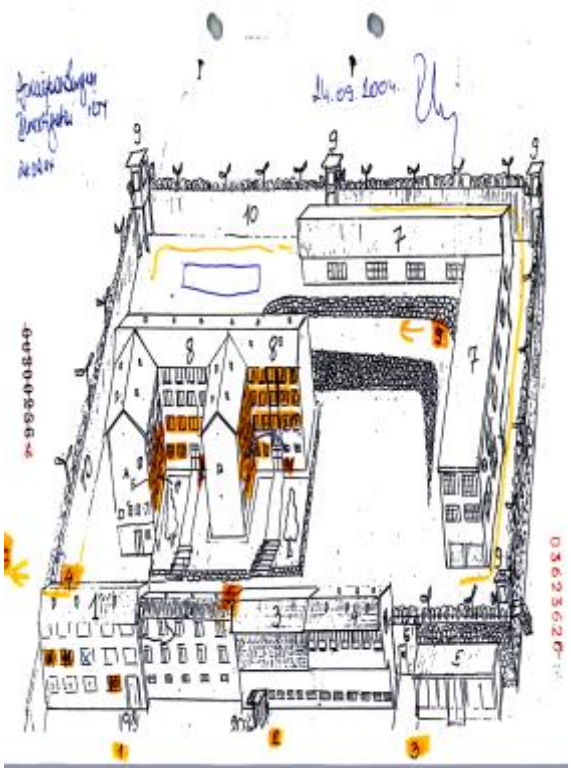
77. The Prosecution focuses its argument that no reasonable Trial Chamber could have concluded that the conditions of life were not calculated to destroy the Bosnian Muslim group on three detention facilities: Omarska, KP Dom Foca, and Susica Camp.[66]

Omarska Camp

78. Of the more than 3000 detainees who passed through **Omarska** between 25 May and 21 August 1992,[67] approximately 155 were killed by gunshots or beatings.[68] No one is recorded as having died from the deplorable conditions there. If the conditions of life were calculated to destroy the group, someone miscalculated.

[66] *Prosecution Appeal Brief*, para. 74.
[67] *Judgement*, para. 1749.
[68] *Id*, para. 1768, fn. 6065.

79. In the Omarska camp commanders' prosecution, the Prosecution decided not to charge any of them with genocide.[69] Had the conditions of life there been calculated to destroy the Bosnian Muslim group, the Prosecution would have charged the camp commanders under Article 4(2)(c).



KP Dom Foca

80. **KP Dom Foca** housed about 5-600 detainees at its peak.[70] Approximately 200 detainees were killed there between June and December 1992.[71] At least one detainee died due to inadequate medical care,[72] and one detainee hanged himself.[73] Some detainees were released on the condition that they report daily to the police or were transferred to other camps to be exchanged.[74] If the conditions of life were calculated to destroy the group, someone miscalculated.

[69] *Prosecutor v Kvocka* et al, No. IT-98-30/1-T, *Amended Indictment* (26 October 2000).
[70] *Judgement*, para. 888.
[71] *Id*, para. 911.
[72] *Id*, paras. 895, 903.
[73] *Id*, para. 900.
[74] *Id*, para. 887.

81. In the KP Dom Foca camp commanders' prosecution, the Prosecution decided not to charge them with genocide.[75] Had the conditions of life there been calculated to destroy the Bosnian Muslim group, the Prosecution would have charged the camp commanders under Article 4(2)(c).

Susica Camp

82. Approximately 2,000 to 2,500 Bosnian Muslims passed through **Susica Camp** between May and September 1992.[76] Nine were killed by gunshots or beatings in June and July 1992,[77] and approximately 140 detainees were taken from the camp on 30 September

[75] *Prosecutor v Krnojelac*, No. IT-97-25-I, *Third Amended Indictment* (25 June 2001); *Prosecutor v Racevic and Todovic*, No. IT-97-25/1-PT, *Second Joint Amended Indictment* (24 March 2006).
[76] *Judgement*, para. 1187.
[77] *Id*, paras. 1203-07.

1992 and shot.[78] No one died because of the camp conditions. If the conditions of life were calculated to destroy the group, someone miscalculated.

83. In the Susica camp commander's prosecution, the Prosecution decided not to charge him with genocide.[79] Were the conditions of life there calculated to destroy the Bosnian Muslim group, the Prosecution would have charged the camp commander under Article 4(2)(c).

Keraterm Camp

84. The Prosecution also points to deplorable conditions at other detention facilities.[80] Approximately 4,000 detainees were held at **Keraterm** throughout its operation as a camp.[81] The Chamber found that at least one detainee died from beatings,[82] and at least 190 Bosnian Muslim men were killed in Room 3 at Keraterm by gunshots on 24-25

[78] *Id*, para. 1213.
[79] *Prosecutor v Nikolic*, No. IT-94-2-PT, *Third Amended Indictment* (31 October 2003).
[80] *Prosecution Appeal Brief*, para. 75.
[81] *Judgement*, para. 1793.
[82] *Id*, paras. 1805-06.

July 1992.[83] No one died due to the camp conditions there. In the Keraterm camp commander and guards' prosecution, the Trial Chamber acquitted them of genocide at the end of the Prosecution's case.[84]

Trnopolje Camp

85. Of the other detention facilities cited in the Prosecution brief,[85] more than 23,000 people had been housed at **Trnopolje** by the end of September 1992,[86] and at least two detainees were identified as having died due to camp conditions.[87]

[83] *Id*, para. 1815.
[84] *Prosecutor v Sikirica et al*, No. IT-95-8-T, *Judgement on Defence Motions to Acquit* (3 September 2001), para. 75 ("*Sikirica Rule 98 bis Decision*").
[85] Para 75: Vlasenica SJB, Trnopolje, Karakaj Technical School, Betonirka Garage, Sanski Most SJB, Prijedor SJB, and Vlasenica prison.
[86] *Judgement*, para. 1851.
[87] *Id*, para. 1827.

Karakaj Technical School

86. At **Karakaj Technical School**, 20 men died the first night from suffocation, none died from the camp conditions thereafter.[88] At the remaining detention facilities, no one died from the conditions.[89]

87. The Prosecution chose not to proceed with its appeal under Ground 2 for the Bratunac football stadium, Karaman's house, Buk Bijela Worker's Huts, Livade TO warehouses, Kljuc SJB Building, Nikola Mackic School, Velagici School, Ljubija football stadium, Magarica military facility, Celopek Dom Culture, Alhos Factory, Novi Izvor (Ciglana), Drinjaca Dom Culture, Ekonomija Farm, and Standard Factory.[90] Therefore, it

[88] *Id*, para. 1307.
[89] *Id*, para. 1179 (Vlasenica SJB), para. 1747 (Prijedor SJB), para. 1991 (Sanski Most SJB), para. 1998 (Betonirka Garage).
[90] *Prosecution Appeal Brief*, fn. 196.

can be concluded that conditions of life at those facilities were not designed to destroy the Bosnian Muslims.

88. That the Bosnian Serbs maintained many facilities in the Count One Municipalities which were not designed to create conditions of life designed to destroy the Bosnian Muslims itself calls into question whether the other facilities were so designed. If genocide was a means to carry out the JCE's common purpose, as the Prosecution contends, why did so many detention facilities fail to employ these means?

89. Another inexplicable feature of the very detention facilities the Prosecution claimed to have conditions calculated to destroy the group were the vast number of people who were released from those facilities. 1,773 detainees were transferred from Omarska to Trnopolje for release or exchange. The remaining detainees were transferred to Manjaca Prison, where genocide is not alleged to have been committed.[91] At other detention facilities in northwestern Bosnia, the detainees were also transferred to Manjaca.[92] Why would so many Bosnian Muslims be released or transferred to a non-genocide facility if the conditions were calculated to destroy the group?

Manjaca Prison

[91] *Judgement*, para. 1789.
[92] *Id*, paras. 1381-86, 1534-35, 1543, 1987, 2017.

90. It must also be remembered that the facilities in question were set up hastily in wartime conditions, where shortages of food and medicine prevailed even among the Serb population.[93]

91. During debate on Article 4(2)(c) at the Genocide Convention, the representative for France stated:

> …To quote an historical example, the ghetto, where the Jews were confined in conditions which, either by starvation or by illness accompanied by the absence of medical care, led to their extinction, must certainly be regarded as an instrument of genocide. If any group were placed on rations so short as to make it extinction inevitable, merely because it belonged to a certain nationality, race, or religion, the fact would also come under the category of genocidal crime.[94]

92. Given the few deaths due to camp conditions in our case, it cannot be said that those conditions made the Bosnian Muslims' extinction inevitable.

93. Considering all of the above, a reasonable Trial Chamber could have had a reasonable doubt that the conditions of life in the detention facilities were calculated to destroy the Bosnian Muslims as a group. Indeed, other Trial Chambers and the ICJ have examined these same conditions and found them not to have met the requirements for genocide,[95] while in the *Brdjanin* case, the conditions were found to satisfy the *actus reus* of genocide, but committed without the intent to destroy the group.[96]

94. An ICTR Trial Chamber has also declined to find that the *actus reus* set forth in Article 4(2)(c) was established where the time period during which the deprivations occurred were short.[97] Likewise, in this case, the short time period in which the temporary detention facilities operated, and that almost all who died were shot or beaten, militates against a finding that the Article 4(2)(c) requirements were satisfied.

D. The effect of any error would not require reversal

95. Despite the lack of a reasoned opinion, the Trial Chamber's conclusion that the conditions were not calculated to destroy the Bosnian Muslims is, at the very least, a reasonable inference available on the evidence.

---

[93] See, e.g. P3717, p.86; D1738, p.4; D1928; D4138, paras. 4-6; D4226, para. 6.
[94] UN Doc. E/AC.25/SR.4, p. 14 (Ordonneau) (emphasis added). See also Schabas, p. 166.
[95] *Sikirica Rule 98 bis Decision*, para. 75; *Stakic TJ*, para. 557; *Stakic AJ*, para. 47; *Krajisnik TJ*, para. 867; *Bosnia v Serbia*, para. 354.
[96] *Brdjanin TJ*, para. 989.
[97] *Kayishema and Ruzindana TJ*, para. 548.

96. Should the Appeals Chamber be convinced otherwise, this would not be cause to disturb President Karadzic's acquittal for genocide. Because the number of persons subjected to such conditions under Article 4(2)(c), was small compared to those who were killed [Article 4(2)(a)] or beaten [Article 4(2)(b)], reclassifying those acts as part of the *actus reus* of genocide would have no impact on the Trial Chamber's overall conclusion that President Karadzic did not have the intent to destroy the Bosnian Muslims as such.[98]

[98] See *Stakic AJ*, para. 55; *Bosnia v Serbia*, para. 334.

3. The mens rea for genocide was not established

In Brief

The Trial Chamber's conclusion on *mens rea* for genocide was not unreasonable, and was consistent with long-standing precedent.

A. There was a reasoned opinion concerning Prijedor

97. The Trial Chamber correctly articulated the law on genocidal intent.[99] It made detailed findings on the 1992 events in the Municipalities.[100] It expressly considered the genocidal intent of physical perpetrators, unnamed JCE members, and named JCE members, including President Karadzic.[101] It then went on to consider whether such intent was the only reasonable inference from the "pattern of crimes" in the Count 1 Municipalities.[102]

98. The Trial Chamber also expressly considered the Prosecution's suggestion that Prijedor was the "core example" of genocidal intent,[103] and that "the part of the Bosnian Muslim and Bosnian Croat groups in each of the Count 1 Municipalities satisfies the substantiality requirement when considering the numeric size and significance of the targeted parts, as well as the areas of the perpetrators' activity and the possible extent of their reach".[104] Further, the Trial Chamber acknowledged that "Prijedor is taken as the primary example of the part of the Bosnian Muslim and Bosnian Croat groups that would meet the substantiality requirement with regard to numeric size and the significance of targeting these communities, given that Prijedor represented a symbol of "brotherhood and unity."[105]

[99] *Judgement*, paras. 549-55.
[100] *Id*, paras. 596-2438.
[101] *Id*, paras. 2595-2613.
[102] *Id*, paras. 2614-25.
[103] *Id*, para. 2589.
[104] *Id*, para. 2593.
[105] *Id*, para. 2593.

99. The Trial Chamber explicitly referenced the arguments at paragraphs 589-94 of the Prosecution *Final Trial Brief*, twice, when analysing genocidal intent in the Count 1 Municipalities and Prijedor.[106] In light of these direct references, it cannot be said that the Trial Chamber failed to consider the Prosecution's arguments.[107]

100. Further, the Trial Chamber examined the evidence when coming to its conclusion on genocidal intent, looking at the events in each municipality separately, including Prijedor,[108] to determine if genocidal intent could be inferred from the pattern of acts.

101. The Prosecution's case was that the JCE was carried out in "municipality after municipality" through a "coordinated campaign of crimes". It alleged that "the pattern of these crimes reflects the organisation, preparation and planning that preceded them, and reveals the common purpose behind them".[109] The Prosecution contended that "while the *same general pattern of crimes* occurred in all of the municipalities charged in Count 1, it is instructive to focus on one [Prijedor] to illustrate how far removed from 'mere' forcible transfer this was and how clearly the underlying crimes reflect Karadzic's intent to destroy the group in part".[110]

102. Having recited key factual findings for each Count 1 Municipality (including Prijedor) separately, the Trial Chamber accepted the Prosecution's submission that "a clear pattern" to the crimes across those Municipalities existed.[111] But the Trial Chamber was unable to eliminate the reasonable inference that the intent behind the crimes was "redistribution – rather than the physical destruction – of the population".[112]

103. The Prosecution claims that the *Stanisic and Simatovic* Appeals Judgement supports the proposition that the Trial Chamber was obliged to assess separately whether genocidal intent could be established concerning the Bosnian Muslims and Bosnian Croats in Prijedor.[113] What the Appeals Chamber decided in that case was that the Trial Chamber erred by failing to "adjudicate whether the elements of the *actus reus* of JCE liability – namely, the existence of a common criminal purpose, a plurality of persons, and Stanisic

---

[106] *Id*, para. 2593, fns. 8701-02.
[107] *Prosecution Appeal Brief*, para. 89.
[108] *Judgement*, paras. 2616-22.
[109] *Prosecution Final Trial Brief*, para. 179, 186 (heading "6. Pattern of crimes").
[110] *Id*, para. 583.
[111] *Judgement*, para. 2623.
[112] *Id*, para. 2623-25.
[113] *Prosecution Final Trial Brief*, paras. 89-91.

and Simatovic's contribution – were fulfilled" before considering *mens rea*.[114] The Appeals Chamber stated:

> [W]ithout making findings on the existence and scope of the common criminal purpose shared by a plurality of persons, the Trial Chamber could not assess Stanisic's and Simatovic's words in the context of that purpose and whether their acts contributed to that purpose and, consequently, it could not properly adjudicate whether Stanisic's and Simatovic's *mens rea* for JCE liability could be inferred from the circumstances.[115]

It was in this context that the *Stanisic and Simatovic* Appeals Chamber remarked that the evidence may have established a JCE of a "temporally and/or geographically reduced" scope against which the Trial Chamber would have to evaluate *mens rea*.[116]

104. In the present case, the Trial Chamber made findings on the JCE's existence and scope.[117] As the Trial Chamber noted, those findings were "intrinsically connected" to the assessment of JCE members' genocidal intent.[118] Having found in the Prosecution's favour that there existed a "broad" Overarching JCE, and in the Prosecution's favour that a "pattern" to the crimes in the Count 1 Municipalities also existed, the Trial Chamber did not err by conducting its analysis in accordance with its actual findings rather than assessing genocidal intent as against a hypothetical additional "Prijedor JCE".

105. In the *Brdjanin* case, the Trial Chamber warned that "narrowing down the scope of the 'targeted part' to the relevant ARK municipalities could have a distorting effect, in more ways than one".[119] Aside from distinctiveness and substantiality issues, the Trial Chamber noted that the Prosecution's submission was that any genocidal intent extended to the Bosnian Muslims and the Bosnian Croats of the ARK as a whole rather than to individual municipalities. The same risk of distortion arises here.[120]

106. In reality, the Prosecution never put its case on the basis that, if genocidal intent could not be inferred from the pattern of crimes in the seven municipalities, the Trial Chamber should conduct a separate municipality-by-municipality analysis. While the

---

[114] *Stanisic and Simatovic AJ*, para. 79.
[115] *Id*, para. 82.
[116] *Id*, para. 86.
[117] See e.g. *Judgement*, para. 3515.
[118] *Judgement*, para. 2592.
[119] *Brdjanin TJ*, para. 966.
[120] See further *Krstic AJ*, paras. 12-13: "[T]he area of the perpetrators' activity and control, as well as the possible extent of their reach should be considered."

Prosecution emphasises headings and statements in its *Final Trial Brief* that refer, for example, to intent to destroy the Bosnian Muslims and Bosnian Croats "in each of the seven identified municipalities",[121] the real thrust of its case was that the relevant communities in the Count 1 Municipalities were "simultaneously targeted for destruction" with a "compounding" effect.[122] This makes sense – if genocidal intent could not be established through the cumulative evidence of a clear and consistent pattern of crimes across seven municipalities, it is unlikely that such a conclusion would be reached by isolating the evidence of one municipality.

107. While the Prosecution suggests that it emphasised the "strength of its case" in Prijedor,[123] separately analysing the pattern of crimes in Prijedor would not have produced a different conclusion for the following reasons:

108. First, in assessing the "pattern of crimes", the Trial Chamber recalled its earlier detailed findings about Prijedor (spanning some 344 paragraphs) without any suggestion that the evidence diverged in any significant manner from the other Count 1 Municipalities.[124]

109. Second, the pattern of crimes in Prijedor has already been assessed by ICTY Trial Chambers and the ICJ, which found that genocidal intent was not established. In *Stakic*, the Trial Chamber analysed the "comprehensive pattern of atrocities against Muslims in Prijedor municipality in 1992".[125] Dr Stakic was charged with genocide on the basis that he acted in concert with several individuals, including President Karadzic.[126] In that case, the Trial Chamber acknowledged that genocidal intent can be inferred from a "pattern of purposeful action"[127] but was unable to find that Dr Stakic, or anyone else, possessed genocidal intent.[128]

110. As demonstrated below, the evidence in the case against President Karadzic for Prijedor went no further than that presented in earlier cases, where this Tribunal has not

---

[121] See references in *Prosecution Appeal Brief*, fn. 347.
[122] *Prosecution Final Trial Brief*, para 589.
[123] *Prosecution Final Trial Brief*, para. 91.
[124] *Judgement* paras 1569-1913, 2620.
[125] *Stakic TJ*, para. 546.
[126] *Id*, para. 547.
[127] *Id*, para. 526.
[128] *Id*, paras. 560-61. The Appeals Chamber dismissed the Prosecution's appeal of these aspects of the Trial Chamber's decision: *Stakic AJ*, paras. 37-57.

found genocidal intent.[129] Genocide charges were not pressed against the Omarska camp commanders,[130] and genocide charges against the Keraterm Camp commanders were dismissed.[131]

111. Third, no direct evidence exists that a different fate was intended for Prijedor as compared to the other Count 1 Municipalities. For example, while the Prosecution in its *Final Trial Brief* stressed President Karadzic's remark that "a green stain" had appeared in Prijedor,[132] that remark applied to a wider area:

> In that regard, you can understand now why a green, a green stain has appeared here. Another German, actually an Austrian VALDHEIM had carried out genocide here. Here, for instance, in Sanski Most over 5,300 Serbs were killed, murdered and slaughtered in one day. In this area here, in Bosanska Krupa even, and Bihac county we were absolutely the majority of the population in this area; more than two thirds. […] [133]

112. Moreover, while the Prosecution emphasised that Prijedor had "strategic significance", it did so by claiming that "Prijedor, Sanski Most and Kljuc" attracted the *same* significance as Vlasenica, Bratunac and Zvornik, citing "the strategic objectives as articulated at the 16th Assembly".[134] Those strategic objectives have been analysed by both this Tribunal and the ICJ and found not to manifest genocidal intent.[135]

113. While the Prosecution described Prijedor as a symbol of "brotherhood and unity", the evidence it cited in support were two extracts from testimony given by witnesses in previous cases with significant ties to Prijedor.[136] No evidence exists that President Karadzic himself or any JCE members sought to single out Prijedor.

114. The arguments outlined above on genocidal intent in the Municipalities demonstrate that the Trial Chamber; (i) analyzed the relevant legal principles and evidence in the case, (ii) made detailed findings which explain its basis for acquitting the accused, (iii) provided reasoning that enable the parties to exercise their appellate rights, and (iv)

---

[129] See sub-ground 3(D) below. See also *98bis Appeal Response Brief*, paras 141-69.
[130] *Prosecutor v Kvocka* et al, No. IT-98-30/1-T, *Amended Indictment* (26 October 2000).
[131] *Sikirica Rule 98 bis Decision*, paras. 90-97.
[132] *Prosecution Final Trial Brief*, para. 33 (citing P6134).
[133] P6134.
[134] *Prosecution Final Trial Brief*, para. 590.
[135] See e.g. *Stakic TJ*, paras. 548, 560; *Bosnia v Serbia*, paras. 237, 372 (noting ICTY jurisprudence); *Brdjanin TJ*, paras. 75, 981-82.
[136] *Prosecution Final Trial Brief*, para. 593 citing P3703 and [REDACTED].

made findings that the Appeals Chamber is able to understand and review alongside the Trial Chamber's evaluation of the evidence.[137]

115. A Trial Chamber need not refer to the testimony of every witness or every piece of evidence on the trial record, absent an indication that the Trial Chamber disregarded any particular piece of evidence.[138] The Trial Chamber met and exceeded this standard.

B. Permanent removal did not preclude genocidal intent

116. Contrary to the Prosecution's claims, the Trial Chamber never found that genocidal intent was precluded because of the permanent removal objective.

117. The Trial Chamber acknowledged that genocide was charged as a means of achieving the permanent removal of the Bosnian Muslims and Bosnian Croats from the Count 1 Municipalities[139] and expressly recognised that the objective of forcible removal may coexist with genocidal intent. For example, in analysing speeches and statements made by President Karadzic and JCE members, the Trial Chamber stated that it was not satisfied that "the evidence which demonstrates this objective [forcible removal] *also* shows an intent to physically destroy".[140]

118. In other words, the Trial Chamber accepted that genocidal intent may accompany an objective of permanent removal, but found that the evidence did not establish intent to destroy the Bosnian Muslims and/or Bosnian Croats in the Count 1 Municipalities as such. One scholar has noted that the similar use of the adverb "also" in another case "is revealing", as it reflects an acknowledgement that genocidal intent may coexist with an agenda of forcible removal.[141]

119. The same approach is seen later in the *Judgement*, where the Trial Chamber emphasised that President Karadzic and other JCE members' statements, speeches and acts were consistent with the objective of ethnic separation "[h]owever, the Chamber is not satisfied that this evidence […] allows the Chamber to conclude that the Accused or the named members of the alleged Overarching JCE had genocidal intent".[142] In other words,

---

[137] *Krajisnik AJ*, para. 139; *Haradinaj AJ*, para. 128; *Kunarac AJ*, para. 41; *Limaj AJ* para. 81.
[138] *Perisic AJ*, para. 92 (citing *Limaj AJ*, para. 86); *Kvocka AJ*, para 23; *Haradinaj AJ*, para 129.
[139] *Judgement*, para. 592.
[140] *Id*, para. 2596 (emphasis added).
[141] P. Behrens, *"Genocide and the Question of Motives"* 10 JICJ 501(2012), p. 514 ("Behrens").
[142] *Judgement*, para. 2605.

the objective of forcible removal did not preclude finding genocidal intent; instead, the Trial Chamber considered that *despite* that objective, it could not be satisfied that the only reasonable inference was that genocidal intent was also present.

120. In assessing the pattern of crimes in the Count 1 Municipalities, the Trial Chamber never concluded that the objective of removal "precluded" it from finding genocidal intent. Instead, considering the control that the Bosnian Serb forces held over the Count 1 Municipalities together with the low numbers of Bosnian Muslims or Bosnian Croats allegedly targeted for destruction by acts falling within Article 4(2), the Trial Chamber was unable to find genocidal intent.[143] Rather, the "results on the ground" were consistent with a more limited intent that did not extend to removal by destroying the Bosnian Muslim or Bosnian Croat groups in part as such.[144]

121. While the Prosecution stresses that genocide may be "a means to achieve" permanent removal,[145] in the present case the evidence did not support a finding that genocide was deployed for such a purpose, or that this was the intent of the JCE or President Karadzic. Rather, the evidence in the case against President Karadzic was similar to *Brdjanin*, where the Trial Chamber emphasised that, although genocide "has at times been referred to as the last resort of the frustrated 'ethnic cleanser'", no evidence of escalation into genocide in the ARK existed, but rather the Bosnian Serb leadership "was able to assert control over the territory with relative ease, after which it embarked on a campaign of massive displacement".[146] In that case, like this one, the Trial Chamber held that the "significant difference in numbers between those forcibly displaced from the ARK and those subjected to acts envisaged in Article 4(2)(a) to (c)" combined with the Bosnian Serb forces' capacity to carry out destruction pointed against genocidal intent.[147]

122. The same reasoning is reflected in the ICJ's decision in *Croatia v Serbia*, where the Court considered that the small number of victims of genocidal acts as compared to the size of the targeted part of the group indicated that the JNA and Serb Forces had not

[143] *Id*, para. 2624.
[144] *Id*, para. 2625.
[145] *Prosecution Appeal Brief*, para. 118.
[146] *Brdjanin TJ*, para. 982.
[147] *Id*, paras. 977-78.

"availed themselves of opportunities to destroy that part of the group", a factor indicating a lack of genocidal intent.[148]

123. Similarly, in *Stakic*, the Trial Chamber, having found that the objective or goal was to establish a "Serbian municipality", was unable to make a finding of genocidal intent due to the low number of relevant acts within Article 4(2) as compared to the opportunity that was available to JCE members.[149]

124. In *Sikirica*, the Trial Chamber held that "the fact that the evidence does not establish that a substantial number of Bosnian Muslims or Bosnian Croats were victims within the terms of Article 4 (2)(a), (b) and (c) of the Statute", while not necessarily negating an inference of genocidal intent, assisted it in finding that such intent could not be inferred.[150]

125. The Prosecution's suggestion that Trial Chamber "blurred the distinction between intent and objective by concluding that the permanent removal *objective* was a "reasonable inference" inconsistent with genocidal *intent"*[151] is unfounded. First, neither in the paragraph the Prosecution cited[152] nor indeed anywhere else, did the Trial Chamber state that it found that permanent removal was inconsistent with genocidal intent.

126. Further, the framework in which the Trial Chamber considered the genocide charges in the Municipalities was one in which the Prosecution sought an inference for a "pattern of crimes."[153] This is, thus, a situation characterised by the *absence* of a general plan that can be demonstrated to exist[154] from which the Prosecution invites an inference to be drawn. This stands in sharp contrast to, for example, the factual matrix at the Nuremberg Tribunals where, although the specific crime of genocide was not yet created, the IMT charges focused on a clear organized scheme demonstrated through the "planned and systematic character of the Jewish persecutions"[155] and the development of the "plan for exterminating the Jews".[156]

---

[148] *Croatia v Serbia*, para. 437.
[149] *Stakic TJ*, para. 553.
[150] *Sikirica Rule 98 bis Decision*, para. 75.
[151] *Prosecution Appeal Brief*, para. 98.
[152] *Judgement*, para. 2624.
[153] *Id*, para. 2625.
[154] See *Bosnia v Serbia*, paras. 373-74.
[155] *IMT Judgement*, Vol. 22, pp. 493-94.
[156] *Id*, p. 493.

127. In the *Justice Case*, such an objective was exposed by means of "a plan for the persecution and extermination of Jews and Poles".[157] The *RuSHA Case* was similarly characterised by "a systematic program of genocide."[158] But nothing in Ground 3(B) of the present case shows that the Trial Chamber was presented with evidence, either as part of a plan or in the absence of it, from which the only reasonable inference available on the facts presented, was that destroying the Bosnian Muslim group was intended.

128. This jurisprudence demonstrates that: (1) as the Prosecution asserts, the objective of permanent removal can be compatible with genocidal intent; but also (2) that genocidal intent must be established as the only reasonable inference to be drawn from the whole of the factual matrix.

129. The latter point is exemplified in the *Stakic* case, where the Appeals Chamber held that the Trial Chamber did not conflate motive and intent, but rather found insufficient evidence of genocidal intent.[159] The Appeals Chamber in *Stakic* concluded that:

> The evidence could reasonably be seen as consistent with the conclusion the Trial Chamber did draw: that the accused merely intended to displace, but not to destroy, the Bosnian Muslim group. To be sure, he was willing to employ means to this end that ensured that some members of the group would be killed and others brutalised, and this was surely criminal – but not necessarily genocidal, absent evidence proving beyond a reasonable doubt that he sought the destruction of the group as such.[160]

130. The Prosecution in the present case alleges that by using the two phrases "intent behind those crimes" and "intent to create ethnically pure territories",[161] the Trial Chamber conflated the Bosnian Serb leadership's objective with intent and failed to grapple with whether genocide was used as a means to further the objective of permanent removal.[162] But putting those phrases back into context, what the Trial Chamber considered was that the scale of acts that fell within Article 4(2), as compared to the scale of forcible displacement, gave rise to an inference of no intent to destroy the Bosnian Muslims and/or Bosnian Croats from the Count 1 Municipalities.

---

[157] "*Justice Case*", Vol. 3, p. 1063.
[158] "*RuSHA Case*" Vols. 4-5, p. 609.
[159] *Stakic AJ*, para. 45. See also *Krnojelac AJ*, para.103.
[160] *Stakic AJ*, para. 56.
[161] *Judgement*, para. 2625.
[162] *Prosecution Appeal Brief*, paras. 99-100.

131. The Trial Chamber never built a "dichotomy" between redistribution and destruction as the Prosecution alleged,[163] but simply recognised that in every case, it is necessary to establish intent to destroy the relevant group or part of the group. As the Appeals Chamber emphasised in *Stakic* in the extract above, using violence and killings to achieve part of a group's displacement may not be sufficient to establish beyond a reasonable doubt that destroying part of the group as such is intended.[164]

132. Similarly, the Trial Chamber never implied that Krajisnik and President Karadzic's remarks about Foca "were inconsistent with genocidal intent", as the Prosecution alleged.[165] Rather, the statements are examples of evidence that never rose to the threshold of establishing intent to destroy the parts of the groups in the Count 1 Municipalities.

133. Thus, the Trial Chamber never found that genocidal intent was precluded due to the objective of permanent removal. Instead, it was unable to conclude that genocidal intent was the only reasonable inference to be drawn, especially considering the low numbers of Bosnian Muslims or Bosnian Croats allegedly targeted for destruction by acts falling within Article 4(2) as compared to the opportunity available to the Bosnian Serb forces.

C. The concept of "destruction" was not limited

134. The Trial Chamber never limited its focus to "intent to physically destroy most group members" as the Prosecution alleged, but considered whether "all of the evidence, taken together" established genocidal intent.[166] The Trial Chamber considered the evidence in a "holistic and contextualised" manner, taking account of "the evidence as a whole" in determining whether it could find genocidal intent.[167]

135. The Prosecution's claim that the Trial Chamber conceived of genocidal intent as the intention to physically destroy "most group members" or "a large proportion" of group members misconstrues the *Judgement*.[168] Instead, the Trial Chamber correctly recalled that

[163] *Id*, para. 100.
[164] *Stakic AJ*, para. 56.
[165] *Prosecution Appeal Brief*, para 101.
[166] *Judgement*, para. 550.
[167] *Id*, para. 2592.
[168] *Prosecution Appeal Brief*, paras. 103-04.

although no minimum number of acts within Article 4(2) is required for the *actus reus* of genocide to be established, the "scale" of such acts is a relevant factor in assessing whether genocidal intent can be inferred.[169]

136. In *Brdjanin*, the Trial Chamber held that "the scale of the acts enumerated in Article 4(2)(a) to (c) does not allow the Trial Chamber to legitimately come to the conclusion in favour of the existence of genocidal intent".[170] In the *Kayishema and Ruzindana* case at the ICTR, it was noted that in the Report of the Sub-Commission on Genocide, the Special Rapporteur stated that "the relative proportionate scale of the actual or attempted destruction of a group, by any act listed in Articles II and III of the Genocide Convention, is strong evidence to prove the necessary intent to destroy a group in whole or in part."[171] And in *Krstic*, the Appeals Chamber noted the "scale of the killing" at Srebrenica was an indicator of genocidal intent;[172] the massacre of about one fifth of the Bosnian Muslim population was the "main evidence underlying the Trial Chamber's conclusion" in the absence of direct evidence.[173]

137. Thus, in the Municipalities, the low proportions of the groups of Bosnian Muslims and Bosnian Croats allegedly targeted by acts under Article 4(2) was a relevant factor that the Trial Chamber was entitled to consider.[174] Considering this factor does not mean that the Trial Chamber conceived of genocidal intent as intent to physical destroy most group members. As in *Stakic*, considering the low number of underlying acts did not represent error on the part of the Trial Chamber, but rather was evidence that genocidal intent was lacking because "more Bosnian Muslims could have been killed, but were not".[175]

138. Similarly, the Trial Chamber did not, as the Prosecution alleged, focus on underlying acts falling within Article 4(2) to the exclusion of other culpable conduct.[176] For forcible transfers, the Trial Chamber correctly recognised that forcible transfers are "a relevant consideration as part of the Chamber's overall factual assessment" in determining

---

[169] *Judgement*, para. 542, fn. 1723.
[170] *Brdjanin TJ*, para. 978.
[171] *Kayishema TJ*, para. 93.
[172] *Krstic AJ*, para. 35.
[173] *Id*, para. 26.
[174] *Judgement*, para. 2624.
[175] *Stakic AJ*, para. 42.
[176] *Prosecution Appeal Brief*, para. 104.

whether genocidal intent has been established.[177] But, as the ICJ emphasised in *Bosnia v Serbia*, while relevant, forcible transfers are not genocidal acts *per se*. A proposal to include measures intended to oblige members of a group to abandon their homes as a type of genocidal act was rejected during the Genocide Convention's drafting process.[178] Thus, although the Prosecution stresses that transfers of children to another group may be genocidal conduct under Article 4(2)(e), being conduct that allows "for the continued physical and biological existence" of individuals,[179] it must equally be emphasised that forcible transfers are not genocidal acts *per se* and should not be elevated as such.

139. The Prosecution also emphasises the Appeals Chamber's decision in *Krstic* to support the proposition that conduct "that impedes the long-term ability of the group to reconstitute itself" reflects genocidal intent.[180] But the remarks in *Krstic* must be assessed against the unique context of Srebrenica. The VRS Main Staff was "constrained" by the international focus on Srebrenica and presence of UN troops in the area,[181] and the killing of the men would in any event have "severe procreative implications […] potentially consigning the community to extinction".[182] In those circumstances, the forcible removal of Bosnian Muslim women and children could support a finding of genocidal intent in Srebrenica, even though their removal rather than massacre could leave destruction "incomplete" and be ineffective or inefficient.[183] By contrast, in the Municipalities, where the conduct took place during an eight-month period, it is not suggested that part of the populations was forcibly removed rather than subjected to acts falling within Article 4(2) due to such constraints.

140. As the Appeals Chamber in *Blagojevic and Jokic* made clear, forcible transfers are "simply a relevant consideration as part of the overall factual assessment" and "simply assist in placing [underlying acts] in their proper context".[184] They are contextual factors,

---

[177] *Judgement*, para. 553, fn. 1758 (citing *Krstic AJ*, paras. 33, 133; *Blagojevic AJ*, para. 123; *Bosnia v Serbia*, para. 190).
[178] *Bosnia v Serbia*, para 190.
[179] *Prosecution Appeal Brief*, paras. 105-08.
[180] *Id*, para. 111.
[181] *Krstic AJ*, para 32.
[182] *Id*, para 28.
[183] *Krstic AJ*, paras. 32-33.
[184] *Blagojevic AJ*, para. 123; *J. Clark, "Elucidating the Dolus Specialis: An Analysis of ICTY Jurisprudence on Genocidal Intent",* 26 Crim. L. Forum 497 (2015), p. 512 ("Clark").

and should not be erroneously elevated to underlying acts.[185] As emphasised by one scholar, it would be "deeply problematic" to "view the actus reus of one crime [forcible transfer] as furnishing the mens rea of another", as this would create "a disconnect between the actus reus and mens rea of genocide, in the sense that the actus reus of forcible transfer becomes an 'imposter' actus reus artificially linked to the mens rea of genocide".[186]

141. The ICJ's decision in *Bosnia v Serbia* supports this view. First, the difference between intent to deport a group and genocidal intent was emphasized:

> Neither the intent, as a matter of policy, to render an area "ethnically homogenous", nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide (…) deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction and automatic consequence of displacement.[187]

142. Second, the ICJ made specific reference to "statements in the Assembly by President Karadzic"[188] and noted that, even considering the interpretation most favourable to the Applicants in that case, his statements did "not necessarily involve the intent to destroy in whole or in part the Muslim population in the enclaves."[189] The ICJ also concluded that, "an essential motive of much of the Bosnian Serb leadership – to create a larger Serb State […] did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion" and went on to state that "it is significant that in cases in which the Prosecutor has put the Strategic Goals in issue, the ICTY has not characterized them as genocidal".[190]

143. Third, the ICJ evaluated whether the pattern of crimes committed against Bosnian Muslims and Croats demonstrates specific intent to destroy the group in whole or in part. The ICJ concluded that such intent:

> […] has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent. […]

---

[185] *Tolimir AJ*, para. 209; *Bosnia v Serbia*, para. 190; *Croatia v Serbia*, paras. 162-63.
[186] Clark, p. 512.
[187] *Bosnia v Serbia*, para. 190. See also *Croatia v Serbia*, paras. 162-63.
[188] *Bosnia v Serbia*, para. 372. These very statements were expressly considered by the Trial Chamber. (*Judgement*, para. 57 (P956), para. 399 (P1394).
[189] *Bosnia v Serbia*, para 372.
[190] *Id.*

> Furthermore, and again significantly, the proposition is not consistent with the findings of the ICTY relating to genocide.[191]

144. In coming to this conclusion, the ICJ analysed ICTY precedent, concluding that, save in the case of Srebrenica, specific intent for genocide was not demonstrated.[192]

145. In a similar context, the ICJ, in its decision in *Croatia v Serbia,* found that the evidence considered failed to demonstrate "intent to destroy, in whole or in part, the Croats in the regions concerned"[193] and that it was not established that "the only reasonable inference that can be drawn from the pattern of conduct […] was the intent to destroy, in whole or in part, the Croat group."[194] Likewise, in the Serbian counterclaim, the Serbian population's expulsion from Croatian Krajina was not found to have been undertaken with genocidal intent: "even if Serbia's allegations […] were true, that would still not prove the existence of the *dolus specialis*: genocide presupposes the intent to destroy a group as such, and not to inflict damage upon it or to remove it from a territory, irrespective of how such actions might be characterized in law."[195]

146. Other respected sources have also reached similar conclusions regarding circumstances in which acts such as forcible displacement are not characterized as genocide. In *Israel v Eichmann*, the Jerusalem District Court acquitted Eichmann of genocide during the period in which it determined the German objective was expelling the Jews, stating that:

> With regard to the expulsion of Jews, […] between the beginning of the War and mid-1941, […] We have found that these were organized by the Accused in complete disregard for the health and lives of the deported Jews […] But in the final analysis, a doubt remained in our minds as to whether there was that intentional aim to exterminate which is required for the proof of a crime against the Jewish People.[196]

147. The validity of this position has also been confirmed by respected academic sources.[197] The "abundant authority"[198] available for the proposition that the events in the

---

[191] *Id*, paras. 373-74.
[192] *Id*, paras 374-76.
[193] *Croatia v Serbia*, para. 439.
[194] *Id*, para. 440.
[195] *Id*, para. 514.
[196] *Israel v Eichmann* (1961), para. 186.
[197] Schabas, pp. 199-200; Behrens, p. 517.
[198] W. Schabas, "*The Contribution of the Eichmann Trial to International Law*", 26 LJIL 667 (2013), p. 675.

Municipalities case do not fulfil the requirements for genocide, confirms that the Trial Chamber's conclusion should not be disturbed on appeal.

148. Evidence referenced in the *Judgement* indicates that Trial Chamber considered that President Karadzic and the Bosnian Serb Leadership did anticipate a co-existent relationship with non-Serb groups, both initially and at each stage throughout the conflict. Originally this was contemplated within Yugoslavia as an "equal federal Bosnia Herzegovina",[199] where it would be possible for "the Serbs to be able to survive […] and for all the other peoples to be able to survive together."[200] Later this was envisaged through "the creation of a border separation with the other two national communities […] [and the] "division of the city of Sarajevo into Serbian and Muslim parts and implementation of an effective state government in each of these parts."[201] This co-existence was later formalised in the abortive Vance-Owen Plan signed by the Accused[202] and finally through the Dayton Agreement.[203] The Trial Chamber was entitled to take into account this expectation that neighbouring entities would exist in which non-Serbs would live, when finding no intent to destroy those groups.

149. As discussed above, dissolving a group, or removing a group from a particular geographical region, does not inevitably constitute genocide.[204] As the Trial Chamber in *Stakic* noted:

> The expulsion of a group or part of a group does not in itself suffice for genocide. As Kress has stated, '[t]his is true even if the expulsion can be characterised as a tendency to the dissolution of the group, taking the form of its fragmentation or assimilation […].'[205]

150. Similarly, Behrens emphasises that "[d]estruction carries a distinct notion of permanence which does not inhabit the concept of 'expulsion".[206]

151. While the Prosecution emphasises the "traumatic surrounding circumstances" of the forcible displacement,[207] the Prosecution never charged such conduct as serious mental

---

[199] *Judgement*, para. 58.
[200] *Id*, para. 2637.
[201] *Id*, para. 57.
[202] *Id*, para. 372
[203] *Id*, para. 436.
[204] *Tolimir AJ*, paras. 225, 233; *Stakic TJ*, para. 519, cited in *Bosnia v Serbia*, para. 190.
[205] *Stakic TJ*, para. 519.
[206] Behrens, p. 517.
[207] *Prosecution Appeal Brief*, para. 119.

harm under Article 4(2)(b). Instead, it only charged serious mental harm as a consequence of forcible transfers from Srebrenica.[208] The ICTY has consistently found that genocidal intent accompanied the crimes committed in Srebrenica, but has never made such a finding for the Municipalities.

152. In finding that the forcible removal operation in Srebrenica occasioned serious mental harm under Article 4(2)(b), the Trial Chamber emphasised the sudden separations from and the loss of large numbers of male family members, and "anxiety as well as feelings of helplessness and betrayal, which underpin an unwillingness or inability to return to their former homes".[209] In *Tolimir*, the Appeals Chamber similarly noted that for Srebrenica, "the painful separation process from their male family members […] the fear and uncertainty as to their fate and that of their detained male relatives, and the appalling conditions of the journey […] as well as the financial and emotional difficulties they faced" taken holistically amounted to serious mental harm.[210]

153. The significant differences between the events in Srebrenica and those in the Municipalities also answer the Prosecution's criticism that the Trial Chamber "ignored the biological aspect of genocidal intent altogether" and failed to use the word "biological" in its analysis of genocidal intent.[211] Notably the Prosecution in its *Final Trial Brief* also never mentioned "biological" destruction, and the Prosecution never put its case on this basis.

154. While the Appeals Chamber in *Krstic* accepted that "the Trial Chamber was entitled to consider the long-term impact" of the killings in Srebrenica, namely the "severe procreative implications […] potentially consigning the community to extinction",[212] no one has suggested in the present case that the killings, serious bodily or mental harm, or other culpable conduct such as forcible transfers had procreative implications for the Bosnian Muslim population in the Municipalities.

155. In criticising the Trial Chamber's consideration of detention conditions, the Prosecution again falls into the error of attempting to transpose this Tribunal's findings for Srebrenica onto the events in the Municipalities. The Prosecution alleges that the Trial

[208] Compare *Indictment*, para. 47(b)(Srebrenica) with para. 40(b)(Municipalities).
[209] *Judgement*, para. 5664.
[210] *Tolimir AJ*, para. 210.
[211] *Prosecution Appeal Brief*, para. 115, fn. 415.
[212] *Krstic AJ*, para. 28.

Chamber erroneously discounted detention conditions by failing to recognise that some detainees were "fortunate enough to be expelled […] before being killed or subjected to serious bodily or mental harm" and counting those detainees as "displaced".[213]

156. But while the Trial Chamber found that President Karadzic made efforts to close down the camps after international media began reporting on the conditions,[214] the Trial Chamber also noted that "by the time the Bosnian Serb Government officially decided to close all 'illegal camps' on 27 October 1992, the make-shift detention facilities used throughout the Municipalities by Serb Forces to detain non-Serbs had already largely served their purpose of facilitating the process of the forcible removal of non-Serbs".[215]

157. The circumstances are therefore not comparable to those noted in *Krstic*, where international pressure mounting about Srebrenica was found to have explained the omission to kill women and children.

158. The Trial Chamber also did not, as the Prosecution alleges, erroneously disregard destroying cultural and religious property as a possible indicator of genocidal intent.[216] In setting out the applicable principles, the Trial Chamber expressly noted that, although not underlying acts, attacks on cultural or religious property "may be considered evidence of intent to physical destroy the group".[217] In analysing the pattern of crimes, the Trial Chamber then recalled heavy damage or destruction of: 26 mosques in Zvornik,[218] two mosques in Foca,[219] "mosques and other Muslim monuments" in Bratunac,[220] 17 mosques and two churches in Prijedor,[221] 16 mosques and a church in Sanski Most,[222] and eight mosques in Kljuc.[223] This destruction formed part of its assessment of the pattern of crimes.

159. Similar remarks may be made of the Prosecution claims that the Trial Chamber failed to properly consider the "broader destructive impact" of conduct such as sexual

[213] *Prosecution Appeal Brief*, para. 120.
[214] *Judgement*, para. 3498.
[215] *Id*, para. 3399.
[216] *Prosecution Appeal Brief*, para. 117.
[217] *Judgement*, para. 553.
[218] *Id*, para. 2616.
[219] *Id*, para. 2617.
[220] *Id*, para. 2618.
[221] *Id*, para. 2620.
[222] *Id*, para. 2621
[223] *Id*, para. 2622.

violence and the targeting of leaders.[224] The Trial Chamber specifically noted that such conduct could contribute to destroying the Bosnian Muslim and Bosnian Croat populations in the Municipalities, and found that these acts amounted to serious bodily or mental harm under Article 4(2)(b).[225] In assessing the pattern of crimes, it noted sexual violence in Zvornik, Foca, Vlasenica and Prijedor, and the targeting of intellectuals in Bratunac and political leaders in Sanski Most.[226] The Trial Chamber also specifically considered that "some prominent members" of the Bosnian Muslim and Bosnian Croat populations in the Municipalities were targeted.[227] The Trial Chamber was not required to enter into a specific individual discussion of these aspects of the evidence and their specific long-term effects.[228] A Trial Chamber "need not spell out every step of its analysis".[229]

160. For the reasons above, the Prosecution has failed to demonstrate that the Trial Chamber adopted an overly narrow concept of genocidal intent in assessing the pattern of crimes. In fact, the Trial Chamber's analysis of intent was consistent with the Genocide Convention and the jurisprudence that has interpreted its provisions.

D. Findings on genocidal intent were not unreasonable

161. When challenging the Trial Chamber's evaluation of the evidence of genocidal intent, the burden is on the Prosecution to demonstrate that it was "wholly erroneous".[230] It must show that the evidence was "so unambiguous that a reasonable Trial Chamber was *obliged* to infer that [genocidal] intent was established beyond a reasonable doubt" – a "heavy burden".[231]

162. 27 international judges have come to the conclusion in earlier proceedings at the ICTY and ICJ that genocidal intent was not established in the Municipalities.[232] That so

[224] *Prosecution Appeal Brief*, para. 122.
[225] *Judgement*, paras. 2580-82.
[226] *Id*, paras. 2616-21.
[227] *Id*, para. 2624.
[228] *Popovic AJ*, para. 505; *Tolimir AJ*, para. 247.
[229] *Stakic AJ*, para. 47.
[230] *Kupreskic AJ*, para. 30. See also *Stakic AJ*, para. 10.
[231] *Stakic AJ*, para. 56.
[232] ICTY Judges Robinson, May and Fassi-Fihri (*Sikirica)*, Judges Schomburg, Vassylenko, and Argibay (*Stakic)*, Judges Pocar, Shahabuddeen, Guney, Vaz, and Meron *(Stakic* appeal), Judges Agius, Janu, and Taya *(Brdjanin)*, Judges Orie, Canivell, and Hanoteau (*Krajisnik)*, ICJ Judges Higgins, Owanda, Simma, Tomka, Abraham. Keith, Sepulvedaamor, Bennouna, Skotnikov, Kreca.

many judges have declined to find genocidal intent makes it difficult to conclude that the Trial Chamber's judgement in this case was unreasonable.

163. Indeed, the Prosecution convinced the Trial Chamber that the findings of the *Krajisnik* and *Brdjanin* judgements were so reliable that it should take judicial notice of 926 adjudicated facts from those judgements. Now, it asks the Appeals Chamber to find that the conclusion from those judgements, on the same evidence, that President Karadzic and the Bosnian Serb leadership did not have genocidal intent, was not even a reasonable one.

164. In assessing whether "all of the evidence, taken together" could establish genocidal intent,[233] the Trial Chamber considered the evidence about the circumstances in the Municipalities that the Prosecution claims was not fully taken into account.[234] As the Prosecution has focused on Prijedor in its appeal, the same approach is taken below.

1. The pattern of the crimes

165. The first incidents to which the Prosecution points in support of the proposition that no reasonable Trial Chamber could have found that genocidal intent was not the only reasonable inference are the attacks on Hambarine, Ljubija, Kozarac and Kamicani.[235] In its assessment of genocidal intent, the Trial Chamber recalled, with appropriate cross-references, its earlier findings that in May 1992, "villages in the predominantly Muslim areas of Kozarac and Brdo, as well as in Brisevo were attacked by Serb Forces; villages were shelled, set ablaze, and for the most part destroyed. During these attacks, Bosnian Muslims and Croats were killed".[236] Thus, the Trial Chamber took these attacks into account.

166. The same attacks have also been previously analysed by this Tribunal in other cases where genocidal intent was not found. For example, in *Stakic*, the Trial Chamber described these attacks as heralding "the first in a series of measures […] to rid the

[233] *Judgement*, para. 550.
[234] See, *inter alia*, *Judgement*, paras. 689, 691, 693, 709, 714, 730, 731, 737, 740, 749, 780, 784, 853, 855-56, 861, 869, 876, 903, 911, 913-16, 919-23, 1103, 1129-31, 1143, 1146, 1153, 1159, 1170, 1179, 1207, 1213, 1230, 1237, 1240, 1242, 1244, 1249, 1260, 1264, 1269-74, 1301, 1311, 1314-15, 1320, 1328, 1338, 1349, 1353, 1507-08, 1515, 1522, 1529, 1531-36, 1544, 1555, 1605, 1637, 1657, 1663, 1677, 1681, 1684-89, 1715, 1735, 1749, 1791, 1805, 1832, 1861, 1871, 1877, 1885, 1945, 1960, 1964-65, 1969, 1973, 1978, 1991-92, 2004, 2011, 2018, 2024.
[235] *Prosecution Appeal Brief*, para. 131.
[236] *Judgement*, para. 2620.

municipality of non-Serbs",[237] and noted all the same features of the attacks to which the Prosecution in this case points: "intense and unrelenting" shelling, shooting "aimed at people fleeing", torching of houses, "extensive" property damage, killings and mistreatment.[238] It heard the same evidence that entire villages were "razed" which the Prosecution emphasises.[239] It also considered the testimony to which the Prosecution refers, that of Dr Merdzanic – who testified that he was not permitted to evacuate two injured children and was instead told that all "balija" should die there.[240] But in that case, the Trial Chamber concluded that it could not find genocidal intent; the intent was solely to force non-Serbs to leave Prijedor, not to destroy the Bosnian Muslims.[241]

167. The Chamber was also unequivocal in its findings regarding other potentially destructive measures imposed on persons in Prijedor, including detentions and forcible transfers, taking full account of this evidence in weighing up factors both *for* and *against* genocidal intent. For example, the Trial Chamber found that the Prijedor Crisis Staff and civilian authorities facilitated the non-Serb population of Prijedor's movement out of the municipality, but that this was done by negotiating with the ICRC and the Prijedor Red Cross.[242] It was thus open to the Trial Chamber to conclude that, although a factor potentially in favour of genocidal intent was transferring the non-Serb population, a factor against it was cooperating with humanitarian organisations. Such reasoning discloses no error by the Trial Chamber.

168. The Trial Chamber in *Stakic* also noted: "[s]ecurity for the Serbs and protection of their rights seems to have been the paramount interest".[243] In this regard, important factual findings in the case against President Karadzic include that before the take-over of Prijedor, the TO, Green Berets and other Bosnian Muslim groups were active in the Kozarac area[244] and the TO had a presence in Hambarine.[245] On 22 May 1992, Serb soldiers were attacked at a Bosnian Muslim checkpoint near Hambarine,[246] and on 24 May

[237] *Stakic TJ*, para. 479.
[238] See e.g. *Stakic TJ*, paras 142-45, 252 (Kozarac), 132-33 (Hambarine).
[239] See *Judgement*, para. 1621, citing KDZ048, P678 (Transcript from *Stakic*).
[240] *Stakic TJ*, para. 146. See *Judgement*, para 1625 citing P3881 (Idriz Merdzanic transcript from *Stakic*).
[241] *Stakic TJ*, para 553.
[242] *Judgement*, para. 1901.
[243] *Stakic TJ*, para. 553.
[244] *Judgement*, para. 1614.
[245] *Id*, para. 1662.
[246] *Id*, para. 1663.

a Serb army column was attacked from the direction of Kozarac.[247] Thus, the Bosnian Muslims in the areas attacked were already armed and militarily organised.[248] It was not until 29 May that the ARK Crisis Staff issued a decision that "all Muslims and Croats, who so wish, should be able to move out of the area" (in contrast to its earlier conclusion on 20 May that there was "no reason for the population of any nationality to move out"), suggesting a connection between these provocative incidents and the ensuing attacks.[249]

169. The attacks on these areas were also analysed by the Trial Chamber in *Brdjanin*,[250] and in *Bosnia v Serbia*, where the ICJ noted that "particular emphasis" was placed in submissions on "the shelling and attacks on Kozarac, 20 km east of Prijedor, and on Hambarine in May 1992".[251] In neither case was it found that the crimes in Prijedor were committed with genocidal intent.

170. In each area, the number killed represented a very small percentage of the population. In Kozarac and surrounding areas, the Trial Chamber found at least 80 Bosnian Muslims from a population of 27,000 were killed (0.3%) between 24 May and June 1992.[252] In Kamicani, at least 9 were killed from a population of 2,000-3,000 (0.3-0.45%)[253] and in Hambarine and Ljubija, at least 6 from a combined population of 4,891 (0.12%).[254] The Prosecution has not pointed to any data on the number of people suffering serious bodily or mental harm, or allegedly subject to acts calculated to destroy the group.

171. The next incident the Prosecution emphasised is the attack on Prijedor's old town, Stari Grad.[255] Again, this attack was precipitated by a Bosnian Muslim attack on Prijedor town on 30 May 1992.[256] The evidence the Prosecution relies upon was also admitted in previous cases such as *Stakic*, where the Trial Chamber considered destruction and looting of Bosnian Muslim and Bosnian Croat homes, businesses and places of

---

[247] [REDACTED]; D4195, para 18.
[248] See also re recruitment and arming before to the attacks: D4138, para. 3; D4195, paras. 10, 15;[REDACTED]; Mujadzic, T20658-59 (video: 11:10-15:42); D1839, para. 1; D1841; D4681; Sejmenovic, T20609-11 (video: 53:06-57:15).
[249] See D1309 (Conclusions of ARK Crisis Staff, 20 May 1992); P3461 (Conclusions of ARK Crisis Staff, 29 May 1992); Adjudicated Fact 541.
[250] *Brdjanin TJ*, paras. 104, 401-05, 476, 626-27 (Hambarine, Kozarac, Kamicani).
[251] *Bosnia v Serbia*, para. 257.
[252] *Judgement*, paras. 1612, 1637.
[253] *Id*, paras. 1642, 1649.
[254] *Id*, para 1677; P6684.
[255] *Prosecution Appeal Brief*, para 132.
[256] *Judgement*, para. 1605. The perpetrators were dressed in civilian clothing (D4195, para 19), and the attack resulted in the killing of 17 Serb soldiers and policemen and wounding of several civilians (D4138, para 38).

worship.[257] The evidence on which President Karadzic's Trial Chamber relied to make the factual findings to which the Prosecution draws attention is predominantly drawn from Nusret Sivac's evidence in the *Stakic* case. Sivac testified that: the radio played "Chetnik" songs and appealed to Serbs to "lynch" non-Serbs; tank and grenade fire was deployed; mosques were destroyed; non-Serbs were harassed and beaten; and homes were looted and non-Serbs evicted.[258] But as noted above, the Trial Chamber in *Stakic* was unable to find genocidal intent.

172. The Prosecution then emphasises Trial Chamber's findings about attacks on villages in the Brdo area in July 1992.[259] The Trial Chamber noted these same incidents in its summary of the pattern of crimes, including the attack on Brisevo.[260] These crimes have also been previously considered by this Tribunal in cases such as *Brdjanin*, *Stakic* and *Krajisnik*, where destroying homes and places of worship, looting and killings were recalled by those Trial Chambers.[261] For the attack on Biscani,[262] the Trial Chamber was unable to determine how many of the 300 non-Serbs killed were combatants and how many were civilians.[263]

173. The Trial Chamber's findings in the case against President Karadzic about the attack on Brisevo on 24-26 July are largely based on Ivo Atlija's testimony in *Stakic*,[264] being the same evidence that the Trial Chambers in *Brdjanin* and *Krajisnik* considered.[265] In each case, no genocidal intent was found for the crimes in Prijedor.

174. Similarly, separating men from women and children in the aftermath of such attacks and detaining them in separate facilities in Prijedor[266] was noted by the Trial Chambers in *Stakic*, *Krajisnik* and *Brdjanin*.[267]

---

[257] *Stakic TJ*, paras. 276-80.
[258] Nusret Sivac, P3478 (Transcript from *Stakic*) cited at *Judgement*, fns. 5560-65, 5567-69, 5575, 5577 (paras. 1606-10).
[259] *Prosecution Appeal Brief*, para. 133.
[260] *Judgement*, para. 2620.
[261] *Brdjanin TJ*, paras. 407-12; 625, 653; *Stakic TJ*, paras. 292, 831; *Krajisnik TJ*, paras. 480, 482.
[262] See *Brdjanin TJ*, paras. 407-09; *Stakic TJ*, paras. 265, 290, 861-62.
[263] *Judgement*, para. 1715: "at least 300 non-Serbs, including civilians, were killed by Serb Forces".
[264] *Id*, paras 1720-33. Ivo Atlija's evidence given in *Stakic* is referenced in every footnote from fn. 5885 to 5925.
[265] *Brdjanin TJ*, paras. 411-12, 653; *Krajisnik TJ*, para. 482.
[266] *Prosecution Appeal Brief*, para. 134.
[267] See e.g. *Stakic TJ*, para. 143; *Krajisnik TJ*, paras. 477, 487; *Brdjanin TJ*, paras. 115, 549.

175. The Trial Chamber mentioned the detention conditions[268] when considering the pattern of crimes to determine whether it could find genocidal intent, noting that "the conditions in these detention facilities were, in general, abysmal, that detainees were subjected to frequent and severe beatings, rape and other acts of sexual violence, and that some were killed".[269]

176. The Trial Chamber's findings on the three key detention facilities – Omarska, Keraterm, and Trnopolje – mirror the findings made by the ICTY and ICJ in earlier cases, including *Brdjanin*, *Stakic* and *Krajisnik*, for killings,[270] beatings and torture,[271] rapes and sexual violence,[272] targeting leaders and professionals,[273] and detention conditions.[274] In each earlier case, genocidal intent could not be inferred from the pattern of crimes.

177. For example, in *Brdjanin*, the Trial Chamber noted that "particularly in camps and detention facilities", the victims were "predominantly, although not only, military-aged men" which could suggest that the acts were designed to "eliminate any perceived threat to the implementation of the Strategic Plan".[275] In *Stakic*, the Trial Chamber in assessing whether it could infer genocidal intent noted that "while approximately 23,000 people were registered as having passed through the Trnopolje camp at various times when

[268] *Prosecution Appeal Brief*, para. 135.
[269] *Judgement*, para. 2620.
[270] Omarska: See, e.g. *Brdjanin TJ*, paras. 441-42, 453-54; *Krajisnik TJ*, paras. 487, 490; *Stakic TJ*, paras. 208-22; *Bosnia v Serbia*, paras 262-64. Keraterm: See, e.g. *Brdjanin TJ*, paras. 115, 454-55; *Krajisnik TJ*, paras. 488, 499; *Stakic TJ*, paras. 203-07, 223-24; *Bosnia v Serbia*, paras. 265-66. Trnopolje: See, e.g. *Brdjanin TJ*, paras 449-50, 457-60; *Stakic TJ*, paras 225-27; *Krajisnik TJ*, paras. 493, 499; *Bosnia v Serbia*, paras. 267-69.
[271] Omarska: See, e.g. *Brdjanin TJ*, paras. 447 (detainees ordered to help move dead bodies), 844-46, 848 (beatings and humiliation); *Krajisnik TJ*, paras. 487, 490; *Stakic TJ*, paras. 167, 229-233; *Bosnia v Serbia*, para. 312. Keraterm: See, e.g. *Brdjanin TJ*, paras. 538, 851-53; *Krajisnik TJ*, paras. 488, 499; *Stakic TJ*, paras. 237-39; *Bosnia v Serbia*, para. 313. Trnopolje: See, e.g. *Brdjanin TJ*, paras. 510, 856-57; *Krajisnik TJ*, paras. 493, 499; *Stakic TJ*, paras. 242-43; *Bosnia v Serbia*, para. 314.
[272] Omarska: See, e.g. *Brdjanin TJ*, paras. 515-17, 847; *Krajisnik TJ*, paras. 487, 490; *Stakic TJ*, paras. 234-36; *Bosnia v Serbia*, para. 312. Keraterm: See, e.g. *Brdjanin TJ*, paras. 512, 852; *Krajisnik TJ*, para 499; *Stakic TJ*, paras. 240-41; *Bosnia v Serbia*, para. 313. Trnopolje: See, e.g. *Brdjanin TJ*, paras. 513-14, 856; *Stakic TJ*, para. 244; *Krajisnik TJ*, paras. 493, 499; *Bosnia v Serbia*, para. 314.
[273] Omarska: See, e.g. *Brdjanin TJ*, paras. 445-46.
[274] Omarska: See, e.g. *Brdjanin TJ*, paras. 444, 930-34; *Krajisnik TJ*, para. 490; *Stakic TJ*, paras. 167-69; *Bosnia v Serbia*, para. 348. Keraterm: See, e.g. *Brdjanin TJ*, paras. 936-39; *Krajisnik TJ*, para. 488; *Stakic TJ*, para. 163; *Bosnia v Serbia*, para. 349. Trnopolje: See, e.g. *Krajisnik TJ*, para. 493; *Brdjanin TJ*, paras. 941-45; *Stakic TJ*, paras. 190-91; *Bosnia v Serbia*, para. 350.
[275] *Brdjanin TJ*, para. 979.

it was operational and through other suburban settlements, the total number of killings in Prijedor municipality probably did not exceed 3,000".[276]

178. The next aspect the Prosecution emphasised was the suffering of those not direct victims of genocidal acts.[277] Previous Trial Chambers also considered these aspects – including loss of homes and property, destroying places of worship, and uncertainty about the "fate of missing loved ones".[278] Destroying homes and looting and destroying mosques and churches were all noted by the Trial Chamber in its summary of the pattern of crimes.[279]

179. Therefore, the Trial Chamber's findings complained of by the Prosecution have been considered in previous decisions that reached the same result, concluding that genocidal intent could not be inferred. As the evidence in the case against President Karadzic has predominantly been drawn from evidence adduced in these earlier trials, it is unsurprising that the same conclusion was reached.

180. Examining the fate of the Prosecution's prominent witnesses from Prijedor confirms the lack of genocidal intent.

181. [REDACTED],[280][REDACTED],[281] [REDACTED].[282]

[276] *Stakic TJ*, para. 553.
[277] *Prosecution Appeal Brief*, paras. 136-37.
[278] See, e.g. *Brdjanin TJ*, paras. 503-18 (executions in front of others, those alive made to collect bodies and bury them, causing "severe pain and suffering"), 624-30 (destroying homes, loss of property), 652-53 (destroying Muslim and Catholic institutions); *Stakic TJ*, paras. 298-305 (destroying mosques and churches); 868 (cannot forget the missing and dead); *Krajisnik TJ*, paras. 473 (destroying mosques and other religious institutions), 498 (destroying homes and businesses); *Bosnia v Serbia*, para. 337 (destroying religious monuments).
[279] *Judgement*, para. 2620.
[280] [REDACTED].
[281] [REDACTED].
[282] [REDACTED].

Nusret Sivac

182. Similarly, Nusret Sivac, a television reporter, was arrested on 10 June 1992[283], released the same day, and arrested again ten days later.[284] He was taken to Omarska camp, then Trnopolje, and then released in August 1992. He returned to Prijedor where he remained until December 1992.[285] His sister, Nusreta Sivac, a Judge in Prijedor, was likewise in Bosnian Serb custody at Omarska for two months, and was not killed.[286] After her release, she remained in Prijedor town.[287]

[283] P3478, p. 58.
[284] *Id*, p. 64, 69.
[285] *Id*, p. 70, 137-38, 142.
[286] T20383-84.
[287] *Id.*

Kerim Mesanovic

183. Kerim Mesanovic worked for the Municipality Secretariat for National Defence.[288] He was arrested on 24 June 1992 and taken to Omarska.[289] On 6 August 1992, he was transferred to Trnopolje Camp and released soon thereafter.[290]

[288] P3528, paras. 1-2, 5.
[289] *Id*, paras. 20-21, 23.
[290] *Id*, para. 59.

Mevludin Sejmenovic

184. Mevludin Sejmenovic**,** an SDA party founding member and member of Parliament representing the Prijedor area,[291] was taken to Omarska,[292] but in August 1992, was released by Vojo Kupresanin, an SDS leader, who took him to Banja Luka. There he stayed with a family member until January 1993.[293]

[291] T20454 (video: 03:23-05:34).
[292] T20491-92 (video: 14:27-20:29).
[293] T20504-06 (video: 47:10-55:10), T20512 (video: 66:35-69:25).

Idriz Merdzanic

185. Idriz Merdzanic was a doctor in Prijedor municipality.[294] He was arrested and transported to Trnopolje camp.[295] He was released on 30 September 1992.[296]

186. The Bosnian Serbs had many opportunities to kill these people if they were intent on destroying the Muslims as a group or its leadership.

[294] P3881, p. 3.
[295] *Id*, p. 27, 34.
[296] *Id*, p. 78.

Ewa Tabeau

187. Exhibit D2250, a chart prepared by Prosecution demographic expert, Ewa Tabeau, confirms that the findings of lack of genocidal intent were correct. The chart, reproduced below, shows that 2.6% of Bosnian Muslims died during the three-and-a-half year war. Given that the figures include soldiers killed in combat and civilians killed in 1993-95, including an estimated 5,000 Muslims killed in the 1995 Srebrenica events,[297] the figure for 1992 would be less than 2%.

[297] T28412 (video: 74:12-76:50).

Deaths and Disappearances of BH Muslims in 1992-95, Minimum Numbers

Municipality	Muslim Population 1991 Census	Muslims Killed & Disappeared	Percentage of Muslim Killed or Disappeared
BRATUNAC	21,535	3,281	15.2%
FOCA	20,790	1,160	5.6%
KLJUC	17,696	600	3.4%
PRIJEDOR	49,351	2,627	5.3%
SANSKI MOST	28,136	618	2.2%
VLASENICA	18,727	1,197	6.4%
ZVORNIK	48,102	3,411	7.1%
ALL BH	**1,902,956**	**49,111**	2.6%

Note: Ethnicity of 13,654 unmatched records (with 1991 Census) is unknown and excluded from the minimum numbers here. The corrected minimum number of Muslim victims for all Bosnia and Herzegovina is 57,992

188. While genocide does not require a minimum number of victims, courts have looked to the scale of the killings when determining whether they were committed with the intent to destroy the group.[298] The 2% figure, when compared to the 60% of Jews killed in Europe during the Holocaust,[299] and 70% of Tutsis killed during the Rwandan genocide,[300] speaks volumes about whether the acts that occurred in the Municipalities were done with genocidal intent.

189. The low number of underlying acts combined with the opportunity available to the Serb forces, and the targeting largely of military-aged men combined with the security concerns facing the Serb forces, all give rise to a reasonable inference that genocidal intent was not present.

2. President Karadzic's and other JCE members' statements

190. As the Appeals Chamber emphasised in *Stakic*, evidence demonstrating ethnic bias "however reprehensible, does not necessarily prove genocidal intent".[301] In considering whether genocidal intent could be found, the Trial Chamber noted its earlier finding that President Karadzic referred to the Serb people's historical grievances.[302] But as the Trial Chamber noted, no evidence existed that "references to the historic genocide against Serbs were used to call on the Bosnian Serbs to do the same".[303]

[298] *Sikirica Rule 98 bis Decision*, para. 94; *Stakic TJ*, para. 553; *Brdjanin TJ*, paras. 973-74; *Krajisnik TJ*, paras. 868-69.
[299] U.S. Holocaust Museum, *https://www.ushmm.org/wlc/en/article.php?ModuleId=10005687*.
[300] P. Verwimp, "*Death and Survival during the 1994 Genocide in Rwanda*", 58(2) Population Studies (Camb) 233-45 (2004).
[301] *Stakic AJ*, para. 52.
[302] *Judgement*, para. 2598. See *Prosecution Appeal Brief*, paras. 140-41.
[303] *Judgement*, para. 2598.

Herbert Okun

191. The Trial Chamber also found that in June 1992, President Karadzic stated Bosnian Serbs should "defend their borders against attacks but not attack themselves".[304] While the Prosecution emphasises Herbert Okun's remarks warning that past crimes should not be viewed as justifying "all of Bosnian Serb behaviour", in cross-examination, when confronted with President Karadzic's numerous orders regarding protecting non-Serb civilians and POWs and punishing crimes against them, Okun testified:

> Dr. Karadzic, I'm surprised to hear you say that I alleged that your appeals were disingenuous. I said the opposite. I said they were praiseworthy, I said they were commendable, I said they had merit. I said they were not observed in the field, but I never accused those documents of being anything but sincere.[305]

192. The Bosnian Serb leadership's references to WWII have also been considered by previous Trial Chambers in assessing whether the crimes in the Count 1 Municipalities were committed with genocidal intent. In *Krajisnik*, the Trial Chamber found that memories Bosnian Serbs' historical suffering left fear which was fuelled by "extreme and

[304] *Id*, para. 2658.
[305] T1818.

aggressive messages" expressed by "some Bosnian Muslims and Bosnian Croats", and that "the SDS leadership did not discourage such fears, but rather shared them and made them public".[306] The Trial Chamber noted that statements by Krajisnik and others in the Bosnian Serb leadership suggested that Serbs had to live separately and that there existed historically separate Serb territories, but concluded that these remarks served to "retrospectively legitimize the forcible removal. They did not reveal an intent to destroy […]".[307]

193. In *Stakic*, the Trial Chamber noted remarks by Dr Stakic – including that the Muslims in Bosnia "were created artificially" – and concluded that, while these remarks revealed "an intention to adjust the ethnic composition of Prijedor" and demonstrated intolerance of Muslims, did not establish genocidal intent.[308] This conclusion was upheld on appeal.[309]

194. The ICTY's jurisprudence thus demonstrates that the Trial Chamber was well within its discretion when arriving at the conclusion that it "did not find evidence to demonstrate that these constant references to the historic genocide against Serbs were used to call on the Bosnian Serbs to do the same."[310]

195. President Karadzic's 15 October 1991 speech, to which the Prosecution also draws attention,[311] warned of the "chaos" that could result from attempts to resolve issues in an unconstitutional manner.[312] As the Trial Chamber found, the speech warned that the potential conflict if the Bosnian Muslims continued to pursue independence would be "extremely violent".[313] That does not amount to genocidal intent. Similarly, the Trial Chamber found that President Karadzic's statements in July 1992 to which the Prosecution refers,[314] when placed in context, did not demonstrate genocidal intent – in fact, President Karadzic went on to state that the Bosnian Muslims would have "all the rights that we

[306] *Krajisnik TJ*, para. 43.
[307] *Id*, para. 1092.
[308] *Stakic TJ*, para. 554.
[309] *Stakic AJ*, paras. 51-52.
[310] *Judgement*, para. 2598, *contra Prosecution Appeal Brief*, para. 141.
[311] *Prosecution Appeal Brief*, para. 142.
[312] D1270.
[313] *Judgement*, para. 2600. See also para. 2599.
[314] *Prosecution Appeal Brief*, para. 142.

have" in the envisioned Serb state "under the condition that they are not hostile and that they leave the weapons".[315]

196. In the telephone conversations in late 1991 on which the Prosecution relies,[316] President Karadzic stressed that the moves towards independence were unconstitutional and expressed concern about the Bosnian Muslims "preparing for war".[317] Moreover, President Karadzic distinguished between the militant Muslim leadership's fundamentalism and ordinary Bosnian Muslim civilians, stating that "there are ordinary people out there, and I think that they should be welcomed with open arms".[318] President Karadzic emphasised that the conflict would hurt both sides, and agreed with Krajisnik that: "We should say we will all disappear, both sides".[319] President Karadzic also repeatedly stated that war should be avoided.[320] Therefore, these conversations also fail to demonstrate genocidal intent.

197. The Prosecution also emphasises Mladic, Seselj and Plavsic's statements.[321] Mladic's remarks about the "enemy" […] "vanishing" and "kick[ing] the hell out of the Turks", in context, relate to the army, rather than civilians.[322] Indeed, at the same Bosnian Serb Assembly session in which Mladic made the above remarks about "vanishing", President Karadzic stated that it would be "impossible" to make "the Muslims vanish, and that we keep the entire territory"; instead, "we must give them something". He also noted that they could not declare a ban on returning refugees under international law.[323]

198. The Trial Chamber considered statements made by Mladic[324] and "highly inflammatory" statements of others such as Seselj and Plavsic "in the context of the totality of the evidence" in determining whether it could find genocidal intent,[325] yet was unable to conclusively find such intent.[326]

---

[315] *Judgement*, para. 2601, citing D92, p. 86.
[316] *Prosecution Appeal Brief*, para. 142.
[317] D0279, p. 2.
[318] *Id*, p. 12. See also T3664.
[319] P3200.
[320] See, e.g. D86; D4548; D4550; D4551; D4553; P1347; P5605; P5621; P5788.
[321] *Prosecution Appeal Brief*, paras. 143-44.
[322] P1385, P4442. See also P4441: "The Turks can't do a thing to us".
[323] See *Judgement*, paras. 2766-68, citing P1385.
[324] *Id*, paras. 2603-04.
[325] *Id*, para. 2602.
[326] *Id*, para. 2605.

199. Further, the Prosecution fails to take into account that the Trial Chamber examined, at some length, statements made at the Bosnian Serb Assembly and considered factors tending both towards[327] as well as away from genocidal intent, before finding overall that such statements were not made with the intent to destroy a part of the Bosnian Muslim group.[328]

200. Concerning Drljaca's promotion, in *Stakic*, the Trial Chamber also considered the Drljaca's acts and was "not satisfied that Drljaca pulled the Crisis Staff into a genocidal campaign", even though the evidence portrayed him as a "brutal person".[329] Moreover, as the Trial Chamber noted, President Karadzic was "angry" about the Koricanske Stijene incident,[330] and demanded an investigation.[331]

E. Conclusion

201. The Trial Chamber's evaluation of the evidence of genocidal intent was not "wholly erroneous", nor was the evidence "so unambiguous that a reasonable Trial Chamber was *obliged* to infer that [genocidal] intent was established beyond a reasonable doubt".[332] This Trial Chamber, like all others that have assessed the same evidence, found that genocidal intent was not established. The Prosecution has adduced no reason for the Appeals Chamber to now abandon 14 years of solid and consistent precedent from the ICTY and ICJ and reverse the Trial Chamber's findings on genocidal intent.

[327] See analysis of statements of Miroslav Deronjic at *Judgement*, para. 2606.
[328] See analysis of Milan Nedic's statements at *Judgement*, paras. 2607-10.
[329] *Stakic TJ*, para. 555.
[330] *Judgement*, para. 3346.
[331] *Id*, para. 3418.
[332] *Stakic AJ*, para. 56.

4. A life sentence was not required

In Brief

The Trial Chamber had the discretion to consider mitigating circumstances and impose a sentence less than life imprisonment despite the gravity of the crimes.

202. President Karadzic agrees that the Trial Chamber erred in imposing a 40-year sentence. As set forth in his appeal brief, the Trial Chamber ignored several mitigating circumstances.[333]

203. With so many errors in the Trial Chamber's *Judgement*, the Appeals Chamber may order a new trial or impose its own sentence for any convictions left standing. But if the entire *Judgement* is affirmed, no reason exists to reverse the Trial Chamber for failing to impose a life sentence.

A. The Chamber's findings do not "require" a life sentence

1. Mandatory Life Sentences are not provided

204. Had the Security Council desired a mandatory life sentence for the gravest crimes, it would have been included in the Statute. Had the Judges desired a mandatory life sentence, it would have been included in the Rules. A mandatory life sentence appears nowhere in ICTY's constitutive documents.

205. In the ICTY's early years, the Prosecution argued for fixed sentencing guidelines.[334] The Appeals Chamber rejected this proposal, finding a "definitive" sentencing scale's benefits to be "questionable". It emphasised that "the underlying principle is that the sentence imposed largely depended on the individual facts of the case and the individual circumstances of the convicted person".[335] The "considerable amount of

[333] *Radovan Karadzic's Appeal Brief*, Grounds 47-50.
[334] *Delalic AJ*, para. 715.
[335] *Id*, paras. 716-17.

discretion"[336] afforded to a Trial Chamber meant that the Judges were within their right "to impose different sentences for the same type of crime".[337]

206. Now, the Prosecution once again contends that some crimes are so serious that they warrant restricting judicial discretion, with "no room for any other sentence" than a life sentence.[338]

207. This argument cannot be reconciled with the emphasis placed by this Appeals Chamber on the broad discretion afforded to a Trial Chamber in sentencing[339] – a position other international courts and tribunals have adopted.[340] Fixed or mandatory sentences redistribute discretion from Judges to prosecutors in a manner inconsistent with Trial Chambers' overriding obligation to individualise a penalty to fit the individual circumstances of the case.

208. The Prosecution's approach has adverse implications. A finding that some crimes "require" a life sentence risks undermining any incentive for those who have engaged in atrocities, to then engage in peace. A reduction in sentence should be available to those who, "despite their past actions have, subsequent to their crimes, made a critical and decisive contribution to the peace process."[341] Encouraging this kind of behaviour may have a greater practical impact on the life of victims and survivors than imposing a life sentence on the perpetrator.

209. Trial Chambers have put this principle into practice. Colonel Vidoje Blagojevic and Dragan Jokic's sentences for crimes at Srebrenica were reduced due to their de-mining efforts after the war.[342] General Dragomir Milosevic's sentence for crimes in Sarajevo was reduced due to participating in an anti-sniper agreement.[343] At the ICC, Germain Katanga's sentence was reduced for participating in disarming and demobilising child soldiers in

[336] *Id*, para. 717.
[337] *Furundzija AJ*, para. 249.
[338] *Prosecution Appeal Brief*, para. 159.
[339] *Delalic AJ*, para. 717.
[340] *Bagosora AJ*, para. 419: *Prosecutor v Taylor*, No. SCSL-03-01-A, *Judgment* (26 September 2013), para. 665.
[341] *Prosecutor v Sesay et al*, No. SCSL-04-15-T, *Sentencing Judgement* (8 April 2009), para. 225 ("RUF SJ").
[342] *Blagojevic TJ*, para. 860.
[343] *D. Milosevic TJ*, para. 1003.

Ituri, even though he acted as an accessory to crimes against humanity of "particular cruelty" during the horrific attack on Bogoro in February 2003.[344]

210. The Trial Chamber was under no compulsion to impose a mandatory life sentence in the present case, nor was any restriction on judicial discretion automatically invoked by the gravity of the crimes for which President Karadzic was convicted.

2. The Trial Chamber was aware that a life sentence is greater than 40 years

211. The Prosecution arguments centre on the fact that a fixed 40-year sentence is less than a life sentence.[345] This is not in dispute, nor was the Trial Chamber unaware of this fact.

212. In *Galic*, the President held that, for early release, a life sentence should be treated as equivalent to more than a 45-year sentence.[346] Thus a person serving a life sentence would not be ordinarily eligible for early release until he served at least 30 years.

213. When sentencing President Karadzic to 40 years' imprisonment, the Trial Chamber would have calculated that he would be 89 years old by the time he served two thirds of this sentence. Had it imposed a life sentence, President Karadzic would be 93 years old after serving 30 years.

214. Thus, the Trial Chamber could have been under no illusion that it was imposing a life sentence.

3. Sentences in other cases do not demonstrate any error

215. The Appeals Chamber has emphasised that, as a general principle, comparison between cases "is often of limited assistance."[347] While the Appeals Chamber did not disagree that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, it held that "often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results."[348]

---

[344] *Prosecutor v Katanga*, No. ICC-01/04-01/07, *Decision on Sentence pursuant to Article 76 of the Statute* (23 May 2014), para. 115.
[345] *Prosecution Appeal Brief*, paras. 160-63.
[346] *Prosecutor v Galic*, No. MICT-14-83-ES, *Reasons for the President's Decision to Deny the Early Release of Stanislav Galic and Decision on Prosecution Motion* (23 June 2015), para. 35.
[347] *Delalic AJ*, paras. 719, 798.
[348] *Id*, para. 719.

216. With this in mind, the parties' focus on sentences imposed in other cases has been unpersuasive.[349] Individual circumstances and mitigating or aggravating circumstances vary. In this case, the Trial Chamber considered President Karadzic's voluntary relinquishing of power and withdrawal from public life to be a mitigating circumstance.[350] There is no similar situation at the ICTY, and therefore no disparity with other sentences.

4. The Trial Chamber provided a reasoned opinion

217. The Prosecution's 413-page *Final Trial Brief* devoted four paragraphs to sentence.[351] Its arguments made no reference to comparable cases, or the mitigating circumstances it was on notice the Defence would pursue,[352] nor did it attempt to "situate Karadzic's crimes in relation to previous cases".[353] Its oral arguments were similarly brief.[354]

218. In such circumstances, criticisms of "inadequate reasoning" are difficult to accept.[355] The criticism that the Trial Chamber only addressed those cases the Defence raised, when the Prosecution itself raised none, is unfair.[356] An appeal "is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing."[357] The Prosecution cannot impugn the Trial Chamber for not having taken into account the arguments it submits for the first time on appeal.

219. A Trial Chamber's "obligation to clearly articulate" why it did not impose a life sentence, features nowhere in the Tribunal's sentencing practice.[358] The Prosecution points to no case where a Trial Chamber explained why it did not impose a life sentence. A survey of cases across both the ICTY and ICTR reveals that none have. Nor have Trial Chambers been required to explain when deviating from the Prosecution's proposed sentence. The Prosecution claims errors on the basis of standards that do not exist.

---

[349] President Karadzic's comparison of his case with those of his two alleged JCE accomplices—Biljana Plavsic (11 years) and Momcilo Krajisnik (20 years) did not persuade the Trial Chamber. *Defence Final Trial Brief* (29 August 2014), para. 3429; *Judgement*, para. 6067.
[350] *Judgement*, para. 6057.
[351] *Prosecution Final Trial Brief*, paras. 1119-22.
[352] *Submission of Evidence Related to Sentencing* (8 January 2014); *Prosecution Response to Karadzic's Submission of Evidence Related to Sentence: Holbrooke Agreement*, (15 January 2014).
[353] *Prosecution Appeal Brief*, para. 169.
[354] T47699 (video: 13:20-14:21).
[355] *Prosecution Appeal Brief*, paras. 151, 169-72, 176.
[356] *Id*, para. 172.
[357] *Erdemovic AJ*, para. 15.
[358] *Prosecution Appeal Brief*, para. 170.

220. The Trial Chamber's reasoning is then impugned on the basis that it "does not mention the Prosecution's recommended sentence of life imprisonment".[359] No sensible argument can be made that the Trial Chamber failed to consider the Prosecution's minimal submissions. Of the four paragraphs provided, the Trial Chamber in fact reproduced one in whole,[360] and summarised the remainder.[361] That the Trial Chamber did not specify that "the Prosecution asks for life" is not persuasive.

B. The Trial Chamber took into account President Karadzic's abuse of authority in assessing the gravity of the crimes

221. The Trial Chamber said that it declined to take into account "abuse of authority" as an aggravating circumstance, because it already took it into account "in relation to the gravity of the crimes".[362] The Prosecution says that, in fact, it did not.

222. A Trial Chamber is not required to articulate every step of its reasoning. If a Trial Chamber says "we took abuse of authority into account in assessing the gravity of the crime", then it can be presumed to have done so. That the word "abuse" does not appear in the section on gravity is a red herring. "Abuse of authority" means its wrongful exercise. In its discussion of gravity, the Trial Chamber referred to its findings about President Karadzic's position of authority,[363] and how he used this position (and the institutions he created) to further the criminal enterprise, thereby abusing the authority placed in him.[364]

223. For Srebrenica, for example, the Trial Chamber is explicit that "[i]n relation to the gravity of the Accused's conduct in relation to the killings after 13 July, the Chamber found that he 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, where they were ultimately killed."[365]

224. If an accused is found to have a position of authority, and is found to have used this position to further a criminal purpose, then what else could this be, than an abuse of

[359] *Id*, para. 169.
[360] *Judgement*, para. 6045.
[361] *Id*, paras. 6045, 6051.
[362] *Id*, para. 6052.
[363] *Id*, para. 6047: "as RS as RS President and Supreme Commander of the VRS, the Accused was at the apex of power and played an integral role in this enterprise […]."
[364] *Id*, para. 6047: "He also established the institutions used to carry out the objective of the common plan […]."
[365] *Id*, para. 6049.

that authority? The Prosecution's implication that the "magic words" must be used is unpersuasive.

225. If these signposts were in some way insufficient, the Trial Chamber then clarified: (i) "the Accused's unique position at the apex of power in the RS and his *de jure* authority over the VRS, MUP and other political organs, which he exercised in fact"; (ii) "[t]the essential role the Accused played in the commission of the crimes in each of the components was a reflection of his position and the manner in which he used that position to further his objectives"; and (iii) the President Karadzic's responsibility "as a superior for having failed to punish the killings which took place before the evening of 13 July 1995 in Srebrenica", have all been "taken into consideration in relation to the gravity of the crimes".[366] The argument that the Trial Chamber failed to take into account President Karadzic's abuse of authority when assessing gravity does not bear sensible scrutiny.

226. The Prosecution also alleges that the Trial Chamber failed to address that the abuse of authority was "massive and sustained".[367] No indication exists that the Trial Chamber considered the abuse to be insignificant, or limited in time. In fact, it refers the reader to its findings on the Accused's responsibility, where these factors have been "abundantly discussed".[368] And indeed they were.

C. The Trial Chamber did not err in considering resignation as a mitigating factors

227. The Trial Chamber found that President Karadzic's withdrawal from public life "had a positive influence on the establishment of peace and stability in BiH and the region in the wake of the Dayton Agreement".[369] This finding is not in dispute. The Appeals Chamber has already considered that President Karadzic's agreement with Richard Holbrooke to resign and withdraw from public life is relevant to sentencing.[370]

228. The establishment of peace and security, being one of international criminal justice's broader goals, should not be undervalued. Nor should the decision to resign from public life for the sake of peace. In "situations of protracted conflict where peace can be

[366] *Id*, para. 6052.
[367] *Prosecution Appeal Brief*, para. 175.
[368] *Judgement*, para. 6052.
[369] *Id*, para. 6057.
[370] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.4, *Decision on Karadzic's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement* (12 October 2009), para. 55

fragile, all efforts must be made to encourage its preservation."[371] Many leaders have clung to power with catastrophic results. President Karadzic's resigning and withdrawing from public life are acts that should be encouraged.

229. In determining Biljana Plavsic's sentence, the Trial Chamber gave "significant weight" to her being "instrumental in ensuring that the Dayton Agreement was accepted and implemented in Republika Srpska".[372] It was likewise proper to attribute weight to President Karadzic's contribution to "the establishment of peace and stability in BiH and the region in the wake of the Dayton Agreement" as a mitigating factor.[373] In doing so, the Trial Chamber did not commit a discernible error.

D. Conclusion

230. The Trial Chamber did not err in failing to impose a life sentence.

[371] *RUF SJ*, para. 225.
[372] *Plavsic SJ*, paras. 85-94.
[373] *Id*, para. 6057.

III. CONCLUSION

231. The Prosecution's appeal should be dismissed in its entirety.

Word count: 20,062.

Respectfully submitted,

PETER ROBINSON
Counsel for Radovan Karadzic

TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS/ *FICHE DE TRANSMISSION POUR LE DÉPÔT DE DOCUMENTS DEVANT LE MÉCANISME POUR LES TRIBUNAUX PÉNAUX INTERNATIONAUX*

I - FILING INFORMATION / *INFORMATIONS GÉNÉRALES*

To/ *À* :	MICT Registry/ *Greffe du MTPI*	☐ Arusha/ *Arusha*	☒ The Hague/ *La Haye*	
From/ *De* :	☐ Chambers/ *Chambre*	☒ Defence/ *Défense* **Peter Robinson**	☐ Prosecution/ *Bureau du Procureur*	☐ Other/ *Autre* :
Case Name/ *Affaire* :	**Prosecutor v Radovan Karadzic**		**Case Number/ *Affaire n°* :**	**MICT-13-55-A**
Date Created/ *Daté du* :	**15 March 2017**	**Date transmitted/ *Transmis le* :** **15 March 2017**	**No. of Pages/ *Nombre de pages* :**	**70**
Original Language / *Langue de l'original* :	☒ English/ *Anglais*	☐ French/ *Français*	☐ Kinyarwanda	☐ B/C/S ☐ Other/*Autre* (specify/*préciser*) :
Title of Document/ *Titre du document* :	**RADOVAN KARADZIC'S RESPONSE BRIEF--PUBLIC REDACTED VERSION**			
Classification Level/ *Catégories de classification :*	☒ Unclassified/ *Non classifié* ☐ Confidential/ *Confidentiel* ☐ Strictly Confidential/ *Strictement confidentiel*	☐ Ex Parte Defence excluded/ *Défense exclue* ☐ Ex Parte Prosecution excluded/ *Bureau du Procureur exclu* ☐ Ex Parte R86(H) applicant excluded/ *Art. 86 H) requérant exclu* ☐ Ex Parte Amicus Curiae excluded/ *Amicus curiae exclu* ☐ Ex Parte other exclusion/ *autre(s) partie(s) exclue(s)* (specify/*préciser*) :		
Document type/ *Type de document* :	☐ Motion/ *Requête* ☐ Decision/ *Décision* ☐ Order/ *Ordonnance* ☐ Judgement/ *Jugement/Arrêt*	☒ Submission from parties/ *Écritures déposées par des parties* ☐ Submission from non-parties/ *Écritures déposées par des tiers* ☐ Book of Authorities/ *Recueil de sources* ☐ Affidavit/ *Déclaration sous serment*	☐ Indictment/ *Acte d'accusation* ☐ Warrant/ *Mandat* ☐ Notice of Appeal/ *Acte d'appel*	

II - TRANSLATION STATUS ON THE FILING DATE/ *ÉTAT DE LA TRADUCTION AU JOUR DU DÉPÔT*

☐ Translation not required/ *La traduction n'est pas requise*

☒ Filing Party hereby submits only the original, and requests the Registry to translate/
La partie déposante ne soumet que l'original et sollicite que le Greffe prenne en charge la traduction :
(Word version of the document is attached/ *La version Word est jointe)*

☐ English/ *Anglais* ☐ French/ *Français* ☐ Kinyarwanda ☒ B/C/S ☐ Other/*Autre* (specify/*préciser*) :

☐ Filing Party hereby submits both the original and the translated version for filing, as follows/
La partie déposante soumet l'original et la version traduite aux fins de dépôt, comme suit :

Original/ *Original en*	☐ English/ *Anglais*	☐ French/ *Français*	☐ Kinyarwanda	☐ B/C/S	☐ Other/*Autre* (specify/*préciser*) :
Translation/ *Traduction en*	☐ English/ *Anglais*	☐ French/ *Français*	☐ Kinyarwanda	☐ B/C/S	☐ Other/*Autre* (specify/*préciser*) :

☐ Filing Party will be submitting the translated version(s) in due course in the following language(s)/
La partie déposante soumettra la (les) version(s) traduite(s) sous peu, dans la (les) langue(s) suivante(s) :

☐ English/ *Anglais* ☐ French/ *Français* ☐ Kinyarwanda ☐ B/C/S ☐ Other/*Autre* (specify/*préciser*) :

Send completed transmission sheet to/ *Veuillez soumettre cette fiche dûment remplie à :*
JudicialFilingsArusha@un.org OR/OU JudicialFilingsHague@un.org