UNITED
NATIONS

International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-56-A
Date: 14 November 2018
Original: English

IN THE APPEALS CHAMBER

Before: **Judge Prisca Matimba Nyambe (Presiding)**
Judge Seymour Panton
Judge Gberdao Gustave Kam
Judge Aminatta Lois Runeni N'gum
Judge Elizabeth Ibanda-Nahamya

Registrar: **Mr. Olufemi Elias**

Date: **14 November 2018**

PROSECUTOR
v.
RATKO MLADIĆ

PUBLIC

RESPONSE TO PROSECUTION'S APPEAL BRIEF ON BEHALF OF RATKO MLADIĆ

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GENERAL ABBREVIATIONS

Abbreviation	Full citation
ABiH	Army of Bosnia-Herzegovina
API	Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
APII	Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
AJ	Appeals Judgement
Art.	Article
BCS	Bosnian / Croat / Serb languages
BiH	Bosnia and Herzegovina
Ch.	Chapter
CIL	Customary International Law
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Fn	Footnote(s)
GA Report	Measures to eliminate terrorism, Report of the Working Group, General Assembly, Fifty-second session, Sixth Committee, A/C.6/52/L.3 10 October 1997
GCI	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949
GCII	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949
GCIII	Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949
GCIV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949
ICC Statute	UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998,-ISBN No. 92-9227-227-6
ICJ Statute	Statute of the International Court of Justice
ICRC	International Committee of the Red Cross

ICRC Commentary to AP	International Committee of the Red Cross commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IMT	International Military Tribunals
JCE(s)	Joint Criminal Enterprise(s)
JCE-I	The First Category of JCE
JCE-II	The Second Category of JCE
JCE-III	The Third Category of JCE
ICC	International Criminal Court
IRMCT	International Residual Mechanism for Criminal Tribunals
IRMCT LCSS	IRMCT Conference & Languages Services Section
MICT	Mechanism for International Criminal Tribunals
Count 1 Municipalities	Foča, Kotor Varoš, Prijedor, Sanski Most, and Vlasenica
OJCE	Overarching Joint Criminal Enterprise
OLAD	Office for Legal Aid and Defence Matters
Para.	paragraph
Paras.	paragraphs
POW(s)	Prisoner(s) of war
Preparatory Committee Report	Report of the Preparatory Committee on the Establishment of an International Criminal Court, 51st Session, Vol. 2, Supp. No.2, UN Doc. A/51/22 (1996), Article H, Proposal 1
Report of Working Group	Report of the Working Group on General Principles of Criminal Law, UN Doc. A/CONF.183/C.1/WGGP/L.4
RPE	Rules of Procedure and Evidence, ICTY, IT/32/Rev.50
RSI	Repubblica Sociale Italiana
Rule(s)	Rules of Procedure and Evidence, ICTY, IT/32/Rev.50
SCSL	Special Court for Sierra Leone
SFRY	Socialist Federal Republic of Yugoslavia
SJ	Sentencing Judgement
Statute	Statute of International Criminal Tribunal for the Former Yugoslavia established by UNSC Resolution 827 (1993)
STL	Special Tribunal for Lebanon
T.	Trial transcript
The Tribunal	International Criminal Tribunal for the Former Yugoslavia
TJ	Trial Judgement
Trial Chamber	Trial Chamber I of the ICTY, Case No. IT-09-92.

UN	United Nations
VRS	Vojska Srpske Republike Bosne I Herzegovine, later Vojska Republike Srpske – Army of the Republika Srpska / Bosnian-Serb Republic
WWII	World War II

I. INTRODUCTION

A. Procedural Background

1. On 22 November 2017, the Trial Chamber unanimously found the Respondent not guilty of Count 1, genocide in the municipalities.[1] While agreeing with the finding, Judge Orie rendered a partially dissenting opinion from the reasoning given by the majority.[2]

2. On 22 March 2018, the Prosecution filed a Notice of Appeal against the Respondent's acquittal on Count 1 of the Indictment. On 6 August 2018, the Prosecution filed its Appeal Brief.

3. The Response to the Prosecution's Appeal Brief set out below is submitted on behalf of the Respondent. At the time of filing this Response, the Respondent has still not been provided with an official translation of the Judgement in his native language, BCS.

B. The Respondent's approach to the Prosecution's appeal

4. While procedurally the Prosecution's appeal is considered separately from the Respondent's appeal against conviction and sentence, it represents a cross-appeal against the Trial Chamber's Judgement. The Respondent notes, this Response is filed without prejudice to the submissions contained in his Appeal Brief filed on 6 August 2018. The Respondent recalls, this Response is limited to the Trial Chamber's approach and findings on Count 1. Nothing in this Response should be taken as an admission or concession for the purposes of the Respondent's appeal against conviction and sentence.

5. The Respondent has followed the structure of the Prosecution's appeal and responds to the submissions contained therein. As a result, this Response becomes repetitive at times as it parallels the Prosecution's approach. The Respondent has recalled paragraphs of the response when appropriate, to try and avoid repetition.

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[1] Judgement, para.5214.
[2] Judgement, paras.5217-5221.

6. Where the Prosecution has made submissions in footnotes,[3] the Respondent has considered these as if they were part of the main body of the Prosecution's appeal.

7. At the start of the response to each of the Prosecution's ground of appeal and remedies sought, the Respondent has set out the applicable law to assist the Appeals Chamber and also to provide the legal framework for his Response. To avoid repetition, this is recalled when appropriate.

8. The Respondent notes, the Prosecution uses the phrase "destructive intent" throughout its Appeal Brief. The Respondent understands this to refer to the Majority's finding that the physical perpetrators possessed the intention to destroy the protected group when they committed the prohibited acts.[4] The Response to the Prosecution's appeal has been drafted on this basis. However, the Prosecution does not define "destructive intent", nor does it cite any authorities that use this phrase in its Appeal Brief. As such, notice is given on behalf of the Respondent that, should the Prosecution's phrase "destructive intent" refer to something other than the Majority's finding or go beyond this, an application to file an addendum to this Response will be submitted.

C. OVERVIEW OF THE RESPONSE

9. Count 1 of the Indictment was thoroughly adjudicated over the course of a four-year trial. The Prosecution vigorously prosecuted this charge, relying on hundreds of witnesses and voluminous exhibits of it. The Trial Chamber rendered a comprehensive, reasoned Judgement on this charge, making clear and extensive findings on the evidence presented by the Prosecution.

10. On appeal, the Prosecution bear the burden to show that the Trial Chamber erred in law or that no reasonable trier of fact could have reached the same factual findings. As the Prosecution seek to appeal an acquittal, it must prove that all reasonable doubt of the Respondent's guilt has been eliminated.[5] The Prosecution fails to meet this burden.

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[3] Prosecution Appeal, paras.9, fn14; 23, fn52; 25, fn56; 29, fn65.
[4] Judgement, para.3526.
[5] *Popović* AJ, para.21, fn90; *Šainović* AJ, para.24, fn96.

11. In alleging legal errors in the Trial Chamber's findings on Count 1, the Prosecution disregards, or misunderstands, trite law in relation to the burden and standard of proof.[6] The Prosecution invites the Appeals Chamber to overturn the Trial Chamber's meticulous analysis of hundreds of witnesses and thousands of exhibits admitted to prove the charge on Count 1. It relies on a handful of documents[7] and attempts to show an error by citing other factual findings made by the Trial Chamber, with little, if any, analysis demonstrating the effect of the error it alleges on the findings concerned[8]. The Prosecution ignores or mischaracterises evidence,[9] as well as the Judgement.[10] Further, its loose use of legal terminology is not only inaccurate, but also mischaracterises the Trial Chamber's findings.[11] The Prosecution advances alternative versions of events without meeting the appellate standard.[12]

12. With regards to the remedies sought for the alleged errors of law and/or fact – namely a conviction on the basis of JCE-I, in the first alternative JCE-III, and in the second alternative Art.7(3) of the Statute – the Prosecution fails to establish the elements of these modes of liability.[13]

13. The Respondent submits, the Appeals Chamber should take a cautious approach to the Prosecution's submissions, use of evidence, and characterisation of the Trial Chamber's findings for the reasons identified in the preceding paragraphs.

14. For the reasons set out in this Response, the Prosecution's appeal fails to meet the appellate standard and should be dismissed.

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[6] Prosecution Appeal, paras.22-25.
[7] Prosecution Appeal, paras.12-13.
[8] Prosecution Appeal, paras.9-10, 12-14, 22-23, 28-40.
[9] Prosecution Appeal, paras.44-50.
[10] Response, Sections II and III.
[11] Response, paras.108-112.
[12] Response, Sections II and III.
[13] Response, Sections IV, V and VI.

II. GROUND 1: THE PROSECUTION HAS FAILED TO DISCERN ANY ERROR IN THE TRIAL CHAMBER'S ASSESSMENT OF THE EVIDENCE ON THE SUBSTANTIALITY OF EACH OF THE COUNT 1 MUNICIPALITIES

15. The Respondent submits, the Trial Chamber's finding that the Bosnian-Muslim communities in the Count 1 Municipalities did not constitute a substantial part of the Bosnian-Muslim group, was reasonable. The Prosecution fails to demonstrate that the evidence was so unambiguous that a reasonable Trial Chamber was obliged to infer that the Bosnian Muslims in each of the Count 1 Municipalities constituted a substantial part of the Bosnian-Muslim group. As such, the Respondent invites the Appeals Chamber to dismiss Ground 1 of the Prosecution's appeal.

A. THE PROSECUTION HAS FAILED TO DISCERN ANY ERROR IN THE TRIAL CHAMBER'S ASSESSMENT OF THE EVIDENCE RELATING TO (A) THE NUMERICAL SIZE AND (B) PROMINENCE WITHIN, AND EMBLEMATIC NATURE OF, THE BOSNIAN MUSLIM COMMUNITY IN EACH OF THE COUNT 1 MUNICIPALITIES

A.1 APPLICABLE LAW

A.1.1 Appellate Standard

17. It is trite law that an Appeals Chamber will summarily dismiss deficient submissions on appeal.[14] These include: arguments that misrepresent the factual findings or the evidence, or ignore other relevant factual findings; and mere repetition of arguments that were unsuccessful at trial without any demonstration that the rejection by the Trial Chamber constituted an error warranting the intervention of the Appeals Chamber.[15]

18. When determining whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt, the same reasonableness standard to alleged errors of fact is applicable regardless of whether the finding of fact was based on direct or circumstantial evidence.[16] On appeal, the Prosecution must demonstrate that, when account is taken of the

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[14] *Krajišnik* AJ, para.17.
[15] *Krajišnik* AJ, para.17-27; *Rutaganda* AJ, paras.17-19.
[16] *Stakić* AJ, paras.219-220; *Galić* AJ, para.9, fn21.

alleged errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.[17]

19. The Respondent recalls, at trial the Prosecution must satisfy the Trial Chamber that an accused is guilty beyond any reasonable doubt.[18] Further, the burden of proof remains on the Prosecution throughout the trial.[19] At trial, the Prosecution must prove all facts beyond reasonable doubt before the Trial Chamber can conclude the commission of a crime.[20]

20. There is a presumption that the Trial Chamber has evaluated all the evidence presented to it, providing there is no indication that it completely disregarded any particular piece of evidence.[21] This presumption may be rebutted when evidence which is clearly relevant to a Trial Chamber's findings is not addressed in its reasoning.[22] A Trial Chamber has discretion in weighing and assessing the evidence before it[23] and it is within the discretion of a Trial Chamber to evaluate discrepancies and to consider the credibility of the evidence as a whole, without explaining its decision in every detail.[24] An Appellant cannot argue that a Trial Chamber has failed to consider all relevant evidence, given insufficient weight to certain evidence, or should have interpreted evidence in a particular manner and reached a particular conclusion, without explaining why no reasonable trier of fact, based on the evidence, could reach the same conclusion as the Trial Chamber.[25]

A.1.2 The actus reus of the crime of genocide

21. The underlying prohibited acts, enumerated in Article 4(2)(a)-(e), reflect the *actus reus* of the crime of genocide.

[17] *Popović* AJ, para.21 fn90; *Šainović* AJ, para.24 fn96.
[18] *Stakić* AJ, para.219; *Martić* AJ, para.55-61; *Blagojević* AJ, para.226
[19] *Brđanin* TJ, para.22, *Gotovina* TJ, para.14.
[20] *Halilović* AJ, para.125.
[21] *Stanišić & Župljanin* AJ, para.536; *Galić* AJ, para.256.
[22] *Stanišić & Župljanin* AJ, para.536 fn1806.
[23] *Stanišić & Župljanin* AJ, para.218.
[24] *Stanišić & Župljanin* AJ, para.218.
[25] *Brđanin* AJ, para.24; *Kunarac* AJ, para.48; *Halilović* AJ, para.12; *Blagojević* AJ, para.11.

A.1.3 The mens rea of the crime of genocide

22. The requisite *mens rea* of the crime of genocide is set out in Article 4(2) of the Statute. It requires that the prohibited acts are committed with the specific intent to destroy the protected group in whole or in part. Where the physical perpetrator or the accused possesses an intention to destroy a *part* of the group, that part must be substantial (considered below).

23. When considering an accused's intent, the conduct and statements of the accused must be considered within the context in which they are made.[26]

A.1.4 Substantiality

24. It is well established that, where a conviction for genocide relies on the intent to destroy a protected group 'in part', the part must be a *substantial part* of that group.[27] While there is no numerical threshold of victims necessary to establish genocide,[28] the "part targeted must be significant enough to have an impact on the group as a whole".[29] To determine whether the targeted part is substantial enough to meet the intent requirement, the jurisprudence shows that both quantitative and qualitative factors are considered.[30]

A.1.4.1 Quantitative considerations

25. The Appeals Chamber in *Krstić* explained that, "the number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire [protected] group".[31] The danger, threat, or risk created to the existence of the entire group through the targeting of the part of the group is also relevant.[32]

26. The fact that the evidence does not establish the actual destruction of a substantial number of the protected group relative to the total population of the municipality or group as a

[26] *Jeslić* TJ, para.73; *Krstić* TJ, para.633.
[27] *Krstić* AJ, para.8.
[28] *Semanza* TJ, para.316.
[29] *Krstić* AJ, para.8.
[30] *Krstić* AJ, paras.12; *Krstić* TJ, para.634.
[31] *Krstić* AJ, para.12; *Popović* AJ, para.422; *Sikirica* Judgement on Acquittal Motions, paras.69-75, 84; *Brđanin* TJ, para.974 fn2448.
[32] *Krstić* TJ, para.634; *Krstić* AJ, para.28 (endorsing the Trial Chamber's approach).

whole, does not in and of itself negate an inference that the perpetrators possessed the specific intent (*dolus specialis*) to destroy a substantial part of the protected group.[33] However, coupled with the totality of the evidence, it could negate that the only reasonable inference was that the physical perpetrators and/or an accused possessed the requisite specific intent (*dolus specialis*).[34] Therefore, while the *actual* destruction of a substantial part of the group is not a requirement, it may assist in determining whether a physical perpetrator or an accused intended to bring about the result.[35]

A.1.4.2 Qualitative considerations

27. The prominence of the targeted portion of the group is a relevant factor to establish the crime.[36] Likewise, it is a relevant factor in establishing whether a specific part of the group is emblematic of the overall group, or essential to its survival.[37] The intention to destroy may be established if there is evidence that the destruction is related to a significant section of the group, such as leadership.[38]

A.1.4.3 Physical perpetrators authority and geographical control

28. The perpetrator's activity and control, as well as their possible reach, must be assessed while analysing the quantitative and qualitative considerations.[39] The Appeals Chamber in *Krstić* noted that, "[t]he intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him".[40] The physical perpetrators' geographical control and authority to carry out activities is directly relevant to this.[41]

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[33] *Milošević* 98*bis* Decision, para.125.
[34] *Brđanin* TJ, para.974.
[35] *Brđanin* TJ, para.697; *Milošević* 98*bis* Decision, para.125.
[36] *Krstić* AJ, para.12.
[37] *Krstić* AJ, para.12; *Jelisić* TJ, para.82; *Sikirica* Judgement on Acquittal Motions, para.65.
[38] *Tolimir* AJ, para.263; *Jelisić* TJ, para.82; para.82 fn113; *Sikirica* Judgement on Acquittal Motions, para.77.
[39] *Krstić* AJ, para.13.
[40] *Ibid*.
[41] *Krstić* AJ, para.13; *Popović* TJ, paras.1401-1415 (affirmed in *Popović* AJ, paras.517, 525-530).

A.1.4.4 Weighting of indicia

29. The aforementioned considerations used by both the Appeals and the Trial Chamber are not exhaustive.[42] The relevance of these factors, as well as the relative weight given to them, will depend on the circumstances of the case and the totality of the evidence.[43]

A.1.5 The ad hoc tribunals' approach to genocide

30. The intent of the physical perpetrators at the conception and commission of the crime must be distinguished from the intention of the accused.[44] The jurisprudence confirms that this requires an analysis of the physical perpetrators' intent before the JCE members' intent can be ascertained.[45] The jurisprudence of the *ad hoc* tribunals demonstrates that both the ICTY and ICTR have taken this two-stage approach to determining an accused's liability for genocide.[46]

31. An accused's participation *and* knowledge of the overall context are examined before affirmative findings on specific intent can be made.[47]

A.2 THE TRIAL CHAMBER'S APPROACH

32. The Trial Chamber's legal findings on the crime of genocide in the Municipalities[48] are set out in Chapter 8.10.2.

A.2.1 The prohibited acts established under Article 4(2)(a)-(c)

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[42] *Krstić* AJ, para.14.
[43] *Ibid*.
[44] *Krstić* TJ, para.549.
[45] For the approach to genocide in the municipalities see: *Jelisić* TJ, paras.88-98, 108; *Brđanin* TJ, paras.969-984; *Karadžić* 98*bis* Decision, T.28768-28769; *Sikirica* Judgement on Acquittal Motions, paras.61-86. For the approach to genocide in Srebrenica: *Krstić* TJ, paras.549, 594-599, subsequently endorsed in *Krstić* AJ, paras.15-17; *Popović* TJ, paras.837-866, 863; *Karadžić* 98*bis* Appeal Decision, T.28751-28752; *Karadžić* 98*bis* Decision, para.56-60; *Tolimir* TJ, paras.769, 1157. For the ICTR approach to genocide: *Akayesu* TJ, paras.118-129, 169; *Kayishema* TJ, paras.273-292, 293-311; *Rutaganda* TJ, paras. 390-394, 399-400; *Musema* TJ, paras.354-361, 931; *Ndindabahizi* TJ, para.470-471.
[46] *Ibid*.
[47] *Krstić* TJ, paras.623-632, 644-648; *Popović* TJ, paras.1401-1415 (affirmed in *Popović* AJ, paras.517, 525-530).
[48] Judgement, paras.3438-3536.

33. The Trial Chamber considered the underlying crimes of persecution through the lens of the definition of genocide under Art.4(2)(a), (b) and (c) to establish whether the underlying acts satisfied the *actus reus* of the crime of genocide.[49] It concluded that equivalent prohibited acts had been committed in Count 1 Municipalities.[50]

A.2.2 The mens rea of physical perpetrators when carrying out the prohibited acts

34. The Trial Chamber divided this into two stages: (a) assessing whether the physical perpetrators possessed the intent to destroy a part of the protected group;[51] and, (b) whether the targeted part of the protected group was substantial.[52]

A.2.2.1 The intent of the physical perpetrators

35. The Trial Chamber identified the relevant factors to determine the intent of the physical perpetrators to destroy Bosnian Muslims and Bosnian Croats as a protected group, in part, as such.[53] These included: (a) the general context within which the crimes were committed; (b) the scale of the crimes; (c) the targeting of victims on the basis of their membership of a particular group; (d) connections between the physical perpetrators' prohibited acts, such that an intent to destroy could be inferred from their collective actions.[54] It then examined the intent of the physical perpetrators involved in the conception and commission of the crimes in light of this.[55] The Trial Chamber, Judge Orie dissenting,[56] concluded that some of the named physical perpetrators of prohibited acts possessed intent to destroy the protected group, in part, as such.[57] It did not make affirmative findings on the intent of anonymous or unidentifiable perpetrators.[58]

[49] Judgement, paras.3438, 3443-3454.
[50] Judgement, paras.3443-3454.
[51] Judgement, paras.3503-3526.
[52] Judgement, paras.3527-3535.
[53] Judgement, paras.3456-3502.
[54] Judgement, para.3457.
[55] Judgement, paras.3503-3526.
[56] Judgement, paras.5219-5220.
[57] Judgement, paras.3511, 3513, 3515, 3519, 3524.
[58] Judgement, paras.3512, 3525.

A.2.2.2 Substantiality

36. Having made affirmative findings on the physical perpetrators' intent to destroy, the Trial Chamber went on to consider "whether the targeted *part constituted a substantial part of the protected group, in so far as the specific intent* of the physical perpetrators is concerned".[59]

37. The Trial Chamber emphasised that this section of its analysis;

> [c]oncerns the specific intent of the physical perpetrators and, accordingly, in determining whether the targeted part was substantial, consideration must be given, *inter alia*, to the physical perpetrators' activity, *de facto* control, and reach.[60]

38. The Trial Chamber identified the relevant factors it should consider in determining whether a substantial part of the group was targeted.[61] For each municipality, the Trial Chamber considered: (a) the numerical size of the Bosnian-Muslims in each municipality in relation to the overall size of the Bosnian-Muslim population in BiH; (b) the prominence of the part of the group within the larger whole, and whether it was emblematic of the group as whole or essential to its survival; (c) the municipality where the prohibited crimes were committed; and (d) the part of the Bosnian-Muslim protected group within the area of control of the physical perpetrators.[62] For all of the Count 1 Municipalities, the Trial Chamber concluded that the Bosnian-Muslim population in each of the individual municipalities were a "relatively small part of the population under Bosnian-Serb activity and control".[63]

39. The Trial Chamber concluded that;

> [t]he Bosnian Muslims in [the municipalities] were targeted by the physical perpetrators of prohibited acts largely in their own respective municipalities. The Trial Chamber notes that *the physical perpetrators had limited geographical control or authority to carry out activities*. The Bosnian Muslims targeted in each individual municipality formed a relatively small part of the Bosnian-Muslim population in the Bosnian-Serb claimed territory or in Bosnia-Herzegovina as a whole. The Trial Chamber received *insufficient evidence* indicating why the Bosnian Muslims in each of the above municipalities or the

[59] Judgement, para.3526 [emphasis added].
[60] Judgement, para.3528.
[61] Judgement, para.3528; Prosecution Appeal, para.5.
[62] Judgement, para.3528, 3530-3534.
[63] Judgement, paras.3530-3534.

> municipalities themselves had a special significance or were emblematic in relation to the protected group as a whole.[64]

40. As a result, it was not satisfied beyond reasonable doubt that the only reasonable inference that could be drawn from the evidence presented was that the physical perpetrators possessed the intent to destroy the Bosnian-Muslims in the Sanski Most, Foča, Kotor Varoš, Prijedor, and Vlasenica Municipalities as a substantial part of the protected group[65] or that they possessed the requisite specific intent to destroy a substantial part of the protected group.[66]

A.3 The Prosecution's submissions

41. The Prosecution accepts that the Trial Chamber applied the correct legal standard to the question of substantiality.[67] The Prosecution alleges that no reasonable trier of fact could have concluded that the Bosnian-Muslims in the Count 1 Municipalities were not substantial parts of the Bosnian-Muslim group as a whole.[68]

A.3.1 Numerical size of communities

42. The Prosecution contends that, "the targeted part of the Bosnian Muslim Group comprised the municipality's entire Bosnian Muslim population".[69] To demonstrate the alleged unreasonableness of the Trial Chamber's decision, the Prosecution draws parallels with the Trial Chamber's findings on Srebrenica to assert that "each of the targeted communities was comparable in size to Srebrenica's Bosnian Muslim population."[70] The Prosecution alleges that the physical perpetrators acted with the intent to destroy "as large a part of the Bosnian Muslims as was within their reach".[71] Further, that the territories of the municipalities in which the physical perpetrators operated "represented the full extent of their area of activity and control".[72]

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[64] Judgement, para.3535 [emphasis added].
[65] Judgement, para.3535.
[66] Judgement, para.3536.
[67] Prosecution Appeal, para.5.
[68] Prosecution Appeal, para.5.
[69] Prosecution Appeal, para.8.
[70] Prosecution Appeal, para.9.
[71] Prosecution Appeal para.10.
[72] Prosecution Appeal, para.5, 10.

A.3.2 Prominence and emblematic nature of communities

43. The Prosecution contends that the Trial Chamber unreasonably concluded that there was insufficient evidence to prove why the Bosnian Muslims in each of the municipalities had a special significance or were emblematic to the protected group as a whole.[73]

44. Further, the Prosecution alleges, the predicate findings and underlying evidence supports that the communities were prominent and emblematic in ways that "parallel" the Bosnian-Muslim community of Srebrenica.[74] The Prosecution states that "the acts of destruction directed against the Count 1 Communities thus targeted parts of the Bosnian Muslim Group that were emblematic of the group as a whole […]".[75]

A.3.3 Prosecution's conclusion

45. In its conclusion, the Prosecution asserts that "each of the communities constituted a substantial part of the Bosnian Muslim Group" and that no reasonable trier of fact would have found that they did not.[76] The Prosecution invites the Appeals Chamber to find that the physical perpetrators possessed "genocidal intent".[77]

A.4 ANALYSIS

46. The Prosecution accepts that the Trial Chamber's methodology is correct, but disagrees with the ultimate findings.[78] The Respondent avers, the Prosecution has failed to establish that (a) the evidence was so unambiguous that a reasonable Trial Chamber was obliged to infer targeted part of the group was substantial in size; and, (b) the Trial Chamber erred in finding that the Prosecution had failed to present sufficient evidence indicating why the Bosnian-Muslims in the Count 1 Municipalities themselves had a special significance or were emblematic in relation to the protected group as a whole.

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[73] Prosecution Appeal, para.11.
[74] Prosecution Appeal, paras.11, 12-14.
[75] Prosecution Appeal, para.15.
[76] Prosecution Appeal, para.16.
[77] Prosecution Appeal, para.17.
[78] Prosecution Appeal, paras.5, 8-16.

47. The Trial Chamber reasonably concluded that, on the basis of the evidence presented, it could *not* be satisfied that the only reasonable inference was that the physical perpetrators possessed the specific intent to destroy a substantial part of the protected group.[79]

A.4.1 The Trial Chamber correctly concluded that the numerical size of the Bosnian Muslim community in each of the Count 1 Municipalities was not substantial

48. The Prosecution suggests the physical perpetrators' activity and control extended across the entire municipality and placed every Bosnian-Muslim in their respective municipalities within their potential reach.[80] As such, the "intended destruction" satisfies the substantiality requirement.[81] It then claims, using the Trial Chamber's findings on Srebrenica by analogy, that the Trial Chamber should have found that the targeted Bosnian-Muslim population in the Count 1 Municipalities were substantial in size.

49. The Respondent asserts that: (a) the numerical size of the targeted part of the protected group is limited to the opportunity presented to the physical perpetrators; and (b) the Trial Chamber's findings on the numerical size of Srebrenica is not analogous to the Count 1 Municipalities. The Respondent avers, the Prosecution fails to demonstrate that a reasonable Trial Chamber was compelled to find that the Bosnian-Muslim community in each of the Count 1 Municipalities was substantial, or that the Trial Chamber failed to consider relevant evidence in reaching its conclusions.

A.4.1.1 The Trial Chamber correctly concluded that the numerical size of the targeted part was not substantial

A.4.1.1.1 Geographical control and authority

50. The Prosecution claims that, "the targeted part of the Bosnian Muslim Group comprised of the municipality's entire Bosnian Muslim population".[82] To substantiate this, it alleges that

[79] Judgment, para.3536.
[80] Prosecution Appeal, paras. 6, 8, 10.
[81] Prosecution Appeal, para.8.
[82] Prosecution Appeal, para.8.

"the territory covered by the municipalities represented the full extent of the perpetrators' respective areas of activity and control".[83] The Respondent submits, this misconstrues the Trial Chamber's findings and fails to demonstrate an error.

51. As the Prosecution acknowledges, the numerical size of the targeted part of the Bosnian-Muslim community must be assessed in light of the physical perpetrators' geographical control and authority.[84] The Trial Chamber's findings demonstrate that it assessed the numerical size of the targeted part on this basis. The Trial Chamber held that the "physical perpetrators had *limited* geographical control or authority to carry out activities".[85] The Trial Chamber came to this conclusion after considering, amongst other factors: (a) the military level of the physical perpetrators; (b) their authority to carry out activities; (c) the areas which they operated within the municipality; (d) the Bosnian Muslims within their area of control.[86]

52. The Trial Chamber's analysis showed that the physical perpetrators' activities were geographically and temporally limited, with prohibited acts being confined to the individual physical perpetrators' sphere of responsibility (for example, specific detention centres[87] and execution sites[88]). In light of this, the Respondent asserts that the Trial Chamber's finding that the numerical size of the targeted part of the Bosnian-Muslims was not substantial, is supported by a comprehensive analysis of the evidence presented and is reasonable. The Prosecution fails to demonstrate an error.

A.4.1.1.2 Specific intent to destroy a substantial part of the group

53. As both the Trial Chamber and the Prosecution correctly identified, the specific intent to destroy is "limited by the opportunity presented to [the perpetrator]".[89] As the preceding paragraphs highlight, the physical perpetrators were limited geographically and by their

[83] Prosecution Appeal, paras.2, 6, 8, 10.
[84] Prosecution Appeal, para.10: "[t]he numerical size must be assessed in light of the perpetrators' area of activity and control".
[85] Judgement, para.3535 [emphasis added].
[86] *See* Response, paras.37-38.
[87] For example, Dragan Zelenović (see Judgement, paras.607, 616, 621), Dragoljub Kunarac (see Incidents C.6.2, C6.4 and C.6.5), Nedo Samardžić (see Judgement, para.620), Milorad Petrović (see Judgement, para.3475)
[88] For example, Slodoban Župljanin (see Judgement, paras.897 and 902), Goran Vukojević (see Judgement, para.1629), Daniluško Kajtez (see Judgement, para.1629) and Mane Đurić (see Judgement, para.3476).
[89] Judgement, para.3528; Prosecution Appeal, para.10.

restricted authority. The Trial Chamber reasonably concluded that the numerical size of the targeted part in the Count 1 Municipalities, when considered with the physical perpetrators' control, was not a substantial part of the protected group.[90]

54. The Respondent asserts, the Prosecution fails to demonstrate that the *only* reasonable inference that could have been drawn from the evidence presented is that the physical perpetrators possessed the specific intent to destroy a substantial part of the protected group. The evidence is not so "unambiguous that a reasonable Trial Chamber was obliged to infer" that all reasonable doubt of the physical perpetrators' guilt had been eliminated.[91] As such, the Prosecution fails to demonstrate an error.

A.4.1.2 The numerical size of the targeted part of the population in Srebrenica is not analogous to the targeted part of the population in the Count 1 Municipalities

55. The Prosecution draws parallels with the Trial Chamber's findings on Srebrenica to "underscore the unreasonableness" of the Trial Chamber's conclusions on substantiality.[92] Succinctly put, the Prosecution are alleging that, if the Trial Chamber found that the substantiality requirement is satisfied in Srebrenica where the targeted part represented less than 2% of the Bosnian-Muslim population in BiH as a whole, by analogy the Trial Chamber should have found that the targeted parts of the Bosnian-Muslim population in the Count 1 Municipalities were also substantial.[93] The Respondent asserts, this quantitative approach ignores the Trial Chamber's contrasting findings on the physical perpetrators' geographical control and activity in the Count 1 Municipalities and Srebrenica.

56. The Prosecution contends, in a footnote, that the Trial Chamber "incorrectly found that the Bosnian Muslims of Prijedor formed 2.2% of the total protected group".[94] In the same footnote, it calculates that the Bosnian Muslim population of Prijedor was approximately 2.6%.[95] The comparison made by the Prosecution between the 2.6% of Bosnian-Muslims of Prijedor and less than 2% in Srebrenica is to substantiate its assertion that the Trial

[90] Judgment, para.3535.
[91] *Stakić* AJ, para.56; *Popović* AJ, para.21, fn90.
[92] Prosecution Appeal, para.7.
[93] Prosecution Appeal, paras.9, 7.
[94] Prosecution Appeal, para.9, fn14.
[95] Prosecution Appeal, para.9, fn14.

Chamber's findings were unreasonable. The Respondent submits, the Prosecution's assertions are based on the false premise that calculating the numerical size is a purely mathematical analysis.

57. The Respondent recalls paragraphs 50-52 in this regard, as well as the Prosecution's own acknowledgement that "numeric size *must* be assessed in light of the perpetrators' area of activity and control".[96] By 11 July 1995, Srebrenica fell under the Bosnian-Serb control.[97] In the subsequent weeks, the Trial Chamber concluded that the physical perpetrators: (a) murdered many thousands of Bosnian-Muslim males in a UN safe area; (b) forcibly transferred "all or substantially all of the remaining Bosnian-Muslim population" from Srebrenica; (c) and destroyed political and religious monuments and homes in Srebrenica.[98] The Trial Chamber found that, the commission of these prohibited acts were "all the more significant *given the scope of the* [physical perpetrators] *activity and control* of this municipality in what was then one of the few remaining predominantly Bosnian-Muslim populated territories".[99] Unlike the Count 1 Municipalities,[100] the Trial Chamber found that the physical perpetrators possessed an exclusive and total geographical control and authority to carry out activities in Srebrenica. This, in addition to the Trial Chamber's findings on the scale, pattern of prohibited acts committed in a short period of time, and number of victims, distinguishes the evidence presented on Srebrenica from the Count 1 Municipalities.[101] On the basis of the evidence presented, the Trial Chamber reasonably concluded that the numerical size of the targeted part in the Count 1 Municipalities, when considered with the physical perpetrators' control, was *not* a substantial part of the protected group.

58. The Trial Chamber's findings on the contrasting opportunities presented to the physical perpetrators' in the Count 1 Municipalities and Srebrenica, demonstrate that the findings on the numerical size of the targeted group are not analogous. As such, the Prosecution's comparative approach is misguided and fails to demonstrate an error.

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[96] Prosecution Appeal, para.10 [emphasis added].
[97] Judgement, paras.2407-2414.
[98] Judgement, paras.3553, 3545-3549.
[99] Judgement, para.3553 [emphasis added].
[100] Response, paras.38-40.
[101] Judgement, para.3550-3554.

A.4.2 The Trial Chamber reasonably concluded that the Prosecution had adduced insufficient evidence that the Count 1 Municipalities were prominent within, and emblematic of, the Bosnian-Muslim group as a whole

59. The Prosecution alleges, the communities in each municipality were prominent and emblematic in relation to the Bosnian-Muslim population as a whole.[102] It asserts that the predicate findings and evidence demonstrate this.[103] The Prosecution suggests, the Trial Chamber erred in finding that there was insufficient evidence to establish that the Bosnian Muslims in each municipality or the municipalities themselves had a special significance or were emblematic to the protected group as a whole.[104]

60. The Respondent submits, the Prosecution simply repackages the Trial Chamber's reasoning and draws untenable parallels with the Trial Chamber's findings on Srebrenica. The Prosecution fails to demonstrate that the Trial Chamber applied the incorrect standard of proof, disregarded evidence, and unreasonably concluded that the Prosecution failed to discharge its burden of proof.

A.4.2.1 The Prosecution's claim that the Count 1 Municipalities had a "unique historic and cultural identity" to evidence their prominence and emblematic nature to the Bosnian-Muslim Group as a whole, is unsubstantiated

61. The Prosecution contends, "each of the Count 1 Municipalities was home to a sizable community of Bosnian Muslims with a unique historic and cultural identity".[105] The Respondent submits, the Prosecution fails to substantiate that the Count 1 Municipalities possessed a "unique historic and cultural identity" to establish that a reasonable Trial Chamber was *obliged* to find that they were prominent within and emblematic of the Bosnian-Muslim group as a whole.

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[102] Prosecution Appeal, para.11.
[103] Prosecution Appeal, para.11.
[104] Prosecution Appeal, para.11, 6-7.
[105] Prosecution Appeal, para.12.

A.4.2.1.1 The ethnic composition of the Count 1 Municipalities does not support that each municipality had a "unique historic and cultural identity"

62. The Prosecution relies on the Trial Chamber's quantitative findings to support that each of the Count 1 Municipalities was "home to a sizable community of Bosnian-Muslims with a unique historic and cultural identity".[106] The percentages relied on by the Prosecution simply show the number of Bosnian-Muslims in each municipality at the material time without reference to the alleged unique historic and cultural identity.

63. The evidence cited by the Prosecution in footnote 30 relates to the integration of the ethnic communities.[107] The Respondent asserts, this does not demonstrate that any of the municipalities, either individually or cumulatively, possessed a unique historic and cultural identity for the Bosnian-Muslims within those areas. Further, the paragraphs of the Judgement cited by the Prosecution does not substantiate that the Count 1 Municipalities were prominent within and emblematic of the Bosnian-Muslim group as a whole.

64. The Prosecution cites exhibits relating to Prijedor and surrounding hamlets in Biscani, Prijedor, in footnote 21, in support of its claim that the Count 1 municipalities had a unique historic and cultural identity. The evidence cited relates to the presence of minorities in Prijedor,[108] but does not demonstrate that Prijedor or any other Count 1 municipality had a unique historic and cultural identity, to establish that they were prominent within and emblematic of the Bosnian-Muslim group as a whole. The Respondent submits, the Prosecution fails to demonstrate an error in the Trial Chamber's finding.

A.4.2.1.2 The political statements made by the Bosnian-Serb leadership do not evidence that the Count 1 Municipalities had a "unique historic and cultural identity" or were prominent within, and emblematic of, the group as a whole

65. The *Krstić* Appeals Chamber considered the prominence and emblematic nature of the targeted group through the "eyes of the Bosnian-Muslims".[109] Further, it required the fate

[106] Prosecution Appeal, para.12, fn21 (citing Judgement, paras.3442, 3530-3534).
[107] Prosecution Appeal, para.13, fn30.
[108] Prosecution Appeal, para.12, fn21.
[109] *Krstić* AJ, para.16.

of the Bosnian-Muslims community should be "emblematic of that of all Bosnian-Muslims".[110] The focus of this *indicia* of substantiality is the prominence or emblematic nature of the Bosnian-Muslim community or area itself, to the Bosnian-Muslims as a protected group. The community or area must be symbolic of, and for, the protected group. To evidence the prominence of the Bosnian Muslims in the Count 1 municipalities or the municipality as a whole, the Prosecution was required at trial to adduce *sufficient* evidence demonstrating that the communities were prominent within, and emblematic of, the targeted group through the "eyes" of the Bosnian-Muslim group as a whole. The Trial Chamber, having considered all of the evidence,[111] concluded the Prosecution had failed in this regard.[112]

66. The Respondent submits, the Prosecution's reliance on the political statements of the Bosnian-Serb leadership does not substantiate that Count 1 Municipalities possessed a "unique historic and cultural identity" so as to establish that each municipality was prominent within, and emblematic of, the Bosnian-Muslim group as a whole. Furthermore, the Prosecution only refers to Foča, Prijedor and Sanski Most. These will be considered in turn.

Foča

67. To support its contention that each of the Count 1 Municipalities had a "unique historic and cultural identity", the Prosecution allege that "Foča was considered 'extremely important' to the Muslims in light of its rich Muslim heritage".[113] The paragraph cited by the Prosecution is from the Judgement. It reads as follows: "[i]n January 1994, Karadžić explained that Foča is 'extremely important to the Muslims' […]".[114] The Respondent invites the Appeals Chamber to proceed with caution. The Prosecution seeks to use a political statement from Karadžić as evidence that the Bosnian-Muslims considered Foča important. Further, the Prosecution's assertion that Foča was important "in light of its rich Muslim heritage"[115] is not based on the Trial Chamber's findings nor is it supported by

[110] *Ibid*.
[111] Judgement, para.5311.
[112] Judgement, para.3535.
[113] Prosecution Appeal, para.12.
[114] Judgement, para.3531.
[115] Prosecution Appeal, para.12.

evidence from any member of the Bosnian-Muslim group which it alleges this rich and deep connection. The Prosecution has taken a quote from the Judgement and added its own narrative about cultural heritage. This does not support the Prosecution's contention that Foča had a "unique historic and cultural identity".

68. The Prosecution's reliance on further political statements made by the Bosnian-Serb leadership that Foča was destined to become "another Mecca" or "Islamic Centre for Muslims in Europe",[116] suffers from the same deficiencies. Again, the Respondent invites the Appeals Chamber to proceed with caution when considering the weight that can be attached to this. The Respondent submits, these statements when considered in their true context fail to substantiate the Prosecution's contention that Foča had a "unique historic and cultural identity".

69. The Prosecution concludes that an attack against the Bosnian Muslims in Foča represented an attack aimed at destroying "the religious heritage and identity of the entire Bosnian-Muslim Group".[117] The Prosecution does not support this statement with any citations. As such, the Respondent invites the Appeals Chamber to proceed with caution when considering the weight that can be attached to this.

70. In light of the evidentiary deficiencies identified in the preceding paragraphs, the Respondent submits that: (a) the Prosecution has failed to demonstrate that Foča possessed a "unique historic and cultural identity"; (b) and, as a result, failed to establish that the municipality was prominent within, and emblematic of, the Bosnian-Muslim group as a whole through the "eyes" of the Bosnian-Muslims.

Sanski Most and Prijedor

71. To support its contention that each of the Count 1 Municipalities had a "unique historic and cultural identity", the Prosecution alleges that "the non-Serb communities of Sanski Most and Prijedor symbolised to Bosnian Serbs the extent of Serb suffering during WWII and 'the slaughter' of Serbs throughout the region".[118] It relies on political statements made by

[116] Prosecution Appeal, para.12.
[117] Prosecution Appeal, para.12.
[118] Prosecution Appeal, para.12.

Karadžić and Prime Minister Lukić to substantiate this,[119] and nothing else. The Respondent submits, these statements fail to demonstrate that either municipality possessed a "unique historic and cultural identity" so as to establish that each municipality was prominent within, and emblematic of, the Bosnian-Muslim group as a whole.

A.4.2.1.3 Conclusion

72. The Respondent submits, the Prosecution's attempts to repackage political statements made by the Bosnian-Serb leadership to demonstrate the unreasonableness of the Trial Chamber's conclusion is flawed. As supported by the jurisprudence, evidence as to the prominence and emblematic nature of the municipality must be assessed from the perspective of the Bosnian Muslims, not the Bosnian-Serbs. The Prosecution has failed to demonstrate that each of the Count 1 Municipalities possessed a "unique historic and cultural identity" to evidence their prominence and emblematic nature to the Bosnian-Muslim group as a whole. As such, it has failed to establish that a reasonable Trial Chamber was *obliged* to infer that the communities were prominent and emblematic from the evidence presented. [120] Therefore, the Prosecution has failed to demonstrate an error.

A.4.2.2 The parallels drawn with the Trial Chamber's findings on Srebrenica do not demonstrate any unreasonableness in the Trial Chamber's findings that the Count 1 Municipalities were not prominent within, and emblematic of, the entire Bosnian-Muslim group

73. The Prosecution alleges, the Bosnian Muslims in the municipalities were prominent and emblematic "in ways that parallel the Bosnian-Muslim community of Srebrenica".[121] Throughout the Prosecution's submissions in this section, comparisons like this are drawn between the Trial Chamber's findings on Srebrenica and the Count 1 Municipalities.[122] The Prosecution claims it does this to "underscore the unreasonableness" of the Trial Chamber's conclusions.[123] The Respondent asserts, the parallels with the Trial Chamber's findings on

[119] *See* P7294; P7028.
[120] *See Stakić* AJ, para.56; *Popović* AJ, para.21, fn90.
[121] Prosecution Appeal, para.11.
[122] Prosecution Appeal, paras.11-15.
[123] Prosecution Appeal, para.7.

Srebrenica are misguided and fail to demonstrate that a reasonable Trial Chamber was *obliged* to infer that Count 1 Municipalities were prominent and emblematic to the Bosnian-Muslim group as a whole. As such, the Prosecution fails to demonstrate an error in the Trial Chamber's findings.

A.4.2.2.1 "Vulnerability and defencelessness"

74. The Prosecution claims, the pattern of crimes and targeting of the Bosnian-Muslims in the municipalities in the early stages of the conflict "was as much of a signal to the Bosnian Muslims in BiH of their vulnerability and defencelessness as the acts of destruction targeting the Bosnian Muslims of Srebrenica".[124]

75. The Respondent recalls paragraphs 57, setting out the Trial Chamber's finding that the numerical size of the Bosnian-Muslim population in Srebrenica was substantial. The Trial Chamber was satisfied that the Bosnian-Muslims in Srebrenica were prominent and emblematic of the group as a whole on the basis that: (a) Srebrenica was one of the few remaining predominantly Bosnian-Muslim populated territories in the area claimed as the Republika Sprska; (b) it had become a refuge for Bosnian Muslims from across the country; (c) the "symbolic impact" of the murder of the Bosnian-Muslims males in a designated UN safe area; (d) the simultaneous nature of the murders, destruction of religious buildings and homes in the area, and forcible transfers of the women, children and elderly from the region; and, (e) the "symbolic impact" of the extent of the Bosnian-Serb control over this area.[125] The Trial Chamber concluded that the pattern of the crimes in this context supported its findings that the Bosnian-Muslims in Srebrenica were prominent within, and emblematic of, the Bosnian-Muslim group.

76. The Respondent recalls paragraphs 39, setting out the Trial Chamber's finding that the Prosecution had failed to prove that the Bosnian-Muslims in the Count 1 Municipalities were prominent within, and emblematic of, the group. To demonstrate the unreasonableness of the Trial Chamber's findings, the Prosecution relies on the paragraphs of the Judgement

[124] Prosecution Appeal, para.13; The Respondent notes, the phrase "vulnerability and defencelessness" was coined by the *Krstić* Appeals Chamber in the context of its findings that murder and other culpable acts had been committed against Bosnian-Muslims in Srebrenica, despite it being a UN safe area, when it was under the control of the Bosnian-Serbs (*Krstić* AJ, para.16).
[125] Judgement, paras.3553-3554.

and exhibits cited in footnotes 29 and 30 of its appeal. The evidence relied upon relates to ethnic integration in the municipalities. The Prosecution fails to discharge its burden and substantiate its contention that the communities or areas were symbolic of the protected group as a whole. Its assertion that the Count 1 Municipalities were prominent and emblematic "in ways that parallel the Bosnian-Muslim community of Srebrenica" is, therefore, unfounded. The Respondent submits, the Prosecution fails to prove any unreasonableness in the Trial Chamber's finding that the Count 1 Municipalities were not prominent and emblematic in relation to the entire Bosnian-Muslim group. As such, it fails to demonstrate an error.

A.4.2.2.2 Prijedor as a "refuge"

77. The Prosecution relies on a comparison between the Trial Chamber's findings that Srebrenica was a refuge to Bosnian-Muslims in 1995, and its own contention that Prijedor "represented a perceived refuge" to support its contention that the Count 1 Municipalities were prominent and emblematic "in ways that parallel the Bosnian-Muslim community of Srebrenica".[126]

78. The Trial Chamber concluded that Srebrenica served as a refuge to Bosnian Muslims because: (a) it was one of the last remaining predominately Bosnian-Muslim populated territories; and (b) it was designated a UN safe area through the international community's political and military involvement.[127] Further, it found that the symbolic impact of murdering Bosnian Muslims in an UN safe area was considered to be indicative of "the ultimate fate that awaited Bosnian-Muslims in Bosnia-Herzegovina" as a result.[128]

79. The Prosecution draws a parallel with the Trial Chamber's findings on Srebrenica by alleging that Prijedor "represented a perceived refuge from ethnic violence for Bosnian Muslims at the start of the conflict".[129] The Prosecution relies on paragraphs of the Judgement and exhibits in footnote 29 of its appeal, which relate to ethnic integration and a possible plan to divide the municipality. Further, despite the Prosecution citing paragraph

[126] Prosecution Appeal, para.13.
[127] Judgement, paras.3553-3554.
[128] Judgement, para.3553.
[129] Prosecution Appeal, para.13.

3534 of the Judgement in support of its assertion, the Trial Chamber does not make any reference to Prijedor being perceived in this way.[130] The fact that Prijedor was integrated does not support the Prosecution's claim that it was a perceived refuge at the start of the conflict.

80. The Respondent asserts, the Prosecution has failed to substantiate its claim that Prijedor was perceived as a refuge to Bosnian-Muslims in 1992. Therefore, it has failed to prove any unreasonableness in the Trial Chamber's finding that the Count 1 Municipalities were not prominent and emblematic in relation to the entire Bosnian-Muslim group. As such, the Prosecution fails to demonstrate an error.

A.4.2.2.3 Conclusion

81. The Respondent submits, the parallels drawn with the Trial Chamber's findings on Srebrenica do not demonstrate any unreasonableness in the Trial Chamber's findings that the Count 1 Municipalities were not prominent and emblematic in relation to the entire Bosnian-Muslim group.

A.4.2.3 The strategic importance of the municipalities to the Bosnian-Serbs does not demonstrate that the communities were prominent within, and emblematic of, the Bosnian-Muslim group as a whole

82. To substantiate its contention that the Count 1 Communities were prominent within, and emblematic of, the Bosnian-Muslim group as a whole, the Prosecution claims that the municipalities held "immense strategic importance for the Bosnian Serb leadership".[131] It then cites to other parts of the Judgement referencing political statements in support of this.[132]

83. The Trial Chamber expressly considered the strategic importance of each municipality in the Judgement.[133] The Respondent further recalls paragraphs 20, identifying the

[130] *See* Prosecution Appeal, para.13, fns29-30.
[131] Prosecution Appeal, para.14.
[132] *See* Prosecution Appeal, para.14, fns32-42.
[133] Judgement, paras.3530-3534.

presumption that the Trial Chamber reviewed all of the evidence before it and "examined every piece of evidence individually, as well as in light of the totality of the evidence" whether it cited it or not.[134] The Appellant must demonstrate an error in this regard.

84. The Respondent recalls paragraphs 65, highlighting that it must be established that the communities are prominent within, and emblematic of, the Bosnian-Muslim group as a whole through the "eyes" of the protected group itself. The Respondent asserts that the Prosecution's reliance on political statements from the Bosnian-Serb leadership about the strategic importance of the Count 1 Municipalities does not substantiate that the Bosnian-Muslim community in each municipality was prominent within, and emblematic of, the group as a whole.

A.4.3 Conclusion

85. The Respondent submits, the Prosecution's attempts to repackage political statements made by the Bosnian-Serb leadership to demonstrate the unreasonableness of the Trial Chamber's conclusion, fails to demonstrate that each of the Count 1 Municipalities were prominent within, and emblematic of, the Bosnian-Muslim Group as a whole. As such, it has failed to prove that a reasonable Trial Chamber was *obliged* to infer that the communities were prominent and emblematic from the evidence presented. [135]

A.5 THE PROSECUTION FAILS TO MEET THE APPELLATE STANDARD

86. The Respondent recalls the "heavy burden of persuasion" borne by the Prosecution on appeal against factual findings.[136] The Respondent submits, the Prosecution has failed to establish that the Trial Chamber's findings that (a) the Bosnian-Muslim communities in the Count 1 Municipalities were not substantial in size, and (b) that the Prosecution had failed to establish that the targeted part of the Bosnian-Muslim community were prominent within, and emblematic of, the Count 1 Municipalities, were findings that no reasonable tier of fact could have reached. Further, the Respondent asserts that the Appeals Chamber cannot conclude that the evidence in relation to the numerical size of the targeted part, or the

[134] Judgement, para.5311.
[135] *See Stakić* AJ, para.56; *Popović* AJ, para.21, fn90.
[136] *Stakić* AJ, para.56.

prominence and emblematic nature of the communities, is so unambiguous that a reasonable Trial Chamber was obliged to infer that all doubt that the physical perpetrators' possessed the specific intent to destroy a substantial part of the group had been eliminated.[137]

A.6 REMEDY SOUGHT

87. The Respondent invites the Appeals Chamber to dismiss Ground 1 of the Prosecution's appeal.

[137] *See Stakić* AJ, para.56.

III. GROUND 2: THE PROSECUTION HAS FAILED TO DISCERN ANY ERROR IN THE TRIAL CHAMBER'S FINDINGS THAT THE RESPONDENT AND OTHER JCE MEMBERS DID NOT POSSESS "DESTRUCTIVE INTENT"

88. The Respondent submits, the Trial Chamber's finding that the Respondent and other OJCE members did not possess "destructive intent" was not based on a heightened evidentiary standard and does not represent an error of fact.[138] The Respondent avers, the Trial Chamber correctly concluded that the Prosecution had failed to prove that the *only* reasonable inference that could be drawn from the evidence was that the crime of genocide formed part of the common plan.

89. The Respondent invites the Appeals Chamber to dismiss Ground 2 of the Prosecution's appeal on the basis that: (a) it fails to demonstrate an error of law or fact; and, (b) it fails to demonstrate that the evidence was so unambiguous that a reasonable Trial Chamber was obliged to infer that all reasonable doubt of the Respondent's guilt had been eliminated.

A. Ground 2(a): The Trial Chamber did not apply a heightened evidentiary threshold when assessing the "destructive intent" of the Respondent and other OJCE members

90. The Prosecution's suggestion that the Trial Chamber applied a heightened evidentiary standard misunderstands the applicable law and misconstrues the Trial Chamber's findings. The Respondent asserts, the Trial Chamber applied the correct legal standard in accordance with the burden and standard of proof.

A.1 Applicable Law

A.1.1 Appellate standard

91. The Respondent recalls paragraphs 17-18, on the appellate standard applicable to errors of law and errors of fact. On appeal, the Prosecution must demonstrate that that the evidence

[138] *Contra* Prosecution Appeal, para.19.

is so "unambiguous that a reasonable Trial Chamber was obliged to infer" that all reasonable doubt of the accused's guilt had been eliminated.[139]

92. The Respondent further recalls paragraphs 20, identifying the presumption that the Trial Chamber considered all of the evidence presented to it, and the burden on the Appellant to demonstrate an error in this regard.

A.1.2 The mens rea required for the crime of genocide

93. The Respondent recalls paragraphs 22-23, setting out the *mens rea* element for the crime of genocide.

A.1.3 When can JCE members incur liability for physical perpetrators who are non-JCE members?

94. In relation to members of a JCE incurring liability for crimes committed by physical perpetrators who were non-JCE members, the Appeals Chamber in *Karadžić* held that;

> [t]he relevant question in the context of JCE I liability is whether the JCE member used the non-JCE member to commit the *actus reus* of the crime forming part of the common purpose; it is not determinative whether the non-JCE member shared the *mens rea* of the JCE member or that the non-JCE member knew of the existence of the JCE. Therefore, in accordance with the allegations underlying Count 1 of the Indictment, *it is the genocidal intent of Karadžić and other alleged JCE members, not the physical perpetrators of the underlying genocidal acts, that is determinative for the purposes of JCE I*.[140]

95. This reflects the approach taken by previous Appeals Chambers.[141]

A.2 THE TRIAL CHAMBER'S APPROACH

96. The Respondent recalls paragraphs 35-40, for the Trial Chamber's approach to the physical perpetrators' intent.

[139] *Stakić* AJ, para.56; *Popović* AJ, para.21, fn90.
[140] *Karadžić* 98*bis* Appeal Decision, para.79 [citations omitted, emphasis added].
[141] *Krajišnik* AJ, para.225; *Brđanin* AJ, paras.410-413, 430.

97. With regards to the Respondent and other OJCE members, the Trial Chamber expressly considered the Prosecution's arguments that "the number and nature of the crimes, considered together, reflected an intent to destroy the groups in part rather than an intention to 'ethnically cleanse'".[142]

98. The Trial Chamber then analysed the statements and speeches of the Respondent and others involved in the alleged OJCE members to determine whether they demonstrated a specific intent to destroy the protected groups.[143] The Trial Chamber noted;

> [c]onsidering the disparate dates, meetings, and purposes of the speeches and statements, the Trial Chamber is careful not to combine them to give a semblance of a collective intent to destroy where no such collective intent existed or to read individual statements and speeches in isolation and without context.[144]

99. The Trial Chamber concluded that, while speeches and statements evidenced and intent towards ethnic separation, they were insufficient to evidence an intention on behalf of the Respondent to physically destroy the protected groups.[145]

100. The Trial Chamber explained that;

> [a]n inference that the Bosnian-Serb leadership sought to destroy the protected groups in the Count 1 municipalities through the use of a number of physical perpetrators as tools *requires more*. In the absence of other evidence which would unambiguously support a finding of genocidal intent, drawing an inference on the basis of prohibited acts of physical perpetrators alone is insufficient.[146]

101. The Trial Chamber concluded that it could not be satisfied that the only reasonable inference was that the crime of genocide formed part of the objective of the OJCE.[147]

A.3 THE PROSECUTION'S SUBMISSIONS

[142] Judgement, para.4233.
[143] Judgement, para.4235.
[144] Judgement, para.4235.
[145] Judgement, para.4235.
[146] Judgement, para.4236 [emphasis added].
[147] Judgement, para.4237.

102.The Prosecution suggests, the Majority's finding that the physical perpetrators possessed "destructive intent" was sufficient for the Trial Chamber to infer that the Respondent and other OJCE members also shared this "destructive intent".[148] The Prosecution alleges, the Trial Chamber failed to reach this conclusion because it imposed an impermissibly heightened evidentiary standard[149] because "it required 'more' evidence that 'unambiguously supported genocidal intent'".[150] The Prosecution contends that this "categorical restriction on its ability to infer destructive intent" from the pattern of crimes was an error[151] and was "not supported by any legal rule or precedent".[152]

103.The Prosecution further asserts that the inferences drawn from the "large-scale criminality" should be "stronger" for the leadership figures than for the low-level perpetrators.[153] It advances the OJCE members' "ability to steer the overall pattern of crimes" and their authority over the physical perpetrators, in support of this submission.[154]

104.The Prosecution concludes that the "disparate treatment" of the physical perpetrators on the one hand and the Respondent and other OJCE members on the other "underlines the arbitrary – and erroneous – nature of the Chamber's heightened evidentiary standard".[155]

A.4 Analysis

105.The Respondent submits that: (a) the Trial Chamber did not apply a heightened evidentiary standard; and (b), the examples cited by the Prosecution do not support its contention that a heightened evidentiary standard was applied.

106.Before addressing the Prosecution's submissions, the Respondent highlights several observations on the terminology used by the Prosecution in Ground 2.

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[148] Prosecution Appeal, paras.22, 19.
[149] Prosecution Appeal, para.22-25.
[150] Prosecution Appeal, para.22.
[151] Prosecution Appeal, para.23-24.
[152] Prosecution Appeal, para.24.
[153] Prosecution Appeal, para.24.
[154] Prosecution Appeal, paras.24-25.
[155] Prosecution Appeal, para.25.

A.4.1 The Respondent's observations on the terminology used by the Prosecution

107. The Prosecution uses the phrases, "destructive intent" and "genocidal and other culpable acts" throughout Ground 2.

<u>"Destructive intent"</u>

108. The Respondent notes, the Prosecution repeatedly uses the phrase "destructive intent" throughout Ground 2. The Respondent recalls paragraph 8, in the Introduction in this regard.

109. No definition of this is proffered by the Prosecution and it is not used by the Trial Chamber in the Judgement. Further, no legal basis is provided to support the use of this terminology in the present context. To assist the Appeals Chamber, and to avoid ambiguity, the Respondent will use quotation marks when referring to the Prosecution's term "destructive intent".

<u>"Genocidal acts"</u>

110. The Prosecution uses the phrase "genocidal acts" throughout Ground 2(B)(1) when refencing the prohibited acts established under Art.4(2)(a)-(b) by the Trial Chamber.

111. The Respondent recalls paragraphs 21-22, for the crime of genocide one or more prohibited acts enumerated in Art.4(2) must be established. The Trial Chamber considered all of the underlying crimes of persecution and identified the incidents that satisfied the *actus reus* of the acts enumerated under Art.4(2)(a)-(c).[156] It then refers to these as "prohibited acts" in the Judgement.[157] The Respondent notes, the acts proscribed in Art.4(2)(a)-(b) can only be elevated to genocide if they are committed with the intention to destroy the protected group in whole or in part.[158] Given that the Trial Chamber concluded that the physical perpetrators did not possess the requisite specific intent, using the phrase "genocidal acts" to represent the prohibited acts committed under Art.4(2)(a)-(b) is legally inaccurate. The Prosecution's

[156] Judgement, paras.3445-3455.
[157] Judgement, paras.3458-3526.
[158] *Stakić* TJ, paras.518-520.

terminology erroneously elevates the prohibited acts by referring to them as “genocidal acts”. This mischaracterises the Trial Chamber’s findings.

112. The Respondent adopts the terminology used by the Trial Chamber, which is consistent with the applicable law – ‘prohibited acts’ – and uses quotation marks when referencing the Prosecution’s terminology “genocidal acts”.

A.4.2 The Trial Chamber applied the correct evidentiary standard in accordance with trite law

A.4.2.1 Overview

113. The Prosecution asserts, the Trial Chamber applied a heightened evidentiary standard.[159] The Prosecution claims, in requiring the evidence to unambiguously support intent, the Trial Chamber imposed a “categorical restriction on its ability to infer destructive intent on the part of JCE members” and that “such a restriction is not supported by any legal rule or precedent”.[160] The Respondent recalls paragraph 19, identifying the burden and standard of proof required by the Tribunal. The Trial Chamber concluded that it could not be satisfied that OJCE members possessed the specific intent to destroy.[161] It did not apply a heightened evidentiary standard, it applied the correct legal standard by requiring the Prosecution to prove the that the only reasonable inference that could be drawn from the evidence, was that the Respondent and other OJCE members possessed the specific intent to destroy the protected group.

114. The Prosecution claims, the Trial Chamber erroneously “required ‘more’ evidence that ‘unambiguously’ supported genocidal intent on the part of OJCE members”.[162] These submissions will be addressed in turn.

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[159] Prosecution Appeal, para.22.
[160] Prosecution Appeal, para.24.
[161] Judgement, para.4236.
[162] Prosecution Appeal, para.22.

A.4.2.1 The Trial Chamber's finding that more evidence was required is reasonable

115. The Trial Chamber found that "[a]n inference that the Bosnian-Serb leadership sought to destroy the protected groups in the Count 1 municipalities through *the use of a number of physical perpetrators as tools requires more*".[163] The Trial Chamber considered that the acts committed by the physical perpetrators used as tools was, in and of itself, insufficient to prove that the Respondent and other OJCE members possessed the requisite intent to destroy.[164] The Respondent submits, the reference to "requir[ing] more" is simply the Trial Chamber identifying and applying the requisite burden and standard of proof.

116. The Respondent notes, the Trial Chamber found that a JCE existed to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian-Serb claimed territory, through the commission of crimes against humanity.[165] It concluded that the statements and conduct of the Respondent and other OJCE members was consistent with "ethnic separation and division" rather than physical destruction,[166] which provided another reasonable inference, inconsistent with a specific intent to destroy the protected group, that could be drawn from the evidence presented.

117. The Respondent submits, the Trial Chamber properly considered the evidentiary weight that could be attached to the use of physical perpetrators as tools. It correctly found that this alone was insufficient to support the finding that the *only* reasonable inference that could be drawn was that the Respondent and other OJCE members possessed the specific intent to destroy. The Trial Chamber applied the correct legal standard.

A.4.2.2 The Trial Chamber's finding that other unambiguous evidence was required is reasonable

118. The Trial Chamber found that, "in the absence of other evidence which would *unambiguously support a finding of genocidal intent*, drawing an inference on the basis of

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[163] Judgement, para.4236 [emphasis added].
[164] Judgement, para.4236.
[165] Judgement, para.4232.
[166] Judgement, para.4235.

the prohibited acts of the physical perpetrators alone is *insufficient*".[167] The Respondent submits, requiring the evidence to be unambiguous is in accordance with the burden on the Prosecution to prove its case beyond reasonable doubt. The Trial Chamber's findings that the Respondent and other OJCE members' statements were consistent with "ethnic separation and division" as opposed to physical destruction,[168] provided another reasonable inference that could be drawn from the evidence presented, which is inconsistent with the required specific intent to destroy.

119. The Trial Chamber properly considered the evidentiary weight that could be attached to the prohibited acts of the physical perpetrators. By this analysis, it correctly found that this alone was insufficient to support that the *only* reasonable inference that could be drawn was that the Respondent and other OJCE members possessed the specific intent to destroy the group.[169] The Trial Chamber applied the correct legal standard.

A.4.2.3 Conclusion

120. The Prosecution's allegation that the Trial Chamber applied a heightened evidentiary standard misunderstands the applicable law, including the burden and standard of proof, and the Trial Chamber's findings. The Trial Chamber applied the correct evidentiary standard in accordance with the burden and standard of proof. It correctly concluded that the Prosecution failed to discharge its burden beyond reasonable doubt. The Prosecution has failed to establish any error in this finding.

A.4.3 The Trial Chamber reasonably concluded that the underlying prohibited crimes were an insufficient evidentiary basis for the Majority to infer that the Respondent and other OJCE members possessed the requisite intent

121. The Prosecution cites numerous examples of how the Trial Chamber applied a heightened evidentiary standard to support the alleged error in law. The Respondent submits, these

[167] Judgement, para.4236 [emphasis added].
[168] Judgement, para.4235.
[169] Judgement, para.4236.

examples demonstrate the Prosecution's misunderstanding of both the applicable law and the Trial Chamber's findings.

A.4.3.1 The conduct used to infer that the physical perpetrators possessed the requisite intent when carrying out the prohibited acts is not "equally attributable"[170] to the Respondent and other OJCE members

122. The Prosecution alleges, "the body of criminal conduct that the Majority used to infer the destructive intent of local perpetrators was equally applicable to the JCE members".[171] It relies on the ambit of the common purpose, the OJCE members' intent, and the pattern of crimes to substantiate its submissions. These will be considered in turn.

A.4.3.1.1 The Prosecution's reliance on the Trial Chamber's findings of the OJCE common plan is erroneous

123. The Prosecution states, in a footnote, "all the genocidal and other acts in which the perpetrators with destructive intent participated […] were within the scope of the common purpose".[172] The Prosecution are seeking to rely on the Trial Chamber's findings that incidents of crimes against humanity were part of the OJCE, to establish that the prohibited acts under Article 4(2) also fell within the scope of this common purpose. This is incorrect as a matter of law and fact.

124. The Respondent notes, crimes against humanity and genocide are separate crimes under Article 5 and Article 4 of the Statute respectively. Further, that for JCE-I liability to be engaged, the JCE member must have used the physical perpetrators to commit the *actus reus* of the crime within the common purpose.[173]

125. The Prosecution's contention that "all the genocidal and other acts"[174] were within the scope of the common purpose elides the Trial Chamber's findings on crimes against humanity and

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[170] Prosecution Appeal, para.23.
[171] Prosecution Appeal, para.23.
[172] Prosecution Appeal, para.23, fn52.
[173] *Karadžić* 98*bis* Appeal Decision, para.79.
[174] Prosecution Appeal, para.23.

genocide. The Respondent recalls, the Trial Chamber found that the crimes of persecution, extermination, murder, forcible transfer and deportation were within the scope of the OJCE's common purpose,[175] not genocide[176]. Therefore, the Trial Chamber found that the crimes against humanity were within the scope of the common purpose, not the prohibited acts established under Art.4(2). The Prosecution mischaracterises the Trial Chamber's findings. As such, its reliance on the ambit of the common purpose does not demonstrate an error in the Trial Chamber's approach.

A.4.3.1.2 The intent of the OJCE members

126. The Prosecution alleges, the JCE members intended the commission of the prohibited acts by the physical perpetrators.[177] The Trial Chamber did not make this finding and the Prosecution fails to prove that all reasonable doubt of the Respondent's guilt has been eliminated.

127. The Prosecution's statement elides the Trial Chamber's findings on crimes against humanity and genocide, and is inaccurate. It cites paragraph 4232 of the Judgement, which sets out the Trial Chamber's findings that there existed a JCE with the objective of permanently removing Bosnian Muslims and Bosnian Croats from Bosnian-Serb claimed territory through persecution, extermination, murder, inhumane acts (forcible transfer) and deportation.[178] The Prosecution avoids the clear differentiation made by the Trial Chamber between its findings on crimes against humanity set out in paragraph 4232, and for genocide in paragraphs 4233-4237. The Trial Chamber's findings that the Respondent and other OJCE members possessed the requisite intent for crimes against humanity, does not establish the specific intent to destroy the protected group.

128. The Trial Chamber concluded that there was insufficient evidence to establish that the *only* reasonable inference that could be drawn from the evidence presented was that the Respondent and OJCE members possessed the requite intent. The Prosecution fails to discharge its burden and prove otherwise.

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[175] Judgement, para.4232.
[176] Judgement, para.4237.
[177] Prosecution Appeal, para.23.
[178] Judgement, para.4232.

A.4.3.1.3 Pattern of crimes

129. The Prosecution's suggestion that, the "JCE members were found to have committed the same pattern of crimes collectively committed by the [physical] perpetrators",[179] is inaccurate. The Trial Chamber found that the pattern of acts was, in and of itself, an insufficient basis to conclude that the OJCE members possessed the specific intent to destroy the protected group.[180]

130. As outlined in the preceding paragraphs, the Trial Chamber did not find that the OJCE members committed the crimes enumerated under Art.4(2) as (a) they fell outside the common plan, and (b) the OJCE did not possess the specific intent to destroy. The Prosecution's claim, again, elides the Trial Chamber's findings on crimes against humanity with the crime of genocide. The Prosecution fails to demonstrate an error in the Trial Chamber's approach.

A.4.3.1.4 Conclusion

131. In light of the aforementioned, the Respondent asserts that the Prosecution's suggestion that the "body of criminal conduct" was "equally attributable to JCE members"[181] demonstrates a misunderstanding of both the law, and the Trial Chamber's findings. The Prosecution fails to discern any error in the Trial Chamber's approach. The Prosecution has not discharged its burden and demonstrated the Trial Chamber applied a heighted evidentiary standard.

A.4.3.2 The Trial Chamber properly considered the evidentiary weight that could be afforded to the pattern of crimes

132. The Prosecution alleges, "the *pattern of crimes committed by JCE members* through tools […] should have greater evidentiary value" for assessing the intent to destroy.[182] The

[179] Prosecution Appeal, para.23.
[180] Judgment, para.3504.
[181] Prosecution Appeal, para.23.
[182] Prosecution Appeal, para.24 [emphasis added, original emphasis removed].

Respondent recalls paragraphs 126-130, identifying the Prosecution's erroneous attempts to rely on the Trial Chamber's findings on the pattern of crimes against humanity. The Trial Chamber found that there was insufficient evidence to draw an inference that the Respondent and other OJCE members committed one or more of the acts enumerated in Art.4(2) through the physical perpetrators with the requisite intent.[183]

133. The Prosecution claims, there is no legal basis "or logic to discount the evidentiary weight of an *underlying pattern of crimes* simply because it is being used to assess the intent of a leadership figure".[184] The Respondent recalls, the pattern of crimes committed by a non-JCE member can only be attributed to a JCE member if the *actus reus* of the crime fell within the scope of the common purpose.

134. The Respondent recalls that, as a matter of law, an inference of guilt must be the *only* reasonable inference capable of being drawn from the evidence presented.[185] The Respondent notes, the Trial Chamber stated that the use of the physical perpetrators as tools to commit the underlying crimes was, in and of itself, insufficient to establish that the *only* reasonable inference that could be drawn from the evidence is that the Respondent and OJCE members possessed the requisite intent.[186] In light of the totality of the evidence presented by the Prosecution, the Trial Chamber correctly concluded the pattern of crimes committed by the physical perpetrators provides limited evidentiary value in and of itself. The Trial Chamber applied the correct legal standard and reached a reasonable conclusion.

135. The Prosecution further claims that, "the inferences drawn from the large-scale organised commission of crimes in relation to the *mens rea* of leadership figures *responsible for that large-scale criminality* should logically be stronger, not weaker" than the physical perpetrators.[187] The Respondent notes that, as a matter of law, an inference of guilt must be the *only reasonable inference* capable of being drawn from the evidence presented. It is not a question of strength.[188] The Trial Chamber correctly concluded that, drawing an inference that the Respondent and other OJCE members possessed the requisite intent on the basis of

[183] *See* Judgement, para.4236.
[184] Prosecution Appeal, para.24 [emphasis added].
[185] Response, para.18.
[186] Prosecution Appeal, para.4236.
[187] Prosecution Appeal, para.24 [emphasis added, original emphasis removed].
[188] Response, para. 18.

the prohibited acts committed by the physical perpetrators *alone* was insufficient. The Respondent asserts, the Trial Chamber reasonably concluded that the intention to destroy was not the *only* reasonable inference that could be drawn from the evidence. The Trial Chamber did not apply a heightened evidentiary standard.

136. In conclusion, the Respondent submits that the Prosecution has failed to demonstrate that the Trial Chamber applied a heightened evidentiary standard.

A.4.3.3 The intent to destroy possessed by the mid and low-level commanders is not determinative of the Respondent's and other OJCE members' intent

137. The Prosecution tries to draw a comparison between non-physical perpetrators, that were found to possess the intent to destroy when the prohibited acts were committed, and the Respondent and other OJCE members.[189]

138. The Trial Chamber did not treat the non-physical perpetrators and the OJCE members differently. The Trial Chamber, on both occasions, considered whether the evidence presented could establish that the *only* reasonable inference that could be drawn was one of an intent to destroy.[190] This is consistent with, not only the burden and standard of proof but also, the need to "distinguish between the individual intent of the accused and the intent involved in the conception and commission of the crime".[191] The Trial Chamber correctly, and reasonably, considered the inferences that could be drawn from the acts and intent of the non-physical perpetrators and concluded that this alone was insufficient to demonstrate that the only reasonable inference that could be drawn from the totality of the evidence.[192] The Prosecution fails to demonstrate that the Trial Chamber applied a heighted evidentiary standard.

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[189] Prosecution Appeal, para.25.
[190] Judgement, paras.3509-3524; 4234-4236.
[191] *Krstić* TJ, para.549; *see* also *Karadžić* 98*bis* Appeal Decision, para.79.
[192] Judgement, paras.4235-4236.

A.4.4 The Trial Chamber correctly concluded that genocide did not form part of the common purpose of the OJCE

139. The Prosecution contends, the Trial Chamber applied a heightened evidentiary standard, and this led it to erroneously conclude that genocide did not form part of the OJCE.[193]

140. The Trial Chamber concluded, in light of its findings, that there was insufficient evidence to support an inference that the Respondent and the other OJCE members possessed the specific intent to destroy, and;

> [h]aving assessed the *entire trial record*, including the statements, speeches, and conduct of [the Respondent] and the Bosnian-Serb leadership as well as the prohibited and other culpable acts committed by the physical perpetrators, *[it was] not satisfied that the only reasonable inference that can be drawn from the evidence is that the crime of genocide formed part of the objective of the [OJCE]*.[194]

141. The Trial Chamber considered the totality of the evidence to determine whether an inference that genocide formed part of the OJCE was the *only* reasonable inference that could have been drawn from the evidence presented. The Respondent asserts, the Trial Chamber explicitly applied the correct legal standard in accordance with the burden and standard of proof.[195] The Respondent avers, the Prosecution fails to substantiate its assertion that the Trial Chamber applied a heighted evidentiary standard.

A.5 THE PROSECUTION FAILS TO MEET THE APPELLATE STANDARD

142. The Respondent submits, the Prosecution fails to demonstrate that the Trial Chamber erred in law. The Prosecution misunderstands the Trial Chamber's approach and the applicable law. The Trial Chamber applied the correct evidentiary standard to conclude that it could not be satisfied that the *only* reasonable inference that could be drawn from the evidence was that the Respondent and the other OJCE members possessed the requisite intent and that genocide formed part of the common plan. The Prosecution fails to substantiate its submission that the Trial Chamber applied a heightened evidentiary standard.

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[193] Prosecution Appeal, para.20-21.
[194] Judgement, para.4237 [emphasis added].
[195] *See* Response, paras.19.

A.6 REMEDY SOUGHT

143. The Respondent invites the Appeals Chamber to dismiss Ground 2(a) of the Prosecution's appeal.

B. Ground 2(b): The Prosecution has failed to discern any error in the Trial Chamber's finding that the Respondent and other JCE members did not possess "destructive intent"

144. The Respondent submits, the Prosecution has failed to demonstrate that the evidence of the Respondent's and OJCE members' intent is such that a reasonable Trial Chamber was obliged to infer that all reasonable doubt of their guilt had been eliminated.[196] As such, the Prosecution fails to meet the appellate standard and demonstrate an error of fact.

B.1 Applicable law

B.1.1 Appellate standard

145. The Respondent recalls paragraphs 18 relating to errors of fact.

B.1.2 The actus reus *and* mens rea *required for the crime of genocide*

146. The Respondent recalls paragraphs 21-23, identifying the legal elements of genocide.

B.2 The Trial Chamber's approach

147. The Respondent recalls paragraphs 32-40, setting out the Trial Chamber's approach to substantiality, and paragraphs 96-101, setting out the Trial Chamber approach to the Respondent and other OJCE members' intent.

B.3 The Prosecution's submissions

148. In Ground 2(B) of the Prosecution's appeal, it claims that: (a) the Majority's finding that the physical perpetrators possessed "destructive intent" means that the Trial Chamber erred in failing to find that the Respondent and other OJCE members shared this "destructive

[196] *Stakić* AJ, para.56.

intent";[197] and, (b) the public statements made by the Respondent and other OJCE members demonstrated that they acted with "destructive intent" towards the Count 1 municipalities.[198]

149. As a remedy, the Prosecution invites the Appeals Chamber to find that the Respondent and other OJCE members possessed the intent to destroy the protected group.[199] It asserts that if the Appeals Chamber grants Ground 1 of its appeal and finds substantiality, this finding would evidence the specific intent to destroy a substantial part of the group.[200]

B.3.1 Ground 2(B)(1)

150. The Prosecution alleges, the "scale of genocidal acts committed by the OJCE members far exceeded that of any [physical perpetrator]".[201] Further, that the OJCE members controlled the pattern of crimes "through a common criminal purpose".[202] The Prosecution assert that the Trial Chamber;

> [a]ppeared to justify its differential treatment of intent in relation to the local perpetrators versus JCE members on the basis that the former group physically participated in genocidal and other culpable acts, while the latter did not.[203]

151. The Prosecution then repeats that the OJCE members planned, prepared, controlled and furthered the crimes committed in the municipalities.[204] It cites examples from the Judgement to support this assertion.[205]

152. The Prosecution concludes that no reasonable trier of fact could have found that the physical perpetrators possessed destructive intent based on the scale and nature of the crimes, but not the Respondent and other OJCE members.[206]

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[197] Prosecution Appeal, paras.28-36.
[198] Prosecution Appeal, paras.37-41
[199] Prosecution Appeal, para.42.
[200] Prosecution Appeal, paras.44-45, 47.
[201] Prosecution Appeal, para.29.
[202] Prosecution Appeal, para.30.
[203] Prosecution Appeal, para.31.
[204] Prosecution Appeal, paras.32-36.
[205] Prosecution Appeal, paras.32-36.
[206] Prosecution Appeal, para.28.

B.3.2 Ground 2(B)(2)

153.The Prosecution alleges, "the commission of [the] same prohibited acts together with explicit expressions of genocidal intent clearly demonstrates the destructive intent of leadership figures".[207] The Prosecution relies on examples of speeches and statements from OJCE members to evidence this.[208] The Prosecution contends, "there is only one reasonable conclusion: [the Respondent] and other OJCE members acted with destructive intent" towards the Count 1 Communities.[209]

B.4 ANALYSIS

154.The Respondent will consider the Prosecution's submissions in turn. The Respondent submits, the Prosecution has failed to meet the appellate standard and demonstrate that the evidence was so unambiguous that a reasonable Trial Chamber was obliged to infer that all reasonable doubt of the Respondent's guilt had been eliminated.

B.4.1 Ground 2(b)(1): The Trial Chamber correctly concluded that the "destructive intent" of the physical perpetrators did not compel a finding that the Respondent and other OJCE members shared this "destructive intent"

155.The Prosecution suggests that, no reasonable trier of fact could have found that the physical perpetrators possessed the intent to destroy based on the "scale and nature of the crimes", but that the Respondent and other OJCE members did not.[210]

156.The Respondent recalls paragraphs 132-138. The Trial Chamber did not find that the Respondent and the other OJCE members responsible for the commission of any acts under Art.4(2) by physical perpetrators. The Respondent submits, the Trial Chamber's conclusions were reasonable in light of the totality of the evidence.

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[207] Prosecution Appeal, para.37.
[208] Prosecution Appeal, paras.38-41.
[209] Prosecution Appeal, para.41.
[210] Prosecution Appeal, para.28.

B.4.1.1 The Prosecution's contention that the scale of prohibited acts committed by the OJCE members "far exceeded"[211] *that of the physical perpetrators is erroneous*

Responsibility

157. The Respondent recalls paragraphs 110-112, identifying his observations on the Prosecution's use of the phrase "genocidal acts".

158. The Respondent further recalls paragraphs 94-95, identifying that in the context of JCE-I liability the relevant question is whether the JCE member used the non-JCE member to commit the *actus reus* of the crime forming part of the common purpose.

159. The Prosecution alleges, the Respondent and other OJCE members "are responsible under JCE1" for the prohibited acts committed by the physical perpetrators.[212] It relies on the Trial Chamber's findings on crimes against humanity to support that "the JCE members committed – and intended – *all* the genocidal and other culpable acts".[213] The Respondent will consider the *actus reus* and *mens rea* elements in turn.

160. The Respondent recalls paragraphs 126-130, identifying how the Prosecution's submissions elide the Trial Chamber's findings on crimes against humanity with the *actus reus* of the prohibited acts established under Article 4(2). Further, paragraphs 139-141, that the Prosecution fails to prove that the evidence was so unambiguous, that a reasonable trial chamber was obliged to infer that the crime of genocide formed part of the common purpose.

161. The Trial Chamber properly assessed the inferences that could be drawn from the evidence – namely, the use of the physical perpetrators as tools – and reasonably concluded that the Respondent's and other OJCE members' intent to destroy was not the *only* reasonable one.[214] As highlighted by the *Karadžić* Appeals Chamber, the intent of the Respondent and other OJCE members must be proved separately from that of the physical perpetrators to establish responsibility for the acts of the physical perpetrators under JCE-I.[215] The

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[211] Prosecution Appeal, p.13 (Ground 2(B)(1)(a) heading).
[212] Prosecution Appeal, para.29.
[213] Prosecution Appeal, para.29. *See*, para.29 fn65 (citing para.23 fn52).
[214] Judgement, paras.4235-4237.
[215] *Karadžić* 98*bis* Appeal Decision, para.79.

Prosecution fails to meet its burden to demonstrate that the evidence was so unambiguous, that a reasonable Trial Chamber was obliged to infer that all reasonable doubt of the Respondent's and the OJCE members' guilt had been eliminated and that they possessed requisite intent.[216]

162. The Prosecution then contends, "the JCE members also committed and intended an additional array of genocidal and other culpable acts" carried out by unidentified physical perpetrators.[217] The deficiencies identified in the Prosecution's submissions in the paragraph above, are applicable to this assertion. Again, the Prosecution fails to meet its burden.

Scale of responsibility

163. The Prosecution alleges, "the scale of the JCE members' criminal responsibility [….] – a relevant factor to determining their destructive intent – is far greater than that of any individual perpetrator" found to possess the intent to destroy.[218]

164. The Respondent recalls paragraphs 126-130, identifying how the Prosecution's submissions elided the Trial Chamber's findings on crimes against humanity with the prohibited acts established under Art.4(2). Further, paragraphs 139-141 above are recalled, relating to the Prosecution's failure to prove that genocide formed part of the common purpose and that the physical perpetrators were used to commit the *actus reus* of the crime of genocide.

165. The Prosecution fails to demonstrate that the evidence was so unambiguous that a reasonable Trial Chamber was obliged to infer that the Respondent and the OJCE members possessed the requisite intent to destroy, and that all reasonable doubt of their guilt had been eliminated.[219] In the absence of this, the Respondent and other OJCE members cannot be said to have committed any acts enumerated under Art.4(2) through the use of tools with the intent to commit genocide.[220] As such, the Respondent and other OJCE members could not be found to have committed prohibited acts under Art.4(2) on a far greater scale than

[216] *See Stakić* AJ, para.56.
[217] Prosecution Appeal, para.29.
[218] Prosecution Appeal, para.29.
[219] *See Stakić* AJ, para.56.
[220] *See* Response, paras.94-95 and 161.

the physical perpetrators. The Prosecution's contention is defective and demonstrates no error in the Trial Chamber's approach.

B.4.1.2 The Prosecution's claim that the Respondent and other OJCE members "controlled the overall pattern of crimes"[221] conflates the Trial Chamber's findings on crimes against humanity with prohibited acts under Art.4(2)(a)-(b)

Pattern of crimes

166. The Prosecution contends that the Respondent and the other OJCE members "were responsible for the pattern itself […] through a common criminal purpose the widespread and systematic campaign of crimes".[222] Therefore, it suggests, it was unreasonable for the Majority to "ground" its findings that the physical perpetrators possessed the intent to destroy in the pattern of crimes, but not to do the same for the Respondent and other OJCE members.[223]

167. The Prosecution repeats its previous submission, which has been addressed by the Respondent. The Respondent recalls paragraphs 126-136 in this regard.

168. The Respondent further recalls, paragraphs 139-141, relating to the Prosecution's failure to establish that genocide formed part of the common purpose and that the physical perpetrators were used to commit the *actus reus* of the crime of genocide.

Physical participation

169. The Prosecution suggests, the Trial Chamber "appeared to justify its differential treatment of intent in relation to [physical] perpetrators versus JCE members on the basis that the former group physically participated in genocide and other culpable acts".[224] The Judgement does not lend any support to this contention, and the Prosecution does not cite to any paragraphs that do.

[221] Prosecution Appeal, p.14 (heading).
[222] Prosecution Appeal, para.30.
[223] Prosecution Appeal, para.30.
[224] Prosecution Appeal, para.31.

170. The Trial Chamber did not treat the physical perpetrators and the other OJCE members differently. The Trial Chamber, on both occasions, considered whether the evidence presented could establish that the *only* reasonable inference that could be drawn was one of an intent to destroy.[225] This is consistent with, not only the burden and standard of proof but also, the need to "distinguish between the individual intent of the accused and the intent involved in the conception and commission of the crime".[226] Given that the evidence presented was different, the Majority and the Trial Chamber was entitled to come to different conclusions. In accordance with the appellate standard, the Prosecution fails to demonstrate that a reasonable Trial Chamber was obliged to infer that all reasonable doubt of the Respondent's and other OJCE members' guilt has been eliminated.

171. The Prosecution alleges, the "disparate treatment" between the mid to low-level commanders and the other OJCE members "highlights the unreasonableness" of the Trial Chamber's conclusion that they did not possess the requisite intent.[227] The deficiencies in the Prosecution's claim identified in the preceding paragraph of this Response are applicable to this contention. The Prosecution fails to meet its burden and demonstrate that the evidence is so unambiguous that a reasonable Trial Chamber was obliged to infer that all reasonable doubt of the Respondent's and other OJCE members' intent to destroy has been eliminated.[228]

B.4.1.2.1 The Prosecution's reliance on the Trial Chamber's findings that the OJCE members planned and prepared the crimes against humanity in the Count 1 Municipalities, as evidence of an intent to destroy, fails to demonstrate an error

172. The Prosecution recites evidence considered by the Trial Chamber when it assessed whether the crimes of persecution, extermination, murder, forcible transfer and deportation formed part of the common plan, in paragraph 32.[229] It suggests that the OJCE members' "responsibility for and control over the pattern of crimes" is demonstrated by the Trial

[225] Judgement, paras.3509-3524; 4234-4236.
[226] *Krstić* TJ, para.549; *see* also *Karadžić* 98*bis* Appeal Decision, para.79.
[227] Prosecution Appeal, para.31.
[228] *Stakić* AJ, para.56; *Popović* AJ, para.21 fn90.
[229] Prosecution Appeal, para.32.

Chamber's findings in this regard.[230] The Respondent recalls paragraphs 126-130, highlighting how the Prosecution's submissions elide the Trial Chamber's findings on crimes against humanity and prohibited acts under Article 4(2).

173. The Respondent recalls paragraphs 20, identifying the presumption that the Trial Chamber has evaluated all the evidence presented to it. Further, that the Prosecution bears the burden to explain why a reasonable trial chamber would have come to a different conclusion. The Respondent notes, the Trial Chamber expressly stated that it had reviewed all the evidence before it and, while it did not cite every piece of evidence individually, it considered the totality of the evidence relevant to the alleged crimes.[231] In simply reciting other pieces of evidence, the Prosecution fails to demonstrate an error.

B.4.1.2.2 The Prosecution's reliance on the Trial Chamber's finding that OJCE members controlled, furthered, and implemented the campaign of crimes against humanity in the Count 1 Municipalities, as evidence of an intent to destroy, is erroneous

174. The Prosecution alleges, the "criminal campaign" in the Count 1 Municipalities "further demonstrates [the OJCE members'] control over, and responsibility for, the ensuing pattern of crimes".[232] The Prosecution repeats its previous submissions. As such, the Respondent recalls paragraphs 129-136.

175. In paragraph 34 of its appeal, the Prosecution recites numerous findings made by the Trial Chamber on the Respondent's and other OJCE members' conduct and statements.[233] The Prosecution then recites the Trial Chamber's findings on the Respondent's and other OJCE members' role in pursing the objective of permanently removing Bosnian-Muslim and Bosnian-Croats from the Bosnian-Serb claimed territory.[234]

176. The Respondent recalls paragraph 20, identifying the presumption that the Trial Chamber has evaluated all the evidence presented to it. Further, that the Prosecution bears the burden to explain why a reasonable trial chamber would have come to a different conclusion. The

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[230] Prosecution Appeal, para.32.
[231] Judgement, para.5311.
[232] Prosecution Appeal, para.33.
[233] Prosecution Appeal, para.34.
[234] Prosecution Appeal, para.35-36, *see* fns86-88.

Respondent notes, the Trial Chamber expressly stated that it had reviewed all of the evidence before it and, while it did not cite every piece of evidence individually, it considered the totality of the evidence relevant to the alleged crimes.[235] In simply reciting other pieces of evidence, the Prosecution fails to meet its burden and demonstrate an error.

177. The Prosecution alleges, in a footnote, that in paragraphs 3510-3511 and 3513-3524 the Trial Chamber "describ[ed] genocidal and other culpable acts".[236] The Respondent once again recalls paragraphs 110-112, emphasising that the Trial Chamber *did not* find that any genocidal acts had been committed, but rather described the prohibited acts. The Prosecution's loose use of legal language misconstrues the Trial Chamber's findings.

B.4.2 Ground 2(b)(2): The Prosecution has failed to discern any error in the Trial Chamber's assessment of public statements made by the Respondent and other OJCE members

B.4.2.1 The Prosecution recites the Trial Chamber's findings without discerning any error in its approach

178. The Prosecution alleges: (a) "JCE members painted Bosnian-Muslims as genocidal enemies and called for their disappearance and destruction";[237] and (b) "[t]he Chamber unreasonably concluded that JCE members' statements were aimed only at ethnic separation and division"[238]. These will be considered in turn.

Propaganda

179. The Prosecution claims, the statements made by OJCE members "painted Bosnian Muslims as genocidal enemies".[239] The Prosecution has not defined the term, "genocidal enemies". The Prosecution recites evidence cited by the Trial Chamber to support the existence of a JCE to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian-Serb

[235] Judgement, para.5311.
[236] Prosecution Appeal, para.35, fn89.
[237] Prosecution Appeal, p.18 (heading).
[238] Prosecution Appeal, p.19 (heading).
[239] Prosecution Appeal, para.38.

claimed territory, without any explanation as to how the Trial Chamber erred, or how the evidence supports its claim.[240]

180. The Respondent recalls paragraphs 20, identifying the presumption that the Trial Chamber has evaluated all the evidence presented to it and the appellate standard. The Prosecution has failed to discharge its burden.

Statements aimed at ethnic separation

181. The Prosecution alleges, the Trial Chamber's finding that certain statements could have been "directed towards a military enemy and have been used as propaganda"[241] is unreasonable.[242] It cites a "pattern of crimes" relied upon by the Majority to infer the physical perpetrators' intent to destroy, and the OJCE members' role in employing the pattern, to substantiate this claim.[243]

182. The Prosecution is simply repeating its previous submissions. Once again, the Respondent recalls paragraphs 126-136. The Prosecution fails to demonstrate that the evidence is so "unambiguous that a reasonable Trial Chamber was obliged to infer" that all reasonable doubt of the Respondent's and OJCE members' intent to destroy has been eliminated.

183. The Prosecution suggests, "it is beside the point that the record reveals" occasions where the OJCE members indicated that conciliation and compromise were possible in pursuit of their goal of ethnic separation.[244] The Respondent recalls the burden and standard of proof set out at paragraph 19. Contrary to the Prosecution's claim, this is directly relevant to whether the *only* reasonable inference that could be drawn from the evidence was one of guilt. The Trial Chamber applied the correct legal standard to the totality of the evidence presented. Again, the Prosecution fails to demonstrate that the Trial Chamber's finding was unreasonable.

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[240] Prosecution Appeal, paras.38-39 fns99-113.
[241] Judgement, para.4235.
[242] Prosecution Appeal, para.40.
[243] Prosecution Appeal, para.40.
[244] Prosecution Appeal, para.40.

184.The Prosecution alleges, the Trial Chamber's finding that the statements made by the other OJCE members were not consistent with an intention to destroy, "cannot be reconciled" with the Majority's finding that the physical perpetrators possessed the intent to destroy.[245] This is inaccurate. The Majority's finding that the physical perpetrators possessed the intent to destroy cannot be applied vertically to the Respondent and other OJCE members. The intent of the Respondent and other OJCE members must be distinguished, and considered separately, from the intent of the physical perpetrators.[246] Given the different evidentiary bases from which the Trial Chamber drew its inferences, it was entirely reasonable for the Trial Chamber to conclude that there was insufficient evidence to support that the Respondent and the other OJCE members shared the physical perpetrators' intent at the conception and commission of the prohibited acts. The Trial Chamber applied the correct legal standard and properly concluded that, on the totality of the evidence presented, it could not conclude that the *only* reasonable inference that could be drawn was that the Respondent and other OJCE members possessed the requisite intent. Once again, the Prosecution fails to demonstrate that the evidence was so unambiguous that a reasonable Trial Chamber was obliged to infer that all reasonable doubt had been eliminated.

Conclusion

185.In an effort to undermine the Trial Chamber's conclusions that the Respondent and other OJCE members did not possess the requisite intent to destroy, the Prosecution seeks to have the Appeals Chamber: (a) improperly analyse fragments of evidence in isolation; (b) misapply the burden of proof to these individual shards of evidence; (c) ignore or misconstrue the relevant findings; and, (d) discard the margin of deference due to the Trial Chamber.

B.5 The Prosecution has failed to meet the appellate standard

186.The Respondent recalls paragraphs 18, setting out the appellate standard applicable to the Prosecution on appeal. In its conclusion, the Prosecution claims that the "pattern of crimes and [the OJCE members] statements reflect destructive intent".[247] On this basis, it asserts,

[245] Prosecution Appeal, para.40.
[246] *Krstić* TJ, para.549; *Karadžić* 98*bis* Appeal Decision, para.79.
[247] Prosecution Appeal, para.41.

that the *only* reasonable inference was that the Respondent and the OJCE members "acted with [general] intent towards the Count 1 Municipalities".[248] For the aforementioned reasons, the Respondent asserts that the Prosecution has failed to meet its burden and demonstrate that the evidence is so unambiguous, that a reasonable Trial Chamber was *obliged* to find that all reasonable doubt of the Respondent's guilt had been eliminated.

B.6 Remedy sought

187. The Respondent invites the Appeals Chamber to dismiss Ground 2(B) of the Prosecution's appeal.

[248] Prosecution Appeal, para.41.

IV. COMBINED REMEDY: THE PROSECUTION HAS FAILED TO DISCERN ANY ERROR IN THE TRIAL CHAMBER'S FINDING THAT THE RESPONDENT WAS NOT LIABLE FOR GENOCIDE UNDER JCE-I

190. The Respondent submits, the Prosecution has failed to discharge its burden and demonstrate that the Trial Chamber erred in either law or fact, in finding that the Respondent and other OJCE members did not possess the requisite specific intent to destroy, and that genocide did not form part of the common purpose.

191. The Respondent notes, the Prosecution repeats its submissions in Grounds 1 and 2 of its appeal in this section. The Respondent will recall the relevant paragraphs of this Response to avoid repetition.

A.1 THE PROSECUTION HAS FAILED TO DEMONSTRATE THAT THE TRIAL CHAMBER ERRED IN CONCLUDING THAT THE RESPONDENT AND OTHER OJCE MEMBERS DID NOT POSSESS THE INTENT TO DESTROY EACH OF THE COUNT 1 COMMUNITIES INDIVIDUALLY

192. The Prosecution invites the Appeals Chamber to find that the Respondent and other OJCE members possessed the specific intent to destroy the Bosnian Muslims in the Count 1 Municipalities considered individually.[249]

193. As set out in paragraphs 86, 142 and 186 of this Response, the Respondent submits that the Prosecution has failed to demonstrate that the Trial Chamber erred in either law or in fact when reaching its findings on genocide on the Count 1 Municipalities. In short, the Prosecution has failed to demonstrate that all reasonable doubt of the Respondent's guilt has been eliminated.

194. Further, paragraphs 139-141 are recalled with regards to the Prosecution's failure to demonstrate an error in the Trial Chamber's finding that genocide did not form part of the common purpose of the OJCE.

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[249] Prosecution Appeal, para.44.

195. The Respondent invites the Appeals Chamber to dismiss the Prosecution's request to find that genocide formed part of the common purpose and to convict him of genocide on Count 1 pursuant to JCE-I.

A.2 THE PROSECUTION HAS FAILED TO DEMONSTRATE THAT THE TRIAL CHAMBER ERRED IN CONCLUDING THAT THE RESPONDENT AND OTHER OJCE MEMBERS DID NOT POSSESS THE INTENT TO DESTROY TWO OR MORE OF THE COUNT 1 COMMUNITIES CONSIDERED CUMULATIVELY

196. As an alternative to the remedy sought under Ground 1, the Prosecution requests the Appeals Chamber to find that the Bosnian Muslims in two or more of the Count 1 municipalities, considered cumulatively, constituted a substantial part of the Bosnian-Muslim group.[250]

197. With regards to the Prosecution claim that "each community was prominent within and emblematic of" the group,[251] the Respondent recalls paragraphs 59-85 of this Response. In the absence of an affirmative finding on this *indicia*, the numerical aggregation alone cannot satisfy the substantiality requirement.

198. The Respondent notes, the Trial Chamber considered whether the Respondent and the other OJCE members possessed the intent to destroy the protected groups in the Count 1 municipalities cumulatively.[252] The Respondent recalls Section III of this Response, addressing the Prosecution's contention that the Respondent and other OJCE members possessed the intention to destroy the Count 1 Municipalities. The Respondent submits, the Prosecution has failed to prove that all reasonable doubt that he and the other OJCE members possessed the intent to destroy has been eliminated.

199. The Respondent invites the Appeals Chamber to dismiss the Prosecution's request to find that he possessed the specific intent to destroy in relation to five – or alternatively two or more – of the Count 1 Communities.

[250] Prosecution Appeal, para.45.
[251] Prosecution Appeal, para.45
[252] Judgement, para.4236-4237.

A.3 CONCLUSION

200. The Respondent submits, the Prosecution has failed to establish that the Respondent and other OJCE members (a) possessed the specific intent to destroy each of the Count 1 Municipalities considered individually; (b) possessed the specific intent to destroy two or more of the Count 1 Municipalities considered cumulatively; (c) that genocide formed part of the common plan.

A.4 REMEDY SOUGHT

201. The Respondent invites the Appeals Chamber to dismiss the Prosecution's request to enter a conviction for genocide on Count 1 pursuant to JCE-I.

V. FIRST ALTERNATIVE REMEDY: THE PROSECUTION HAS FAILED TO ESTABLISH THAT THE RESPONDENT IS RESPONSIBLE FOR GENOCIDE UNDER JCE-III

202. The Prosecution invites the Appeals Chamber to hold the Respondent responsible for Count 1 under JCE-III. The Respondent notes, the Trial Chamber concluded that the physical perpetrators did not possess the intent to destroy a substantial part of the group.[253] If the Appeals Chamber dismisses Ground 1 of the Prosecution's appeal, then the Prosecution is unable to establish that the crime of genocide was committed by the physical perpetrators. In these circumstances, the Respondent invites the Appeals Chamber to dismiss this request.

203. In the alternative, the Respondent submits: (a) there are compelling reasons for the Appeals Chamber to revisit *Tadić* to determine whether JCE-III liability has a basis in customary international law; and (b) in the alternative, the Prosecution has failed to establish that the Respondent is responsible for genocide in the Count 1 Municipalities under JCE-III.

A. THERE ARE COMPELLING REASONS FOR THE APPEALS CHAMBER TO REVISIT *TADIĆ* TO DETERMINE WHETHER JCE-III HAS A LEGAL BASIS IN CUSTOMARY INTERNATIONAL LAW

A.1 OVERVIEW

204. The *Tadić* Appeals Chamber relied on numerous sources to establish that the notion of common purpose liability, including JCE-III, had a basis in customary international law ('CIL').[254] It considered that, based on JCE, an accused may be held liable on the basis of foresight for crimes whose *actus reus* they did not commit and which were not encompassed by the common purpose ('JCE-III').[255]

205. The Respondent submits, an analysis of the sources relied upon by *Tadić*, in addition to other post-WWII cases, demonstrates that a notion of JCE-III liability is not evidenced by, or evident in, CIL at the time of the Indictment. The Respondent asserts, there are clear and

[253] Judgement, para.3535.
[254] *Tadić* AJ, paras.204-226.
[255] *Tadić* AJ, para.228.

compelling reasons to depart from *Tadić* in the interest of justice.[256] *Tadić's* finding in this regard was made on the basis of an incorrect legal principle or given *per incuriam*.

206. The Respondent notes, the Appeals Chamber can still exercise its discretion and consider the legal basis of JCE-III in the interests of justice, even if it dismisses Ground 1. For the reasons set out below, the Respondent invites the Appeals Chamber to revisit *Tadić* even in these circumstances.

A.2 THE APPEALS CHAMBER HAS THE INHERENT JURISDICTION TO CONSIDER ISSUES OF GENERAL SIGNIFICANCE

A.2.1 Applicable Law

207. The role of the Appeals Chamber is not limited to correcting errors of law or fact arising from decisions taken by the Trial Chamber. The Appeals Chamber has the inherent jurisdiction to examine issues of general importance for the case-law and functioning of the Tribunal.[257] Providing the issues raised are of a general interest to legal practice at the Tribunal and have a nexus with the case at hand, the Appeals Chamber can exercise its jurisdiction to consider issues of general significance.[258]

A.2.2 The legal basis of JCE-III liability has both a general significance to the practice of the Tribunal and a nexus with the Prosecution's appeal

208. The Prosecution alleges that "the Appeals Chamber should convict [the Respondent] for genocide under JCE3".[259] It asserts that the commission of crimes outside the common plan was a foreseeable consequence.[260] The legal basis for holding an accused responsible for crimes not encompassed by the common plan is intrinsically linked to the Appeals Chamber's consideration of this.

[256] *Aleksovski* AJ, para.108-109, *Đorđević* AJ, para.24, fn82.
[257] *Krnojelac* AJ, para.7; *Delalić* AJ, paras.218, 221; *Brđanin* Decision, p.3.
[258] *Akayesu* AJ, paras.16-23, 24.
[259] Prosecution Appeal, paras.48, 49.
[260] Prosecution Appeal, para.49.

209. Whether the notion of JCE-III does in fact have a basis in CIL is of general significance to the Tribunal, not only for legal certainty but also for the Tribunal's legacy. Concerns about the legal basis of JCE-III, as well as its application to specific intent crimes, have been consistently raised.[261] However, a wholesale review of the sources of CIL relied on by *Tadić* has never been conducted. The Respondent submits, the Appeals Chamber now has the opportunity to resolve the matter once and for all. The legal basis of JCE-III has a nexus with the Prosecution's appeal. In these circumstances, the Respondent submits that the Appeals Chamber can exercise its discretion and consider whether *Tadić* was made on the basis of an incorrect legal principle or decided *per incuriam*.

A.3 *TADIĆ* AND JCE-III

210. The *Tadić* Appeals Chamber considered numerous sources to conclude that the notion of JCE-III liability existed in CIL.[262]

211. It concluded that;

> [t]he *consistency and cogency* of the case law and treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation, *warrant the conclusion that case law reflects customary rules of international criminal law*.[263]

212. While the *actus reus* elements for all three categories of joint enterprise were the same,[264] *Tadić* held that, "the *mens rea* element differs according to the category of common design under consideration".[265]

213. With regards to the *mens rea* element for JCE-III, it stated that;

> [w]hat is required is the *intention to* participate in and further the criminal activity or the criminal purpose of the group and to contribute to the joint criminal enterprise

[261] *See* for example, *Šešelj* TJ, Concurring Opinion of Presiding Judge Jean-Claude Antonetti; *Brđanin* JCE-III Decision, Separate Opinion of Judge Shahabuddeen; *Brđanin* AJ, Partly Dissenting Opinion of Judge Shahbuddeen, para.3; *Stakić* TJ, paras.527-530; *Nuon & Khieu* AJ, paras.768-810 (Judge Mwachande-Mumba sat in the ECCC Supreme Court Chamber); *ECCC* JCE Decision, para.75-87; *Taylor* TJ, para.468; *Ayyash* AJ, paras.248-249; *Ambos*; *Badar*; *Ohlin* 2007; *Ohlin* 2010; *Stewart*; *van der Wilt*; *van Sliegdregt*.
[262] *Tadić* AJ, paras.207-223, 226.
[263] *Tadić* AJ, para.226.
[264] *Tadić* AJ, para.227.
[265] *Tadić* AJ, para.228.

> or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.[266]

214. Elaborating on this, it explained;

> [w]hat is required is a state of mind in which a person, *although he did not intend to bring about a certain result*, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took the risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems).[267]

215. Therefore, under JCE-III liability, an accused may be held responsible for crimes they did not commit and were not encompassed by the common purpose, on the basis of foresight.

216. *Tadić* did not consider whether an accused could be held liable for a specific intent crime not encompassed by the common purpose on the basis of foresight.

A.3.1 Sources of customary international law cited in Tadić

217. *Tadić* relied upon the following sources to establish the notion of JCE liability in CIL: (a) WWII cases; (b) post-WWII Italian cases; (c) international convention/treaties; and, (d) domestic cases. The Respondent considers <u>*all*</u> of these to demonstrate that liability for crimes not encompassed by the common purpose, on the basis of foresight (JCE-III), was not evidenced by, or evident in, these sources of CIL at the time of the Indictment. The Respondent asserts, this review elicits clear and compelling reasons to depart from *Tadić*.

A.3.1.1 WWII Cases

218. In reaching its conclusions, *Tadić* cites two WWII cases, *Essen Lynching* and *Borkum Island*, on the basis that they established that responsibility for crimes falling outside the common plan can be attributed to the group when: (a) the person intends to participate in

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[266] *Ibid* [original emphasis].
[267] *Tadić* AJ, para.220 [emphasis added].

the common criminal design; and, (b) it was foreseeable that criminal acts other than those envisaged in the common criminal design are likely to be committed by other participants.[268] The Respondent submits that these authorities do not provide support for the notion of JCE-III liability in CIL. Further, the authorities do not support that an accused can be held liable for a specific intent crime falling outside the common purpose on the basis of foresight.

219. In addition, the Respondent reviews other WWII cases not considered in *Tadić*, to reiterate that the WWII cases do not lend any support the assertion that JCE-III has a basis in CIL at the time of the Indictment.

A.3.1.1.1 Essen Lynching

220. On 13 December 1944, three British POW's were lynched. Seven people "concerned in the killing of three unidentified British airmen prisoners of war" were charged.[269] Five were convicted, two were acquitted of the charge.

221. No Judge Advocate was appointed in the case, meaning no summation of the case was given in open court. As such, there is no affirmative evidence of the legal concepts relied upon by the Court. The United Nations War Crimes Commission emphasised that;

> [t]he considerations as to the facts and as to the law which guided the Court cannot, therefore, be quoted from the transcript in so many words. It is *only possible to attempt by inference* to derive them from the verdict and the sentences imposed, having regard to the arguments brought forward by Counsel.[270]

222. Notwithstanding this, *Tadić* infers that the accused were convicted of murder on the basis that they "could have foreseen that others would kill the prisoners".[271] The Respondent submits, this does not correlate with the Prosecution's legal submissions, the evidence or the verdicts.

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[268] *Tadić* AJ, para.205-206.
[269] *Essen Lynching*, p.65.
[270] UNWCC, p.91 [emphasis added].
[271] *Tadić* AJ, para.209.

223. In identifying the legal basis upon which the Court could convict the accused, the Prosecution in *Essen Lynching* explicitly stated it had to be sure that the accused were "guilty of *either murder or manslaughter*" before the accused could be convicted of the charge of being 'concerned in the killing'.[272] Therefore, the Prosecution's case was that the accused had committed the *actus reus* of the crime with either the intent to kill or to cause serious injury. Given that the death or causing serious injury to the airmen was encompassed by the common plan,[273] the Prosecution did not rely on a notion of JCE-III liability.

224. For each of those convicted, there was ample evidence that they possessed either an intention to kill or cause serious injury to the airmen.[274] The Respondent notes, the Prosecution alleged that accused Sambol could be found guilty because;

> [h]e was the first match which set the fuse alight and while he may not at that time have appreciated what an explosion was going to come at the end *he was concerned in their killing in that he struck the first blow or one of the first blows* that started off the train of tragedy.[275]

225. The evidence supported that Sambol beat the airmen with not "particularly violent" blows, but such blows were the ones that started the lynching.[276] Given that he was acquitted, it can be inferred that the Court considered that an intention to kill or cause serious injury had not been proved. If a notion of foreseeability had been applied, Sambol could also have been convicted of 'being concerned in the killing'. His acquittal further undermines that the accused were held liable based on JCE, for crimes which were not encompassed by the common purpose, on the basis of foresight.[277]

226. For the aforementioned reasons, the Respondent asserts that there is little, if any, evidence that the Court held the accused liable by applying a notion of JCE-III liability. The Respondent submits, this case does not support that JCE-III has a basis in CIL or that an accused can be held liable for specific intent crimes on the basis of foresight.

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[272] *Essen Lynching*, p.65.
[273] *Ibid*.
[274] *Essen Lynching, pp.65-68.*
[275] *Essen Lynching*, p.66 [emphasis added].
[276] *Ibid*.
[277] *See Tadić* AJ, para.209.

A.3.1.1.2 Borkum Island

227. Seven United States crew members were killed after they were taken prisoner and marched through the town streets of Borkum, a German island. The accused faced two charges: (1) "wilfully, deliberately, and wrongfully encourage, aid, abet and participate in the killing" of the crew;[278] and, (2) "wilfully, deliberately, and wrongfully encourage, aid, abet and participate in the assaults"[279] upon the crew. No Judge Advocate sat on this case.

228. *Tadić* suggests that, "it may be inferred from this case that all of the accused found guilty were held responsible for pursuing a common criminal design, the intent being to assault the prisoners of war"[280]. This is not supported by the Prosecution's legal submissions, the evidence, or the convictions.

229. The Prosecution alleges that all of the accused had participated in a *conspiracy* to kill, and/or assault, the crew members.[281] On the basis of their role in either or both of the conspiracies, it asserted that each of the accused could be found guilty of the charges.[282] *Tadić* accepts that the Prosecutor propounded the notion of JCE-I.[283]As an alternative to conspiracy, the Prosecution also set out the law on aiding and abetting and common plan liability.[284]

230. The Defence presented their cases on a combination of the following: (a) presence alone was insufficient to establish the intent to kill or assault the airmen; (b) there was no evidence of a conspiracy or that they were part of a conspiracy to kill or assault; (c) if there was a conspiracy, it was not to kill the airmen.[285]

231. *Tadić* relies on the guilty verdicts entered on Count 1 (killing the airmen) to infer that the accused were convicted on the basis of foresight.[286] This ignores not only the way in which the Prosecution and Defence put their case, but also the evidence. There was ample

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[278] *Borkum Island*, p.11.
[279] *Borkum Island*, pp.11-12.
[280] *Tadić* AJ, para.213.
[281] *Borkum Island,* pp.1190; 1186-1188.
[282] *Borkum Island*, pp.1188, 1190.
[283] *Borkum Island*, p.211.
[284] *Borkum Island*, pp.1192-1193.
[285] *Borkum Island*, pp.1201-1206; 1234, 1241-1243; 1268-1270.
[286] *Tadić* AJ, para.213.

evidence that the accused conspired to kill the airmen.[287] Their intent and participation in the conspiracy can be inferred from their contribution to the execution of it, statements and actions throughout.[288] The accused even worked together to try and cover the murders up.[289] The deaths and assaults on the crew members were encompassed by the conspiracies they participated in.

232. Those accused acquitted of killing the airmen, either participated directly in the beatings or encouraged others to do so, were found guilty of Count 2 (assaulting the airmen).[290] As the Court did not hold them responsible for a crime that fell outside of the conspiracy they participated in – assaulting the crew members - the Respondent submits, their acquittals show that the Court did not apply a notion of JCE-III liability.

233. The Respondent asserts, the Court's approach does not support that an accused may be held liable for crimes falling outside the common purpose on the basis of foresight. As such, this case does not support that JCE-III has a basis in CIL or that an accused can be held liable for specific intent crimes on the basis of foresight.

A.3.1.1.3 Other post-WWII cases

234. The Respondent has also reviewed other post-WWII cases not cited in *Tadić*, to further evidence that there are clear and compelling reasons to depart from *Tadić*. These cases do not support the notion that JCE-III liability existed under CIL at the time of the charges.

A.3.1.1.3.1 The Nuremberg Trials

235. The International Military Tribunal's (IMT) approach to accused Sauckel and Speer has been cited as evidence of the existence of JCE-III in CIL.[291]

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[287] *Borkum Island*, pp.1178-1188.
[288] *Ibid*.
[289] *Borkum Island*, p.1188.
[290] *Borkum Island*, pp.1280-1286.
[291] *See* for example *Nuon & Khieu*, para.793.

236. Counts 3 and 4 of the Indictment alleged that Saukel had committed crimes against humanity and war crimes through his involvement in the slave programme.[292] The IMT found that Saukel had the overall responsibility for the slave labour programme, was "aware of the ruthless methods being used to obtain labourers and vigorously supported them".[293]

237. The Prosecution's case against Speer's related to his involvement in the slave labour programme.[294] He was directly appointed by Hitler and knew, participated in and facilitated the use of slave labour.[295]

238. Both were convicted of crimes falling within the scope of the common purpose – enslavement and forced labour. Taken with the IMT's findings on the other accused, there is insufficient evidence that liability for crimes not encompassed by the common plan existed under CIL on the basis of JCE or that an accused can be held liable for specific intent crimes on the basis of foresight.

A.3.1.1.3.2 Renoth et al.

239. Four German individuals were accused of committing the war crime of killing an unknown allied POW airman.[296] The Prosecution's case alleged that all four accused "shared the intention to commit" the killing, all four were "aware of this common design" and "acted in furtherance of it".[297] Three accused were alleged to have beaten the airman, while one shot him. While the three agreed that they were present during the incident, they denied beating the ariman. The Prosecution asserted that, even if the British Military Court accepted this, they could still be found guilty of aiding and abetting the killing and therefore guilty of the charge.[298]

[292] *The Nuremberg Trials*, p.73.
[293] *The Nuremberg Trials*, p.321.
[294] *The Nuremberg Trials*, p.331.
[295] *The Nuremberg Trials*, pp.331-333.
[296] *Renoth*, p.76.
[297] *Ibid*.
[298] *Renoth*, p.77.

240. All of the accused were found guilty of killing the airman.[299] The case notes highlight that, "[i]t is impossible to say conclusively whether the court found that the three accused took an active part in the beating or whether they were liable under the doctrine set out by the Prosecutor".[300] The doctrine set out was that of aiding and abetting a crime. As such, the Respondent submits there is insufficient evidence to support that liability for crimes not encompassed by the common plan existed under CIL on the basis of JCE or that an accused can be held liable for specific intent crimes on the basis of foresight.

A.3.1.1.3.3 RuSHA case

241. In this case, the International Military Tribunal's approach to the accused Hildebrandt has been cited as evidence in support of the existence of JCE-III liability in CIL.[301] However, the Tribunal found that Hildebrandt "actively participated in and is criminally responsible" for numerous crimes that were encompassed by the common plan.[302] Taken with the Tribunal's findings on the other accused, there is insufficient evidence that liability for crimes not encompassed by the common plan existed under CIL or that an accused can be held liable for specific intent crimes on the basis of foresight.

A.3.1.1.3.4 Pohl et al.

242. The findings for accused Hohberg and Baier, within this case, have been cited as evidence that the Military Tribunal applied a notion of JCE-III liability.[303] This case relates to crimes arising from concentration camps.

243. Hohberg was charged with war crimes and crimes against humanity.[304] The Prosecution alleged that he had been complicit in the enslavement of prisoners in the camps and exploited them as slave labour through his economic advice and cooperation and collaboration with numerous enterprises that exploited the prisoners.[305] The Military

[299] *Renoth*, p.76.
[300] *Renoth*, p.77.
[301] *See* for example *Nuon & Khieu*, para.793; *Đorđević* AJ, para.47, fn164.
[302] *RuSHA*, p.161.
[303] *See* for example *Nuon & Khieu*, para.793.
[304] *Pohl et al*, p.962.
[305] *Pohl et al*, p.962; pp.1040-1042.

Tribunal concluded that he knew that the enterprises exploited the prisoners for slave labour and was an active participant in facilitating this.[306] The Tribunal convicted Hohberg on the basis of his role in the "enslavement" and "deportation of slave labour".[307]

244. Similar to Hohberg, the Military Tribunal concluded that Baier assisted in setting up the camps for prisoners engaged in forced labour and participated in the commercial trade of prisoner slave labour, in the full knowledge that the prisoners were unlawfully detained.[308] The Tribunal found him guilty on the basis that he "took a consenting and active part in the exploitation of slave labour".[309]

245. In both cases, the crimes fell within the scope of the common plan. Therefore, the Military Tribunal's approach and findings do not lend any support to liability for crimes not encompassed by the common plan existing in CIL or that an accused can be held liable for specific intent crimes on the basis of foresight.

A.3.1.1.3.5 Ikeda case

246. The Martial Court established that the accused participated in formulating and establishing brothels, using girls and women from internment camps as prostitutes, and later learned that the plan had been executed.[310] The Martial Court concluded that, "he clearly indicated that he fully agreed with the spirit that prevailed among the leading officers in respect of this brothel situation".[311] The Respondent submits, the crimes were encompassed by the common plan. While the Martial Court did not articulate the mode of liability relied upon, it could be inferred that it applied a notion of command responsibility.[312] Given the uncertainties surrounding the legal basis for the convictions, this case provides an insufficient basis to support that liability for a crime falling outside of the common plan on the basis of foresight existed at the time of the charges.

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[306] *Pohl et al*, p.1042.
[307] *Pohl et al*, p.962.
[308] *Pohl et al*, pp.1043-1047.
[309] *Pohl et al*, p.1047.
[310] *Ikeda*, p.4.
[311] *Ibid*.
[312] *Ibid*.

A.3.1.1.3.6 Einsatzgruppen

247. The approach to Dr. Six has been cited as existence of JCE-III liability in CIL.[313] The Prosecution alleged Dr. Six had command and oversight for the liquidation operations within his area of control. Dr. Six denied any knowledge of the crimes. He did not deny that the crimes fell within the scope of the common plan.[314] Evidence of his knowledge and participation in the common plan included statements about physically eliminating Jews from not only Germany, but also the world.[315] While the IMT could not be sure that he personally took part in the murder programme, the crimes clearly fell within the scope of the common purpose that he participated in. On the basis of the charge, his knowledge and active participation in the criminal organisations the SS and SD, both of which sought to achieve the common objective of persecuting, murdering, exterminating, imprisoning and committing other inhumane acts against the Jewish population,[316] proved the charge. His conviction does not lend any support to the notion of JCE-III liability or that an accused can be held liable for specific intent crimes on the basis of foresight.

248. Further, there is nothing to suggest that the IMT held any of the other accused criminally responsible for crimes that fell outside of the common plan to support the existence of JCE-III in CIL.

A.3.1.1.3.7 Dachau Concentration Camp

249. The Military Court's approach in this case has been cited as evidence in support of the existence of JCE-III liability in CIL.[317] The Military Court's reasoning supports that the convictions were entered on the basis that: (a) there was a general system of cruelty and murders of inmates in the camp; and (b) this system was known and participated in by members of staff.[318] The UN War Crimes Commission confirmed this.[319] A notion of JCE-II was applied. Given that the accused were convicted of crimes arising from the system of

[313] *See* for example *Nuon & Khieu*, para.793.
[314] *Einsatzgruppen*, pp.521-526.
[315] *Einsatzgruppen*, p.525.
[316] *Einsatzgruppen*, pp.15-22; 521-526.
[317] *See* for example *Nuon & Khieu*, para.793; *Đorđević* AJ, para.47, fn164.
[318] *Dachau Concentration Camp case*, p.14-15.
[319] *Dachau Concentration Camp case*, p.15.

ill-treatment, the case lends support to the notion of JCE-II, but does not confirm the existence of JCE-III in CIL.

A.3.1.1.3.8 Sch. et al case

250. The approach taken by the Supreme Court for the British Zone has been cited as evidence in support of the existence of JCE-III liability in CIL.[320]

251. The Respondent notes, in the absence of an official English translation of this case, unofficial translations of this case have been relied upon.[321]

252. The victim was brought to a synagogue by the accused. The victim was mistreated at the synagogue, and later taken to a police station and killed. The accused was charged with being responsible for the mistreatment of the victim on the basis that, at the very least, he failed to protect the victim from harm. The charges against the accused did not include murder or homicide.

253. The Supreme Court for the British Zone remitted the case to the lower court for it to consider if the accused *knew* that the victim would be mistreated in the synagogue. This case does not lend any support to the contention that an accused can be held liable for a crime falling outside the common purpose on the basis of foresight. Given that the accused was not charged with homicide, this in fact undermines the notion of JCE-III liability.

A.3.1.1.4 Conclusion on WWII cases

254. The analysis conducted demonstrates that the notion of JCE-III liability is not evident in, or evidenced by, the WWII cases either cited in *Tadić* or otherwise. The Respondent asserts, the WWII cases are therefore clearly insufficient to demonstrate that liability for crimes not encompassed by the common purpose existed in CIL at the time relevant to the Indictment. Flowing from this, the authorities do not support that an accused can be held liable for specific intent crimes on the basis of foresight.

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[320] *See* for example *Nuon & Khieu*, para.793; *Đorđević* AJ, para.47, fn164.
[321] *See* (in German) *Sch et al,* pp.11-15.

A.3.1.2 Italian cases

255. *Tadić* then cites numerous cases brought before the Italian Court of Cassation after WWII, concerning crimes committed by individuals belonging to the armed forces of the 'Repubblica Sociale Italiana' (RSI).[322] The Court applied Italian domestic law (specifically the pre-existing 1930s Criminal Code, adopted and enacted by Mussolini's regime) to the war crimes. *Tadić* concludes that the cases demonstrate: (a) a person could be held criminally responsible for a crime committed by another member of the group and not encompassed in the criminal plan; and, (b) foresight is the legal element of *mens rea* required for criminal responsibility for the crime falling outside the common plan.[323]

256. *Tadić* then relies on numerous other domestic Italian cases to support its "assum[ption]" that the Court of Cassation applied foresight to the *mens rea* element in the RSI cases.[324]

A.3.1.2.1 Lack of translations and accessibility to Italian cases

257. The Respondent notes, the Italian authorities heavily cited by the *Tadić* Appeals Chamber are handwritten, barely legible and written in Italian. These have been annexed to the Respondent's Book of Authorities, so the Appeals Chamber can see first-hand the poor quality of the authorities. While copies of some of the cases cited are available in the IRMCT Tribunal's library, not all are available. With the assistance of the IRMCT Tribunal's library staff, the Respondent has obtained copies of 12 out of the 14 Italian cases relied upon by the Appeals Chamber.

258. Of the authorities available, they are not accessible in a language of the Tribunal either in the library or elsewhere. The *Tadić* Appeals Chamber relied on *unofficial* translations of the Italian cases in the Judgement and did not have the authorities translated for the Tribunal's library. It appears that Judge Cassese translated them himself. Official translations of the cases have not been obtained, or made available, by the Tribunal since the judgement was rendered in 1999, almost 20 years ago.

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[322] *Tadić* AJ, paras.214-219.
[323] *Tadić* AJ, paras.214, 218-220.
[324] *Tadić* AJ, paras.218, 218-219.

259. The Respondent notes, the IRMCT LSS refused the Respondent's request translate the Italian authorities for the purpose of this Response to the Prosecution's Appeal on the basis that: (a) the Italian documents did not meet the translation criteria[325] and, (b) there was no order or decision from the Appeals Chamber requesting the material. However, the Respondent was granted a special dispensary from OLAD to fund the translations. All of the available authorities have now been translated. Therefore, for the first time in 20 years, the Appeals Chamber can scrutinise the Italian authorities cited in *Tadić* to consider whether they do in fact support the notion of JCE-III liability.

260. The remaining two cases, *Minafo* and *Minapo*, are not on file with the Tribunal's library and the Respondent has been unable to locate them.

A.3.1.2.2 Overview of Tadić*'s conclusions on post-WWII Italian authorities*

261. The Respondent highlights, Italian domestic law was applied to *all* of the post-WWII cases by the Court of Cassation. The same national legislation applied in these cases is cited in *Tadić* as evidence of Italy's domestic state practice.[326]

262. The Respondent submits, the case law does not show a consistent approach to liability for crimes not encompassed by the common purpose, nor is the *mens rea* element clearly articulated in most of the judgements. The lack of clarity on the *mens rea* required was explicitly acknowledged in *Tadić*.[327] The Respondent submits, the uncertainties surrounding the Court of Cassation's approach to the elements of JCE-III liability provides insufficient evidence of the existence of JCE-III in CIL at the time of the Indictment. Additionally, the authorities do not support that an accused can be held liable for a specific intent crime falling outside the common purpose on the basis of foreseeability.

263. The Respondent will consider the cases chronologically, as opposed to the order they are cited in *Tadić*.

[325] *See* MICT/22 Annex B Policy on Translation for the Conduct of Judicial Activity of the IRMCT.
[326] *Tadić* AJ, para.224, fn286 (Art.116 in particular is relied upon in the post-WWII cases).
[327] *Tadić* AJ, para.218.

A.3.1.2.3 Bonati (15 July 1946)

264. The accused participated in a plan to suppress anti-fascists and German invasions.[328] The case concerned three operations of this nature. On the basis of the facts, violence and murder were used as a means of achieving this objective.[329] The evidence cited by the Court of Cassation supports the inference that four out of five of the defendants possessed the intent to kill[330] (due to the legibility issues, it is unclear what role one defendant Ferrara played).[331] It can reasonably be inferred that the crimes the accused were convicted of were encompassed within the common purpose, or they possessed the intent to commit them.

265. With regards to the liability for additional crimes committed outside the common purpose, the Court of Cassation's approach to defendant Gertosio, a military sectary, is relevant. In February 1945, partisans attacked and killed a substantial number of Italian agents.[332] Gertosio notified Police Chief Bonati, who later sent a military column to assist him.[333] Individuals, seemingly unconnected to the events, were captured and executed in retaliation.[334] The Court noted that the executions were "approved of by Gertosio".[335] His report on the events made reference to taking revenge.[336] Gertosio claimed that he had acted in self-defence during the attack and denied any involvement in the executions of the men.[337] However, this was rejected and he was sentenced to death for his participation in the executions.[338] The Court of Cassation nullified his death sentence on the basis that the crime was not encompassed by the common plan, and there was insufficient evidence that he intended the outcome.[339] This does not support that an accused can be held liable for a crime committed outside the plan on the basis of foreseeability.

[328] *Bonati*, p.4.
[329] *Bonati*, pp.4-12.
[330] *See Bonati*, pp.6, 15.
[331] *Bonati*, p.16.
[332] *Bonati*, p.7.
[333] *Ibid*.
[334] *Bonati*, pp.7-9.
[335] *Bonati*, p.9.
[336] *Bonati*, p.18.
[337] *Bonati*, p.10; 19.
[338] *Bonati*, p.11.
[339] *Bonati*, p.19, *see* further p.20.

266. *Tadić* relies on this case to support the finding that a person can be held responsible for an additional crime, even if it was "an indirect consequence of their participation".[340] However, the Court of Cassation does not set out the *mens rea* required for an accused to be held responsible for a crime not encompassed by the common purpose. Moreover, crimes that are an indirect consequence of the common purpose can still be encompassed by it. The Court did not engage with this issue. Given the uncertainties surrounding the mode of liability applied or the basis of the accused's convictions, there is insufficient evidence to support that JCE-III liability existed in CIL at the time of the charges or that an accused can be held liable for a specific intent crime based on foresight.

A.3.1.2.4 Torrazzini (18 August 1946)

267. The headnote for *Torrazzini* consists of one sentence. It confirms that an accused can be held responsible for a crime falling within the common plan.[341] As this case does not consider JCE-III liability at all, it cannot be used to support its existence in CIL at the time of the charges or that an accused can be held liable for a specific intent crime based on foresight.

A.3.1.2.5 Tossani (17 September 1946)

268. Tossani participated in a mopping up operation with the Italian Police.[342] He was unarmed and had no active part in the operation itself.[343] During the course of it, the victim attempted to flee through the trenches and was shot and killed by a German solider. The Court found that, they "must exclude any link of causality, *whether material or mental*, between the actions of [Tossani] and the death of [the victim]".[344] Tossani was not held liable for the murder.

269. The Respondent notes, the perpetrator was not part of the common plan, and the crime was not encompassed by the plan. The Court did not apply a notion of JCE-III liability, nor does the judgement lend any support to the contention that an accused can be held liable for

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340 *Tadić* AJ, para.217; *Bonati*., p.20.
341 *Torrazzini*.
342 *Tossani*, p.2.
343 *Ibid*.
344 *Ibid* [emphasis added].

crimes not encompassed by the common plan. Further, the *mens rea* required for an accused to be held responsible for a crime not encompassed by the common purpose was not considered.

A.3.1.2.6 Palmia (20 September 1946)

270. The headnote for *Palmia* consists of one sentence. It explains, the accused were "excluded from amnesty only if the shooting exhibits a relationship of causality as established by Articles 40 and 41 of the Criminal Code".[345] With such limited information, it cannot be said that this supports the existence of liability for crimes not encompassed by the common purpose on the basis of foresight. There is insufficient evidence in a single sentence to support that JCE-III liability existed in CIL or that an accused can be held liable for a specific intent crime based on foresight.

A.3.1.2.7 D'Ottavio et al. (12 March 1947)

271. Four armed civilians sought to unlawfully pursue and capture two POW's that had escaped from a concentration camp. To escape capture, the two POW's tried to flee, resulting in one being shot twice in the arm by D'Ottavio. The victim that was shot only died due to an infection that was not properly treated. At trial, all four men were charged with murder. The Respondents case was that they had shot at the POW's in self-defence after one threw a grenade at them.[346] The trial court rejected this and convicted them of involuntary homicide under Art.584, but excluded that they intended to kill the POW and that the attack was premeditated.[347] The offence of involuntary homicide under Art.584 requires only an intention to cause serious bodily harm, with the death being attributed to a person through strict liability.

272. The Respondents appealed under Art.116 on the basis that the POW's death was not a consequence of their intention to capture him.[348] The Court of Cassation found that the Respondents were guilty of *intending* to cause serious injury to the POW.[349] The Court

[345] *Palmia*.
[346] *D'Ottavio*, p.4-6.
[347] *D'Ottavio*, p.3.
[348] *D'Ottavio*, p.4.
[349] *D'Ottavio*, p.6.

concluded that the intention to cause the POW's serious bodily harm was encompassed by the plan to illegally capture them.[350] As such, under Art.584, they could be found responsible for his death.

273. The Court's findings show that causing the POW's serious harm was not an additional crime that fell outside the one agreed upon by the accused. This case does not provide evidence of the Court of Cassation applying a notion of JCE-III liability for a crime committed outside the plan on the basis of foreseeability. As such, it does not support the existence of JCE-III liability in CIL. Further, it does not consider the *mens rea* required for an accused to be held responsible for a crime not encompassed by the common purpose or whether an accused can be held liable for a specific intent crime based on foresight.

A.3.1.2.8 Aratano et al. (21 February 1949)

274. A group of RSI militiamen attended a property with the intention of arresting partisans. A shoot out ensued and one of the partisans was killed by a member of the RSI militiamen. The trial court found: (a) all of the accused that participated in the roundup of partisans, with the intention to arrest them, could also be found responsible for the murder as it was a consequence of their common plan; and (b) even if some of them *did not intend* the murder and only intended to arrest them, they could still be held responsible for the murder.[351] The trial court considered that an accused could be held liable for a crime not encompassed by the common plan on the basis of foresight. This was appealed.[352]

275. For two of the accused, the Court of Cassation *overturned* their convictions for the murder perpetrated during the operation aimed at arresting the partisans because (a) it fell outside the plan of arresting the partisans and (b) was "unintended" by the participants.[353] In rejecting the trial court's approach, this case does not support the existence of JCE-III liability in CIL. The *mens rea* required for an accused to be responsible for a crime not encompassed by the common purpose is not clearly set out. However, it appears that the

[350] *D'Ottavio*, p.9.
[351] *Aratano*, p.4.
[352] *Aratano*, p.7.
[353] *Aratano*, pp.13-15.

Court rejected the notion of foreseeability. As such, this case does not support that an accused can be held liable for a specific intent crime based on foresight.

A.3.1.2.9 Antonini (20 March 1949)

276. *Tadić* footnotes *Antonini* in the context of the Court of Cassation's approach to domestic cases.[354] However, it relates to crimes committed in WWII. The Respondent considers it in this section as a result.

277. Antonini was part of an operation to arrest partisans. During this operation, a military sabotage occurred which resulted in the German forces retaliating and individuals being killed.[355] The trial court found Antonini guilty of murder. With regards to his intent to commit the killings, it held that "it cannot be asserted with certainty that he intended the death of those persons, but certainly he knew he placed them in a situation in which death would occur".[356] The trial court explained, "[h]e did not exclusively intend for death to take place, but acted with foresight that it might result from his actions; he acted, in essence, with indeterminate intent".[357] To establish Antonini's responsibility for the crime other than the one agreed upon by the group, the *mens rea* element applied by the trial court was one of foreseeability.

278. The Court of Cassation concluded that the German retaliation that resulted in the deaths, was "neither foreseen nor foreseeable".[358] Importantly, with regards to foresight being applied as the *mens rea* element for the additional crime, it concluded that the trial court's approach was "absolutely erroneous".[359] The Court of Cassation held that;

> [t]he intentional or intended offense must produce an event foreseen *and* intended by the agent. It is not enough that the orchestrator have foreseen it (theory of representation), but it is necessary that he or she wanted it (theory of will) with his or her will directed to a certain purpose (intention).[360]

[354] *Tadić* AJ, para.219.
[355] *Antonini*, p.6.
[356] *Antonini*, p.7.
[357] *Ibid*.
[358] *Ibid*.
[359] *Antonini*, p.8.
[360] *Ibid* [emphasis added].

279. The Court of Cassation required: (a) the crime to be objectively foreseeable *and* (b) the accused to possess the intention to commit it.[361] It expressly rejected the application of subjective foresight as the *mens rea* element for crimes the accused did not commit and were not encompassed by the common purpose. The Court emphasised that, "there is no homicidal intent perfecting the psychological element of the offense attributed to [Antonini]".[362] The Court of Cassation *overturned* Antonini's conviction as a result.[363]

280. Given the Court's reasoning, this case does not support that an accused can be held liable for a crime committed outside the common plan on the basis of foreseeability. As such, it does not support the existence of JCE-III in CIL or that an accused can be held liable for a specific intent crime based on foresight.

A.3.1.2.10 "Ferrida" (25 July 1949)

281. The *Tadić* Appeals Chamber misstates the name of this case. It is in fact, *Ferri*.

282. Ferri argued that he could not be held responsible for the murder of the partisans during the mopping up operation, because he had been a large distance away from the line of fire and was serving as a nurse at the material time.[364] The Court concluded that the murders were not encompassed by the common plan to aid the enemy. [365] It upheld Ferri's submissions that he could not be held responsible for the murder as it was not encompassed by the common plan.[366] The Court did not apply a notion of JCE-III liability nor did it consider *mens rea* required for an accused to be held responsible for a crime not encompassed by the common purpose. As such, this judgement does not support the existence of JCE-III in CIL.

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[361] *Ibid.*
[362] *Ibid*.
[363] *Ibid*.
[364] *Ferri*, p.2.
[365] *Ibid.*
[366] *Ibid*.

A.3.1.2.11 Conclusion the post-WWII Italian authorities

283. A review of the Italian post-WWII cases demonstrates that the approach to liability for crimes not encompassed by the common purpose does not demonstrate a sufficient basis for the existence of JCE-III liability in CIL at the time of the charges. Further, the authorities do not support that an accused can be held liable for specific intent crimes not encompassed in the common purpose on the basis of foresight.

284. The Respondent recalls, the Italian Court of Cassation (a domestic court) applied domestic law to all of the aforementioned cases cited by *Tadić*. The Respondent asserts that, at its highest, the authorities provide evidence of Italy's state practice. Given that *Tadić* later concludes that the major legal systems of the world took differing approaches to the notion of JCE-III liability,[367] the state practice of Italy, in and of itself, is insufficient to demonstrate that JCE-III had a sufficient legal basis in CIL at the time of the charges.

A.3.1.3 Other Italian authorities relied on to clarify the mens rea element of the post-WWII Italian cases

285. *Tadić* concedes that the *mens rea* required was "not clearly spelled out" in these cases. [368] However, it cites numerous domestic cases to conclude that the Court of Cassation applied "either a notion of attenuated form of intent (*dolus evenualis*) or required a high degree of carelessness (*culp*)" to the *mens rea* element required for criminal liability for a crime not encompassed by the common purpose.[369] The Respondent submits, this is not sufficiently evident in, or evidenced by, the post-WWII Italian cases, to support: (a) the existence of foreseeability as a legal element of *mens rea* element in CIL; and, (b) that an accused can be held responsible for a specific intent crime not encompassed by the common purpose on the basis of foresight.

[367] *Tadić* AJ, para.225.
[368] *Tadić* AJ, para.218.
[369] *Tadić* AJ, paras.218-219.

286. The Respondent recalls, *Tadić* concluded that Italy's national legislation and case-law relied on foreseeability as the *mens rea* element required for an accused to be held liable for crimes not encompassed by the common purpose.[370]

287. However, the cases cited in *Tadić* do not support the application of foreseeability as a legal element of *mens rea*, as distinct from a factual consideration from which *mens rea* could be inferred. *Tadić* did not consider this distinction. The Respondent submits, that the Italian case-law falls short of illustrating foreseeability as a legal requirement.

288. The Respondent will consider these in chronological order, not the order the cases are cited in *Tadić*.

A.3.1.3.1 Minapo (23 October 1946)[371]

289. The judgement was not placed on file with the Tribunal's library by the *Tadić* Appeals Chamber and the Respondent has been unable to locate it.[372] The Respondent invites the Appeals Chamber to attach little, if any, weight to this case as a result.

A.3.1.3.2 Peveri (15 March 1948)

290. The reference for this case cited by *Tadić* includes an academic article by Girolamo Santucci and a paragraph from the Court of Cassation's reasoning in *Peveri*.[373]

291. The Respondent recalls, while the writings of academics may be considered in determining law, their subsidiary nature is well-established and the Appeals Chamber is not bound by them.[374] Given that little is known about who Girolamo Santucci was or other academic commentary on this issue in the 1940s, the Respondent submits that little, if any, weight can be attached to this article.

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[370] *Tadić* AJ, para.224.
[371] *Tadić* AJ, para.219, fn277.
[372] *Ibid*.
[373] *Tadić* AJ, para.219, fn277; *see* also *Peveri*, pp.1-5.
[374] Art.38(1) ICJ Statute. *See* further, *Đorđević* AJ, para.33, fn117.

292. With regards to the Court of Cassation's findings, the facts of the case demonstrate that the murder was not encompassed by the common purpose to commit robbery.[375] It concluded that the lower court should have considered whether (a) the use of a gun was within the common purpose; and, (b) the murder was not premeditated and committed unbeknown to the co-participant before convicting the accused.[376] The Court does not make affirmative findings on whether an accused could be held liable for a murder not encompassed by the common purpose on the basis of foresight. It simply identifies the errors in the trial court's approach and remits the matter for further consideration.

293. As such, this authority is insufficient to support the existence of foreseeability as a legal element or that an accused can be held liable for a specific intent crime on the basis of foresight.

A.3.1.3.3 Mannelli (20 July 1949)

294. The Court of Cassation held that, if the secondary crime is a "logical development of the intended offence" then a causal nexus existed between this crime and the crimes in the common purpose.[377] The state of mind of the person is treated as a separate consideration, and the Court did not set out the *mens rea* required to find an accused liable for a crime not encompassed by the common purpose.[378] Given this uncertainty, it is unclear whether the Court applied a foreseeability standard as the *mens rea* element for criminal responsibility, as suggested in *Tadić*. As such, the judgement is insufficient to support the existence of foreseeability as a legal element.

A.3.1.3.4 "Minafo" (27 October 1949)

295. The case of *Missapò* is cited in *Solesio* "for the psychological element" required for offences not envisaged by the common plan.[379] Given that the citation of this case accords with the *Tadić* Appeals Chamber's citation for "*Minafo*", it appears that it has incorrectly

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[375] *Peveri*, p.4.
[376] *Ibid*.
[377] *Mannelli*, p.3.
[378] *Ibid*.
[379] *Solesio*, p.7.

referenced the name of the case.[380] The judgement was not placed on file with the Tribunal's library and the Respondent has been unable to locate it. The Respondent asserts that little, if any, weight can be attached to this case as a result.

A.3.1.3.5 Montagnino (24 February 1950)

296. The headnote for *Montagnino* consists of a brief summary of the Court of Cassation's approach to Art.116 and Art.40 for crimes not encompassed by the common purpose.[381] The case confirms that an accused cannot be held liable for crimes which are committed outside the common purpose and are not a consequence of it. It does not support an accused could be held responsible for the *actus reus* of a crime not envisaged by the common plan on the basis of foresight or that an accused can be held liable for a specific intent crime on the basis of foresight.

A.3.1.3.6 Solesio et al. (19 April 1950)

297. The Court of Cassation considered whether an accused could be liable for a crime not encompassed by the common purpose. Using the example of a robbery, it explained that;

> [i]t is quite difficult to imagine agreement to the commission of offenses of this kind, *disconnected from an at least tacit agreement* to the use of violence against those attempting to oppose the realization of the criminal plan or to injure the personal integrity of the aggressors, even if violence should result in more or less serious injuries or the death of the victim.[382]

298. In this scenario, the use of serious violence is agreed upon by the participants as a means of achieving the common objective, as opposed to a crime not encompassed by the common plan. On this basis, the Court of Cassation concluded that the defendants could have been tried for murder. This reflects a notion of co-perpetration, not JCE-III. Therefore, the judgement does not support that an accused could be held responsible for the *actus reus* of a crime not envisaged by the common plan on the basis of foresight or that an accused can be held liable for a specific intent crime on the basis of foresight.

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[380] *Tadić* AJ, para.219, fn277.
[381] *Montagnino*.
[382] *Solesio*, p.6.

A.3.1.3.7 Conclusion on the Italian authorities relied on to clarify the mens rea *element of the post-WWII Italian cases*

299. *Tadić*'s conception of JCE-III is based on foreseeability being a legal element of *mens rea.*[383] The Respondent submits that neither the post-WWII Italian cases nor the other Italian cases cited support the existence of foreseeability as a legal element of *mens rea* required for an accused to be held responsible for a crime not encompassed by the common purpose. Further, the Respondent submits that the approach taken by the Court of Cassation reflects the Italian domestic conception of JCE-III liability and does not, in and of itself, reflect CIL at the time of the Indictment.

300. As such, there is insufficient evidence to support that: (a) this conception of JCE-III existed in CIL at the time of the charges; and (b) an accused could be held responsible for a specific intent crime falling outside the common purpose on the basis of foresight.

A.3.1.4 International conventions/statutes

301. *Tadić* relies on the Convention for the Suppression of Terrorist Bombing and Art.25 of the Rome Statute, as evidence that "the notion of common plan has been upheld in at least two international treaties".[384] While the notion of a common plan was upheld in these instruments, recourse to the *travaux preparatoires* demonstrates that attempts to include a notion of JCE-III liability was specifically abandoned.

A.3.1.4.1 Convention for the Suppression of Terrorist Bombing

302. *Tadić* cites the Convention for the Suppression of Terrorist Bombing because it "upholds the notion of a 'common criminal purpose' as distinct from aiding and abetting".[385] *Tadić* did not expressly consider if the Convention supported the notion of JCE-III liability or whether an accused could be held liable for a specific intent crime not encompassed by the common purpose on the basis of foresight.

[383] *Tadić* AJ, paras.228, 220.
[384] *Tadić* AJ, para.221-222.
[385] *Tadić* AJ, para.221.

303. Art.2(3)(c) sets out a notion of JCE-I liability for crimes committed by an accused. With regards to the *mens rea* element, an intention to perpetrate the crime is required.

304. With regards to the legal position taken, and expressed, by States on holding an accused liable for crimes not encompassed by the common purpose, the negotiating process is instructive. A provision reading: "under the circumstances in which that person knew or should have known that the person's actions would create a state of terror among the general public", was originally contained in the draft version of the Convention.[386] This was subsequently abandoned. Given that JCE-III was a judicial creation, as opposed to derived from State practice, this may be taken to express the legal position - or *opinio juris* - of those States that an accused should not be held responsible for the specific intent crimes of terrorism falling outside the common plan on the basis of foresight. As such, the Convention does not support the existence of JCE-III in CIL.

A.3.1.4.2 Art.25(3) Rome Statute

305. *Tadić* relies on the text of Art.25(3) to substantiate that "the mode of accomplice liability under discussion is well-established in international law".[387] It did not expressly consider if it supported the notion of JCE-III liability.

306. Art.25(3) makes no reference to foresight. Recourse to the *travaux preparatoires* confirms that drafters had explicitly considered, and initially included, the concepts of recklessness and *dolus eventualis* in the Rome Statue.[388] However, this was later abandoned by the Working Group on the General Principles of Criminal Law in Rome.[389] The fact that the concept of foreseeability was abandoned by consensus, may be taken to express the legal position – or *opinio juris* – of those States that an accused should not be held liable for crimes, including specific intent crimes, falling outside the common purpose on the basis of foresight. As such, the Convention does not support the existence of JCE-III in CIL.

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[386] GA Report, p.37, *see* also p.25.
[387] *Tadić* AJ, para.222.
[388] Preparatory Committee Report of the 51st Session, pp.92-93.
[389] Report of Working Group, p.255.

A.3.1.5 National legislation and case law

307. *Tadić* cites these sources to show that the notion of *common purpose liability* that had been "upheld in international criminal law has an underpinning in many national systems".[390]

308. In the context of JCE-III, *Tadić* concedes that;

> [i]n the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules […] [F]or this reliance to be permissible, *it would be necessary to show that most, if not all, countries adopt the same notion of common purpose*. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. *The above brief survey shows that this is not the case*.[391]

309. *Tadić* accepts that the lack of consistency in State practice prevented it from establishing that a notion of JCE-III liability could be rooted in national legislation and case law at the time of the Indictment.[392] The national legislation and case law cited in *Tadić* demonstrates that the state practice on the standard of *mens rea* applicable to the additional crime differs.[393] Whether foreseeability is a legal element or a factual consideration from which intent could be inferred does not appear to have been considered in *Tadić*.

310. Despite this, and the absence of cogent support for this notion in the sources of CIL it considered, *Tadić* identified foreseeability as a legal element of *mens rea*.[394]

A.3.1.6 Consequences of applying foresight as a legal element of mens rea

311. The difference between applying foresight as a legal element or a factual consideration is significant. Applying foresight as a legal element creates a lower subjective threshold applicable to the accused for the extended crime, than to the principal perpetrator of the crime. For a specific intent crime, this lowers the *mens rea* requirement for an accused. For the crime of genocide – a specific intent crime requiring the intention to destroy – this

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[390] *Tadić* AJ, para.225.
[391] *Ibid* [emphasis added].
[392] *Tadić* AJ, para.228.
[393] *Tadić* AJ, para.224.
[394] *Tadić* AJ, para.228.

creates an anomaly. It lowers the *mens rea* required to prove an accused guilty of a specific intent crime. This dichotomy was not considered in *Tadić*.

312. *Tadić* did not consider whether the authorities it cited lent support to the notion that an accused could be held liable for a specific intent crime not encompassed by the criminal purpose on the basis of foresight. The Respondent notes, applying foresight as a legal element to liability to crimes falling outside the common purpose is not evidenced by, or evident in, the sources of CIL considered above.

A.4 Discussion

313. The Respondent submits, the *Tadić* formulation of the JCE-III *actus reus* and *mens rea* elements was pronounced *per incuriam* or otherwise on the basis of an incorrect legal principle as the notion of JCE-III is neither sufficiently evident in, nor evidenced by, the sources of CIL relied upon. There is no consistent or cogent support in the various authorities considered in *Tadić* for: (a) holding an accused liable for *actus reus* of a crime they did not commit and one not encompassed by the common purpose; (b) the application of foresight as a legal element of *mens rea*; and (c) holding an accused liable for a specific intent crime falling outside the common purpose on the basis of foresight. Given that there is insufficient evidence of the existence of JCE-III liability in CIL at the time of the Indictment, *Tadić* violated the principle of *nullum crimen sine lege* by creating new law or interpreting the existing law beyond the reasonable limits of acceptable clarification.[395] On the basis of its *obiter* statements, the Appeals Chamber created JCE-III.

314. Further, *Tadić* did not expressly consider whether an accused could be held liable for a specific intent crime on the basis of foresight, in CIL at the time of the Indictment. Despite this, subsequent Appeals Chambers have established that JCE-III liability can be applied to specific intent crimes.[396] This exceeds the permissible limits of clarifying the legal elements of JCE-III in *Tadić* and contravenes the principle of *nullum crimen sine lege*.[397] The Appeals Chamber has interpreted *Tadić* beyond the reasonable limits of acceptable

[395] *Milutinović* JCE-III Decision, para.38, fn93.
[396] *Brđanin* JCE-III Decision, para.6.
[397] *Milutinović* JCE-III Decision, para.38, fn93.

clarification.[398] JCE-III has been expanded to include specific intent crimes, without the Appeals Chamber demonstrating a legal basis for doing so. The Respondent has shown that reliance on *Tadić* as support for this in CIL is misguided, and the legal consequences caused by lowering the *mens rea* required for specific intent crimes. This gives further impetus to revisit *Tadić*.

315. The body of jurisprudence developed over the course of the Tribunal's mandate shapes its legacy as a legal institution. JCE-III is a judicial creation. A wholesale review of the sources of CIL alleged by *Tadić* to support the notion of JCE-III liability has not been undertaken by the Appeals Chamber in 20 years. Successive Appeals and Trial Chambers have simply deferred to the judgement without scrutinising the sources themselves. It is significant that the ICC has distanced itself from JCE-III liability and the ECCC has explicitly overturned it.[399] Further, the STL has concluded that JCE-III should not be applied to specific intent crimes in the context of terrorism.[400] While the Appeals Chamber is not bound by the decisions taken by other courts or *ad hoc* tribunals,[401] it highlights a conscious and deliberate attempt to erase this product of judicial creativity from international criminal law.

316. The Respondent's submissions represent the Appeals Chamber's, and therefore the Tribunal's, last opportunity to engage with this issue. The analysis conducted by the Respondent, and submissions made, are distinguishable from previous challenges to JCE-III.[402] It shows that the law took a wrong turn in *Tadić*, and must be corrected. The Respondent asserts, in accordance with the jurisprudence, cogent reasons to depart from the reasoning in *Tadić* in the interests of justice has been demonstrated and is justified.

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[398] *Brđanin* JCE-III Decision, para.6.
[399] *See Bemba* PTC, paras.365-366 *Katanga* TJ, paras.1619, 1596-1642; *Nuon & Khieu*, paras.810 (where the ECCC conducted a wholesale review of all the sources cited in *Tadić* as well as other WWII cases).
[400] *Ayyash* AJ, para.248-249.
[401] *Đorđević* AJ, para.83; *Tolimir* AJ, para.226; *Popović* AJ, para.1674.
[402] *Stanišić & Župljanin* AJ, paras.588-591, 619, 962-963; *Đorđević* AJ, paras.59-83; *Kvočka* AJ, paras.79-119; *Martić* AJ, paras.70-76; *Brđanin* JCE-III Decision, paras.5-10; *Krajišnik* AJ, paras.699-703; *Karadžić* JCE-III Decision §§7-12; *Milutinović* JCE-III Decision, paras.8, 13-17; *Furundžija* AJ, paras.115-116.

A.5 Remedy Sought

317. The Respondent invites the Appeals Chamber to: (a) exercise its discretion and consider whether JCE-III was established in CIL at the time of the Indictment; (b) find that there are cogent reasons to depart from *Tadić*; and (c) conclude that there was insufficient evidence that JCE-III existed in CIL at the time of Indictment. Should the Appeals Chamber find that JCE-III did not exist, the Respondent invites the Appeals Chamber to dismiss the Prosecution's request to convict the Respondent on the basis of JCE-III liability.

B. In the alternative, the Prosecution has failed to establish that the Respondent is responsible for genocide in the Count 1 Municipalities under JCE-III

318. The Prosecution invites the Appeals Chamber to hold the Respondent liable for genocide under JCE-III as an alternative to its request under JCE-I.

319. The Respondent notes, the Prosecution does not allege that the Trial Chamber erred in failing to convict the Respondent of genocide under JCE-III. Notwithstanding this, the Respondent asserts that the Prosecution is still required to meet the appellate standard and demonstrate that all reasonable doubt of the Respondent's guilt has been eliminated. The Respondent submits, the Prosecution has failed to establish that he is liable under JCE-III and, as such, the Appeals Chamber should dismiss its request to find the Respondent responsible for genocide.

B.1 Applicable Law

B.1.1 The Appellate Standard

320. The Respondent recalls paragraphs 18, identifying the burden on the Prosecution on appeal.

B.1.2 Criminal responsibility under JCE-III

321. In order to establish a finding of criminal responsibility under JCE-III, the following factors must be proved beyond reasonable doubt: (1) it was foreseeable that such a crime would be perpetrated in order to carry out the *actus reus* of the crimes forming part of the common purpose; (2) the accused was aware that such a crime was a possible consequence of the implementation of the common plan, but willingly took the risk.[403]

[403] *Brđanin* AJ, para.411; *Tadić* AJ, para.228.

B.2 THE PROSECUTION HAS FAILED TO ESTABLISH THE ELEMENTS OF JCE-III LIABILITY

B.2.1 The Prosecution has failed to prove that the crime of genocide was a foreseeable consequence of the implementation of the common purpose

322. The Prosecution alleges, the "organised and intensely violent pattern of crimes" in the Municipalities demonstrates that the crime of genocide was a foreseeable consequence of the implementation of the common purpose.[404]

323. The Prosecution must prove "it was foreseeable that such a crime might be perpetrated […] in order to carry out the *actus reus* of the crimes forming part of the common purpose".[405] The Respondent recalls, genocide is a specific intent crime. The Prosecution has failed to establish that it was foreseeable that the physical perpetrators would commit genocide as a result of the order to carry out the *actus reus* elements of the crimes against humanity. The Prosecution has failed to discharge its burden and demonstrate that all reasonable doubt of the Respondent's guilt has been eliminated.

B.2.2 The Prosecution has failed to prove that the Respondent was aware that genocide might be committed and willingly took the risk

324. The Prosecution claims, the Respondent "*knew* that the crimes constituting genocidal and other culpable acts were being committed".[406] It cites the Trial Chamber's findings on crimes against humanity to substantiate this.[407] Again, the Respondent recalls that genocide is a specific intent crime. The Prosecution has failed to establish that the Respondent knew a prohibited act under Art.4(2) would be committed, and would be committed with the specific intent to destroy the protected group.[408] The Prosecution has failed to discharge its burden of proof and demonstrate that all reasonable doubt of the Respondent's guilt has been eliminated.

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[404] Prosecution Appeal, para.49.
[405] *Brđanin* AJ, para.411.
[406] Prosecution Appeal, para.49 [emphasis added].
[407] Prosecution Appeal, para.49, fns128-130.
[408] *Brđanin* JCE Decision, para.6.

325. The Prosecution further claims, the use of propaganda "is more than sufficient to have alerted [the Respondent] to the risk" that the physical perpetrators might act with genocidal intent.[409] It cites the Trial Chamber's finding that the Respondent used propaganda to convince the Bosnian Serbs that the war was "necessary and justified".[410] The Respondent notes, the Trial Chamber found that this was aimed at the task of ethnic separation and division, not the physical destruction of the group.[411] The Prosecution has failed to establish that the Respondent was aware that genocide was a possible consequence of the speeches and statements made by the other OJCE members. The Prosecution has failed to discharge its burden of proof and demonstrate that all reasonable doubt of the Respondent's guilt has been eliminated.

B.3 Conclusion

326. The Respondent recalls that, before the Appeals Chamber can accede to the Prosecution's request, it must show that all reasonable doubt of the Respondent's guilt has been eliminated. The Respondent submits, the Prosecution has failed to discharge its burden to prove that the elements of JCE-III have been satisfied beyond reasonable doubt.

B.4 Remedy Sought

327. The Respondent invites the Appeals Chamber to dismiss the second remedy sought by the Prosecution.

[409] Prosecution Appeal, para.49.
[410] Judgement, para.4500.
[411] Judgement, para.4235.

VI. SECOND ALTERNATIVE REMEDY: THE PROSECUTION HAS FAILED TO ESTABLISH THAT THE RESPONDENT IS RESPONSIBLE FOR GENOCIDE AS A SUPERIOR UNDER ART.7(3)

328. The Respondent recalls, the Trial Chamber concluded that the physical perpetrators did not possess the intent to destroy a substantial part of the group.[412] If the Appeals Chamber dismisses Ground 1 of the Prosecution's appeal, then the Prosecution is unable to establish that the crime of genocide was committed by the physical perpetrators. In these circumstances, the Respondent invites the Appeals Chamber to dismiss this request.

329. In the alternative, the Prosecution invites the Appeals Chamber to hold the Respondent liable for genocide as superior under Art.7(3) of the Statute, as an alternative to its alternative request for the Appeals Chamber to find the Respondent liable under JCE-III. This is the third remedy sought by the Prosecution.

330. The Respondent notes, the Prosecution does not allege that the Trial Chamber erred in failing to convict the Respondent of genocide under Art.7(3). Its submissions are simply that the Appeals Chamber should enter a conviction under Art.7(3) as an alternative to JCE-I or JCE-III. Notwithstanding this, the Respondent asserts that the Prosecution is still required to meet the appellate standard and demonstrate that all reasonable doubt of the Respondent's guilt has been eliminated. The Respondent submits, the Prosecution has failed to establish the elements of Art.7(3) liability and, as such, the Appeals Chamber should dismiss its request to find the Respondent responsible for genocide under Art.7(3).

A.1 APPLICABLE LAW

A.1.1 THE APPELLATE STANDARD

331. The Respondent recalls paragraphs 18, identifying the burden on the Prosecution on appeal.

[412] Judgement, para.3535.

A.1.2 CRIMINAL RESPONSIBILITY UNDER ART.7(3)

332. In order to establish a finding of criminal responsibility under Art.7(3), the following factors must be proved beyond reasonable doubt: (1) that the accused was a *de jure* or *de facto* superior of the perpetrator of the crime and exercised effective control over this perpetrator; (2) the accused knew or had reason to know that a crime was going to be committed or had been committed; and (3) the accused did not take the necessary and reasonable measures to prevent or punish the commission of the crime by the subordinate.[413]

A.1.2.1 Effective control

333. A superior's authority to issue orders *does not automatically* establish that he had effective control over his subordinates.[414] It is one of the indicators to be considered. Effective control requires more than a "substantial influence" over subordinates.[415] Whether or not his orders were actually followed is relevant to an assessment of this.[416]

A.1.2.2 Knowledge or awareness

334. The accused does not need to have the same intent as the perpetrator of the criminal act, but it must be shown that the accused knew or had reason to know about the actions of his subordinate.[417]

A.1.2.3 Necessary and reasonable measures

335. Necessary measures "are those required to discharge the obligation to prevent or punish, in the circumstances prevailing at the time", and reasonable measures "are those which the

[413] *Milošević* AJ para.280, fn816; *Kordić & Čerkez* AJ, para.827; *Blaskić* TJ, para.294.
[414] *Halilović* AJ, paras.68, 70, 139; *see* further API, Commentary, para.3544: "we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control".
[415] *Delalić* AJ, para.266.
[416] *Strugar* AJ, para.254.
[417] *Nahimana* AJ, para.865.

commander was in a position to take in the circumstances."[418] The Trial Chamber must assess at what point in time, what measures were at the commander's disposal in the circumstances,[419] and what crimes the commander knew or should have known about.[420]

A.2 THE PROSECUTION HAS FAILED TO ESTABLISH THE ELEMENTS OF ART.7(3) RESPONSIBILITY

336. The Respondent submits that the Prosecution has failed to establish the elements of Art.7(3) responsibility for the prohibited acts committed by the physical perpetrators. As such, the Prosecution has failed to discharge its burden and demonstrate that all reasonable doubt of the Respondent's guilt has been eliminated.

A.2.1 EFFECTIVE CONTROL IS NOT ENOUGH TO ESTABLISH LIABILITY UNDER ART.7(3) FOR GENOCIDE

337. The Trial Chamber concluded that the Respondent exercised effective control over the VRS perpetrators.[421] Given that the Trial Chamber found that genocide was not encompassed by the common plan,[422] and that the Respondent and OJCE members did not possess the intention to destroy the protected group,[423] effective control alone is insufficient to establish liability under Art.7(3).

A.2.2 THE PROSECUTION HAS FAILED TO PROVE THAT THE RESPONDENT KNEW OR HAD REASON TO KNOW THAT THE PHYSICAL PERPETRATORS POSSESSED THE INTENT TO DESTROY THE PROTECTED GROUP

338. The Prosecution alleges, the Respondent was "well-aware of the risk that his subordinates might commit, or might have committed, genocide".[424] The Prosecution relies on the Trial Chamber's findings that the Respondent had knowledge of the commission of crimes

[418] *Blaskić* TJ, para.333.
[419] *Bemba* AJ, para.168, fn337.
[420] *Bemba* AJ, para.168.
[421] Prosecution's Appeal, para.50, fn133.
[422] Judgement, para.4237.
[423] Judgement, para.4236.
[424] Prosecution Appeal, para.50.

against humanity, to evidence his knowledge and/or awareness of the physical perpetrators having committed the genocidal acts with the intent to destroy the protected group.[425]

339. The Respondent recalls paragraphs 334, identifying the legal standard. The Respondent notes that in the context of genocide, the Prosecution must prove that the Respondent possessed sufficiently alarming information to alert him to the specific intent of the physical perpetrators.[426] The Prosecution fails to demonstrate that the Respondent knew or had reason to know that the physical perpetrators possessed the specific intent to destroy the protected group when carrying out the prohibited acts. The Prosecution fails to discharge its burden and demonstrate that all reasonable doubt of the Respondent's guilt has been eliminated.

A.2.3 Obligation to take necessary and reasonable measures

340. Flowing from the Prosecution's claim that the Respondent knew or had reason to know that the physical perpetrators possessed the specific intent to destroy when carrying out the prohibited acts, it alleges that he failed to fulfil his obligation to take necessary and reasonable measures to prevent his subordinates committing genocide.[427] The Respondent submits, as the Prosecution has failed to establish that he knew or was aware that genocide had been committed, it has failed to prove that should have prevented or punished the physical perpetrators.

341. The Respondent notes, the Prosecution cites the Trial Chamber's findings on crimes against humanity in this submission.[428] These findings do not demonstrate that the Respondent knew of was aware that the physical perpetrators had committed genocide or that he failed to take all necessary and reasonable measures in this regard.

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[425] Prosecution's Appeal, para.50. *See* para.50, fn134, referencing Prosecution's Appeal, para.49.
[426] *Karemera* AJ, para.307; *Blagojević* TJ, para.686; *Brđanin* TJ, para.721; *Krnojelac* AJ, para.155.
[427] Prosecution's Appeal, para.50.
[428] Prosecution's Appeal, para.50, fn136.

A.3 CONCLUSION

342. The Respondent recalls that, before the Appeals Chamber can accede to the Prosecution's request, it must show that all reasonable doubt of the Respondent's guilt has been eliminated. The Respondent submits, the Prosecution has failed to discharge its burden prove that the elements of Art.7(3) have been satisfied beyond reasonable doubt.

A.4 REMEDY SOUGHT

343. The Respondent invites the Appeals Chamber to dismiss the third remedy sought by the Prosecution.

VII. RELIEF SOUGHT

343. The Respondent has identified the deficiencies in the Prosecution's appeal. The Respondent submits, the Prosecution has failed to meet the appellate standard and demonstrate that the errors of law and/or fact alleged invalidate the Judgement. The Respondent invites the Appeals Chamber to:

(a) Dismiss the Prosecution's appeal on Ground 1;

(b) Dismiss the Prosecution's appeal on Ground 2;

(c) Dismiss the Prosecution's request for the Appeals Chamber to enter a conviction for Count 1 on the basis of JCE-I;

(d) Dismiss the Prosecution's alternate request for the Appeals Chamber to enter a conviction for Count 1 on the basis of JCE-III on the basis that either:

(i) JCE-III liability has no basis in CIL; or

(ii) The Prosecution has failed to prove the elements of the JCE-III liability;

(e) Dismiss the Prosecution's alternate request for the Appeals Chamber to enter a conviction for Count 1 on the basis of Art.7(3) of the Statute.

Word Count: 28,028.

RESPECTFULLY SUBMITTED BY:

Branko Lukić
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Dated this 14th day of November 2018
At The Hague, The Netherlands

JURISPRUDENCE

Mladić Case Documents

Abbreviation	**Full citation**
Indictment	*Prosecutor v. Ratko Mladić*, IT-09-92-PT, Prosecution Submission on the Fourth Amended Indictment and Schedules of Incidents, 16 December 2011.
Judgement	*Prosecutor v. Ratko Mladić*, IT-09-92-T, Trial Chamber I, Judgement, 22 November 2017.
Prosecution Appeal	*Prosecutor v. Ratko Mladić,* MICT-13-56-A, Prosecution Appeal Brief, 6 August 2018.
Response	*Prosecutor v. Ratko Mladić,* MICT-13-56-A, Defence Response to Prosecution Appeal Brief, 14 November 2018.

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Blagojević AJ	*Prosecutor v. Vidoje Blagojević & Dragan Jokić,* IT-02-60-A, Appeals Chamber, Judgement, 9 May 2007.
Blaskić TJ	*Prosecutor v. Thomir Blaskić,* IT-95-14-T, Trial Chamber, Judgement, 3 March 2000.
Brđanin AJ	*Prosecutor v. Radoslav Brđanin,* IT-99-36-A, Appeals Chamber, Judgement, 3 April 2007.
Brđanin TJ	*Prosecutor v. Radoslav Brđanin,* IT-99-36-T, Trial Chamber, Judgement, 1 September 2004.
Brđanin JCE-III Decision	*Prosecutor v. Radoslav Brđanin,* IT-99-36-A, Appeals Chamber, Decision on Interlocutory Appeal, 19 March 2004.
Đorđević AJ	*Prosecutor v. Vlastimir Đordević*, IT-05-87/1-A, Appeals Chamber, Judgment, 27 January 2014.
Delalić AJ	*Prosecutor v. Zenjil Delalić, Hazim Delić, Esad Landžo, and Zdravko Mucić,* IT-96-21-A, Appeals Chamber, Judgement, 20 February 2001.
Delalić TJ	*Prosecutor v. Zenjil Delalić, Hazim Delić, Esad Landžo, and Zdravko Mucić,* IT-96-21-T, Trial Chamber, 16 November 1998.
Furundžija AJ	*Prosecutor v. Anto Furundžija*, IT-95-17/1-A, Appeals Chamber, Judgement, 21 July 2000.
Galić AJ	*Prosecutor v. Stanislav Galić,* IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006.
Gotovina AJ	*Prosecution v. Ante Gotovina and Mladen Markač*, IT-06-90-A, Appeals Chamber, Judgement, 16 November 2012.
Halilović AJ	*Prosecutor v. Sefer Halilović,* IT-01-48-A, Appeals Chamber, Judgement, 16 October 2007.
Jelisić TJ	*Prosecutor v. Goran Jelisić,* IT-95-10-T, Trial Chamber, Judgement, 14 December 1999.
Karadžić 98*bis* Decision	*Prosecutor v. Radovan Karadžić,* IT-95-5/18-AR98*bis.*1, Appeals Chamber, Judgement, 11 July 2013.
Karadžić JCE-III Decision	*Prosecutor v. Karadžić,* IT-95-5/18-AR72.4, Appeals Chamber, Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, 25 June 2009.

Kordić & Čerkez AJ	*Prosecutor v. Dario Kordić and Mario Čerkez,* IT-95-14/2-A, Appeals Chamber, Judgement, 17 December 2004.
Krajišnik AJ	*Prosecutor v. Momčilo Krajišnik,* IT-00-39-A, Appeals Chamber, Judgement, 17 March 2009.
Krajišnik TJ	*Prosecutor v. Momčilo Krajišnik,* IT-00-39-T, Trial Chamber, Judgement, 27 September 2006.
Krnojelac AJ	*Prosecutor v. Milorad Krnojelac,* IT-97-25-A, Appeals Chamber, Judgement, 17 September 2003.
Krstić AJ	*Prosecutor v. Radislav Krstić,* IT-98-33-A, Appeals Chamber, Judgement, 19 April 2004.
Krstić TJ	*Prosecutor v. Radislav Krstić,* IT-98-33-T, Trial Chamber, Judgement, 2 August 2001.
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Martić AJ	*Prosecutor v. Milan Martić*, IT-95-11-A, Appeals Chamber, Judgement, 8 October 2008.
Milošević 98*bis* Decision	*Prosecutor v. Slodoban Milošević,* IT-02-54-T, Trial Chamber, Decision on Motion for Judgement of Acquittal, 16 June 2004.
Milošević AJ	*Prosecutor v. Dragomir Milošević,* IT-98-29/1-A, Appeals Chamber, Judgement, 12 November 2009.
Milutinović JCE-III Decision	*Prosecution v. Milan Milutinović, Nikola Šainović, and Dragoljub Ojdanić,* IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003.
Popović AJ	*Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, Vinko Pandurević,* IT-05-88-A, Appeals Chamber, Judgement, 30 January 2015.
Popović TJ	*Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, Vinko Pandurević,* IT-05-88-T, Trial Chamber, Judgement, 10 June 2010.
Šainović AJ	*Prosecutor v. Nikola Šainović, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić*, IT-05-87-A, Appeals Chamber, Judgement, 23 January 2014.

Šešelj TJ	*Prosecution v. Vojislav Šešelj*, IT-03-67-T, Trial Chamber, Judgement, 31 March 2016.
Sikirica Judgement on Acquittal Motions	*Prosecution v. Duško Sikirica, Damir Došen, and Dragan Kolundžija*, IT-95-8-T Trial Chamber, Judgement on Defence Motions to Acquit, 3 September 2001.
Stakić AJ	*Prosecutor v. Milomir Stakić,* IT-97-24-A, Appeals Chamber, Judgement, 22 March 2006.
Stakić TJ	*Prosecutor v. Milomir Stakić,* IT-97-24-T, Trial Chamber, Judgement, 31 July 2013.
Stanišić & Župljanin AJ	*Prosecutor v. Mićo Stanišić & Stojan Župljanin,* IT-08-91-A, Appeals Chamber, Judgement, 30 June 2016.
Strugar AJ	*Prosecutor v. Pavle Strugar,* IT-010420A, Appeals Chamber, Judgement, 17 July 2008.
Tadić AJ	*Prosecutor v. Duško Tadić,* IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999.
Tolimir AJ	*Prosecutor v. Zdravko Tolimir,* IT-05-88/2-A, Appeals Chamber, Judgement, 08 April 2015.
Tolimir TJ	*Prosecutor v. Zdravko Tolimir,* IT-05-88/2-T, Trial Chamber, Judgement, 12 December 2012.

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Abbreviation	Full Citation
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Akayesu TJ	*Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998.
Karemera AJ	*Prosecution v. Édouard Karemera and Matthieu Ngirumpatse,* ICTR-98-44-A, Appeals Chamber, Judgement, 29 September 2014.
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Rutaganda AJ	*Prosecution v. Goerges Anderson Nderubumwe Rutaganda,* ICTR-96-3-A, Appeals Chamber, Judgement, 26 May 2003.
Rutaganda TJ	*Prosecution v. Goerges Anderson Nderubumwe Rutaganda,* ICTR-96-3-T, Trial Chamber, Judgement, 6 December 1999.
Semanza TJ	*Prosecution v. Laurent Semanza,* ICTR-97-20-T, Trial Chamber, Judgement, 15 May 2003.

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Notice of filing of Book of Authorities, from page 5 to 932

Abbreviation	Full citation
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Bemba PTC	*Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Pre-Trial Chamber, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecution Against Jean Pierre Bemba Gombo, 15 June 2009.
Katanga TJ	*Prosecutor v. Germain Katanga,* ICC-01/04-01/07, Trial Chamber, Judgement, 7 March 2014.

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Notice of filing of Book of Authorities, from page 933 to 1,522

Abbreviation	Full citation
Nuon & Khieu AJ	*Prosecution v. Chea Nuon and Samphan Khieu,* Case 002/19-09-2007-ECCC/SC, Appeals Chamber, Judgement, 23 November 2016.
ECCC JCE Decision	*Co-Prosecutors v. Ieng Thirith et al*. (Case 002), 002/19-09-2007-ECCC/OCIJ (PTC38), Appeals Chamber, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010.

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Abbreviation	Full citation
Ayyash AJ	*Prosecution v. Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi, and Assad Hassan Sabra,* Case STL-11-01/I, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 10 February 2011.

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Abbreviation	Full citation
Taylor TJ	*Prosecution v. Charles Ghankay Taylor,* Case STL-11-01-T, Trial Chamber, Judgement, 18 May 2012.

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Notice of filing of Book of Authorities, from page 4,218 to 5,554

Abbreviation	Full citation
Borkum Island	*United States v Kurt Goebell et al*, Case 12-439, Trial Transcripts Vol.6, 21 March 1949, pp.1045-1286 (copy on file with the Tribunal's Library)
Dachau Concentration Camp case	Review of the Proceedings of General Military Court in the case of *United States of America v Martin Gottfried Weiss et al*, Law-Reports of Trials of War Criminals, United Nations War Crimes Commission, Vol.XI, pp.5-17
The Einsatzgruppen case	*United States of America v Otto Ohlendorf et al,* 08 April 1948, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, October 1946-April 1949, Washington, DC: U.S. Government Printing Office, 1949.
Essen Lynching	Transcript, Public Record Office, London WC 235/58, pp.65-68 (copy on file with the Tribunal's Library)
Ikeda case	*The Queen v Shoichi Ikeda*, 30 March 1948, Temporary Military Court, Batavia, National Archives Kew, London, WO 00235 No. 01064, JAG No.65251
The Nuremberg trials	*Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 01 October 1946*, Official text in the English Language, published 1947.
Pohl et al	*The United States of America v Oswald Pohl et al*, 03 November 1947, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, October 1946-April 1949, Washington, DC: U.S. Government Printing Office, 1949.
Renoth et al	Trial *of Hans Renoth and three others,* British Military Court, Germany, 08-10 January 1946, Law-Reports of Trials of War Criminals, United Nations War Criminal Commission, V.XI, pp.76-78
The RuSHA case	*United States of America v Ulrich Greifelt et al*, 22 July 1947, Military Tribunal, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, October 1946-April 1949, Washington, DC: U.S. Government Printing Office, 1949
Sch et al	*Entscheidungen des Obersten Gerichtshofes für die Britische Zone*, Entscheidungen in Strafsachen, Walter de Gruyter & Co (Berlin, 1950), Vol.2, pp.11-15.

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Notice of filing of Book of Authorities, from page 5,555 to 5,689

Abbreviation	Full citation
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Aratano et al	Italian Court of Cassation Criminal Section II Judgment of 21 February 1949, No.201 See BoA ITAL-0022 & ITAL-0034
Bonati et al	Italian Court of Cassation Criminal Section II Judgement of 15 July 1946, No.4173 See BoA ITAL-0050 & ITAL-0065
D'Ottavio et al	Italian Court of Cassation Criminal Section I Judgment of 12 March 1947, No. 270 See BoA ITAL-0096 & ITAL-0092
Ferri	Italian Court of Cassation Criminal Section II Judgment of 17 September 1946, No.1358, in Archivio Penale 1947, Part II See BoA ITAL-0104 & ITAL-00108
Mannelli et al	Italian Court of Cassation Criminal Section I Judgment of 20 July 1949, No.914, in Giustizia Penale, 1949, Part II See BoA ITAL-0003 & ITAL-0016
Montagnino	Italian Court of Cassation Criminal Section I Judgement of 24 February 1950, in Giustizia Penale, 1950, Part II See BoA ITAL-0006 & ITAL-0018
Palmia	Italian Court of Cassation Criminal Section II Judgement of 20 September 1946, in Archivio Penale 1947, Part II See BoA ITAL-0116 & ITAL-0117
Peveri	Italian Court of Cassation Criminal Section I Judgement 15 March 1948, in Archivio Penale 1948 See BoA ITAL-0118 & ITAL-0123
Solesio	Italian Court of Cassation Criminal Section II Judgement of 19 April 1950, in Giustizia Penale, 1950, Part II See BoA ITAL-0006 & ITAL-0018
Tossani	Italian Court of Cassation Criminal Section II Judgment of 17 September 1946, No.1449, in Archivio Penale 1947, Part II See BoA ITAL-0127 & ITAL-0129
Torrazzini	Italian Court of Cassation Criminal Section II Judgement of 18 August 1946, in Archivio Penale 1947, Part II See BoA ITAL-0116 & ITAL-0117

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Notice of filing of Book of Authorities, from page 5,690 to 5,927

Abbreviation	Full citation
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Badar	Mohamed Elewa Badar, "Just Convict Everyone!" – Joint Perpetrations: From *Tadić* to *Stakić* and Back Again" *International Criminal Law Review* 6: 293–302, 2006.
Ohlin 2007	Ohlin, Jens David. "Three conceptual problems with the doctrine of joint criminal enterprise." Journal of International Criminal Justice 5.1 (2007)
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