

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No: MICT-13-56-A

Date: 21 January 2019

Original: English

IN THE APPEALS CHAMBER

Before:

Judge Prisca Matimba Nyambe, Presiding
Judge Aminatta Lois Runeni N’gum
Judge Gberdao Gustave Kam
Judge Seymour Panton
Judge Elizabeth Ibanda-Nahamya

Registrar:

Mr. Olufemi Elias

THE PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

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

The Office of the Prosecutor:

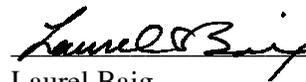
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1. The Prosecution hereby files a public redacted version of its Reply Brief.¹

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Dated this 21st day of January 2019
At The Hague, The Netherlands

¹ *Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Prosecution Reply Brief, 29 November 2018. Note that the Prosecution has corrected the typographical error in the title of the public redacted version of its Reply Brief.

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The Office of the Prosecutor:

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I. OVERVIEW

1. As set out in the Prosecution's Appeal, the Chamber erred in determining that the Bosnian Muslim communities of Kotor Varoš, Sanski Most, Foča, Vlasenica and Prijedor (the "Count 1 Municipalities") did not each constitute a substantial part of the Bosnian Muslim Group (Ground 1) and erred in failing to hold Mladić responsible for genocide in the five Count 1 Municipalities (Ground 2). Mladić's response does not undermine the Prosecution's appeal arguments. To the contrary, under Ground 1, much of Mladić's argument on substantiality is irrelevant because he misconstrues the Judgement's findings on the numeric size of the targeted parts of the Bosnian Muslim Group. Similarly, under Ground 2 Mladić's argument centres around his misconceived and incorrect claim that the criminal conduct of local perpetrators in the Count 1 Municipalities is not fully attributable to the JCE members because the Chamber attributed this conduct to the JCE members as crimes against humanity, rather than genocide.

2. In his remedy arguments, Mladić neither shows cogent reasons to depart from the Appeals Chamber's repeated affirmations of the customary international law status of JCE3, nor undermines the Prosecution's argument that the elements of JCE3 liability and Article 7(3) liability are met in this case.

II. GROUND 1: THE BOSNIAN MUSLIM COMMUNITY IN EACH OF THE COUNT 1 MUNICIPALITIES CONSTITUTED A SUBSTANTIAL PART OF THE BOSNIAN MUSLIM GROUP

3. Mladić’s arguments in response fail to undermine Ground 1 of the Prosecution’s Appeal. His numeric size arguments are premised on a misreading of the Judgement’s findings on the parts of the Bosnian Muslim Group that were intended for destruction, as well as on the scope of the perpetrators’ area of activity and control.¹ His discussion on the prominent and emblematic status of the targeted parts is permeated by the false notion that this factor must be assessed solely “through the eyes” of the protected group.²

4. Mladić acknowledges that to constitute a substantial part of a protected group the part targeted must be “significant enough to have an impact on the group as a whole”.³ His arguments fail to undermine the Prosecution’s position that no reasonable trier of fact could have failed to conclude that destroying any one of the Count 1 Communities⁴—each comprising many thousands of Bosnian Muslims, possessing characteristics that made it prominent within and emblematic of the Bosnian Muslim Group, and representing the full extent of the perpetrators’ respective areas of activity and control—was significant enough to have an impact on the Bosnian Muslim Group as a whole.⁵

A. The Bosnian Muslim population in each Count 1 Municipality was substantial in size

5. Mladić’s arguments on the numeric size of the targeted parts are irrelevant because they are premised on the misconception that the parts of the Bosnian Muslim Group targeted for destruction were subsets of the Bosnian Muslim population within each Count 1 Community.⁶ This (i) misconstrues the Judgement’s clear findings on the scope of the targeted parts, and (ii) is based on a misapprehension that the

¹ *Contra* Mladić-RB, paras.48-58.

² *Contra* Mladić-RB, paras.59-85.

³ Mladić-RB, para.24. *Also* Prosecution-AB, para.5 *citing* Judgement, paras.3437, 3528, 3530-3534, *Krstić* AJ, paras.8, 12-14.

⁴ “Count 1 Communities” is defined as the Bosnian Muslim community in each of the Count 1 Municipalities.

⁵ *See* Prosecution-AB, paras.5-16.

perpetrators' areas of activity and control is relevant to the identification of the part targeted. In any event, Mladić also mischaracterises the Chamber's findings on the perpetrators' areas of activity and control.

1. Mladić misconstrues the findings on the targeted parts

6. The Majority found that certain local perpetrators intended to destroy the entire Bosnian Muslim population within their respective Count 1 Municipalities.⁷ Accordingly, the Chamber went on to assess whether any of these five targeted parts, not any subset(s) of such parts, were substantial in relation to the Bosnian Muslim Group as a whole, considering the quantitative and qualitative features of the Count 1 Municipalities and their respective Bosnian Muslim populations.⁸ As part of this substantiality analysis, for each Count 1 Municipality, the Chamber took into consideration that “the Bosnian Muslims of [the respective Count 1 Municipality] were the only part of the Bosnian-Muslim protected group within the[] area of activity and control” of the local perpetrators in question.⁹ The Chamber ultimately concluded that none of the five assessed parts of the group—i.e. the five Count 1 Communities—was individually substantial, holding that it was not satisfied that the local perpetrators “possessed the intent to destroy *the Bosnian Muslims* [in each of the Count 1 Municipalities] as a substantial part of the protected group.”¹⁰

7. It is thus the Majority's finding—not, as Mladić contends, the Prosecution's “claim[]”¹¹—that each targeted part comprised the Count 1 Municipality's entire Bosnian Muslim population. Based upon that finding, the Prosecution argues that those targeted parts were substantial.¹²

2. Mladić conflates the area of activity and control with the part targeted

8. Mladić's misconception about the scope of the targeted parts in this case is based on his erroneous suggestion that the scope of the targeted part in question is

⁶ Mladić-RB, paras.50-53.

⁷ Judgement, para.3526.

⁸ Judgement, paras.3526, 3530-3534.

⁹ Judgement, paras.3530-3534.

¹⁰ Judgement, para.3535 (emphasis added).

¹¹ *Contra* Mladić-RB, para.50.

¹² *See* Prosecution-AB, paras.5-16.

limited by the geographic area of activity and control of individual perpetrators.¹³ This conflates the assessment of the area of activity and control—a factor used to determine whether a targeted part is substantial¹⁴—with the initial identification of the part intended for destruction.

9. Mladić also incorrectly claims the Prosecution “acknowledges” his theory that individual perpetrators’ “geographical control and authority” alters the “numerical size of the targeted parts” found by the Majority.¹⁵ Rather, the Prosecution submits that a relatively small numeric part is more likely to meet the substantiality threshold where that part reflects the full extent of the perpetrators’ authority and control or reach.¹⁶ Accordingly, the Prosecution relies on the Chamber’s findings on the perpetrators’ respective areas of activity and control¹⁷ to support its argument that the targeted parts, as defined by the Majority,¹⁸ were substantial.¹⁹

10. Based on his misconceived premise that the targeted parts in the Count 1 Municipalities consisted of only subsets of their respective Bosnian Muslim populations,²⁰ Mladić incorrectly asserts that “[t]he 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”.²¹ He also attempts to distinguish the Chamber’s reasoning in relation to Srebrenica based on the scale and pattern of crimes and victim numbers.²² However, once the targeted part is defined, these factors are not relevant—and were not relied on by the Chamber—in assessing its substantiality.²³

¹³ Mladić-RB, paras.51-53.

¹⁴ *Krstić* AJ, para.13 (holding that “[w]hile this factor alone will not indicate whether the targeted group is substantial, it can – in combination with other factors – inform the analysis.”). *Also* Judgement, para.3528.

¹⁵ *Contra* Mladić-RB, para.51. *Also* Mladić-RB, paras.50 (wrongly contending that the Prosecution’s “alleg[ations]” about the size of the perpetrators’ areas of activity and control are used to “substantiate” Prosecution “claims” as to the scope of the targeted parts), 53.

¹⁶ Prosecution-AB, para.10 *citing* *Krstić* AJ, para.17. *Further Brdanin* TJ, fn.2441 (finding that the fact that “the area of the Accused’s activity and power as well as the possible extent of their reach” corresponds to the size of the targeted parts “would point towards the satisfaction of the substantiality requirement”).

¹⁷ *Below* para.11.

¹⁸ *Above* para.6.

¹⁹ Prosecution-AB, para.10.

²⁰ *Contra* Mladić-RB, para.57.

²¹ Mladić-RB, heading A.4.1.2, p.15. *See* Prosecution-AB, para.9 (correctly observing that each of the Count 1 Communities “was comparable in size to Srebrenica’s Bosnian Muslim population”).

²² Mladić-RB, para.57 *citing* Judgement, paras.3550-3554.

²³ *Krstić* AJ, paras.12-13.

3. Mladić misconstrues the findings on the perpetrators' areas of activity and control

11. In any event, Mladić's misconceived claims about the size of the targeted parts are based on mischaracterisations of the Chamber's findings on the perpetrators' areas of activity and control. The Chamber expressly found "the Bosnian Muslims of [the Count 1 Municipalities] were the only part of the Bosnian Muslim protected group within [the perpetrators'] area of activity and control" because their authority "did not extend beyond" the respective Count 1 Municipalities.²⁴ Nowhere did it find that their area of activity and control or extent of their reach covered less than an individual municipality.²⁵

12. Because of his fundamental misunderstanding of the Judgement, Mladić's argument focuses exclusively on made-up "sphere[s] of responsibility" of individual perpetrators, including single crime sites,²⁶ rather than the targeted parts the substantiality of which was assessed by the Chamber. These arguments are irrelevant and thus fail to undermine the Prosecution's argument on the targeted parts' absolute and relative size:²⁷ that each of the Count 1 Communities comprised many thousands of group members²⁸ and was comparable in size to Srebrenica's Bosnian Muslim community²⁹—a part found to be substantial.³⁰

B. The Count 1 Communities were prominent within and emblematic of the Bosnian Muslim Group

13. Mladić's arguments on the prominent and emblematic nature of the Count 1 Communities are permeated by a false theory that this factor must be assessed solely "through the eyes" of the protected group.³¹ Mladić's remaining arguments mischaracterise the Prosecution's submissions.³²

²⁴ Judgement, paras.3530-3534.

²⁵ *Contra* Mladić-RB, paras.50-53.

²⁶ Mladić-RB, para.52.

²⁷ *Krstić* AJ, para.12.

²⁸ Prosecution-AB, para.8, fn.14.

²⁹ Prosecution-AB, para.9.

³⁰ Judgement, para.3554.

³¹ Mladić-RB, paras.65-68, 72, 82-85.

³² *Below* paras.17-18.

14. ICTY jurisprudence does not limit the prominent or emblematic assessment solely to the perspective of the protected group.³³ The *Krstić* Appeal Judgement, relied on by Mladić,³⁴ also considered both the targeted part’s “prominence in the eyes of [...] the international community”³⁵ and its “strategic importance to the Bosnian Serb leadership” to be relevant to this analysis.³⁶ Other ICTY Chambers have taken a similar approach.³⁷

15. The Chamber in this case correctly understood that this factor was not limited to the perspective of the victims alone. In relation to both Srebrenica and the Count 1 Municipalities, it made comparable findings as to their symbolic and strategic significance in the eyes of the Bosnian Serbs.³⁸ For example, it found Mladić considered the Srebrenica area synonymous with Muslim domination over the Serbs.³⁹ Similarly, it found the Bosnian Serb leadership saw Prijedor and its Bosnian Muslim community as emblematic of World War II and “the slaughter” of Serbs throughout the region.⁴⁰ Furthermore, just as the Chamber found control over Srebrenica was necessary to the Bosnian Serb leadership “for maintaining a Serb-populated border area contiguous with Serbia”,⁴¹ it concluded that Prijedor held strategic significance as the only land corridor connecting Serbia with western BiH.⁴²

16. Mladić fails to explain why statements by members of the Bosnian Serb leadership or Defence witnesses, including those made in private,⁴³ are less capable of demonstrating the targeted part was prominent within or emblematic of the Bosnian Muslim Group.⁴⁴ This claim is belied by the Chamber’s own approach, which considered statements by members of the Bosnian Serb leadership, including “Mladić’s statements with respect to Srebrenica”, in its substantiality assessment.⁴⁵ In any event, Mladić ignores evidence from the perspective of members of the Count 1

³³ *Contra* Mladić-RB, paras.65, 72, 84.

³⁴ Mladić-RB, paras.65 (citing *Krstić* AJ, para.16), 72.

³⁵ *Krstić* AJ, para.16 referenced at Mladić-RB, para.65.

³⁶ *Krstić* AJ, para.15.

³⁷ See *Popović* TJ, para.865; *Tolimir* AJ, para.186; *Karadžić* TJ, para.5672.

³⁸ Judgement, paras.3530-3534, 3552-3554. See Prosecution-AB, paras.12-14.

³⁹ Judgement, para.3552. See Prosecution-AB, para.12.

⁴⁰ Judgement, para.3534. The same is true for Sanski Most. See Prosecution-AB, para.12.

⁴¹ Judgement, para.3554. See Prosecution-AB, para.14.

⁴² Judgement, para.3534. See Prosecution-AB, para.14.

⁴³ *E.g.* Exhs.P355, p.66 (recording War Commission President Miroslav Stanić as stating that “Foča was supposed to be the second Islamic centre for Muslims in Europe” during a tactical group meeting on Foča) relied on at Judgement, para.3531; P353, p.262 relied on at Judgement, para.3533.

⁴⁴ *Contra* Mladić-RB, paras.67-68, 71, 85.

Communities that illustrates the prominent and emblematic nature of those communities.⁴⁶

17. Mladić’s remaining arguments mischaracterise the findings and evidence relied on by the Prosecution. Contrary to Mladić’s claim, the Prosecution nowhere suggests that ethnic integration in the Count 1 Communities is proof of a unique historic and cultural identity.⁴⁷ The Prosecution arguments he cites point to findings and underlying evidence that the Count 1 Municipalities had sizeable Bosnian Muslim communities with a centuries-long presence⁴⁸—including in Prijedor where, over “generations”,⁴⁹ Bosnian Muslims had developed “their own identity”.⁵⁰

18. Mladić also misconstrues the findings underlying the Prosecution’s arguments on the symbolic impact that the destructive campaign against the Count 1 Communities had on the Bosnian Muslim Group.⁵¹ He incorrectly contends the Prosecution’s submission on Prijedor’s status as “a perceived refuge from ethnic violence for Bosnian Muslims at the start of the conflict”⁵² is based solely on findings and evidence “which relate to ethnic integration and a possible plan to divide the municipality.”⁵³ In fact, this argument is grounded in the Chamber’s finding, based on *verbatim* quotes from a witness, that “Prijedor, as a multi-ethnic area, was a symbol throughout the region of Yugoslavia of ‘brotherhood and unity’, to the extent that Bosnian Muslims thought it was ‘the last town where ethnic conflict was possible.’”⁵⁴ The targeting of Prijedor’s Bosnian Muslim community thus represented an attack on the perceived ability of the Bosnian Muslim Group to survive in a multi-ethnic nation.⁵⁵ Mladić fails to show why, given this symbolic significance, the elimination of Prijedor’s Bosnian Muslim community at the start of the conflict was any less of a

⁴⁵ Judgement, para.3552. *Also above* para.15.

⁴⁶ *See* Judgement, fns.13394 (*citing* RM050:Exh.P2936, pp.18831-18832 (confidential)), 13410 (*citing* RM065:Exh.P3271, p.15); Prosecution-AB, fns.21 (*citing* [REDACTED]; N.Sivac:Exh.P480, p.76 (T.6753); [REDACTED]), 29 (*citing* N.Sivac:T.4837; [REDACTED]).

⁴⁷ *Contra* Mladić-RB, paras.62, 64 *citing* Prosecution-AB, fn.21.

⁴⁸ Prosecution-AB, para.11. *See* Judgement, paras.3442 (finding Bosnian Muslims had formed a part of the Count 1 Municipalities for centuries), 3530-3534 (finding Bosnian Muslims formed a large part of each Count 1 Municipality’s population) *referenced at* Prosecution-AB, fn.21.

⁴⁹ [REDACTED] Prosecution-AB, fn.21. *Also* Prosecution-AB, para.12.

⁵⁰ [REDACTED] Prosecution-AB, fn.21. *Also* Prosecution-AB, para.12.

⁵¹ *Contra* Mladić-RB, paras.73-81.

⁵² *See* Prosecution-AB, para.13.

⁵³ Mladić-RB, para.79. *Also* Mladić-RB, paras.63, 76.

⁵⁴ Judgement, para.3534 *relied on at* Prosecution-AB, para.13.

potent signal to the Bosnian Muslim Group of their vulnerability and defencelessness and the potential fate of all Bosnian Muslims in multi-ethnic BiH, than the destruction of Srebrenica's Bosnian Muslim community at the end of the conflict.⁵⁶

⁵⁵ See Judgement, para.3442; Exh.P178, pp.1, 3-4.

⁵⁶ Prosecution-AB, paras.13, 15. *Contra* Mladić-RB, para.73.

III. GROUND 2: MLADIĆ AND OTHER JCE MEMBERS POSSESSED DESTRUCTIVE INTENT

19. At the heart of Ground 2 of the Prosecution's Appeal are two incompatible findings: (i) the pattern of crimes in the Count 1 Municipalities reflected destructive intent⁵⁷ on the part of local perpetrators; and (ii) this same pattern of crimes did not reflect destructive intent on the part of those who masterminded that criminal pattern and used the local perpetrators to commit the crimes. These two irreconcilable findings reflect the Chamber's errors. First, their incompatibility results from the heightened—and erroneous—evidentiary standard imposed by the Chamber when assessing the destructive intent of JCE members (Ground 2(A)). Second, their incompatibility demonstrates the unreasonableness of the Chamber's conclusion on the JCE members' intent (Ground 2(B)).

20. The core underlying premise of Ground 2 of the Prosecution's Appeal is that the collective criminal conduct of the local perpetrators formed the sole basis for the Majority's findings on their destructive intent and that this collective criminal conduct was attributed to Mladić and the other JCE members. This premise is grounded in the following findings:

- Certain local perpetrators in the five Count 1 Municipalities acted with the intent to destroy a part of the Bosnian Muslim Group.⁵⁸
- These destructive intent findings were based solely on the local perpetrators' involvement in the pattern of crimes—many of which constituted underlying acts of genocide under Article 4(2)—committed in their respective Count 1 Municipalities.⁵⁹

⁵⁷ In light of Mladić's comment regarding the Prosecution's use of the phrase "destructive intent" (Mladić-RB, para.8) and in the event any clarification is necessary, the Prosecution notes that this refers to the intent to destroy the protected group in part. Where appropriate, the Prosecution has used this phrase, rather than "genocidal intent", in light of the Majority's findings that local perpetrators in the Count 1 Municipalities had the intent to destroy parts of the Bosnian Muslim Group but that these parts were not substantial. Judgement, paras.3526, 3535-3536.

⁵⁸ Prosecution-AB, para.23.

⁵⁹ Prosecution-AB, para.23.

- The JCE members used the local perpetrators who acted with destructive intent as tools to commit this pattern of crimes.⁶⁰
- The crimes committed by these local perpetrators formed part of the common purpose and were intended by the JCE members.⁶¹

21. Mladić takes issue with this premise. He argues—incorrectly—that the criminal conduct of these local perpetrators is not fully attributable to Mladić and other JCE members.⁶² He bases this contention on two flawed arguments.

22. First, Mladić complains that it was misleading for the Prosecution to characterise the crimes of local perpetrators falling under Article 4(2) as “genocidal acts” because the Chamber found the criminal conduct of the local perpetrators to constitute crimes against humanity and war crimes, but not genocide.⁶³ As is evident from its submissions, the Prosecution used the term “genocidal acts” as a descriptive term for acts satisfying the *actus reus* of genocide under Article 4(2).⁶⁴ Mladić rightly concedes that the Chamber found that crimes satisfying the *actus reus* of genocide under Article 4(2) were committed in the Count 1 Municipalities.⁶⁵

23. Second, permeating Mladić’s Ground 2 arguments is his misconceived and incorrect claim that the local perpetrators’ criminal conduct in the Count 1 Municipalities is somehow not properly attributable to the JCE members because the Chamber attributed that conduct to the JCE members as crimes against humanity, rather than genocide.⁶⁶ This argument ignores that the criminal conduct of local perpetrators that the Chamber attributed to the JCE members as war crimes and crimes against humanity is the same body of criminal conduct that the Majority relied on to infer the local perpetrators’ destructive intent.⁶⁷ That criminal *conduct* is attributable to the JCE members, regardless of its legal qualification. Accordingly, the Prosecution’s attribution arguments are based on findings demonstrating that the

⁶⁰ Prosecution-AB, para.23 *in particular* fn.52.

⁶¹ Prosecution-AB, para.23.

⁶² *E.g.* Mladić-RB, heading A.4.3.1 *and* para.131.

⁶³ Mladić-RB, paras.110-111. *Also* Mladić-RB, paras.157, 177.

⁶⁴ *E.g.* Prosecution-AB, paras.19-20, 26-27, 29, 35-36 (clearly using the phrase “genocidal and other culpable acts” to refer to underlying acts of genocide that fall under Article 4(2) and other culpable conduct).

⁶⁵ Mladić-RB, para.33 *citing* Judgement, paras.3438, 3443-3454. *See in particular* Judgement, paras.3446, 3451.

⁶⁶ *Below* paras.24-27.

underlying criminal acts of the local perpetrators found to have destructive intent were committed pursuant to the common purpose and were attributed to the JCE members.⁶⁸ The Prosecution never represented that the Chamber found the crime of genocide formed part of the JCE and was attributed to the JCE members. Yet Mladić repeatedly responds to this non-existent Prosecution claim.

24. For example, Mladić claims the Prosecution’s assertion that “all the genocidal and other acts in which the perpetrators with destructive intent participated [...] were within the scope of the common purpose” is “incorrect as a matter of law and fact”.⁶⁹ This is because—Mladić argues—the Chamber “found that the crimes against humanity were within the scope of the common purpose, not the prohibited acts established under Art.4(2).”⁷⁰ It is uncontested that the Chamber did not find that genocide fell within the common purpose. Mladić does not challenge the actual point the Prosecution makes, namely that the criminal acts of the perpetrators found to possess destructive intent—those that constituted Article 4(2) acts as well as other culpable acts—were found to be within the scope of the common purpose and were attributed to the JCE members.⁷¹

25. Similarly, Mladić responds to the Prosecution’s contention that “the JCE members intended the commission of the prohibited acts by the physical perpetrators”⁷² with the irrelevant and uncontested point that the finding on the JCE members’ shared intent for crimes against humanity “does not establish the specific intent to destroy the protected group.”⁷³ The Prosecution never argued that it did. Rather, the Prosecution correctly observed that the underlying crimes of persecution, extermination, murder, forcible transfer and deportation committed by the local perpetrators in the Count 1 Municipalities—the same acts that the Majority relied on

⁶⁷ See Prosecution-AB, para.23 *in particular* fn.52.

⁶⁸ Prosecution-AB, para.23.

⁶⁹ Mladić-RB, para.123.

⁷⁰ Mladić-RB, para.125.

⁷¹ Prosecution-AB, para.23 *in particular* fn.52.

⁷² Mladić-RB, para.126 *citing* Prosecution-AB, para.23.

⁷³ Mladić-RB, para.127. *Also* Mladić-RB, para.126.

to infer their destructive intent—were found to form part of the common purpose and were intended by the JCE members and attributed to them.⁷⁴

26. Mladić takes the same approach in contesting the Prosecution’s proposition that “the JCE members were found to have committed the same pattern of crimes collectively committed by the local perpetrators”⁷⁵ and in responding to Prosecution arguments on the scale and nature of the crimes in the Count 1 Municipalities.⁷⁶ He relies on the uncontested and irrelevant points that the Chamber found that genocide fell outside the common plan⁷⁷ and that the JCE members were responsible for the local perpetrators’ crimes as crimes against humanity, rather than genocide.⁷⁸

27. Mladić’s focus on the manner in which the Chamber *categorised* local perpetrators’ crimes in attributing those crimes to the JCE members side-steps the core assertion underlying Ground 2 of the Prosecution’s Appeal: “[t]he accumulated criminal conduct from which the Majority inferred destructive intent on the part of local perpetrators was equally attributable to Mladić and other JCE members.”⁷⁹ This assertion is firmly grounded in the Judgement’s findings.⁸⁰

A. Ground 2(A): The Chamber erroneously imposed a heightened evidentiary threshold when assessing the destructive intent of Mladić and other JCE members

28. As set out in the Prosecution’s Appeal,⁸¹ the Chamber imposed an erroneously heightened evidentiary threshold in determining the destructive intent of JCE members. It made a general ruling that it is impermissible to infer JCE members’ destructive intent on the basis of the “prohibited acts of physical perpetrators alone” where the JCE members use those perpetrators as tools to commit the prohibited

⁷⁴ Prosecution-AB, para.23 *in particular* fn.52 (asserting that “all the genocidal and other culpable acts in which perpetrators with destructive intent participated across all five Count 1 Municipalities were within the scope of the common purpose”, an assertion expressly grounded in the Chamber’s “holding that persecution, extermination, murder, forcible transfer and deportation were all within the scope of the common purpose”).

⁷⁵ Mladić-RB, para.129.

⁷⁶ Mladić-RB, paras.155-177.

⁷⁷ Mladić-RB, paras.129-130. Similar claims are made at Mladić-RB, paras.132-133, 166-168 and 174.

⁷⁸ *See in particular* Mladić-RB, paras.156-160, 162, 164, 167-168, 172, 174, 177, 181-182 *and* heading B.4.1.2.

⁷⁹ Prosecution-AB, para.23.

⁸⁰ *Above* para.20.

⁸¹ Prosecution-AB, paras.22-25.

acts.⁸² It determined that such cases require “more” evidence that “unambiguously” supports genocidal intent on the part of JCE members.⁸³ In an effort to defend this holding, Mladić relies largely on his incorrect claim that the pattern of crimes carried out by the JCE members’ tools was not attributable to the JCE members.⁸⁴

29. Mladić also argues that the Chamber’s pronouncement of this heightened standard for JCE members reflects the Chamber “identifying and applying the requisite burden and standard of proof”.⁸⁵ However, this is contradicted by the Chamber’s categorical language, which was neither connected to, nor by its terms limited to, the facts of this case. The Chamber held that for JCE members who use tools to commit crimes, a finding of genocidal intent “requires more” than a pattern of crimes that suffices to reflect destructive intent on the part of their tools⁸⁶ and that “drawing an inference on the basis of prohibited acts of physical perpetrators alone is *insufficient*.”⁸⁷ The Chamber did not state that, on the facts of *this* case, it was unable to conclude that the pattern of crimes committed by JCE members’ tools supported an inference of destructive intent on the part of JCE members. Rather, it made an unconditional determination about the available inferences that could be drawn from the crimes of JCE members committed via their tools.

30. Mladić makes a similar argument in seeking to justify the Chamber requiring—in addition to the evidence of the crimes perpetrated by JCE members through their tools—“other evidence which would unambiguously support a finding of genocidal intent”.⁸⁸ Mladić argues that this does not reflect an error because “requiring the evidence to be unambiguous is in accordance with the burden on the Prosecution to prove its case beyond reasonable doubt.”⁸⁹ However, the beyond reasonable doubt standard only applies to the assessment of the *entire* body of evidence relevant to the JCE members’ genocidal intent.⁹⁰ That body of evidence necessarily includes the pattern of crimes carried out by the JCE members’ tools in the Count 1 Municipalities. The beyond reasonable doubt standard should *not* have

⁸² Judgement, para.4236.

⁸³ Judgement, para.4236.

⁸⁴ Mladić-RB, paras.122-133. *Above* paras.23-27.

⁸⁵ Mladić-RB, para.115. *Also* Mladić-RB, paras.116-117, 119-120, 134-135, 138.

⁸⁶ Judgement, para.4236.

⁸⁷ Judgement, para.4236 (emphasis added).

⁸⁸ Judgement, para.4236.

⁸⁹ Mladić-RB, para.118.

⁹⁰ *See Mrkšić* AJ, para.217.

been applied to the subset of the intent evidence which stands separate and apart from that pattern of crimes. In fact, by arguing that the Chamber applied the beyond reasonable doubt standard to this “other evidence” of the JCE members’ intent (*i.e.* the evidence other than the pattern of crimes they committed through tools) Mladić underscores the erroneously heightened evidentiary standard applied by the Chamber.

31. Finally, Mladić points⁹¹ to the language in paragraph 4237 of the Judgement in which the Chamber held that “having assessed the entire trial record [...] the Trial Chamber is 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 Overarching JCE.”⁹² However, it is beside the point that the Chamber “assessed the entire trial record” because it did so based on an incorrect legal standard. This in turn caused the Chamber to erroneously discount the weight accorded to a key component of the trial record—the pattern of crimes in the Count 1 Municipalities.

B. Ground 2(B): The Chamber unreasonably concluded that Mladić and other JCE members did not possess destructive intent

32. As set out above, the pattern of crimes carried out by the JCE members’ tools in the Count 1 Municipalities formed the basis for the finding on the destructive intent of the local perpetrators and was fully attributed to the JCE members.⁹³ Moreover, this pattern provides *stronger*, not weaker, evidence of the JCE members’ destructive intent as compared to the local perpetrators found to have destructive intent. This is because the JCE members were responsible for the collective criminal conduct of all the local perpetrators across all five Count 1 Municipalities and it was the JCE members—not local perpetrators—who set the overall pattern of crimes in motion, controlled its implementation and steered its course.⁹⁴ Given the finding that local perpetrators in the Count 1 Municipalities (acting as tools of the JCE members) possessed destructive intent based on their participation in a pattern of crimes in their respective municipalities, it was unreasonable for the Chamber not to draw the same inference regarding the JCE members. This is reinforced by the fact that, unlike the

⁹¹ Mladić-RB, paras.140-141.

⁹² Judgement, para.4237.

⁹³ *Above* para.20.

⁹⁴ Prosecution-AB, paras.24-25, 27-36.

local perpetrators, there is direct evidence of genocidal intent on the part of Mladić and other JCE members in the form of statements demonstrative of such intent.

33. Mladić primarily responds to this argument by repeating his erroneous claim that the pattern of crimes carried out by the JCE members' tools was not attributable to the JCE members.⁹⁵

34. While Mladić also claims that “the evidence presented” in relation to the local perpetrators “was different” from that presented in relation to JCE members—and that this justified the “different conclusions” drawn as to the destructive intent of each group⁹⁶—he points to no such differences. The body of evidence that the Majority used to infer the destructive intent of the local perpetrators was the pattern of crimes in their respective Count 1 Municipalities.⁹⁷ As the collective pattern of crimes across *all* the Count 1 Municipalities is fully attributable to the JCE members, that cumulative body of evidence is equally applicable to assessing the JCE members' intent. In fact, the only significant difference between the bodies of evidence relevant to each group of perpetrators is that there is *additional* evidence demonstrating the destructive intent of the JCE members. This includes their greater scale of criminal responsibility, their initiation of, and control over, the pattern of crimes⁹⁸ and their statements reflecting genocidal intent.⁹⁹

35. The remainder of Mladić's arguments consist of unconvincing attempts to justify the Chamber's treatment of the statements of Mladić and other JCE members. For instance, Mladić complains about the Prosecution's assertion that JCE members “painted Bosnian Muslims as genocidal enemies” because “[t]he Prosecution has not defined the term ‘genocidal enemies’”.¹⁰⁰ But he fails to explain why the Prosecution was supposedly required to define this term. Its meaning is made plain in the Prosecution's submissions, which cite numerous examples of Mladić and other JCE members warning that Muslims posed a genocidal threat to Serbs. For instance, in September 1992, Mladić declared that Serbs “were brutally attacked, threatened with extinction and expulsion from our centuries-old homes” and “had to take all measures

⁹⁵ Mladić-RB, paras.155-177. *Above* paras.23-27.

⁹⁶ Mladić-RB, para.170. *Also* Mladić-RB, para.184.

⁹⁷ Prosecution-AB, para.23.

⁹⁸ Prosecution-AB, paras.24, 29-36.

⁹⁹ Prosecution-AB, paras.37-41.

¹⁰⁰ Mladić-RB, para.179.

available to defend [them]selves from genocidal intentions and actions of [their] enemies”.¹⁰¹ And in 1995, he announced that the Serb people had “prevented ‘the planned and prepared [...] genocide’”.¹⁰²

36. Likewise, Mladić offers no meaningful counter-argument to the Prosecution’s submission¹⁰³ that the Chamber’s analysis improperly divorced the JCE members’ calls for the destruction and disappearance of Muslims from the JCE members’ orchestration of a pattern of crimes that demonstrated the destructive intent of the tools they used to implement it. The Chamber thus unreasonably concluded that these statements “could have been directed to the military enemy and have been used as propaganda, rather than to demonstrate an expression of a genocidal intent”.¹⁰⁴ In response Mladić relies only on his misconceived claim about the attribution of the pattern of crimes to the JCE members.¹⁰⁵

37. Similarly, Mladić submits¹⁰⁶ that the Chamber was merely applying the reasonable doubt standard when, in assessing destructive intent, it gave credence to Mladić’s, Koljević’s and Karadžić’s occasional “intimat[i]ons that conciliation and compromise were possible [...] when it came to the strategic goals of living in ethnically separate states”.¹⁰⁷ However, this interpretation of the evidence is contradicted by findings that the JCE members did not in fact compromise in achieving their strategic ethnic separation goal but rather committed themselves to “the separation of people along ethnic lines [...] by ‘whatever means’” necessary and orchestrated an intensely violent campaign to achieve it.¹⁰⁸ It was thus unreasonable for the Chamber to hold that these ultimately empty intimations of conciliation and compromise¹⁰⁹ could have genuinely reflected the JCE members’ mental state.¹¹⁰

¹⁰¹ Exh.P1966, p.3 *referenced at* Judgement, para.4481. *See* Prosecution-AB, para.38.

¹⁰² Judgement, para.4486 *referring to* Judgement, para.4649 *citing* Exh.P1976. *See* Prosecution-AB, para.38.

¹⁰³ Prosecution-AB, paras.40-41.

¹⁰⁴ Judgement, para.4235.

¹⁰⁵ Mladić-RB, paras.181-182.

¹⁰⁶ Mladić-RB, para.183.

¹⁰⁷ Judgement, para.4235.

¹⁰⁸ Prosecution-AB, para.40 *citing* Judgement, para.3708 *and* Judgement, para.3703 *citing* Exh.P431, p.28.

¹⁰⁹ The Chamber refers to two “instances” of such statements. The first is Koljević’s 8 January 1992 conversation with Croatian President Franjo Tudman during which Koljević proposed a “civilized transfer of property and population” in order to achieve “homogeneity of certain areas”. *See* Judgement, paras.3629, 4235. However, the Chamber found that the JCE members then deliberately pursued a brutal, violent ethnic homogenisation campaign that could in no way be characterised as a

Mladić does not explain how a theoretical interpretation of evidence that is contradicted by the Chamber’s own findings could raise a reasonable doubt.¹¹¹

38. The JCE members’ statements depicting Muslims as the genocidal enemy of the Serbs and calling for the disappearance and destruction of Muslims must be assessed in light of the JCE members initiating and overseeing a pattern of crimes across the Count 1 Municipalities that demonstrated destructive intent on the part of their tools. Assessed in that context, there is room for only one reasonable conclusion: that Mladić and other JCE members possessed destructive intent.¹¹²

“civilized transfer of property and population”. The second instance consists of statements made by Mladić and Karadžić at the 12 May 1992 Bosnian Serb Assembly session. *See* Judgement, paras.3694-3701 (Karadžić speech) and paras.3704-3705, 4460-4461, 4625, 4816-4817 (Mladić speech). However, the Chamber concluded that, at this session, the Assembly adopted the strategic objectives, which involved separating people along ethnic lines, and emphasised that these objectives should be achieved by “whatever means”. Judgement, para.3708. It also concluded that Mladić repeatedly “expressed his commitment to the strategic objectives” (Judgement, para.4477) and that Mladić, Karadžić and Koljević all participated in a common criminal purpose that involved separating people along ethnic lines through violent crimes, not through “conciliation and compromise.” Judgement, paras.4232, 4238, 4611-4612, 4688.

¹¹⁰ Prosecution-AB, paras.40-41.

¹¹¹ Reasonable doubt “must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence.” *Rutaganda* AJ, para.488.

¹¹² Paragraph 185 of Mladić’s Response Brief is a purported summary of Mladić’s Ground 2 submissions. It matches, virtually *verbatim*, language from the Prosecution’s response brief in another case. *Compare* Mladić-RB, para.185 with *Karadžić* Prosecution Response Brief, para.256. Mladić has apparently adopted the Prosecution’s language despite its inapplicability to his submissions. For instance, nowhere in his preceding Ground 2 submissions does Mladić make a claim along the lines that the Prosecution “seeks to have the Appeals Chamber improperly analyse fragments of evidence in isolation [and] misapply the burden of proof to these individual shards of evidence”.

IV. REMEDY

A. The Bosnian Muslims in the Count 1 Municipalities, considered cumulatively, constituted a substantial part of the Bosnian Muslim Group

39. Mladić and other JCE members had the intent to destroy the Bosnian Muslims of all five Count 1 Municipalities considered collectively. As set out in the Prosecution’s Appeal, this aggregate part of the protected group—which is numerically far larger than any single Bosnian Muslim community within the Count 1 Municipalities—constitutes a substantial part of the Bosnian Muslim Group.¹¹³ While Mladić makes the unsupported contention that “the numerical aggregation alone cannot satisfy the substantiality requirement”,¹¹⁴ he does not explain why a part constituting 6.7% of the entire group would not be significant enough to have an impact on the group as a whole. ICTY precedent indicates that it would.¹¹⁵ In any event, Mladić incorrectly claims that there are no indicia of prominence and emblematic status within this aggregate part.¹¹⁶

B. JCE3 is firmly grounded in customary international law, including for specific intent crimes

40. The Appeals Chamber has consistently confirmed that JCE liability, including JCE3, is firmly established in customary international law.¹¹⁷ The Appeals Chamber has also repeatedly confirmed JCE3 is applicable to specific intent crimes,¹¹⁸ including genocide.¹¹⁹ Mladić fails to demonstrate cogent reasons to overturn this case

¹¹³ Prosecution-AB, para.45.

¹¹⁴ Mladić-RB, para.197.

¹¹⁵ See *Brdanin* TJ, para.967 (finding that the Bosnian Croats and Bosnian Muslims of the ARK region, constituting, respectively 7.96% and 10.8% of the protected groups, “[n]umerically speaking [...] constituted a substantial part” of the Bosnian Muslim and Bosnian Croat groups).

¹¹⁶ *Above* paras.13-18. Also Prosecution-AB, paras.11-15.

¹¹⁷ See *Prlić* AJ, paras.587, 591; *Popović* AJ, paras.1672-1673; *Đorđević* AJ, paras.52, 58, 81; *Karemera* AJ, para.110; *Martić* AJ, para.80; *Brdanin* AJ, paras.405, 410, 431; *Karemera* JCE Decision, paras.13, 16; *Stakić* AJ, paras.62, 100; *Ntakirutimana* AJ, paras.463, 468; *Vasiljević* AJ, para.95; *Krnjelac* AJ, para.29; *Ojdanić* JCE Decision, paras.21, 29; *Tadić* AJ, paras.194-226.

¹¹⁸ *Stanišić & Župljanin* AJ, para.599; *Đorđević* AJ, paras.81, 84, 919, 929.

¹¹⁹ See *Popović* AJ, paras.1440-1443, 1707; *Stakić* AJ, para.38; *Rwamakuba* JCE Decision, paras.10, 13, 17; *Brdanin* Interlocutory Appeal Decision, paras.6, 9-10, 12.

law. Nor does he raise issues of general importance, the adjudication of which would “contribute substantially to the Mechanism’s jurisprudence”.¹²⁰

41. Mladić’s challenges to JCE3 do not present “clear and compelling” cogent reasons to overturn the Appeals Chamber’s well-established jurisprudence.¹²¹ The Appeals Chamber has already considered and rejected many arguments similar to those raised by Mladić as not constituting cogent reasons.

42. In particular, the Appeals Chamber has already declined to revisit this well-established case law in response to challenges to the *Tadić* Appeals Chamber’s interpretation of post-World War II cases. In declining to do so, the Appeals Chamber has confirmed that the *Borkum Island* and *Essen Lynching* cases support JCE3 liability.¹²²

43. In any event, Mladić fails to show why his interpretation of the *Borkum Island* and *Essen Lynching* cases should be preferred to that of the Appeals Chamber. Contrary to Mladić’s claim that *Borkum Island* does not support JCE3 liability,¹²³ the Deputy Judge Advocate’s Review and Recommendations in that case explicitly confirmed a statement of the applicable law setting out a standard akin to JCE3:

All who join as participants in a plan to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, are legally responsible as principals for a homicide committed by any one of them in pursuance of or in furtherance of the plan.¹²⁴

44. The other international post-World War II cases highlighted by Mladić cannot show cogent reasons to revisit JCE3 liability. First, none of these cases were relied on by the *Tadić* Appeals Chamber in its JCE3 analysis. Second, that some of these cases may not apply a notion akin to JCE3 liability says nothing about its status under

¹²⁰ *Niyitegeka* Appeal Decision, fn.38. Also *Brdanin* Appeal Ground Decision, p.3. *Contra* Mladić-RB, paras.206-209.

¹²¹ See *Aleksovski* AJ, paras.107-109; *Đorđević* AJ, para.24. *Contra* Mladić-RB, para.316.

¹²² See *Đorđević* AJ, paras.49, 52 (“The Appeals Chamber is satisfied that the sources of law examined by the *Tadić* Appeals Chamber are reliable and that the principles in relation to the third category of joint criminal enterprise set out therein are well-established in both customary international law and the jurisprudence of this Tribunal”); *Popović* AJ, para.1673. *Contra* Mladić-RB, paras.221-222, 228.

¹²³ *Contra* Mladić-RB, paras.231-233.

¹²⁴ *Borkum Island Case* (Review and Recommendations), p.22; *Borkum Island Case* (Board of Review Report), pp.13, 16. Also *Borkum Island Case* (Prosecutor’s Closing Arguments), pp.1190, 1192-1193 *referenced at Tadić* AJ, para.210.

customary international law. None of these cases exclude the application of JCE3 in appropriate circumstances.¹²⁵

45. On the contrary—even among the few World War II cases highlighted by Mladić—there is evidence that JCE3-type liability was already accepted in international criminal law. In the review of the general military court proceedings in the *Dachau Concentration Camp Case*, for example, the Staff Judge Advocate endorsed a statement of law that closely mirrors JCE3:

[A]ll who join in such common design to commit an unlawful act must take responsibility for all the consequences of the execution of that act if done in furtherance of the plan although not specifically contemplated by the parties, or even forbidden by the defendant, or although the actual perpetrator is not identified.¹²⁶

46. The customary international law status of JCE3 is further evidenced by the authoritative statement of the law applicable in war crimes trials set out in the post-World War II US Forces' Manual for Trial of War Crimes.¹²⁷ Concerning “Liability of Multiple Participants in War Crimes” the Manual states:

All who join in a common design to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, are responsible for a homicide committed by one of them while acting in pursuance of or in furtherance of the common design, although not specifically contemplated by the parties, or even forbidden by defendant, or although the actual perpetrator is not identified.¹²⁸

47. The Italian cases relied upon by Mladić¹²⁹ also cannot show cogent reasons to depart from the Appeals Chamber’s consistent approach to JCE3. In *Tadić*, the Appeals Chamber “emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal

¹²⁵ See *Rwamakuba* JCE Decision, para.24 (“The post-World War II materials do not always fit neatly into the so-called ‘three categories’ of joint criminal enterprise discussed in *Tadić*, in part because the tribunals’ judgements did not always dwell on the legal concepts of the criminal responsibility”). *Contra* Mladić-RB, paras.235-240, 242-245.

¹²⁶ *Dachau Concentration Camp Case*, p.141.

¹²⁷ War Crimes Trial Manual, p.i. Foreword (“This manual for trial of war crimes cases is prescribed for use by all personnel concerned in such trials. It contains a compilation of the directives covering the important aspects of trials, together with citations of authorities derived from past decisions on questions arising therein, as well as prescribed forms for the records of trials.”).

¹²⁸ War Crimes Trial Manual, Section 410, 15 July 1946, p.305 citing *United States v. Josef Hartgen et al.* See *Hartgen Case*, Section 8(a) Discussion.

¹²⁹ Mladić-RB, paras.261-300.

law has an underpinning in many national systems”.¹³⁰ It made “[m]ention” of the Italian cases,¹³¹ as well as legal provisions of other national jurisdictions,¹³² to illustrate that the doctrine is grounded in national systems.¹³³ Thus, domestic cases cannot undermine the Appeals Chamber’s reasoning about customary international law status of JCE3 liability and do not constitute cogent reasons to depart from it.¹³⁴ In any event, Mladić fails to show error in the Appeals Chamber’s view that the Italian cases provide examples of applying “the notion that a person may be held criminally responsible for a crime committed by another member of a group and not envisaged in the common plan”.¹³⁵

48. Similarly, the Appeals Chamber has already rejected challenges to the *Tadić* Appeals Chamber’s reliance on the ICC Statute and the Convention for the Suppression of Terrorist Bombings, in particular since this reliance was “limited to demonstrating the consistent legal view of a large number of States on the existence of a notion of a ‘common criminal purpose’ as such”.¹³⁶

49. In faulting the *Tadić* Appeals Chamber for not having expressly considered whether JCE3 liability applies to specific intent crimes,¹³⁷ Mladić overlooks that the ICTY Appeals Chamber has subsequently addressed this very issue.¹³⁸ The *Tadić* Appeals Chamber set out the broad contours of each category of JCE liability under customary international law.¹³⁹ Subsequently the *Brdanin* Appeals Chamber appropriately interpreted the principle of JCE3 liability as set out in *Tadić* to apply to

¹³⁰ *Tadić* AJ, para.225. Also *Tadić* AJ, para.224 (“As pointed out above, the doctrine of acting in pursuance of a common purpose is rooted in the national law of many States”).

¹³¹ *Tadić* AJ, para.214.

¹³² *Tadić* AJ, para.224.

¹³³ *Contra* Mladić-RB, paras.255-300.

¹³⁴ *See* *Prljić* AJ, para.590; *Stanišić & Župljanin* AJ, para.598; *Popović* AJ, para.1674. *Contra* Mladić-RB, paras.255-300, 307-310, 315.

¹³⁵ *See* *Tadić* AJ, para.218. Also *Tadić* AJ, paras.214-217, 219-220. *E.g.* *D’Ottavio* Case, p.10 (requiring a “foresight of a possible different offense” in achieving the common plan) *referenced at* *Tadić* AJ, para.215; *Bonati* Case, p.20 (requiring that a more serious crime of murder to be “an indirect consequence of participation” in a certain criminal operation) *referenced at* *Tadić* AJ, para.217; *Mannelli* Case, p.1 (finding it to be “necessary that the second offense represent the logical and foreseeable development of the first”) *referenced at* *Tadić* AJ, para.218; *Tossani* Case, p.2 (excluding liability for “an exceptional and unforeseen event”) *referenced at* *Tadić* AJ, para.217; *Palmia* Case, p.1 (requiring a more serious crime to have a relationship of “causality” or “occasionality” to the operation) *referenced at* *Tadić* AJ, fn.275; *Peveri* Case, p.5 (requiring “foresight of the occurrence a possible different crime” as a result of participation in the main crime) *referenced at* *Tadić* AJ, fn.277.

¹³⁶ *Prljić* AJ, para.589. Also *Popović* AJ, para.1673; *Đorđević* AJ, paras.37-39; *Tadić* AJ, paras.221-223. *Contra* Mladić-RB, paras.301-306.

¹³⁷ Mladić-RB, paras.312, 314.

¹³⁸ *Brdanin* Interlocutory Appeal Decision, paras.5-7.

specific intent crimes.¹⁴⁰ It emphasised the distinction between the *mens rea* for the mode of liability and the *mens rea* for the crime, pointing out that in this respect JCE3 “is no different from other forms of criminal liability which do not require proof of intent to commit a crime on the part of an accused before criminal liability can attach.”¹⁴¹ Mladić does not engage with this reasoning, let alone show cogent reasons to depart from it. Moreover, to the extent that he claims that foreseeability should be treated as a factual consideration rather than a legal element of the mode of responsibility,¹⁴² he fails to develop his argument.

C. Mladić is responsible for genocide under JCE3 liability and Article 7(3) liability¹⁴³

50. In contesting his liability for genocide under JCE3 and Article 7(3),¹⁴⁴ Mladić focuses on challenging the *mens rea* elements of these forms of liability. However, in light of Mladić’s central, leading role in implementing the common criminal purpose across the Count 1 Municipalities, his knowledge of crimes constituting the *actus reus* of genocide under Article 4(2) and his promotion of fear and hatred towards Muslims, it was plainly foreseeable to him that local perpetrators in the Count 1 Municipalities might act with genocidal intent in the execution of the common purpose—and with this knowledge, he willingly participated in the common purpose. For the same reasons, Mladić was aware of the risk that his subordinates might commit, or might have committed, genocide.¹⁴⁵

1. Mladić is responsible for genocide under JCE3

51. In arguing that the elements of JCE3 liability are not met in this case, Mladić does not apply the correct legal standard.

¹³⁹ *Tadić* AJ, para.187. Also *Tadić* AJ, paras.194-195, 220.

¹⁴⁰ *Brdanin* Interlocutory Appeal Decision, paras.5-7. For the interpretation of customary international law principles, see *Hadžihasanović* Command Responsibility Decision, Partially Dissenting Opinion of Judge Shahabuddeen, para.9. Also *Karemera* JCE Decision, para.15.

¹⁴¹ *Brdanin* Interlocutory Appeal Decision, para.7.

¹⁴² Mladić-RB, paras.287, 309, 311.

¹⁴³ As set out in the Prosecution’s Appeal, the Prosecution’s primary contention is that Mladić is responsible for genocide under JCE1 liability. Prosecution-AB, paras.43-48.

¹⁴⁴ Mladić-RB, paras.322-325, 337-341.

¹⁴⁵ Prosecution-AB, paras.49-50.

52. While he correctly articulates the objective foreseeability standard (that the extended crime of genocide “might be perpetrated”),¹⁴⁶ he then mis-applies it by contending that it had to be foreseeable that the perpetrators “*would* commit genocide *as a result of the order* to carry out the *actus reus* elements of the crimes against humanity.”¹⁴⁷ The “would” threshold is incorrect, as JCE3 requires only a possibility of the extended crime’s commission.¹⁴⁸ There is also no requirement under JCE3 that the crime resulted from the implementation of an order.¹⁴⁹

53. Likewise, for subjective foreseeability, Mladić incorrectly asserts that it must be demonstrated that he was aware that “a prohibited act under Art.4(2) *would* be committed, and *would* be committed with [...] specific intent [...]”.¹⁵⁰ Here again, he applies a standard of probability, or even certainty, rather than the correct possibility standard. He also ignores that the first component of his incorrect test was in any event established, since the Chamber found that Mladić had *actual* knowledge of the widespread commission of acts falling under Article 4(2) in execution of the common purpose.¹⁵¹

54. As set out in the Prosecution’s Appeal, Mladić’s awareness of the possibility that local perpetrators committing these acts might possess destructive intent flows from his knowledge of—and intent for—an intensely violent criminal campaign, his leading role in steering it and his promotion of hatred and fear towards Muslims.¹⁵² Mladić wrongly contends that the Prosecution relies only on Mladić’s dissemination of propaganda to demonstrate his awareness of this risk.¹⁵³ Also, it is beside the point that the Chamber found Mladić used propaganda to further “the task of ethnic separation”¹⁵⁴ through the commission of crimes. Mladić’s promotion of fear and hatred towards Muslims heightened the risk—and Mladić’s awareness of the risk—of

¹⁴⁶ Mladić-RB, para.323.

¹⁴⁷ Mladić-RB, para.323 (emphasis added).

¹⁴⁸ JCE3 involves an awareness of a possibility, not a probability, of the crime’s commission. *Karadžić* JCE3 Decision, para.18.

¹⁴⁹ *E.g. Brdanin* AJ, para.411.

¹⁵⁰ Mladić-RB, para.326 (emphasis added).

¹⁵¹ Mladić’s suggestion at paragraph 324 that it was improper for the Prosecution to rely on Mladić’s knowledge of criminal acts falling under Article 4(2) because of the Chamber’s ultimate characterisation of those criminal acts as crimes against humanity is flawed for reasons discussed above. *Above* paras.23-27.

¹⁵² Prosecution-AB, para.49.

¹⁵³ Mladić-RB, para.325. *See* Prosecution-AB, para.49.

¹⁵⁴ Mladić-RB, para.325.

local perpetrators acting with the intent to destroy a part of the Bosnian Muslim Group while executing this ethnic separation task.

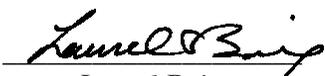
2. Mladić is responsible for genocide under Article 7(3)

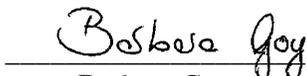
55. Mladić does not contest the Prosecution’s submission that he possessed effective control over VRS perpetrators.¹⁵⁵

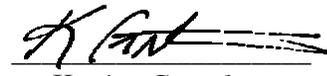
56. In relation to his *mens rea* under Article 7(3), Mladić incorrectly contends that he was required to have had “sufficiently alarming information to alert him to the specific intent of the physical perpetrators”.¹⁵⁶ In fact, he was required to have had sufficiently alarming information putting him on notice of the *risk* that his subordinates *might* act, or *might* have acted, with genocidal intent.¹⁵⁷ Given the Chamber’s finding that Mladić had actual knowledge of crimes satisfying the *actus reus* of Article 4(2) by his subordinates, it need only be shown that he was aware of a risk that, in committing these crimes, subordinates might act, or might have acted, with genocidal intent. The Chamber’s findings on Mladić’s knowledge, role and intent in relation to the common purpose are more than sufficient to satisfy this standard.¹⁵⁸

57. In relation to his failure to take necessary and reasonable measures to prevent and punish genocide committed by his subordinates, Mladić illogically asserts that the Chamber’s findings on his failures to prevent and punish criminal acts¹⁵⁹ constituting war crimes and crimes against humanity would not apply to the same criminal acts characterised as genocide.¹⁶⁰

Word Count: 8,164


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Dated this 29th day of November 2018
At The Hague, The Netherlands

¹⁵⁵ Mladić-RB, para.337. *See* Prosecution-AB, para.50.

¹⁵⁶ Mladić-RB, para.339.

¹⁵⁷ *Strugar* AJ, para.304.

¹⁵⁸ *Above* paras.50, 54; Prosecution-AB, paras.49-50.

¹⁵⁹ *E.g.* Judgement, paras.4511-4512, 4545-4546.

¹⁶⁰ Mladić-RB, para.341.

V. GLOSSARY

Pleadings, Orders, Decisions, etc. from *Prosecutor v. Ratko Mladić*, Case Nos. IT-09-92 and MICT-13-56-A

Abbreviation used in Prosecution Reply Brief	Full citation
Judgement	<i>Prosecutor v. Ratko Mladić</i> , Case No. IT-09-92-T, T.Ch., Judgement, 22 November 2017 (public with public Annexes and confidential Annex D)
Mladić-RB	<i>Prosecutor v. Ratko Mladić</i> , Case No. MICT-13-56-A, Response to Prosecution's Appeal Brief on Behalf of Ratko Mladić, 14 November 2018
Prosecution-AB	<i>Prosecutor v. Ratko Mladić</i> , Case No. MICT-13-56-A, Prosecution Appeal Brief, 6 August 2018 (confidential) <i>Prosecutor v. Ratko Mladić</i> , Case No. MICT-13-56-A, Notice of Filing of Public Redacted Version of Prosecution Appeal Brief, 7 August 2018

Other ICTY authorities

Abbreviation used in Prosecution Reply Brief	Full citation
<i>Aleksovski</i> AJ	<i>Prosecutor v. Zlatko Aleksovski</i> , Case No. IT-95-14/1-A, App.Ch., Judgement, 24 March 2000
<i>Brđanin</i> AJ	<i>Prosecutor v. Radoslav Brđanin</i> , Case No. IT-99-36-A, App.Ch., Judgement, 3 April 2007
<i>Brđanin</i> Appeal Ground Decision	<i>Prosecutor v. Radoslav Brđanin</i> , Case No. IT-99-36-A, App.Ch., Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 5 May 2005
<i>Brđanin</i> TJ	<i>Prosecutor v. Radoslav Brđanin</i> , Case No. IT-99-36-T, T.Ch., Judgement, 1 September 2004
<i>Brđanin</i> Interlocutory Appeal Decision	<i>Prosecutor v. Radoslav Brđanin</i> , Case No. IT-99-36-A, App.Ch., Decision on Interlocutory Appeal, 19 March 2004
<i>Đorđević</i> AJ	<i>Prosecutor v. Vlastimir Đorđević</i> , Case No. IT-05-87/1-A, App.Ch., Judgement, 27 January 2014

Abbreviation used in Prosecution Reply Brief	Full citation
<i>Hadžihasanović</i> Command Responsibility Decision	<i>Prosecutor v. Enver Hadžihasanović et al.</i> , Case No. IT-01-47-AR72, App.Ch., Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003
<i>Karadžić</i> JCE3 Decision	<i>Prosecutor v. Radovan Karadžić</i> , Case No. IT-95-5/18-AR72.4, App.Ch., Decision on Prosecution’s Motion Appealing Trial Chamber’s Decision on JCE III Foreseeability, 25 June 2009
<i>Karadžić</i> Prosecution Response Brief	<i>Prosecutor v. Karadžić</i> , Case No. MICT-13-55-A, Notice of Filing of Revised Public Redacted Version of Prosecution Response Brief, 16 May 2017
<i>Karadžić</i> TJ	<i>Prosecutor v. Radovan Karadžić</i> , Case No. IT-95-5/18-T, T.Ch., Judgement, 24 March 2016
<i>Krnojelac</i> AJ	<i>Prosecutor v. Milorad Krnojelac</i> , Case No. IT-97-25-A, App.Ch., Judgement, 17 September 2003
<i>Krstić</i> AJ	<i>Prosecutor v. Radislav Krstić</i> , Case No. IT-98-33-A, App.Ch., Judgement, 19 April 2004
<i>Martić</i> AJ	<i>Prosecutor v. Milan Martić</i> , Case No. IT-95-11-A, App.Ch., Judgement, 8 October 2008
<i>Mrkšić</i> AJ	<i>Prosecutor v. Mile Mrkšić & Veselin Šljivančanin</i> , Case No. IT-95-13/1-A, App.Ch., Judgement, 5 May 2009
<i>Ojdanić</i> JCE Decision	<i>Prosecutor v. Milan Milutinović et al.</i> , Case No. IT-99-37-AR72, App.Ch., Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003
<i>Popović</i> AJ	<i>Prosecutor v. Vujadin Popović et al.</i> , Case No. IT-05-88-A, App.Ch., Judgement, 30 January 2015
<i>Popović</i> TJ	<i>Prosecutor v. Vujadin Popović et al.</i> , Case No. IT-05-88-T, T.Ch., Judgement, 10 June 2010
<i>Prlić</i> AJ	<i>Prosecutor v. Jadranko Prlić et al.</i> , Case No. IT-04-74-A, App.Ch., Judgement, 29 November 2017
<i>Stakić</i> AJ	<i>Prosecutor v. Milomir Stakić</i> , Case No. IT-97-24-A, App.Ch., Judgement, 22 March 2006
<i>Stanišić & Župljanin</i> AJ	<i>Prosecutor v. Mićo Stanišić & Stojan Župljanin</i> , Case No. IT-08-91-A, App.Ch., Judgement, 30 June 2016

Abbreviation used in Prosecution Reply Brief	Full citation
<i>Strugar</i> AJ	<i>Prosecutor v. Pavle Strugar</i> , Case No. IT-01-42-A, App.Ch., Judgement, 17 July 2008
<i>Tadić</i> AJ	<i>Prosecutor v. Duško Tadić</i> , Case No. IT-94-1-A, App.Ch., Judgement, 15 July 1999
<i>Tolimir</i> AJ	<i>Prosecutor v. Zdravko Tolimir</i> , Case No. IT-05-88/2-A, App.Ch., Judgement, 8 April 2015
<i>Vasiljević</i> AJ	<i>Prosecutor v. Mitar Vasiljević</i> , Case No. IT-98-32-A, App.Ch., Judgement, 25 February 2004

ICTR authorities

Abbreviation used in Prosecution Reply Brief	Full citation
<i>Karemera</i> AJ	<i>Édouard Karemera & Matthieu Ngirumpatse v. Prosecutor</i> , Case No. ICTR-98-44-A, App.Ch., Judgement, 29 September 2014
<i>Karemera</i> JCE Decision	<i>Édouard Karemera et al. v. Prosecutor</i> , Cases No. ICTR-98-44-AR72.5 & ICTR-98-44-AR72.6, App.Ch., Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006
<i>Ntakirutimana</i> AJ	<i>Prosecutor v. Elizaphan Ntakirutimana & Gérard Ntakirutimana</i> , Cases No. ICTR-96-10-A & ICTR-96-17-A, App.Ch., Judgement, 13 December 2004
<i>Rutaganda</i> AJ	<i>Georges Anderson Nderubumwe Rutaganda v. Prosecutor</i> , Case No. ICTR-96-3-A, App.Ch., Judgement, 26 May 2003
<i>Rwamakuba</i> JCE Decision	<i>André Rwamakuba v. Prosecutor</i> , Case No. ICTR-98-44-AR72.4, App.Ch., Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004

Other Mechanism authorities

Abbreviation used in Prosecution Reply Brief	Full citation
<i>Niyitegeka</i> Appeal Decision	<i>Prosecutor v. Eliézer Niyitegeka</i> , Case No. MICT-12-16-R, App.Ch., Decision on Appeals of Decisions Rendered by a Single Judge, 13 December 2017

International post-World War II materials

Abbreviation used in Prosecution Reply Brief	Full citation
<i>Borkum Island Case</i>	<p><i>United States v. Kurt Goebell et al.</i></p> <ul style="list-style-type: none"> a. <i>United States v. Kurt Goebell et al.</i>, Case No. 12-489, Deputy Judge Advocate's Office, Review and Recommendations, 1 August 1947 b. <i>United States v. Kurt Goebell et al.</i>, Report of War Crimes Board of Review, 29 September 1947 c. <i>United States v. Kurt Goebell et al.</i>, Case No. 12-489, Trial Transcripts Vol.6, 21 March 1946, pp.1178-1194 (Prosecutor's closing arguments)
<i>Dachau Concentration Camp Case</i>	<i>United States v. Martin Gottfried Weiss et al.</i> , Office of Judge Advocate, Review of Proceedings of General Military Court, 24 January 1946
<i>Essen Lynching Case</i>	<i>Trial of Erich Heyer and six others</i> , British Military Court for the Trial of War Criminals, Essen, 18-19 and 21-22 December 1945
<i>Hartgen Case</i>	<i>United States v. Joseph Hartgen et al.</i> , Case No. 12-1497, Review and Recommendations of the Deputy Theater Judge Advocate, 29 September / 2 October 1945
War Crimes Trial Manual	Manual for Trial of War Crimes and Related Cases, prepared by Deputy Theater Judge Advocate's Office, War Crimes Group, United States Forces European Theater, 1 February 1947

National cases

Abbreviation used in Prosecution Reply Brief	Full citation
<i>Bonati Case</i>	Italian Court of Cassation Criminal Section II, Judgement of 15 July 1946, No. 4173
<i>D'Ottavio Case</i>	Italian Court of Cassation Criminal Section I, Judgement of 12 March 1947, No. 270
<i>Mannelli Case</i>	Italian Court of Cassation Criminal Section I, Judgement of 20 July 1949, No. 914, in <i>Giustizia Penale</i> 1949, Part II
<i>Palmia Case</i>	Italian Court of Cassation Criminal Section II, Judgement of 20 September 1946, in <i>Archivio Penale</i> 1947, Part II
<i>Peveri Case</i>	Italian Court of Cassation Criminal Section I, Judgement of 15 March 1948, in <i>Archivio Penale</i> 1948
<i>Tossani Case</i>	Italian Court of Cassation Criminal Section II, Judgement of 17 September 1946, No. 1449, in <i>Archivio Penale</i> 1947, Part II

Other abbreviations

Abbreviation used in Prosecution Reply Brief	Full citation
Art.	Article
BiH	Socialist Federal Republic of Bosnia and Herzegovina (later, Republic of Bosnia and Herzegovina)
Bosnian Muslim Group	Bosnian Muslim population in Bosnia and Herzegovina
Chamber	Trial Chamber in <i>Prosecutor v. Ratko Mladić</i> , Case No. IT-09-92-T
Count 1 Communities	Bosnian Muslim communities of Foča, Kotor Varoš, Prijedor, Sanski Most and Vlasenica
Count 1 Municipalities	Foča, Kotor Varoš, Prijedor, Sanski Most and Vlasenica
Exh.	Exhibit
Exhs.	Exhibits
fn.	Footnote

Abbreviation used in Prosecution Reply Brief	Full citation
fns.	Footnotes
ICTY	International Criminal Tribunal for the former Yugoslavia
ICC	International Criminal Court
JCE	Joint criminal enterprise
JCE1	First category of joint criminal enterprise
JCE3	Third category of joint criminal enterprise
Mechanism	International Residual Mechanism for Criminal Tribunals
p.	Page
para.	Paragraph
paras.	Paragraphs
pp.	Pages
T.	Trial transcript
VRS	Army of Republika Srpska



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