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CHAMBERS

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CT/MO/997e

KRAJIŠNIK CASE: MOTION FOR ACQUITTAL DENIED

- **Momčilo Krajišnik's Rule 98 *bis* motion for acquittal denied "*in every respect*"**
- **Momčilo Krajišnik "*has a case to answer on all eight counts of the indictment*"**

Please find below the oral judgement rendered today by Trial Chamber I, composed of Judges Orie (presiding), Martín Canivell and Hanoteau, with respect to Momčilo Krajišnik's motion for acquittal pursuant to Rule 98 bis.

This is a judgement on the Defence motion for acquittal under Rule 98 *bis*. The motion was made in court on 16 August 2005, when the Chamber heard oral submissions from both the Defence and the Prosecution.

The Defence's motion was both general and specific. It was general in that it asserted – and we should emphasize that it was nothing but a bare assertion – that Mr. Krajišnik has no case to answer whatsoever.

As for the specific Defence submissions, the Defence argued, as a preliminary procedural matter, that the amendment to Rule 98 *bis* on 8 December 2004, which changed the rule to an oral procedure, is prejudicial to the rights of Mr. Krajišnik, because although the standard of review remains the same, the amended rule no longer allows for a comprehensive review of all matters contained in the indictment. The Defence argues that, as the amendment occurred while the case was pending, Rule 6 (D) operates to render the amendment ineffective in this case.

The Defence's other specific submission is that there is insufficient evidence on which a Trial Chamber could be satisfied beyond reasonable doubt of the guilt of Mr. Krajišnik in relation to the genocide of the Bosnian Croats in the territory covered by the indictment. The Defence explained that, in its view, while evidence has been received of wrongdoing and even atrocities against Bosnian Croats, such crimes do not amount to a genocide of that group.

The Prosecution opposed the Defence's motion in its entirety.

In relation to the Defence's procedural argument, the Chamber observes that except for the fact that submissions must now be oral, neither the old version of Rule 98 *bis*, nor the current version, prescribe a format for submissions. Under the old rule, the practice varied in terms of the level of detail of submissions. Practice under the amended rule has yet to develop, but undoubtedly it will vary according to the needs of each case.

In the Orić case, which was the first decision under the amended rule, the parties' submissions considered the indictment in detail. Admittedly that case was smaller than the present one. What is relevant, however, is that the amended rule did not prevent a comprehensive review in the Oric case.

We believe that these few observations suffice to show that the Defence's assumption that the amendment to Rule 98 *bis* precludes submissions at any given level of detail is without foundation. The amended rule certainly abets the speed and efficiency of the process. But it does not follow that the amendment itself had a prejudicial effect on any right Mr. Krajišnik might have had under Rule 98 *bis*. We imposed very few constraints on the Defence. On 17 May 2005, when we gave the Defence guidance in relation to the Rule 98 *bis* motion, we did not specify restrictions on content. We received no preliminary requests by the Defence concerning the nature of its

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submissions. It was open to the Defence to ask the Chamber for relief from any unfair constraints, but the Defence gave no indication that it felt any unfairness until the day of the hearing. In our view, the Defence's preliminary argument must be dismissed.

We now turn to the general Defence assertion that there is no case to answer. In the course of considering this assertion, we'll address the Defence's specific argument on the question of whether the charges of genocide against Bosnian Croats should be maintained. Our decision will go to the heart of the issues, without too many introductions and elaborations.

In determining a motion for acquittal, the test applied – and here we are quoting the Appeals Chamber – is "whether there is evidence, if accepted, upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question". It is important always to emphasize, as the Appeals Chamber has done, that "at the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if *no* defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt".

The indictment against Mr. Krajišnik focuses on the period from late 1991 to the end of 1992, when he was the President of the Bosnian Serb Assembly. Mr. Krajišnik is charged with eight counts relating to the treatment of Bosnian Muslims and Bosnian Croats in 37 municipalities in Bosnia-Herzegovina. The first two counts are genocide and complicity in genocide. There are five counts of crimes against humanity, namely, persecution, extermination, murder, deportation, and forced transfer as an inhumane act. Lastly, there is one count of murder as a violation of the laws or customs of war. The forms of responsibility charged are, primarily, joint criminal enterprise and command responsibility.

Taken at its best, the evidence presented by the Prosecution paints the following picture of events that took place in the indictment municipalities in 1992.

I would again emphasize that whenever we talk about *what the evidence shows* what we mean is that there is evidence which, if accepted, could lead a reasonable tribunal of fact to conclude, beyond reasonable doubt, that something or other is the case.

And so we turn to the general picture.

There is evidence that beginning in March 1992 and continuing through to the autumn of 1992, Bosnian Serb forces gradually took power in the indictment municipalities. The precise manner and timing of the take-over varied between municipalities, but followed the same general pattern. First, Bosnian Serb authorities at the municipal level effected the division of the local police force along ethnic lines, often dismissing non-Serb policemen. As ethnic tensions mounted, both Serbs and non-Serbs erected checkpoints and barricades around the towns and villages to control movement of people and weapons.

There is evidence that in the months that followed – and we are now in April 1992 – Bosnian Serb armed forces, acting in cooperation with the Serb crisis staffs established in accordance with the so-called 19 December instructions, took control of the indictment municipalities often launching artillery and infantry attacks on towns and villages. These forces consisted of some or all of the following groups: the Yugoslav National Army (or JNA), the Territorial Defence organization (or TO), local paramilitary units and paramilitary units from Serbia proper, local police, and, at a later stage, the Army of Republika Srpska (or VRS). Areas and villages inhabited by Bosnian Muslims and Bosnian Croats were specifically targeted. Any non-Serb resistance was generally weak and disorganized.

There is evidence that during and after the attacks, many Bosnian Muslim and Bosnian Croat civilians, particularly men, were killed, beaten, or otherwise abused by Serb forces. Civilians were systematically detained for periods ranging from a few days to several months in what were frequently makeshift detention facilities. Detainees were, as a rule, kept in crowded, unsanitary conditions, with very little food or water. Many were killed, or subjected to severe physical or psychological abuse, including beatings, torture, or rape. Some detainees were forced to perform labour at front lines, or forced to act as human shields in combat situations. There is evidence that several persons used in those ways were killed.

There is, moreover, evidence that in many municipalities the remaining Bosnian Muslims and Bosnian Croats fled as a result of a campaign of intimidation and harassment. In addition to killings and other forms of abuse, this campaign included destruction of Muslim and Croat religious sites, and burning of Muslim and Croat homes. In some of the municipalities, Serb municipal or regional authorities directed the large-scale forced transfer of Bosnian Muslims and Bosnian Croats out of Serb-controlled territory. In some cases, those who left were forced to state that their departure was voluntary, pay a fee, or sign over their property to the municipality.

We have received evidence from at least 157 witnesses, counting both viva voce witnesses and Rule 92 *bis* witnesses, on these subjects. Moreover, hundreds of adjudicated facts and items of documentary evidence from the period provide additional support for these propositions.

In giving a legal characterization of any incident, the Chamber adopts and applies the Tribunal's consistent case-law with respect to the definition of the elements of the crimes charged in this case, namely genocide, complicity in genocide, persecution, extermination, murder, deportation, and the inhumane act of forced transfer, as crimes against humanity, as well as murder as a war crime. The Chamber will not further discuss the law, except to the extent necessary to deal with specific Defence arguments.

In relation to genocide, the Defence in its submission focused on the elements of genocidal intent and argued that none of the elements had been made out with respect to the Bosnian Croats, except for the fact that the Bosnian Croats are a protected group under the definition of genocide.

It is necessary to emphasize that the Chamber does not agree with the Defence's further submission that to prove genocide "in part" the Prosecution must prove that the destruction of a part of the group, if carried out, would have an impact on the survival of the whole group. The case-law of the international tribunals does not require proof of any such element.

In this connection, what *does* have to be proved is that the intent of the perpetrator was to destroy a part of the group as such. A part of the group is understood as a *substantial* part of the group. In the present case, what is in question is that part of the Bosnian Croat group living in the indictment municipalities. During the relevant period, well over 100,000 Bosnian Croats lived in those municipalities. High numbers of Bosnian Croats lived in Banja Luka, Brčko, Prijedor, and Kotor Varoš, municipalities where there was much violence against non-Serbs. The evidence before the Chamber allows the conclusion that the part of the Bosnian Croat group targeted was a substantial part of the protected group.

In relation to the general picture of events in the indictment municipalities, there is evidence to support a finding that the crimes enumerated in each of the eight indictment counts were committed. The Chamber moreover finds that there is evidence to support a finding that crimes were committed, at least in some instances, with the intent to destroy, in part, not only the Bosnian Muslim, but also the Bosnian Croat group, as such. Since the evidence related to Bosnian Croats has been specifically questioned by the Defence, the Chamber will concentrate on the sufficiency of the evidence received in relation to this group.

There is evidence from which to infer that a considerable number of Bosnian Croats from the indictment municipalities were killed by Bosnian Serb forces during armed attacks and in detention facilities. For example, the Chamber recalls the incident described by witness Ivo Atlija in which approximately seventy villagers from the predominantly Croat village of Briševo, in Prijedor municipality, were killed during an attack by Serb forces.

There is also evidence to support the inference that thousands of Bosnian Croats were detained in harsh conditions where they were subjected to severe physical or psychological abuse. The Chamber has received evidence that Bosnian Croats were held in at least 23 detention facilities in at least 13 municipalities. For example, between May and August 1992, 125 Bosnian Croats were detained at Omarska camp in Prijedor. There is also evidence that in the beginning of May 1992, 117 Bosnian Croats were in detention in facilities, including the Krings camp, in Sanski Most municipality.

In inferring genocidal intent, a Trial Chamber is entitled to look beyond the crimes that constitute the actus reus of genocide, since the intent to destroy a group as such, or in the present case the intent to destroy a part of a group as such, may also be evident in speeches made – a subject to which we shall return – but also in acts whose effect is to break up the targeted group, disperse it,

and wipe out its traces from a particular territory. Physical destruction of individuals is a necessary component of the crime of genocide, but it is not the only way, and may not even be the main way, through which the intent to destroy a group, or a part thereof, is manifested.

In this connection, there is evidence to show mass deportations or forced transfer of Bosnian Croats out of territories under Bosnian Serb control. For example, large numbers of Muslims and Croats who had been detained at facilities in Prijedor were later deported. In Kotor Varoš there were around 8,000 Croats in 1991, constituting 28 per cent of the population. A report by the Banja Luka Bosnian Serb police authorities states that, soon after the end of the indictment period, the Croat portion of the population had dropped to 5 per cent and were "predominantly elderly people who do not pose any real threat".

There is also evidence to show extensive appropriation and destruction of Bosnian Croat property, including destruction of Catholic churches throughout the territory in question. Ivo Atlija, the witness we mentioned a moment ago, testified that during the attack on the predominantly Croat village of Briševo, in Prijedor municipality, 68 houses and one Catholic church were destroyed.

These and similar acts by Bosnian Serb forces created an atmosphere of terror, which led to the involuntary departure of large numbers of Bosnian Croats from the indictment municipalities. Exactly the same effect was achieved against the Bosnian Muslims. Because *their* numbers in the indictment municipalities were much higher, they were victimized in much higher numbers.

We now turn to the evidence relating to Mr. Krajišnik's responsibility for the crimes. We will first give an overview of the picture that emerges from the evidence, again in the sense of Rule 98 *bis*, with respect to the position of Mr. Krajišnik in the Bosnian Serb leadership. We will then deal with the evidence specifically linking Mr. Krajišnik and his associates to the crimes.

There is evidence that by mid 1991 Mr. Krajišnik was a key figure within the political leadership of the SDS. Together with other key SDS figures, including Radovan Karadžić, Biljana Plavšić, and Nikola Koljević, Mr. Krajišnik played a central role in the formulation of SDS policy.

Moreover, there is evidence that from the time of the proclamation of Republika Srpska, in January 1992, until the end of the indictment period, both formal and effective power in the Bosnian Serb Republic were concentrated in the hands of the four people just mentioned, who we will refer to collectively as the Bosnian Serb leadership.

On the formal level, Mr. Krajišnik held the position of President of the Bosnian Serb Assembly from 24 October 1991 until November 1995. In March 1992, he became an ex officio member of the National Security Council. This Council was a transitional executive organ of "Republika Srpska" which issued instructions to, and received reports from municipal crisis staffs, and met with the Bosnian Serb government to make decisions on political, military, and administrative matters. The other members of the Bosnian Serb leadership were also members of this Council.

The Bosnian Serb Presidency, which was at the apex of Bosnian Serb political institutions, was initially composed of Biljana Plavšić and Nikola Koljević. It was later expanded to include Radovan Karadžić and Mr. Krajišnik, as well as the prime minister Branko Đerić. Mr. Krajišnik was the only one of the five Presidency members to attend every one of the 36 Presidency sessions for which documents are available between 12 May and 30 November 1992.

In addition to the positions held by Mr. Krajišnik within the various organs of "Republika Srpska", numerous witnesses who were in frequent contact with the Bosnian Serb leadership during the indictment period gave evidence that Mr. Krajišnik wielded enormous power on an informal basis. Momčilo Mandić, Dragan Đokanović, Milan Babić, and Witnesses 528 and 680 all testified that Mr. Krajišnik was the second most powerful member of the leadership, second only to Radovan Karadžic. There is also evidence that Mr. Krajišnik and Radovan Karadžic cooperated closely on all matters throughout 1992.

Turning now to the links between the crimes and Mr. Krajišnik and his associates, there is evidence that the political platform of the SDS emphasized the protection of the interests of the Bosnian Serb people as well as safeguarding their physical survival in Bosnia-Herzegovina and the maintenance of a federal Yugoslavia. Evidence shows that in the summer of 1991, the Bosnian Serb leadership began to speak openly about separating Serb territory within Bosnia-Herzegovina, with a

view to enabling Bosnian Serbs to remain in Yugoslavia should Bosnia-Herzegovina declare independence.

There is evidence to support the inference that the leadership subsequently set the stage for implementation of this objective. A programme of regionalization was implemented, in which Serb-majority municipalities were organized into communities of municipalities, or autonomous regions.

On 24 October 1991, an SDS-dominated Bosnian Serb Assembly was formed. Evidence allows a reasonable trier of fact to conclude that Mr. Krajišnik used his role as Assembly President to ensure support for and implementation of SDS policies, as developed by the Bosnian Serb leadership.

There is evidence that by late 1991, the policies of the Bosnian Serb leadership had crystallized into preparation for the take-over of territory by force. In late 1991 and early 1992, Radovan Karadžić stated on several occasions that in the eventuality of an independent Bosnia-Herzegovina, the Bosnian Serbs would create, by any means, their own political and territorial entity corresponding to approximately 70 per cent of the territory of Bosnia-Herzegovina. Evidence supports the inference that what the Bosnian Serb leadership envisaged was an ethnically purer, Serb-dominated state. The means envisaged for the creation of a Bosnian Serb state included the use of extreme force. There is evidence that members of the SDS party at municipal and republican levels, in cooperation with members of the JNA, coordinated the covert arming of the Bosnian Serb population with weapons from JNA and TO armouries.

At the municipal level, the drive towards a Serb-dominated state saw the Bosnian Serb leadership push for the creation of separate Serb administrative structures, particularly in Serb-minority areas. There is evidence that on 19 December 1991, the SDS leadership issued instructions to SDS municipal boards for the take-over of power and creation of crisis staffs in municipalities which were to form part of a separate Bosnian Serb state. Among other tasks, the crisis staffs were to activate mechanisms for municipal defence and prepare for the establishment of Bosnian Serb state organs within the municipalities. There is evidence that the instructions were subsequently implemented, fully or partially, by Serb leaders in most of the indictment municipalities. At the central level, the Bosnian Serb Assembly proclaimed the Republic of the Serb People of Bosnia-Herzegovina, later Republika Srpska, and proceeded to provide the fledgling political entity with a legislative foundation.

As we have previously outlined, beginning in March 1992 and continuing through to the autumn of that year, Bosnian Serb forces gradually took power in the indictment municipalities. Almost invariably, this take-over resulted in the commission of the crimes we have described. Two important mechanisms through which the Bosnian Serbs seized and maintained control of territory were the crisis staffs and, later, the VRS. There is evidence that both received instructions from and reported to the Bosnian Serb leadership.

The crisis staffs, created in accordance with the 19 December instructions, began to take-over of power at the municipal level, coordinating the activities of Bosnian Serb municipal authorities, the military, the police, and other armed forces on the ground. In May 1992, the VRS began to take control of these forces. Evidence would allow the conclusion that the Bosnian Serb leadership generally, including Mr. Krajišnik, exercised effective control over the VRS. There is evidence that the Presidency approved major military operations, consulted with the VRS Main Staff on military matters, received regular briefings on the military situation, and issued orders in relation to military matters that were implemented on the ground.

On 12 May 1992, the Bosnian Serb Assembly adopted six strategic objectives, the most important of which was “to establish State borders separating the Serb people from the other two ethnic communities”. There is evidence that these six objectives formed the basis of directives from the VRS Main Staff to the armed forces on the ground.

Certain statements made at the 12 May 1992 Bosnian Serb Assembly session by Radovan Karadžić and Mr. Krajišnik allow the conclusion that the ethnic groups targeted by the policies of the Bosnian Serb leadership were the Bosnian Croats, as well as the Bosnian Muslims. For example, at the session, Mr. Krajišnik said “we are at war, and it will be possible to solve this thing with Muslims and Croats only by war”. Another example comes from Witness 623, who testified that Mr. Krajišnik was “obsessed” with the project of ethnic division of Serbs from Muslims and Croats. According to the

same witness, Mr. Krajišnik said that the time had come for separate Croat, Serb, and Muslim areas, because a common state was no longer possible.

There is, moreover, evidence that the Bosnian Serb leadership was fully informed about the circumstances of the take-over of power in the municipalities and the consequences for the Bosnian Muslim and Bosnian Croat populations. On 10 May 1992, at a meeting in Pale chaired by Radovan Karadžić and Ratko Mladić, Miroslav Deronjić, the SDS leader for Bratunac, received a round of applause upon reporting about the continuing operation to drive Muslims out of his municipality. In June 1992, the Bosnian Serb leadership raised no opposition to Ratko Mladić's proposal to shell Sarajevo, despite the arguments of another VRS officer that this would clearly place civilians at risk.

Similarly, there is evidence that the Bosnian Serb leadership received extensive information from a variety of sources about the existence of detention facilities for Bosnian Muslims and Bosnian Croats in the indictment municipalities and the treatment meted out in those facilities. For example, in July 1992 Biljana Plavšic stated that she was aware of 3,000 non-Serbs who were being detained at Omarska camp in Prijedor. Finally, there is evidence that the Bosnian Serb leadership knew that Bosnian Serb forces were engaged in the forcible removal of Bosnian Muslims and Bosnian Croats from Serb-controlled territory. Predrag Radić described how Radovan Karadžić visited Banja Luka and complained that insufficient steps had been taken to remove the Muslim and Croat population still present there. There is evidence that when the issue of ethnic cleansing was raised with the Bosnian Serb leadership at international negotiations, they did not deny that it was taking place. Their standard response was rather to allege that Muslims and Croats were committing crimes against the Serbs.

In giving a legal characterization of Mr. Krajišnik's responsibility for the municipality crimes, the Chamber adopts and applies the Tribunal's consistent case-law with respect to the definition of the elements of the various forms of individual criminal responsibility under Article 7 of the Statute.

There is evidence that Mr. Krajišnik acted in association with numerous persons, including other Bosnian Serb political leaders, such as Radovan Karadžić, Biljana Plavšić, and Nikola Koljević, as well as military leaders, notably Ratko Mladić, to take over Serb-majority and some Serb-minority territories and join them into an independent entity dominated by Serbs. There is direct evidence, as well as evidence from which to infer, that these Serb leaders and their political and military subordinates intended to accomplish the task of creating a Serb-dominated territory through any means, and in particular through killings, unlawful detention, physical or psychological abuse, and deportation of Muslim and Croat civilians, and destruction of their cultural monuments.

The evidence is sufficient to infer an intent at the top level to destroy not only the part of the Bosnian Muslim group living in the territory slated to become Republika Srpska, but also the part of the Bosnian Croat group living in that territory. In other words, the evidence is sufficient to infer genocidal intent in relation to *both* Bosnian Muslims and Bosnian Croats. There is evidence to infer that Mr. Krajišnik had that intent and shared it with others. He offered them significant support to help them realize their intent. There is evidence supporting an inference that Mr. Krajišnik, around March 1992, if not before, came to accept that the events unfolding in the municipalities under the direction of the Bosnian Serb leadership would escalate to genocide within the indictment period. There is evidence from which to infer that Mr. Krajišnik was informed of acts of genocide on the ground.

There is therefore evidence sufficient for the purposes of Rule 98 *bis* to conclude that Mr. Krajišnik is responsible for genocide under the various headings of Article 7(1) of the Tribunal's Statute, including joint criminal enterprise type 1, joint criminal enterprise type 3, and complicity.

Since there is also evidence allowing the conclusion that Mr. Krajišnik, by virtue of his position, had effective control over the perpetrators of genocidal acts, the conclusion is supported, for the purposes of Rule 98 *bis*, that he had superior responsibility for acts of genocide, in the terms of Article 7(3) of the Statute.

There is, finally, evidence to infer that Mr. Krajišnik had the *mens rea* required for conviction under the counts of the indictment alleging crimes other than genocide. Here, again, there is evidence to satisfy the elements of the various forms of responsibility charged under Article 7 of the Statute.

In conclusion, the Defence motion is denied in every respect. Mr. Krajišnik has a case to answer on all eight counts of the indictment.

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The full text of the indictment is available on the Tribunal's website http://www.un.org/icty. Courtroom proceedings can be followed on the Tribunal's website.