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PLENARY SESSION

IT/226

"AMENDMENT TO THE RULES OF PROCEDURE AND EVIDENCE"

7 APRIL 2003

By decision of the Judges at an Extraordinary plenary session of the International Tribunal held on 6 April 2004, the following Rule of the Rules of Procedure and Evidence of the International Tribunal ("Rules") is amended:

Rule 28 (A) English and French

The amendments have been highlighted in the text of this document.

Pursuant to Rule 6 (D), these amendments shall enter into force seven days after the date of issue of this official document, i.e., on **14 April 2004.** Document IT/32/Rev. 30, incorporating these amendments, will be issued in both languages as soon as possible.

The full text of the amended Rule is set out in the Annex to this document.

Carmel Agius
Judge
Chair of the Rules Committee

Dated this seventh day of April 2004
At The Hague
The Netherlands

ANNEX

Rule 28
Reviewing and Duty Judges

(A) On receipt of an indictment for review from the Prosecutor, the Registrar shall consult with the President ~~who shall designate one of the permanent Trial Chamber Judges for the review~~. **The President shall refer the matter to the Bureau which shall determine whether the indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal. If the Bureau determines that the indictment meets this standard, the President shall designate one of the permanent Trial Chamber Judges for the review under Rule 47. If the Bureau determines that the indictment does not meet this standard, the President shall return the indictment to the Registrar to communicate this finding to the Prosecutor.**

APPEALS CHAMBER

The Prosecutor v. Radislav Krstic

Case No. IT-98-33-A

Judges Meron [Presiding], Pocar, Shahabuddeen, Güney and Schomburg

"JUDGEMENT"

19 APRIL 2004

Genocide - Targeted group - Substantial part of a group - Intent to "destroy"- Aiding and abetting genocide - Exculpatory evidence - Remedy for non-compliance with the obligation to disclose exculpatory evidence - Identification of exculpatory evidence - Disclosure of exculpatory evidence - Disciplinary avenues - Cumulative convictions - Extermination and genocide - Persecution and genocide

Targeted group: the intent requirement of genocide under Article 4 of the Statute is satisfied where the evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group.

Substantial part of a group: the numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4.

Intent to "destroy":
- the genocidal intent may be inferred, among other facts, from evidence of other culpable acts systematically directed against the same group;
- the inference that a particular atrocity was motivated by genocidal intent may be drawn, moreover, even where the individuals to whom the intent is attributable are not precisely identified.

Aiding and abetting genocide:
- the conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of the Tribunal;
- a defendant may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified.

Remedy for non-compliance with the obligation to disclose exculpatory evidence: where the Defence seeks a remedy for the Prosecution's breach of its disclosure obligation under Rule 68, it must show (i) that the Prosecution has acted in violation of its obligations under Rule 68, and (ii) that the Defence's case suffered material prejudice as a result.

Identification of exculpatory evidence: the fact that there is no prima facie obligation on the Prosecution to identify the disclosed Rule 68 material as exculpatory does not prevent the accused from arguing, as a ground of appeal, that he suffered prejudice as a result of the Prosecution's failure to do so.

Disclosure of exculpatory evidence: on a plain reading of Rule 68, the Prosecution is merely obliged to disclose the existence of Rule 68 material, not to provide the actual material itself.

Disciplinary avenues: when the Prosecution does not meet its obligations under Rule 68, the consequences are governed by Rule 46 (Misconduct of Counsel) and Rule 68 *bis* (Failure to Comply with Disclosure).

Cumulative convictions:

Extermination and genocide: while a perpetrator's knowing participation in an organized or extensive attack on civilians may support a finding of genocidal intent, it remains only the evidentiary basis from which the fact-finder may draw this inference. The offence of genocide, as defined in the Statute and in international customary law, does not require proof that the perpetrator of genocide participated in a widespread and systematic attack against a civilian population.

Persecution and genocide: the offence of genocide does not subsume that of persecution.

Procedural Background

On 2 August 2001, Trial Chamber I rendered its Judgement in the *Krstic* case ("Trial Chamber Judgement").[1] It found Radislav Krstic guilty of genocide, persecution for murders, cruel and inhumane treatment, terrorising the civilian population, forcible transfer and destruction of personal property of Bosnian Muslim civilians, murder as a violation of the laws or customs of war, and sentenced him to 46 years' imprisonment.[2]

On 15 and 16 August 2001, the Prosecution and the Defence respectively filed their notices of appeal of the Trial Chamber Judgement.

The Prosecution filed its Appeal Brief on 14 November 2001. The Defence filed its Response to the Prosecution's Appeal on 21 December 2001.The Prosecution filed its Brief in Reply on 14 January 2002.

The Defence filed confidentially its Appeal Brief on 10 January 2002. The Prosecution filed confidentially its Response to the Defence Appeal Brief on 19 February 2002. The Defence filed its Brief in Reply on 6 March 2002.

The public versions of the Defence Appeal Brief and of the Prosecution Response to the Defence Appeal Brief were filed respectively on 7 and 8 May 2002.

Grounds of Appeal

The Prosecution based its appeal on two grounds. First, it appealed against the Trial Chamber's conclusion on impermissibly cumulative convictions. Second, it appealed against the sentence imposed by the Trial Chamber and requested the imposition of a life sentence on Radislav Krstic, with a minimum of 30 years imprisonment.

The Defence based its appeal on four grounds. First, it

[1] *Krstic*, IT-98-33-T, Judgement, 2 August 2001, *Judicial Supplement* No. 27.
[2] For more information on the factual allegations, the charges and the background of the case, see the *Krstic* case information sheet available on the Tribunal website at www.un.org/icty under "The ICTY at a Glance/Case Information Sheets".

appealed against the conviction for genocide of Radislav Krstic on the basis that factual and legal errors had been committed by the Trial Chamber. Second, it appealed on the basis of various disclosure practices of the Prosecution which it alleged deprived Krstic of a fair trial. Third, it alleged that the Trial Chamber made a number of factual and legal errors. Fourth, it appealed against the sentence and alleged that the Trial Chamber failed to adequately take into account the sentencing practice in the former Yugoslavia and to give sufficient weight to the mitigating circumstances.

Judgement

The Appeals Chamber:

- set aside, Judge Shahabuddeen dissenting, Radislav Krstic's conviction as a participant in a joint criminal enterprise to commit genocide and found, Judge Shahabuddeen dissenting, Radislav Krstic guilty of aiding and abetting genocide (Count 1);
- resolved that the Trial Chamber incorrectly disallowed Radislav Krstic's convictions as a participant in extermination and persecution (Counts 3 and 6) committed between 13 and 19 July 1995, but that his level of responsibility was that of an aider and abettor in extermination and persecution as crimes against humanity;
- set aside, Judge Shahabuddeen dissenting, Radislav Krstic's conviction as a participant in murder under Article 3 (Count 5) committed between 13 and 19 July 1995, and found, Judge Shahabuddeen dissenting, Radislav Krstic guilty of aiding and abetting murder as a violation of the laws or customs of war;
- affirmed Radislav Krstic's convictions as a participant in murder as a violation of the laws or customs of war (Count 5) and in persecution (Count 6) committed between 10 and 13 July 1995 in Potocari;
- dismissed the Defence and the Prosecution appeals concerning Radislav Krstic's convictions in all other respects;
- dismissed the Defence and the Prosecution appeals against Radislav Krstic's sentence and imposed a new sentence of 35 years' imprisonment.

Reasoning[3]

Genocide

Article 4 of the Tribunal's Statute (Genocide) reads as follows:

"1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

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

3. The following acts shall be punishable:
(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide."

[3] Only those legal findings which are significant with regard to the case-law of the Tribunal and to international law will be developed. The Judgement and the summary Judgement are available on the Tribunal website under "Judgements".

The Defence argued that the Trial Chamber's definition of the part of the national group Krstic was found to have intended to destroy was unacceptably narrow. It also argued that the Trial Chamber erroneously enlarged the term "destroy" in the prohibition of genocide to include the geographical displacement of a community.

Targeted group

The targeted group, identified in the Indictment and accepted by the Trial Chamber, was that of the Bosnian Muslims.[4] As evident from the Indictment, Krstic was not alleged to have intended to destroy the entire national group of Bosnian Muslims but only part of that group, namely the Bosnian Muslims from Srebrenica.

Although Trial Chambers of this Tribunal had already addressed the issue of what is covered by the requirement that the targeted group be targeted "in part", the Appeals Chamber had not yet addressed the issue.

In *Jelisic*, the first case to confront the question, Trial Chamber I held that "[g]iven the goal of the [Genocide] Convention[5] to deal with mass crimes, it is widely acknowledged that the intention to destroy must target at least a *substantial* part of the group".[6] Similarly, the *Sikirica* Trial Chamber held that "[t]his part of the definition calls for evidence of an intention to destroy a reasonably *substantial* number relative to the total population of the group".[7]

Trial Chambers of the International Criminal Tribunal for Rwanda ("ICTR") have also considered the question and reached the same conclusion. The Trial Chamber in *Kayishema* found that the term "in part" required the "intention to destroy a considerable number of individuals who are part of the group".[8] The definition was refined by the Trial Chambers in the *Bagilishema* and *Semanza* cases to the effect that the intention to destroy must target at least a *substantial* part of the group.[9]

In the present case the Appeals Chamber confirmed that "[t]he intent requirement of genocide under Article 4 of the Statute is [...] satisfied where the evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group".[10] It then turned to the determination of when the targeted group is substantial enough to meet this requirement.

Substantial part of a group

The *Jelisic* and the *Sikirica* Trial Chambers both explained that the substantiality requirement captures genocide's defining character as a crime of massive proportions <u>and</u> reflects the Convention's concern with the impact that the destruction of the targeted part will have on the overall survival of the group.11 In the present case, the Appeals Chamber held the following:

[4] Trial Chamber Judgement, para. 558.
[5] Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 ("Genocide Convention").
[6] *Jelisic*, IT-95-10-T, Judgement ("*Jelisic* Trial Judgement"), 14 December 1999, para. 82 (emphasis in the original). See *Judicial Supplement* No. 10.
[7] *Sikirica et al.*, IT-95-8-T, Judgement on Defence Motions to Acquit ("*Sikirica* Judgement on Defence Motions to Acquit"), 3 September 2001, para. 65 (emphasis added). See *Judicial Supplement* No.27.
[8] *Kayishema and Ruzindana*, ICTR-95-1-T, Judgement, 21 May 1999, para. 97.
[9] *Bagilishema*, ICTR-95-1A-T, Judgement, 7 June 2001, para. 64. *Semanza*, ICTR-97-20-T, Judgement and Sentence, 15 May 2003, para. 316.
[10] Para. 12.
[11] See *Jelisic* Trial Judgement, para. 82: "Genocidal intent may therefore be manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such. This would then constitute an intention to destroy the group 'selectively'." See also *Sikirica* Judgement on Defence Motions to Acquit, para. 77: "The Chamber finds persuasive the analysis in the *Jelisic* Trial Judgement that

"The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4".[12]

The Appeals Chamber added, drawing from historical examples of genocide, that the "area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered" as a factor which, combined with others, can inform the analysis as to whether the targeted group is substantial.[13] It made clear, though, that all the above-mentioned factors are "neither exhaustive nor dispositive", and are only "useful guidelines" the applicability of which and relative weight will vary depending on the circumstances of each case.[14]

In the present case, the Appeals Chamber confirmed that the identification by the Trial Chamber of the Bosnian Muslims of Srebrenica as the targeted group abided by the above guidelines. The identified protected group was the national group of Bosnian Muslims. Although the targeted group constituted a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the Appeals Chamber found that the "importance of the Muslim community in Srebrenica [was] not captured only by its size".[15] It *inter alia* concurred with the Trial Chamber that Srebrenica was of immense strategic importance to the Bosnian Serb leadership, was prominent in the eyes of the Bosnian Muslims and the international community, and that the fate of the Bosnian Muslims of Srebrenica was emblematic of that of all Bosnian Muslims.

The Defence did not in fact argue that the characterisation of the Bosnian Muslims of Srebrenica as a "substantial part" of the targeted group contravened Article 4 of the Statute but contended that the Trial Chamber had, to enter a finding of guilt, impermissibly measured the number of Bosnian Muslim men of military age Krstic had killed against the Bosnian Muslim population of Srebrenica. The Appeals Chamber found that the Defence misunderstood the analysis of the Trial Chamber, which in fact "treated the killing of the men of military age as evidence from which to infer that Radislav Krstic and some members of the VRS [Bosnian Serb Army] Main Staff had the requisite intent to destroy all the Bosnian Muslims of Srebrenica, the only part of the protected group relevant to Article 4 analysis".[16] It dismissed the Defence's appeal on this issue.

Intent to "destroy"

The Defence argued that the Trial Chamber impermissibly broadened the definition of genocide by concluding that an effort to displace a community from its traditional residence is sufficient to show that the alleged perpetrator intended to destroy a protected group. The Defence alleged that, by including a geographic displacement, the Trial Chamber departed from the established meaning of the term genocide in the Genocide Convention as applying only to instances of physical or biological destruction of a group.

As noted by the Appeals Chamber, the Genocide Convention and customary law in general prohibit only the physical or biological destruction of a human group.[17] Indeed the Trial Chamber acknowledged this limitation and further stated that "an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide."[18]

As noted by the Appeals Chamber, the Trial Chamber did not rely mainly on the decision of the VRS forces to transfer the women, children and elderly within their control to other areas of Muslim-controlled Bosnia. The main evidence the Trial Chamber relied upon was the killing of the Bosnian Muslims men of military age as it impacted on the survival of the community. The Appeals Chamber found that the Trial Chamber, as the best assessor of the evidence presented at trial, was entitled to conclude that the evidence of the transfer supported its finding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica. As the Trial Chamber found in the *Stakic* case, "[t]he expulsion of a group or part of a group does not in itself suffice for genocide".[19] Nevertheless a Trial Chamber may still rely on it as evidence of the specific intent of genocide. In fact the Appeals Chamber held that "[t]he genocidal intent may be inferred, among other facts, from evidence of 'other culpable acts systematically directed against the same group'".[20]

The Appeals Chamber finally addressed the argument of the Defence that the record of the trial contains no statement by members of the VRS indicating that the killing of the Bosnian Muslims was motivated by genocidal intent to destroy the Bosnian Muslims of Srebrenica. It held that the absence of such statement is not determinative since, in the absence of direct evidence of genocidal intent, the intent may still be inferred from the factual circumstances of the case.[21] It further held:

"The inference that a particular atrocity was motivated by genocidal intent may be drawn, moreover, even where the individuals to whom the intent is attributable are not precisely identified. If the crime committed satisfies the other requirements of genocide, and if the evidence supports the inference that the crime was motivated by the intent to destroy, in whole or in part, a protected group, a finding that genocide has occurred may be entered."[22]

In the present case the Appeals Chamber found that "[t]he fact that the Trial Chamber did not attribute genocidal intent to a

the requisite intent may be inferred from the 'desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.' The important element here is the targeting of a selective number of persons who, by reason of their special qualities of leadership within the group as a whole, are of such importance that their victimisation within the terms of Article 4(2) (a), (b) and (c) would impact upon the survival of the group, as such."

[12] Para. 12.

[13] Para. 13.

[14] Para. 14.

[15] Para. 15.

[16] Para. 19.

[17] "The International Law Commission, when drafting a code of crimes which it submitted to the ICC [International Criminal Court] Preparatory Committee, has examined closely the *travaux préparatoires* of the Convention in order to elucidate the meaning of the term "destroy" in the Convention's description of the requisite intent. The Commission concluded: "As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, cultural or other identity of a particular group." Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May – 26 July 1996, G.A.O.R., 51st session, Supp. No. 10 (A/51/10) (1996), pp. 90-91. The commentators agree. *See, e.g.*, William A. Schabas, *Genocide in International Law* (2000), p. 229 (concluding that the drafting history of the Convention would not sustain a construction of the genocidal intent which extends beyond an intent at physical destruction)." (footnote 39 of the Judgement).

[18] Trial Chamber Judgement, para. 580.

[19] *Stakic*, IT-97-24-T, Judgement ("*Stakic* Trial Judgement"), 31 July 2003, para. 519 and footnote 1097-1098 (citing K. Kreß, *Münchner Kommentar zum StGB*, Rn 57, section 6 VStGB (2003); William A. Schabas, *Genocide in International Law* (2000), p. 200; BGH v. 21.2.2001 – 3 StR 244/00, NJW 2001, 2732 (2733)). For a summary of the *Stakic* Trial Judgement, see *Judicial Supplement* No. 43.

[20] Para. 33. The Appeals Chamber referred to the *Jelisic* Appeals Judgement in which it held: "As to proof of specific intent, it may, in the absence of direct explicit evidence , be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts." (*Jelisic*, IT-95-10-A, Judgement, 5 July 2001, para. 47, *Judicial Supplement* No. 26).

[21] Para. 34, referring to para. 47 of the *Jelisic* Appeals Judgement, *supra.*

[22] Para. 34.

particular official within the Main Staff may have been motivated by a desire not to assign individual culpability to persons not on trial here. This, however, does not undermine the conclusion that Bosnian Serb forces carried out genocide against the Bosnian Muslims."[23] It dismissed the Defence's appeal on this issue.

Aiding and abetting genocide

The Trial Chamber found that Krstic knew that Drina Corps personnel and resources were being used to assist in the executions of the Bosnian Muslims but did not take any steps to punish his subordinates for that participation.[24] It inferred the genocidal intent of the Accused from his knowledge of the executions and his knowledge of the use of personnel and resources under his command to assist in those executions. The Appeals Chamber, however, found that "knowledge on the part of Radislav Krstic, without more, is insufficient to support the further inference of genocidal intent on his part".[25] It recalled that genocide is "one of the worst crimes known to mankind [whose] gravity is reflected in the stringent requirement of specific intent".[26] It found that Radislav Krstic was not a supporter of the VRS Main Staff's plan to execute the Bosnian Muslims and that he could not be found guilty of genocide as a principal perpetrator.

The Appeals Chamber held that although Krstic was not a supporter of the genocidal plan, he permitted the Main Staff to call upon Drina Corps resources and to employ those resources. It therefore found Krstic criminally responsible as an aider and abettor to genocide, referring to para. 52 of the *Krnojelac* Appeals Judgement in which it held:

> "The Appeals Chamber considers that the aider and abettor in persecution, an offence with a specific intent, must be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime. He need not share the intent but he must be aware of the discriminatory context in which the crime is to be committed and know that his support or encouragement has a substantial effect on its perpetration."[27]

It held: "The conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of the Tribunal".[28]

For convictions of complicity in genocide, the Appeals Chamber found some authority to the effect that such conviction, "where it prohibits conduct broader than aiding and abetting,[29] requires proof that the accomplice had the specific intent to destroy a protected group".[30] In its view, "Article 4 of the Statute is most naturally read to suggest that Article 4(2)'s requirement that a perpetrator possess the requisite 'intent to destroy' a protected group applies to all the prohibited acts enumerated in Article 4(3), including complicity in genocide".[31] Therefore a conviction of complicity in genocide would have required a showing of genocidal intent.

Finally, the Appeals Chamber found that the fact that the Trial Chamber did not identify individual members of the Main Staff of the VRS as the principal participants in the genocidal enterprise does not negate the finding that Radislav Krstic was aware of their genocidal intent. It held: "A defendant may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified".[32] Accordingly, the Appeals Chamber set aside Krstic's conviction as a participant in a joint criminal enterprise to commit genocide and entered a finding of guilt for aiding and abetting genocide.

Disclosure of exculpatory evidence

Remedy for non-compliance with the obligation to disclose exculpatory evidence

The Defence alleged in its Appeal Brief that the Prosecutor had failed to comply with its disclosure obligation pursuant to Rule 68.[33] The Appeals Chamber held that when the Defence seeks a remedy in such case, the Defence "must show (i) that the Prosecution has acted in violation of its obligations under Rule 68, and (ii) that the Defence's case suffered material prejudice as a result."[34] In other words, if the Defence satisfies the Tribunal that there has been a failure by the Prosecution to comply with Rule 68, the Tribunal - in addressing the aspect of appropriate remedies - will examine whether or not the Defence has been prejudiced by that failure to comply before considering whether a remedy is appropriate.[35]

Identification of exculpatory evidence

The Defence submitted that the Prosecution had failed to identify which materials were actually exculpatory. In the *Krajisnik and Plavsic* case, the Trial Chamber, while recognising that Rule 68 does not require the Prosecution to identify the material being disclosed to the Defence as exculpatory, held that "as a matter of practice and in order to secure a fair and expeditious trial, the Prosecution should normally indicate which material it is disclosing under the Rule [...]".[36]

In the present case, the Appeals Chamber held that "the fact

[23] Para. 35.
[24] Trial Chamber Judgement, para. 418.
[25] Para. 129.
[26] Para. 134.
[27] Para. 137. *Krnojelac*, IT-97-25-A, Appeal Judgement, signed 17 September 2003, para. 52, *Judicial Supplement* No. 45.
[28] Para. 140. For the relationship between Article 7(1) and complicity in genocide under Article 4(3), see *Stakic* Trial Judgement, para. 531: "The Trial Chamber considered the relationship between Article 7(1) and complicity in genocide under Article 4(3) in its Decision on 98 *bis* Motion for Judgement of Acquittal [*Stakic*, IT-97-24-T, Decision on Rule 98 *bis* Motion for Judgement of Acquittal, 31 October 2002, para. 47]. Noting the overlap between Articles 7(1) and 4(3), the Trial Chamber concluded that two approaches are possible. Article 4(3) can either be regarded as *lex specialis* in relation to Article 7(1) (*lex generalis*), or the modes of participation under Article 7(1) can be read into Article 4(3)." In the present case, the Appeals Chamber concluded that the second approach applied.
[29] In the *Krnojelac* Appeals Judgement, para. 70, the Appeals Chamber found that in the case-law of the Tribunal the term "accomplice" has "different meanings depending on the context and may refer to a co-perpetrator or an aider and abettor" (footnote added).
[30] Para. 142.
[31] *Ibid.*

[32] Para. 143.
[33] Rule 68 (Disclosure of Exculpatory and Other Relevant Material) reads:
"(A) The Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.
(B) Without prejudice to paragraph (A), the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically.
(C) The Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (A) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused.
(D) The Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under the Rules to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.
(E) Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (A) above."
[34] Para. 153. In the *Akayesu* Appeal Judgement, para. 340, the Appeals Chamber held that in cases of abuse of process, the burden of proof lies with the Appellant and that what is "more important" is that the Accused shows that he has suffered a prejudice (*Akayesu*, ICTR-96-4-A, Judgement, 1 June 2001).
[35] *Brdjanin*, IT-99-36-T, Decision on Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68 *bis* and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved ("*Brdjanin* Rule 68 Decision"), IT-99-36-T, 30 October 2002, para. 23.
[36] *Krajisnik and Plavsic*, IT-00-39&40-PT, Decision on Motion from Momcilo Krajisnik to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68, 19 July 2001, page 2.

that there is no *prima facie* obligation on the Prosecution to identify the disclosed Rule 68 material as exculpatory does not prevent the accused from arguing, as a ground of appeal, that he suffered prejudice as a result of the Prosecution's failure to do so".[37] It dismissed this ground of appeal as the Defence failed to identify any prejudice.

Disclosure of exculpatory evidence

The Defence submitted that it was only permitted to view copies of exculpatory evidence and was in fact refused copies of the materials. The Appeals Chamber held that "[o]n a plain reading of Rule 68, the Prosecution is merely obliged to disclose the existence of Rule 68 material, not to provide the actual material itself".[38]

Since the Defence had not shown that it suffered prejudice during the trial, the Appeals Chamber dismissed this ground of appeal.

Disciplinary avenues

The Appeals Chamber found that the Prosecution did not always meet its obligations under Rule 68 and that in such case "[t]he consequences are governed by Rule 46 (Misconduct of Counsel)[39] and Rule 68 *bis* (Failure to Comply with Disclosure)[40]".[41]

Nevertheless, in light of the absence of material prejudice to the Defence, the Appeals Chamber could not impose any sanctions on the Prosecution. It was "persuaded that [...] the Prosecution acted in good faith in the implementation of a systematic disclosure methodology which, in light of the findings [in the present case] must be revised so as to ensure future compliance with [its] obligations".[42] It ordered that the Prosecution "investigate the complaints and take appropriate action". Finally, the Appeals Chamber held that it "will not tolerate anything short of strict compliance with disclosure obligations" and considered the discussion of this issue to be "sufficient to put the Office of the Prosecutor on notice for its conduct in future proceedings".[43]

Cumulative convictions

Multiple convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision has a distinct element not contained in the other.[44] In the present case, the Prosecution was challenging the Trial Chamber's non-entry, as impermissibly cumulative with genocide, of Radislav Krstic's convictions for extermination and persecution, and for murder and inhuman acts as crimes against humanity.

Extermination and genocide

In the present case, the Trial Chamber concluded that the requirement of a widespread and systematic attack against a civilian population was subsumed within the genocide requirement that there be an intent to destroy, in whole or in part, a national, ethnical, racial or religious group.[45]

The ICTR Appeals Chamber, in the *Musema* Appeals Judgement, addressed the issue and permitted convictions for genocide and extermination based on the same conduct because genocide "requires proof of intent to destroy, in whole or in part, a national, ethnical or religious group, [which] is not required by extermination", while extermination as a crime against humanity "requires proof that the crime was committed as part of a widespread or systematic attack against a civilian population, which proof is not required in the case of genocide".[46]

The Appeals Chamber followed the finding of the ICTR Appeals Chamber in *Musema* and held:

> "While a perpetrator's knowing participation in an organized or extensive attack on civilians may support a finding of genocidal intent, it remains only the evidentiary basis from which the fact-finder may draw this inference. The offence of genocide, as defined in the Statute and in international customary law, does not require proof that the perpetrator of genocide participated in a widespread and systematic attack against a civilian population."[47]

The Trial Chamber also concluded that the definitions of intent for extermination and genocide "both require that the killings be part of an extensive plan to kill a substantial part of a civilian population".[48] As the Appeals Chamber previously explained, however, the existence of a plan or policy is "not a legal ingredient of the crime" and can only be a factor in the context of proving specific intent.[49] Similarly, the Appeals Chamber previously held, with regard to crimes against humanity, that "the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime".[50] Accordingly the Appeals Chamber held in the present case that the Trial Chamber's finding was erroneous.

Finally, the Appeals Chamber clarified that the intent requirement of genocide is not limited to instances where the perpetrator seeks to destroy only civilians. It held:

> "Provided the part intended to be destroyed is substantial, and provided that the perpetrator intends to destroy that part as such, there is nothing in the definition of genocide prohibiting, for example, a conviction where the perpetrator killed detained

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[37] Para. 191.

[38] Para. 195. See also the *Brdjanin* Rule 68 Decision, in which the Trial Chamber held that "the meaning of Rule 68 must also be placed in the broader context of securing the fair trial rights of the accused [whose concept] demands not only that the Prosecution [...] disclose to the Defence in sufficient time the 'existence of evidence', but also [...] that it actually provide the Defence with all exculpatory evidence in question 'as soon as practical'". (para. 24, emphasis added).

[39] Rule 46 reads :

"(A) (i) A Chamber may, after a warning, refuse audience to counsel if, in its opinion, the conduct of that counsel is offensive, abusive or otherwise obstructs the proper conduct of the proceedings.

(ii) The Chamber may also determine that counsel is no longer eligible to represent a suspect or accused before the Tribunal pursuant to Rule 44 and 45.

(B) A Judge or a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in the counsel's State of admission or, if a professor and not otherwise admitted to the profession, to the governing body of that counsel's University.

(C) In addition to the sanctions envisaged by Rule 46, a Chamber may impose sanctions against counsel if counsel brings a motion, including a preliminary motion, that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof.

(D) Under the supervision of the President, the Registrar shall publish and oversee the implementation of a Code of Professional Conduct for defence counsel."

[40] Rule 68 *bis* reads :

"The pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules."

[41] Para. 200. See also para. 211.

[42] Para. 214.

[43] Para. 215.

[44] *Delalic et al.*, IT-96-21-A, Judgement ("*Celebici* Appeals Judgement"), 20 February 2001, paras. 412-413, *Judicial Supplement* No. 23.

[45] Trial Chamber Judgement, para. 682.

[46] *Musema*, ICTR-96-13-A, Judgement ("*Musema* Appeal Judgement"), 16 November 2001, para. 366.

[47] In footnote 365, the Appeals Chamber, to support its finding, referred to *The Rome Statute of the International Criminal Court: A Commentary* (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds, 2002), on page 340 (under customary international law, "it is only for crimes against humanity [and not for genocide] that knowledge of the widespread or systematic practice is required").

[48] Trial Chamber Judgement, para. 685.

[49] *Jelisic* Appeals Judgement, para. 48, referring to the oral decision by the Appeals Chamber for the ICTR in *Kayishema and Ruzindana*, ICTR-95-1-A, 1 June 2001.

[50] *Kunarac*, IT-96-23 & IT-96-23/1-A, Judgement ("*Kunarac* Appeals Judgement"), 12 June 2002, para. 98, *Judicial Supplement* No. 34.

military personnel belonging to a protected group because of their membership in that group. It may be that, in practice, the perpetrator's genocidal intent will almost invariably encompass civilians, but that is not a legal requirement of the offence of genocide."[51]

Persecution and genocide

The Trial Chamber concluded that the offence of persecution as a crime against humanity was impermissibly cumulative with the conviction for genocide.[52]

Since persecution and extermination, as crimes against humanity, share the same requirement that the underlying act be part of a widespread or systematic attack against a civilian population and that it be perpetrated with the knowledge of that connection, the Appeals Chamber held that "[t]he offence of genocide does not subsume that of persecution" and found the Trial Chamber's conclusions to be erroneous.[53]

[51] Para. 226.
[52] Trial Chamber Judgement, para. 682-686.
[53] Para. 229.

Partial dissenting opinion of Judge Shahabuddeen

Judge Shahabuddeen *inter alia* agreed with the Trial Chamber that Radislav's Krstic responsibility was that of a "principal perpetrator"[54] of genocide and not, as the Appeals Chamber found, that of an aider and abettor. He agreed with the sentence given by the Appeals Chamber but expressed his doubts as to some aspects of cumulative convictions. ■

[54] Trial Chamber Judgement, para. 644.

APPEALS CHAMBER

The Prosecutor v. Enver Hadzihasanovic & Amir Kubura

Case No. IT-01-47-AR73.2

Judges Meron [Presiding], Pocar, Shahabuddeen, Güney and Weinberg de Roca

"DECISION ON INTERLOCUTORY APPEAL RELATING TO THE REFRESHMENT OF THE MEMORY OF A WITNESS"

2 APRIL 2004

Refreshment of a witness's memory during examination-in-chief

The fact that a statement was made pursuant to Rule 92 *bis* does not prevent the use of the unadmitted portions of the statement for the purpose of refreshing the memory of a witness under examination-in-chief.

Procedural Background

- On 4 December 2003, Trial Chamber II orally ruled that it was not possible to produce a previous statement of a witness taken by a Prosecution's investigator to refresh his memory during examination-in-chief ("Oral Decision").[1]

- On 10 December 2003, the Prosecution filed a motion for reconsideration of the Oral Decision.[2] The Defence replied on 17 December 2003.[3]

- On 19 December 2003, Trial Chamber II rendered its "Decision on the Refreshment of a Witness's Memory and on a Motion for Certification to Appeal" ("Impugned Decision") whereby it upheld its Oral Decision and certified the Interlocutory Appeal.

- On 29 December 2003, the Prosecution filed its appeal from the Impugned Decision.[4] The Defence replied on 5 January 2004.[5]

[1] Transcripts, 4 December 2003, p. 531-532.
[2] *Hadzihasanovic & Kubura*, IT-01-47-T, Prosecutor's Motion for Reconsideration of Decision of 4 December 2003 Regarding Refreshing Recollection or Alternatively Certification Under Rule 73(B), 10 December 2003.
[3] Joint Defence Response to Prosecutor's Motion of 10 December 2003.Regarding Refreshing Recollection or Alternatively Certification Under Rule 73 (B), 17 December 2003.
[4] *Hadzihasanovic & Kubura*, IT-01-47-AR73.2, Prosecutor's Appeal from the Trial Chamber's Decision Relating to the Refreshment of the Memory of Witness and Relating to the Request for Certification Dated 19 December 2003, 29 December 2003.

Decision

The Appeals Chamber allowed the Interlocutory Appeal and reversed the Impugned Decision.

Reasoning

The Appeals Chamber referred to its previous finding in the *Simic* et al. case whereby it admitted that a prior statement may be used to refresh a witness's memory during cross-examination:

> "The fact that a statement was made pursuant to Rule 92 *bis* does not prevent the use of the unadmitted portions of the statement for the purpose of refreshing the memory of a witness under cross-examination."[6]

It held that the same conclusion should apply to the question of refreshing a witness's memory during examination-in chief. ■

[5] *Hadzihasanovic & Kubura*, IT-01-47-AR73.2, Joint Defence Response to Prosecutor's Appeal from the Trial Chamber's Decision Relating to the Refreshment of the Memory of a Witness and Relating to the Request for Certification Dated 19 December 2003, 5 January 2003.
[6] *Simic et al.*, IT-95-9-AR73.6 & IT-95-9-AR73.7, Decision on Prosecution Interlocutory Appeals on the Use of Statements not Admitted into Evidence Pursuant to Rule 92 *bis* as a Basis to Challenge Credibility and to Refresh Memory, 23 May 2003, para. 18, *Judicial Supplement* No. 41.

TRIAL CHAMBERS

The Prosecutor v. Vidoje Blagojevic & Dragan Jokic

Case No. IT-02-60-T

Trial Chamber I, section A (Judges Liu [Presiding], Vassylenko and Argibay)

"DECISION ON REQUEST FOR CERTIFICATION OF INTERLOCUTORY APPEAL OF THE TRIAL CHAMBER'S JUDGEMENT ON MOTIONS FOR ACQUITTAL PURSUANT TO RULE 98 *BIS*"

23 APRIL 2004

Appeal from a judgement for acquittal pursuant to Rule 98 *bis*

Rule 108 – and not Rule 73 – is the proper Rule under which to bring an appeal from a judgement including a judgement rendered pursuant to Rule 98 *bis*.

Procedural Background

On 5 April 2004, the Trial Chamber rendered its "Judgement on Motions for Acquittal Pursuant to Rule 98 *bis*" ("Judgement") whereby it granted in part the motions filed by Vidoje Blagojevic.[1]

On 15 April 2004, the Prosecution filed the "Prosecution's Request for Certification of Interlocutory Appeal of the Trial Chamber's Judgement on Motions for Acquittal Pursuant to Rule 98 *bis*" ("Request") whereby it requested that the Trial Chamber grant certification to appeal the Judgement on the basis that the issues raised in the Request satisfied the requirements of Rule 73(B) of the Rules of Procedure and Evidence ("Rules").[2]

Decision

The Trial Chamber found that the Prosecution erred in bringing the Request under Rule 73 of the Rules of Procedure and Evidence ("Rules") and accordingly dismissed the Request.

Reasoning

The Trial Chamber found that "Rule 73(B) of the Rules applies to decisions rendered by the Trial Chamber pursuant to Rule 73 of the Rules".[3]

It noted that motions for acquittal under Rule 98 *bis* fall within Section Four of Part Six of the Rules and that this section is entitled "Judgement". It held that a judgement for acquittal is "not a decision rendered pursuant to Rule 72 or Rule 73 of the Rules".[4]

The Trial Chamber therefore found that "Rule 108[5] – and not Rule 73 – is the proper Rule under which to bring an appeal from a judgement including a judgement rendered pursuant to Rule 98 *bis*".[6]

[1] The Trial Chamber accordingly entered a judgement of acquittal: for Vidoje Blagojevic on Counts 2 to 4 of the Indictment insofar as his individual criminal responsibility is alleged, under Article 7(1) of the Statute, for planning, instigating, ordering and committing the crimes; for Vidoje Blagojevic on Counts 5 and 6 of the Indictment insofar as his individual criminal responsibility is alleged, under Article 7(1) of the Statute, for planning, instigating and ordering the crimes; and for Dragan Jokic on Counts 2 to 5 of the Indictment insofar as his individual criminal responsibility is alleged, under Article 7(1) of the Statute, for planning, instigating and ordering the crimes. The Trial Chamber further rejected certain factual allegations contained in the Indictment.

[2] Rule 73(B) reads:

"(B) Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."

[3] Para. 9 (emphasis in the original).

[4] Para. 10 (emphasis in the original). For previous examples of judgements for acquittal, see *Kordic and Cerkez*, IT-95-14/2-T, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, *Judicial Supplement* No. 14; *Kunarac et al.,* IT-96-23-T and IT-96-23/1-T, Decision on Defence Motions for Judgment of Acquittal, 3 July 2000, *Judicial Supplement* No. 18; *Kvocka et al.*, IT-98-30/1-T, Decision on Defence Motions for Acquittal, 15 December 2000, *Judicial Supplement* No. 21; *Stakic*, IT-97-24-T, Decision on Rule 98 *bis* Motion for Judgement of Acquittal, 31 October 2002.

[5] Rule 108 ("Notice of Appeal") reads :

"A party seeking to appeal a judgement shall, not more than thirty days from the date on which the judgement was pronounced, file a notice of appeal, setting forth the grounds. The Appellant should also identify the order, decision or ruling challenged with specific reference to the date of its filing, and/or the transcript page, and indicate the substance of the alleged errors and the relief sought. The Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal."

[6] Para. 13. The Trial Chamber observed that the decision to grant certification under Rule 73(B) is a discretionary one ("may"). It considered that in order to ensure that the right of all accused to be equal before the Tribunal (Article 21(1) of the Statute) is respected, a discretionary avenue of appeal would not be appropriate in cases where the issue determined by the Trial Chamber is whether to enter a judgement of acquittal on one or more offences in the indictment (footnote 10).

MAY 2004

SUMMARIES OF
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N° 49

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02/04/04	HADZIHASANOVIC *ET AL.*	IT-01-47-PT	DECISION ON INTERLOCUTORY APPEAL RELATING TO THE REFRESHMENT OF THE MEMORY OF A WITNESS	
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23/04/04	BLAGOJEVIC *ET AL.*	IT-02-60-T	DECISION ON PROSECUTION'S REQUEST FOR CERTIFICATION OF INTERLOCUTORY APPEAL OF THE TRIAL CHAMBER'S JUDGEMENT ON MOTION FOR ACQUITTAL PURSUANT TO RULE 98 *BIS*	
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29/04/04	MILOSEVIC	IT-02-54-T	SEPARATE OPINION OF JUDGE O-GON KWON ON TRIAL CHAMBER CONFIDENTIAL DECISION ISSUED 28 JANUARY 2004	
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