THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-AR98*bis*.1

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Patrick Robinson
Judge Liu Daqun
Judge Khalida Rachid Khan
Judge Bakhtiyar Tuzmukhamedov

Registrar: Mr. John Hocking

Date: 23 November 2012

THE PROSECUTOR

v.

RADOVAN KARADZIC

Revised Public Redacted Version

RESPONDENT'S BRIEF

The Office of the Prosecutor:
Mr. Peter Kremer QC

The Accused:
Radovan Karadzic

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I. Introduction

1. Dr. Radovan Karadzic respectfully urges the Appeals Chamber to affirm the decision of the Trial Chamber granting a judgement of acquittal on Count One of the Indictment. The decision of the Trial Chamber that there was no genocide in the municipalities in Bosnia during 1992 was not unreasonable on the evidence and was consistent with the judgements of the International Court of Justice and this Tribunal.

II. Procedural History

2. In Count One of the Third Amended Indictment, it is alleged that:

> in some municipalities, between 31 March 1992 and 31 December 1992, this campaign of persecutions included or escalated to include conduct that manifested an intent to destroy in part the national, ethnical and/or religious groups of Bosnian Muslims and/or Bosnian Croats as such. In such municipalities, a significant section of the Bosnian Muslim and/or Bosnian Croat groups, namely their leaderships, as well as a substantial number of members of these groups were targeted for destruction. The most extreme manifestations of an intent to partially destroy these groups took place in Bratunac, Foca, Kljuc, Prijedor, Sanski Most, Vlasenica and Zvornik.[1]

3. Dr. Karadzic's trial commenced on 27 October 2009 with the prosecution's opening statement. Almost 200 prosecution witnesses were heard between 13 April 2010 and 7 May 2012. On 11 June 2012, Dr. Karadzic orally presented his *Motion for Judgement of Acquittal*. The prosecution responded orally on 13 June 2012. On 28 June 2012, the Trial Chamber orally issued the Impugned Decision.

4. The prosecution filed its notice of appeal on 11 July 2012. On 13 July 2012, the Trial Chamber denied the prosecution's request for certification to appeal the decision, noting that the decision was appealable as of right.[2] The prosecution filed its brief on 24 September 2012.

III. The Impugned Decision

5. In its Decision, the Trial Chamber set forth the standard to be applied to motions for judgement of acquittal pursuant to Rule 98 *bis*. The Trial Chamber held that

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[1] *Prosecution's Marked Up Indictment* (19 October 2009)

[2] *Decision on Prosecution Request for Certification to Appeal Judgement of Acquittal Under Rule 98 bis.* Dr. Karadzic agrees with the Trial Chamber and does not challenge the prosecution's right to appeal the judgement of acquittal as an appeal from a final judgement.

the test to be applied was whether there was evidence upon which, if accepted, a reasonable trier of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the count in question. Only if the Chamber was convinced that, after taking the totality of the evidence presented by the Prosecution at its highest, there was no evidence on which it could convict the accused of that count, would the Chamber enter a judgement of acquittal. The Trial Chamber noted that it was not to evaluate the credibility of witnesses or the strengths and weaknesses of contradictory evidence at this stage of the case.[3]

6. In its determination as to the genocide charge in Count One, the Trial Chamber recognized that there were three types of acts charged:(1) killing of members of the protected group; (2) causing of serious bodily and mental harm to members of the protected group; and (3) detention under conditions of life calculated to bring about physical destruction of the protected group.[4]

7. The Trial Chamber found that the prosecution had established that a large number of Bosnian Muslims and/or Bosnian Croats were killed on a large scale by Bosnian Serb forces in the seven municipalities during and after their alleged take-over and while in detention. The Chamber noted that the determination of whether there is evidence capable of supporting a conviction for genocide does not involve a numerical assessment of the number of people killed and does not have a numeric threshold.

8. The Chamber went on to hold that the evidence of killings, even if taken at its highest, did "not reach the level from which a reasonable trier of fact could infer that a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of members of these groups were targeted for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such."[5]

9. With respect to the act of causing serious bodily harm, the Chamber considered the harm to those in detention as well as those who had been displaced.

10. The Trial Chamber found that there was evidence that Bosnian Serb forces caused serious bodily or mental harm to many Bosnian Muslims and/or Bosnian Croats during their detention. However, it found that there was no evidence, even taken at its

[3] T28732-33, 28764
[4] T28764-65
[5] T28764

highest, which could support a conclusion by a reasonable trier of fact that the harm caused reached a level where it contributed to or tended to contribute to the destruction of the Bosnian Muslims and/or Bosnian Croats in whole or in part or that it was committed with the intent to destroy those groups.[6]

11. The Trial Chamber also held that, where attended by such circumstances as to lead to the death of the whole or part of the displaced population, forcible transfer may be considered an underlying offence that causes serious bodily or mental harm. The Chamber found that there was evidence that the circumstances in which the Bosnian Muslims and/or Bosnian Croats in the municipalities were forcibly transferred or displaced from their homes were attended by conditions of great hardship and suffering and that some of those displaced may have suffered serious bodily or mental harm during this process. However, the Chamber found that there was no evidence which rose "to the level which could sustain a conclusion that the serious bodily or mental harm suffered by those forcibly transferred in the municipalities was attended by such circumstances as to lead to the death of the whole or part of the displaced population for the purposes of the actus reus for genocide."[7]

12. Turning to the actus reus of inflicting conditions of life calculated to bring about physical destruction, the Trial Chamber found that there was sufficient evidence of cruel and inhumane treatment, torture, physical and psychological abuse, rape and sexual violence, inhumane living conditions, forced labour, failure to provide adequate accommodation, shelter, food, water, medical care or hygienic facilities for those in detention.[8]

13. The Chamber noted, however, that in determining whether conditions of life imposed on the targeted group were calculated to bring about its physical destruction, it focused on the objective probability of these conditions leading to the physical destruction of the group in part and was required to assess factors such as the nature of the conditions imposed, the length of time that members of the group were subjected to that, and characteristics of the targeted group such as its vulnerability.[9]

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[6] T28765-66
[7] T28766-67
[8] T28767
[9] T28767

14. The Trial Chamber noted that the charge of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part did not require proof that the result was actually achieved. Nevertheless, the Trial Chamber held that the evidence before it, even taken at its highest, could not support the conclusion that the conditions of detention reached a level which could support an inference that Bosnian Muslims and/or Bosnian Croats were detained in conditions of life calculated to bring about their physical destruction.[10]

15. The Trial Chamber found that genocidal intent could be inferred from a number of factors and circumstances, including the general context of the case, the means available to the perpetrator, the surrounding circumstances, the perpetration of other culpable acts systematically directed against the same group, the numerical scale of atrocities committed, the repetition of destructive and discriminatory acts, the derogatory language targeting the protected group, or the existence of a plan or policy to commit the underlying offence.[11]

16. The Chamber noted that there was indeed evidence of culpable acts systematically directed against Bosnian Muslims and/or Bosnian Croats in the municipalities and of the repetition of discriminatory acts and derogatory language. However, it found that the nature, scale, and context of these culpable acts, did not reach the level from which a reasonable trier of fact could infer that they were committed with genocidal intent.[12]

17. Having reviewed the totality of the evidence with respect to the killing, the serious bodily or mental harm, the forcible displacement, and the conditions of life inflicted on Bosnian Muslims and/or Bosnian Croats in detention facilities in the municipalities, the Chamber found that there was no evidence that these actions reached a level from which a reasonable trier of fact could draw an inference that they were committed with an intent to destroy in whole or in part the Bosnian Muslims and/or Bosnian Croats as such.[13]

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[10] T28767-68
[11] T28768
[12] T28768
[13] T28768-69

18. The Trial Chamber then turned to evidence of statements and speeches made by Dr. Karadzic and other members of the Bosnian Serb leadership. It found that notwithstanding these statements, there was no evidence upon which, if accepted, a reasonable trier of fact could find that the acts of killing, serious bodily or mental harm, and conditions of life inflicted on the Bosnian Muslims and/or Bosnian Croats were perpetrated with the dolus specialis required for genocide.[14]

19. The Trial Chamber concluded that there was no evidence, even taken at its highest, which could be capable of supporting a conviction for genocide in the municipalities as charged under Article 4(3) of the Statute. It therefore entered a judgement of acquittal on Count One.[15]

IV. Standard of Review

20. The prosecution's brief is remarkable for its complete omission of any discussion of the standard of review.

21. It was established in this Tribunal as far back as the *Tadic* case in 1999 that the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. The Appeals Chamber emphasized that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.[16]

22. The Appeals Chamber subsequently held that only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[17] The Appeals Chamber will not lightly disturb findings of fact made by a Trial Chamber.[18]

23. The Appeals Chamber has also held that the same standard of reasonableness and the same deference to factual findings of the Trial Chamber apply when the

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[14] T28769
[15] T28769-70
[16] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 64.
[17] *Prosecutor v Kunarac et al*, No. IT-96-23&23/1-A, *Judgement* (12 June 2002) at para. 39
[18] *Prosecutor v Blagojevic & Jokic*, No. IT-02 60-A, *Judgement* (9 May 2007) at para. 9

Prosecution appeals against an acquittal.[19] The Appeals Chamber has seen fit to specifically point out that when the prosecution appeals from factual findings against it, it bears a heavy burden of persuasion.[20]

24. Expressed in the context of a judgement of acquittal under Rule 98 *bis*, the standard of review is whether no reasonable Trial Chamber could have concluded that there was no evidence upon which a reasonable trier of fact could be satisfied beyond reasonable doubt of the guilt of the accused.[21]

V. Applicable Provisions

25. Article 4 of the ICTY statute provides that:

> 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.
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> 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:
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> (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.

26. Rule 98 *bis* of the ICTY Rules of Procedure and Evidence provides that:

> At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a

[19] *Prosecutor v Halilovic*, No, IT-01-48-A, *Judgement* (16 October 2007) at para. 11
[20] *Prosecutor v Stakic*, No, IT-97-24-A, *Judgement* (22 March 2006) at para. 56
[21] In that same vein, although Dr. Karadzic challenges the credibility of much of the prosecution's evidence, for purpose of this appeal, he will also take the prosecution's evidence at its highest.

judgement of acquittal on any count if there is no evidence capable of supporting a conviction.

VI. Argument

A. Ground 1: The Trial Chamber *Did* Conclude that The *Actus Reus* of Genocide had been Established

27. The prosecution contends in its first ground of appeal that the Trial Chamber erred in failing to find that underlying acts of genocide had occurred.

28. The Trial Chamber found that the prosecution had established that a number of Bosnian Muslims and/or Bosnian Croats were killed by Bosnian Serb forces in the seven municipalities during and after their alleged take-over and while in detention.[22] That, in and of itself, was sufficient to meet the *actus reus* requirement of Article 4 of the Statute.

29. The Trial Chamber's finding that the killings did "not reach the level from which a reasonable trier of fact could infer that a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of members of these groups were **targeted** for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such", [23](emphasis added) was a finding that the killings were not carried out with genocidal intent.

30. Similarly, the Trial Chamber recognized that it had received evidence that Bosnian Serb forces caused serious bodily and mental harm to many Bosnian Muslims and/or Bosnian Croats during their detention in multiple detention facilities.[24] It likewise found that this evidence, taken at its highest, did not support a finding that these acts were committed with the intent to destroy these groups.[25]

31. While the Chamber also opined that that the harm had not reached a level where it contributed to or tended to contribute to the destruction of the groups, this statement was in the alternative to its finding of lack of *mens rea* and is not essential to its holding.

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[22] T28764
[23] T28764
[24] T28764-65
[25] T28765, lines 10-11

32. The Appeals Chamber has held that the infliction of serious bodily or mental harm alone is not sufficient to meet the *actus reus* requirement, and that such harm must rise to another level to qualify as the *actus reus* for genocide. As the prosecution notes, the ICTR Appeals Chamber in *Seromba*, including three members of the Appeals Chamber panel in this appeal,[26] held that "to support a conviction for genocide, the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part."[27]

33. This makes sense. Inflicting serious bodily and mental harm on another is beyond doubt a crime. But many persons who are the victims of serious bodily and mental harm are not destroyed. They go on with their lives, often scarred by the physical, mental, and emotional scars from these acts. These people continue to form part of the protected group and often make valuable contributions to the group and to the community. Therefore, only when the harm reaches the level where such persons cannot continue to be functioning members of the group, and therefore threatens the very existence of the group, can the infliction of serious bodily or mental harm be said to rise to the level to satisfy the *actus reus* of genocide.

34. This is consistent with the formulation of the *actus reus* described in Article 4(2)(c)-- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. Inflicting horrific conditions of life are not enough if not for the purpose of destroying the group.

35. Although Article 4(2)(c) contains an explicit component of intent not found in Article 4(2)(b) with respect to serious harm, the Appeals Chamber in *Seromba*, as well as the authorities upon which it relied, including the International Law Commission, did not insert a similar requirement in that section. Rather, it interpreted section (b) in light of the Genocide Convention's requirement of physical destruction.

36. In Sierra Leone and Liberia, the practice of cutting off the limbs of members of the population undoubtedly caused serious physical and mental harm, but such harm did not destroy the victims nor threaten the existence of the group. Therefore, while constituting a crime, it did not constitute the *actus reus* of genocide. The same rationale

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[26] Judges Meron, Robinson, and Liu
[27] *Prosecutor v Seromba,* No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 46

supports the Appeals Chamber's decision in *Seromba* and the Trial Chamber's decision here.

37. The Trial Chamber's alternative holding that the infliction of serious bodily and mental harm did not rise to the level required to constitute the *actus reus* of genocide was consistent with Appeals Chamber jurisprudence and was a correct application of the facts. However, even if erroneous, it does not invalidate the judgement, because the Trial Chamber also found that the serious harm was not inflicted with the intent to destroy the group. Therefore, the prosecution's claim that the Trial Chamber erred in failing to find that underlying acts of genocide occurred must be dismissed.

B. Ground 2 ½: The Trial Chamber was not Unreasonable to Conclude that Genocide was not Committed in the Municipalities

38. In its combination of grounds two and three, the prosecution's brief goes to the very heart of the matter. Was genocide committed in the municipalities in Bosnia in 1992?

39. The Trial Chamber concluded that it was not. The question before the Appeals Chamber is whether that conclusion is one which no reasonable Trial Chamber could have made.

1. An overview of the jurisprudence: 27 International Judges Can't be Wrong

40. Twenty-seven international judges have come to the same conclusion in earlier proceedings in this Tribunal and the International Court of Justice.[28] The fact that so many judges have reached the same conclusion makes it virtually impossible to conclude that the Trial Chamber's decision in this case was unreasonable.

(A). The *Jelisic* case[29]

41. The ICTY's first case where genocide in the municipalities was alleged was the *Jelisic* case. Goran Jelisic, a guard at the Luka prison camp in Brcko municipality was accused of genocide and crimes against humanity for having killed many persons

[28] ICTY Judges Robinson, May and Fassi-Fihri (*Sikirica),* Judges Schomburg, Vassylenko, and Argibay (*Stakic),* Judges Pocar, Shahabuddeen, Guney, Vaz, and Meron *(Stakic* appeal), Judges Agius, Janu, and Taya *(Brdjanin),* Judges Orie, Canivell, and Hanoteau (*Krajisnik),* ICJ Judges Higgins, Owanda, Simma, Tomka, Abraham. Keith, Sepulvedaamor, Bennouna, Skotnikov, Kreca

[29] *Prosecutor v Jelisic*, No. IT-95-10-T, *Judgement* (14 December 1999) (hereinafter "*Jelisic* TC" and *Prosecutor v Jelisic*, No. IT-95-10-A, *Judgement* (5 July 2001) ("*Jelisic* AC")

detained at the camp. The Trial Chamber acquitted him of genocide at the close of the prosecution's case.

42. The Trial Chamber held that the *mens rea* for genocide meant that the prohibited act (i.e. killing) must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group.[30]

43. The Trial Chamber concluded that two elements must be established for *mens rea* of genocide: (1) that the victims belonged to an identified group; and (2) that the alleged perpetrator must have committed his crimes as part of a wider plan to destroy the group as such.[31]

44. In distinguishing the *mens rea* for genocide with that for persecution, the Trial Chamber held that it must be proven that the accused had the special intention which, beyond the discrimination of the crimes he commits, characterised his intent to destroy the discriminated group as such, at least in part.[32] This differs from persecution, where the perpetrator chooses his victims because they belong to a specific community but does not necessarily seek to destroy the community as such.[33]

45. The Trial Chamber went on to identify two ways in which an intention to destroy the group, in part, could be manifested: (1) desiring the extermination of a very large number of the members of the group, intending to destroy a group en masse; or (2) targeting for destruction a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.[34]

46. The Trial Chamber found that the prosecution had not provided sufficient evidence of a plan to destroy the Muslim group in Brcko or elsewhere within which the murders committed by the accused would allegedly fit.[35] It also found that Jelisic did not individually act with the intent to destroy the Bosnian Muslims as such, noting that his killings were arbitrary, he sometimes spared Muslims, and that they were the product of a

[30] *Jelisic* TC at para. 66
[31] *Jelisic* TC at para. 66
[32] *Jelisic* TC at para. 78
[33] *Jelisic* TC at para. 79
[34] *Jelisic* TC at para. 82
[35] *Jelisic* TC at para. 98

disturbed personality rather than an intention to destroy the group.[36] It therefore entered a judgement of acquittal for genocide at the close of the prosecution's case.

47. The prosecution appealed. The Appeals Chamber did not disturb the Trial Chamber's formulation of the *mens rea* required for genocide, but found that the Trial Chamber's reliance on Jelisic's disturbed personality and the randomness of his acts did not exclude that he could have acted with the requisite intent to destroy the group, particularly in light of his announced intention to kill the majority of the Muslims in Brcko.[37] While it found that the Trial Chamber had erred in granting the judgement of acquittal, the Appeals Chamber declined to reverse the Trial Chamber's decision.

48. Dr. Karadzic notes that he is not charged with genocide in Brcko municipality or in Luka camp.[38]

(B) The *Sikirica* case[39]

49. The next case involving genocide in the municipalities was the prosecution of the commander and two guards at the Keraterm prison camp in Prijedor municipality. The Trial Chamber examined the requirements of the *mens rea* for genocide and held that there must be evidence of an intention to destroy a reasonably substantial number relative to the total population of the group, or an intention to destroy a significant section of the group, such as its leadership.[40]

50. The Trial Chamber found that the number of persons detained in Keraterm camp constituted at most only 2.8% of the Muslim population of Prijedor and did not constitute a reasonably substantial number part of the group.[41]

51. The Trial Chamber went on to determine if there was evidence of an intention to target the leadership of the group. It looked for targeting of Bosnian Muslims who, whether by reason of their official duties or by reason of their personality, had this special quality of directing the actions or opinions of the group in question, that is those who had a significant influence on its actions.[42] The Chamber rejected the argument that

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[36] *Jelisic* TC at paras. 106-08
[37] *Jelisic* AC at paras. 70-71
[38] See para. 38 of *Third Amended Indictment*
[39] *Prosecutor v Sikirica et al*, No. IT-95-8-T, *Judgement on Defence Motions to Acquit* (3 September 2001) (*Sikirica* TC)
[40] *Sikirica* TC at para. 65
[41] *Sikirica* TC at para. 72
[42] *Sikirica* TC at para. 73

all those who were active in the resistance of the take-over of their villages, should be treated as leaders. It noted that "acceptance of that submission would necessarily involve a definition of leadership so elastic as to be meaningless."[43]

52. The Trial Chamber was unable to conclude from the evidence that the leadership of the Bosnian Muslims from Prijedor had been targeted for destruction, either within or outside of Keraterm camp.[44]

53. The Trial Chamber observed that what differentiates genocide from persecution is that for genocide, it is the group that must been targeted, and not merely specific individuals within that group. Although the destruction of the group necessarily requires the commission of crimes against its members, the ultimate victim of genocide is the group. It is the requirement that the act be committed with the special intent to destroy the group that establishes a demarcation between genocide and most cases of ethnic cleansing.[45]

54. The Trial Chamber concluded that while there was evidence of killings and serious bodily and mental harm at Keraterm, there was no evidence which established that the accused intended to destroy the Bosnian Muslims, in whole or in part, as such.[46]

55. The Trial Chamber then went on to examine the evidence in light of the factors identified by the prosecution from which it claimed that the intent to destroy the group could be inferred.

56. With respect to the scale of the atrocities, the Trial Chamber found that where only 2.8% of the Bosnian Muslims of Prijedor were victims, it could not infer the intent to destroy the Bosnian Muslims as a group.[47]

57. With respect to the manner the crimes were committed, the Trial Chamber was unable to conclude that they were so systematic as to suggest an intention to destroy the group.[48]

58. The Trial Chamber entered a judgement of acquittal on the charge of genocide. The prosecution did not appeal.

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[43] *Sikirica* TC at para. 81
[44] *Sikirica* TC at para. 84
[45] *Sikirica* TC at para. 89
[46] *Sikirica* TC at para. 90
[47] *Sikirica* TC at para. 94
[48] *Sikirica* TC at para. 95

59. The crimes at Keraterm camp form part of the charges against Dr. Karadzic.[49] It is significant that in his trial, the prosecution led no live evidence concerning Keraterm camp. It relied solely on Rule 92 *bis* testimony as well as adjudicated facts. It cannot therefore claim to be surprised that the Trial Chamber came to the same conclusion as the Trial Chamber in *Sikirica.*

(C) The *Stakic* case[50]

60. Milomir Stakic was the President of the Crisis Staff of Prijedor municipality. He was charged with participating in a joint criminal enterprise with Dr. Karadzic and others to commit genocide in Prijedor.[51] At the end of the prosecution's case, the Trial Chamber declined to acquit Dr. Stakic of genocide.[52] However, in its judgement, the Trial Chamber acquitted Dr. Stakic of genocide. His acquittal was upheld on appeal.

61. The Trial Chamber, in its judgement, found it important to distinguish destruction of the group and displacement of the group. It held that deportation of a group or part of a group does not suffice for genocide, which requires the intent for the physical destruction of the group.[53] It found that despite the fact that "crimes were committed on a massive scale throughout the municipality of Prijedor"[54], it had not been proven that Dr. Stakic himself, perpetrators acting on a higher level in the political structure than Dr. Stakic, or the physical perpetrators acted with the requisite intent to destroy the Bosnian Muslims or Croats of Prijedor in whole or in part.[55]

62. The Trial Chamber found that the goal of Dr. Stakic and the Bosnian Serb leadership was not the destruction of the Bosnian Muslims or Croats as a group, but rather to eliminate any perceived threat to the overall plan to take control of Prijedor municipality and to force non-Serbs to leave the municipality.[56]

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[49] See scheduled incidents B15.1, C20.3
[50] *Prosecutor v Stakic*, No. IT-97-24-T, *Judgement* (31 July 2003) (*Stakic* TC); *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006)(*Stakic* AC)
[51] *Prosecutor v Stakic*, No. IT-97-24-T, *Fourth Amended Indictment* (10 April 2002) at para. 27; *Stakic* TC at para. 547
[52] *Prosecutor v Stakic*, No. IT-97-24-T, *Decision on Rule 98 bis Motion for Judgement of Acquittal* (31 October 2002) at paras. 35,94
[53] *Stakic* TC at paras. 518-19, 554
[54] *Stakic* TC at para. 544
[55] *Stakic* TC at paras. 547,549,553-55
[56] *Stakic* TC at para. 553

63. The Trial Chamber noted that "had the aim been to kill all Muslims, the structures were in place for this to be accomplished." It pointed out that while approximately 23,000 people were registered as having passed through the Trnopolje camp and through other suburban settlements, the total number of killings in Prijedor municipality probably did not exceed 3,000.[57]

64. The prosecution appealed the acquittal of Dr. Stakic for genocide. The Appeals Chamber upheld the Trial Chamber. It held that the Trial Chamber's conclusion that the Dr. Stakic merely intended to displace, but not to destroy, the Bosnian Muslim group was a reasonable one. The fact that Dr. Stakic was willing to employ means to this end that ensured that some members of the group would be killed and others brutalised was surely criminal, in the eyes of the Appeals Chamber, but not necessarily genocidal.[58]

65. The crimes in Prijedor municipality form part of the charges against Dr. Karadzic.[59]

(D) The *Milosevic* case

66. Slobodan Milosevic was the President of the Republic of Serbia in 1992. He was charged with participating in a joint criminal enterprise with Dr. Karadzic and others whose object was to commit genocide in Bosnia.[60] At the end of the prosecution's case, the Trial Chamber declined to acquit Mr. Milosevic, finding that there was evidence from which a Trial Chamber could be satisfied beyond reasonable doubt that there existed a joint criminal enterprise, which included Dr. Karadzic and members of the Bosnian Serb leadership, whose aim and intention was to destroy a part of the Bosnian Muslim population, and that genocide was in fact committed in Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kljuc and Bosanski Novi.[61]

67. President Milosevic died before a final judgement was rendered in his case.

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[57] *Stakic* TC at para. 553
[58] *Stakic* AC at para. 56
[59] See *Third Amended Indictment* at paras. 38, scheduled incidents A10, B15,C20
[60] *Prosecutor v Milosevic*, No. IT-02-54-T, *Amended Indictment "Bosnia and Herzegovina"* (22 November 2002) at paras. 6,7,10
[61] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Motion for Judgement of Acquittal* (16 June 2004) at para. 246

(E) The *Brdjanin* case[62]

68. Radoslav Brdjanin was President of the Crisis Staff of the Autonomous Region of Krajina (ARK). He was charged with participating in a joint criminal enterprise with Dr. Karadzic and others whose object was to commit genocide in the ARK.[63] At the end of the prosecution's case, the Trial Chamber declined to acquit Mr. Brdjanin.[64] However, in its judgement, the Trial Chamber acquitted Mr. Brdjanin of genocide.

69. The Trial Chamber, in its judgement, observed that the intent to destroy makes genocide an exceptionally grave crime and distinguishes it from other serious crimes, in particular persecution, where the perpetrator selects his victims because of their membership in a specific community but does not necessarily seek to destroy the community as such.[65]

70. The Trial Chamber also noted that "in cases of joint participation, the intent to destroy, in whole or in part, a group as such must be discernible in the criminal act itself, apart from the intent of particular perpetrators."[66]

71. The Trial Chamber went on to consider a number of factors which the specific intent to destroy the group might be inferred. It found that while the **extent of the actual destruction** will more often than not be a factor from which the inference may be drawn that the underlying acts were committed with the specific intent, the percentage of victims of killings and infliction of serious harm in the ARK compared with the Muslim and Croat population of the ARK was not high enough to warrant the inference that there was an intention to destroy those groups.[67]

72. The Trial Chamber found that the **forcible displacement** of so many Bosnian Muslims and Croats from the ARK, as compared with the number of Muslims and Croats who were killed or subject to serious harm, was more reasonably indicative of an intent to displace rather than an intent to destroy those groups.[68]

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[62] *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement* (1 September 2004) (*Brdjanin* TC)
[63] *Prosecutor v Brdjanin*, No. IT-99-36-T, *Sixth Amended Indictment* (9 December 2003) at para. 27
[64] *Prosecutor v Brdjanin*, No. IT-99-36-T, *Decision on Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (28 November 2003) at paras. 59-63
[65] *Brdjanin* TC at para. 699
[66] *Brdjanin* TC at para. 969
[67] *Brdjanin* TC at paras. 973-74
[68] *Brdjanin* TC at para. 976

73. The Trial Chamber also found that the **nature of the victims**—predominately military-aged men, was a factor that also militated against the inference of an intent to destroy the group, since the military-aged men may also have been targeted because of the security threat they posed to the Bosnian Serbs.[69]

74. The Trial Chamber also found that the **existence of a policy or plan for genocide** was an important factor to consider. However, it held that the Strategic Plan of the Bosnian Serbs, as well as other statements by Dr. Karadzic and the Bosnian Serb leadership, did not necessarily envision the destruction, as opposed to the displacement, of Bosnian Muslims and Croats from the ARK.[70]

75. The Trial Chamber also found that the **perpetration of other destructive and discriminatory acts** undoubtedly occurred, but had as its objective the removal and not the destruction of the Bosnian Muslims and Croats.[71]

76. The Trial Chamber did not find that the **utterances of the accused,** as offensive as they were, evidenced an intent to destroy, as opposed to displace, the Muslims and Croats.[72] Notably, the prosecution relies on these same utterances as evidence of intent to destroy in its case against Dr. Karadzic.[73]

77. In concluding that an intent to destroy had not been proven, the Trial Chamber also found it significant that "the Bosnian Serb forces controlled the territory of the ARK, as shown by the fact that they were capable of mustering the logistical resources to forcibly displace tens of thousands of Bosnian Muslims and Bosnian Croats, resources which, had such been the intent, could have been employed in the destruction of all Bosnian Muslims and Bosnian Croats of the ARK."[74]

78. The prosecution did not appeal Brdjanin's acquittal for genocide.[75]

79. Many of the specific crimes charged against Dr. Karadzic were also expressly considered in the Trial Chamber's judgement and found not to have been committed with

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[69] *Brdjanin* TC at para. 979
[70] *Brdjanin* TC at para. 981, and fn. 2467
[71] *Brdjanin* TC at paras. 983-84
[72] *Brdjanin* TC at para. 987
[73] *Brief* at para. 65
[74] *Brdjanin* TC at para. 978
[75] *Prosecutor v Brdjanin*, No. IT-99-36-A, *Judgement* (3 April 2007)

genocidal intent, including virtually all of the crimes charged against him in Kljuc,[76] Prijedor,[77] and Sanski Most[78] municipalities.

(F) The *Krajisnik* case[79]

80. Momcilo Krajisnik was President of the Bosnian Serb Assembly. He was charged with participating in a joint criminal enterprise with Dr. Karadzic and others whose object was to commit genocide in Bosnia.[80] At the end of the prosecution's case, the Trial Chamber declined to acquit Mr. Krajisnik.[81] However, in its judgement, the Trial Chamber acquitted Mr. Krajisnik of genocide.

81. The Trial Chamber found that none of the crimes charged in the indictment were committed with the intent to destroy the Bosnian Muslim or Bosnian Croat group as such.[82] The Trial Chamber specifically considered the scale of the crimes as well as words uttered by the perpetrators or others at the scene of the crime. It found that it could not infer an intent to destroy the group from the evidence relevant to these factors.[83]

82. The Trial Chamber also found that the evidence did not show that Mr. Krajisnik or other members of the JCE, including Dr. Karadzic, had the mens rea of genocide.[84]

83. The Trial Chamber expressly considered the utterances of the accused and other members of the JCE, including Dr. Karadzic. It found that the evidence did not show that genocide formed part of the common objective of the JCE. It found that statements and speeches of Mr., Krajisnik and others in the Bosnian-Serb leadership

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[76] SJB building (*Brdjanin* TC at paras. 806-809 and *Karadzic* Scheduled Incident C15.1); Nikola Mackic school (*Brdjanin* TC at paras. 810-15) and *Karadzic* Scheduled Incident C15.2)
[77] Omarka camp (*Brdjanin* TC at paras. 837-48) and *Karadzic* Scheduled Incident C20.2), Keraterm camp (*Brdjanin* TC at paras. 849-53) and *Karadzic* Scheduled Incident C20.3), Trnopolje camp (*Brdjanin* TC at paras. 854-57 and *Karadzic* Scheduled Incident C20.4), Miska Glava Dom (*Brdjanin* TC at paras. 858-59) and *Karadzic* Scheduled Incident C20.5), Ljubija football stadium (*Brdjanin* TC at paras. 860-61 and *Karadzic* Scheduled Incident C20.6), SJB building (*Brdjanin* TC at paras. 862-63) and *Karadzic* Scheduled Incident C20.1, Prijedor barracks (*Brdjanin* TC at paras. 864 and *Karadzic* Scheduled Incident C20.7)
[78] SJB building (*Brdjanin* TC at paras. 870-77 and *Karadzic* Scheduled Incident C22.1), Betonirka (*Brdjanin* TC at paras. 878-83) and *Karadzic* Scheduled Incident C22.2), Hasan Kikic school (*Brdjanin* TC at paras. 884-86 and *Karadzic* Scheduled Incident C22.3), Magarica military facility (*Brdjanin* TC at para. 887 and *Karadzic* Scheduled Incident C22.5)
[79] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement* (27 September 2006) (*Krajisnik* TC)
[80] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Consolidated Amended Indictment* (7 March 2002) at paras. 5-7
[81] *Prosecutor v Krajisnik*, No. IT-99-36-T, *Oral Decision* (19 August 2005), T17119-31
[82] *Krajisnik* TC at para. 867
[83] *Krajisnik* TC at paras. 868-69
[84] *Krajisnik* TC at para. 1091

hinged on two main ideas, namely that Serbs had to separate from Muslims and Croats (since it was impossible for them to live together), and that there existed historically Serb territories. These utterances did not enable the Trial Chamber to conclude that the intent went further than the removal of Muslims and Croats from territories in Bosnia. They did not reveal an intent to destroy an ethnic group in whole or in part.[85]

84. The Trial Chamber concluded that while some 3000 Bosnian Muslims and Croats lost their lives as part of the attack against them, many more of them were forcibly removed from the municipalities. It found this indicative of an intent to displace, rather than destroy those groups.[86]

85. The prosecution did not appeal Mr. Krajisnik's acquittal.

86. Many of the specific crimes charged against Dr. Karadzic were also expressly considered in the Trial Chamber's judgement and found not to have been committed with genocidal intent, including virtually all of the crimes charged against him in Bratunac[87], Foca[88], Kljuc,[89] Prijedor,[90] and Sanski Most[91], Vlasenica[92], and Zvornik[93] municipalities. These represent all of the seven municipalities in which genocide is charged against Dr. Karadzic.

(G) The ICJ case[94]

87. The International Court of Justice held in February 2007 that the government of Bosnia had failed to establish that genocide occurred in the municipalities in 1992. This landmark ruling was based upon virtually the same evidence as that before the Trial Chamber in this case.

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[85] *Krajisnik* TC at para. 1092
[86] *Krajisnik* TC at para. 1093
[87] *Krajisnik* TC at paras. 310-20 and *Karadzic* Indictment para. 38 and Scheduled Incidents A3,B4, and C6
[88] *Krajisnik* TC at paras. 622-53 and *Karadzic* Indictment para. 38 and Scheduled Incidents A5,B8, and C10
[89] *Krajisnik* TC at paras. 444-56 and *Karadzic* Indictment para. 38 and Scheduled Incidents A7,B10, and C15
[90] *Krajisnik* TC at paras. 469-99 and *Karadzic* Indictment para. 38 and Scheduled Incidents A10,B15, and C20
[91] *Krajisnik* TC at paras. 508-33 and *Karadzic* Indictment para. 38 and Scheduled Incidents A12,B17, and C22
[92] *Krajisnik* TC at paras. 346-58 and *Karadzic* Indictment para. 38 and Scheduled Incidents A15,B18, and C25
[93] *Krajisnik* TC at paras. 359-74 and *Karadzic* Indictment para. 38 and Scheduled Incidents A16,B20, and C27
[94] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide: Bosnia and Herzegovina v Serbia and Montenegro, Judgement* ICJ Reports 2007 at p. 43 ("ICJ case")

88. The ICJ considered the *mens rea* elements for genocide. It held that it is not enough to establish, for instance in terms of paragraph *(a)*, that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely.[95]

89. The Court observed that it is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group.[96]

90. Because of the special status of genocide, as opposed to persecution and other crimes against humanity, the ICJ emphasized that "great care must be taken in finding in the facts a sufficiently clear manifestation of that intent."[97]

91. The Court considered whether "ethnic cleansing" was the equivalent of genocide and decided that it was not. It explained that neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide. The intent that characterizes genocide is "to destroy, in whole or in part" a particular group. Deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.[98]

92. The ICJ examined in detail the evidence of genocide for some of the same municipalities as those charged in this case. It concluded that massive killings and infliction of serious bodily and mental harm occurred in municipalities including Foca[99], Prijedor[100], Vlasenica[101], and Zvornik,[102] and in the prison camps, but they were not

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[95] ICJ case at para. 187
[96] ICJ case at para. 187
[97] ICJ case at para. 189
[98] ICJ case at para. 190
[99] ICJ case at paras. 253, 306, 309-10
[100] ICJ case at paras. 257-69, 311-14
[101] ICJ case at paras. 252, 308
[102] ICJ case at paras. 250-51, 305

perpetrated with the intent to destroy the Bosnian Muslims as a group, in whole or in part.[103]

93. The ICJ also examined deportations and expulsions of Bosnian Muslims from various municipalities, and concluded that they were not perpetrated with the intent to destroy the Bosnian Muslims as a group, in whole or in part.[104]

94. The ICJ then went on to consider whether it was established that the leadership of Republika Srpska had the specific intent to destroy the Bosnian Muslims as a group. It examined the famous six strategic goals of June 1992.[105] The ICJ rejected the argument that the goals evidenced an intent to destroy the Bosnian Muslims, and observed that:

> The Applicant's argument does not come to terms with the fact that an Essential motive of much of the Bosnian Serb leadership — to create a Larger Serb State, by a war of conquest if necessary — did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion. The 1992 objectives, particularly the first one, were capable of being achieved by the displacement of the population and by territory being acquired…[106]

95. The ICJ also found that a pattern of conduct on the part of the leadership of Republika Srpska from which genocidal intent could be inferred had not been established.[107] It therefore concluded that Serbia and Montenegro could not be held responsible under the Genocide Convention for acts taking place in the municipalities in Bosnia in 1992.

2. An overview of the evidence: No New Evidence to Call into Question Previous Judgements

96. A remarkable feature of the prosecution's genocide case against Dr. Karadzic is the great extent to which the prosecution relied upon evidence and adjudicated facts from the trials described above, and the paucity of new evidence elicited in this trial. Given the overlap between the evidence found insufficient to establish genocidal intent by the Trial Chamber in this case, and the evidence found insufficient to establish

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[103] ICJ case at paras. 276-77, 319, 354
[104] ICJ case at para. 334
[105] Exhibit P781
[106] ICJ case at para. 372
[107] ICJ case at para. 376

genocidal intent in the earlier cases, it cannot be said that the decision of the Trial Chamber was unreasonable. And much of the new evidence which was elicited during the *Karadzic* trial confirmed that no genocide took place in the municipalities of Bosnia in 1992.

(A) National events

97. The most compelling new evidence is Exhibit D2250, a chart prepared by the prosecution's own demographic expert, Ewa Tabeau. The chart, reproduced below, shows that only 2.6% of the Muslims of Bosnia lost their lives during the three-and-a-half year war. Given that the figures include soldiers killed in combat and civilians killed in 1993-95, including an estimated 7,000 Muslims killed in the 1995 Srebrenica events[108], the figure for 1992 would be less than 2%.

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

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

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

98. While genocide does not require a minimum number of victims, courts have looked to the scale of the killings when determining whether they were committed with the intent to destroy the group.[109] The 2% figure, when compared to the 60% of Jews killed in Europe during the Holocaust, and 70% of Tutsis killed during the Rwandan genocide, speaks volumes about whether genocide occurred in the municipalities of Bosnia in 1992.

99. The prosecution's case in the *Karadzic* trial also featured testimony from high-ranking persons in the Republika Srpska government. That testimony completely

[108] T28412

[109] *Sikirica* TC at para. 94; *Stakic* TC at para. 553; *Brdjanin* TC at paras. 973-74; *Krajisnik* TC at paras. 868-69

failed to provide any evidence of an intention to destroy the Bosnian Muslims as a group, in whole or in part.

100. The testimony of former Republika Srpska Minister of Justice Momcilo Mandic was particularly significant for its failure to offer any evidence in support of the prosecution's genocide theory and its evidence which affirmatively demonstrated the lack of genocidal intent. Mr. Mandic was alleged to have been a member of the joint criminal enterprise which had genocide as one of its objectives.[110]

101. Mandic testified that the Bosnian Serb leadership always counted on Muslims and Croats continuing to live in Republika Srpska. They would be proportionately represented in government bodies.[111] Mandic knew of no settlements in Republika Srpska that were ethnically homogenous.[112] Some villages in Republika Srpska retained their Muslim populations throughout the war, including Renovica, Vraca, and around Sokolac.[113] Bosnian Muslims and Croats were even appointed to positions as prosecutors and judges in Republika Srpska.[114]

102. Mr. Mandic also provided evidence that Dr. Karadzic and the Republika Srpska government envisioned that many Muslims would return to Republika Srpska after the war. He testified that as early as April 1992, the government prohibited the buying or selling of real estate until the end of the war and acted to prevent the misuse of property which had been abandoned by non-Serbs.[115] Dr. Karadzic advocated that refugees could return to areas that were free from combat and that their property would be restored to them.[116] This same kind of evidence, that envisioned the return of the Muslims, was cited by the Appeals Chamber in *Stakic* as indicative of no intention to destroy the Muslims as a group.[117]

103. Significantly, the prosecution never asked Mr. Mandic if there was any intention to destroy the Bosnian Muslims as a group. His entire testimony refuted that proposition.

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[110] Indictment at para. 11
[111] T5018, 5035
[112] T5133
[113] T5134
[114] T5018-5023
[115] T5017, 5222
[116] T5266
[117] *Stakic* AC at para. 56

104. Nowhere was the lack of intent to destroy the Bosnian Muslims more evident than in the undisputed evidence, much of it presented through the testimony of Mr. Mandic, of the extensive system of exchanging Muslims and Serbs at all levels of Republika Srpska government.

105. Mr. Mandic testified that one of the very first decisions of the Republika Srpska government, in May 1992, was to establish a commission for the exchange of prisoners.[118] This decision was taken after an April 1992 recommendation from the Republika Srpska National Defence Council that exchanges should be organized on a national level, as well as on the municipal and regional levels.[119] Thereafter, tens of thousands of Muslims were released from the custody of the Bosnian Serbs and allowed to go to the Muslim territory.[120] As Mr. Mandic described it, "people worked day in and day out" to facilitate the exchange of Bosnian Muslims.[121]

106. Many of the victims who testified in the case were themselves exchanged, including persons who served as leaders in the municipalities,[122] and able-bodied males.[123] **[redacted]** testified that 4403 persons had gone through that camp and virtually all of them had been exchanged.[124] Dr. Karadzic frequently offered to exchange all Muslim prisoners.[125]

107. The prosecution's own evidence of the extensive system and practice of exchange of Bosnian Muslims is absolutely incompatible with the intent to destroy the Muslims as a group. The Trial Chamber was surely entitled to evaluate the whole of the prosecution's case, including those facts which refuted an intent to destroy the group, in its determination under Rule 98 *bis*.

108. The prosecution's evidence also featured the testimony of Branko Djeric, who served as the first Prime Minister of the Republika Srpska during the entire March-December 1992 period in which the genocide was alleged to have occurred. He testified

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[118] T4531, P1088
[119] T4422, P1087
[120] T4415, 4548
[121] T4570
[122] T18681 (Mirzet Karabeg, President of Sanski Most Executive Board and SDA party founder), T19980 (Asim Erglic, President of Kljuc Executive Board and SDA party founder)
[123] T12384 (Ramiz Muzkic), T12835 (Mehmed Music), T15303 (Harudin Karic), T18134 (Witness KDZ603)
[124] T20769
[125] T5071-72, T21054, P3783, D430

that the Republika Srpska government insisted that people of all ethnicities have their rights respected and feel safe there. Some Muslims lived in peace in Republika Srpska throughout the war. He confirmed that some Muslims were nominated to serve as judges in Republika Srpska.[126] The prosecution never asked him if there was an intention to destroy the Bosnian Muslims as a group and his entire testimony refuted that proposition.

109. Radomir Neskovic, Deputy President of the SDS Executive Board and a member of the SDS party Main Board. testified that it was never SDS policy that Muslims should be mistreated, beaten, or killed.[127] There was absolutely no policy to destroy the Muslims as an ethnic group.[128]

110. In addition to civilians like Mr. Mandic, Prime Minister Djeric, and Mr. Neskovic, who served at the highest levels of Republika Srpska and the SDS party, the prosecution's case featured testimony from General Manojlo Milovanovic, who served as the second highest ranking member of the Bosnian Serb Army from May 1992 through 1996.[129] The prosecution never asked him if there was an intention to destroy the Bosnian Muslims as a group and his entire testimony refuted that proposition. General Milovanovic affirmatively testified that there was no project to expel Muslims from Serb areas of Bosnia and that some Muslim villages within Republika Srpska remained untouched during the war.[130]

111. General Petar Skrbic, an Assistant Commander of the VRS Main Staff, also testified that there was no intent to destroy the Muslims as a group, in whole or in part.[131]

112. Therefore, not only was there no evidence of genocide in the municipalities of Bosnia during 1992, but the prosecution's own evidence was replete with testimony which refuted, on a national level, its genocide charge in Count One.

113. An examination of the evidence for each of the seven municipalities in which genocide was charged in this case likewise confirms the fact that no genocide occurred in the municipalities of Bosnia in 1992.

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[126] T28024
[127] T14322
[128] T14323
[129] T25432
[130] T25758
[131] T26054

(B) Bratunac

114. As noted earlier, the Trial Chamber in the *Krajisnik* case found that there was no intent to destroy the Bosnian Muslims in various municipalities in Bosnia, including Bratunac. Among the adjudicated facts from the *Krajisnik* case that were judicially noticed in the *Karadzic* case were that most Muslims left the municipality by 29 April 1992.[132]

115. The witnesses called at the *Karadzic* trial who testified about events in Bratunac municipality were Musan Talovic, Dzevad Gusic, KDZ605, Suad Dzafic, KDZ480, Srbislav Davidovic, Milenko Katanic, and Momir Nikolic.

116. **Musan Talovic** was a survivor of an incident in Glogova village in which 68 Muslims were killed on 9 May 1992. He identified Momir Nikolic as one of the persons who were present in Glogova during the incident.[133] **Momir Nikolic** testified as a prosecution witness. He was never asked by the prosecution if the Glogova killings were committed with the intent to destroy the Muslims in whole or in part. In fact, he testified that the killings in Glogova were in response to the 8 May 1992 killing of a Serb Judge, Goran Zekic, by the Muslims. [134]

117. **Milenko Katanic**, an SDS official in Bratunac municipality, testified that Bratunac Municipality President Miroslav Deronjic ordered Glogova to be attacked after the murder of Goran Zekic. Deronjic said that Glogova was a legitimate target. Mr. Karanic did not believe that Deronjic foresaw that civilians would be murdered in Glogova.[135] Mr. Katanic was never asked by the prosecution whether the killings in Bratunac were committed with the intention to destroy the Muslims.

118. Miroslav Deronjic was prosecuted for this event at this Tribunal. He was never charged with genocide and it was never alleged that the killings in his municipality were committed with the intention to destroy the Muslims in whole or in part. In fact, despite the fact that it controlled the entire village and could easily have killed all of the

[132] Adjudicated fact 2312
[133] P3188, paras. 27-32
[134] T24726-27
[135] P4374, para. 29

inhabitants, his judgement indicates that the other residents of Glogova were eventually transported by the Bosnian Serbs to Muslim territory.[136]

119. The prosecution also had the benefit of the testimony of **Srbislav Davidovic**, who later became the President of the Bratunac Municipality Executive Board. It never asked Davidovic if the killings in his municipality had been committed with the intention to destroy the Bosnian Muslims. In fact, Davidovic testified that the Serbs favored separating the municipality into two parts, with shared infrastructure and separate police and municipal administration. It was never envisaged that the Muslims would be expelled. The plan was for co-existence, Mr. Davidovic testified, not ethnic cleansing .[137]

120. **Dzevad Gusic** was the President of the SDA party for the municipality of Bratunac. His own survival speaks volumes to the fact that there was no intention to destroy the Muslims, or its leadership. He left Bratunac on 17 April 1992 and became Assistant Commander for Moral Guidance in the Army of Bosnia and Herzegovina.[138]

121. **Witness KDZ605** was **[redacted]**. His evidence consisted mainly of his testimony in the *Krajisnik* trial.[139] It is a classic example of why there was no intent to destroy the Bosnian Muslims as a group.

122. In early May, the Serbs came to his village and arranged for the women and children to be bused to Muslim territory. They directed the men to Bratunac, where they were detained at the Vuk Karadzic school. Although the Serbs had the ability to kill all the men who were detained at the school, instead the vast majority of them, some 400 people,[140] were transported on buses to Pale and ultimately taken to Visoko were they were exchanged.[141]

123. **Suad Dzafic** was a resident of Vitkovici village in Bratunac municipality. His evidence repeated in large part what he testified to in the *Krajisnik* trial.[142] He testified that on 17 May 1992, the residents of his village were bused to Vlasenica, where all but 37 men and boys were released. 29 men were subsequently executed by

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[136] *Prosecutor v Deronjic*, No. IT-02-61-S, *Sentencing Judgement* (30 March 2004)
[137] T24379
[138] P3196 at paras. 66,70
[139] P3205
[140] T4539, T28045
[141] P3205 paras. 55,114,122
[142] P3263

paramilitaries.[143] Once again, although the Serbs had the ability to kill all the residents of Vitkovici, the vast majority of them were spared.[144]

124. Therefore, the prosecution's own evidence, taken at its highest, proved that there was no intent to destroy the Bosnian Muslims in whole or in part, in Bratunac municipality.

(C) Foca

125. As noted earlier, the Trial Chamber in the *Krajisnik* case, as well as the International Court of Justice, found that there was no intent to destroy the Bosnian Muslims in various municipalities in Bosnia, and in particular Foca.[145] Indictments at the ICTY of numerous persons for crimes committed in Foca never even alleged genocide.[146]

126. The witnesses called at the *Karadzic* trial who testified about events in Foca municipality were Witnesses KDZ379, KDZ239, and KDZ017. None of them testified to facts indicating that the crimes in Foca, horrible as they were, were carried out with the intent to destroy the Muslims as a group.

127. **Witness KDZ379** was **[redacted].** If there had been an intention to destroy the Muslims as a group, Witness KDZ379 should have been killed.

128. **Witness KDZ239** was **[redacted]** imprisoned in Foca and later transferred to Kula prison. He was ultimately exchanged.[147] Witness KDZ239 was in the control of Bosnian Serb officials for over 2 years. He was **[redacted]**and an educated person. Had there been an intention to destroy the Bosnian Muslim group, or its leadership, Witness KDZ239 should have been killed. The fact that he was not demonstrates that there was no such intent.

129. **Witness KDZ017**, a resident of Foca who fled to Montenegro, was imprisoned **[redacted]** at KP Dom in Foca. While he testified to incidents of brutality at the prison, he also testified that hundreds of prisoners were released during the time he was at the prison.[148] Notably, Witness KDZ017 testified to hearing about a statement

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[143] P3263, paras. 17, 27, 56-60
[144] P3205 paras. 55,114,122
[145] ICJ case at paras. 253, 306, 309-10
[146] *Prosecutor v Krnojelac*, No. IT-97-25-I, *Prosecutor v Kunarac et al*, No. IT-96-23-I, *Prosecutor v Zelenovic*, No. IT-96-23/2-I, *Prosecutor v Todovic & Rasevic* No. IT-97-25/1-I; *Prosecutor v Stankovic & Jankovic*, No. IT-96-23/2-I
[147] P3335 at pp. 1182, 1204, 1283, 1291
[148] P3568 at pp. 2783, 2893-94

made by Bosnian Serb Minister Velibor Ostojic at the beginning of the war to the effect that all Muslims should be killed.[149] Yet, in Foca municipality, as in other municipalities in Bosnia, the vast majority of Muslims in Bosnian Serb custody were transported to safety or exchanged.

130. **[redacted]**

131. Therefore, the prosecution's own evidence, taken at its highest, proved that there was no intent to destroy the Bosnian Muslims in whole or in part, in Foca municipality.

(D) Kljuc municipality

132. As noted earlier, the Trial Chambers in the *Brdjanin* and *Krajisnik* cases found that there was no intent to destroy the Bosnian Muslims in various municipalities in Bosnia, and in particular Kljuc.[150] Evidence judicially noticed from those cases by the Trial Chamber evidenced the massive displacement of Muslims in Kljuc on convoys organized by the Bosnian Serbs, who could have killed the Muslims had the intent to destroy the group existed.[151]

133. The witnesses called at the *Karadzic* trial who testified about events in Kljuc municipality were Witnesses KDZ075, KDZ192, Atif Dzafic, and Asim Erglic. None of them testified to facts indicating that the crimes in Kljuc were carried out with the intent to destroy the Muslims as a group.

134. **Witness KDZ075**'s testimony from the *Krajisnik* trial was admitted into evidence pursuant to Rule 92 *ter*. He had testified to an event which occurred in his village on 10 July 1992. Soldiers ordered all of the men from his village to assemble and that the women and children should remain home.[152] About 60 of them were taken to the primary school where some of them were killed.[153] At the *Karadzic* trial, he also testified that in order to leave Kljuc, a person had to get paperwork in order, obtain permission from the authorities, and buy their own ticket for the bus.[154]

135. **[redacted]**

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[149] T19868
[150] *Brdjanin* TC at paras. 806-815; *Krajisnik* TC at paras. 444-56
[151] Adjudicated facts 953-56,2454-55, 2457
[152] P3358, pp. 4965-66
[153] P3358, p. 4967
[154] T19047-48

136. Perhaps the strongest evidence of a lack of intent to destroy the Bosnian Muslims of Kljuc came from the testimony of two Muslim leaders as to what had happened to them.

137. **Asim Egerlic** was the leading Muslim figure in Kljuc. He was President of Kljuc municipality and the President of the SDA party in Kljuc.[155] On 28 May 1992, he shot himself in the foot by accident.[156] When he went to the hospital he was arrested at a checkpoint. He was taken to prison, and then Manjaca camp. He remained there for a few months before being transferred to Batkovici camp. He was released in January 1993.[157]

138. **Atif Dzaflic** was the Chief of Police in Kljuc.[158] He was arrested on 1 June 1992.[159] On 7 June 1992, he was taken to Manjaca camp.[160] He was released on 16 December 1992.[161] Interestingly enough, Mr. Dzaflic conducted an investigation into the events in Kljuc when he returned after the war and determined that non-Serbs in Kljuc were arrested and taken to collection centers around the municipality. Women and children were released and most of the men were transferred to Manjaca.[162]

139. **[redacted]** testified as a prosecution witness that 4403 people went through Manjaca Camp.[163] There were two murders and three natural deaths at Manjaca. All others were released.[164] After the two murders, those responsible were dismissed, an investigation was conducted and they were prosecuted.[165]

140. This is hardly evidence of an intent to destroy the Muslims of Kljuc. The prosecution's own evidence, taken at its highest, proved that there was no intent to destroy the Bosnian Muslims in whole or in part, in Kljuc municipality.[166]

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[155] P3570 at pp. 4635-36, T19938
[156] P3570 at p. 4789
[157] P3570 at pp. 4795-96
[158] P3488, para. 6
[159] P3488, para. 84
[160] P3488, para. 96
[161] P3488, para. 128
[162] P3488, paras. 152-53
[163] P3717, p. 5353
[164] T20759; P3717, p. 5348
[165] T20759; P3717, p. 5281
[166] Two other witnesses from Kljuc municipality, **[redacted]**, had their *Brdjanin* trial testimony admitted under Rule 92 *bis*, but they offered no evidence from which the intent to destroy the group could be inferred.

(E) Prijedor municipality

141. As noted earlier, the Trial Chambers in the *Sikirica, Stakic, Brdjanin* and *Krajisnik* cases, as well as the International Court of Justice, have examined the events in Prijedor municipality in detail, and uniformly found that there was no intent to destroy the Bosnian Muslims in Prijedor.[167] In the prosecution of the commanders of the notorious Omarska camp, genocide charges were not even brought.[168]

142. All of the witnesses who testified about the events in Prijedor at Dr. Karadzic's trial had also recounted the same evidence in the earlier trials. No new witnesses were called and no new evidence bearing upon the intent to destroy the Bosnian Muslims as a group was elicited. Therefore, the prosecution cannot reasonably have expected a different result.

143. The witnesses called at the *Karadzic* trial who testified about events in Prijedor municipality were Witness KDZ026, Nusret Sivac, Kerim Mesanovic, Ivo Atlija, Witness KDZ080, Mevludin Sejmenovic, Mirsad Mujadic, Nenad Krejic, Milan Koljmenovic, Ed Vulliamy, Idriz Merdzanic, and Witness **[redacted]**.

144. **Witnesses [redacted], Nenad Krejic, and Milan Koljmenovic** all testified about the notorious massacre of people from Prijedor which occurred at Korikanske Stijena. An examination of that incident demonstrates that the killings of people from Prijedor were not carried out with the intent to destroy the Bosnian Muslims as a group.

145. **[redacted]**

146. **[redacted]**

147. In fact, the only other witnesses to testify about this event ascribed other reasons for the killing. Nenad Krejic and Milan Koljmenovic, two officials from the municipality of Skender Vakuf, where the killings took place, testified that the motive of the perpetrators was theft.[169] Their testimony supports the Trial Chamber's conclusion that the evidence presented by the prosecution was incapable of supporting a finding that the killings in the municipalities were carried out with the intent to destroy the Muslims as a group.

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[167] *Sikirica* TC at para. 84; *Stakic* TC at para. 553; *Stakic* AC at para. 56; *Brdjanin* TC at paras. 837-64; *Krajisnik* TC at paras. 469-99; ICJ case at paras. 257-69, 311-14

[168] *Prosecutor v Kvocka et al*, No. IT-98-30/1-T, *Amended Indictment* (26 October 2000)

[169] T20857 (Krejic); T20924-25 (Kolmjenovic)

148. Mr. Koljmenovic also testified that for two or three months, during the summer of 1992, convoys were passing through his municipality transporting Muslims and Croats from the Krajina area to territory under the control of the ABiH.[170]

[redacted]

149. This evidence, showing that thousands of Muslims and Croats under the control of the Bosnian Serbs were displaced but not destroyed, also supports the findings of the Trial Chamber.

150. This Trial Chamber was not the first to consider whether the killings at Korikanske Stijena were perpetrated with genocidal intent. This event was also charged in the *Stakic*, *Brdjanin*, and *Krajisnik* cases. In each case, the Trial Chamber found that the prosecution had not established that the killings constituted genocide.[171] In the only prosecution at this Tribunal of a perpetrator of the killings at Korikanske Stijena, Darko Mrdja, he was never even charged with genocide.[172]

151. Another notorious event in Prijedor municipality was the massacre in Room 3 at Keraterm camp. The facts surrounding the Room 3 massacre at Keraterm on 26 July 1992 demonstrate that the killing was not carried out with intent to destroy the Bosnian Muslims as a group.

152. Of the estimated 570 people in Room 3, only about ½ were killed. The others were later bused to Omarska and Trnopolje camps. In the *Popovic* judgement, the Trial Chamber cited the relentless pursuit and execution of every last Muslim male as evidence of genocidal intent. Conversely, the fact that many Muslim males, from Room 3, as well as the other rooms at Keraterm, were not killed, shows that there was no intent to destroy the Muslims as a group.

153. As Witness KSZ050 conceded, if the Serbs had wanted to kill all of the detainees, they could easily have done so.[173]

154. The prosecution never even asked any witness what the reason for the killing in Room 3 was. However, witness Justin Arifagic testified that one of the guards said that the shooting had been in retaliation for what occurred in World War II, He said that

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[170] P3768, para. 6
[171] *Stakic* TC at paras. 215-19, 553,555; *Brdjanin* TC at paras. 457-60, 989; *Krajisnik*, TC at paras. 494,867
[172] *Prosecutor v Mrdja*, No. 02-50-I, *Indictment* (16 April 2002)
[173] P680 at p. 2533

one or two Serb soldiers had been killed in Hambarine and that was another reason for the shootings.[174] This does not indicate that the killings were done with the intent to destroy the Muslims as a group.

155. No selection of victims was made prior to the killing and even people like KDZ050, who were not involved in politics, were in Room 3. Therefore, there was no evidence that the leaders of the Muslim community were selectively targeted to bring about the destruction of the group. This was explicitly found in the *Sikirica* judgement, where the Trial Chamber held that:

> The Chamber rejects the submission that all those Bosnian Muslims, whether from the Brdo area or elsewhere, and who were active in the resistance of the take-over of their villages, should be treated as leaders. Acceptance of that submission would necessarily involve a definition of leadership so elastic as to be meaningless.[175]

156. Around 4000 detainees passed through Keraterm Camp.[176] The vast majority of them were not killed. They were transferred to other prisons and released. Therefore, there is no evidence of an intention to destroy the Bosnian Muslims as a group from the killings that occurred on 26 July 1992 in Room 3.

157. The events in Room 3 have been the subject of genocide charges in the *Sikirica, Stakic, Brdjanin, and Krajisnik* cases. In each case, the Trial Chamber has acquitted the accused. The *Sikirica* Trial Chamber specifically held that the Room 3 massacre of about 120 people is an episode, which, by itself, would not necessarily signify a particular system of killing and did not evidence an intent to destroy the Bosnian Muslims as a group.[177] The International Court of Justice likewise found no genocidal intent in this killing,[178]

158. The prosecution did not introduce any additional evidence in the *Karadzic* trial. In fact, not a single witness testified about Keraterm. The entire body of evidence consists of testimony and adjudicated facts from earlier trials.

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[174] P688 at p. 7150
[175] *Sikirica* TC at para. 81
[176] Adjudicated fact 1197
[177] *Sikirica* TC at para. 95
[178] ICJ case at para. 256

159. **Witnesses KDZ026** was **[redacted]**. His testimony demonstrates that there were many opportunities for the Bosnian Serbs of Prijedor to kill him if they were intent on destroying the Muslims as a group or its leadership. Instead, he was allowed to be at liberty until **[redacted]**.[179]

160. Similarly, **Nusret Sivac** was arrested on 10 June 1992[180], released the same day, and arrested again ten days later.[181] He was taken to Omarska camp, then Trnopolje, and then released in August 1992. He returned to Prijedor where he remained until December 1992.[182] There were many opportunities to kill him if it was the intention of the Bosnian Serbs to destroy the Muslims as a group.

161. **Kerim Mesanovic** is yet another living example of the non-existence of the intention to destroy the Muslims as a group. He was a computer programmer who worked for the Municipality Secretariat for National Defence.[183] He was arrested on 24 June 1992 and taken to Omarska.[184] On 6 August 1992, he was transferred to Trnopolje Camp and released shortly thereafter.[185]

162. **Witness KDZ080**, **[redacted]**, was likewise in the custody of the Bosnian Serbs at Omarska for two months, and was not killed.[186] After his/her release, s/he remained in Prijedor town, where the authorities discouraged her from leaving.[187] This is hardly what one would expect if there was the intention to destroy the Bosnian Muslims as a group.

163. **Mevludin Sejmanovic** is also living proof that there was no intention to destroy the Bosnian Muslims. He was a founding member of the SDA party and a member of Parliament representing the Prejidor area.[188] He was taken to Omarksa,[189] but in August 1992, was released by Vojo Kupresanin, an SDS leader, who took him to Banja

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[179] T10328; P2089, p. 1933
[180] P3478, p. 6608
[181] P3478, p. 6611
[182] P3478, p. 6620, 6687, 6692
[183] P3528, paras. 1-2, 5
[184] P3528, paras. 20-21, 23
[185] P3528, para. 59
[186] P3691, paras. 11, 107
[187] P3691, para. 108
[188] T20454
[189] T20491-92

Luka. There he stayed with a family member until January, 1993.[190] Had there been an intention to destroy the Bosnian Muslims as a group, or its leadership, Mr. Sejmanovic should have been killed, not released.

164. **Idriz Merdzanic** was a doctor in Prejidor municipality.[191] He was arrested and transported to Trnopolje camp.[192] He was released on 30 September 1992.[193] Had there been an intention to destroy the Muslims of Prijedor or its leadership, his fate would have been much different.

165. Apart from these intellectuals and leaders who were spared, the evidence of killings which occurred in Prijedor municipality indicated that there was no intention to destroy the Muslims as a group. The killings in the Brdo area of Prijedor provide a classic example of how genocide was not committed in the municipalities. Throughout the operation in the Brdo area, men, women, and children were not killed, but bused to detention or collection centers, where most were ultimately transported to Muslim territory. Those that were killed constituted a small fraction of the people in custody of the Serbian forces. Had there been the intention to destroy the group, it would have been relatively easy to kill them all.

166. **[redacted]**

167. **[redacted]**

168. **[redacted]**

169. The evidence of the events in 1992 in Prijedor municipality in the *Karadzic* case simply re-enforced the conclusions reached in the *Sikirica*, *Stakic*, *Brdjanin*, and *Krajisnik* cases, and at the International Court of Justice, that the killings and infliction of serious harm which occurred there were not done with the intent to destroy the Bosnian Muslims as a group.

(F) Sanski Most municipality

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[190] T20504-06, 20512
[191] P3882, p. 7716
[192] P3882, p. 7740, 7747
[193] P3882, p. 7791

170. As noted earlier, the Trial Chambers in the *Brdjanin* and *Krajisnik* cases found that there was no intent to destroy the Bosnian Muslims in various municipalities in Bosnia, and in particular Sanski Most.[194]

171. The witnesses called at the *Karadzic* trial who testified about events in Sanski Most municipality were Ahmet Zulic, Mirzet Karabeg, Witness KDZ052, Witness **[redacted]** Grgo Stojic, and Witness KDZ490 . None of them testified to facts indicating that the crimes in Sanski Most were carried out with the intent to destroy the Muslims as a group.

172. **Ahmet Zulic** was arrested in June 1992 and detained at the Betonirka factory.[195] Although the prisoners were subject to beatings and mistreatment, there was no evidence of any intention to destroy the Muslims as a group. Although it would have been easy to kill the 90 or so prisoners who were kept at the factory, the Serbs transferred them to Manjaca camp, where most of them were released or exchanged.[196]

173. **Mirzet Karabeg** was the President of the Executive Board of Sanski Most and a founding member of the SDA party.[197] If there was an intention to destroy the Bosnian Muslims in Sanski Most, or their leadership, he would have been the first to be killed. Instead, he was detained in the Sanski Most police station and Betonirka for three months before being transported to Manjaca camp and later exchanged.[198]

174. **Witness KDZ052** was arrested in two Muslim villages around Sanski Most. In Kljevci, armed Serbs from the village searched for weapons and then took the men for interrogation, allowing the women and children to remain in the village.[199] In Tomina, he was once again rounded up and detained, while the women and children were taken to Muslim territory.[200] He was released about a month later.[201] Had there been an intention to destroy the Muslims in Sanski Most, he could easily have been killed while twice in the custody of the Bosnian Serbs.

175. **[redacted]**

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[194] *Brdjanin* TC at paras. 868-77; *Krajisnik* TC at paras. 508-33
[195] P718 at p. 14
[196] T1026, 1029
[197] P3303 at p. 6066, T18739
[198] P3303 at pp. 6169, 6176, 6182
[199] P3370 at p. 8058
[200] P3370 at p. 8068-69
[201] P3370 at p. 8071

176. **Grgo Stojic**, a Bosnian Croat, testified that he was able to go to the market in Sanski Most through 2 November and sell his products.[202] On that day, he was arrested by some "Chetniks" outside of the control of the authorities, who shot him and killed some of his neighbors.[203] Nothing from this unfortunate event supports any claim of an intent to destroy the Bosnian Croats in Sanski Most.

177. [**redacted**]

179. Therefore, the prosecution's own evidence, taken at its highest, proved that there was no intent to destroy the Bosnian Muslims in whole or in part, in Sanski Most municipality.[204]

(G) Vlasenica municipality

180. As noted earlier, the Trial Chamber in the *Krajisnik* case found that there was no intent to destroy the Bosnian Muslims in various municipalities in Bosnia, and in particular Vlasenica.[205] The International Court of Justice also examined the events at the Susica camp in Vlasenica and found that the acts there were not shown to have been committed with genocidal intent.[206] Dragan Nikolic, the commander of the Susica Camp, was prosecuted at the ICTY and was not charged with or convicted of genocide.[207]

181. The witnesses called at the *Karadzic* trial who testified about events in Vlasenica municipality were Izet Redzic, Ibro Osmanovic, [**redacted**], Witness KDZ603, and Sead Hodzic. None of them testified to facts indicating that the crimes in Vlasenica were carried out with the intent to destroy the Muslims as a group.

182. **Izet Redzic** was the President of the Executive Board of Vlasenica Municipality.[208] He left Vlasenica on 18 or 19 April 1992.[209]

183. **Ibro Osmanovic** was arrested on 22 May 1992.[210] He was transferred to Vlasenica prison and then to Susica Camp.[211] He was subsequently taken to Batkovici

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[202] T19769
[203] T19770, 19773-74
[204] Four other witnesses from Sanski Most municipality, Rajif Begic, Sakib Mujic, [**redacted**], and Faik Bicevic, had their prior statements and *Brdjanin* trial testimony admitted under Rule 92 *bis*, but they offered no evidence from which the intent to destroy the group could be inferred.
[205] *Krajisnik* TC at paras. 346-58
[206] ICJ case at paras. 252,308
[207] *Prosecutor v Nikolic*, No. IT-94-2-T, *Sentencing Judgement* (18 December 2003)
[208] P3189, p.5006
[209] P3189, p.5053
[210] P3212, para. 52

camp, and then exchanged.[212] Although he was mistreated while in detention, there were ample opportunities for the Serbs to kill him in the two months that he was in their custody in three different detention facilities had there been the intent to destroy the Muslims in Vlasenica.

184. **[redacted]**

185. **[redacted]**

186. **[redacted]**

187. **[redacted]**

188. **[redacted]**

189. **[redacted]**

190. **[redacted]**

191. **[redacted]**

192. **Witness KDZ603** was an inmate at Susica camp. On his third day there, those who wanted to go to Kladanj were given the opportunity to leave. He chose to stay because he did not want to sign away his property in Vlasenica.[213] On the 28th day at Susica camp, he was taken by bus to Batkovici and then exchanged.[214] This is hardly evidence of an intent to destroy the Muslims in Vlasenica.

193. **Sead Hodzic** escaped from an attack on Zaplopaca village on 16 May 1992.[215] 58 men, women, and children were killed in the attack. [216] Three men were arrested taking two wounded women to the hospital in Vlasenica. They were never seen again. The women were released and allowed to go to a Muslim village.[217]

194. The prosecution's own evidence, taken at its highest, proved that there was no intent to destroy the Bosnian Muslims in whole or in part, in Vlasenica municipality.[218]

(H) Zvornik municipality

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[211] P3212, paras. 71,90
[212] P3212, paras 132,. 166
[213] P3262; para. 31
[214] P3262, paras. 35-36
[215] P3284, p. 5
[216] P3284, p. 8
[217] P3284, p. 9
[218] Another witnesses from Vlasencia municipality, **[redacted]**, a prisoner at Susica camp, had his prior statement admitted under Rule 92 *bis*, but they offered no evidence from which the intent to destroy the group could be inferred.

195. As noted earlier, the Trial Chamber in the *Krajisnik* case found that there was no intent to destroy the Bosnian Muslims in various municipalities in Bosnia, and in particular Zvornik.[219] The International Court of Justice also examined the events in Zvornik and found that the acts there were not shown to have been committed with genocidal intent.[220]

196. The witnesses called at the *Karadzic* trial who testified about events in Zvornik municipality were Witness KDZ064, Witness KDZ555, Witness KDZ340, **[redacted]**, Dragan Vidovic, Petko Panic, and Witness KDZ610. None of them testified to facts indicating that the crimes in Zvornik were carried out with the intent to destroy the Muslims as a group.

197. **Witness KDZ064** lived in the village of **[redacted]** and fled the area in February 1993 towards Konjevic Polje in the wake of Serb attacks.[221] His family went towards Tuzla.[222]

198. **Witness KDZ555, [redacted]** was well placed to provide evidence of genocidal intent if any such intent existed in Zvornik municipality. He never testified that any of the killings were done with the intent to destroy the Muslims as a group. In fact, his testimony was that the goal of the SDS was to have separate municipalities, not to take over Muslim areas.[223] He testified that there was never any ill intention of the regular authorities towards any group.[224]

199. Witness KDZ555 testified that a Muslim served as a member of the Serb Crisis staff and a Muslim woman was appointed as a director of a company in Zvornik.[225] **[redacted]**

200. Witness KDZ555 testified that while Serb refugees from Muslim areas were allowed to temporarily use houses of Muslims who had fled, the authorities insisted that such occupation was temporary and no ownership changed hands. The properties of the Muslims in Kozluk and Divic were returned when they came back.[226] This expectation

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[219] *Krajisnik* TC at paras. 359-74
[220] ICJ case at paras. 250-51,305
[221] P768, p 198804.
[222] P768, p 637.
[223] T17342
[224] T17454
[225] T17354
[226] T17413

that Muslims would return was cited by the Appeals Chamber as a factor indicating no intent to destroy the group in the *Stakic* case.[227]

201. Witness KDZ555 testified that there was constant combat along the front lines in Zvornik municipality.[228] Despite all that a considerable number of Muslims continued to live in Zvornik.[229]

202. **Witness KDZ340,** another Serb who was assigned to guard duty in Zvornik, testified that on one occasion, he secured the release of a Muslim by verifying that he was a good man and had not done anything wrong. The police were only interested in detaining Muslims who had done something wrong, not simply because they were Muslim. They apologized to the man.[230]

203. **[redacted]**

204. **[redacted]**

205. **Dragan Vidovic** was another Serb drafted to guard prisoners at Karakaj. He testified that local Muslims were not imprisoned; they were allowed to peacefully go to Serbia.[231] However, persons at Karakaj School were under the control of paramilitary leader named Pivarski. No authorities in Zvornik had control over Pivarski. He was like God.[232] There was no law in Zvornik at that time.[233] Most of the Muslims from Kozluk and Divic returned after the paramilitaries had been arrested.[234]

206. **Petko Panic** was a Serb policeman in Zvornik. He had been told by the police commander on 1 June that the crisis staff had made arrangements with the Muslim politicians for the citizens of Klisa and the surrounding places to be allowed to go to Muslim territory and trucks were made available for that purpose.[235] He went there and witnessed the men being separated from the women. He learned later that day that 700 men had remained behind at the Karakaj technical center.[236] 5-6000 women had been

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[227] *Stakic* AC at para. 56
[228] T17426
[229] T17429
[230] T17511
[231] T17762
[232] T17759
[233] T17762
[234] T17771
[235] P3380, p. 2898, T19188
[236] P3380, p. 2900

transported to Memici in Muslim territory.[237]He understood that there was to be an exchange for 400 Serbs who had been held at a stadium in Tuzla.[238] The men were supposed to be a part of the exchange.[239]

207. He testified that two or three days later, rumors started circulating that the paramilitary units of Zuco and Repic were killing people in the technical school and executing them in front of the slaughterhouse. Most of the men were killed there and perhaps a small number of them were transferred to Batkovici prison.[240]

208. He testified that properties that the Muslims had abandoned in the villages of Divic and Kozluk were given only to refugees.[241] The refugees kept the homes in good condition and returned it to the Muslim residents when they returned.[242] In Zvornik, 100% of the property was returned to its rightful owners.[243] All contracts for property after 6 April were voided.[244]

209. **Witness KDZ610** testified about the execution of Muslims at Gero's Slaughterhouse in Zvornik municipality, but offered no insight into the intent of those who killed them.

210. **Fadil Banjanovic**, whose testimony from the *Milosevic* trial was admitted pursuant to Rule 92 *quater*, provided further evidence that there was no intent to destroy the Muslims in Zvornik municipality. He described an event in June 1992 when seventeen buses, three trailer trucks, and two passenger vehicles were organised by the Serbs to transport 525 Bosnian Muslim households, consisting of 1822 people from Kozluk and the neighbouring village of Skoići.to Serbia.[245]

211. Therefore, the prosecution's own evidence, taken at its highest, proved that there was no intent to destroy the Bosnian Muslims in whole or in part, in Zvornik municipality.[246]

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[237] P3380, p. 2989
[238] P3380, p. 2989
[239] P3380, p. 2990
[240] P3380, p. 2902, T19142
[241] T19151
[242] T19170-71
[243] T19201
[244] T19201; D1706
[245]P57, pp. 20630, 20633
[246] Nine other witnesses from Zvornik municipality, Witness KDZ059, Witness KDZ446, KDZ072, Matija Boskovic, Nedzad Hadziefendic, Osman Krupinac, Witness KDZ023, Safeta Hamzic, and Justin

3. What a Genocide Looks Like: The Holocaust, Rwanda, Srebrenica

212. When comparing the events in the municipalities of Bosnia during 1992 with the events which have been found to constitute genocide in the 20th Century—the Holocaust, Rwanda, and Srebrenica—it is obvious that the events in the municipalities did not constitute genocide.

213. During the Holocaust, approximately 67% of the Jews in Europe were killed.[247] This contrasts with less than 2% of the Muslims killed in the municipalities of Bosnia in 1992.[248] There was no Genocide Convention at the time of the Nuremberg trials, but the prosecution of Adolf Eichmann in Israel in 1961 provided the opportunity for the first use of the Genocide Convention in a criminal prosecution arising out of the Holocaust.

214. In the *Eichmann* judgement, the District Court of Jerusalem found that the German acts against the Jews proceeded in three stages: (1) persecution between 1933-39; (2) outbreak of war to mid-1941 when the object of the Germans was to expel the Jews; and (3) 1941 until the end of the war, when the object was the extermination of the Jews.

215. The second stage was described as "a period of mass deportations...with the aim of getting rid of the Jews by all means."[249] In the third stage, there was the specific intent to destroy the Jews.[250]

216. The Court held that in the "second stage," the Accused organized deportations in complete disregard for the health and lives of the deported Jews. Many Jews died as a result of their expulsions. However, despite the "cruelty which bordered on premeditated malice", the Court found that the intentional aim to exterminate had not been shown.. The Court therefore declined to convict Eichmann of genocide of the Jews for the period before 1941.[251]

Adispahic, had their prior statements and *Brdjanin* trial testimony admitted under Rule 92 *bis*, but they offered no evidence from which the intent to destroy the group could be inferred.

[247] U.S. Holocaust Museum, http://www.ushmm.org/wlc/en/article.php?ModuleId=10005143

[248] D2250

[249] *Israel v Eichmann* (1961) ***http://ess.uwe.ac.uk/genocide/Eichmann_Index.htm*** at para. 68

[250] *Israel v Eichmann, supra*, at para. 182

[251] *Israel v Eichmann, supra*, at para. 186

217. Likewise, in Bosnia, the prosecution's evidence, at its highest, established an intent to displace, but not destroy, the Bosnian Muslims.

218. In the Rwandan genocide, the ICTR Appeals Chamber has found that "although exact numbers may never be known, the great majority of Tutsis were murdered."[252] Estimates are that approximately 75% of the Tutsis were killed in 100 days.[253] In the 270 days of the alleged genocide in the Bosnian municipalities, although Serb forces took control of more than 70% of the territory of Bosnia, less than 2% of the Bosnian Muslim population was killed.

219. In the *Krstic* case, when the Appeals Chamber found that the killings of men from Srebrenica constituted genocide, it cited the fact that the men constituted some 20% of the population of Srebrenica, and that the destruction of the men "would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica.[254] It relied upon the fact that the perpetrators sought to kill all of the men under their control in Srebrenica.[255] Such was clearly not the case in the municipalities, where less than 2% were killed and where tens of thousands of Bosnian Muslims, mostly men, were under the control of the Bosnian Serbs in prison camps and were released or exchanged.

220, While it is clear that the intent to destroy does not depend on numbers alone, the fact that so few Bosnian Muslims were killed in 1992 compared to the Jews, Tutsis, and Bosnian Muslims of Srebrenica supports the Trial Chamber's conclusion that the acts in the municipalities were not committed with an intent to destroy the group as such.

221. In the *Krstic* case, the Appeals Chamber said that:

> Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all of humankind, its harm being felt not only by the group

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[252] *Prosecutor v Karemera et al*, No.ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 35

[253] Verwimp, *Death and Survival During the 1994 Genovide in Rwanda,* 58 Population Studies 233 (2004), http://www.francerwandagenocide.org/documents/VerwimpKibuye.pdf

[254] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 28 ("*Krstic* AC")

[255] *Krstic* AC at para. 26. Dr. Karadzic is in the process of presenting new evidence concerning the Srebrenica events which will establish that the killings were not in fact done with the intent to destroy the Bosnian Muslims. However, he recognizes *Krstic* as binding precedent for purposes of this appeal.

targeted for destruction, but by all of humanity.

> The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements – the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part – guard against a danger that convictions for this crime will be imposed lightly.[256]

222. Applying those words to the events in the municipalities of Bosnia in 1992, it is clear that the Trial Chamber did not err in concluding that the intent for genocide was not established.

4. Genocidal rhetoric, but no Genocide

223. The prosecution's brief attempts to elevate its disagreement with the Trial Chamber's factual finding that there was no genocide in the municipalities into a series of legal issues. An examination of each issue raised by the prosecution reveals that its effort to find legal error in the Trial Chamber's judgement is unconvincing.

224. The prosecution claims that the Trial Chamber erred in failing to find from the statements of Dr. Karadzic alone that he had genocidal intent.[257]

225. The Trial Chamber was well aware that the derogatory language targeting the protected group, or the existence of a plan or policy to commit the underlying offence were factors to be considered when determining the *mens rea* for genocide and expressly included those among the factors that it considered.[258]

226. It then went on to specifically consider Dr. Karadzic's statements, holding that:

> The Prosecution in its response to the accused also refers to evidence of statements and speeches made by him and other members of the Bosnian Serb leadership which, according to the Prosecution, contained rhetorical warning of the disappearance, elimination, annihilation or extinction of Bosnian Muslims in the event that war broke out. The Chamber has considered these examples as well as the other evidence received in relation to the accused in light of the scale and the context of the alleged crimes in the municipalities

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[256] *Krstic* AC at paras. 36-37
[257] *Brief* at paras. 59-62
[258] T28768

> in 1992, and the inability to infer genocidal intent from other factors. Following this review, the Chamber finds that notwithstanding the statements of the accused, there is no evidence upon which, if accepted, a reasonable trier of fact could find that the acts of killing, serious bodily or mental harm, and conditions of life inflicted on the Bosnian Muslims and/or Bosnian Croats were perpetrated with the dolus specialis required for genocide.[259]

227. The Trial Chamber did not reject or diminish the prosecution's evidence of the statements of Dr. Karadzic. It simply concluded that notwithstanding those statements, the crime of genocide did not take place in the municipalities of Bosnia in 1992.

228. This is undeniably correct. Genocide is not an inchoate crime. It has to have been committed in order for an individual who wished it to come about to be liable for that crime.[260] Had the prosecution charged Dr. Karadzic with incitement to genocide under Article 4(3)(c), or conspiracy to commit genocide under Article 4(3)(b), it may have prevailed in the absence of evidence that genocide was in fact carried out in the municipalities in 1992.[261] However, having charged Dr. Karadzic with the commission of genocide itself, it was obligated to establish that the crime of genocide was committed. This it failed to do.

229. The prosecution contends that the Trial Chamber erred in failing to infer genocidal intent from the statements of other members of the alleged joint criminal enterprise.[262]

230. The Trial Chamber expressly considered the statements of "other members of the Bosnian Serb leadership" in its decision, as quoted above.[263] However, given the scale and context of the acts carried out in the municipalities in 1992, it concluded that the killings and infliction of serious harm which were carried out in the municipalities were not done with the intent to destroy the group. This conclusion was not

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[259] T28769
[260] *Gatete v Prosecutor*, No. ICTR-00-61-A, *Judgement* (9 October 2012) at para. 260
[261] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at paras. 492, 678 (incitement); *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 788; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Motions for Judgement of Acquittal* (20 March 2007) at para. 14 (conspiracy)
[262] *Brief* at para. 67
[263] T28679

unreasonable. Indeed, there is no other explanation for why the well-disciplined military and civilian structure, which the prosecution claimed existed among the Bosnian Serbs, could have let 98% of the Bosnian Muslims slip through their fingers if there was an intention to destroy the Muslims as a group.

231. The Trial Chamber did not err in failing to consider the statements of Dr. Karadzic and the other alleged members of the joint criminal enterprise in isolation.

232. The prosecution claims that the Trial Chamber ignored the "totality of the evidence" in concluding that the crimes in the municipalities were not committed with genocidal intent.[264] However, it was the totality of the evidence that convinced the Trial Chamber that no genocide had occurred.

233. The Trial Chamber acknowledged the existence of the *actus reus* of killings and infliction of serious harm, and the existence of statements that the Muslims should disappear. However, it recognized that genocide is the *confluence* of *actus reus* and *mens rea*, where such acts and statements are not viewed in isolation, but are viewed in their totality to determine if the prohibited acts were committed with the intent to destroy the group.

234. The Trial Chamber correctly and expressly stated the test to be applied:

> If the Chamber is convinced that taking the totality of the evidence presented by the Prosecution even at its highest there is no evidence on which it could convict the accused of genocide under Count 1, the Chamber should enter a judgement of acquittal on Count I at this stage...[265] (emphasis added)

235. It was aware of, and did, take into account the context in which these acts were committed:

> ...in the absence of direct evidence that the physical perpetrators of the crimes alleged to have been committed in the municipalities carried out these crimes with genocidal intent, the Chamber can infer specific intent from a number of factors and circumstances, including the general context of the case, the means available to the perpetrator, the surrounding circumstances, the perpetration of other culpable acts systematically directed against the same group, the numerical scale of atrocities committed, the repetition of destructive and discriminatory acts, the derogatory language targeting the protected group, or the existence of a plan or policy to commit the

[264] *Brief* at para. 68
[265] T28764

underlying offence.[266] (emphasis added)

> However, the nature, scale, and context of these culpable acts, be it in all the municipalities covered by the indictment or the seven municipalities in which genocide is specifically alleged, do not reach the level from which a reasonable trier of fact could infer that they were committed with genocidal intent…[267] (emphasis added)

236. And the Trial Chamber, in its conclusion, specifically and explicitly stated that it had taken the totality of the circumstances into account:

> Finally, having reviewed the totality of the evidence which the Chamber has received with respect to the killing, of serious bodily or mental harm to, the forcible displacement of, and conditions of life inflicted on Bosnian Muslims and/or Bosnian Croats in detention facilities in the municipalities, the Chamber finds that there is no evidence that these actions reached a level from which a reasonable trier of fact could draw an inference that they were committed with an intent to destroy in whole or in part the Bosnian Muslims and/or Bosnian Croats as such.[268] (emphasis added)

237. There was nothing faulty about the Trial Chamber's approach or its reasoning. It correctly concluded that notwithstanding the statements of Dr. Karadzic, the killings and serious harm in the municipalities were not done with the intent to destroy the Bosnian Muslims as a group. The prosecution's attempt to convert its disagreement with that conclusion into a legal error is unavailing.

5. The Trial Chamber Considered the Factors for Determining Intent to Destroy the Group

238. The prosecution's factual disagreement with the Trial Chamber's findings is set forth in paragraphs 68-83 of its *Brief*. It does not contend that the Trial Chamber failed to consider the relevant factors for *mens rea* for genocide. Indeed, although not required to list all of the factors it considered, the Trial Chamber expressly noted that it had considered the means available to the perpetrator, the surrounding circumstances, the perpetration of other culpable acts systematically directed against the same group, the numerical scale of atrocities committed, the repetition of destructive and discriminatory

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[266] T28768
[267] T28768
[268] T28768-69

acts, the derogatory language targeting the protected group, or the existence of a plan or policy to commit the underlying offence.[269]

239. The conclusion reached by the Trial Chamber after considering all of these factors, cannot be said to be unreasonable.

240. The scale[270] of the destruction of the Bosnian Muslims in the municipalities in 1992, totaling some 2%, pales in comparison to the 67% of Jews killed in the Holocaust, 75% of the Tutsis killed in the Rwandan genocide, and even the 20% of the population of Srebrenica.

241. It cannot be fairly said that the nature of the killings and infliction of serious bodily harm in the municipalities indicates genocidal intent.[271] These same acts were committed by all three sides in the civil war in Bosnia. Although the Trial Chamber has not allowed Dr. Karadzic to introduce evidence of crimes committed by the Bosnian Muslims and Croats in the municipalities and the detention camps that they operated, the jurisprudence of this Tribunal is rich with evidence of the same kind of crimes perpetrated by Muslims and Croats.[272] There is simply nothing in the nature of these acts themselves from which the special intent to destroy the group can be inferred. The fact that so many Muslims survived the camps and were released and exchanged belies such intent.

242. The factor of whether genocidal and culpable acts were directed at and impacted virtually all members of the group weighs heavily in favor of the defence in this case.[273] Time after time, in municipality after municipality, Serb forces had within their custody and control tens of thousands of Bosnian women and children. Had the intention to destroy the group existed, the easiest and most direct way to accomplish that would be

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[269] T28768
[270] *Brief* at paras. 69-72
[271] *Brief* at paras. 73-75
[272] *Prosecutor v Delalic et al*, No. IT-96-21-T, *Judgement* (16 November 1998); *Prosecutor v Kupreskic et al*, No. IT-95-16-T, *Judgement* (14 January 2000); *Prosecutor v Natelic & Martinovic*, No. IT-98-34-T, *Judgement* (31 March 2003) *Prosecutor v Bralo*, No. IT-95-17-S, *Sentencing Judgement* (7 December 2005), *Prosecutor v Hadzihasanovic & Kubura,* No IT-01-47-T, *Judgement* (15 March 2006); *Prosecutor v Oric*, IT-03-68-T, *Judgement* (30 June 2006) *reversed* (3 July 2008); *Prosecutor v Delic*, No. IT-04-83-T, *Judgement* (15 September 2008); *Prosecutor v Prlic*, No. IT-04-74-T, *Second Amended Indictment* (11 June 2008)
[273] *Brief* at paras. 76-78

to kill the women and children. Instead, at great expense and diversion of resources, the Bosnian Serbs regularly and consistently transported the women and children to safety.

243. The prosecution also failed to prove in its case that persons essential to survival of the group were eliminated in an attempt to bring about the destruction of the group.[274] The prosecution's own witness list was replete with Bosnian Muslim leaders in the 7 municipalities who were in the hands of the Bosnian Serb forces and were not killed.[275] The incidents in which large numbers of people were killed, such as Korikanske Stijena, the Keraterm Room 3 massacre, the post-funeral killings of inmates at Susica Camp, and the killings at the Karakaj technical school in Zvornik were not shown to have involved individuals targeted for their position of leadership or impact on the survival of the Bosnian Muslims as a group.[276]

244. Looking at the factor of whether the acts in fact had a destructive impact on the Bosnian Muslims in the municipalities also confirms the reasonableness of the Trial Chamber's decision.[277] The acts which diminished the population of the Muslims in the municipalities were acts of displacement, not destruction. The killing of less than 2% of the population cannot be said to have had a destructive impact on the group.

245. The prosecution also claims that other Trial Chambers have inferred genocidal intent on similar evidence.[278] Its list of citations remarkably omits the *Sikirica* Rule 98 *bis* decision, the Trial Chamber judgements in the *Stakic*, *Brdjanin*, and *Krajisnik* case, as well as the judgement by the International Court of Justice. The prosecution appears to argue that the Appeals Chamber should require the case to go forward, even if an acquittal on the same evidence is inevitable at the end of the case. Even if true, this gambit would waste precious public United Nations funds at a time of financial crisis and would simply be irresponsible.

246. No Trial Chamber has ruled on the issue of genocide in the municipalities since the ICJ judgement in 2007. Principles of judicial comity require that the ICJ judgement be seriously considered at this Tribunal and not lightly departed from. Having

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[274] *Brief* at paras. 79-80
[275] Dzevad Gusic, KDZ605 (Bratunac),KDZ379, KDZ239 (Foca), Atif Dzafic, Asim Erglic (Kljuc), KDZ392, KDZ026, Kerim Measnovic, KDZ080, Mevludin Sejmenovic, Idriz Merdzanic (Prijedor), Ahmet Zulic, Faik Bicevic, Mirzet Karabeg, KDZ234 (Sanski Most), Izet Redzic, (Vlasenica),
[276] See paras.144-50, 151-58,190, 204-07, above
[277] *Brief* at paras. 81-83
[278] *Brief* at para. 84

now seen the international consensus on this issue and the judgements of four Trial Chambers, the Trial Chamber in Dr. Karadzic's case was well within reason to determine that the prosecution's evidence at its highest could not lead to a conviction for genocide in the municipalities. Its judgement of acquittal was both reasonable and responsible.

6. The Trial Chamber Did Not Limit its Consideration to the Intent of Physical Perpetrators

247. The prosecution next claims that the Trial Chamber erred in limiting its assessment of genocidal intent to the physical perpetrators[279]

248. The Chamber found that:

> the evidence the Chamber received in relation to the municipalities, even if taken at its highest, does not reach the level from which a reasonable trier of fact could infer that a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of members of these groups were targeted for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such.[280]

249. No limitation to the physical perpetrators was stated in this conclusion. In fact, the Trial Chamber specifically considered "the nature, scale, and context of these culpable acts, be it in all the municipalities covered by the indictment or the seven municipalities in which genocide is specifically alleged" and specifically considered the statements of the accused when considering whether they were committed with the intent to destroy the group.[281]

250. The prosecution's claim that by using the word "notwithstanding", the Trial Chamber was disregarding Dr. Karadzic's intent is wrong. The Trial Chamber was saying that even if Dr. Karadzic's words, taken at their highest, were expressions of his own genocidal wishes, the facts showed that those wishes were not implemented in the municipalities in 1992. This is not an evaluation of only the intent of the physical perpetrators, but is an evaluation of what really happened. There is simply no other explanation for why 98% of the Bosnian Muslims survived.

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[279] *Brief* at para. 87
[280] T28765
[281] T28768-69

251. The prosecution's argument fails to come to grips with the fact that Dr. Karadzic could have genocidal intent yet be acquitted because no genocide in fact took place.[282] Genocide is not an inchoate crime.

7. The Trial Chamber Did Not Improperly Segment its Analysis of *Mens Rea*

252. The prosecution next claims that the Trial Chamber erred by impermissibly segmenting its analysis of genocidal intent in considering whether genocidal intent had been established vis a vis each category of underlying acts[283] Not so. The Trial Chamber's analysis of each of the three applicable forms of *actus reus* for genocide was the same approach taken by the Trial Chamber in *Brdjanin*[284] and not appealed by the prosecution, and by the International Court of Justice.[285] There is nothing in the Trial Chamber's language that indicated that it was not considering the totality of the circumstances, and it expressly stated to the contrary in its judgement.[286] Having found on the evidence that both killings and infliction of serious harm were committed in the municipalities, there was no error in the Trial Chamber's evaluation of the *mens rea* for genocide.

8. The Trial Chamber Never Found that the Part of the Group was not Substantial

253. The Trial Chamber never found, as claimed by the prosecution, that the Bosnian Muslims in each of the seven municipalities, or in the municipalities as a whole, did not constitute a substantial part of the Bosnian Muslims as an ethnic or religious group.[287] It found that the acts of killing or inflicting serious harm were not perpetrated

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[282] Dr. Karadzic contends that he never had such intent, that his statements have been taken out of context, and that his many statements and orders in favor of preserving the right of the Muslims and Croats have been ignored. Nevertheless, he recognizes that the Chamber was entitled to take the prosecution's evidence at its highest when deciding the Rule 98 *bis* motion and does not complain about the Chamber's findings in this context.
[283] *Brief* at para. 99
[284] See *Brdjanin* TC, Table of Contents E(2)(b)
[285] ICJ case, Table of Contents VI(4) through (9)
[286] T28764, ln. 4, T28768, ln.23
[287] *Brief* at para. 103

with the intent to destroy the group, in whole or in part.[288] Had the Trial Chamber found that some acts were committed with genocidal intent, but that the targeted group was too small to constitute a substantial part of the Bosnian Muslim group, the prosecution would have a point. But that was not the finding of the Chamber. The prosecution's attempt to find legal error in the requirement that the "part" of the group be substantial is unavailing.

C. Ground 4: There Was No Error Concerning the Mode of Liability

1. The Mode of Liability is Irrelevant When the Underlying Crime was not Committed

254. The prosecution contends in its fourth ground of appeal that the Trial Chamber erred in failing to examine other alleged modes of liability besides joint criminal enterprise. However, since the Trial Chamber reasonably concluded that the crime of genocide had not occurred, it was not necessary to proceed to the step of determining in what way Dr. Karadzic might be liable for such a crime.[289]

2. There is no Liability under JCE III for the Specific Intent Crime of Genocide

255. The prosecution argues that Dr. Karadzic could be liable for the specific intent crime of genocide under the third form of joint criminal enterprise liability.[290] The Appeals Chamber should reject this argument and hold that JCE III does not apply to crimes like genocide which require a specific intent.

256. Dr. Karadzic asserts that customary international law does not permit a defendant to be convicted of a special-intent crime such as genocide or persecution via JCE III, a form of principal perpetration that does not require the defendant to share the special intent of the crime's physical perpetrator.

257. A split Appeals Chamber held in *Brdjanin* – reversing the decision of the Trial Chamber[291] – that a defendant can be convicted of genocide via JCE III even though that mode of liability does not require the Prosecution to prove that the defendant

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[288] T28768-69

[289] As stated above, genocide is not an inchoate crime. Therefore one cannot be convicted of instigating, planning, ordering, or aiding and abetting absent a finding that genocide took place in the municipalities of Bosnia in 1992.

[290] *Brief* at paras. 111-14

[291] *Prosecutor v. Brdjanin*, No. IT-99-36-T, *Decision on Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (28 November 2003) at para. 57

possessed the necessary special intent. According to the Court, "the third category of joint criminal enterprise 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."[292]

258. Judge Shahabuddeen dissented from the majority's holding. In his view, no matter what mode of liability the Prosecution relies on, a defendant can never be convicted of genocide as a principal perpetrator unless he possessed the necessary special intent:

> The third category of *Tadic* does not, because it cannot, vary the elements of the crime; it is not directed to the elements of the crime; it leaves them untouched. The requirement that the accused be shown to have possessed a specific intent to commit genocide is an element of that crime. The result is that specific intent always has to be shown; if it is not shown, the case has to be dismissed.[293]

259. In *Krstic*, the Appeals Chamber implicitly disapproved the majority decision in *Brdjanin*. The Trial Chamber had relied on both JCE I and JCE III to convict General Krsticć of genocide as a principal perpetrator: JCE I for the actual killing of the military-age Bosnian Muslim men of Srebrenica,[294] and JCE III for the foreseeable serious bodily and mental suffering inflicted upon the men who survived the killings.[295] Nevertheless, once the Appeals Chamber concluded that General Krstic did not act with the special intent necessary for genocide,[296] it reversed *both* convictions on the ground that – regardless of the mode of liability – a defendant cannot be convicted of genocide as a principal perpetrator unless he possesses the requisite special intent:

> [A]ll that the evidence can establish is that Krstic was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the

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[292] *Prosecutor v. Brdjanin*, No. IT-99-36-A, *Decision on Interlocutory Appeal*, (19 March 2004) at para. 7 ("*Brdjanin Appeal Decision*").
[293] *Ibid.*, *Dissenting Opinion of Judge Shahabuddeen*, para. 4.
[294] *Prosecution v. Krstic*, No. IT-98-33-T, *Judgment*, (2 August 2001) at para. 633 (*Krstic* TC)
[295] *Krstić* TC, para. 635
[296] *Krstic* AC at paras. 79-133

> stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established. There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstic possessed the genocidal intent. Krstic, therefore, is not guilty of genocide as a principal perpetrator.[297]

260. Since *Brdjanin*, two International Tribunals have specifically held that JCE III does not apply to specific intent crimes.

261. In 2011, the Appeals Chamber of the Special Court for Lebanon, in a panel led by its President, the late Antonio Cassese, the father of JCE, held that:

> "...while the case law of the ICTY allows for convictions under JCE III for genocide and persecution as a crime against humanity, even though these crimes require special intent...the better approach under international law is not to allow convictions under JCE III for special intent crimes like terrorism."[298]

262. In 2012, the Trial Chamber of the Special Court for Sierra Leone, in the prosecution of Liberian President Charles Taylor concurred with the Appeals Chamber of the Lebanon Tribunal and held that JCE III did not apply to specific intent crimes.[299]

263. These decisions provide cogent reasons for the Appeals Chamber to depart from its holding in *Brdjanin*.

264. In addition to these recent decisions, the idea that a defendant can be convicted of a special-intent crime via JCE III finds no support in customary international law. The Appeals Chamber has held that "in order to fall within the Tribunal's jurisdiction *ratione personae*, any form of liability... must have existed under customary international law at the relevant time."[300] This Tribunal has never considered whether there is a customary basis for using JCE III to convict a defendant of genocide or persecution. *Tadic* upheld the customary status of JCE III itself, but that case did not involve genocide or any offence that requires special intent.[301] *Brdjanin* held that JCE III

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[297] *Krstic* AC at para. 134.
[298] *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (16 February 2011) at para. 249
[299] *Prosecutor v Taylor*, No. SCSL-03-01-T, *Judgement* (18 May 2012) at para. 468
[300] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR72, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise*, (21 May 2003) at para. 40 ff
[301] *Prosecutor v. Rwamakuba*, No. ICTR-98-44-AR72.4, *Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide*, (22 October 2004) para. 11 ("*Rwamakuba Appeal Decision*").

was available for special-intent crimes, but it did not examine whether customary international law supported that conclusion, as the Appeals Chamber specifically noted in *Rwamakuba*.[302] And although *Rwamakuba* held that there was a customary basis for convicting a defendant of genocide via JCE I, it did not address whether the same was true of JCE III.[303]

265. This Tribunal and the International Criminal Tribunal for Rwanda (ICTR) have upheld the customary status of JCE III on the basis of World War II-era international and national jurisprudence, international agreements such as the Rome Statute and the Genocide Convention, and national legislation and cases. As explained below, those sources uniformly indicate that a defendant cannot be convicted of a special-intent crime via JCE III.

(A) International Tribunals After World War II

266. In *Rwamakuba*, the Appeals Chamber relied on three judgments issued by post-WW II international tribunals to find that customary international law permitted a defendant to be convicted of genocide via JCE I: the IMT Judgment, the *RuSHA Case*, and the *Justice Case*.[304] Those cases do not help establish that a defendant can be convicted of genocide via JCE III.

267. First, this Tribunal has consistently held that a defendant cannot be convicted of genocide via JCE I unless he acts with the special intent that genocide requires – a requirement that follows naturally from the fact that JCE I "is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention."[305] The availability of JCE I for genocide thus has no bearing on whether JCE III is available for genocide, given that the defining characteristic of JCE III is that it holds defendants responsible for crimes that, though foreseeable and foreseen, they did not intend to commit.[306]

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[302] *Rwamakuba Appeal Decision*, para. 9

[303] *Prosecutor v. Rwamakuba*, No. ICTR-98-44C-I, *Indictment* (9 June 2005) (alleging that Rwamakuba was the physical perpetrator of genocide (Count 1) or alternatively instigated or aided and abetted genocide (Count 2). Indeed, despite the Appeal Chamber's decision that JCE I was available for genocide, the Prosecution ultimately removed all reference to JCE from the June 9, 2005, Indictment. *See Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, *Judgment*, (20 September 2006) at para. 21

[304] *Rwamakuba Appeal Decision*, paras. 15-24.

[305] *Prosecution v. Tadic*, No. IT-94-1-A, *Judgment*, (15 July 1999) ("*Tadic Appeal Judgment*") at para.196.

[306] *See, e.g., Tadic Appeal Judgment*, at para. 204.

268. Second, nothing in the cases cited in *Rwamakuba* supports the idea that JCE III is available for genocide. All three cases involved a joint criminal enterprise whose special objective was the commission of genocide: a "plan for exterminating the Jews" at the IMT[307]; a "systematic program of genocide" in the *RuSHA Case*,[308] and "a plan for the persecution and extermination of Jews and Poles" in the *Justice Case*.[309] Moreover, in each case, all of the defendants convicted of genocidal acts clearly participated in the JCEs with the special intent that genocide requires. The IMT judgment notes, for example, that Rosenberg "helped to formulate the policies of Germanisation, exploitation, forced labour, extermination of Jews and opponents of Nazi rule, and he set up the administration which carried them out."[310] Similarly, in the *RuSHA Case*, Ulrich Griefelt was convicted because he was "the main driving force in the entire Germanization program."[311] Finally, in the *Justice Case*, the tribunal concluded that Oswald Rothaug "gave himself utterly" to the "programme of persecution and extermination" – a requirement that the Tribunal described as "the essence of the proof."[312]

(B) National Military Tribunals After World War II

269. In *Tadic*, the Appeals Chamber relied heavily on two judgments issued by national military courts in 1945 to justify its conclusion that JCE III existed under customary international law: *Essen Lynching*,[313] decided by a British military court; and *Borkum Island*, decided by a United States military court.[314] Neither case, however,

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[307] *Judgment of the International Military Tribunal* ("*IMT Judgment*"), (30 September-1 October 1946), in Trial of the Major War Criminals before the International Military Tribunal, Vol. 22 p. 494.
[308] *United States v. Greifelt and others* ("*RuSHA*"), United States Military Tribunal No. 1, *judgment* of 10 March 1948, in Trials of War Criminals before the Nurenberg Military Tribunals under Control Council Law No.10, Vols. 4-5 (New York, 1997), p. 609.
[309] *Alstötter and others* ("*Justice*"), United States Military Tribunal III, *judgment* of 4 December 1947, in Trials of War Criminals before the Nurenberg Military Tribunals under Control Council Law No. 10, Vol. 3 (New York, 1997), p. 1063.
[310] *IMT Judgment*, p. 540.
[311] *RuSHA Case*, p. 155.
[312] *Justice Case*, p. 1156.
[313] *Trial of Erich Heyer and six others* ("*Essen Lynching*"), British Military Court for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd December, 1945, UNWCC, Vol. I, p. 88, p. 91.
[314] *United States of America v. Kurt Goebell et al.* ("*Borkum Island*"), Case No. 12-489, U.S. National Archives Microfilm Publications.

supports the idea that a defendant can be convicted of a special-intent crime like genocide via JCE III.

270. First, neither case involved a crime that required special intent. In *Essen Lynching*, seven defendants, two German soldiers and five German civilians, were charged with the war crime of being "concerned in the killing" of British prisoners of war.[315] That crime did not require the prosecution to prove that the defendants specifically intended to kill the POWs, much less that they acted with any kind of special intent; as the prosecutor in the case told the jury, the defendants could be convicted of the war crime if they were "concerned in the killing of these three unidentified airmen in circumstances which the British law would have amounted to *either murder or manslaughter*."[316]

271. Similarly, the defendants in *Borkum Island*, sixteen soldiers and civilians who had assaulted and killed American POWs, were variously charged with the war crimes of "wilfully, deliberately and wrongfully encourag[ing]... and participat[ing] in the killing" and "wilfully, deliberately and wrongfully encourag[ing]... and participat[ing] in the assaults."[317] Neither war crime required proof that the defendants acted with the kind of special intent required by genocide or persecution.

272. Second, both cases support the idea that a defendant who participates in a JCE cannot be convicted of an unplanned crime that requires special intent simply because that crime was both foreseeable and foreseen. As noted above, Cassese rejects the use of JCE III for special-intent crimes because the difference between the defendant's *mens rea* and the *mens rea* of the crime's physical perpetrator is simply too great: whereas the defendant acts only with the ordinary intent to commit the planned crimes, the physical perpetrator acts with the more culpable special intent.[318] *Essen Lynching* implicitly adopted that argument. The prosecutor argued that the British military court should convict the defendants of murder under English law instead of the

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[315] *Essen Lynching Case*, p. 88.
[316] *See Essen Lynching* Transcript, on file in the Public Record Office, London, WO 235/58, p. 65 (emphasis added). Under British law, manslaughter is a form of unintentional homicide.
[317] *See Borkum Island Case*, Charge Sheet, in U.S. National Archives Microfilm Publications, I (on file with the international Tribunal's Library).
[318] It is a basic principle of international criminal law that special intent (*dolus specialis*) is a more culpable *mens rea* than intent (*dolus directus*). *See, e.g., Krstic* AC, para. 134.

war crime of being involved in killing POWs.[319] The court refused, because it concluded that although all of the defendants had intended to participate in the ill-treatment of the POWs, thus satisfying the *mens rea* of the war crime, they had not all intended to kill, the necessary *mens rea* of murder.[320]

273. The only possible interpretation of *Essen Lynching* is that the court rejected the idea that JCE III can be used to convict a defendant of an unplanned crime that requires a higher *mens rea* than the planned crimes. There was no question that the death of the POWs was a foreseeable consequence of their mistreatment, yet the court was only willing to convict the defendants of the unplanned crime (being concerned in the killing of a POW) that required the same *mens rea* as the planned crime (mistreatment) – the basic intent to commit the act. Had it believed that a member of a JCE could be convicted of an unplanned crime requiring a higher *mens rea*, it would have convicted the defendants of murder, which additionally required the intent to bring about a particular consequence, death.

274. The military court in *Borkum Island* also rejected the idea that a defendant can be convicted of an unplanned crime that requires a higher *mens rea* than the planned crime. Although the prosecution argued that all of the defendants had intended to kill the POWs and thus were guilty of the more serious war crime of participating in killing, the court convicted some of the defendants of the less serious war crime, participating in assaults.[321] As in *Essen Lynching*, there was no question that it was foreseeable that the assaults could lead to death. Indeed, none of the defendants denied that the killings were foreseeable; most simply denied the existence of a common plan or argued that they had only been part of a common plan to commit assault and thus could not be convicted of the more serious crime.[322] The court obviously rejected the former claim, because all of the defendants were convicted. Yet it must have accepted the latter claim, because not all of the defendants were convicted of killing – an inexplicable result if the court believed that the defendants could be convicted of an unplanned crime (killing) that was more

[319] *Essen Lynching Case*, p. 91
[320] *Tadic Appeal Judgment*, para. 204.
[321] *Borkum Island Case*, Charge Sheet, pp. 1280-86.
[322] *Ibid.*, pp. 1268-70.

serious than the planned crime (assault) as long as the unplanned crime was both foreseeable and foreseen.

(C) Italian Cases After World War II

275. In upholding the customary status of JCE III in general, *Tadic* also relied heavily on a number of cases decided by the Italian Court of Cassation in the aftermath of the war. With one early exception, *Bonati et al.*,[323] those decisions consistently held that a member of a JCE cannot be convicted of an unplanned crime that requires a higher *mens rea* than the planned crimes. The Italian cases thus indicate that customary international law does not permit a defendant to be convicted of a special-intent crime like genocide or persecution via JCE III.

276. In *Bonati et al.*, a defendant claimed that he could not be convicted of murder as a foreseeable consequence of his participation in a JCE, because that crime was more serious than the crimes the enterprise planned to commit. The Court of Cassation rejected that argument, holding that "the crime committed, despite more grave that that intended by some of the participants... was a consequence, albeit indirect, of their participation."[324]

277. That case, however, is the exception that proves the rule. Four years later, in *Aratano et al.*,[325] the Court of Cassation reversed the murder convictions of two members of a Fascist brigade who had participated in a search for partisans that had foreseeably but not intentionally resulted in a partisan being murdered. The Court specifically held that a member of a JCE cannot be convicted of an unplanned crime that required a higher *mens rea* than the planned crimes:

> The shootout that followed *was intended to frighten the partisans* so as to make them surrender; one must, therefore, rule out that the militiamen intended to kill – all these circumstances have been established in point of fact by the lower Court. Hence, it is evident that the participants may not be charged with the event [murder], which was not willed. **The criminal offense committed was in sum more serious that the one intended; one must, therefore, apply notions different from that of voluntary murder. This Supreme Court has already**

[323] Italian Court of Cassation, Penal Section II, *judgment* of 5 July 1946 (handwritten text of the unpublished judgment provided by the Italian Public Record Office in Rome; on file with the Tribunal's Library); *see also Giustizia Penale*, 1945-46, Part II, cols. 530-532.
[324] *Ibid.*, p. 19.
[325] Italian Court of Cassation, Penal Section II, *judgment* of 21 February 1949 (handwritten text of the unpublished judgment provided by the Italian Public Record Office in Rome; on file with the Tribunal's Library); *see also Archivio Penale*, 1949, p. 472.

> **had the opportunity to set out the same principle by observing that to hold somebody responsible for murder committed in the course of a police sweep in which many persons have participated, it would be necessary to establish that in taking part in such operation, *all participants also voluntarily intended to perpetrate murder*.** It follows that while the position of other appellants who must answer for other murders or vicious ill-treatment must remain as it stands, Dell'Antonio and Raimondi may not be held guilty of voluntary murder.[326]

278. The Court of Cassation articulated that principle even more clearly in *Antonini*.[327] The trial court had convicted the defendant of murder for illegally arresting civilians involved in an attack on German soldiers knowing – though not intending – that they would be executed in reprisal once he arrested them.[328] The Court of Cassation rejected the trial court's theory of liability and reversed the defendant's conviction:

> Indeed, on the basis of such theory, the fact that a possible event is foreseen ('situation in which the death could likely occur') and the fact that a voluntary conduct from which the death can result is carried out suffice in order for an accused to be held liable of murder. These concepts are completely wrong as they are not consistent with the legal definition of *dolus* and with the principles doctrine and jurisprudence have always been expressing. *The intentional killing, or the killing with intent, must consist in an event which has been* ***both foreseen and intended by the agent.*** The fact that the author foresaw it (*representation theory*) does not suffice, but it is also necessary that he intended it (*willingness theory*) with the willingness to achieve a specific intended aim (intent).[329]

(D) The Terrorist Bombing Convention and the Rome Statute

279. *Tadic* also noted[330] that JCE is embraced by two international treaties: the International Convention for the Suppression of Terrorist Bombing[331] and the Rome

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[326] *Ibid.*, pp. 13-14. (emphasis added; italics in the original).
[327] Italian Court of Cassation, Penal Section, *judgment* of 29 March 1949; see the text of the judgment in *Giustizia Penale*, 1949, Part II, cols. 740-742.
[328] *Ibid.*, col. 741.
[329] *Ibid.*, cols. 741-42 (emphasis added; italics in the original).
[330] *Tadic Appeal Judgment*, paras. 221-223.
[331] *International Convention for the Suppression of Terrorist Bombing*, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998), entered into force May 23, 2001 ("*Terrorist Bombing Convention*"), cited in *Tadic Appeal Judgment*, para. 221.

Statute of the International Criminal Court.[332] Neither treaty supports the idea that customary international law permits a defendant to be convicted of a special-intent crime via JCE III.

280. The Terrorist Bombing Convention requires States Parties to criminalize "contribut[ing]to the commission of one or more offences" specified in the Convention "by a group of persons acting with a common purpose."[333] The Convention also provides, however, that the contribution must "either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned."[334] As a result, an individual would not commit the offence envisioned by the Convention if he only foresaw the possibility that an unplanned crime would be committed: whereas the minimum *mens rea* of the Convention offence is *knowledge*, JCE III simply requires *recklessness*.[335]

281. The same is true of the Rome Statute. Article 25(3)(d), which is an almost verbatim copy of Article 2(3)(c) of the Terrorist Bombing Convention, limits contributing to a common plan to conduct that is either intentional or knowing – recklessness is not enough.[336] Indeed, most of the States that were involved in drafting the Article were reluctant to base criminal responsibility for serious international crimes on recklessness.[337]

282. There is a second – and equally important – reason that the Rome Statute does not support the idea that JCE III is available for special-intent crimes. As noted earlier, a defendant convicted of a crime via JCE III is convicted as a principal perpetrator. A defendant who contributes to a common plan under Article 25(3)(d), by contrast, is convicted only as an accomplice.[338]

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[332] *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9, 17 July 1998, cited in *Tadic Appeal Judgment*, para. 222 fn. 280.
[333] *Terrorist Bombing Convention*, art. 2(3)(c).
[334] *Id.*
[335] *See Tadic Appeal Judgment*, para. 89.
[336] *See Rome Statute*, art. 25(3)(d)(i)-(ii).
[337] *See* Roger S. Clark, "The Mental Element in International Criminal Law", 12 *Crim. L. F.* 291, 301 (2001).
[338] *See, e.g., Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, *Judgement*... (14 March 2012) at para. 999

283. The Appeals Chamber held in *Tadic* that because the Rome Statute "was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly," its text "may be taken to express the legal position i.e. *opinio juris* of those States."[339] Article 25(3)(d) is inconsistent with using JCE III to convict a defendant of a special-intent crime as a perpetrator. The Article is thus powerful evidence that such a conviction is impermissible under customary international law.

(E) National Legislation and Cases

284. Finally, *Tadic* relied on national legislation and cases to uphold the customary status of JCE III, although it acknowledged that countries were too divided on the issue to consider the mode of liability a general principle of criminal law.[340] The Appeals Chamber examined the legal systems of nine countries, both common law and civilian: Germany, the Netherlands, France, Italy, England, Canada, the United States, Australia, and Zambia.[341] Of those nine countries, only two – Italy[342] and Zambia[343] – permit a member of a criminal enterprise to be convicted of a foreseeable yet unplanned crime that requires special intent. As explained below, the remaining seven – and others such as Switzerland, Russia, Israel, and India – either reject JCE III outright, accept JCE III but prohibit its use for unplanned crimes that require a higher *mens rea* than the planned crimes, or consider JCE III to be a form of accomplice liability instead of a form of principal perpetration.

285. At least five countries categorically reject JCE III. Tadic itself mentions two: Germany[344] and the Netherlands.[345]

286. In Switzerland, if one of the participants in a JCE commits a crime that was outside the scope of the common plan, he alone can be held responsible for that crime.[346]

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[339] *Tadic Appeal Judgment*, para. 223.
[340] *Tadic Appeal Judgment*, para. 225.
[341] *Tadic Appeal Judgment*, para. 224.
[342] Codice Penale, art. 116. Note, though, that Article 116 provides that "the penalty for those who wanted the less grave offense will be reduced."
[343] Penal Code of Zambia, art. 22.
[344] *Tadic Appeal Judgment*, para. 224 fn. 283, citing BGH GA 85, 270
[345] *Tadic Appeal Judgment*, para. 224 fn. 284, citing HR 6 December 1943, NJ 1944, 245; HR 17 May 1943, NJ 1943, 576; HR 6 April 1925, NJ 1925, 723 W 11393.
[346] Arrêts du Tribunal Fédéral Suisse, Recueil Officiel, Vol. 118, Part IV, pp. 227 ff., consideration 5d/cc, p. 232

287. In Russia, Article 36 of the Penal Code provides that "[t]he commission of a crime that is not embraced by the intent of other accomplices shall be deemed to be an excess of the perpetrator. Other accomplices to the crime shall not be subject to criminal responsibility for the excess of the perpetrator." JCE is a form of accomplice liability to which Article 36 applies.[347]

288. In Argentina, there is no form of perpetration equivalent to JCE III. A defendant can only be considered a perpetrator of a crime if he has control over it, such as where he designed the criminal plan or controlled the hierarchical organization that physically committed the crime. "[A]nyone who fails to bear this kind of (direct or indirect) control over at least a part of the execution of a crime would not count as its perpetrator (or co-perpetrator) – at most, she would count as an accomplice of one sort or another."[348] In addition, Article 47 of the Argentine Penal Code specifically provides that accomplices cannot be held responsible for a crime that they did not know the principal would commit.

289. The Appeals Chamber of the Extraordinary Chambers of the Courts of Cambodia also held that JCE III did not form part of customary international law.[349]

290. At least three countries limit JCE III to unplanned crimes that do not require a higher *mens rea* than the planned crimes.

291. In India, Section 34 of the Penal Code provides that "[w]hen a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone." Courts have interpreted Section 34 to prohibit holding a member of JCE responsible for an unplanned crime more serious than the crimes he intended to commit.[350]

292. In France, JCE is governed by Article 121-7 of the Penal Code, which provides that "[a]ny person who knowingly has assisted in planning or committing a crime or offence, whether by aiding or abetting, is a party to it."[351] Such accomplice liability, however, is limited to foreseeable unplanned crimes that have the same *actus*

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[347] Russian Penal Code, art. 33(1).
[348] Marcelo Ferrante, "Argentina", in Heller & Dubber, *Handbook of Comparative Criminal Law*
[349] *Ieng Sary et al*, Case No. 002, *Decision on the Appeals Against the Co-Investigative Judges' Order on Joint Criminal Enterprise* (20 May 2010) at para. 83
[350] *See, e.g., Munna v State*, 1993 Cr LJ 45 (SC); *Joginder Ahir v State*, 1971 Cr LJ 1285.
[351] Translation in *Tadic Appeal Judgment*, para. 224 fn. 285.

reus and *mens rea* as the planned crimes: "If the offence committed has a different *actus reus* or *mens rea* than that foreseen by the potential accomplice, the latter is not liable."[352]

293. In Israel, Section 34A of the Penal Law holds members of a JCE responsible for unplanned crimes "a reasonable person could have been aware" might be committed as a result of the planned crimes. Section 34(a)(1)(a), however, provides that if the unplanned crimes require a *mens rea* higher than the planned crimes, a defendant "shall bear liability for such as for an offence of indifference only." In other words, the defendant is not convicted of the unplanned crime, but of a *lesser* crime that requires only recklessness.

294. Finally, at least three countries adopt JCE III, but consider it to be a form of accomplice liability instead of a form of principal perpetration.

295. In Australia, neither the common-law nor the Code jurisdictions expressly rule out convicting a defendant of an unplanned but foreseeable special-intent crime via joint enterprise liability. In every jurisdiction, however, that defendant would be convicted as an accomplice instead of as a principal perpetrator.[353]

296. In England at the time of the crimes alleged in the Third Amended Indictment, courts were divided over the availability of JCE III for unplanned crimes that required a higher *mens rea* than the planned crimes.[354] Some cases, such as *Chan Wing-Siu v The Queen*,[355] held that JCE III was available in such situations. Others, such as *R. v Smith*,[356] held precisely the opposite. That split alone indicates that English law does not support the customary status of JCE III for special-intent crimes. Equally important, though, British courts have always held that a defendant convicted of an unplanned crime via JCE III is guilty as an accomplice, not as a principal perpetrator.[357]

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[352] Catherine Elliott, "France", *Handbook of Comparative Criminal Law*, citing Orléans, 28 janvier 1896, *Recueil Dalloz*, 97.2.5.
[353] *See McAuliffe v The Queen*, 1995 WL 1689639, 130 ALR 26, 183 CLR 108, (HCA 28 June 1995), pp. 117-18.
[354] This conflict was resolved in favour of permitting responsibility for unplanned crimes requiring a higher *mens rea* in *R. v. Powell* [1999] 1 A.C. 1, pp. 12-13. That case was decided in 1999, four years after the most recent crimes in the Third Amendment Indictment were allegedly committed. *See Indictment*, para. 10. Moreover, the House of Lords reaffirmed that responsibility for unplanned crimes is a form of accomplice liability, not perpetration. *See* Opinion of Lord Mustill.
[355] [1985] 1 AC 168 (PC).
[356] [1988] WL 624408 (CA (Crim Div)), [1988] Crim. L.R. 616.
[357] *See* Law Commission of Great Britain, *Participating in Crime* (London, 2006), para. 3.147.

297. In the United States, courts applying the so-called "*Pinkerton* rule" distinguish between two different kinds of foreseeable unplanned crimes: those that were unplanned but still within the scope of the unlawful project, and those that were unplanned and outside the scope of the unlawful project. The narrower version is part of federal law and has likely been adopted by a majority of states.[358] The broader version is applied much more rarely – and courts acknowledge its rarity when they do apply it. In both versions, though, the defendant is convicted as an accomplice of the unplanned crime, not as a principal perpetrator.

298. Almost no state practice or *opinio juris*, in short, supports the idea that customary international law permits a defendant to be convicted of a special-intent crime as a perpetrator via JCE III. On the contrary, the overwhelming majority of countries – both common law and civilian – either prohibit such convictions outright or treat them as a form of accessorial liability.

(F) The Genocide Convention

299. In *Rwamakuba*, the Appeals Chamber relied on the Genocide Convention to support its holding that JCE I was available for genocide.[359] Like the previous sources, the Convention also indicates that a defendant cannot be convicted of committing genocide if he does not possess the special intent that genocide requires – a limitation that is inconsistent with convicting a defendant of genocide via JCE III.

300. Article II of the Genocide Convention provides that the *actus reus* of genocide must be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." There is an ongoing debate about whether the four modes of participation in genocide listed in Article III of the Convention other than direct commission – conspiracy, direct and public incitement, attempt, and complicity – require the defendant to possess the necessary special intent. Scholars insist

[358] *See* Joshua Dressler, *Understanding Criminal Law* 529 (4th ed. 2006).
[359] *Rwamakuba Appeal Decision*, paras. 26-28.

that they do,[360] while this Tribunal has held that aiding and abetting genocide requires only knowledge of the principal perpetrator's genocidal intent.[361]

301. That debate is irrelevant, however, to whether a defendant can be convicted of genocide via JCE III. As noted above, JCE III is a form of *commission*: the defendant is convicted of the foreseeable unplanned crime as a principal perpetrator, not as an accomplice. No court[362] or scholar[363] has ever suggested that the Genocide Convention does not require the Prosecution to prove that a defendant charged with *committing* genocide possessed the special intent that Article II of the Convention requires. The Convention is thus further evidence that permitting a defendant to be convicted of genocide via JCE III is inconsistent with customary international law.

302. In conclusion, sources of customary international law uniformly indicate that an accused cannot be convicted of an unplanned special-intent crime as a perpetrator unless he possesses the special intent that the crime requires. The prosecution's argument that the Trial Chamber should have upheld Count One on a theory of liability based on JCE III should be rejected.

D. Even if the Trial Chamber Erred, the Judgement of Acquittal Should not be Reversed

303. In the *Jelisic* case, the Appeals Chamber found that it was in the interests of justice not to reverse the Judgement of Acquittal, even where the Trial Chamber had erred in its assessment of genocide. Dr. Karadzic suggests that should the Appeals Chamber find that his Trial Chamber erred, it should likewise not reverse the judgement of acquittal on Count One.

304. In *Jelisic*, the Appeals Chamber found that it had the discretion not to reverse the judgement even when it had found that the Trial Chamber had erred. It stated that the determination of whether to reverse should be made on a case-by-case basis. The factors to be considered included fairness to the accused, the interests of justice, the nature of the offences, the circumstances of the case, and considerations of public interest.[364]

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[360] *See, e.g.*, William A. Schabas, *Genocide in International Law* 259 (Cambridge, 2000).
[361] *See, e.g.*, *Krstic* AC at para. 140. The Appeals Chamber also noted in *Krstic* that "there is authority to suggest that complicity in genocide, where it prohibits conduct broader than aiding and abetting, requires proof that the accomplice had the specific intent to destroy a protected group." *Krstic* AC, para. 142.
[362] *See, e.g.*, *Krstic* AC at para. 20.
[363] See, *e.g.*, Schabas, *Genocide in International Law* 259 (Cambridge, 2000)
[364] *Jelisic* AC at para. 73

305. The Appeals Chamber decided not to reverse the acquittal in *Jelisic's* case based upon the fact that the other charges already covered the same killings as the genocide count.[365] That is also true in Dr. Karadzic's case, where he remains charged with murder and persecution for those same events.

306. The Appeals Chamber in *Jelisic* also considered the fact that the alleged offenses took place a long time ago—May 1992.[366] Likewise, the offenses took place in 1992 in Dr. Karadzic's case as well.

307. The Appeals Chamber also considered that the Trial Chamber had granted the acquittal *proprio motu* and that further trial proceedings would delay transfer of the accused to a prison setting—factors which are not present here.[367]

308. What appeared to be at the heart of the Appeals Chamber's decision was the fact that the accused already faced a long prison sentence, and that reversal would unnecessarily prolong the proceedings. Those same factors apply to Dr. Karadzic's case as well, where he faces a long prison sentence if convicted on the remaining counts, for which the Trial Chamber in its judgement found that there was abundant evidence.

309. While Dr. Karadzic has not pled guilty to the other charges as *Jelisic* had, the Appeals Chamber should not consider this as a significant factor, as it would penalize an accused for standing on his right to have the prosecution prove the charges against him.

310. Although reversal of the judgement on Count One would not require a new trial, it would disrupt the ongoing trial on the remaining counts which will be considerably advanced by the time the Appeals Chamber renders its judgement. This delay can be mostly attributed to the prosecution's choice to pursue its appeal as an appeal from a final judgement, rather than the more expedited procedure of an interlocutory appeal.

311. As an *ad hoc* Tribunal with an obligation to use its limited public resources wisely, the ICTY should not squander those resources on an academic exercise. Even if the Appeals Chamber finds that the prosecution's evidence can survive the Rule 98 *bis* standard, the Trial Chamber would be well within its discretion to enter the same judgement at the end of the trial. Given that the prosecution has closed its case, there is

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[365] *Jelisic* AC at para. 74
[366] *Jelisic* AC at para. 75
[367] *Jelisic* AC at paras.75-76

no reasonable prospect of a different result. When weighed against the disruption and extension of the ongoing trial, reversal of the acquittal would not be in the interests of justice in this case.

312. The United Nations can feed two children in Africa for an entire month for the 75 Euro cost of one hour of a lawyer's time on this case.[368] When multiplying that by the significant number of hours it would take to present defence evidence on Count One, and brief and decide the issue as part of a final judgement, the Appeals Chamber should consider, along with the other factors, that it would not be a responsible use of public funds to reverse the acquittal.

VII. Ancillary Requests

A. Oral Hearing

313. Rule 114 provides that "after the expiry of the time-limits for filing the briefs provided for in Rules 111, 112 and 113, the Appeals Chamber **shall** set the date for the hearing and the Registrar shall notify the parties." (emphasis added)

314. Dr. Karadzic contends that the parties are entitled to an oral hearing in this appeal, given that it is an appeal from a final judgement. He wishes to exercise that right.

315. Dr. Karadzic notes that in the *Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal* (4 April 2012), the President has specifically provided with respect to appeals from judgements under Rules 11 *bis*, 77, and 91, that "the Appeals Chamber may thereafter decide the appeal without further submission by the parties".[369] Rule 98 *bis* is not among those rules for which oral argument has been excluded.

316. The issues presented in this appeal are significant and complex. The Appeals Chamber and the public would benefit from a full airing of these issues at an oral hearing.

B. Right of Audience

317. Should the Trial Chamber hold an oral hearing, Dr. Karadzic respectfully requests that his Legal Advisor Peter Robinson be granted right of audience to address the Appeals Chamber during the oral hearing. Mr. Robinson delivered the oral argument

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[368] T28577
[369] para. 7

on this issue before the Trial Chamber and has significantly participated in the drafting of this brief.[370] Dr. Karadzic and the Appeals Chamber would benefit from his assistance in presenting the legal issues at an oral hearing before the Appeals Chamber.

C. Hearings in Bosnia

318. Dr. Karadzic respectfully requests that the Appeals Chamber seek the authorization of the ICTY President pursuant to Rule 4 to hold the oral hearing on this appeal in Bosnia. Dr. Karadzic proposes that the arguments in chief be heard in Sarajevo in the morning of the first day and that the rebuttal and rejoinder arguments be heard in Banja Luka on the second day.

319. Holding a hearing on this important issue in Bosnia will bring the work of the Tribunal directly to the people for whom it is intended to benefit, thus fostering a greater understanding of the work of the Tribunal and advancing the goals of reconciliation and peace in Bosnia.

VIII. Conclusion

320. In the *Karemera* and *Krtsic* cases, the Appeals Chamber deemed it important to call the events in Rwanda and Srebrenica by what it considered to be their rightful name—genocide. It is just as important to settle once and for all what the International Court of Justice and four other Trial Chambers have already concluded—that the events in the municipalities of Bosnia in 1992 did not constitute genocide.

321. This does not mean that the victims did not suffer just as much, or that the crimes committed against them were not as serious. Those who link the genocide label to the validity of the suffering of victims do those victims a great disservice. Genocide is a legal term with a definition that has remained intact for more than 60 years and was left unchanged in the Statue of this Tribunal and that of the International Criminal Court. It is just as important to be faithful to that definition in upholding an acquittal as it is when affirming a conviction.

322. It is respectfully requested that after an oral hearing in this matter, the prosecution's appeal be denied, and that the Appeals Chamber settle the matter once and for all that no genocide was committed in the municipalities of Bosnia in 1992.

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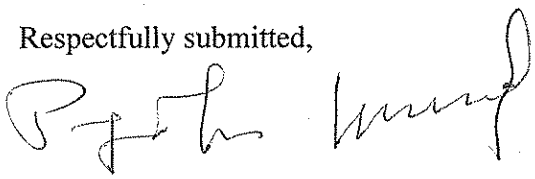
[370] T28569-80

Word count: 25362

Respectfully submitted,



Radovan Karadzic