

## **LE TRIBUNAL PÉNAL INTERNATIONAL POUR L'EX-YOUGOSLAVIE (T.P.I.Y.)**

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# LE TRIBUNAL PÉNAL INTERNATIONAL POUR L'EX-YOUGOSLAVIE (T.P.I.Y.)

By Vincent Sautenet\*

## Introduction

This Case Law Review will analyze the first semester of 2004 which was again very intense and very important for the development of International Criminal Law as well as International Humanitarian Law. No less than 4 judgments of guilt were rendered after the defendant pleaded guilty<sup>1</sup>, as well as more than 120 decisions by the Trial Chambers and more than 30 decisions in appeal.

Two judgments of the Appeals Chamber, *Krstic* and *Vasiljevic*, will be reviewed as well as the decision “of acquittal on any count if there is no evidence capable of supporting a conviction”<sup>2</sup> in the *Milosevic* case.

## I. *The Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Judgment, 19 April 2004

On 2 August 2001, Trial Chamber I rendered its judgment in the *Krstic* case (Trial Chamber Judgment)<sup>3</sup>, in which it found Radislav Krstic guilty of genocide, persecution for murders, cruel and inhumane treatment, terrorizing the civilian population, forcible transfer and destruction of personal property of Bosnian Muslim civilians, and murder as a violation of the laws or customs of war. He was sentenced to 46 years in prison.

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<sup>1</sup> *Prosecutor v. Cesic* (2004), Case No. IT-95-10/1-S (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I); *Prosecutor v. Deronjic* (2004), Case No. IT-02-61-S (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II); *Prosecutor v. Mrdja* (2004), Case No. IT-02-59-S (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I); *Prosecutor v. Babic* (2004), Case No. IT-03-72-S (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I). All these judgments, as well as the Trial Chambers' and Appeals Chamber decisions are available online at United Nations <<http://www.un.org/icty/cases/jugemindex-e.htm>>.

<sup>2</sup> International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence*, UN Doc. IT/32/Rev.34 (1994) Part VI, sec. 4, Rule 98 *bis*.

<sup>3</sup> *Prosecutor v. Krstic* (2004), Case No. IT-98-33-A (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber).

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

The Appeal Chamber mainly contributed to the following issues:

### *Genocide*

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

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
  - (a) killing members of the group;
  - (b) causing serious bodily or mental harm to members of the group;
  - (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) imposing measures intended to prevent births within the group;
  - (e) forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
  - (a) genocide;
  - (b) conspiracy to commit genocide;
  - (c) direct and public incitement to commit genocide;
  - (d) attempt to commit genocide;
  - (e) complicity in genocide.

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

### A. Targeted group

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

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

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

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

In the present case, the Appeals Chamber confirmed that "[t]he intent requirement of genocide under Article 4 of the *Statute* is [...] satisfied where

<sup>4</sup> *Prosecutor v. Krstic* (2001), Case No. IT-98-33-S (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I) at para.558.

<sup>5</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 1021 (entered into force 12 January 1951).

<sup>6</sup> *Prosecutor v. Jelusic* (1999), Case No. IT-95-10-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I) at para.82 [emphasis in original].

<sup>7</sup> *Prosecutor v. Sikirica et al.* (2001), Case No. IT-95-8-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III) at para.65 [emphasis added].

<sup>8</sup> *Prosecutor v. Kayishema and Ruzindana* (1999), Case No. ICTR-95-1-T (International Criminal Tribunal for Rwanda, Trial Chamber II) at para.97.

<sup>9</sup> *Prosecutor v. Bagilishema* (2001), Case No. ICTR-95-1A-T (International Criminal Tribunal for Rwanda, Trial Chamber I) at para.64; *Prosecutor v. Semanza* (2003), Case No. ICTR-97-20-T (International Criminal Tribunal for Rwanda, Trial Chamber III) at para.316.

evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group.”<sup>10</sup> It then turned to the determination of when the targeted group is substantial enough to meet this requirement.

## **B. Substantial part of a group**

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

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

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

In the present case, the Appeals Chamber confirmed that the Trial Chamber’s identification of the Bosnian Muslims of Srebrenica as the targeted group abided by the above guidelines. The identified protected group was the national group of

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<sup>10</sup> *Krstic*, *supra* note 3 at para.12.

<sup>11</sup> *Jelusic*, *supra* note 6 at para.82: “Genocidal intent may therefore be manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group *en masse*. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such. This would then constitute an intention to destroy the group ‘selectively.’” See also *Sikirica*, *supra* note 7 at para. 77: “The Chamber finds persuasive the analysis in the *Jelusic* Trial Judgment that the requisite intent may be inferred from the ‘desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.’ The important element here is the targeting of a selective number of persons who, by reason of their special qualities of leadership within the group as a whole, are of such importance that their victimization within the terms of Article 4(2) (a), (b) and (c) would impact upon the survival of the group, as such”.

<sup>12</sup> *Krstic*, *supra* note 4 at para.12.

<sup>13</sup> *Ibid.* at para.13.

<sup>14</sup> *Ibid.* at para.14.

Bosnian Muslims. Although the targeted group constituted a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the Appeals Chamber found that the “importance of the Muslim community in Srebrenica [was] not captured solely by its size.”<sup>15</sup> It concurred with the Trial Chamber, *inter alia*, that Srebrenica was of immense strategic importance to the Bosnian Serb leadership, was prominent in the eyes of the Bosnian Muslims and the international community, and that the fate of the Bosnian Muslims of Srebrenica was emblematic of that of all Bosnian Muslims.

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

### C. Intent to “destroy”

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

As noted by the Appeals Chamber, the *Genocide Convention* and customary law, in general, prohibit only the physical or biological destruction of a human group.<sup>17</sup> Indeed, the Trial Chamber acknowledged this limitation and further stated

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<sup>15</sup> *Ibid.* at para.15.

<sup>16</sup> *Ibid.* at para.19.

<sup>17</sup> *Infra* note 39, citing: “The International Law Commission, when drafting a code of crimes which it submitted to the ICC Preparatory Committee, has examined closely the *travaux préparatoires* of the Convention in order to elucidate the meaning of the term ‘destroy’ in the Convention’s description of the requisite intent.” The Commission concluded: “As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, cultural or other identity of a particular group.” *Report of the International Law Commission on the Work of its Forty-Eighth Session*, 6 May – 26 July 1996, UN GAOR, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1996) 90-91. The commentators agree. See e.g. William A. Schabas, *Genocide in International Law* (2000) 229

that “an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.”<sup>18</sup>

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

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

The inference that a particular atrocity was motivated by genocidal intent may be drawn, moreover, even where the individuals to whom the intent is attributable are not precisely identified. If the crime committed satisfies the other requirements of genocide, and if the evidence supports the inference

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(concluding that the drafting history of the Convention would not sustain a construction of the genocidal intent which extends beyond an intent at physical destruction)”.

<sup>18</sup> *Krstic*, *supra* note 4 at para. 580.

<sup>19</sup> *Prosecutor v. Stakic* (2003), Case No. IT-97-24-T, (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) at para.519, including footnote 1097-1098 (citing K. Kreß, *Münchener Kommentar zum StGB*, Rn 57, section 6 VStGB (2003); William A. Schabas, *Genocide in International Law* (2000), p. 200; BGH v. 21.2.2001 – 3 StR 244/00, NJW 2001, 2732 (2733)).

<sup>20</sup> *Krstic*, *supra* note 4 at para.33. The Appeals Chamber referred to the *Jelusic* Appeals Judgement in which it held: “As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.” (*Prosecutor v. Jelusic* (2001), Case No. IT-95-10-A, (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at para.47.).

<sup>21</sup> *Ibid.* at para.34.

that the crime was motivated by the intent to destroy, in whole or in part, a protected group, a finding that genocide has occurred may be entered.<sup>22</sup>

In the present case, the Appeals Chamber found that

[t]he fact that the Trial Chamber did not attribute genocidal intent to a particular official within the Main Staff may have been motivated by a desire not to assign individual culpability to persons not on trial here. This, however, does not undermine the conclusion that Bosnian Serb forces carried out genocide against the Bosnian Muslims.<sup>23</sup>

It dismissed the Defense's appeal on this issue.

#### 1. AIDING AND ABETTING GENOCIDE

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

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

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

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<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.* at para.35.

<sup>24</sup> *Krstic*, *supra* note 4 at para.418.

<sup>25</sup> *Krstic*, *supra* note 4 at para.129.

<sup>26</sup> *Ibid.* at para.134.

<sup>27</sup> *Ibid.* at para.137.; *Prosecutor v. Krnjelac* (2003), Case No. IT-97-25-A, (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at para.52.



It held that “[t]he conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator’s genocidal intent is permitted by the *Statute* and case law of the Tribunal.”<sup>28</sup>

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

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

## 2. CUMULATIVE CONVICTIONS

Multiple convictions entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision has a distinct

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<sup>28</sup> *Krstic, Ibid.* at para.140. For the relationship between Article 7(1) and complicity in genocide under Article 4(3), see *Stakic, supra* note 16 at para.531: “The Trial Chamber considered the relationship between Article 7(1) and complicity in genocide under Article 4(3) in its Decision on 98 *bis* Motion for Judgement of Acquittal [*Stakic*, IT-97-24-T, Decision on Rule 98 *bis* Motion for Judgement of Acquittal, 31 October 2002, para. 47]. Noting the overlap between Articles 7(1) and 4(3), the Trial Chamber concluded that two approaches are possible. Article 4(3) can either be regarded as *lex specialis* in relation to Article 7(1) (*lex generalis*), or the modes of participation under Article 7(1) can be read into Article 4(3).” In the present case, the Appeals Chamber concluded that the second approach applied.

<sup>29</sup> *Krnjelac, supra* note 27 at para. 70, the Appeals Chamber found that in the case law of the Tribunal the term “accomplice” has “different meanings depending on the context and may refer to a co-perpetrator or an aider and abettor”[footnote added]. See our commentaries in this review at Vincent Sautenet, “Le Tribunal pénal international pour l’ex-Yougoslavie : *still alive!*” (2004) 16.2 R.Q.D.I. (to be published).

<sup>30</sup> *Krstic, supra* note 3 at para.142.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.* at para.143.

element not contained in the others.<sup>33</sup> In the present case, the Prosecution challenged the fact that the Trial Chamber, for the reason that they were impermissibly cumulative with genocide, did not enter Krstic's convictions for extermination and persecution and for murder and inhuman acts as crimes against humanity.

#### D. Extermination and genocide

In the present case, the Trial Chamber concluded that the requirement of a widespread and systematic attack against a civilian population was subsumed within the genocide requirement that there be an intent to destroy, in whole or in part, a national, ethnical, racial or religious group.<sup>34</sup>

The ICTR Appeals Chamber, in the *Musema* Appeals Judgment, addressed the issue and permitted convictions for genocide and extermination based on the same conduct because genocide "requires proof of intent to destroy, in whole or in part, a national, ethnical or religious group, [which] is not required by extermination," while extermination as a crime against humanity "requires proof that the crime was committed as part of a widespread or systematic attack against a civilian population, the proof of which is not required in the case of genocide."<sup>35</sup>

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

While a perpetrator's knowing participation in an organized or extensive attack on civilians may support a finding of genocidal intent, it remains only the evidentiary basis from which the fact-finder may draw this inference. The offence of genocide, as defined in the *Statute* and in international customary law, does not require proof that the perpetrator of genocide participated in a widespread and systematic attack against a civilian population.<sup>36</sup>

The Trial Chamber also concluded that the definitions of intent to enact extermination and genocide "both require that the killings be part of an extensive plan to kill a substantial part of a civilian population."<sup>37</sup> As the Appeals Chamber previously explained, however, the existence of a plan or policy is "not a legal

<sup>33</sup> *Prosecutor v. Delalic et al.* (2001), Case No. IT-96-21-A, (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at paras.412-413.

<sup>34</sup> *Krstic*, *supra* note 4 at para.682.

<sup>35</sup> *Musema v. Prosecutor* (2001), Case No. ICTR-96-13-A, (International Criminal Tribunal for Rwanda, Appeals Chamber) at para.366.

<sup>36</sup> *Krstic*, *supra* note 3 at para.223 (including footnote 365); the Appeals Chamber, to support its finding, referred to Antonio Cassese, Paola Gaeta & John R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, vol.1 (Oxford: Oxford University Press, 2002) at 340 (under customary international law, "it is only for crimes against humanity [and not for genocide] that knowledge of the widespread or systematic practice is required").

<sup>37</sup> *Krstic*, *supra* note 3 at para.225.

ingredient of the crime” and can only be a factor in the context of proving specific intent.”<sup>38</sup> Similarly, the Appeals Chamber previously held, with regard to crimes against humanity, that “the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.”<sup>39</sup> Accordingly, the Appeals Chamber held, in the present case, that the Trial Chamber’s finding was erroneous.

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

Provided the part intended to be destroyed is substantial, and provided that the perpetrator intends to destroy that part as such, there is nothing in the definition of genocide prohibiting, for example, a conviction where the perpetrator killed detained military personnel belonging to a protected group because of their membership in that group. It may be that, in practice, the perpetrator’s genocidal intent will almost invariably encompass civilians, but that is not a legal requirement of the offence of genocide.<sup>40</sup>

### **E. Persecution and genocide**

The Trial Chamber concluded that the offence of persecution as a crime against humanity was impermissibly cumulative with the conviction for genocide.<sup>41</sup>

Since persecution and extermination, as crimes against humanity, share the same requirement that the underlying act be part of a widespread or systematic attack against a civilian population and that it be perpetrated with the knowledge of that connection, the Appeals Chamber held that “[t]he offence of genocide does not subsume that of persecution,” and found the Trial Chamber’s conclusions to be erroneous.<sup>42</sup>

## **II. *The Prosecutor v. Mitar Vasiljevic, Case No. IT-98-32-A, Judgment, 25 February 2004***

On 29 November 2002, Trial Chamber II found Mitar Vasiljevic guilty in relation to the Drina River incident<sup>43</sup> as a co-perpetrator of persecution as a crime

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<sup>38</sup> *Jeliscic, supra* note 20 at para.48, referring to the oral decision by the Appeals Chamber for the ICTR in *Kayishema and Ruzindana, supra* note 9.

<sup>39</sup> *Prosecutor v. Kunarac* (2002), Case No. IT-96-23 & 23/1-A, (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at para.98.

<sup>40</sup> *Krstic, supra* note 3 at para.226.

<sup>41</sup> *Krstic, supra* note 4 at paras.682-686.

<sup>42</sup> *Krstic, supra* note 3 at para.229.

<sup>43</sup> It was alleged in the Indictment that on or about 7 June 1992 the Accused, together with his two co-accused (Milan Lukic and Sredoje Lukic) and other unidentified individuals, had led seven Bosnian Muslim men to the bank of the Drina River. There, they forced them to line up on the bank of the river,

against humanity pursuant to Article 5(h) of the *Statute*. It held him guilty for the murders of five Muslim men and the inhumane acts inflicted on the two surviving Muslim men (Count 3), murder as a violation of the laws or customs of war pursuant to Article 3 of the *Statute*, and for the murder of the five Muslim men (Count 5). The Trial Chamber acquitted the Accused on the remaining counts, either because it found the evidence to be insufficient or because the convictions would have been cumulative. For the convictions on Counts 3 and 5, the Trial Chamber imposed a prison sentence of 20 years.<sup>44</sup>

In the present appeal judgment, the Appeals Chamber allowed Vasiljevic's appeal with regard to his convictions as a co-perpetrator of persecution, a crime against humanity (murder and inhumane acts) under Count 3 of the Indictment, and of murder, a violation of the laws or customs of war under Count 5 of the Indictment. It set aside these convictions. Pursuant to Article 7(1) of the *Statute* of the Tribunal, it found Vasiljevic guilty of Counts 3 and 5 of the Indictment as an aider and abettor to persecution, a crime against humanity (murder and inhumane acts), and as an aider and abettor to murder, a violation of the laws or customs of war.<sup>45</sup> The Appeals Chamber dismissed Vasiljevic's appeal against convictions in all other respects and dismissed his appeal against the sentence. It imposed a new sentence, taking into account his responsibility established on the basis of the convictions entered on appeal. Mitar Vasiljevic was sentenced to 15 years imprisonment.

The Appeal Chamber mainly contributed to the following issues:

**A. Differences between participating in a joint criminal enterprise as a co-perpetrator and as an aider and abettor**

Joint criminal enterprise is a form of liability which, although not explicitly referred to in the *Statute*, existed in customary international law in 1992. As such, it is a form of "commission" under Article 7(1) of the *Statute*.<sup>46</sup> Three categories of joint criminal enterprise have been identified in the Tribunal's case law: the "basic" form of joint criminal enterprise, the "systemic" form of joint criminal enterprise, and the "extended" form of joint criminal enterprise.<sup>47</sup> While the Trial Chamber

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facing the river, and opened fire on them. It was alleged that five of the seven died as a result of the shooting while the other two escaped without serious physical injury.

<sup>44</sup> *Prosecutor v. Vasiljevic* (2002), Case No. IT-98-32-T, (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II).

<sup>45</sup> *Statute of the International Criminal Tribunal for the Former Yugoslavia*, International Criminal Tribunal for the Former Yugoslavia (1993) art.7(1) (Individual Criminal Responsibility) reads :

"A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present *Statute*, shall be individually responsible for the crime".

<sup>46</sup> See *Prosecutor v. Tadic* (1999), Case No. IT-94-1-A, (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at paras.188, 226.

<sup>47</sup> *Ibid.* at paras.195-226; *Krnjelac*, *supra* note 28. See our commentaries in this review at Vincent Sautenet, "Le Tribunal pénal international pour l'ex-Yougoslavie : *still alive !*" (2004) 16.2 R.Q.D.I. (to be published).

considered that the first and second categories of joint criminal enterprise applied to the Drina River incident, the Appeals Chamber considered that only the first category applied to the present case. In the first category, all co-perpetrators act pursuant to a common purpose and possess the same criminal intention. For example, in the case of a plan to kill, formulated by the participants in such a joint criminal enterprise, the participants do not need to carry out the same role. All have the intent to kill, however.

In a joint criminal enterprise the participants are considered co-perpetrators. As noted by the Appeals Chamber, however, there can also be participants in a joint criminal enterprise through “aiding and abetting.” This participation “is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime.”<sup>48</sup> The Appeals Chamber noted that, when a crime is committed by several co-perpetrators, “the aider and abettor is always an accessory to these co-perpetrators, although the co-perpetrators may not even know of the aider and abettor’s contribution.”<sup>49</sup> It pointed to the differences that exist in relation to the *actus reus* as well as to the *mens rea* requirements between both forms of individual criminal responsibility:

- (i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.
- (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.<sup>50</sup>

## B. Standard of proof

The Appeals Chamber recalled that to find an accused criminally responsible as a co-perpetrator in a joint criminal enterprise, the Prosecution must establish that i) the accused voluntarily participated in one aspect of the common purpose even if he or she did not physically commit the crime, and ii) the accused, even if not personally effecting the crime, nevertheless intended this result [emphasis added].<sup>51</sup>

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<sup>48</sup> *Prosecutor v. Vasiljevic* (2004), Case No. IT-98-32-A, (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at para.102.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Tadic*, *supra* note 46 (of the previous section) at para.196.

The Appeals Chamber endorsed the test the Trial Chamber adopted. According to this test, when the Prosecution relies upon proof of the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence.<sup>52</sup> It added that

when a Chamber is confronted with the task of determining whether it can infer from the acts of an accused that he or she shared the intent to commit a crime, special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inferences.<sup>53</sup>

In the present case, the Appeals Chamber found, Justice Shahabuddeen dissenting, that “no reasonable tribunal could have found that the only reasonable inference available on the evidence [was] that the Appellant had the intent to kill the seven Muslim men.”<sup>54</sup> It found the Appellant guilty as an aider and abettor and expressed its view that “aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator.”<sup>55</sup>

### **III. *The Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004**

The present decision was rendered by Trial Chamber III pursuant to Rule 98 *bis* (B) of the *Rules of Procedure and Evidence*, that is, at the request of the Trial Chamber itself. After having reviewed the parties’ submissions, the Trial Chamber found “sufficient evidence to support each count in the three Indictments” but found that there is “no or insufficient evidence to support certain allegations relevant to some of the charges in the Indictments.”<sup>56</sup> More specifically, the Trial Chamber held, *inter alia*, the following:

- *Kosovo*: there is sufficient evidence of an armed conflict in Kosovo at the relevant times for the purposes of Rule 98 *bis*.<sup>57</sup>
- *Croatia*: Croatia was a State by 8 October 1991 for the purposes of Rule 98 *bis*.<sup>58</sup>

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<sup>52</sup> *Vasiljevic*, *supra* note 44 at para.120, referring to *Vasiljevic*, *supra* note 1 at 68. This test was first adopted in *Prosecutor v. Krnojelac* (2002), Case No. IT-97-25-T, (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) at para.83.

<sup>53</sup> *Ibid.* at para.131.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.* at para.182.

<sup>56</sup> *Prosecutor v. Slobodan Milosevic* (2004), Case No. IT-02-54-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para.316.

<sup>57</sup> The Trial Chamber dismissed the *Amici Curiae* submission that there was no armed conflict in Kosovo in the Federal Republic of Yugoslavia (“FRY”) prior to 24 March 1999 (commencement of the North Atlantic Treaty Organisation (“NATO”) - bombing campaign) (*Ibid.* at para.318).

- *Bosnia*: there existed a joint criminal enterprise, which included some members of the Bosnian Serb leadership, the aim and intention of which was to destroy a part of the Bosnian Muslims as a group. Its participants committed genocide in Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kljuc and Bosanski Novi. The Accused was a participant in that joint criminal enterprise (Justice Kwon dissenting). The Accused was a participant in a joint criminal enterprise, which included members of the Bosnian Serb leadership, to commit other crimes than genocide. It was reasonably foreseeable to him that, as a consequence of the commission of those crimes, genocide of a part of the Bosnian Muslims as a group would be committed by other participants in the joint criminal enterprise. The genocide was committed. The Accused aided and abetted or was complicit in the commission of the crime of genocide in that he had knowledge of the joint criminal enterprise, and that he gave its participants substantial assistance, being aware that its aim and intention was the destruction of a part of the Bosnian Muslims as a group. The Accused was a superior to certain persons whom he knew, or had reason to know, were about to commit or had committed genocide of a part of the Bosnian Muslims as a group, and he failed to take the necessary measures to prevent the commission of genocide, or punish the perpetrators thereof.

In the reasoning of its judgment, the Trial Chamber mainly contributed to the following issues:

*Rule 98 bis test*

**A. Applicable law**

Rule 98 *bis* was adopted on 10 July 1998 in order to deal with a situation that, by that time, “had developed in every trial heard by the Tribunal”: the Accused applied at the close of the Prosecution case for a determination that there was “no case to answer” on one or more or all the charges in the Indictment.<sup>59</sup> Such applications, in the absence of a specific rule, were made pursuant to Rule 54, which allows a Trial Chamber to issue such orders as may be necessary for the conduct of the trial.<sup>60</sup> The test adopted in such situations was “whether as a matter of law there is

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<sup>58</sup> The Trial Chamber dismissed the *Amici Curiae* submission that Croatia only become a State some time between 15 January and 22 May 1992, and that consequently the conflict in Croatia was not international before that time. (*Ibid.* at para.320).

<sup>59</sup> *Prosecutor v. Dragoljub Kunarac et al.* (2000), Case No. IT-96-23-T & IT-96-23/1-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) at para.2.

<sup>60</sup> Rule 54 (General Rule) reads: “At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.” International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence*, UN Doc. IT/32/Rev.34 (1994) Part V, Sec. 2, Rule 54.

evidence, were it to be accepted by the Trial Chamber, as to each count charged in the indictment which could lawfully support a conviction of the accused.”<sup>61</sup>

Rule 98 *bis* (Motion for Judgment of Acquittal), as amended 17 October 1999, reads as follows:

- (A) An accused may file a motion for the entry of judgment of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor’s case and, in any event, prior to the presentation of evidence by the defense pursuant to Rule 85 (A)(ii).
- (B) The Trial Chamber shall order the entry of judgment of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or those charges [emphasis added].

The test for determining whether the evidence is “insufficient to sustain a conviction” was settled in the *Jelisc* case. The Appeals Chamber followed its previous holding in the *Delalic* Appeal Judgment that “[t]he test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.”<sup>62</sup> It held as follows:

The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defense evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt.<sup>63</sup>

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<sup>61</sup> *Prosecutor v. Dusko Tadic* (1996), Case No. IT-94-1-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Decision on Defence Motion to Dismiss Charges) at para.2. The same test was adopted in *Prosecutor v. Zejnil Delalic* (1998), Case No. IT-96-21-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Order on Motions to Dismiss the Indictment at the Close of the Prosecutor’s Case) at para.4: whether “[...] as a matter of law, there is evidence relating to each element of the offences in question which, were it to be accepted, is such that a reasonable tribunal might convict”.

<sup>62</sup> *Prosecutor v. Zejnil Delalic et al.* (2001), Case No. IT-96-21-A, (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), at para. 434 [emphasis in original]. This test was previously stated in the *Prosecutor v. Dragoljub Kunarac et al.* (2000), Case No. IT-96-23&23/1-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Decision on Motion for Acquittal) at para. 3.

<sup>63</sup> *Prosecutor v. Goran Jelisc* (2001), Case No. IT-95-10-A (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at para. 37.



## B. “No case to answer” procedure

Rule 98 *bis* has its origin in the common law “no case to answer” procedure. Nevertheless, as noted by the Trial Chamber in *Kordic and Cerkez*<sup>64</sup> and cited with approval by the Appeals Chamber in the *Jelusic Appeals Judgment*<sup>65</sup>, Rule 98 *bis* must not necessarily be applied in the same way as proceedings for “no case to answer.”

It is true that Rule 98 *bis* proceedings, coming as they do at the end of the Prosecution’s case, bear a close resemblance to applications for “no case to answer” in common law jurisdictions. However, that does not necessarily mean that the regime to be applied for Rule 98 *bis* proceedings is the same as that which is applicable in the domestic jurisdictions of those countries. Ultimately, the regime to be applied for Rule 98 *bis* proceedings is to be determined on the basis of the *Statute* and the *Rules*, having in mind, in particular, its construction in the light of the context in which the *Statute* operates and the purpose it is intended to serve. That determination may be influenced by features of the regime in domestic jurisdictions with similar proceedings, but will not be controlled by it; and therefore a proper construction of the Rule may show a modification of some of those features in the transition from its domestic berth.

In the view of the present Trial Chamber, “[c]rucial to an understanding of the ‘no case to answer’ procedure in common law jurisdictions is the differing roles of the judges and jury in criminal trials: the judges being the tribunal of law and the jury, the tribunal of fact.”<sup>66</sup> It referred to *R. v. Galbraith*, in which it was held that “a balance has to be struck between on the one hand the usurpation of the jury’s functions and on the other the danger of an unjust conviction,”<sup>67</sup> as an illustration that “an essential function of the procedure is to ensure that at the end of the Prosecution’s case the jury is not left with evidence which cannot lawfully support a conviction.”<sup>68</sup> As to the balance between the functions of the judge and the jury, the Trial Chamber quoted the following passage from *R. v. Galbraith*:

- (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
- (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.
  - (a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed

<sup>64</sup> *Prosecutor v. Dario Kordic & Mario Cerkez* (2000), Case No. IT-95-14/2-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Decision on Defence Motions for Judgement of Acquittal) at para.9.

<sup>65</sup> *Jelusic*, *supra* note 7 at para.33.

<sup>66</sup> *Milosevic*, *supra* note 1 at para.11.

<sup>67</sup> *R. v. Galbraith*, 73 Cr. App. R. 124 (1981) at para.127 (per Lord Lane, C.J.), 125.

<sup>68</sup> *Milosevic*, *supra* note 1 at para. 11.

could not properly convict on it, it is his duty, on a submission being made, to stop the case.

- (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.<sup>69</sup>

The Trial Chamber then envisaged, *inter alia*, the following possibilities:

- Where there is no evidence to sustain a charge, the Motion is to be allowed. [...]
- Where there is some evidence, but it is such that, taken at its highest, a Trial Chamber could not convict on it, the Motion is to be allowed. This will be the case even if the weakness in the evidence derives from the weight to be attached to it, for example, the credibility of a witness. This is in accordance with the exception to the general principle in common law jurisdictions that issues of credibility and reliability must be left to the jury as the tribunal of fact.<sup>70</sup>
- Where there is some evidence, but it is such that its strength or weakness depends on the view taken of a witness's credibility and reliability, and on one possible view of the facts a Trial Chamber could convict on it, the Motion will not be allowed. [...]<sup>71</sup>

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<sup>69</sup> *Galbraith*, *supra* note 11 at para.127.

<sup>70</sup> *Milosevic*, *supra* note 1 at para.13, footnote 24: "See R. Watson, *Criminal Law* (New South Wales) (1996) at p.5740 (expressing this exception with great clarity: 'On a submission of no case the judge is concerned with the question whether there is evidence which is legally capable of leading to a conviction and not with the question whether the evidence is so lacking in weight that a conviction based upon it would be unsafe or unsatisfactory, except where the evidence is so inherently incredible that no reasonable person would accept its truth')." In the *Kordic* Judgement of Acquittal, the Trial Chamber held: "[...] generally the Chamber would not consider questions of credibility and reliability in dealing with a motion under Rule 98 *bis*; leaving those matters to the end of the case. However, there is one situation in which the Chamber is obliged to consider those matters; it is where the Prosecution's case has completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through cross-examination as to the reliability and credibility of a witness that the Prosecution is left without a case"; See also *Prosecutor v. Kvočka et al.* (2000), Case No. IT-98-30/1-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Decision on Defence Motion for Acquittal) at para.17; *Prosecutor v. Stanislav Galic* (2002), Case No. IT-98-29-T, (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Decision on the Motion for the Entry of the Acquittal of the Accused Stanislav Galic) at para. 11.

<sup>71</sup> *Milosevic*, *supra* note 1 at para.13(3).

## 1. DEPORTATION, FORCIBLE TRANSFER AND CROSS-BORDER TRANSFER

The Accused is charged, in the three Indictments<sup>72</sup> against him, with deportation as a crime against humanity under Article 5(d) of the *Statute*<sup>73</sup>, forcible transfer as a crime against humanity (other inhumane acts) under Article 5(i) of the *Statute*<sup>74</sup>, unlawful deportation or transfer as a grave breach of the *Geneva Conventions* under Article 2(g) of the *Statute*<sup>75</sup>.

Trial Chambers have held, in several judgments, that deportation is defined as “the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, across a national border, without lawful grounds.”<sup>76</sup> The crime of forcible transfer has been defined as a forced removal or displacement of people from one area to another which may take place within the same national borders.<sup>77</sup>

While the *Amici Curiae* submitted that deportation presumes transfer beyond borders, whereas forcible transfer relates to displacement within a State, the Prosecution submitted that deportation does not require border transfer. The Trial Chamber, therefore, decided to examine “the history of the law on deportation and forcible transfer” to facilitate an understanding of its development and status.<sup>78</sup>

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<sup>72</sup> The three Indictments are available on the Tribunal’s website on the “Indictments” page: <<http://www.un.org/icty/cases/indictindex-e.htm>> (“Kosovo Indictment”, IT-99-37-PT; “Croatia Indictment”, IT-02-54-T; “Bosnia Indictment”, IT-02-54-T). On 13 December 2001, the Trial Chamber ordered, *inter alia*, that the Croatia and Bosnia Indictments be joined and be given a common case number. (*Prosecutor v. Slobodan Milosevic* (2001), Case No. IT-99-37-PT, IT-01-50-PT, IT-01-51-PT, (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Decision on Prosecution’s Motion for Joinder)). On 1 February 2002, the Appeals Chamber ordered, *inter alia*, that the three Indictments “be tried together in the one trial” and that the case against the Accused be given a single number.

<sup>73</sup> Count 1 of the Kosovo Indictment, Count 14 of the Croatia Indictment, Count 16 of the Bosnia Indictment.

<sup>74</sup> Count 2 of the Kosovo Indictment, Count 15 of the Croatia Indictment, Count 17 of the Bosnia Indictment.

<sup>75</sup> Count 16 of the Croatia Indictment, Count 18 of the Bosnia Indictment.

<sup>76</sup> *Prosecutor v. Blagoje Simic et al.* (2003), Case No. IT-95-9-T, (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para.122; *Prosecutor v. Mladen Naletilic & Vinko Martinovic* (2003), Case No. IT-98-34-T, (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para.670; *Prosecutor v. Milorad Krnojelac* (2002), Case No. IT-97-25-T, (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) at paras. 474,476; *Prosecutor v. Radislav Krstic* (2001), Case No. IT-98-33-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at paras.521, 531-532.

<sup>77</sup> *Krnojelac, Ibid.* at para.474. The *Krstic* Trial Judgement defines both deportation and forcible transfer as “the involuntary and unlawful evacuation of individuals from the territory in which they reside.” See *Krstic, Ibid.* at para.521.

<sup>78</sup> *Milosevic, supra* note 1 at paras.47-79.

## 2. NUREMBERG INTERNATIONAL MILITARY TRIBUNAL (IMT)

The Trial Chamber found no reference to forcible transfer in the IMT case law but referred to the *United States of America v. Milch*<sup>79</sup> and held that the IMT dealt with deportation “as a crime involving cross-border transfer.”<sup>80</sup>

## 3. GENEVA CONVENTIONS

The Trial Chamber first referred to paragraph 1 of the Commentary to Article 49 of the *Geneva Convention IV*, which distinguishes between “forcible transfers” and “deportations.” This paragraph reads:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.<sup>81</sup>

It then referred to Article 17 (“Prohibition of forced movement of civilians”) of *Additional Protocol II to the Geneva Conventions*<sup>82</sup> and its commentary<sup>83</sup>, which reads:

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

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<sup>79</sup> Trials of war criminals before the Nuremberg Military Tribunals under Control Council law No. 10 (1952) vol. 6 at 681: “Displacement of groups of persons from one country to another is the proper concern of international law in as far as it affects the community of nations. International law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime [...]” [emphasis added]; see *Ibid.* at para.51, footnote 113.

<sup>80</sup> *Ibid.* at para.52.

<sup>81</sup> *Commentary to Article 49 of the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of August 12, 1949* (“*Geneva Convention IV*” or “*Fourth Geneva Convention*”) at 278, para.1; see *Ibid.* at para.53, footnote 114.

<sup>82</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 U.N.T.S 609 (entered into force December 7 1978); See *Ibid.* at para.54, footnote 116.

<sup>83</sup> C. Pilloud, *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987); see *Ibid.* at para.55, footnote 117.

It noted that its first paragraph covers “displacements of the civilian population as individuals or in groups within the territory of a Contracting Party where a conflict [...] is taking place” and that its second paragraph refers to the displacement of civilians (either individually or in groups) across a state border.<sup>84</sup>

The Trial Chamber inferred that

although *Additional Protocol II* does not deal with the crimes of deportation and forcible transfer in express terms, Article 17, paragraph 1 may be construed as referring to forcible transfer within the territory of a state, *i.e.*, internal displacement, and paragraph 2 may be interpreted as referring to deportation outside the territory of a state, *i.e.*, external displacement.<sup>85</sup>

#### 4. INTERNATIONAL LAW COMMISSION (ILC)

The Trial Chamber referred to the commentary to Article 18(g) (“arbitrary deportation or forcible transfer of population”) of the *1996 Draft Code Against the Peace and Security of Mankind*, which distinguishes between deportation and forcible transfer: “Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State.”<sup>86</sup>

#### 5. TRIBUNAL CASE LAW

The Trial Chamber noted that the Tribunal’s case law is “not uniformly consistent” in relation to the element of a “cross-border movement” and found that “the preponderance of case law favours the distinction based on destination.”<sup>87</sup>

The Trial Chamber first referred to paragraph 474 of the *Krnjelac* Trial Judgment, in which it was held, by reference to the *Krstic* Trial Judgment, that “[d]eportation requires the displacement of persons across a national border, to be distinguished from forcible transfer which may take place within national boundaries.” It then referred to the *Stakic* Trial Judgment, in which the Trial Chamber held that deportation pursuant to Article 5(d) of the *Statute* “must be read to encompass forced population displacements both across internationally recognized borders and *de facto* boundaries, such as constantly changing frontlines, which are not internationally recognized,” and defined deportation “as the forced displacement of persons by expulsion or other coercive acts for reasons not permitted under

<sup>84</sup> *Ibid.* at paras.1472-1473. Article 17 covers “expulsion of groups of civilians across the boundaries by armed forces or armed groups because of military operations” and “territory” refers to “the whole of the territory of a country”. See *Ibid.* at para.1474.

<sup>85</sup> *Milosevic*, *supra* note 1 at para.56.

<sup>86</sup> *International Law Commission Draft Code 1996*, Article 18, Commentary (13); see *Ibid.* at para.57, footnote 119.

<sup>87</sup> *Ibid.* at para.58.

international law from an area in which they are lawfully present to an area under the control of another party.”<sup>88</sup> The Trial Chamber finally referred to the *Simic* Trial Judgment, in which the Trial Chamber held that “[t]o establish deportation under Article 5 of the *Statute*, the crossing of a national border needs to be shown.”<sup>89</sup>

The Trial Chamber noted that the *Stakic* Trial Judgment “is the only case in which transfer across national border is not to be treated as a requirement for the crime of deportation.”<sup>90</sup>

## 6. STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

The Trial Chamber noted that, in the *ICC Statute*, the terms deportation and forcible transfer “appear to be given the same meaning.” Article 7(2)(d) of the *ICC Statute* provides: “Deportation or forcible transfer of population means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”

It referred to one commentator of this article who took the view that, in light of the common distinction between deportation as involving cross-border transfer, and forcible transfer as relating to movement within a country, it is likely that the common distinction between the two crimes was intended. It also referred to two other commentators. They were involved in the preparatory work of the *ICC Statute* and Elements of Crimes and asserted that “‘forcible transfer of population’ was added as an alternative to ‘deportation’ so as to encompass large-scale movements within a country’s borders.”<sup>91</sup>

The Trial Chamber expressed its view that if the drafters of the *ICC Statute* intended such a distinction, “it would be in line with customary international law,” and recognized that “the correctness of this interpretation must be a matter of dispute, since it contradicts what appears to be the plain meaning of Article 7(2)(d).”<sup>92</sup>

<sup>88</sup> *Prosecutor v. Milomir Stakic* (2003), Case No. IT-97-24-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) at para.679; see also *Prosecutor v. Milorad Krnojelac* (2003), Case No. IT-97-25-A (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Separate Opinion of Judge Schomburg) at para.15.

<sup>89</sup> *Simic*, *supra* note 21 at para.129.

<sup>90</sup> *Milosevic*, *supra* note 1 at para.674.

<sup>91</sup> C. Hall, in O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Baden-Baden : Nomos Verlagsgesellschaft, 1999) at 136; H. von Hebel & D. Robinson, “Crimes Within the Jurisdiction of the Court” in R. Lee, ed., *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (Boston: Kluwer Law International, 1999) at 99.

<sup>92</sup> *Milosevic*, *supra* note 1 at para.67. In the *Stakic* Trial Judgment, the Trial Chamber noted: “According to the Elements of Crimes for the International Criminal Court, the first element of this crime against humanity is that ‘[t]he perpetrator deported or forcibly transferred, without grounds under international law, one or more persons to another State or location, by expulsion or other coercive acts’”. At footnote 1338: “Assembly of State Parties to the Rome Statute of the International Criminal Court, 1st session, 3-10 Sept. 2002, Part II.B. Elements of Crimes, ICC-ASP/1/3 [emphasis added].”) While such

## 7. CONCLUSION

The Trial Chamber held the following:

[...] the distinction between deportation and forcible transfer is recognized in customary international law. Deportation relates to involuntary transfer across national borders, while forcible transfer relates to involuntary transfers within a state. Article 7(2)(d) of the *ICC Statute*, if it conflates the two crimes, does not reflect customary international law.<sup>93</sup>

The *ICC Statute* adhered to the Trial Chamber's finding in the *Simic* Trial Judgment that both crimes protect the same values, namely, "the right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location."<sup>94</sup> It also adhered to the finding of the Appeals Chamber in the *Krnjelac* Appeals Judgment:

The prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent.<sup>95</sup>

Since both crimes protect the same values, the Trial Chamber held that

[t]here is no detriment to a victim if the crime of deportation is confined to transfer across borders, because if it is established that he has not been so transferred, then he is protected by the prohibition against forcible transfer, which applies to involuntary movements within national borders.<sup>96</sup>

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simultaneous use of both terms (deportation and forcible transfer) might create terminological confusion in the law, it is clear that the *Statute* of the International Criminal Court does not require proof of crossing an international border but only that the civilian population was displaced." See *Prosecutor v. Milomir Stakic* (2003), Case No. 97-24-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para. 680.

<sup>93</sup> *Milosevic*, *supra* note 1 at para.68.

<sup>94</sup> *Simic*, *supra* note 21 at para.130.

<sup>95</sup> In *Krnjelac*, the Appeals Chamber found in the same paragraph that the "acts of forcible displacement underlying the crime of persecution punishable under Article 5(h) of the *Statute* are not limited to displacements across a national border". See *Prosecutor v. Milorad Krnjelac* (2003), Case No. IT-97-25-A (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at para.218.

<sup>96</sup> *Milosevic*, *supra* note 1 at para.69.

## 8. DEFINITION OF A STATE

The Trial Chamber had to determine whether Croatia was a State, or became a State, on 8 October 1991, as argued by the Prosecution, or whether it only became a State at some time between 15 January 1992 and 22 May 1992, as contended by the *Amici Curiae*.

The Trial Chamber noted that the “best known definition of a state is the one provided by Article 1 of the *Montevideo Convention*.”<sup>97</sup> This article reads:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.<sup>98</sup>

It found that those four criteria have been used “time and again” in questions related to statehood and that “reliance on them is so widespread that in some quarters they are seen as reflecting customary international law.”<sup>99</sup> To support its finding, the Trial Chamber relied on one commentator who referred to the *Montevideo Convention* as a “crystallization of the state of customary international law” and as having exercised “great influence on the way in which the legal characteristics of statehood have been understood since.”<sup>100</sup>

In the present case, the Trial Chamber did not find it necessary to determine whether those criteria have the status of customary international law, but nevertheless, felt “sufficiently confident” to rely on them as “reflecting well-established core principles for the determination of statehood.” It concluded that “the criteria of statehood are laid down by law”<sup>101</sup> and that the law, in its view, “is reflected by the four criteria set out in the *Montevideo Convention*.”<sup>102</sup> The Trial Chamber, using these criteria, found that “there is sufficient evidence that Croatia was a State by 8 October 1991 for the purposes of Rule 98 *bis*.”<sup>103</sup>

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<sup>97</sup> *Ibid.* at para.85.

<sup>98</sup> *Montevideo Convention on Rights and Duties of States*, 26 December 1933, 165 U.N.T.S. 19 (entered into force 26 December 1934).

<sup>99</sup> *Milosevic*, *supra* note 1 at para.86.

<sup>100</sup> C. Warbrick, “States and Recognition in International Law” in M.D. Evans, ed., *International Law* (Oxford: Oxford University Press, 2003) at 221.

<sup>101</sup> The Trial Chamber referred in its footnote to I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003) at 86-88; J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979) at 17.

<sup>102</sup> *Milosevic*, *supra* note 1 at para.87.

<sup>103</sup> *Ibid.* at para.115. For a complete application of these criteria to the present case, see paras. 94-114 of *Milosevic*.



## 9. AIDING AND ABETTING GENOCIDE AND COMPLICITY IN GENOCIDE

The question arose in the present case as to whether the Accused aided and abetted in the commission of the crime of genocide in Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina and Bosanski Novi, or was complicit in its commission.

The Trial Chamber first referred to the *Krstic* Appeals Judgment, in which the Appeals Chamber, *inter alia*, held the following:

- [t]he conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the *Statute* and case law of the Tribunal,<sup>104</sup>
- there is authority to the effect that the conviction of 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."<sup>105</sup>

The Trial Chamber observed that the Appeals Chamber convicted *Krstic* as an aider and abettor in the crime of genocide but noted that the Appeals Chamber's finding was "*obiter dicta*" as it was "confined to the facts of that case."<sup>106</sup> As to the Appeals Chamber's finding that complicity in genocide can strike broader than the offence of aiding and abetting, the Trial Chamber noted that the Appeals Chamber took no position as to the *mens rea* of complicity,<sup>107</sup> therefore found that "there is [...] no authoritative decision within the Tribunal as to whether there is a difference in the *mens rea* for aiding and abetting genocide and complicity in genocide, either when the latter is broader than aiding and abetting, or indeed when it is of the same scope as aiding and abetting."<sup>108</sup> It found that "[i]n the absence of anything to indicate that complicity in genocide is broader than aiding and abetting in the circumstances of this case, [...] there is merit in the Prosecution's submission that the two are essentially the same."<sup>109</sup>

The Trial Chamber then referred with approval to the *Stakic* Trial Judgment, in which the Trial Chamber held that complicity in genocide under Article 4(3)(e) is

<sup>104</sup> *Prosecutor v. Radislav Krstic* (2004), Case No. IT-98-33-A (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at para.140.

<sup>105</sup> *Ibid.* at para.142.

<sup>106</sup> *Milosevic, supra* note 1 at para.295 (including footnote 761); *Prosecutor v. Radislav Krstic* (2004), Case No. IT-98-33-A (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at para.139. ("The Appeals Chamber concludes that the latter approach [*i.e.*, characterising *Krstic*'s responsibility as aiding and abetting under Article 7(1) of the *Statute*] is the correct one in this case.")

<sup>107</sup> See footnote 247 of *Krstic, Ibid.* at para.142: "As it is not at issue in this case, the Appeals Chamber takes no position on the *mens rea* requirement for the conviction for the offence of complicity in genocide under Article 4(3) of the *Statute* where this offense strikes broader than the prohibition of aiding and abetting".

<sup>108</sup> *Milosevic, supra* note 1 at para.296.

<sup>109</sup> *Ibid.* at para.297 [emphasis added].

the *lex specialis* in relation to liability under Article 7(1).<sup>110</sup> As a result, it refused the Prosecution's suggestion that the Trial Chamber confine itself to a determination of the Accused's responsibility as an aider or abettor. It found that the Accused's form of liability "may be complicity in genocide" but refused to determine the matter at that stage of the trial, leaving such determination, "if necessary," to the judgment phase.<sup>111</sup>

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<sup>110</sup> See *Prosecutor v. Milomar Stakic* (2003), Case No. IT-97-24-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) at para.531: "The Trial Chamber considered the relationship between Article 7(1) and complicity in genocide under Article 4(3) in its Decision on 98 *bis* Motion for Judgement of Acquittal. Noting the overlap between Articles 7(1) and 4(3), the Trial Chamber concluded that two approaches are possible. Article 4(3) can either be regarded as *lex specialis* in relation to Article 7(1) (*lex generalis*), or the modes of participation under Article 7(1) can be read into Article 4(3)".

<sup>111</sup> *Milosevic*, *supra* note 1 at para.297.