UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991

Case No: IT-98-33-A

Date: 19 April 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement: **19 April 2004**

PROSECUTOR

v.

RADISLAV KRSTIĆ

JUDGEMENT

Counsel for the Prosecution:

Mr. Norman Farrell
Mr. Mathias Marcussen
Ms. Magda Karagiannakis
Mr. Xavier Tracol
Mr. Dan Moylan

Counsel for the Defendant:

Mr. Nenad Petrušić
Mr. Norman Sepenuk

II. THE TRIAL CHAMBER'S FINDING THAT GENOCIDE OCCURRED IN SREBRENICA

5. The Defence appeals Radislav Krstić's conviction for genocide committed against Bosnian Muslims in Srebrenica. The Defence argues that the Trial Chamber both misconstrued the legal definition of genocide and erred in applying the definition to the circumstances of this case.[4] With respect to the legal challenge, the Defence's argument is two-fold. First, Krstić contends that the Trial Chamber's definition of the part of the national group he was found to have intended to destroy was unacceptably narrow. Second, the Defence argues that the Trial Chamber erroneously enlarged the term "destroy" in the prohibition of genocide to include the geographical displacement of a community.

A. The Definition of the Part of the Group

6. Article 4 of the Tribunal's Statute, like the Genocide Convention,[5] covers certain acts done with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The Indictment in this case alleged, with respect to the count of genocide, that Radislav Krstić "intend[ed] to destroy a part of the Bosnian Muslim people as a national, ethnical, or religious group."[6] The targeted group identified in the Indictment, and accepted by the Trial Chamber, was that of the Bosnian Muslims.[7] The Trial Chamber determined that the Bosnian Muslims were a specific, distinct national group, and therefore covered by Article 4.[8] This conclusion is not challenged in this appeal.[9]

7. As is evident from the Indictment, Krstić was not alleged to have intended to destroy the entire national group of Bosnian Muslims, but only a part of that group. The first question presented in this appeal is whether, in finding that Radislav Krstić had genocidal intent, the Trial Chamber defined the relevant part of the Bosnian Muslim group in a way which comports with the requirements of Article 4 and of the Genocide Convention.

8. It is well established that where a conviction for genocide relies on the intent to destroy a protected group "in part," the part must be a substantial part of that group. The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted

[4] The latter challenge is examined in Part III of this Judgement, which considers whether the Trial Chamber was correct to find that the facts of this case supported the charge of genocide.
[5] Article II of the Genocide Convention.
[6] Indictment, para. 21.
[7] *See* Trial Judgement, para. 558 ("the indictment in this case defined the targeted group as the Bosnian Muslims").
[8] *Ibid.*, paras. 559 - 560.
[9] *See* Defence Appeal Brief, paras. 28, 38.

must be significant enough to have an impact on the group as a whole. Although the Appeals Chamber has not yet addressed this issue, two Trial Chambers of this Tribunal have examined it. In *Jelisić*, the first case to confront the question, the Trial Chamber noted that, "[g]iven the goal of the [Genocide] Convention to deal with mass crimes, it is widely acknowledged that the intention to destroy must target at least a *substantial* part of the group."[10] The same conclusion was reached by the *Sikirica* Trial Chamber: "This part of the definition calls for evidence of an intention to destroy a substantial number relative to the total population of the group."[11] As these Trial Chambers explained, the substantiality requirement both captures genocide's defining character as a crime of massive proportions and reflects the Convention's concern with the impact the destruction of the targeted part will have on the overall survival of the group.[12]

9. The question has also been considered by Trial Chambers of the ICTR, whose Statute contains an identical definition of the crime of genocide.[13] These Chambers arrived at the same conclusion. In *Kayishema*, the Trial Chamber concluded, after having canvassed the authorities interpreting the Genocide Convention, that the term "'in part' requires the intention to destroy a considerable number of individuals who are part of the group."[14] This definition was accepted and refined by the Trial Chambers in *Bagilishema* and *Semanza*, which stated that the intent to destroy must be, at least, an intent to destroy a substantial part of the group.[15]

10. This interpretation is supported by scholarly opinion. The early commentators on the Genocide Convention emphasized that the term "in part" contains a substantiality requirement. Raphael Lemkin, a prominent international criminal lawyer who coined the term "genocide" and was instrumental in the drafting of the Genocide Convention, addressed the issue during the 1950 debate in the United States Senate on the ratification of the Convention. Lemkin explained that "the

[10] *Jelisić* Trial Judgement, para. 82 (citing Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May – 26 July 1996, G.A.O.R., 51st session, Supp. No. 10 (A/51/10) (1996), p. 89; Nehemiah Robinson, *The Genocide Convention: A Commentary* (1960) (1st ed. 1949), p. 63; *Genocide Convention, Report of the Committee on Foreign Relations*, U.S. Senate, 18 July 1981), p. 22). The *Jelisić* Trial Judgement was reversed in part by the Appeals Chamber on other grounds. *See Jelisić* Appeal Judgement, para. 72. The Trial Chamber's definition of what constitutes an appropriate part of the group protected by the Genocide Convention was not challenged.
[11] *Sikirica* Judgement on Defence Motions to Acquit, para. 65.
[12] *Jelisić* Trial Judgement, para. 82; *Sikirica* Judgement on Defence Motions to Acquit, para. 77.
[13] *See* Art. 2 of the ICTR Statute (defining the specific intent requirement of genocide as the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such").
[14] *Kayishema and Ruzindana* Trial Judgement, para. 97.
[15] *See Bagilishema* Trial Judgement, para. 64 ("the intention to destroy must target at least a substantial part of the group") (citing *Kayishema and Ruzindana* Trial Judgement, para. 97); *Semanza* Trial Judgement and Sentence, para. 316 ("The intention to destroy must be, at least, to destroy a substantial part of the group") (citing *Bagilishema* Trial Judgement, para. 64). While *Kayishema* used the term "considerable number" rather than "substantial part," *Semanza* and *Bagilishema* make it clear that *Kayishema* did not intend to adopt a different standard with respect to the definition of the term "a part." The standard adopted by the Trial Chambers of the ICTR is therefore consistent with the jurisprudence of this Tribunal.

destruction in part must be of a substantial nature so as to affect the entirety."[16] He further suggested that the Senate clarify, in a statement of understanding to accompany the ratification, that "the Convention applies only to actions undertaken on a mass scale."[17] Another noted early commentator, Nehemiah Robinson, echoed this view, explaining that a perpetrator of genocide must possess the intent to destroy a substantial number of individuals constituting the targeted group.[18] In discussing this requirement, Robinson stressed, as did Lemkin, that "the act must be directed toward the destruction of a *group*," this formulation being the aim of the Convention.[19]

11. Recent commentators have adhered to this view. The International Law Commission, charged by the UN General Assembly with the drafting of a comprehensive code of crimes prohibited by international law, stated that "the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group."[20] The same interpretation was adopted earlier by the 1985 report of Benjamin Whitaker, the Special Rapporteur to the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.[21]

12. The intent requirement of genocide under Article 4 of the Statute is therefore satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group. The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. 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.[22]

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[16] 2 Executive Sessions of the Senate Foreign Relations Committee, Historical Series (1976), p. 370; *see also Jelisić* Trial Judgement, para. 82; William A. Schabas, *Genocide in International Law* (2000), p. 238.
[17] *Ibid.*, *cited in* William A. Schabas, *Genocide in International Law* (2000), p. 238.
[18] Nehemia Robinson, *The Genocide Convention: A Commentary* (1960), pp. 63.
[19] *Ibid.,* p.58.
[20] Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May – 26 July 1996, p. 89. The Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission, contains a prohibition of the offence of genocide substantively similar to the prohibition present in the Genocide Convention. The Draft code is not binding as a matter of international law, but is an authoritative instrument, parts of which may constitute evidence of customary international law, clarify customary rules, or, at the very least, "be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world." *Furundžija* Trial Judgement, para. 227.
[21] Benjamin Whitaker, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, U.N. Doc. E/CN.4/Sub.2/1985/6, para. 29 ("'In part' would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group, such as its leadership."); *see also Jelisić* Trial Judgement, para. 65 (quoting the report); Trial Judgement, para. 587 (same).
[22] The Trial Chambers in *Jelisić* and *Sikirica* referred to this factor as an independent consideration which is sufficient, in and of itself, to satisfy the requirement of substantiality. *See Jelisić* Trial Judgement, para. 82; *Sikirica* Trial

13. The historical examples of genocide also suggest that the area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of that enterprise on a global scale. Similarly, the perpetrators of genocide in Rwanda did not seriously contemplate the elimination of the Tutsi population beyond the country's borders.[23] The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can - in combination with other factors - inform the analysis.

14. These considerations, of course, are neither exhaustive nor dispositive. They are only useful guidelines. The applicability of these factors, as well as their relative weight, will vary depending on the circumstances of a particular case.

15. In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia.[24] This conclusion comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people.[25] This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region.[26] Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the

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Judgement, para. 65. Properly understood, this factor is only one of several which may indicate whether the substantiality requirement is satisfied.

[23] For a discussion of these examples, see William A. Schabas, *Genocide in International Law* (2000), p. 235.

[24] Trial Judgement, para. 560 ("The Chamber concludes that the protected group, within the meaning of Article 4 of the Statute, must be defined, in the present case, as the Bosnian Muslims. The Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia constitute a part of the protected group under Article 4."). *See also* Trial Judgement, para. 591. Although the Trial Chamber did not delineate clearly the interrelationship between these two alternative definitions, an explanation can be gleaned from its Judgement. As the Trial Chamber found, "most of the Bosnian Muslims residing in Srebrenica at the time of the [Serbian] attack were not originally from Srebrenica but from all around the central Podrinje region." Trial Judgement, para. 559; *see also ibid.*, para. 592 (speaking about "the Bosnian Muslim community of Srebrenica and its surrounds"). The Trial Chamber used the term "Bosnian Muslims of Srebrenica" as a short-hand for the Muslims of both Srebrenica and the surrounding areas, most of whom had, by the time of the Serbian attack against the city, sought refuge with the enclave. This is also the sense in which the term will be used in this Judgement.

[25] While the Trial Chamber did not make a definitive determination as to the size of the Bosnian Muslim community in Srebrenica, the issue was not in dispute. The Prosecution estimated the number to be between 38,000 and 42,000. *See* Trial Judgement, para. 592. The Defence's estimate was 40,000. *See ibid.*, para. 593.

[26] The pre-war Muslim population of the municipality of Srebrenica was 27,000. Trial Judgement, para. 11. By January 1993, four months before the UN Security Council declared Srebrenica to be a safe area, its population swelled to about 50,000 – 60,000, due to the influx of refugees from nearby regions. *Ibid.*, para. 14. Between 8,000 and 9,000 of those who found shelter in Srebrenica were subsequently evacuated in March – April 1993 by the UN High Commissioner for Refugees. *Ibid.*, para. 16.

importance of the Muslim community of Srebrenica is not captured solely by its size.[27] As the Trial Chamber explained, Srebrenica (and the surrounding Central Podrinje region) were of immense strategic importance to the Bosnian Serb leadership. Without Srebrenica, the ethnically Serb state of Republica Srpska they sought to create would remain divided into two disconnected parts, and its access to Serbia proper would be disrupted.[28] The capture and ethnic purification of Srebrenica would therefore severely undermine the military efforts of the Bosnian Muslim state to ensure its viability, a consequence the Muslim leadership fully realized and strove to prevent. Control over the Srebrenica region was consequently essential to the goal of some Bosnian Serb leaders of forming a viable political entity in Bosnia, as well as to the continued survival of the Bosnian Muslim people. Because most of the Muslim inhabitants of the region had, by 1995, sought refuge within the Srebrenica enclave, the elimination of that enclave would have accomplished the goal of purifying the entire region of its Muslim population.

16. In addition, Srebrenica was important due to its prominence in the eyes of both the Bosnian Muslims and the international community. The town of Srebrenica was the most visible of the "safe areas" established by the UN Security Council in Bosnia. By 1995 it had received significant attention in the international media. In its resolution declaring Srebrenica a safe area, the Security Council announced that it "should be free from armed attack or any other hostile act."[29] This guarantee of protection was re-affirmed by the commander of the UN Protection Force in Bosnia (UNPROFOR) and reinforced with the deployment of UN troops.[30] The elimination of the Muslim population of Srebrenica, despite the assurances given by the international community, would serve as a potent example to all Bosnian Muslims of their vulnerability and defenselessness in the face of Serb military forces. The fate of the Bosnian Muslims of Srebrenica would be emblematic of that of all Bosnian Muslims.

17. Finally, the ambit of the genocidal enterprise in this case was limited to the area of Srebrenica. While the authority of the VRS Main Staff extended throughout Bosnia, the authority of the Bosnian Serb forces charged with the take-over of Srebrenica did not extend beyond the Central Podrinje region. From the perspective of the Bosnian Serb forces alleged to have had genocidal intent in this case, the Muslims of Srebrenica were the only part of the Bosnian Muslim group within their area of control.

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[27] The Muslim population of Bosnia and Herzegovina in 1995, when the attack against Srebrenica took place, was approximately 1,400,000. *See* http://www.unhabitat.org/habrdd/conditions/southeurope/bosnia.htm, accessed 26/03/2004 (estimating that the Muslims constituted 40 percent of the 1995 population of 3,569,000). The Bosnian Muslims of Srebrenica therefore formed about 2.9 percent of the overall population.
[28] Trial Judgement, para. 12; *see also* para. 17.

18. In fact, the Defence does not argue that the Trial Chamber's characterization of the Bosnian Muslims of Srebrenica as a substantial part of the targeted group contravenes Article 4 of the Tribunal's Statute. Rather, the Defence contends that the Trial Chamber made a further finding, concluding that the part Krstić intended to destroy was the Bosnian Muslim men of military age of Srebrenica.[31] In the Defence's view, the Trial Chamber then engaged in an impermissible sequential reasoning, measuring the latter part of the group against the larger part (the Bosnian Muslims of Srebrenica) to find the substantiality requirement satisfied.[32] The Defence submits that if the correct approach is properly applied, and the military age men are measured against the entire group of Bosnian Muslims, the substantiality requirement would not be met.[33]

19. The Defence misunderstands the Trial Chamber's analysis. The Trial Chamber stated that the part of the group Radislav Krstić intended to destroy was the Bosnian Muslim population of Srebrenica.[34] The men of military age, who formed a further part of that group, were not viewed by the Trial Chamber as a separate, smaller part within the meaning of Article 4. Rather, the Trial Chamber treated the killing of the men of military age as evidence from which to infer that Radislav Krstić and some members of the VRS Main Staff had the requisite intent to destroy all the Bosnian Muslims of Srebrenica, the only part of the protected group relevant to the Article 4 analysis.

20. In support of its argument, the Defence identifies the Trial Chamber's determination that, in the context of this case, "the intent to kill the men [of military age] amounted to an intent to destroy a substantial part of the Bosnian Muslim group."[35] The Trial Chamber's observation was proper. As a specific intent offense, the crime of genocide requires proof of intent to commit the underlying act and proof of intent to destroy the targeted group, in whole or in part. The proof of the mental state with respect to the commission of the underlying act can serve as evidence from which the fact-finder may draw the further inference that the accused possessed the specific intent to destroy.

21. The Trial Chamber determined that Radislav Krstić had the intent to kill the Srebrenica Bosnian Muslim men of military age. This finding is one of intent to commit the requisite genocidal act – in this case, the killing of the members of the protected group, prohibited by Article 4(2)(a) of the Statute. From this intent to kill, the Trial Chamber also drew the further inference

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[29] Security Council Resolution 819, UN Doc. S/RES/819 (1993), quoted in Trial Judgement, para. 18 & n. 17. The two other protected enclaves created by the Security Council were Žepa and Goražde. *See* Security Council Resolution 824, UN Doc. S/RES/824 (1993); Trial Judgement, para. 18 & n. 18.
[30] Trial Judgement, paras. 15, 19 - 20.
[31] Defence Appeal Brief, paras. 38 - 39.
[32] *Ibid.*, para. 40.
[33] *Ibid.*
[34] Trial Judgement, paras. 560, 561.
[35] Defence Appeal Brief, para. 40 (quoting Trial Judgement, para. 634) (internal quotation marks omitted).

that Krstić shared the genocidal intent of some members of the VRS Main Staff to destroy a substantial part of the targeted group, the Bosnian Muslims of Srebrenica.

22. It must be acknowledged that in portions of its Judgement, the Trial Chamber used imprecise language which lends support to the Defence's argument.[36] The Trial Chamber should have expressed its reasoning more carefully. As explained above, however, the Trial Chamber's overall discussion makes clear that it identified the Bosnian Muslims of Srebrenica as the substantial part in this case.

23. The Trial Chamber's determination of the substantial part of the protected group was correct. The Defence's appeal on this issue is dismissed.

B. The Determination of the Intent to Destroy

[36] *See, e.g.*, para. 581 ("Since in this case primarily the Bosnian Muslim men of military age were killed, a second issue is whether this group of victims represents a sufficient part of the Bosnian Muslim group so that the intent to destroy them qualifies as an 'intent to destroy the group in whole or in part' under Article 4 of the Statute."); para. 634 ("[T]he Trial Chamber has concluded that, in terms of the requirement of Article 4(2) of the Statute that an intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively, the military aged Bosnian Muslim men of Srebrenica do in fact constitute a substantial part of the Bosnian Muslim group, because the killing of these men inevitably and fundamentally would result in the annihilation of the entire Bosnian Muslim community at Srebrenica.").
[37] Defence Appeal Brief, para. 43.
[38] *Ibid.*, paras. 46 - 47.
[39] 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, G.A.O.R., 51st session, Supp. No. 10 (A/51/10) (1996), pp. 90-91. The commentators agree. *See, e.g.*, William A. Schabas, *Genocide in International Law* (2000), p. 229 (concluding that the drafting history of the Convention would not sustain a construction of the genocidal intent which extends beyond an intent at physical destruction).