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International Criminal Tribunal for the Former Yugoslavia

The Second Srebrenica Trial: *Prosecutor v. Vidoje Blagojević and Dragan Jokić*

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Abstract

In its judgment issued on 17 January 2005, in *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Trial Chamber I, Section A, found that genocide had been committed against the Bosnian Muslim population following the fall of the Srebrenica 'safe area' in July 1995. The Trial Chamber's findings that forcible transfer, when combined with other acts, can constitute an underlying act of genocide (namely, causing serious mental harm to members of a group) contributes to a growing body of jurisprudence on genocide. The Trial Chamber found the accused guilty of such serious crimes as complicity in genocide, extermination, persecutions and murder. It determined that the appropriate mode of liability for each was aiding and abetting rather than committing through participation in a joint criminal enterprise. Accordingly the Trial Chamber sentenced Vidoje Blagojević to 18 years' imprisonment and Dragan Jokić to nine years' imprisonment.

Key words

Srebrenica; genocide; complicity in genocide; forcible transfer; assignment of counsel; guilty plea

1. Introduction

On 17 January 2005, Trial Chamber I, Section A of the International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal) delivered its judgment in the case *Prosecutor v. Vidoje Blagojević and Dragan Jokić*.[1] This is the second judgment following trial at the Tribunal to focus on the crimes committed following the fall of the UN 'safe area' of Srebrenica in July 1995.[2] Radislav Krstić, the commander of the

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1. *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment, T.Ch. I, Sec.A, delivered on 17 January 2005 and filed on 24 January 2005 (hereafter Judgment). The Trial Chamber comprised Judges Liu Daqun, Presiding (China), Volodymyr Vassylenko (Ukraine) and Carmen Maria Argibay (Argentina).

2. Three accused have pleaded guilty to crimes committed in and around Srebrenica in July 1995 pursuant to plea agreements. See *Prosecutor v. Erdemović*, (First) Sentencing Judgment, Case No. IT-96-22-T, T.Ch. I, 29 November 1996 and *Prosecutor v. Erdemović*, Case No. IT-96-22-T*bis*, (Second) Sentencing Judgment, T.Ch.

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Drina Corps, received the final judgment in his case in April 2004, and is currently serving a 35-year sentence in the United Kingdom, having been convicted of inter alia aiding and abetting genocide.[3] As eight persons indicted for crimes related to the fall of Srebrenica have been taken into the custody of the Tribunal in the last six months, the *Blagojević and Jokić* judgment will not, however, be the last.[4]

1.1. The case against Vidoje Blagojević and the Trial Chamber's findings

Vidoje Blagojević, a Colonel in the Army of Republika Srpska, was the commander of the Bratunac Brigade. By virtue of his position, the prosecution alleged that Blagojević participated in the forcible transfer of women and children from the Srebrenica enclave to non-Serb held territory in Bosnia and Herzegovina, and was responsible for all prisoners captured, detained or killed within his zone of responsibility, including thousands of Bosnian Muslim male prisoners captured in the Bratunac Brigade zone and subsequently transported to the Zvornik Brigade zone for further detention and execution.[5]

Blagojević was charged with complicity in genocide; extermination as a crime against humanity; murder as a crime against humanity and a violation of the laws or customs of war; persecutions as a crime against humanity; and inhumane acts (forcible transfer) as a crime against humanity. The prosecution alleged that he was both directly responsible under Article 7(1) of the Statute, including for 'committing' the crimes as part of a joint criminal enterprise, and responsible as a superior pursuant to Article 7(3) of the Statute.

The Trial Chamber convicted Vidoje Blagojević of complicity in genocide, murder,[6] persecutions, and inhumane acts (forcible transfer). Having dismissed all forms of liability except aiding and abetting and liability as a superior pursuant to Article 7(3) in relation to all counts, as well as maintaining joint criminal enterprise in relation to forcible transfer[7] at the Rule 98 *bis* stage,[8] the Trial Chamber found

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II, 5 March 1998; *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Sentencing Judgment, T.Ch. I, Sec.A, 2 December 2003 (hereafter *Nikolić* Sentencing Judgment); *Prosecutor v. Obrenović*, Case No. IT-02-60/2-S, Sentencing Judgment, T.Ch. I, Sec.A, 10 December 2003. The judgments in the cases against Momir Nikolić and Dragan Obrenović were rendered by the same Trial Chamber that heard the *Blagojević and Jokić* trial.

3. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, A.Ch., 19 April 2004 (hereafter *Krstić* Appeal Judgment).
4. The persons indicted for crimes related to Srebrenica currently in the custody of the Tribunal are Ljubiša Beara, Milan Gvero, Radivoje Miletić, Drago Nikolić, Vinko Pandurević, Ljubomir Borovčanin, Milorad Trbić and Vujadin Popović. As of the end of April 2005, three persons indicted for crimes related to the massacres committed following the fall of Srebrenica in July 1995 remained at large: Radovan Karadžić, Ratko Mladić (both indicted in November 1995 for crimes in and around Srebrenica) and Zdravko Tolimir (indicted in February 2005).
5. *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Indictment, 23 May 2003 (hereafter Indictment), para. 36, and paras. 36–51 generally.
6. As will be discussed below, Vidoje Blagojević was convicted for murders committed in the town of Bratunac. He was found not guilty of the mass executions which occurred at numerous locations in the Bratunac and Zvornik municipalities in the days following the fall of Srebrenica.
7. Forcible transfer (as an underlying act for persecutions and inhumane acts (forcible transfer)) was charged under the first form of joint criminal enterprise, which requires that the accused share the criminal intent of the other participants in the enterprise and 'intend the criminal result'. Judgment, *supra* note 1, para. 703.
8. *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment on Motions for Acquittal Pursuant to Rule 98 *bis*, 5 April 2004 (hereafter Judgment on Motions for Acquittal), paras. 47–51, 56, 57. The Trial Chamber dismissed joint criminal enterprise as a mode of liability in relation to the mass executions. Rule 98 *bis* of the Rules of Procedure and Evidence of the Tribunal (Rules) provided, at the time of the Judgment on Motions

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the 'more appropriate' form of criminal liability for Blagojević to be aiding and abetting.[9] As will be discussed below, the Trial Chamber understood aiding and abetting genocide as a form of liability under complicity in genocide. The Trial Chamber sentenced Vidoje Blagojević to 18 years' imprisonment.[10]

1.2. The case against Dragan Jokić and the Trial Chamber's findings

Dragan Jokić, a Major in the Army of the Republika Srpska, served as duty officer in the Zvornik Brigade for a 24-hour period during which thousands of Bosnian Muslim men were transported to detention centres around the Zvornik municipality, from which they were taken to various execution sites in the Zvornik Brigade's area of responsibility and murdered. He also was the chief of engineering for the Zvornik Brigade. As such, he was alleged to be responsible for, inter alia, organizing and directing the deployment of engineering company personnel and equipment used to bury thousands of Bosnian Muslim men in mass graves at or nearby the execution sites.

Dragan Jokić was charged with extermination, murder, and persecutions under Article 7(1) of the Statute. The Trial Chamber had entered a judgment of acquittal for all counts, insofar as Jokić's individual criminal responsibility was alleged under Article 7(1) for planning, instigating, and ordering the crimes;[11] it thus only had to consider his liability as a member of a joint criminal enterprise and as an aider and abettor.[12]

Dragan Jokić was convicted of extermination, murder as a crime against humanity and a violation of the laws or customs of war,[13] and persecutions, as an aider and abettor. He was sentenced to nine years' imprisonment.[14]

2. Trial proceedings

Before addressing the judgment itself, two aspects of the trial proceedings deserve consideration: the guilty pleas of two co-accused at the start of trial and their

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for Acquittal, for an accused to bring a motion for the entry of judgment of acquittal on one or more offences charged in the indictment upon the completion of the prosecution's case. If the trial chamber finds that the evidence is insufficient to sustain a conviction on that or those charges, it 'shall order the entry of judgment of acquittal on motion of an accused or *proprio motu*'. Rule 98 *bis* was amended in December 2004, and now provides that a trial chamber 'shall, by oral decision and after hearing the oral submissions of the parties, enter a judgment of acquittal on any count if there is no evidence capable of supporting a conviction'.

9. See Judgment, *supra* note 1, paras. 713, 796.
10. The prosecution has challenged the sentence, characterizing it as 'manifestly inadequate'. At the time of writing this note, the defence for Vidoje Blagojević had not yet filed its notice of appeal, having been granted an extension of time in which to do so.
11. Judgment on Motions for Acquittal, *supra* note 8. The Trial Chamber also dismissed a number of factual allegations.
12. Dragan Jokić was alleged to have been a member of a joint criminal enterprise in relation to the mass executions; he was not charged with forcible transfer.
13. The murder and extermination charges were based on specific allegations of mass executions at different execution sites throughout the Zvornik Brigade area of responsibility. Based on its determination of Dragan Jokić's knowledge of the overall execution operation and the involvement of resources from the Zvornik Brigade (personnel or equipment) that had a link to Dragan Jokić, the Trial Chamber found that Dragan Jokić had liability for some, but not all, of the mass executions charged.
14. The prosecution has challenged the sentence, characterizing it as 'manifestly inadequate'. While Jokić seeks a full acquittal in his notice of appeal, in the alternative, he seeks a 'substantial reduction' of the sentence.

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subsequent testimony in the case against Vidoje Blagojević and Dragan Jokić, and the assignment of counsel to Blagojević.

2.1. Guilty pleas

The trial of Vidoje Blagojević and Dragan Jokić was scheduled to commence with four accused. On the eve of trial, the prosecution and Momir Nikolić filed a motion for consideration of a joint plea agreement, pursuant to which the prosecution would move to dismiss all charges against Nikolić – including a charge of genocide – except for one count of persecutions, and Nikolić would plead guilty to that count of persecutions and further agreed to testify in Srebrenica-related trials, including the *Blagojević and Jokić* trial. The prosecution recommended a sentence of 15 to 20 years for Momir Nikolić. Expressing concern about certain terms of the plea agreement, and in particular the provision that the prosecution would hold all other counts but persecutions in abeyance but not formally dismiss the charges until Nikolić was sentenced, the Trial Chamber declined to accept the guilty plea.[15] After an amended plea agreement was drafted which took into account the Trial Chamber's concerns, the Trial Chamber accepted Momir Nikolić's plea of guilty for the crime of persecutions.[16]

Nearly two weeks later, during the examination of the first witness, Dragan Obrenović and the prosecution filed a joint motion for consideration of his plea agreement. In this case, the Trial Chamber accepted Obrenović's guilty plea immediately after satisfying itself that the plea was voluntary, informed, and not equivocal, and that there was a sufficient factual basis to establish the crime of persecutions.

While the guilty pleas and the severance of Nikolić and Obrenović had practical implications for the *Blagojević and Jokić* trial, such as the withdrawal of witnesses and a decrease in time required for cross-examination and the presentation of defence cases,[17] the greatest impact of the guilty pleas was the 20 days of testimony provided

15. *Prosecutor v. Blagojević, Obrenović, Nikolić and Jokić*, Case No. IT-02-60-PT, Motion Hearing, 6 May 2003. For a critique of the Trial Chamber's initial dismissal of the plea agreement, see Coalition for International Justice, 'Court Questions Plea Agreement in Srebrenica Case' (6 May 2003), at http://www.cij.org/index.cfm? fuseaction=viewReport&reportID=288&tribunalID=1. While the Trial Chamber's judgment in the *Nikolić* case does reveal certain reservations about plea agreements in cases of serious violations of international humanitarian law, the Trial Chamber's rejection of the initial plea agreement should not be taken as a denunciation of plea agreements per se, but rather may be seen as a sign of the Trial Chamber's determination that the guilty plea could not later be dismissed on the grounds that the accused's rights had not been protected or that the rules had not been properly applied. For the Trial Chamber's comments on guilty pleas and their applicability and appropriateness in cases of serious violations of international humanitarian law, see *Nikolić* Sentencing Judgment, *supra* note 2, paras. 57–73, and in particular para. 73: 'The Trial Chamber finds that, on balance, guilty pleas pursuant to plea agreements, may further the work – and the mandate – of the Tribunal. The Trial Chamber further finds, however, that based on the duties incumbent on the Prosecutor and the Trial Chambers pursuant to the Statute of the Tribunal, the use of plea agreements should proceed with caution and such agreements should be used only when doing so would satisfy the interests of justice.'
16. *Prosecutor v. Blagojević, Obrenović, Nikolić and Jokić*, Case No. IT-02-60-PT, Motion Hearing, 7 May 2003.
17. See, e.g., *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motion to Amend Witness List, T. Ch. I, Sec. A, 25 June 2003. It is difficult to assess the impact, if any, of the guilty pleas and sentencing judgments on other aspects of the case, including the impact on other 'insider witnesses' to come forward and provide truthful testimony.

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by key 'insider witnesses'.[18] Both the Blagojević and Jokić defence teams challenged the testimony of Nikolić and Obrenović as unreliable and self-serving.[19] In the 'evaluation of evidence' section of the judgment, it is stated that the Trial Chamber assessed their evidence:

> in light of the circumstances under which they gave their testimony and in particular, that they testified pursuant to a plea agreement; that they took the solemn declaration to speak the truth; that the charges dropped against them were dropped without prejudice; and that they had not yet been sentenced at the time of their testimony.[20]

The Trial Chamber expressed particular concern with the testimony of Momir Nikolić, finding that he 'cannot be considered a wholly credible or reliable witness' and specifically required corroborating evidence on matters that bear directly on Blagojević's knowledge.[21]

Two months after providing testimony in the *Blagojević and Jokić* trial, both men were sentenced: Momir Nikolić to 27 years and Dragan Obrenović to 17 years.[22]

2.2. Counsel issue

The trial of Vidoje Blagojević was the first trial at the Tribunal in which an accused went through his entire trial without having any communication with his assigned counsel.[23] Unlike the cases of Slobodan Milošević[24] or Vojislav Šešelj,[25] Vidoje Blagojević never sought to represent himself.[26] As a result of what the Trial

18. Vidoje Blagojević, as commander of the Bratunac Brigade, was the superior of Momir Nikolić, the Assistant Chief for Security and Intelligence in the Bratunac Brigade. Dragan Obrenović, as Chief of Staff and Deputy Commander of the Zvornik Brigade, was in a superior or command position in relation to Dragan Jokić, the Chief of Engineering of the Zvornik Brigade.
19. On the credibility of Momir Nikolić, see, e.g., the Blagojević Closing Arguments, Submissions of Michael Karnavas, 30 September 2004, T. 12400-01: '[W]e have to examine [Nikolić] carefully and the Prosecutor said we need to take him with a grain of salt. I say we take him with a ton of salt. Because that man, as we saw, was all too willing to manufacture evidence – and I'm going to demonstrate how he did it – in order to sing the Prosecution's tune, because he knew what the tune was as it is laid out in the indictment, and he had all the evidence. So he had the music sheet. So all he had to do was tell what the Prosecution wanted to hear.'
20. Judgment, *supra* note 1, para. 24.
21. Ibid., para. 472. In its judgment in the *Nikolić* case, the Trial Chamber found that Momir Nikolić was 'evasive' and 'that his testimony was not as detailed as it could have been in certain areas'. *Nikolić* Sentencing Judgment, *supra* note 2, para. 156.
22. Momir Nikolić has appealed his sentence; at the time of publication of this paper, his appeal is still pending.
23. Vidoje Blagojević made comments to the effect that he had had no contact with Michael Karnavas at various points in the trial. See, e.g., *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Trial Proceedings, 19 September 2003, T. 1587 and Trial Proceedings, 2 December 2003, T. 5459, cited in *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on Vidoje Blagojević's Oral Request, 30 July 2004 (hereafter 30 July 2004 Decision), at 4. The 30 July 2004 Decision further states that Vidoje Blagojević met 'briefly' with Mr Karnavas and a representative of the Office of Legal Aid and Detention Matters of the Registry in early 2004.
24. See, e.g., *Milošević v. Prosecutor*, Case No. IT-02-54-AR73.6, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004.
25. See *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, 9 May 2003.
26. Pre-trial Conference Hearing, 5 May 2003, T. 258. Mr Blagojević stated as follows: 'And although I do not know much about law because I know what I needed in my profession, however, it opened my eyes and I realised how things are really done in situations like this. I'm not trying to dodge responsibility and I'm saying I do not want to defend myself. No. It would be insane if I did that, but a lawyer of my choice must professionally represent my interests or he cannot be my lawyer.'

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Chamber described as 'friction' between client and his counsel,[27] however, Mr Blagojević chose to forego any communication and, seemingly, co-operation, with the counsel provided to him by the Tribunal.

Following his arrest and transfer to the International Tribunal in August 2001, Vidoje Blagojević applied to the Registrar to have defence counsel assigned to him pursuant to Rule 45, claiming that he lacked the means to remunerate counsel. In accordance with a request from Blagojević, Michael Karnavas, an American lawyer on the Registrar's list of available counsel, was appointed as lead counsel for the Accused.[28] Upon the request of Mr Karnavas, Suzana Tomanović from Bosnia and Herzegovina was assigned as co-counsel in September 2002.[29]

In late November 2002, as pre-trial proceedings were coming to a close, Blagojević complained that co-counsel had been assigned without his consent and that he had wanted another person assigned as co-counsel. After hearing the defence team, Blagojević, and a representative of the Registry, the pre-trial chamber (Trial Chamber II) found that co-counsel had been assigned in accordance with the Directive of Assignment of Defence Counsel[30] and Rules; it denied Vidoje Blagojević's motion to have his co-counsel replaced, finding that no good cause had been shown to intervene in the Registrar's decision.[31] Trial Chamber II considered that it is not permissible for an accused to 'deliberately destroy the atmosphere of trust and to make unsubstantiated claims that no co-operation between himself and co-counsel is possible in order to have new co-counsel appointed'.[32]

Six weeks before the beginning of the trial of Blagojević and his three co-accused, Blagojević again raised the issue of his counsel, and said that he had lost confidence in his lead counsel and wanted his whole defence team replaced.[33] The pre-trial judge referred the matter to the Registrar for his consideration. The Registrar denied Blagojević's motion, finding that there were no substantive grounds relating to the performance or professional ethics of Ms Tomanović justifying a replacement; that no change in circumstances had taken place since the Trial Chamber's decision; and that to replace co-counsel at that point in the proceedings might have

27. See *Prosecutor v. Blagojević and Jokić*, Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003 (hereafter Decision on Replacement of Counsel), para. 120.

28. *Prosecutor v. Blagojević*, Case No. IT-98-33/1-PT, Decision by the Registrar Assigning Counsel as of 31 August 2001, dated 3 September 2001 and filed 5 September 2001. The initial appointment of Mr Karnavas was for 120 days, pending the review of Mr Blagojević's financial status. The appointment of Mr Karnavas was renewed on 24 December 2001.

29. Ms Tomanović had previously served as a legal assistant/investigator as part of the Blagojević defence team.

30. Directive of Assignment of Defence Counsel, as amended on 12 July 2002, IT/73/Rev.9.

31. *Prosecutor v. Blagojević, Obrenović, Jokić and Nikolić*, Case No. IT-02-60-PT, Decision on Oral Motion to Replace Co-counsel, T.Ch.II, 9 December 2002. The Trial Chamber noted that Blagojević did not provide any concrete reasons for seeking the dismissal of his co-counsel and found that his request to have his co-counsel removed was due to his desire to have another person assigned, 'and [was] not due to any misconduct, incompetence or any conflict of interest on the part of the co-counsel'. Ibid., at 4–5.

32. The Trial Chamber further found that no grounds were identified that would amount to an 'insufficient atmosphere of trust between the Accused and the defence team or which would otherwise show that co-operation between the Accused and his team is no longer possible'. Ibid., at 6.

33. See Decision on Replacement of Counsel, *supra* note 27, paras. 10–11.

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delayed the proceedings and thereby adversely affected the accused's right to be tried expeditiously.[34]

At the pre-trial conference, Blagojević stated that he did not have a lawyer present and that he had had no contact with his assigned counsel during the previous month.[35] Trial Chamber I – the newly assigned trial chamber – ordered that an independent legal counsel be assigned to advise Blagojević on his rights in relation to the assignment of counsel, and assist him in preparing any documentation that may follow from their consultations.[36]

Blagojević filed a motion to have his entire defence team replaced by another Tribunal-appointed and financed defence team of which he approved. Blagojević's primary argument for such a replacement was a lack of trust in his defence team.[37] The Trial Chamber denied Blagojević's motion, making the following findings: the assignment, the qualifications, and professional conduct of counsel and co-counsel were, and continued to be, in accordance with the Statute, the Rules, the Directive, and the Code; no sufficient grounds for disqualification or dismissal of lead counsel or co-counsel had been advanced; the lack of trust and breakdown of communications between the accused and counsel were not based on objective and reasonable criteria that would call into question the ability or the competence of either lead counsel or co-counsel to fulfil their professional obligations to the accused; and it was in furtherance of the accused's right to an expeditious trial to proceed with current counsel.[38]

Having assured itself that Blagojević's right to a fair trial was not infringed by the assignment of counsel he did not want – as well as denying a precedent for other indigent accused who sought to have their counsel replaced without establishing good cause[39] – the Trial Chamber sought a practical solution to the very real problem

34. *Prosecutor v. Blagojević, Obrenović, Jokić and Nikolić*, Case No. IT-02-60-PT, Registrar's Decision, 8 April 2003. In relation to the last point, it is recalled that Vidoje Blagojević's application for provisional release – like that of his co-accused Dragan Obrenović – was denied by both the Trial Chamber and the Appeals Chamber, and he had thus already spent more than one and a half years in pre-trial detention.
35. *Prosecutor v. Blagojević, Obrenović, Jokić and Nikolić*, Case No. IT-02-60-PT, Pre-trial Conference Hearing, 5 May 2003, T. 256.
36. *Prosecutor v. Blagojević, Obrenović, Jokić and Nikolić*, Case No. IT-02-60-PT, Order on the Appointment of Independent Legal Counsel, T.Ch. I, Sec. A, 9 May 2003.
37. In their response, Mr Karnavas and Ms Tomanović challenged essentially all of Blagojević's allegations and assertions about the nature of their assignments and conduct as counsel, and argued that there were no grounds for their replacement. They also submitted, however, that the Trial Chamber must also consider 'whether procedural fairness and the proper administration of justice can be achieved by retaining [lead] counsel and co-counsel in this case'. See Decision on Replacement of Counsel, *supra* note 27, para. 56.
38. Ibid., para. 112.
39. See ibid., para. 69 for the Registrar's argument on this point, and para. 112 for the Chamber's comments on this point. Other international tribunals and hybrid courts have faced difficulties with the frequent replacement of assigned counsel to indigent accused, and/or requests for self-representation. For the Special Court for Sierra Leone see, e.g., *Prosecutor v. Hinga Norman et al.*, Case No. SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self-Representation Under Art. 17(4)(d) of the Statute of the Special Court, 8 June 2004; *Prosecutor v. Hinga Norman et al.*, Case No. SCSL-04-14-T, Consequential Order on Assignment and Role of Stand-by Counsel, 14 June 2004; *Prosecutor v. Hinga Norman et al.*, Case No. SCSL-04-14-T, Ruling on the Issue of Non-Appearance of the First Accused Samuel Hinga Norman, the Second Accused Moinina Fofana and the Third Accused, Allieu Kondewa at the Trial Proceedings, 1 October 2004. For the International Criminal Tribunal for Rwanda (ICTR), see, e.g., 'Statement by the Registrar, Mr. Adama Dieng, on Allegations of Fee Splitting between a Detainee of the ICTR and his Defence Counsel,' ICTR/INFO-9-3-06.EN, Arusha, 29 October 2001; Statement by the Registrar concerning change of counsel under the Tribunal's Legal Aid

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that remained: how to conduct a lengthy, complex trial in which the accused refused to speak to his counsel? The Trial Chamber, recalling that defence counsel had an ethical obligation to promote trust and should always act in a manner to earn the trust of their clients,[40] allowed for the appointment of an additional 'legal representative'; this person would in effect serve as a bridge between client and counsel, and would assist Blagojević and his defence team in the preparation of his defence while rebuilding the trust of Blagojević in his assigned counsel.[41]

Blagojević, through his independent counsel, sought certification to appeal the Trial Chamber's decision, which was granted. The Appeals Chamber upheld the Trial Chamber's decision in its entirety.[42]

Vidoje Blagojević never availed himself of the possibility of appointing an additional legal representative with whom he could communicate. Instead, at various points throughout the trial proceedings, Blagojević addressed the Trial Chamber and stated for the record that he was not represented by counsel. The Registrar assigned new counsel to assist Blagojević in preparing his appeal.[43]

2.2.1. Impact of the counsel issue on matters at trial

The following occasions serve as two examples of the particular difficulties which arose from Vidoje Blagojević's relationship – or lack thereof – with his assigned counsel. The first occasion was during the ten-day testimony of his former co-accused and subordinate, Momir Nikolić. At the conclusion of Mr Karnavas's cross-examination of Nikolić, Blagojević sought leave from the Trial Chamber to ask Nikolić some 'important' questions himself.[44] Observing that Vidoje Blagojević had counsel and that under the Rules the proper method for a witness to be examined was to be examined by counsel, the Trial Chamber reminded Blagojević of his right to make a statement under Rule 84 *bis* of the Rules. It informed him that he would not have to make an oath before making such a statement and could not be cross-examined on the statement; however, anything he said could be used as evidence against him. Blagojević decided to make such a 'statement' in the presence of Momir Nikolić, which in essence was a reformulation of his questions into observations. The Trial Chamber instructed Nikolić that he could not respond to the statement. During rebuttal by the prosecution and extensive questioning of Nikolić by the Trial Chamber, however, most, if not all, of Blagojević's 'observations' were put to Nikolić.[45]

Programme, ICTR/INFO-9-3-13.EN Arusha, 5 November 2002; *Prosecutor v. Nzirorera*, Case No. ICTR-98-44-T, Decision on Nzirorera's Motion for Withdrawal of Counsel, T.Ch. II, 3 October 2001; *Prosecutor v. Ngeze*, Case No. ICTR-97-27-I, Decision on the Accused's Request for the Withdrawal of His Counsel, 29 March 2001.

40. Decision on Replacement of Counsel, *supra* note 27, para. 121.
41. Ibid., Disposition, (1). See Disposition generally for the terms of appointment and scope of assignment of the legal representative.
42. Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 15 September 2003; Public and Redacted Reasons for Decision on Appeal by Blagojević to Replace his Defence Team, 15 December 2003.
43. See *Prosecutor v. Blagojević*, Case No. IT-02-60-A, Decision (Deputy Registrar), 28 February 2005, in which the Deputy Registrar granted Blagojević's request to have new counsel appointed for his appeal, finding 'that the Registry is satisfied that the replacement of Mr. Karnavas would not be detrimental to the representation of the Accused, nor would it unduly delay the appeal proceedings'.
44. *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Trial Proceedings, 30 September 2003, T. 2274.
45. *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Trial Proceedings, 1 October 2003, T. 2321–31.

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The second example where the counsel issue proved to present a difficulty to the Trial Chamber came during the Blagojević defence case: Vidoje Blagojević sought to testify as a witness in his own defence. Concerned that the accused's right to a fair trial could be seriously infringed by having an accused who had not conferred with counsel throughout his entire trial waive his right to silence without being instructed on the potential dangers of testifying and subjecting himself to cross-examination, the Trial Chamber again urged Blagojević to meet with his counsel.[46] Since he refused, it presented the three options available to him: to exercise his right to remain silent; to make a statement under the control of the Trial Chamber, the content of which he would not be examined about; or to testify under oath like any other witnesses.[47] Adopting a strict construction of the Rules, the Trial Chamber held that the only way for Blagojević to exercise the third option was to follow strictly the procedure for examination of witnesses as set out in Rules 85 and 90, which meant that the party calling the witness – in this case Mr Karnavas – would conduct the examination-in-chief of the witness, Blagojević. When Blagojević stated that he would refuse to answer any questions put to him by Mr Karnavas, the Trial Chamber found that his refusal to follow the procedure constituted an 'effective waiver' of his right to appear as a witness in his case.[48] The Trial Chamber denied requests, filed by both Blagojević and his counsel, for certification to appeal its decision.[49] Having previously expressed his concern that an unsworn statement that was not subjected to cross-examination and questioning by the Trial Chamber did not carry significant weight, Blagojević declined to make a statement.[50]

3. JUDGMENT

3.1. The factual findings and findings on individual criminal responsibility

As a result of the Trial Chamber having had a substantial amount of information in evidence to draw upon in making its findings,[51] the factual findings in the judgment are quite detailed.[52] As the facts regarding the 'crime base' had previously been

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46. See, e.g., *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Pre-Defence Conference, Trial Proceedings, 7 April 2004, T. 38-43.
47. *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Motion Hearing, 17 June 2004, T. 10922–25.
48. *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on Vidoje Blagojević's Oral Request, 30 July 2004. The Trial Chamber also examined whether any waiver by Blagojević of the privilege against self-incrimination was knowing, voluntary, and based on sufficient awareness of the consequences of such waiver, and concluded that it was.
49. Decision on Request for Certification to Appeal the Trial Chamber's Decision on Vidoje Blagojević's Oral Request and Request for the Appointment of an Independent Counsel for this Interlocutory Appeal Should Certification be Granted, 2 September 2004.
50. *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Trial Proceedings, 9 September 2004, T. 12280–81.
51. In addition to the evidence tendered by the parties, the Trial Chamber undertook a site visit to the crime scenes after the close of the presentation of evidence 'to assist the Trial Chamber in assessing the evidence admitted in the case'. The Trial Chamber did not take or admit any evidence during the site visit. See Judgment, *supra* note 1, para. 31.
52. It is interesting to note that the *Blagojević and Jokić* Judgment and the recent *Brđanin* judgment provide very detailed factual findings, particularly in relation to the role and actions of the accused in relation to the crimes charged. See *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, T.Ch.II, 1 September 2004 (hereafter *Brđanin* Judgment). As recent Appeals Chamber judgments of the ICTY arguably reflect a trend by the Appeals Chamber to be more interventionist in reviewing factual findings and less deferential in accepting the findings of trial judges, it may be that trial chambers are endeavouring to provide as detailed

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established in detail in the *Krstić* trial,[53] the prosecution relied more heavily on 'insider' witnesses in this case, including members of the Bratunac and Zvornik Brigades, to establish a link between the crimes and the accused. As already touched on above, the Trial Chamber heard testimony spanning nearly 3,000 pages of trial transcript from former co-accused and other persons convicted by the Tribunal who were directly involved in events following the fall of Srebrenica.[54] Interestingly, both the Blagojević Defence and the Jokić Defence also called members of each accused's units to testify as to the competencies, knowledge, and actions of each accused during the indictment period.[55] The result of the evidence from such witnesses is a rich and detailed factual overview of what happened – including how and by whom the horrific crimes were committed – during the days following the fall of the Srebrenica 'safe area'.[56] This authoritative record will not only likely serve the prosecution's interests in subsequent Srebrenica trials, but will also serve as a contribution to establishing a definitive account within the region of what happened during those fateful days in July 1995.

The Trial Chamber had to assess both accused's liability for aiding and abetting[57] and for committing, as members of a joint criminal enterprise,[58] as well as Vidoje

and comprehensive a record as possible not only as part of their obligation to provide a 'reasoned opinion' for their findings, but also to ensure that their factual findings – if not their legal findings – can withstand scrutiny on appeal. See, e.g., *Krstić* Appeals Judgment, *supra* note 3; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, A.Ch., 30 July 2004 (hereafter *Blaškić* Appeal Judgment). See also *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgment, 17 December 2004, in particular paras. 383–8.

53. Much of the crime-based evidence in the *Blagojević and Jokić* case was entered into evidence pursuant to Rule 92 *bis* and Rule 94 *bis* of the Rules. Rule 92 *bis* permits a party to tender either a sworn statement or former testimony of a witness that does not touch upon the acts and conduct of the accused into evidence in written form; the trial chamber has the discretion to accept this evidence with or without calling the witness for cross-examination or questioning by the chamber. Rule 94 *bis* provides for the admission of expert reports, again with or without calling the witness to testify. In this case, the Trial Chamber admitted the evidence of more than 55 witnesses pursuant to Rule 92 *bis* and more than 15 witnesses pursuant to Rule 94 *bis*.
54. The Trial Chamber accepted the evidence of Dražen Erdemović pursuant to Rule 92 *bis*. It accepted the former testimony of Miroslav Deronjic pursuant to Rule 92 *bis* with cross-examination. It is important to emphasize that while Deronjic was appointed Commissioner of Srebrenica by Radovan Karadžić following its take-over by the Bosnian Serbs and held the position of president of the Serbian Democratic Party in Bratunac, he was not charged in relation to the crimes committed in July 1995; his conviction is for crimes committed in Bratunac in 1992. The Prosecutor, Peter McCloskey, said that he would likely call Deronjic because 'he's obviously a historical figure that I think the Court should see'. *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Trial Proceedings, 1 October 2003, T. 2317.
55. Indeed, nearly two-thirds of the almost 60 witnesses called on behalf of Blagojević were members of the Bratunac Brigade.
56. In addition to the Bosnian Muslims and Bosnian Serbs who appeared as witnesses, the Trial Chamber also heard from a number of Dutch witnesses who had served as part of the UN Protection Forces in Srebrenica, including the Dutch Battalion commander, Thomas Karremans.
57. Aiding and abetting requires that the accused carried out an act or omission, which consisted of practical assistance, encouragement, or moral support to the principal perpetrator which had a substantial affect on the commission of the crime. The accused is not required to share the *mens rea* required for the crime; it is sufficient that the aider and abettor had knowledge that his or her acts assisted in the commission of the crime and was aware of the 'essential elements' of the crime committed, including the state of mind of the perpetrator. See, e.g., *Prosecutor v. Tadić,* Case No. IT-94-1-A, Judgment, A.Ch., 15 July 1999, para. 229; *Blaškić* Appeal Judgment, *supra* note 52, paras. 45-8; *Prosecutor v. Mucić, Delić and Landžo*, Case No. IT-96-21-A, Judgment, A.Ch., 20 February 2001 (hereafter *Čelebici* Appeal Judgment), para. 352; and Judgment, *supra* note 1, paras. 726–7. The Prosecution has appealed the Trial Chamber's finding that the accused must have knowledge that his acts assisted in the commission of the specific crime of the principal offender.
58. For the first form of joint criminal enterprise, three objective elements must be established (a plurality of persons; the existence of a common plan, design or purpose which amounts to or involves the commission

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Blagojević's liability for command responsibility.[59] As can be seen from the structure of the judgment, the Trial Chamber took a 'layered' approach to its assessment of the facts in order to make its ultimate determination of the individual criminal responsibility, if any, of each accused. It first assessed the 'crime-base' evidence, including events in Potočari searching for the Bosnian Muslim men who fled from Srebrenica in the so-called 'column'; in Bratunac town where the Bosnian Muslim men were detained pending transport to Zvornik and various detention sites; and finally at the execution and burial sites. The Trial Chamber found that all crimes charged had been established. Furthermore, it made conclusions and findings on the role of both the Bratunac Brigade and the Zvornik Brigade in relation to each topic.

Next, the Trial Chamber analyzed and made findings on the essential elements for each mode of liability, namely the competencies, the actions, and the knowledge of both accused during the time relevant to the indictment, as well as the de facto control of Blagojević over his subordinates and any actions he took to punish crimes committed by those subordinates.

Finally, the Trial Chamber made its findings of the individual criminal responsibility of both accused. For Blagojević, the Trial Chamber was satisfied that the evidence established his participation in the attack on Srebrenica, known as 'Krivaja 95'.[60] Furthermore, it found that Blagojević knew what both the initial and the revised objectives of Krivaja 95 were – namely, to reduce the Srebrenica enclave to its urban area and to eliminate the enclave – as well as the steps that had been taken to weaken the enclave before the attack, including blocking humanitarian assistance convoys from entering the enclave.[61] Finally, it found that achieving the objective of Krivaja 95 'necessarily entailed removing the Bosnian Muslim population from the area'.[62]

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of a crime provided for in the ICTY's Statute; and the participation of the accused in the common plan involving the perpetration of the crime), and it must be found that the accused intended the criminal result. See Judgment, *supra* note 1, paras. 698, 703.

59. For liability pursuant to the doctrine of command responsibility under Art. 7(3) of the ICTY Statute, the following elements must be established: there existed a superior-subordinate relationship between the superior and the perpetrator of the crime; the superior knew or had reason to know that the criminal act was about to be or had been committed; and the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof. See, e.g., judgment, *supra* note 1, para. 790 *citing Čelebići* Appeal Judgment, *supra* note 57. The jurisprudence of the Tribunal permits the prosecution to charge all modes of liability under Art. 7(1), leaving it to the trial chamber's discretion to determine which mode of liability, if any, most accurately reflects the accused's criminal responsibility. See, e.g., *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgment, A.Ch., 28 February 2005, paras. 29, 41. Recent judgments on both the trial and appeals level have discussed the elements of the different modes of liability under Art. 7(1) at length, and have included a detailed analysis of the evidence in relation to each mode charged. Whereas some earlier judgments assessed individual criminal responsibility more in terms of the relationship between Art. 7(1) and Art. 7(3) as a basis for liability, it is suggested that chambers now conduct a more developed analysis when determining intra-Art. 7(1) liability. As the different modes of liability reflect an accused's criminal conduct and degree of participation (i.e., as principal/perpetrator or accomplice/accessory), in the absence of sentencing guidelines, this exercise may reveal an effort by chambers to establish a broad framework for sentencing based, in large part, on the accused's participation in the commission of each crime – in addition to, and not necessarily as opposed to, earlier attempts to 'rank' crimes. See, e.g., Judgment, *supra* note 1, para. 833: 'By "gravity of the offence" the Trial Chamber understands that it must consider the crimes for which each Accused has been convicted, the underlying criminal conduct generally, and the specific role played by Vidoje Blagojević and Dragan Jokić in the commission of the crime.'
60. Judgment, *supra* note 1, paras. 433–6.
61. Ibid., para. 478. See also paras. 474–7.
62. Ibid., para. 758.

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Indeed, the Trial Chamber found that Blagojević had 'participated' in the forcible transfer.[63] While holding that 'background issues' such as those events leading up to and including the attack on the Srebrenica enclave could be used to establish motive, opportunity, intent, preparation, plan, or knowledge,[64] the Trial Chamber ultimately found that Blagojević did not have 'the requisite intent' for forcible transfer.[65] The Trial Chamber did not define what it considered to be 'the requisite intent' for first category joint criminal enterprise; based on its factual findings it appears that the Trial Chamber set a high threshold for such intent.[66]

Following recent Appeals Chamber jurisprudence, the Trial Chamber declined to enter a conviction under Article 7(3) for those crimes for which a conviction had been entered under Article 7(1).[67] It did not, however, look at a count singularly before declining to consider Article 7(3) liability. The Trial Chamber had previously found that some members of the Bratunac Brigade, and indeed Blagojević himself, had rendered practical assistance that had a substantial effect on the mass murder of Bosnian Muslim men at certain execution sites.[68] It further found, however, that Blagojević did not have knowledge that his actions and the actions of his troops were assisting in the commission of mass murder; it thus did not enter a conviction under Article 7(1) for these charges, and it considered Blagojević's liability for these allegations contained under Article 7(3).[69] The Trial Chamber did not analyze in detail each element that must be established to find a superior liable under Article 7(3).[70] Rather, it focused on the fact that Article 7(3) requires that the crime 'was

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63. Ibid., para. 711. Based on the references to this finding, it is evident that the Trial Chamber interpreted 'participated' to include not only the actions of Blagojević himself, but also the actions of elements of Bratunac Brigade. See ibid., para. 702, for the Trial Chamber's findings on 'participation' in a joint criminal enterprise.
64. Ibid., para 473. The joint criminal enterprise is alleged to have been 'conceived and designed ... on 11 and 12 July 1995'. Indictment, *supra* note 5, para. 32.
65. Judgment, *supra* note 1, para. 712.
66. See ibid., para. 703 (for first category joint criminal enterprise, all participants shared the same criminal intention and the accused intended the criminal result). As the prosecution has appealed the Trial Chamber's finding that Vidoje Blagojević did not have the intent to commit forcible transfer as part of a joint criminal enterprise, defining 'the requisite intent' will be a matter for the Appeals Chamber.
67. Judgment, *supra* note 1, para. 794. See also *Blaškić* Appeal Judgment, *supra* note 52, paras. 86–93.
68. Judgment, *supra* note 1, paras. 733–8.
69. In some cases, an indictment might contain more than 30 or 40 counts, with each count limited to a particular and specific crime. This tended to be the practice in the first years of the Tribunal. In other cases, an indictment could include a very limited number of counts, with each count encompassing numerous distinct criminal acts, such as one count of murder that includes many murders alleged to have occurred at different places and on different dates. Furthermore, certain crimes, such as persecutions, other inhumane acts and torture, lend themselves to including numerous related criminal acts in one count. In this case, a six-count indictment contained allegations of a complex and massive crime base that reflected numerous crimes in various locations against tens of thousands of victims.
    The Appeals Chamber held in *Blaškić* that a concurrent conviction for the *same* counts based on the *same* acts pursuant to Art. 7(1) and 7(3) is impermissible as a matter of law. *Blaškić* Appeal Judgment, *supra* note 52, para. 92. If faced with a factual scenario related to one crime whereby *distinct* acts or omissions can be attributed to an accused, it is submitted that it is not only permissible but, indeed, preferable to enter convictions pursuant to both Art. 7(1) and 7(3), if all elements required for the conviction under each sub-article can be satisfied. It is further submitted that only by entering a conviction for that count pursuant to both Art. 7(1) and 7(3) can the totality of the responsibility of the accused be accurately reflected, the provisions of international law be given full effect, and the ultimate purpose of international humanitarian law – deterrence of violations of the laws of war – be achieved.
70. See *supra* note 57. The Trial Chamber had assessed the elements in its earlier findings. See, e.g., Judgment, *supra* note 1, paras. 419, 423–31, 497–500, 742.

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committed by a subordinate'; the Chamber found that it could not determine that Blagojević's subordinates had 'committed' the crimes charged under the murder or extermination count, and thus could not identify the specific perpetrators whom Blagojević had a duty to punish.[71] As the prosecution has appealed this finding, it will be for the Appeals Chamber to determine whether the Trial Chamber erred in not finding that the practical assistance rendered by Blagojević's subordinates was sufficient to trigger his duty to take the necessary and reasonable measures to punish the perpetrators; in making this determination, the Appeals Chamber will have to clarify what form or level of participation of subordinates in a crime triggers criminal liability for a superior.[72]

In relation to Dragan Jokić's individual criminal responsibility, the Trial Chamber also found that he did not have the 'requisite intent' to incur criminal responsibility as a co-perpetrator in a joint criminal enterprise for murder, extermination, and persecutions.[73] It did find, however, that through his role as duty officer and as chief of engineering of the Zvornik Brigade, Jokić had learned of the plan to execute thousands of Bosnian Muslim men by 14 July;[74] it thus assessed whether there was a 'link' through resources of the Zvornik Brigade between Jokić and the specific execution sites, and found him criminally responsible for murder, extermination, and persecutions for some, but not all, of the executions.

3.2. Genocide

3.2.1. The impact of the Krstić appeal judgment on the Blagojević and Jokić judgment

Vidoje Blagojević was charged with complicity in genocide pursuant to Articles 4(3)(e), 7(1), and 7(3) of the Statute.[75] The Appeals Chamber judgment in the *Krstić* case, which was rendered while the *Blagojević and Jokić* trial was ongoing, both raised and answered numerous questions in relation to this charge.[76]

As the Appeals Chamber found that aiding and abetting genocide falls *within* the scope of complicity in genocide, and as the indictment included a charge of complicity in genocide, the Appeals Chamber could have entered a conviction for Krstić under complicity in genocide, pursuant to Article 4(3)(e) of the Statute, based on aiding and abetting genocide; it did not do so. It examined the relationship between Articles 7(1) and 4(3) of the Statute; Article 4(3) enumerates the acts of

71. Judgment, *supra* note 1, para. 794.
72. The Trial Chamber expressed reservations on other grounds, including whether Blagojević had 'effective control' over Momir Nikolić, for not imposing liability under Art. 7(3) for the crimes committed by Nikolić. See Judgment, *supra* note 1, para. 795, and the prior discussion on the existence of a 'parallel chain of command' in relation to the security and intelligence organs, at paras. 396–419.
73. Ibid., para. 723.
74. Ibid., paras. 763–5, and paras. 525–34 generally.
75. The prosecution withdrew the count of genocide against Vidoje Blagojević in January 2002.
76. In *Krstić*, the Appeals Chamber confirmed that genocide had been committed following the fall of Srebrenica in July 1995. It found, however, that the Trial Chamber erred in holding Radislav Krstić guilty of genocide as a member of a joint criminal enterprise based on the conclusion that he did not have genocidal intent, finding instead that Krstić was guilty as an aider and abetter of genocide. In assessing Krstić's liability as an aider and abettor to genocide, the Appeals Chamber held that an aider and abettor to a specific-intent crime such as genocide need not share the specific intent to commit the crime; rather, it is sufficient to find that the accused rendered substantial assistance to the commission of the crime knowing the intent behind the crime. *Krstić* Appeal Judgment, *supra* note 3, para. 140.

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genocide, including complicity in genocide. It found that all crimes in the Tribunal's Statute, including genocide, are subject to Article 7(1) of the Statute, and that it is therefore preferable to characterize Radislav Krstić's liability as aiding and abetting genocide under Articles 4(3)(a) and 7(1) of the Statute rather than as complicity in genocide under Article 4(3)(e) of the Statute.[77] It did not make a finding with regard to the *mens rea* required for complicity in genocide 'where this offence strikes broader than the prohibition of aiding and abetting'.[78] Moreover, the Appeals Chamber did not expound on what 'conduct broader than aiding and abetting' also falls within the scope of complicity. Significantly for the case against Blagojević, it found that a conviction for aiding and abetting genocide could be entered upon proof that the accused knew about the principal perpetrator's genocidal intent and assisted the commission of the crime.[79]

The immediate impact of the *Krstić* appeal judgment on the *Blagojević and Jokić* case was to raise the questions of what precisely a charge of complicity in genocide entails, as a matter of law, and what is the required *mens rea*.[80] There was agreement between the parties that one who bears criminal responsibility for complicity in genocide or aiding and abetting genocide is an accomplice rather than a perpetrator. Regarding the *mens rea*, the prosecution sought to align itself with the *Krstić* finding that knowledge is sufficient for aiding and abetting genocide, while the Blagojević Defence submitted that complicity in genocide requires specific intent. While the prosecution had made the same submissions in both the indictment and its pre-trial brief,[81] it moved to amend the indictment so that its charge would reflect more concretely the *Krstić* appeal judgment, i.e. charging accomplice liability for genocide as 'aiding and abetting genocide' pursuant to Article 4(3)(a) of the Statute rather than as 'complicity in genocide' under Article 4(3)(e) of the Statute. The Trial Chamber denied the prosecution's motion for leave to amend the indictment without going into a discussion on the elements of complicity in genocide.

As can be seen from its findings in the judgment, the Trial Chamber apparently did not consider an amendment to be necessary, as the *Krstić* appeals judgment clearly holds that aiding and abetting genocide falls within complicity in genocide.[82] Accordingly, the prosecution's theory of accomplice liability for genocide as alleged

77. *Krstić* Appeal Judgment, *supra* note 3, paras. 138–9. In essence, it appears that the Appeals Chamber preferred the specificity of the Tribunal's Statute, when possible, rather than the arguably broader forms of participation taken from the Genocide Convention and reproduced in Art. 4(3) of the Statute. As discussed in the Trial Chamber judgment in the case of *Brđanin*, Art. 4(3) includes modes of liability not provided for in Art. 7(1) for inchoate offences, including conspiracy and attempt. See *Brđanin* Judgment, *supra* note 52, para. 725. In finding that Art. 7(1) essentially trumps Art. 4(3) of the Statute, the Appeals Chamber in *Krstić* did not address the implications of its finding when a particular mode of liability is not provided for in Art. 7 of the Tribunal Statute, but exists only in Art. 4(3). *Krstić* Appeal Judgment, *supra* note 3, paras. 138–9.
78. *Krstić* Appeal Judgment, *supra* note 3, n. 247. The Appeals Chamber did observe, however, that 'there is authority to suggest that complicity in genocide, where it prohibits conduct broader than aiding and abetting, requires proof that the accomplice had the specific intent to destroy a protected group'. Ibid., para. 142.
79. Ibid., para. 143.
80. See Judgment, *supra* note 1, para. 637.
81. See ibid., paras. 635, 780.
82. *Krstić* Appeal Judgment, *supra* note 3, paras. 138–9, 142.

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in this case was properly reflected in the charge of complicity in genocide, and therefore the prosecution could proceed on the basis of its initial indictment.[83]

3.2.2. Complicity in genocide

The prosecution specified that it was charging Vidoje Blagojević with complicity in genocide based on aiding and abetting genocide.[84] Aiding and abetting genocide had been defined by the Appeals Chamber in *Krstić*, a determination binding on the *Blagojević and Jokić* Trial Chamber: providing assistance to the commission of the crime while knowing the intent, i.e. genocidal intent, behind the crime.[85]

3.2.3. The actus reus *for genocide*

The Trial Chamber had to determine whether genocide had, in fact, been committed before considering Blagojević's liability for complicity in genocide. Two underlying acts were charged for genocide, namely killings and the infliction of seriously bodily or mental harm. The Trial Chamber found that the execution of more than 7,000 Bosnian Muslim men satisfied the first alleged act of genocide. As for the second underlying act, the prosecution alleged that this harm was caused by, inter alia, the killing and abuse of men, combined with the forced transfer of women out of Srebrenica, and the lasting effects of the psychological trauma suffered by survivors of the killings as well as the women from Srebrenica.

The Trial Chamber found that the acts alleged by the prosecution as causing serious bodily or mental harm had been established.[86] The Trial Chamber reviewed existing case law on genocide and found that deportation is among the acts that could constitute serious bodily or mental harm.[87] In assessing whether the forcible transfer of an estimated 15,000 Bosnian Muslim women, men, and the elderly caused serious bodily and mental harm as an underlying act for genocide, the Trial Chamber examined the context in which the forcible transfer was carried out. It found as follows: the forcible transfer began with the population fleeing from their homes in Srebrenica after a five-day military attack; upon arrival at the UNPROFOR base in Potočari, the Bosnian Muslim population found that UNPROFOR lacked the facilities and supplies to provide them with meaningful assistance or even accommodation;

83. Judgment, *supra* note 1, paras. 638, 776–7. See also, *Brđanin* Judgment, *supra* note 52, para. 727: 'The Trial Chamber regards genocide under Art. 4(3)(a) as encompassing principal offenders, including but not limited to the physical perpetrators and to those liable pursuant to the theory of JCE. By contrast, an accomplice to genocide under Art. 4(3)(e) is someone who associates himself in the crime of genocide committed by another.'
84. See *Prosecution v. Blagojević and Jokić*, Case No. IT-02-60-T, Prosecution Final Brief, para. 584 and Motion Hearing held on 8 June 2004, T. 10448-49, 10452-53. See also Judgment, *supra* note 1, para. 780.
85. *Krstić* Appeal Judgment, *supra* note 3, para. 142; Judgment, *supra* note 1, para. 779. See also *Prosecutor v. Ntakirtimana and Ntakirtimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Judgment, A.Ch., 13 December 2004, paras. 364 and 371.
86. Judgment, *supra* note 1, paras. 647–8 (related to the bodily and/or mental harm suffered by the men who survived the mass executions), paras. 650–2 (related to the mental harm suffered by persons during the separations and displacement) and para. 653 (related to the mental harm suffered by the survivors of those executed).
87. Judgment, *supra* note 1, para. 646. There is jurisprudence to support a finding that forcible transfer and deportation could constitute another underlying act of genocide, namely 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' pursuant to Article 4(2)(c) of the Statute of the Tribunal. Ibid., n. 2072.

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the Bosnian Muslim population witnessed the arrival of Bosnian Serb forces, including General Mladić, at Potočari and the control exerted by those forces over the area; the Bosnian Serb forces abused members of the Bosnian Muslim population and created an atmosphere of terror; brutal separations of Bosnian Muslim men from the rest of the population were carried out; and feeling vulnerable and afraid, the women, children, and the elderly left Potočari in search of safety.

The Trial Chamber further found that 'this displacement was a critical step in achieving the ultimate objective of the attack on the Srebrenica enclave: to eliminate the Bosnian Muslim population from the enclave'.[88] The Trial Chamber then found that the evidence supported a finding that the separation, loss of relatives and friends, and forcible transfer had 'severe consequences' on the survivors, resulting in serious mental harm.[89] It concluded therefore that 'in the circumstances of this case forcible transfer constituted "serious mental harm" within the meaning of Article 4(2)(b)'.[90] The Trial Chamber did *not* find that forcible transfer per se is an underlying act of genocide; rather, it found that forcible transfer combined with, inter alia, separations, cruel treatment, and the creation of an atmosphere of terror caused an underlying act of genocide, namely serious mental harm.

3.2.4. 'Specific intent': the intent to destroy, in whole or in part, a protected group

In undertaking its assessment of whether there existed the specific intent to commit genocide against the Bosnian Muslims, the Trial Chamber broke down the definition of specific intent into its constituent elements. The result of this approach is a finding of genocide that is arguably more expansive than any that has been previously found at the ICTY, and is more akin to the ICTR's finding in the *Akayesu* case that rape and sexual violence formed an integral part of the destruction of the Tutsi group and, as such, constituted a tool of genocide.[91]

The term 'destroy' is limited to the physical or biological destruction of a human group; it specifically excludes concepts of 'cultural genocide'. The Trial Chamber cited with approval the finding by Judge Shahabuddeen of the Appeals Chamber, in his partial dissenting opinion in *Krstić*, that a distinction must be made between the nature of the 'acts' of genocide – i.e., killing and causing serious bodily or mental harm – and the 'intent' with which they are done; the former must take a physical or biological form, but the intent to destroy does not.[92] The Trial Chamber then

88. Judgment, *supra* note 1, para. 650.
89. Ibid., para. 651. See also ibid., para. 652. The Trial Chamber emphasized that the women were 'forcibly displaced from their homes – in such a manner as to traumatise them and *prevent them from ever returning* – obliged to abandon their property and their belongings as well as their traditions and more in general their relationship with the territory they were living on, does constitute serious mental harm.' Ibid. (emphasis added).
90. Ibid., para. 654.
91. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, paras. 731–2.
92. Judgment, *supra* note 1, para. 659, citing *Krstić* Appeal Judgment, *supra* note 3, partial dissenting opinion (Judge Shahabuddeen), para. 50. 'It is the group which is protected. A group is constituted by characteristics – often intangible – binding together a collection of people as a social unit. If those characteristics have been destroyed in pursuance of the intent with which a listed act of a physical or biological nature was done, it is not convincing to say that the destruction, though effectively obliterating the group, is not genocide because the obliteration was not physical or biological.' (Judgment, *supra* note 1, para. 659.)

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examined whether forcible transfer could constitute genocide.[93] It cited examples of cases where the term 'destroy' had been found to encompass acts falling short of causing death,[94] and found that forcible transfer could fall within the term 'destroy', opining as follows:

> The Trial Chamber finds in this respect that the physical or biological destruction of a group is not necessarily the death of the group members. While killing large numbers of a group may be the most direct means of destroying a group, other acts or series of acts, can also lead to the destruction of the group. A group is comprised of its individuals, but also of its history, traditions, the relationships between its members, the relationship with other groups, the relationship with the land. The Trial Chamber finds that the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when the transfer is conducted in such a way that the group can no longer reconstitute itself – particularly when it involves the separation of its members. In such cases the Trial Chamber finds that the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group was. The Trial Chamber emphasises that its reasoning and conclusion are not an argument for the recognition of cultural genocide, but rather an attempt to clarify the meaning of physical and biological destruction.[95]

3.2.5. Findings on genocide and the individual criminal responsibility of Blagojević for complicity in genocide

The Trial Chamber, having found that the acts through which genocide was committed – killings and causing serious bodily or mental harm – had been established, examined whether Blagojević had rendered acts of practical assistance that had a substantial effect on the commission of these acts, and whether he knew he was assisting in the commission of these acts. Relying on its previous findings for aiding and abetting murder, persecutions, and forcible transfer, it found that he did. The Trial Chamber then examined whether Blagojević knew of the principal perpetrators' intent to destroy in whole or in part the Bosnian Muslim group as such. The Trial Chamber inferred his knowledge of such intent 'from all the circumstances that surrounded the take-over of Srebrenica enclave and the acts directed at the Bosnian Muslim population which followed'.[96] These 'circumstances' included Blagojević's knowledge that the goal of the operation against the Srebrenica enclave was to drive the Bosnian Muslim population out of Srebrenica; his knowledge of the separation

93. The Trial Chamber found some support for this proposition in the *Krstić* Appeal Judgment, *supra* note 3, para. 31, as well as in Judge Shahabuddeen's partial dissenting opinion, para. 57. The Appeals Chamber stated as follows: 'Forcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica. The transfer completed the removal of all Bosnian Muslims from Srebrenica, thereby *eliminating even the residual possibility that the Muslim community in the area could reconstitute itself.*' *Krstić* Appeal Judgment, *supra* note 3, para. 31.
94. See, e.g., Application of the Convention of the Prevention and Punishment of the Crime of Genocide, Bosnia *v.* Herzegovina *v.* Yugoslavia (Serbia and Montenegro), Order on further Requests for the Indication of Provisional Measures, [1993] *ICJ Rep.* 325–795, Separate Opinion (Judge Lauterpacht), para. 69; *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment, 27 January 2000, para. 933. See also Final Report of the Commission of Experts, Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674, 27 May 1994, para. 94; UN General Assembly Resolution 47/121, UN Doc. AG/RES/47/121, 18 December 1992 (defining 'ethnic cleansing' as a form of genocide).
95. Judgment, *supra* note 1, para. 666. Cf. *Brđanin* Judgment, *supra* note 52, paras. 975–9.
96. Ibid., para. 786.

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of men from the rest of the population, the forcible transfer of the population, the detention of Bosnian Muslim men, and the murder of some of those men in Bratunac; and also included his participation in searching the area around Srebrenica with the purpose of capturing and detaining Bosnian Muslim men.

In determining that 18 years is the proper sentence following a conviction of, inter alia, complicity in genocide, the Trial Chamber opined:

> In relation to Vidoje Blagojević, the Trial Chamber finds that he was not one of the major participants in the commission of the crimes. The Trial Chamber has found that while commanders of the Main Staff and the MUP [Ministry of the Interior] played the key roles in designing and executing the common plan to kill thousands of Bosnian Muslim men and to forcibly transfer over 30,000 Bosnian Muslims, Vidoje Blagojević's contribution to the commission of the crimes was primarily through his substantial assistance to the forcible transfer – assistance which the Trial Chamber found was rendered without him having knowledge of the organised murder operation – and due to his knowledge of the objective to eliminate the Bosnian Muslim enclave of Srebrenica. The Trial Chamber must consider, however, that the practical assistance he rendered had a substantial effect on the commission of the crime of genocide.[97]

4. Conclusion

The judgment in the case of Vidoje Blagojević and Dragan Jokić contributed to the development of the jurisprudence related to genocide; it remains to be seen what effect the *Blagojević and Jokić* judgment will have on further prosecutions for genocide, be it at the ICTY or beyond. At the same time, it appears that the Trial Chamber took a more cautious or conservative approach to the mental state for liability under a joint criminal enterprise theory of liability, in relation to all crimes charged in its factual findings. The result may be a judgment about which neither side can be fully satisfied – nor dissatisfied.

But more than through legal developments which occur in response to, or as a result of, the Trial Chamber's findings, the *Blagojević and Jokić* Judgment leave the greatest mark through its factual findings. The detailed findings contribute to the establishment of a historical record and a further understanding of what happened during those fateful days following the fall of the Srebrenica enclave in July 1995 and, in doing so, go some way towards fulfilling the Tribunal's mandate to bring justice and promote reconciliation in the former Yugoslavia.

97. Ibid., para. 835.

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