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APPEALS CHAMBER
CHAMBRE D'APPEL

The Hague, 19 April 2004
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APPEALS CHAMBER JUDGEMENT IN THE CASE *THE PROSECUTOR v. RADISLAV KRSTIĆ*

The Appeals Chamber unanimously finds that "genocide was committed in Srebrenica in 1995"

"…Bosnia Serb forces carried out genocide against the Bosnian Muslims (…) .Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity."

Radislav Krstić found "guilty of aiding and abetting genocide"

"…Mr Krstić knew that by allowing Drina Corps resources to be used he was making a substantial contribution to the execution of the Bosnian Muslim prisoners. Although the evidence suggests that Radislav Krstić was not a supporter of that plan, as Commander of the Drina Corps he permitted the Main Staff to call upon Drina Corps resources and to employ those resources."

The Appeals Chamber unanimously "sentences Radislav Krstić to 35 years' imprisonment"

Please find below the summary of the Judgement delivered today by the Appeals Chamber, composed of Judges Theodor Meron (Presiding), Fausto Pocar, Mohamed Shahabuddeen, Mehmet Güney and Wolfgang Schomburg, as read out by the Presiding Judge.

The Appeals Chamber is here today to deliver its judgement on appeal in the case of the Prosecutor against Mr Radislav Krstić. Both the Prosecution and the Defence have appealed from the judgement issued by Trial Chamber I of this Tribunal on 2 August 2001. This followed a trial which began here at The Hague on 13 March 2000 and ran for just over one year.

The facts of this case relate mainly to events which took place in the town of Srebrenica around July 1995. Srebrenica is located in eastern Bosnia and Herzegovina. It gave its name to a United Nations so-called "safe area", which was intended as an enclave of safety set up to

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protect its civilian population from the surrounding war. Since July 1995, however, Srebrenica has also lent its name to an event the horrors of which form the background to this case. The depravity, brutality and cruelty with which the VRS, the Bosnian Serb Army, treated the innocent inhabitants of the safe area are now well known and documented. Bosnian women, children and elderly were removed from the enclave, and between seven to eight thousand Bosnian Muslim men were systematically murdered.

Srebrenica is located in the area for which the Drina Corps of the VRS was responsible. Radislav Krstić was a General-Major in the VRS and Commander of the Drina Corps at the time the crimes at issue were committed. For his involvement in these events, the Trial Chamber found Radislav Krstić guilty of genocide; persecution through murders, cruel and inhumane treatment, terrorising the civilian population, forcible transfer and destruction of personal property as crimes against humanity; and murder as a violation of the laws or customs of war. For these convictions, the Trial Chamber sentenced Mr Krstić to forty-six years' imprisonment.

Following the practice of the Tribunal, I will not read out the text of the Appeal Judgement except for the disposition. Instead, I will summarise the issues on appeal and the reasoning and findings of the Appeals Chamber so that you, Radislav Krstić, together with the public, will know the reasons for the Appeals Chamber's decision. I emphasise, however, that this is only a summary, and that it does not in any way form part of the Judgement of the Appeals Chamber. The only authoritative account of the findings of the Appeals Chamber is in the written Judgement which will be available today at the end of these proceedings.

Because of the importance of this Appeal, the summary of the Judgement which I will read now is longer than our customary practice. To help you understand the Judgement, let me point out in advance that there are two cardinal issues on which the Appeals Chamber is unanimous. The first is the finding that genocide was committed in Srebrenica in 1995. The second is the sentence which I will announce at the end of today's proceedings.

In this case, the Prosecution bases its appeal on two grounds. First, the Prosecution appeals the Trial Chamber's conclusion on impermissibly cumulative convictions. Secondly, the Prosecution appeals the sentence imposed by the Trial Chamber. It requests the imposition of a life sentence on Radislav Krstić, with a minimum of 30 years' imprisonment.

The Defence bases its appeal on four grounds. First, it appeals the conviction for genocide of Radislav Krstić, alleging that both factual and legal errors have been committed by the Trial Chamber; secondly, it appeals on the basis of various disclosure practices of the Prosecution,

which it alleges deprived Mr Krstić of a fair trial; thirdly, the Defence alleges that the Trial Chamber made a number of other factual and legal errors; and fourthly, it appeals the sentence handed down to Mr Krstić, alleging that the Trial Chamber failed to adequately take into account the sentencing practice in the former Yugoslavia, and to give sufficient weight to the mitigating circumstances.

I will now set out in more detail these grounds of appeal as well as the Appeals Chamber's findings in respect of each.

1. The Trial Chamber's Findings that Genocide Occurred in Srebrenica

The Defence appeals Radislav Krstić's conviction for genocide committed against Bosnian Muslims in Srebrenica. The Defence argues that the Trial Chamber misconstrued the legal definition of genocide in two ways.

(a) The Definition of the Part of the Group

First, Mr 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.

Article 4 of the Tribunal's Statute, like the Genocide Convention, covers certain acts done with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The targeted group identified in the Indictment, and accepted by the Trial Chamber, was that of the Bosnian Muslims. The Trial Chamber determined that the Bosnian Muslims were a specific, distinct national group, and therefore covered by Article 4. This conclusion is not challenged on appeal.

As is evident from the Indictment, Mr 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 both Article 4 and the Genocide Convention.

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 must be significant enough to have an impact on the group as a whole.

Thus, the intent requirement of genocide under Article 4 of the Statute is 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 it is 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.

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. 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. Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size. 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. 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.

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." 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. The elimination of the Muslim population of Srebrenica, despite the assurances given by the international community, would have served 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.

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 Mr Krstić intended to destroy was the Bosnian Muslim men of military age of Srebrenica.

In making this argument, 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. 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.

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

Secondly, the Defence submits that the Trial Chamber impermissibly broadened the definition of genocide by concluding that an effort to displace a community from its traditional residence is sufficient to show that the alleged perpetrator intended to destroy a protected group.

The Appeals Chamber agrees that the Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group. The Trial Chamber expressly acknowledged this limitation, and eschewed any broader definition. Given that the Trial Chamber correctly identified the governing legal principle, the Defence must discharge the burden of persuading the Appeals Chamber that, despite having correctly stated the law, the Trial Chamber erred in applying it.

The main evidence underlying the Trial Chamber's conclusion that the VRS forces intended to eliminate all the Bosnian Muslims of Srebrenica was the massacre by the VRS of all men of military age from that community. The Trial Chamber based this conclusion on a number of factual findings, which must be accepted as long as a reasonable Trial Chamber could have arrived at the same conclusions. The Trial Chamber found that, in executing the captured Bosnian Muslim men, the VRS did not differentiate between men of military status and civilians. The Trial Chamber also found that some of the victims were severely handicapped and, for that reason, unlikely to have been combatants. Moreover, as the Trial Chamber emphasized, the term "men of military age" was itself a misnomer, for the group killed by the VRS included boys and elderly men normally considered to be outside that range. The Trial Chamber was also entitled to consider the long-term impact that the elimination of seven to eight thousand men from Srebrenica would have on the survival of that community.

In this case, the factual circumstances, as found by the Trial Chamber, permit the inference that the killing of the Bosnian Muslim men was done with genocidal intent. The scale of the killing, combined with the VRS Main Staff's awareness of the detrimental consequences it would have for the Bosnian Muslim community of Srebrenica and with the other actions the Main Staff took to ensure that community's physical demise, is a sufficient factual basis for the finding of specific genocidal intent. The Trial Chamber found, and the Appeals Chamber endorses this finding, that the killing was engineered and supervised by some members of the Main Staff of the VRS. The fact that the Trial Chamber did not attribute genocidal intent to a particular official within the Main Staff does not undermine the conclusion that Bosnian Serb forces carried out genocide against the Bosnian Muslims.

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

The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements – the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part – guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name. By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction

the forty thousand Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.

In concluding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims of Srebrenica, the Trial Chamber did not depart from the legal requirements for genocide. The Defence appeal on this issue is dismissed.

2. Alleged Factual Errors relating to Joint Criminal Enterprise to Commit Genocide

In this next ground of appeal, the Defence argues that even if the finding of genocide was correct, the Trial Chamber erred in finding the evidence sufficient to establish that Radislav Krstić was a member of a joint criminal enterprise to commit genocide.

It is well established that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber. However, as the Appeals Chamber has stated, when the Prosecution relies upon proof of a state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence.

The Trial Chamber based its conclusion that Radislav Krstić shared the intent of a joint criminal enterprise to commit genocide on inferences drawn from its findings with respect to his knowledge about the situation facing the Bosnian Muslim civilians after the take-over of Srebrenica, his interaction with the main participants of the joint criminal enterprise, and the evidence it accepted as establishing that resources and soldiers under his command and control were used to facilitate the killings. Relying on this evidence, the Trial Chamber held that, from the evening of 13 July 1995, Radislav Krstić intentionally participated in the joint criminal enterprise to execute the Bosnian Muslims of Srebrenica.

In attacking this conclusion, the Defence advances three arguments.

First, the Defence challenges the Trial Chamber's finding that Radislav Krstić assumed effective command over the Drina Corps and Drina Corps assets on 13 July 1995, and not later. The arguments the Defence now puts forward were extensively considered by the Trial Chamber. The Trial Chamber, relying on eye-witness and documentary evidence, found that the transfer of command to Radislav Krstić took place on 13 July. The conclusions of the Trial Chamber are entirely reasonable and supported by ample evidence. The Defence has failed to demonstrate any error on the part of the Trial Chamber, much less that the finding was one that no reasonable Trial Chamber could have reached.

Secondly, the Defence argues that the Trial Chamber erred in rejecting its claim that the executions were ordered and supervised through a parallel chain of command maintained by the VRS security forces, over which Radislav Krstić did not have control. According to the Defence, this chain of command originated with General Mladić, went through his Security Commander, Colonel Beara of the VRS Main Staff, to Colonel Popović of the Drina Corps and finally to the Zvornik Brigade Security Officer, Dragan Nikolić. Acting through this parallel chain of command, the Defence submits, the Main Staff of the VRS could and did commandeer Drina Corps assets without consulting the Drina Corps Command.

In support of this argument, the Defence adduced as additional evidence three police reports made by Dragomir Vasić, Chief of the Centre of Public Security at Zvornik, as well as the statement of a protected witness. These reports do indeed lend support to the Defence's argument that the MUP was acting on its own in carrying out the executions. The Trial Chamber, however, did not disagree. In fact, it expressly refused to "discount the possibility that the execution plan was initially devised by members of the VRS Main Staff without consultation with the Drina Corps command generally and Radislav Krstić in particular," and that General Mladić may have directed the operation. As the Trial Chamber emphasised, however, the Main Staff lacked the resources to carry out the execution on its own and therefore had to call on the resources of the Drina Corps. The Trial Chamber found, moreover, that the Drina Corps Command knew about the Main Staff's requests and about the subsequent use of the resources of the Drina Corps in the executions. These finding's are supported by two combat reports of 16 and 18 July 1995, signed by Radislav Krstić as the Commander of the Drina Corps, which the Prosecution introduced as rebuttal material on Appeal.

The Appeals Chamber is of the view that the Trial Chamber's rejection of the Defence's argument as to the parallel chain of command, even when examined in light of the Defence's additional evidence, is not one that no reasonable trier of fact could have made.

Thirdly, the Defence challenges the finding of the Trial Chamber that Mr Krstić directly participated in the executions and argues that, even if the evidence before the Trial Chamber is sufficient to establish knowledge on his part about the genocide committed in Srebrenica, it is not sufficient to establish that he intended to commit genocide.

Specifically, the Defence argues that the Trial Chamber erred in concluding that on 16 July 1995 members of the Bratunac Brigade, a unit of the Drina Corps subordinate to Radislav Krstić, participated in the killings at Branjevo Farm and the Pilica Cultural Dom. The evidence of Drazen Erdemović (a member of the 10th Sabotage Brigade who participated in the killings at Branjevo Farm), formed a crucial factual basis for this conclusion of the Trial Chamber. With respect to the identification of the men from Bratunac, Mr. Erdemović's evidence was that he had heard that they were from Bratunac, they were dressed in VRS uniform and they knew some of the Bosnian Muslim men of Srebrenica, which suggested to him that they were local. Mr. Erdemović provided no evidence that these men belonged to the Bratunac Brigade, rather than to other military units. In fact, the only man Mr. Erdemović positively identified from photographs belonged to another military unit, one not commanded by Mr Krstić. As such, the evidence of Mr. Erdemović is insufficient to establish that the men were from the Bratunac Brigade.

The insufficiency of Mr. Erdemović's evidence is highlighted by the testimony of the Prosecution military expert, Richard Butler. Correcting evidence he gave during trial, Mr. Butler made clear during the Appeal hearing that Mr. Erdemović had never said that the men who were sent to assist in the executions were from the Bratunac Brigade, only that they were from the town of Bratunac. Mr. Butler also confirmed that one of the men referred to by Mr. Erdemović was identified as being a member of the Panteri unit from the East Bosnia Corps. In light of this fact, Mr. Butler now concluded that the men that arrived to assist in the executions did not belong to the Bratunac Brigade.

Given the evidence relied upon by the Trial Chamber, and the corrections made to that evidence by Mr. Butler, the finding of the Trial Chamber that men from the Bratunac Brigade were dispatched by Mr Krstić to assist in the executions at Branjevo Farm and Pilica Dom is one that no reasonable trier of fact could have made. The evidence fails to establish the direct involvement of the Drina Corps in carrying out the executions, and as such cannot be relied upon as evidence of Radislav Krstić's direct involvement in assisting the executions.

The evidence does, however, establish the involvement of Drina Corps personnel and assets in facilitating the executions. The Trial Chamber's finding on that point is supported by Mr. Erdemović's evidence that his unit was accompanied to the Branjevo Military Farm by two

Drina Corps military police officers, and that military police officers wearing the insignia of the Drina Corps escorted the buses of Bosnian Muslim civilians to the Branjevo Military Farm, and supervised their unloading.

In light of these findings, the Appeals Chamber must determine whether the Trial Chamber erred in finding that Radislav Krstić shared the genocidal intent of a joint criminal enterprise to commit genocide against the Bosnian Muslims of Srebrenica.

The case against Radislav Krstić was one based on circumstantial evidence, and the finding of the Trial Chamber was largely based upon a combination of circumstantial facts. In convicting Mr Krstić as a participant in a joint criminal enterprise to commit genocide, the Trial Chamber relied upon evidence establishing his knowledge of the intention on the part of General Mladić and other members of the VRS Main Staff to execute the Bosnian Muslims of Srebrenica, his knowledge of the use of personnel and resources of the Drina Corps to carry out that intention given his command position, and upon evidence that Radislav Krstić supervised the participation of his subordinates in carrying out those executions.

The Trial Chamber found the contacts between Mr Krstić and General Mladić to be crucial to establishing Radislav Krstić's genocidal intent. The parties agreed that General Mladić was the main figure behind the killings. The Trial Chamber found that Mr Krstić and General Mladić were in constant contact throughout the relevant period. The Trial Chamber concluded that "if General Mladić knew about the killings, it would be natural for Mr Krstić to know as well".

In reaching this conclusion, the Trial Chamber relied upon the presence of Mr Krstić at the second and third of three meetings convened by General Mladić at the Hotel Fontana on 11 and 12 July 1995. All three meetings were attended by UNPROFOR leaders and Bosnian civilians leaders selected by UNPROFOR. The fate of the Bosnian Muslims following the fall of Srebrenica was discussed at these meetings. Based on his presence at two of these meetings, the Trial Chamber concluded that Radislav Krstić "was put on notice that the survival of the Bosnian Muslim population was in question following the take-over of Srebrenica."

However, the most that Radislav Krstić's presence at these meetings establishes is his knowledge about General Mladić's decisions to transfer the population from Potočari to Muslim-held territory on buses, and to screen the male members of this population for war criminals prior to transportation. As the Trial Chamber acknowledged, the decision to screen was neither criminal nor unreasonable. The Bratunac Brigade had drawn up a list of over 350 suspected war criminals thought to be in the Srebrenica area. Although General Mladić also

announced that the survival of the population depended upon the complete surrender of the Army of Bosnia and Herzegovina it is unlikely that General Mladić would be disclosing his genocidal intent in the presence of UNPROFOR leaders and foreign media, or that those present at the meeting, including Mr Krstić, would have interpreted his comments in that light. There was no evidence to suggest that at this time Radislav Krstić knew about the intent on the part of General Mladić to execute the Bosnian Muslim civilians who were to be transferred.

Further, the Trial Chamber relied upon the presence of Radislav Krstić in and around the Potočari compound for between one and two hours in the afternoon of 12 July, at which time he was seen conferring with other high-ranking military officers, including General Mladić, as evidence of his growing knowledge that genocide would be committed. The Trial Chamber found that as a result of his presence there, Mr Krstić "must have known of the appalling conditions facing the Bosnian Muslim refugees and the general mistreatment inflicted upon them by VRS soldiers on that day." The Trial Chamber further found that, based on Mr Krstić's presence at the White House compound in Potočari, he was aware that the segregated men were being detained in terrible conditions and were not being treated in accordance with accepted practice for war crime screening. The Trial Chamber concluded that he must have realised, as did all other witnesses present around the compound, that the fate of these men was terribly uncertain but that he made no effort to clarify this with General Mladić or anyone else.

However, the Trial Chamber also concluded that it was not until 13 July 1995 that Dutch-bat troops witnessed definite signs that Bosnian Serbs were executing some of the Bosnian Muslim men who had been separated; that it was not until all the Bosnian Muslim civilians were removed from Potočari that the personal belongings of the separated men were destroyed; and that Dutch-bat troops were certain that the story of screening for war criminals was not true. The Trial Chamber was unable to conclude that any Drina Corps personnel were still in the compound at that time, and there was no evidence that Mr Krstić was either aware of the shootings at the White House or the destruction of the personal belongings of the separated men.

The Trial Chamber also found that Radislav Krstić must have known that men who managed to board the buses with the women, children and elderly were being removed from them at Tišća. Evidence of an intercept of 12 July 1995 established that Mr Krstić ordered the Drina Corps to secure the road from Vlasenica toward Tuzla. The Trial Chamber concluded that this fact gave rise to the inference that he must have known men were being taken off the buses at Tišća. It further found that the Chief of Staff of the Milići Brigade, and troops from his unit, were present at the Tišća screening site upon the orders of the Drina Corps Command. On the

basis of this evidence the Trial Chamber concluded that it was clear that Mr Krstić must have known that men were being separated at Tišća and taken to detention sites. Notably, however, the Trial Chamber did not establish at this point that Radislav Krstić knew the prisoners were to be executed.

The Trial Chamber did not actually establish, from Mr Krstić's contacts with General Mladić during the relevant period, that Radislav Krstić in fact learned of the intention to execute the Bosnian Muslims as a result of those contacts. The Trial Chamber's assertion was without a proper evidentiary basis. Without having established that Mr Krstić knew of that intention on the part of General Mladić, no reasonable Trial Chamber could have made the further inference that Mr Krstić shared that intention. This erroneous finding of the Trial Chamber casts doubt upon its overall conclusion that Radislav Krstić shared the genocidal intent.

The Appeals Chamber is of the view that all that the evidence can establish is that Mr Krstić was aware of the intent to commit genocide on the part of some members of the Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established. There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed genocidal intent. Mr Krstić, therefore, is not guilty of genocide as a principal perpetrator.

The issue that arises now is the level of Radislav Krstić's criminal responsibility in the circumstances as properly established. All of the crimes that followed the fall of Srebrenica occurred in the Drina Corps zone of responsibility. There was no evidence that the Drina Corps devised or instigated any of the atrocities, and the evidence strongly suggested that the criminal activity was being directed by some members of the VRS Main Staff under the direction of General Mladić. At the time the executions commenced, Mr Krstić was engaged in preparing for combat activities at Žepa and, from 14 July 1995 onwards, directing the attack itself.

It was reasonable for the Trial Chamber to conclude that at least as from 15 July 1995, Radislav Krstić had knowledge of the genocidal intent of some of the members of the VRS Main Staff. Radislav Krstić was aware that the Main Staff had insufficient resources of its own to carry out the executions and that, without the use of Drina Corps resources, the Main Staff would not have been able to implement its genocidal plan. Mr Krstić knew that by allowing

Drina Corps resources to be used he was making a substantial contribution to the execution of the Bosnian Muslim prisoners. Although the evidence suggests that Radislav Krstić was not a supporter of that plan, as Commander of the Drina Corps he permitted the Main Staff to call upon Drina Corps resources and to employ those resources. The criminal liability of Mr Krstić is therefore more properly expressed as that of an aider and abettor to a joint criminal enterprise to commit genocide, and not as that of a perpetrator. This charge is fairly encompassed by the indictment, which alleged that Radislav Krstić aided and abetted in the planning, preparation or execution of genocide against the Bosnian Muslims in Srebrenica.

Mr Krstić's responsibility is accurately characterized as aiding and abetting genocide under Article 7(1) of the Statute and not as complicity in genocide under Article 4(3)(e). The charge of complicity was also alleged in the indictment, as Count 2. The Trial Chamber did not enter a conviction on this count, concluding that Radislav Krstić's responsibility was that of a principal perpetrator. There is an overlap between Article 4(3) as the general provision enumerating punishable forms of participation in genocide and Article 7(1) as the general provision for criminal liability which applies to all the offences punishable under the Statute, including the offence of genocide. There is support for a position that Article 4(3) may be the more specific provision (*lex specialis*) in relation to Article 7(1). There is, however, also authority indicating that modes of participation enumerated in Article 7(1) should be read, as the Tribunal's Statute directs, into Article 4(3), and so the proper characterization of such individual's criminal liability is that of aiding and abetting genocide.

The Appeals Chamber concludes that the latter approach is the correct one in this case. Article 7(1) of the Statute, which allows liability to attach to an aider and abettor, expressly applies that mode of liability to any "crime referred to in articles 2 to 5 of the present Statute," including the offence of genocide prohibited by Article 4. Because the Statute must be interpreted with the utmost respect to the language used by the legislator, the Appeals Chamber may not conclude that the consequent overlap between Article 7(1) and Article 4(3)(e) is a result of an inadvertence on the part of the legislator where another explanation, consonant with the language used by the Statute, is possible. In this case, the two provisions can be reconciled, because the terms "complicity" and "accomplice" may encompass conduct broader than that of aiding and abetting. Given the Statute's express statement in Article 7(1) that liability for genocide under Article 4 may attach through the mode of aiding and abetting, Radislav Krstić's responsibility is properly characterized as that of aiding and abetting genocide.

This, however, raises the question of whether, for liability of aiding and abetting to attach, the individual charged need only possess knowledge of the principal perpetrator's specific

genocidal intent, or whether he must share that intent. The Appeals Chamber has previously explained, on several occasions, that an individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime. This principle applies to the Statute's prohibition of genocide, which is also an offence requiring a showing of specific intent. The conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of the Tribunal. The same approach is followed by many domestic jurisdictions, both common and civil law.

The fact that the Trial Chamber did not identify individual members of the Main Staff of the VRS as the principal participants in the genocidal enterprise does not negate the finding that Radislav Krstić was aware of their genocidal intent. A defendant may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified. In *Vasiljević*, the Appeals Chamber found the accused guilty as an aider and abettor to persecution without having had the alleged principal perpetrator on trial and without having identified two other alleged co-perpetrators. Accordingly, the Trial Chamber's conviction of Mr Krstić as a participant in a joint criminal enterprise to commit genocide is set aside and a conviction for aiding and abetting genocide is entered instead.

The Appeals Chamber's examination of Radislav Krstić's participation in the crime of genocide has implications for his criminal responsibility for the murders of the Bosnian Muslim civilians under Article 3, violations of the laws or customs of war, and for extermination and persecution under Article 5, all of which arise from the executions of the Bosnian Muslims of Srebrenica between 13 and 19 July 1995. There was no evidence that Mr Krstić ordered any of these murders, or that he directly participated in them. All the evidence establishes is that he knew that those murders were occurring and that he permitted the Main Staff to use personnel and resources under his command to facilitate them. In these circumstances, the criminal responsibility of Radislav Krstić is that of an aider and abettor to the murders, extermination and persecution, and not of a principal co-perpetrator.

3. The Disclosure Practices of the Prosecution and Radislav Krstić's Right to a Fair Trial

The Defence has alleged, as a further ground for appeal, that the Prosecutor's disclosure practices violated Radislav Krstić's right to a fair trial under Article 20 of the Statute. In its Judgement, the Appeals Chamber has addressed each of the alleged practices which the Defence argues resulted in prejudice to its case. These are: withholding copies of exhibits for tactical reasons; concealing a tape for later submission as evidence in cross-examination;

various violations of Rule 68 (disclosure of exculpatory material); and the questionable credibility of the testimony of two witnesses.

As a general proposition, where the Defence seeks a remedy for the Prosecution's breach of its disclosure obligations under Rule 68, the Defence must show: first, that the Prosecution has acted in violation of its obligations under Rule 68, and secondly, that the Defence's case suffered material prejudice as a result. In other words, if the Defence satisfies the Tribunal that there has been a failure by the Prosecution to comply with Rule 68, the Tribunal - in addressing the aspect of appropriate remedies - will examine whether or not the Defence has been prejudiced by that failure to comply before considering what remedy is appropriate.

In this case, the Defence has failed to establish that it suffered any prejudice as a result of the four alleged practices. This ground of appeal is therefore dismissed.

However, the right of an accused to a fair trial is a fundamental right, protected by the Statute, and Rule 68 is essential for the conduct of fair trials before the Tribunal. Where an accused can only seek a remedy for the breaches of a Rule in exceptional circumstances – in particular where the very enforcement of that Rule relies for its effectiveness upon the proper conduct of the Prosecution - any failure by the Appeals Chamber to act in defence of the Rule would endanger its application. The Appeals Chamber has a number of options at its disposal in these circumstances, based on Rule 46 (Misconduct of Counsel) and Rule 68*bis* (Failure to Comply with Disclosure Obligations).

Rule 68*bis* in particular is specific to disclosure obligations, and provides the Tribunal with a broad discretionary power to impose sanctions on a defaulting party, *proprio motu* if necessary.

The Appeals Chamber notes that the Prosecution has already described in some detail why certain materials were not disclosed, including declarations by Senior Trial Attorneys in the Office of the Prosecutor. While the disclosure practices of the Prosecution in this case have on occasion fallen short of its obligations under the applicable Rules, the Appeals Chamber is unable to determine whether the Prosecution deliberately breached its obligations.

In light of the absence of material prejudice to the Defence in this case, the Appeals Chamber does not issue a formal sanction against the Prosecution for its breaches of its obligations under Rule 68. The Appeals Chamber is persuaded that, on the whole, the Prosecution acted in good faith in the implementation of a systematic disclosure methodology which, in light of the findings above, must be revised so as to ensure future compliance with the obligations

incumbent upon the Office of the Prosecutor. This finding must not however be mistaken for the Appeals Chamber's acquiescence in questionable conduct by the Prosecution.

In light of the allegations of misconduct being made against the Prosecution in this case, the Appeals Chamber orders that the Prosecutor investigate the complaints alleged and take appropriate action. The Appeals Chamber will not tolerate anything short of strict compliance with disclosure obligations, and considers its discussion of this issue to be sufficient to put the Office of the Prosecutor on notice for its conduct in future proceedings.

4. The Trial Chamber's Analysis of Cumulative Convictions

In its first ground of appeal, the Prosecution challenges the Trial Chamber's non-entry, as impermissibly cumulative, of Radislav Krstić's convictions for extermination and persecution of the Bosnian Muslims of Srebrenica between 13 and 19 July 1995, and for murder and inhumane acts as crimes against humanity committed against the Bosnian Muslim civilians in Potočari between 10 and 13 July 1995. The Trial Chamber disallowed convictions for extermination and persecution as impermissibly cumulative with Mr Krstić's conviction for genocide. It also concluded that the offences of murder and inhumane acts as crimes against humanity are subsumed within the offence of persecution where murder and inhumane acts form the underlying acts of the persecution conviction.

The Defence urges a dismissal of the Prosecution's appeal because the Prosecution does not seek an increase of the sentence in the event its appeal is successful. However, the import of cumulative convictions is not limited to their impact on the sentence. Cumulative convictions impose additional stigma on the accused and may imperil his eligibility for early release. On the other hand, multiple convictions, where permissible, serve to describe the full culpability of the accused and to provide a complete picture of his criminal conduct. The Prosecution's appeal is therefore admissible notwithstanding the fact that it does not challenge the sentence.

The established jurisprudence of the Tribunal is that multiple convictions entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision has a materially distinct element not contained within the other. An element is materially distinct from another if it requires proof of a fact not required by the other element. Where this test is not met, only the conviction under the more specific provision will be entered. The more specific offence subsumes the less specific one, because the commission of the former necessarily entails the commission of the latter.

The first vacated conviction that the Prosecution seeks to reinstate is the conviction for extermination under Article 5 based on the killing of the Bosnian Muslim men of Srebrenica. The Trial Chamber held that this conviction was impermissibly cumulative with Radislav Krstić's conviction for genocide under Article 4, which was based on the same facts. Both statutory provisions contain a materially distinct element not contained within the other. Genocide requires proof of an intent to destroy, in whole or in part, a specified protected group, while extermination requires proof that the crime was committed as part of a widespread and systematic attack against a civilian population. The Trial Chamber's conclusion that convictions for extermination under Article 5 and genocide under Article 4 are impermissibly cumulative was accordingly erroneous.

The Prosecution next argues that the Trial Chamber erred in setting aside Mr Krstić's conviction for persecution under Article 5 for the crimes resulting from the killings of Bosnian Muslims of Srebrenica as impermissibly cumulative with the conviction for genocide. For the reasons just given with respect to the offence of extermination, the offence of genocide does not subsume that of persecution. The Trial Chamber's conclusion to the contrary was erroneous.

The Prosecution appeals the non-entry of two other convictions. The first is the conviction for murder, as a crime against humanity, of Bosnian Muslim civilians in Potočari. The Trial Chamber set aside this conviction as impermissibly cumulative with the conviction for persecution perpetrated through murder of these civilians. The second is the conviction for inhumane acts, based on the forcible transfer of Bosnian Muslim civilians to Potočari. The Trial Chamber concluded that this conviction was subsumed within the conviction for persecution based on the inhumane acts of forcible transfer. The Trial Chamber's conclusions comport with the Appeals Chamber's holdings on these issues in *Krnojelac* and *Vasiljević*. The Prosecution's appeal on these issues is therefore dismissed.

5. Sentencing

The Trial Chamber imposed on Radislav Krstić a single sentence of 46 years' imprisonment. Both parties have appealed this sentence.

The Prosecution argues that the sentence imposed by the Trial Chamber was inadequate because it failed properly to account either for the gravity of the crimes committed or for the participation of Radislav Krstić in those crimes; is inconsistent with ICTR jurisprudence in comparable genocide cases; is based on Mr Krstić's "palpably lesser guilt"; and because the Trial Chamber erred in finding that premeditation was inapplicable as an aggravating factor in

this case. Consequently, the Prosecution argues that the Trial Chamber imposed a sentence beyond its discretion, and that the sentence should be increased to life imprisonment, with a minimum of 30 years.

The Defence argues that in imposing the sentence, the Trial Chamber failed to have due regard to the sentencing practice of the former Yugoslavia and the courts of Bosnia and Herzegovina, or to give adequate weight to what the Defence submits are mitigating circumstances. The Defence accordingly argues that the sentence should be reduced to a maximum of 20 years.

The Appeals Chamber has emphasised that the imposition of a sentence is a discretionary decision. The Appeals Chamber has further explained that only a "discernible error" in the exercise of that sentencing discretion by the Trial Chamber may justify a revision of the sentence.

For the reasons set out in the Appeal Judgement, the Appeals Chamber has not found a discernible error on the part of the Trial Chamber in imposing a sentence of 46 years on Radislav Krstić in respect of any of the submissions put forward by either the Prosecution or the Defence.

However, the Appeals Chamber has reduced Mr Krstić's responsibility for genocide and for the murder of the Bosnian Muslims under Article 3 from that of a direct participant to that of an aider and abettor.

In this light, an adjustment of the sentence is necessary. The Appeals Chamber has the power to do so without remitting the matter to the Trial Chamber.

The general sentencing principles applicable in this case include: (i) the gravity of the crime(s) alleged; (ii) the general practice of prison sentences in the courts of the former Yugoslavia; (iii) the individual circumstances of the convicted person; and (iv) any aggravating or mitigating circumstances.

Regarding the gravity of the crimes alleged, as the Appeals Chamber recently acknowledged in the *Vasiljević* case, aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator. This principle has also been recognized in the ICTR, in the law of the former Yugoslavia and in many national jurisdictions. While Radislav Krstić's crime is undoubtedly grave, the finding that he lacked genocidal intent significantly diminishes his responsibility. The same analysis applies to the reduction of Mr Krstić's responsibility for the murders as a violation of laws or customs of

war committed between 13 and 19 July 1995 in Srebrenica. As such, the revision of Mr Krstić's conviction to aiding and abetting these two crimes merits a considerable reduction of his sentence.

The Appeals Chamber has also concluded that the Trial Chamber erred in setting aside Radislav Krstić's convictions for Counts Three (extermination as a crime against humanity) and Six (persecution as a crime against humanity) as impermissibly cumulative with the conviction for genocide. The Appeals Chamber concluded, however, that Mr Krstić's level of responsibility with respect to these two offences was that of an aider and abettor and not of a principal perpetrator. While these conclusions may alter the overall picture of Radislav Krstić's criminal conduct, the Prosecution did not seek an increase in sentence on the basis of these convictions. The Appeals Chamber therefore does not take Mr Krstić's participation in these crimes into account in determining the sentence appropriate to the gravity of his conduct.

As regards the general sentencing practice of the courts of the former Yugoslavia, the Appeals Chamber has already explained that the Tribunal is not bound by such practice, and may, if the interests of justice so merit, impose a greater or lesser sentence than would have been imposed under the legal regime of the former Yugoslavia. In its Judgement, the Appeals Chamber has considered the sentencing practice of the courts of the former Yugoslavia applicable in this case, and has taken those practices into account. In particular, the law of the former Yugoslavia provided that the sentence of a person who aided a principal perpetrator to commit a crime can be reduced to a sentence less than the one given to the principal perpetrator.

The Appeals Chamber believes that four additional factors must be accounted for in mitigation of Mr Krstić's sentence, namely: (i) the nature of his provision of the Drina Corps assets and resources; (ii) the fact that he had only recently assumed command of the Corps during combat operations; (iii) the fact that he was present in and around the Potočari for at most two hours; and (iv) his written order to treat Muslims humanely.

I shall now read the operative paragraphs of the Appeals Chamber's judgement, the disposition, in full.

Disposition

For the foregoing reasons, **THE APPEALS CHAMBER**

> **PURSUANT** to Article 25 of the Statute and Rules 117 and 118 of the Rules of Procedure and Evidence;

NOTING the respective written submissions of the parties and the arguments they presented at the hearings of 26 and 27 November 2003;

SITTING in open session;

SETS ASIDE, Judge Shahabuddeen dissenting, Radislav Krstić's conviction as a participant in a joint criminal enterprise to commit genocide (Count 1), and **FINDS**, Judge Shahabuddeen dissenting, Radislav Krstić guilty of aiding and abetting genocide;

RESOLVES that the Trial Chamber incorrectly disallowed Radislav Krstić's convictions as a participant in extermination and persecution (Counts 3 and 6) committed between 13 and 19 July 1995, but that his level of responsibility was that of an aider and abettor in extermination and persecution as crimes against humanity;

SETS ASIDE, Judge Shahabuddeen dissenting, Radislav Krstić's conviction as a participant in murder under Article 3 (Count 5) committed between 13 and 19 July 1995, and **FINDS**, Judge Shahabuddeen dissenting, Radislav Krstić guilty of aiding and abetting murder as a violation of the laws or customs of war;

AFFIRMS Radislav Krstić's convictions as a participant in murder as a violation of the laws or customs of war (Count 5) and in persecution (Count 6) committed between 10 and 13 July 1995 in Potočari;

DISMISSES the Defence and the Prosecution appeals concerning Radislav Krstić's convictions in all other respects;

DISMISSES the Defence and the Prosecution appeals against Radislav Krstić's sentence and **IMPOSES** a new sentence, taking into account Radislav Krstić's responsibility as established on appeal;

SENTENCES Radislav Krstić to 35 years' imprisonment to run as of this day, subject to credit being given under Rule 101(C) of the Rules of Procedure and Evidence for the period Radislav Krstić has already spent in detention, that is from 3 December 1998 to the present day;

ORDERS, in accordance with Rules 103(C) and 107 of the Rules of Procedure and Evidence, that Radislav Krstić is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where his sentence will be served.

The Judgement is signed by Judges Pocar, Shahabuddeen, Güney, Schomburg and myself this nineteenth day of April 2004 at The Hague, The Netherlands.

Judge Shahabuddeen appends a partial dissenting opinion.