Prosecutor v Karadžić (ICTY, Case No IT-95-5/18)

The Indictment, English Language and Holbrooke Agreement Decisions

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Introduction

During the 1992–95 Bosnian conflict, Radovan Karadžić was the highest military and political authority of the Bosnian Serbs. He had been one of the founders of the Srpska Demokratska Stranka (Serbian Democratic Party of Bosnia and Herzegovina – 'SDS') and its President from 12 July 1990 until 19 July 1996. He also served as the Chairman of the National Security Council of the Serbian Republic of Bosnia and Herzegovina ('Republika Srpska'), the sole President of Republika Srpska and the Supreme Commander of its armed forces from 17 December 1992 to 19 July 1996.

For events that took place during this period, Karadžić has been indicted on 11 counts of war crimes, crimes against humanity and genocide before the International Criminal Tribunal for the former Yugoslavia ('ICTY'). This case note discusses the final pre-trial Indictment ('*Indictment*')[1], including his alleged forms of criminal responsibility and the charges, together with two decisions of the ICTY Appeals Chamber. The first appeal decision dealt with an application by the Prosecution for a determination that Karadžić, as a self-represented accused, understood the English language for the purposes of disclosure and translation ('*Language Decision*').[2] The second appeal decision concerned Karadžić's allegation of the existence of a secret agreement between his representatives and the United States diplomat Richard Holbrooke that Karadžić would not face prosecution at the ICTY if he resigned from political and public life ('*Holbrooke Decision*').[3]

1. Procedural background

In 1995, Karadžić was indicted by the ICTY for crimes allegedly committed during the war in Bosnia and Herzegovina. After resigning from his political posts in July 1996, Karadžić spent the next 12 years on the run. However, this came to an abrupt end on 21 July 2008 when a very peculiar-looking Karadžić was arrested on a bus by Serbian authorities. On

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1 *Prosecutor v Karadžić (Prosecution's Marked-Up Indictment)* (ICTY, Case No IT-95-5/18-PT, 19 October 2009) ('*Indictment*'), Appendix A.

2 *Prosecutor v Karadžić (Decision on Interlocutory Appeal of the Trial Chamber's Decision on Prosecution Motion Seeking Determination that the Accused Understands English)* (ICTY, Case No IT-95-5/18-AR73.3, 4 June 2009) ('*Language Decision*'), [2].

3 *Prosecutor v Karadžić (Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement)* (ICTY, Case No IT-95-5/18-AR73.4, 12 October 2009) ('*Holbrooke Decision*').

29 July 2008, he was transferred into the custody of the Detention Unit of the ICTY in The Hague, The Netherlands, where he currently resides.

At his initial appearance, Karadžić chose to represent himself,[4] although he now has four legal associates, two case managers, an investigator and a number of international *pro bono* advisers and interns who assist him in the preparation of his case.[5] He subsequently refused to enter a plea and, thus, pursuant to rule 62(A)(iv) of the *Rules of Procedure and Evidence of the ICTY*,[6] the Trial Chamber entered a plea of 'not guilty' on his behalf.[7] To date, Karadžić has filed in excess of 270 motions covering a wide range of legal and factual issues, effectively swamping the Tribunal in paperwork.

After the Appeals Chamber rejected Karadžić's motion for a delay of 10 months for the commencement of his trial,[8] the trial opened on 26 October 2009, with Karadžić refusing to appear in court on the grounds that his team had not been given adequate time to prepare and was not ready for trial.[9] Nonetheless, the Trial Chamber proceeded in his absence, with the Prosecution concluding its opening statement on 2 November 2009. After a status conference was held the following day, the Trial Chamber appointed 'standby counsel' for Karadžić and adjourned the trial until 1 March 2010.[10]

2. The final pre-trial Indictment

A. Introduction

On 25 July 1995, Richard Goldstone, then Prosecutor of the ICTY, confirmed the initial Indictment against Karadžić and his military commander Ratko Mladić. The Indictment charged Karadžić with 16 counts of genocide, crimes against humanity and war crimes relating to events throughout the territories of Bosnia and Herzegovina.[11] On 16 November 1995 a separate Indictment was confirmed, which charged Karadžić with a further 20 counts of genocide, war crimes and crimes against humanity for events in the

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[4] ICTY Transcript of Initial Appearance, *Prosecutor v Karadžić* (ICTY, Case No IT-95-5/18, 31 July 2008), 2.

[5] *Language Decision* [2].

[6] *Rules of Procedure and Evidence of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991*, IT/32/Rev. 43(2009) ('*ICTY Rules*').

[7] *Prosecutor v Karadžić* (ICTY, Case No IT-95-5/18, 29 August 2008), 32–3.

[8] See *Prosecutor v Karadžić (Decision on Radovan Karadžić's Appeal of the Decision on Commencement of Trial)* (ICTY, Case No IT-95-5/18-AR73.5, 13 October 2009).

[9] *Prosecutor v Karadžić (Submission on the Commencement of Trial)* (ICTY, Case No IT-95-5/18-PT, 21 October 2009), 3; *Prosecutor v Karadžić* (UCTY, Case No IT-95-5/18, 26 October 2009), 502.

[10] See *Prosecutor v Karadžić (Decision on Appointment of Counsel and Order on Further Trial Proceedings)* (ICTY, Case No IT-95-5/18-PT, 5 November 2009).
Editor's note: Since this article was written, the Appeals Chamber dismissed Karadžić's appeal against a decision refusing his motion to postpone the trial on the grounds that his right to adequate facilities and to choose his standby counsel had been violated by the Registrar: see *Prosecutor v Karadzic (Decision on Appeal from Decision on Motion for Further Postponement of Trial)* (ICTY, Case No IT-95-5/18-AR73.7, 31 March 2010).

[11] *Prosecutor v Karadžić (Initial Indictment, "Bosnia and Herzegovina")* (ICTY, Case No IT-95-5-I, 24 July 1995).

Srebrenica enclave.[12] These two separate Indictments would later be consolidated on 28 April 2000.[13]

After Karadžić's capture, a new Indictment was issued. It removed a number of crime sites, included two separate genocide charges and removed the complicity to commit genocide charge.[14] After the Trial Chamber reconsidered its decision regarding one killing incident in Sušina Camp, a *Third Amended Indictment* was issued.[15] During various subsequent pre-trial status conferences, the Trial Chamber urged the Prosecution to further reduce the Indictment so as to decrease the length of Karadžić's trial. After submitting proposals for reductions, the Prosecution stated its position that it could not further reduce the Indictment 'without sacrificing a core component of its case'.[16]

Pursuant to the Prosecution's proposals, the final pre-trial *Indictment*, filed on 19 October 2009, lists 22 municipalities where crimes allegedly took place, 115 specific incidents, 51 detention facilities and the destruction of 92 cultural and sacred sites.[17]

B. The Indictment

Individual criminal responsibility: Article 7(1) of the *ICTY Statute*[18]

The Indictment alleges that Karadžić is criminally responsible for crimes that 'he planned, instigated, ordered, committed and/or aided and abetted'.[19] It clarifies that the term 'committed' did not allege that Karadžić physically carried out any crime himself, but that his commission manifested itself through his participation in joint criminal enterprises ('JCEs').[20]

Participation in joint criminal enterprises

The Prosecution claims that Karadžić took part in three separate JCEs – each with a different objective, but which were all related to another overarching joint criminal enterprise ('overarching JCE'). That is, Karadžić was a member of four separate, but linked, JCEs. It alleges that members of the JCEs implemented their objectives either by personally committing crimes or by using others to carry out the crimes.

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[12] *Prosecutor v Karadžić (Initial Indictment, "Srebrenica")* (ICTY, Case No IT-95-18-I, 14 November 1995).
[13] *Prosecutor v Karadžić (Amended Indictment)* (ICTY, Case No IT-95/18-I, 28 April 2000).
[14] *Prosecutor v Karadžić (Prosecution's Second Amended Indictment)* (ICTY, Case No IT-95-5/18-PT, 18 February 2009).
[15] *Prosecutor v Karadžić (Third Amended Indictment)* (ICTY, Case No IT-95-5/18-PT, 27 February 2009).
[16] *Prosecutor v Karadžić (Prosecution Second Submission Pursuant to Rule 73bis(D))* (ICTY, Case No IT-95-5/18-PT, 18 September 2009), [22].
[17] See *Indictment* sch A-G.
[18] *Statute of the International Tribunal for the Prosecution of Persons responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, SC Res 827, UN SCOR, 48th sess, 3217th mtg. UN Doc S/Res/827 (1993) ('*ICTY Statute*').
[19] *Indictment* [5].
[20] Ibid.

(i) Crimes committed to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territories (overarching JCE)

According to the Indictment, Karadžić was a key member of this overarching JCE that existed from at least October 1991 until 30 November 1995.[21] Its objective was to 'permanently remove Bosnian Muslim and Bosnian Croat inhabitants from the territories of Bosnia and Herzegovina claimed as Bosnian Serb territory' by means that included the commission of genocide, persecution, extermination, murder, deportation and inhumane acts (forcible transfers). Karadžić is alleged to have shared the intent for the commission of these crimes; that is, responsibility via JCE commission of the first category ('JCE I commission').[22]

Alternatively, the Prosecution asserts that together with other JCE members,[23] he shared 'at least' the objective of the crimes of deportation and inhumane acts (forcible transfers).[24] In carrying out these crimes, the *Indictment* claims, it was foreseeable that the crimes of genocide, persecution, extermination and murder might have been perpetrated and that Karadžić willingly took the risk of their occurrence[25] – responsibility via JCE commission of the third category ('JCE III commission').

The Prosecution also lists a number of acts carried out by Karadžić that it claims were significant contributions to this JCE:[26]

(i) participation in Bosnian Serb governmental policies that advanced the JCE;
(ii) establishing and supporting Bosnian Serb political and governmental organs and forces through which the JCE was implemented;
(iii) dissemination of propaganda engendering fear and hatred of Bosnian Muslims and Bosnian Croats or otherwise in order to rally support for the JCE;
(iv) directing Bosnian Serb political and governmental organs and forces to carry out acts in furtherance of the JCE;
(v) formulating the acts carried out by Bosnian Serb political and governmental organs and forces in furtherance of the JCE;
(vi) obtaining and encouraging the participation of the Yugoslav Army and Serbian paramilitary forces in furtherance of the JCE;
(vii) failing to ensure that Bosnian Serb political and governmental organs and forces protected Bosnian Muslims and Bosnian Croats under their control;
(viii) encouraging the commission of crimes by Bosnian Serb political and governmental organs and forces in furtherance of the JCE by failing to investigate and punish;

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[21] This JCE encompasses the other three alleged JCEs.
[22] *Indictment* [9].
[23] Other members of this JCE included Momčilo Krajišnik, Ratko Mladić, Slobodan Milošević, Biljana Plavšić, Nikola Koljević, Mićo Stanišić, Momčilo Mandić, Jovica Stanišić, Franko Simatović, Željko Ražnatović ('Arkan'), Vojislav Šešelj as well as a number of political, civil and military entities: *Indictment* [12]–[13].
[24] *Indictment* [10].
[25] Ibid.
[26] Ibid [14].

(ix) providing misleading information to the public about the role of, and the crimes committed by, Bosnian Serb forces in furtherance of the JCE;

(x) restricting humanitarian aid to Bosnian Muslims and Bosnian Croats so as to create unbearable living conditions in furtherance of the JCE.

(ii) Crimes committed to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling

Karadžić allegedly participated in this JCE between April 1992 and November 1995 in order 'to establish and carry out a campaign of sniping and shelling against the civilian population of Sarajevo, the primary purpose of which was to spread terror'.[27] The Prosecution claims that this was carried out through unlawful attacks on civilians, murder and the crime of terror, with Karadžić and others sharing the intent for these crimes (JCE I commission).[28]

Karadžić's significant contributions to this JCE are the same as those of the overarching JCE with the exception of act (vii) above regarding failure to ensure protection of Bosnian Muslims and Bosnian Croats.

(iii) Crimes committed to eliminate the Bosnian Muslims in Srebrenica

In the days immediately preceding 11 July 1995 and until 1 November 1995, the *Indictment* claims that Karadžić 'participated in a joint criminal enterprise to eliminate Bosnian Muslims in Srebrenica by killing the men and boys … and forcibly removing the women, young children and some elderly men'.[29] This objective allegedly amounted to, or included, the commission of genocide, persecution, extermination, murder, deportation and inhumane acts (forcible transfers), with Karadžić sharing the intent with other members of the JCE (JCE I commission).[30]

Karadžić's significant contributions to this JCE mirror those of the overarching JCE, with the exception of act (vi) above regarding participation of the Yugoslav Army and Serbian paramilitary forces in furtherance of the JCE.

(iv) Crime of taking hostages

The last JCE to which Karadžić stands accused of participating in was 'to take United Nations ('UN') personnel hostage in order to compel the North Atlantic Treaty Organization ('NATO') to abstain from conducting air strikes against Bosnian Serb military targets'.[31] Together with other JCE members the Prosecution claims that he shared the intent to commit the crime of taking hostages (JCE I commission).[32]

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[27] Ibid [15].

[28] Other members of this JCE included Momčilo Krajišnik, Ratko Mladić, Biljana Plavšić, Nikola Koljević, Stanislav Galić, Dragomir Milošević, Vojislav Šešelj as well as a number of political, civil and military entities: ibid [16]–[17].

[29] Ibid [20].

[30] Other members of this JCE included Ratko Mladić as well as a number of political, civil and military entities: ibid [21]–[22].

[31] Ibid [25].

[32] Other members of this JCE included Ratko Mladić as well as a number of political, civil and military entities: ibid [26]–[27].

Karadžić's significant contributions to this JCE are the same as those listed in (i), (ii), (iv) (v) and (vii) above regarding the overarching JCE.

Planned, instigated, ordered and/or aided and abetted

The *Indictment* relies on the same acts that the Prosecution alleges were contributions to the overarching JCE, in order to attach criminal responsibility to Karadžić under the remaining modes of liability contained in article 7(1) of the *ICTY Statute*. These are as follows: planning (acts (i) and/or (v) above); instigating (acts (i)–(vi) and (viii) above); ordering (acts (iv) and (x) above); and aiding and abetting (acts (i)–(x) above).

It alleges that Karadžić acted with the intention that the crimes would occur;[33] with the awareness of the substantial likelihood of their occurance;[34] or with the awareness of the probability that they would be committed and that his acts and omissions would contribute to their commission.[35]

Individual criminal responsibility: Article 7(3) of the *ICTY Statute*

Superior responsibility

The *Indictment* asserts that from at least March 1992 until about 19 July 1996, as the highest civilian and military authority in Republika Srpska, Karadžić had reason to know that crimes were, or were about to be, committed by Serb governmental organs and forces over whom he exercised effective control. Karadžić is accused of having failed to take necessary and reasonable measures to prevent the commission of crimes by these organs and forces and/or to punish their perpetrators.[36]

Charges: Counts 1 and 2 – genocide

Count 1 alleges that in some of Bosnia and Herzegovina's municipalities,[37] between 31 March 1992 and 31 December 1992, the overarching JCE escalated into the *dolus specialis* necessary for genocide (JCE I commission) against a part of the Bosnian Muslim and/or Bosnian Croat groups. In those municipalities, 'a significant section of the … groups were targetted for destruction'[38] by killings; causing serious bodily and/or mental harm; and cruel and inhumane treatment in detention camps.[39]

Count 2 accuses Karadžić of having participated in a JCE 'to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys of Srebrenica and forcibly removing the women, young children and some elderly men'.[40] It alleges that Karadžić shared the intent

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[33] For planning, instigating and ordering as modes of liability.
[34] For planning, instigating and ordering as modes of liability.
[35] For aiding and abetting as a mode of liability.
[36] 'Commission' in the context of superior responsibility refers to all the modes of liability under arts 7(1) and 7(3) of the *ICTY Statute*.
[37] The *Indictment* states that the most 'extreme manifestations' of the genocide to partially destroy the groups took place in Bratunac, Foča, Ključ, Prijedor, Sanski Most, Vlasenica and Zvornik municipalities: *Indictment* [38].
[38] Ibid [38].
[39] Ibid [40].
[40] Ibid [42].

of the JCE with others (JCE I commission) or that it was foreseeable that genocide would take place as a result of the overarching JCE. It also alleges that Karadžić, being aware of this, nonetheless willingly took that risk (JCE III commission). The Prosecution asserts that the crime was carried out by the killing of over 7,000 Bosnian Muslim men and boys of Srebrenica, and through causing serious bodily or mental harm to thousands of members of the Bosnian Muslim population of Srebrenica.[41]

Both counts also accuse Karadžić of planning, instigating, ordering and/or aiding and abetting genocide. They also claim that he is criminally responsible as a superior.

Charges: Count 3 – Persecution (as a crime against humanity)

Count 3 alleges that the overarching JCE and the JCE to eliminate the Bosnian Muslims in Srebrenica was carried out through the commission of persecution with members of the JCE sharing the intent to commit such acts (JCE I commission).[42] Alternatively, it alleges that Karadžić was aware that persecution was a possible consequence of the overarching JCE and that he willingly took the risk (JCE III commission).

The Prosecution alleges that the specific persecutory acts included: killings; torture and beatings; rape and sexual violence; inhumane and cruel treatment in detention facilities; acts carried out against Bosnian Muslims in Srebrenica; forcible transfers or deportations; unlawful detention in detention facilities; forced labour and the use of Bosnian Muslims and Bosnian Croats as human shields; plunder and appropriation of property; wanton destruction of private property and the imposition and maintenance of discriminatory measures.[43]

Karadžić is also alleged to have planned, instigated, ordered and/or aided and abetted persecutions and/or is responsible for their occurence as a superior.[44]

Charges: Counts 4, 5 and 6 – Extermination (as a crime against humanity), murder (as a crime against humanity and as a war crime)

The *Indictment* alleges that the crimes of extermination and/or murder formed part of the objectives of the following JCEs (JCE I commission): the overarching JCE; the JCE to spread terror among the civilian population of Sarajevo; and the JCE to eliminate Bosnian Muslims in Srebrenica.[45] Alternatively, the Prosecution alleges that it was foreseeable that such crimes might be perpetrated in the carrying out of deportations and forcible transfers as part of the overarching JCE and that Karadžić willingly took that risk (JCE III commission).

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[41] Ibid [47].
[42] Ibid [49].
[43] Ibid [60].
[44] The *Indictment* specifies that this crime took place in the following municipalities of Bosnia and Herzegovina: Banja Luka (crimes associated with Manjača camp only), Bijeljina, Bosanksi Novi, Bratunac, Brčko (crimes associated with Luka camp only), Foča, Hadžići, Ilidža, Ključ, Novi Grad, Novo Sarajevo, Pale, Prijedor, Rogatica, Sanski Most, Sokolac, Višegrad, Vlasenica, Vogošća, Zvornik and Srebrenica: ibid [48].
[45] Ibid [62].

These counts also allege that Karadžić is criminally responsible as a superior and/or that he planned, instigated, ordered and/or aided and abetted extermination and murder.

Charges: Counts 7 and 8 – Deportation (as a crime against humanity), inhumane acts (as a crime against humanity)

Counts 7 and 8 allege that the overarching JCE was carried out by means that included inhumane acts (forcible transfers) and deportations. The Prosecution claims that Bosnian Muslims and Bosnian Croats fled in fear, whilst others were physically driven out, because of discriminatory measures, arbitrary arrests and detention, harassment, torture, rape and sexual violence, killing, destruction of houses and cultural monuments and through the threat of further such acts.[46] Further, the Prosecution alleges that the forcible transfers and/or deportation of civilians from Srebrenica formed part of the objective of the JCE to eliminate the Bosnian Muslims of Srebrenica and/or the objective of the overarching JCE (JCE I commission).[47]

Karadžić stands accused of being criminally responsible as a superior and/or that he planned, instigated, ordered and/or aided and abetted forcible transfers and deportations of Bosnian Muslims and Bosnian Croats.[48]

Charges: Counts 9 and 10 – Terror (as a war crime), unlawful attacks (as a war crime)

The *Indictment* alleges that Karadžić participated in the JCE that established and carried out a military strategy that used sniping and shelling to kill, maim and wound the civilian population of Sarajevo, the primary purpose of which was to spread terror.[49] It claims that the JCE members shared the intent to spread terror as the primary purpose of the campaign (JCE I commission) through unlawful attacks on civilians, murder and the crime of terror.[50] Alternatively, Karadžić is accused of having planned, instigated, ordered and/or aided and abetted these crimes and it is alleged that, as a superior, he failed to take reasonable measures to prevent and/or punish the perpertrators (superior responsibility).[51]

Charges: Count 11 – Taking of hostages (as a war crime)

The final Count claims that Karadžić participated and shared the intent with others in the JCE (JCE I commission) to take UN personnel hostage in order to compel NATO to abstain from striking Bosnian Serb targets.[52] Alternatively, Karadžić stands accused of planning, instigating, ordering and/or aiding and abetting the crime. This Count also claims that he is criminally responsible as a superior.

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[46] Ibid [71].
[47] Ibid [75].
[48] The Indictment specifies that this crime took place in the following municipalities of Bosnia and Herzegovina: Banja Luka (crimes associated with Manjača camp only), Bijeljina, Bosanksi Novi, Bratunac, Brčko (crimes associated with Luka camp only), Foča, Hadžići, Ilidža, Ključ, Novi Grad, Novo Sarajevo, Pale, Prijedor, Rogatica, Sanski Most, Sokolac, Vlasenica, Vogošća, Zvornik and Srebrenica: ibid [68].
[49] Ibid [77].
[50] Ibid.
[51] Ibid [76].
[52] Ibid [84].

C. Discussion

The Prosecution's case is enormous. The events alleged in the *Indictment* span over four years, almost two dozen municipalities and includes dozens more specific events and detention camps. The case against Karadžić is also complex on a theoretical level. It is the first case where participation in multiple simultaneous JCEs has been alleged, adding a whole new level of intricacy to the proceedings. Being able to direct the Tribunal as to the links between the different JCEs, their members and the evidence being adduced to prove their existence will be critical in keeping the court in tune with the Prosecution's case.

The case also appears to break new ground in other areas. One of Karadžić's significant contributions to the overarching JCE, the *Indictment* alleges, was his participation in the establishment of Bosnian Serb political organs,[53] of which the SDS was the most prominent.[54] However, the SDS was founded on 12 July 1990,[55] whereas the overarching JCE is alleged to have existed '[f]rom at least October 1991 until 30 November 1995'.[56] This suggests that the *actus reus* (establishing the SDS) can occur *before* the existence of any *mens rea*, as the crimes committed pursuant to the overarching JCE are alleged to have taken place more than a year after the founding of the SDS. Such a legal theory, if correct, would take the ICTY's case law into new and uncharted territory.

It is also important to recall that the case against Karadžić mirrors, to an extent, that of his former close associates Momčilo Krajišnik and Biljana Plavšić, both of whom were accused of being members of the same overall JCE as Karadžić.[57] Like Karadžić, they stood accused of genocide on the basis that persecutions in a number of Bosnia and Herzegovina's municipalities rose to the *dolus specialis* to destroy, in part, the Bosnian Muslim and/or Bosnian Croat groups.[58] However, the Prosecution was unable to persuade the Trial Chamber that any of the crimes alleged in the *Krajišnik Indictment* had the requisite *mens rea* for genocide.[59] This finding was not appealed. Therefore, it is imperative that new and/or better evidence than what was presented in *Krajišnik* be adduced in order for a successful conviction on Count 1.

In the event that the Prosecution succeeds in making its case and the Trial Chamber finds that genocide took place in municipalities other than Srebrenica, this would create friction with the judgment of the International Court of Justice ('ICJ') in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* case. There, the ICJ found that only regarding the events in Srebrenica had the specific intent for genocide been made out.[60] A contrary finding in

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[53] Ibid [14(b)].

[54] The *Indictment* considers the SDS to be a Bosnian Serb political organ: ibid [12].

[55] Ibid [2].

[56] Ibid [9].

[57] *Prosecutor v Krajišnik (Amended Consolidated Indictment)* (ICTY, Case No IT-00-39 & 40-PT, 7 March 2002), [4], [7] ('*Krajišnik Indictment*').

[58] Compare *Krajišnik Indictment* ibid [16] to *Indictment* [38].

[59] *Prosecutor v Krajišnik (Trial Judgment)* (ICTY, Case No IT-00-39-T, 27 September 2006), [867]–[869] ('*Krajišnik*'). Krajišnik did not face specific charges relating to events in Srebrenica. Plavšić pleaded guilty under a plea agreement.

[60] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Merits)* (26 February 2007), [376].

Karadžić's trial, would not only have political repercussions in the region, but could also open the door for Bosnia and Herzegovina to apply for a revision of the ICJ's judgment.

3. Appeals Chamber decision on the Prosecution's motion seeking a determination that Karadžić understands English[61]

A. Introduction

During the initial pre-trial phase of the case, the Trial Chamber proceeded on the basis that Serbian, being Karadžić's native language, was the appropriate language in which he should receive documents from the Office of the Prosecutor ('OTP') that were relevant for the preparation of his case. Accordingly, it ordered that any transcripts from ICTY proceedings that the OTP intended to disclose to Karadžić had to be translated and transcribed into Serbian, rather than provided in audio format.[62]

On 17 February 2009, the Prosecution filed a motion requesting the Trial Chamber to determine that Karadžić understood English for the purposes of the *ICTY Statute* and *ICTY Rules*.[63] On 26 March 2009, the Trial Chamber agreed with the Prosecution and determined that it was sufficient for the OTP to disclose to Karadžić audio files of testimony in Serbian accompanied with English transcripts.[64] Karadžić appealed this decision.

B. Reasoning

First, the Appeals Chamber determined that the correct standard for the determination of an accused's language ability at the ICTY was that of the *Tolimir Appeal Decision*.[65] In doing so, it rejected Karadžić's reliance on articles 67(1)(a) and (f) of the *Rome Statute of the International Criminal Court*[66] and recalled that the *Tolimir Appeal Decision* had already settled the Tribunal's interpretation of article 21(4)(a) of the *ICTY Statute*. The Appeals Chamber also noted that 'it [was] not bound by the Rome Statute or by the Rules of Procedure and Evidence of the ICC'.[67] For the Appeal Chamber, the question turned on the accused's understanding of English, and not his preference.[68]

The Appeals Chamber then went on to scrutinise the Trial Chamber's decision and found that it had made no reference to the *Tolimir Appeal Decision*. Nonetheless, by

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[61] *Language Decision*.

[62] *Prosecutor v Karadžić (Decision on the Accused's Request that all Materials, including Transcripts, be Disclosed to Him in Serbian and Cyrillic Script)* (ICTY, Case No IT-95-5/18-PT, 25 September 2008), [11]; *Prosecutor v Karadžić (Decision on Accused Motion for Full Disclosure of Supporting Material)* (ICTY, Case No IT-95-5/18-PT, 25 November 2008), [23].

[63] *Prosecutor v Karadžić (Prosecution Motion Seeking Determination that the Accused Understands English for the Purposes of the Statute and the Rules of Procedure and Evidence)* (ICTY, Case No IT-95-5/18-PT, 17 February 2009), [11].

[64] See *Prosecutor v Karadžić (Decision on Prosecution Motion Seeking Determination that the Accused Understands English for the Purposes of the Statute and the Rules of Procedure and Evidence)* (ICTY, Case No IT-95-5/18-PT, 26 March 2009).

[65] See *Prosecutor v Tolimir (Decision on Interlocutory Appeal Against Oral Decision of the Pre-Trial Judge of 11 December 2007)* (ICTY, Case No IT-05-88/2-AR73.1, 28 March 2008) ('*Tolimir Appeal Decision*').

[66] Opened for signature 17 July 1998, 2187 UNTS 38544 (entered into force 1 July 2002).

[67] *Language Decision* [11].

[68] Ibid [12].

considering article 21(4) of the *ICTY Statute*, rule 66(A) of the *ICTY Rules* and the materials submitted, the Chamber was satisfied that an inquiry had been carried out as to whether Karadžić understood English sufficiently in order to exercise his right to conduct the case. Therefore, although the applicable law had not been explicitly referred to, an equivalent legal standard had been applied.

Second, the Appeals Chamber considered Karadžić's challenges to the Trial Chamber's factual findings regarding his English competence. It rejected his argument that the Trial Chamber overwhelmingly relied on evidence from 1995 and earlier,[69] by pointing out that it had been considered in conjunction with more recent evidence on his ability: to comment on English exhibits in the *Krajišnik* appeals hearing; to communicate with his English-speaking associates; to approve and/or draft English submissions; and to spot errors in the English translation of one of his early motions filed in Serbian.[70] The Chamber noted that Karadžić had not challenged these specific findings.

While the Appeals Chamber found that the Trial Chamber had not considered the large volume of documents disclosed to Karadžić or the difficulty of checking English translations of Serbian audio recordings, it held that these were not factors that went to the determination of language ability.[71] The Chamber emphasised that attention had been correctly focused on Karadžić's ability to understand English from the functional perspective of his ability to exercise the right to conduct his defence. The Appeals Chamber held that Karadžić had failed to show any patently incorrect finding of fact.

The Chamber dismissed Karadžić's appeal in its entirety.

C. Discussion

The correctness of the Appeals Chamber's decision rests, to a large extent, on the factual finding as to Karadžić's English competence. However, it is likely that the Chamber's attention was also drawn, perhaps implicitly, to the extent in which Karadžić is being assisted by persons fluent in English, namely his legal associates, case managers and interns, together with a plethora of legal advisers from around the world.[72] Whilst his effective communication with these persons was considered to be evidence of his English competence, their assistance also makes it clear that Karadžić is hardly handling the case by himself. The sheer number of motions filed by his team (in excess of 270) is a testament to their ability to overcome any of Karadžić's alleged difficulties with English and, in particular, English legal terminology. Furthermore, disadvantages that may have arisen inside the courtroom, where Karadžić would have ordinarily been by himself, has now

[69] Namely, his participation in negotiations and interviews conducted in English during the conflict in Bosnia and Herzegovina.

[70] *Language Decision* [15].

[71] Ibid [17].

[72] The final footnote of many of Karadžić's motions give credit to, or acknowledge the participation of, numerous individuals including, inter alia, Professors and PhD candidates.

been remedied by the Trial Chamber's order permitting his legal adviser, Peter Robinson, and others to be present, so as to advise him on any issues that may arise.[73]

4. Appeals Chamber decision on the alleged Holbrooke Agreement[74]

A. Introduction

During his initial appearance before the ICTY on 31 July 2008, Karadžić first raised an allegation that he had struck a deal in 1996 with the United States, through its diplomat Richard Holbrooke, regarding the Tribunal ('Holbrooke Agreement').[75] After requesting the inspection and disclosure of documents related to this alleged agreement,[76] on 25 May 2009 Karadžić submitted his Holbrooke Agreement motion asking the Trial Chamber to dismiss the Indictment against him on the grounds that, as a result of the agreement, the Tribunal lacked jurisdiction or, alternatively, that it should decline to exercise its jurisdiction on abuse of process grounds.[77] In addition, he requested the Trial Chamber to hold an evidentiary hearing so that findings of fact relating to the alleged Holbrooke Agreement could be made.[78]

Karadžić's *Holbrooke Motion* claimed that he was the beneficiary of a deal struck with Holbrooke, who at the time was acting under the actual or apparent authority of the United Nations Security Council ('UNSC'). Under the terms of the alleged Holbrooke Agreement, as recounted by Karadžić, he would not have had to face prosecution before the ICTY if he resigned from all the positions he held in the Republika Srpska Government and withdrew from public life.[79] After agreeing with the terms, he and other Serbs signed this undertaking.[80] However, according to Karadžić, Holbrooke declined to put his own obligation in writing.

In disposing of the motion, the Trial Chamber declined to hold an evidentiary hearing, reasoning that:

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[73] See *Prosecutor v Karadžić (Order on the Procedure for the Conduct of Trial)* (ICTY, Case No IT-95-5/18-PT, 8 October 2009), Appendix A.

[74] *Holbrooke Decision*.

[75] *Prosecutor v Karadžić* (ICTY, Case No IT-95-5/18, 31 July 2008), 22–4.

[76] See *Prosecutor v Karadžić (Decision on Accused Motion for Inspection and Disclosure)* (ICTY, Case No IT-95-5/18-PT, 9 October 2008); *Prosecutor v Karadžić (Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue)* (ICTY, Case No IT-95-5/18-PT, 17 December 2008); *Prosecutor v Karadžić (Decision on Appellant Radovan Karadžić's Appeal Concerning Holbrooke Agreement Disclosure)* (ICTY, Case No IT-95-5/18-AR73.1, 6 April 2009); *Prosecutor v Karadžić (Decision on Accused Motion for Interview of Defence Witness and Third Motion for Disclosure)* (ICTY, Case No IT-95-5/18-PT, 9 April 2009).

[77] *Prosecutor v Karadžić (Holbrooke Agreement Motion)* (ICTY, Case No IT-95-5/18-PT, 25 May 2009) ('*Holbrooke Motion*'), [1]–[3].

[78] Ibid [8].

[79] Ibid [4].

[80] Ibid annex A.

> [I]f the Accused cannot obtain the relief he seeks as a matter of law, then the issue of whether the Agreement was ever made is irrelevant to any issue other than sentence.[81]

Thus, the Trial Chamber made its findings 'on the basis of the material presented to it by the Accused'.[82] It concluded that the evidence presented by Karadžić did not demonstrate that either the Prosecution or the UNSC had been involved in the making of the alleged Holbrooke Agreement. It also rejected his abuse of process argument on the ground that he had not suffered serious mistreatment or other egregious violations of his rights. Karadžić appealed this decision.

B. Reasoning

The Appeals Chamber found that the Trial Chamber had not confined itself to assessing Karadžić's arguments as a matter of law, but had analysed the evidence available to it and dismissed some of the allegations raised as a matter of fact, not of law. This approach was found to be 'inherently inconsistent' and denied Karadžić the opportunity to set out all his evidence:

> [The Trial Chamber] should have accepted the Appellant's *factual allegations* as if they were true (i.e. *pro veritate*). Instead, the Trial Chamber asserted that it would accept the *evidence* presented by the Appellant *pro veritate*, dismissing some of the Appellant's arguments on the basis that the available evidence was insufficient to establish the factual allegations submitted.[83]

The Appeals Chamber also criticised the Trial Chamber's handling of Karadžić's motion, pointing out that the governing procedural rule (*ICTY Rules*, rule 73) imposed no time limits for the presentation of his motion:

> Rather than deciding the Motion as a preliminary matter, solely in light of the available evidence, and preventing the Appellant from further substantiating his allegations, the Trial Chamber should have either held an evidentiary hearing or directed the Appellant to present his evidence during the course of the trial.[84]

The Chamber then went on to analyse the Trial Chamber's conclusions to determine if they were nonetheless sound in law, regardless of the identified deficiences.

First, it addressed the issue of whether the jurisdiction of the ICTY could only be limited by means of a UNSC Resolution, as claimed by the Prosecution. After pointing out that *ICTY Statute* solely governs the Tribunal's jurisdiction, it held that it could only be amended or derogated from by means of a UNSC Resolution.[85] This conclusion was

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[81] *Prosecutor v Karadžić (Decision on the Accused's Holbrooke Agreement Motion)* (ICTY, Case No IT-95-5/18-PT, 8 July 2009) ('*Holbrooke Trial Decision*'), [46].
[82] Ibid [48].
[83] *Holbrooke Decision* [27].
[84] Ibid [30].
[85] Ibid [35].

founded on the *actus contrarius* doctrine, the ICTY's jurisprudence[86] and by the UNSC's practice of acting by resolution in matters concerning the *ICTY Statute*. It reasoned that the mere involvement of the UNSC in concluding the alleged Holbrooke Agreement (as alleged by Karadžić) could not limit the ICTY's jurisdiction without the ratification of a resolution. The Chamber held that under no circumstances would the alleged Agreement, even if proved, limit the ICTY's jurisdiction.

As to Karadžić's apparent authority argument, the Appeals Chamber pointed out that even if the Agreement had been made with *actual* authority, the absence of a UNSC Resolution meant that it could have no impact on the ICTY's jurisdiction.[87] It further noted that apparent authority and its application in contract law (or rather, agency law) was so far removed and dissimilar from jurisdiction in international criminal law, that the two were incomparable.[88]

The Appeals Chamber similarly rejected Karadžić's argument that the Prosecutor's discretion not to prosecute individuals demonstrated that no UNSC resolution was necessary to limit the ICTY's jurisdiction. The Chamber emphasised that jurisdiction and prosecutorial discretion were two distinct notions independent of each other, so that a decision not to prosecute an individual did not necessarily mean that the Tribunal did not have jurisdiction over him/her.[89]

Second, the Appeals Chamber considered the question of whether the Tribunal would be bound if the alleged Holbrooke Agreement had been made on behalf of the Prosecution. It affirmed the Trial Chamber's observation that once an indictment was in force against an accused, pursuant to rule 51 of the *ICTY Rules*, it could only be withdrawn with leave from a Judge or a Trial Chamber. As the Indictment against Karadžić had already been confirmed when the alleged agreement was made, the Prosecution was not in a position to withdraw the Indictment without first being granted leave.[90] The Tribunal had never granted, or been ask to grant, leave.

Last, the Appeals Chamber addressed the abuse of process argument. It identified the leading case as the *Barayagwiza Appeal Decision*,[91] where the Appeals Chamber specified that the doctrine of abuse of process could be relied upon, as a matter of discretion, where: a fair trial for the accused was impossible; or where proceeding with the trial would contravene the Court's sense of justice. As the Tribunal put it:

> It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity.[92]

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[86] Specifically, *Prosecutor v Krajišnik (Decision on Krajišnik's Appeal Against the Trial Chamber's Decision Dismissing the Defense Motion for a Ruling that Judge Canivell is Unable to Continue Sitting in This Case)* (ICTY, Case No IT-00-39-AR73.2, 15 September 2006).

[87] *Holbrooke Decision* [38].

[88] Ibid.

[89] Ibid [39].

[90] Ibid [41].

[91] *Barayagwiza v Prosecutor (Decision)* (ICTY, Case No IT-97-19-AR72, 3 November 1999) ('*Barayagwiza Appeal Decision*').

[92] Ibid [74].

The Chamber further recalled that the *Nikolić Appeal Decision*[93] had determined that apart from 'exceptional cases' of serious violations of human rights, the remedy of setting aside jurisdiction would usually be disproportionate to the international community's interest in the prosecution of persons accused of serious violations of international humanitarian law. The Appeals Chamber agreed with Karadžić's submission that the author of the alleged conduct was irrelevant in assessing the merits of an abuse of process submission.[94]

Although the Trial Chamber had applied the correct legal test in rejecting Karadžić's submissions on abuse of process, the Appeals Chamber pointed out that it had made an impermissible factual finding that Holbrooke was a third party unconnected to the Tribunal.[95] This prompted an assessment of whether the Trial Chamber's decision could still be upheld as a matter of law, despite erring. Thus, the Appeals Chamber weighed the international community's interest in the prosecution of Karadžić for universally condemned offences against Karadžić's expectation that he would not be prosecuted by keeping his end of the alleged Holbrooke Agreement.[96]

The Chamber observed that any expectation by Karadžić that he would not be tried by the ICTY was grounded in a flawed reading of the law. Further, none of Karadžić's allegations made a fair trial impossible and, thus, they were not covered by the first circumstance envisaged by the *Barayagwiza Appeal Decision*.[97] Instead, Karadžić's situation was analysed within the second circumstance of the *Barayagwiza Appeal Decision*. After recalling that ending impunity and ensuring the prosecution and punishment of international crimes were the aims of international courts and tribunals, the Appeals Chamber held that '[i]ndividuals accused of [serious violations of international humanitarian law] can have no legitimate expectation of immunity from prosecution'.[98] The alleged Holbrooke Agreement, as recounted by Karadžić, did not constitute an exception to this rule.[99]

The Chamber proceeded to dismiss Karadžić's appeal.

C. Discussion

To Karadžić's credit (or, rather, to the credit of his legal associates and advisers), the manner in which his Holbrooke Agreement argument was legally constructed, packaged and presented to the Tribunal demonstrates a high level of creative lawyering. Whilst it was always going to be difficult to convince the Tribunal to throw out his case, it nonetheless brought to light an important legal issue which, it is submitted, was far from adequately addressed by the Appeals Chamber.

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[93] *Prosecutor v Nikolić (Decision on Interlocutory Appeal Concerning Legality of Arrest)* (ICTY, Case No IT-94-2-AR73, 5 June 2003) ('Nikolić Appeal Decision').
[94] *Holbrooke Decision* [47].
[95] Ibid [48].
[96] These include genocide, crimes against humanity and war crimes: *Barayagwiza Appeal Decision* [24].
[97] *Holbrooke Decision* [50]–[51].
[98] Ibid [52].
[99] Ibid.

In its response to Karadžić's *Holbrooke Motion*, the Prosecution argued, albeit in a footnote, that:

> There is considerable support for the existence of a norm of customary international law prohibiting the granting of amnesty – a specific grant of immunity … The norms prohibiting the commission of genocide, crimes against humanity and war crimes and the resulting obligation to extradite persons accused of these crimes have a peremptory character … This peremptory character would at present render unenforceable any international recognition of amnesties for these crimes, including by the UNSC.[100]

In its decision, the Trial Chamber did not make reference to this argument. This was understandable, given its finding that neither the Prosecution nor the UNSC had been involved in the alleged Holbrooke Agreement. In its response to Karadžić's appeal, the Prosecution again repeated the argument, but stated that 'given the alleged agreement could not, in any event, be binding on the Tribunal absent a UNSC Resolution, it is unnecessary for the Appeals Chamber to rule on this norm of customary international law'.[101] However, in dismissing Karadžić's abuse of process argument, the Appeals Chamber, in the space of two sentences, alluded to a 'rule' whereby individuals accused of international crimes could not expect immunity from prosecution.[102] No footnotes or any further elaboration of this holding is provided in the decision.

This raises some obvious and critical questions, namely: what exactly is the origin, scope and character of the 'rule'. Indeed, one could even interpret the decision as implicitly agreeing with the Prosecution's submission.[103] Such a holding necessitated legal analysis and explanation. Instead, the Chamber's silence offers ambiguity in an area of international law that is still far from clear, making the decision ripe for scholarly speculation. It is submitted that the decision, in this respect, does not assist the legal debate surrounding amnesties and immunities.

In response to the Chamber's decision, Karadžić has sent a letter to the UNSC asking it to pass a resolution so as to honour and enforce the alleged Holbrooke Agreement.[104] The likelihood of this happening is nil. Nevertheless, in rejecting the *Holbrooke Motion*, the Appeals Chamber emphasised that it did not impede Karadžić from presenting further evidence supporting his allegations, as they could be considered for the purpose of sentencing 'if appropriate'.[105] It is almost certain that the ICTY has not heard the last of this issue.

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[100] *Prosecutor v Karadžić (Prosecution Response to "Holbrooke Agreement Motion")* (ICTY, Case No IT-95-5/18-PT, 16 June 2009), fn 16. Appendix A of the same response lists a number of sources in support of such a norm of customary international law.

[101] *Prosecutor v Karadžić (Prosecution Response to Karadžić's "Appeal of Decision on Holbrooke Agreement")* (ICTY, Case No IT-95-5/18-AR73.4, 6 August 2009), fn 3.

[102] See *Holbrooke Decision* [52].

[103] If this is so, then discussion of national and international jurisprudence, treaties, the writings of scholars, *opinio juris* and state practice are all sorely missing.

[104] See *Prosecutor v Karadžić (Notice of Request to United Nations Security Council)* (ICTY, Case No IT-95-5/18-PT, 16 October 2009), annex A.

[105] *Holbrooke Decision* [55].

Conclusion

Unless the two last remaining ICTY fugitives, Ratko Mladić and Goran Hadžić, are arrested and transferred to The Hague, the case against Karadžić is scheduled to be the last before the Tribunal. However, the successful apprehension of Karadžić indicates that Serbia possesses the political will to move against former high-ranking officials. Given that the handovers of Mladić and Hadžić are seen as 'preconditions' for Serbia's entry into the European Union (a view most strongly held by The Netherlands), hope still remains that they will one day have to answer for the charges in their Indictments.[106] Time is running out fast, with the Tribunal's current completion strategy expecting all trial and appellate proceedings to conclude by 2013.[107]

In the pre-trial phase, the Tribunal benefited greatly from Karadžić's active cooperation and engagement with the proceedings. His demeanour in court and his attitude to the case, especially when compared to the antics of Slobodan Milošević or Vojislav Šešelj, have permitted the pre-trial phase to run relatively smoothly. Notwithstanding, as Karadžić's boycott of the start of his trial demonstrates, he is prepared to disrupt proceedings if, in his eyes, he is given an adequate reason. This mentality is likely to continue into his trial and could be the cause of further courtroom drama. It is imperative for the Trial Chamber and the Prosecution to recall experiences in previous cases and to prevent Karadžić's trial from following the same path.

[106] *Prosecutor v Karadžić (Initial Indictment, "Bosnia and Herzegovina")* (ICTY, Case No IT-95-5-I, 24 July 1995); *Prosecutor v Hadžić (Initial Indictment)* (ICTY, Case No IT-04-75-I, 21 May 2004).

[107] *Letter dated 14 May 2009 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council*, Annex I, S/2009/252 (18 May 2009), [4].