Wednesday, 17 April 2013

[Appeals Hearing]

[The accused entered court]

--- Upon commencing at 9.01 a.m.

JUDGE MERON: Please be seated.

Good morning to everybody. Registrar, could you please call the case.

THE REGISTRAR: Thank you and good morning, Your Honour. This is case number IT-95-5/18-AR98bis.1, the Prosecutor versus Radovan Karadzic.

JUDGE MERON: Thank you. Mr. Karadzic, can you follow the proceedings in a language you understand? I think --

THE ACCUSED: [Interpretation] Yes, your Excellency. Yes.

JUDGE MERON: Thank you. Appearances of the parties for Mr. Karadzic.

MR. ROBINSON: Yes, good morning, Mr. President, members of the Appeals Chamber. I'm Peter Robinson, Dr. Karadzic's legal advisor, and with me today is Marko Sladojevic, legal associate for Dr. Karadzic.

JUDGE MERON: Thank you, Mr. Robinson.

For the Prosecution.

MR. TIEGER: Good morning, Mr. President, Your Honours. Alan Tieger, Michelle Jarvis, Mathias Marcussen, Katrina Gustafson, Nema Milaninia, and Iain Reid for the Prosecution.

JUDGE MERON: Thank you, Mr. Tieger. The Prosecution appeals from the judgement of acquittal on count 1 of the indictment rendered in this case on 20 June 2012 by Trial Chamber III. According to the

Scheduling Order issued on 22 March 2013, the Appeals Chamber will presently hear the appeal in this case. Before we turn to the Prosecution's submissions, I note that Mr. Karadzic filed a motion to dismiss appeal and for appointment of amicus curiae Prosecutor on 18 March 2013 seeking, first, dismissal of the Prosecution's appeal as a sanction for violating disclosure obligations; and second, appointment of an amicus curiae Prosecutor to investigate possible contempt by the Prosecution. The Prosecution responded to this motion on 28 March 2013, and Mr. Karadzic replied on 2 April 2013. The Appeals Chamber, however, will not entertain oral submissions in relations -- in relation to this motion during today's appeal hearings.

I will now summarise briefly the appeal and the manner in which we will proceed today. The appeal concerns the responsibility of Mr. Karadzic for crimes committed in certain municipalities of Bosnia and Herzegovina or municipalities between 31 March and 31 December 1992. The indictment alleges that during this period, Mr. Karadzic as the highest civilian and military authority in the Republika Srpska, participated in a joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from the municipalities through a campaign of persecutions, which included conduct that manifested an intent to destroy in part the national, ethnical or religious groups of Bosnian Muslims or Bosnian Croats as such.

Under count 1 of the indictment, the Prosecution charges Mr. Karadzic with genocide in the municipalities pursuant to Articles 4(3)(a), 7(1) and 7(3) of the Statute of the Tribunal alleging

that Mr. Karadzic was responsible as a superior for and committed in concert with others, planned, instigated, ordered, or aided and abetted genocide.

At the close of the Prosecution's case, Mr. Karadzic moved for a judgement of acquittal pursuant to Rule 98 bis of the Rules of Procedure and Evidence. At the Rule 98 bis hearing, the Trial Chamber found that the evidence, even taken at its highest, could not support a conviction for genocide in the municipalities. Accordingly, the Trial Chamber entered the judgement of acquittal with respect to count 1 of the indictment. The Prosecution advances four grounds of appeal against the judgement of acquittal, requesting that the Appeals Chamber reverse the acquittal and reinstate the charges against Mr. Karadzic under count 1 of the indictment.

In ground 1 of its appeal the Prosecution challenges the Trial Chamber's assessment of the actus reus of genocide. In grounds 2, 3 and 4 of the appeal the Prosecution contests the Trial Chamber's findings with respect to genocidal intent. Mr. Karadzic responds that the judgement of acquittal should be affirmed.

As set out in the Scheduling Order, this hearing will proceed as follows: First we will hear submissions from the Prosecution for one hour. After a pause of 20 minutes, Mr. Karadzic will have one hour to respond. Following another pause of 20 minutes, the Prosecution will have 30 minutes to reply. Finally, Mr. Karadzic will have 10 minutes for an optional personal address.

Throughout the hearing, the parties may argue the grounds of

appeal in any order they consider suitable for their presentations. Parties shall present their submissions in a clear and concise manner, and they should provide precise references for materials supporting their oral arguments. The Judges, of course, may interrupt the parties at any time to ask questions, or they may ask questions following each party's submissions or at the end of the hearing. I would like to remind the parties to be particularly careful not to reveal any confidential information or information that could identify a protected witness. I also remind the parties that the appeal process is not a trial de novo and they must refrain from repeating their case as presented at trial. Arguments must be limited to alleged errors of law which invalidate the trial judgement or alleged errors of fact which occasion a miscarriage of justice. I further urge parties not to repeat verbatim or to summarise extensively the arguments presented in their briefs as the Appeals Chamber is familiar with these arguments.

Having now stated the manner in which we will proceed, I would like to invite the Prosecution to present its appeal.

Mr. Tieger, please.

MR. TIEGER: Thank you, Mr. President.

Mr. President, Your Honours, our submissions today are divided into two basic parts. First, although I will refer to some legal issues, I intend to primarily highlight the evidence that demonstrates that the required elements of genocide were met. Ms. Jarvis will address the path by which it appears that the Trial Chamber arrived at the erroneous conclusion that the elements of the offence had not been satisfied.

As we will discuss, the Trial Chamber was wrong to find that there was no evidence capable of supporting the conclusion that Mr. Karadzic is responsible for genocidal acts and had genocidal intent.

He is charged with genocide in count 1 under several different modes of liability, but the Trial Chamber focused on joint criminal enterprise category I, and indeed that is all Your Honours need consider as well; because applying the elements of JCE I and the elements of the crime of genocide under the 98 bis standard count 1 should have been sustained on the Prosecution's evidence.

Now, for purposes of 98 bis, given its limited nature and purpose, that means the following: It means taking the Prosecution's evidence at its highest; not weighing the evidence against other evidence in the record; not determining credibility unless the only evidence adduced is so incapable of belief that it could not sustain a conviction, and I emphasise that no such findings were made in this case; and it means disregarding contradictions or inconsistencies in the Prosecution's case to the extent such exist.

JUDGE ROBINSON: What's your -- what's your basis for saying that the -- I'm looking at it here. It's a part of your submission, "... unless the only evidence adduced is" --

MR. TIEGER: So incapable of belief.

JUDGE ROBINSON: So incapable of belief that it could not sustain a conviction. I'd like you to elaborate on that. I agree with it, by the way, but I wanted to elaborate on it.

MR. TIEGER: I think it proposes that there is not an absolute

strict bright line test, that the Trial Chamber retains the capacity to determine in extreme circumstances that -- and I can posit a few hypothetical extreme circumstances when the nature of the testimony, for example, breaks down to such an extent that the witness can be deemed incapable of any credence whatsoever, but those, as the jurisprudence acknowledges clearly and as Your Honour suggests as well, are exceptional circumstances, none of which were found in this particular instance. So it's presumably embedded in the jurisprudence as a kind of safeguard.

It appears specifically in the Jelisic appeals judgement at paragraph 55, but I think it reflects a relatively common sense approach to the -- to evidence that has been adduced in exceptional circumstances. As a general matter, as you have noted, Your Honour, that would not be the case and credibility determinations do not play a role in the 98 bis process.

JUDGE ROBINSON: I'm picking up on what you say, that it is a case where the Prosecution's case has totally broken down.

MR. TIEGER: Yeah. I can imagine a situation where a witness, for example, acknowledges directly that he should be deemed incapable of belief or other circumstances in which that happens, but again I emphasise the exceptional nature of such a circumstance and the fact that there is not a hint of such a finding in this case which means we find ourselves within the ambit of a general proposition that credibility determinations do not play a role in the 98 bis process.

JUDGE ROBINSON: All right. Thanks.

MR. TIEGER: So in essence, to find that 98 bis has not been met,

that the standard has not been fulfilled there must be no evidence, no evidence supporting a particular count. And so the ultimate question based on the evidentiary principles that I've just outlined is whether a reasonable trier of fact could find count 1 sustained. The Trial Chamber was not permitted to determine whether it accepts beyond a reasonable doubt whether Mr. Karadzic is responsible for genocide in the municipalities in Bosnia-Herzegovina in 1992. Those principles, as we've just alluded to, are outlined in paragraph 9 of the appeals brief.

Now, more broadly, there are essentially three evidentiary questions at issue under the 98 bis standard in this appeal. First was there any evidence that Mr. Karadzic is responsible for acts constituting the actus reus of genocide; second, was there any evidence that he had genocidal intent; and third, was there any evidence that he acted together with others who shared his genocidal intent for the purposes of JCE I responsibility.

Now, turning to the initial evidentiary question, that is whether genocidal act are attributable to Mr. Karadzic within the meaning of the 98 bis standard; that is, is he responsible for acts of killing, causing serious bodily and mental harm to Muslims and Croats and inflicting conditions of life calculated to bringing about the physical destruction of the Muslim and Croat communities in Zvornik, Bratunac, Vlasenica, Foca, Sanski Most, Kljuc, and Prijedor, the seven municipalities for which genocide is specifically alleged.

On its face, Your Honours, the answer is obvious, because in upholding other counts in the indictment, the Chamber found that there

was a case to answer for crimes including extermination, murder, and inhumane acts committed against Bosnian Muslims and Croats as a member of a joint criminal enterprise. The Trial Chamber referred expressly to sufficient evidence that Bosnian Muslims and/or Bosnian Croats were killed by Bosnian Serb forces in the municipalities on a large scale, killed in detention facilities and killed during and after the take-over of the municipalities. It referred to sufficient evidence that Bosnian Serb forces caused serious bodily and mental harm to many Bosnian Muslims and/or Croats during their detention, and it referred expressly to sufficient evidence of horrific conditions of detention, including cruel treatment, torture, physical and mental abuse, rape and sexual violence and inhumane living conditions, conditions from which the Trial Chamber found expressly people died and all of which the Trial Chamber found were attributable to the accused. And I refer to transcript's 27860 through 62, 28766, 28767, and 28774.

That should have been the end of the story regarding this first evidentiary question, because the same findings establish the actus reus of the charged crimes of genocide in the seven municipalities. However, contrary to the jurisprudence, the Trial Chamber appeared to have taken an additional step that erroneously prevented the proper and logical application of these findings to count 1. As Ms. Jarvis will discuss in greater detail, the Trial Chamber erroneously adopted with little if any explanation a group impact component and found that therefore the underlying acts of genocide had not been satisfied. This was in error. The Trial Chamber's own findings as well as the underlying evidence

demonstrate that acts of genocide under Articles -- Article 4(2)(a) through (c) were established and that these acts are attributable to the accused. And I referred the Chamber in that regard to paragraphs 15 through 53 of our appeals brief and the accompanying footnotes.

So let me turn next to the issue of intent. And put at its simplest, that is whether there is any evidence taken at its highest which would permit a Trial Chamber to find that the accused intended to destroy a part of a national, ethnic, racial, or religious group as such.

Now, as the Chamber is aware, intent may be --

JUDGE ROBINSON: I'm sorry, Mr. Tieger.

MR. TIEGER: Yes, sir.

JUDGE ROBINSON: Can I just bring you back to the group impact criteria. Suppose the Trial Chamber is correct that group impact is a criterion, is a proper criterion in this regard, would you then still maintain that they were wrong?

MR. TIEGER: In their conclusion, yes.

JUDGE ROBINSON: Assuming it is a proper criterion. What I'm asking is: Would you still maintain that the Trial Chamber was wrong.

MR. TIEGER: First of all, Mr. President, I appreciate the distinction between assuming for the sake of the question that the Trial Chamber was correct in imposing the group impact component, but taking it in light of the question, we would submit that within the 98 bis standard the -- there is no question but that the Trial Chamber was nevertheless wrong in its application of the facts even to that erroneously high standard. And Ms. Jarvis, as I indicated before, is

expected to address in greater detail the path and the reasoning used by the Court.

JUDGE ROBINSON: No, I asked the question because on one view, even if the group impact criterion is valid, the proper interpretation of the 98 bis is that it would still be a matter to be left to the stage at the end of the case.

MR. TIEGER: And that is the Prosecution's position as well, Mr. President.

JUDGE ROBINSON: That's your position.

MR. TIEGER: Yes, it is. I was about to -- and thank you for the question, Your Honour.

I was about to mention the forms of evidence through which intent can be shown, although I am well aware that the Chamber is familiar with those and of course those consist essentially of both circumstantial or indirect evidence or more direct expressions of intent from the mouth or pen of an accused.

Now, indirect evidence includes not only conduct which falls directly within the ambit of the actus reus, but also other set circumstances from which intent can be inferred. Thus, as we know from the Krstic case, the intent underlying killings can be further illuminated by, for example, evidence of expulsions, or as another example, evidence of destruction of religious structures. And I would refer the Chamber to paragraph 34 of the Krstic appeals judgement in that regard.

In this case we have both, indirect and direct evidence of

intent. Individually either would suffice to meet the 98 bis standard. Taken together, they demonstrate clearly that the evidence at its highest establishes the requisite intent. And let me explain that a bit further in the context of just one of the specifically alleged municipalities.

So imagine for a moment, for example, a middle-aged baker from the municipality of Prijedor who has lived there his entire life. Now, during 1991 and the early part of 1992, he's exposed to mounting signs of anti-Muslim animus, to signs of arming by his Serb neighbours and to increasingly hostile claims about Muslims and Croats, including assertions that the villains of World War II have returned - that is the Ustasha and the Muslims who assertedly collaborated with them - claims which in fact tracked which is what was being said by the Bosnian Serb leadership, thus lending it heightened credibility. And I refer Your Honours to P4257 at transcript 21124.

And May 24th 1992, the Bosnian Serb Army and police attacked the most prosperous and populated Muslim area, an area known as Kozarac. 800 people were killed in that attack alone, and although our baker survives he's rounded up and taken with most of the other men to either Omarska or Keraterm camps. At Omarska, he and others are beaten upon arrival, and over the course of the summer until enterprising journalists exposed the camp and its conditions to the world, he is held in horrific conditions. Hundreds and thousands of prisoners are jammed into makeshift cells far too small for that number. Conditions for hygiene are nearly non-existent. Prisoners sometimes lie in their own excrement. Skin disease, dysentery are prevalent. Water intended for industrial use is

provided for drinking purposes. Starvation rations prevail, resulting in dramatic losses of weight and strength, and exposing the prisoners to further illness. And for the relevant cites I refer to paragraphs 36, 45, and 47 of the appeals brief and the accompanying footnotes as well as adjudicated fact 1046.

Leaders of the Muslim and Croat communities are singled out for particularly horrific treatment and are taken to a particular building in the camp for that purpose. Very few of them survive. And I refer to our appeals brief at paragraph 79. But beatings for all are routine. As one prisoner observed, you could rarely find a person without a wound, without bruises, and always some dying from the consequence of those beatings. I refer to P2089, T.1883. Every night men were taken from their squalid cells to be killed; every day piles of bodies are seen outside waiting to be carted away like garbage. The convergence of starvation and daily death was captured in the dilemma of a prisoner who agonised about what to do with a piece of bread he had been given by a father to provide to that to the son, but the son was dead, and that dilemma was resolved when the father himself was killed a few days later. Your Honour, that is Exhibit P2089, T.1887 through 1888 and 1905 and P3691, paragraphs 81 through 84.

As another witness explained, it was inhumane and pitiless machinery which did not see anything human in anyone. It was turned only to itself. That was Omarska. And that's found at transcript 20495.

Meanwhile outside, the roundups and killings continued. In July the last significant area where Muslims continued to live was attacked by

the VRS, the Army of Republika Srpska, and the police. And as with the earlier attack on Kozarac, many people were killed during the attack. At least 300 to 350 bodies were picks up by one man, another saw ten trucks capable of carrying up to 70 bodies each carting the dead. I refer the Chamber to P706, transcript 5934 through 35, and 5966, and Exhibit P4257 at transcript 21088.

As for those who survived the attack and were rounded up to be taken to the camps shortly after arrival in Omarska, 150 more men from the area were murdered. And similarly in Keraterm another 150 or so of the recently arrived prisoners from the cleansed area were executed shortly after arrival. Overall, as many as 5.000 Muslim bodies were hurled into an abandoned mine shaft following the commencement of the attacks and the detentions, prompting concern by Bosnian Serb officials in 1993 about what to do with those bodies: Incinerate, grind them up, or something else. And I refer Your Honours in that regard to adjudicated facts 1185, 1191, 1215 to 1219, Exhibit P1483, pages 154 through 155, as well as evidence from KDZ048, 092, 093, and 367.

In addition to the horrors inflicted on the mostly male inmates of Omarska and Keraterm, the teeming Trnopolje camp operated as a weigh station for women and children who were to be expelled, while meanwhile Prijedor's mosques and Catholic churches were destroyed.

And assuming that our baker survived Omarska he would almost certainly be living somewhere other than his ancestral home. As noted in Exhibit P4994, prior to 1991, 42.6 per cent of Prijedor was comprised of Bosnian Muslims. By 1997, that figure was 1 per cent, a reduction of

nearly 98 per cent. And this kind of figure as well as the broad pattern of attacks, detention facilities, killing, serious bodily harm, inimical conditions of life, destruction of sacral property were reflected in the other genocidal municipalities as well.

Your Honours, no one who experienced this would understand it as anything less than the result of an intention to destroy the Bosnian Muslims of Prijedor, and indeed the scale and ferocity of such attacks is ample evidence from which, applying the 98 bis standard, genocidal intent can be inferred.

In but in assessing the intent, there's no need to look solely to the nature and scale of the genocidal acts, not when the Supreme Commander of those perpetrating such acts had both threatened "the extension" the Muslim people and subsequently approvingly acknowledged the disappearance of a Bosnian Muslim group during the course of the conflict. Let's listen to what the accused explained in October 1991, explained at a session of the Bosnian Assembly, awaited Muslims and Croats if they persisted in their drive towards the independence of Bosnia. And that's Exhibit D267. I would ask -- this has been subtitled, so that it is not necessary for the interpreters to provide an English voice-over so that we may actually listen to the event as it transpired at the time. So I would ask the interpreters not to translate and we will rely on the subtitles.

[Video-clip played]

MR. TIEGER: "Don't think you won't take Bosnia and Herzegovina to hell and Muslim people in possible extinction, because Muslim people

will not" --

JUDGE MERON: Would you please play it once more.

MR. TIEGER: Yes, Mr. President.

[Video-clip played]

MR. TIEGER: As Mr. Karadzic had reminded an interlocutor just a couple of days earlier, what awaited Muslims and Croats in Bosnia would be a "real bloodbath." Sarajevo would be a cauldron where "300.000 Muslims will die" at the hands of armed Serbs. Muslims will be "up to their necks in blood" and would "disappear." That's Exhibit D279, pages 3 and 7 through 8. The insistence that the Muslims would be "annihilated," would "disappear," is also reflected in Exhibit P3200 at page 2 and P5846 at page 3.

As Mr. Karadzic told his closest confidante Krajisnik:

"Now he," meaning Izetbegovic, "is talking openly of a sovereign and independent Bosnia. Does he want to destroy Sarajevo? We will release our Tigers and let them do their job."

Exhibit P5779, page 5.

And once the conflict was underway, once the Tigers had been released, one the persons in Omarska I spoke about a moment ago were slowly dying of starvation or disease or more quickly from beatings, Mr. Karadzic acknowledged the accuracy of remarks of a Republika Srpska Assembly representative who said in his presence that Muslims were planted to Serbs as a people whose executioners Serbs were to be.

JUDGE ROBINSON: Mr. Tieger, would the statements that you just

played by themselves be sufficient to meet the 98 bis standard for genocidal intent?

MR. TIEGER: Our submission, Your Honour, would be that taken individually under the 98 bis standard, they certainly would be. Taken as an aggregate and collectively the statements alone, they are more than an adequate expression of intent within the meaning of Article 4. So they -- the reason I outlined several of those is so that -- is to avoid any ambiguity about context or nuance. The repeated insistence on annihilation, disappearance, extension, blood to their knees, I think makes clear that taken on their face and taken at their highest they more than suffice as direct evidence of the requisite intent.

JUDGE ROBINSON: But you're relying, of course, on other evidence as well.

MR. TIEGER: As I indicated previously, that's absolutely right.

In connection with remarks that Mr. Karadzic made in response to the comment that the Muslims were planted to Serbs as a people whose executioners Serbs were to be, the accused added:

"... this conflict was roused in order to eliminate the Muslims."

And he explained further:

"Muslims think they are being nationally established, but in fact they are vanishing."

And that's Exhibit D92, pages 41 and 86. You'll also find that in the appeal brief footnote 206.

Additionally, the accused personally selected Ratko Mladic to head his army, a man who shared his vision of what would and should

happen to the Muslims and Croats. And you can find that reference to the personal selection at P970, page 317. And as just one example of Mladic's vision, in 1994 Mladic stated that the conflict was a historical opportunity to create an all Serbian state, explaining when referring to the Bosnian Muslims and Croats that "my concern is to have them vanish completely." That's Exhibit P1385, pages 47 through 49.

And the evidence I've just cited, Your Honours, also reveals the fulfillment of the third and final evidentiary question that I mentioned at the outset; that is, whether the accused acted together with others who shared his intent. In addition, one could also turn, for example, to evidence concerning the accused's closest compatriot, Krajisnik, whose view, according to Slobodan Milosevic, was "to kill off all the Muslims and Croats." And that's at P1487, page 17.

Despite the evidence that I've just recounted, the Trial Chamber found that there was no evidence that would permit a reasonable trier of fact to find that the actus reus were perpetrated with the necessary intent. And as explained in our written submissions, and as Ms. Jarvis will discuss further, this reflects either the Trial Chamber's erroneous insistence that the physical perpetrators share the required intent or it reflected an impermissible weighing of other evidence against the direct and indirect evidence of intent which I've just outlined.

Indeed, even the accused acknowledges at page 53 of his brief that the statements I've just identified and that were the subject of Your Honour's questions were "genocidal expressions," but he asserts that these expressions must be measured against the totality of the

circumstances. Now, while that proposition may accurately reflect an assessment that must be made at the conclusion of the case, it is an impermissible approach in the context of 98 bis. And in a similar fashion much of the Defence commission represents an improper invitation for the Appeals Chamber to weigh and consider evidence that the accused considers, contradicts or rebuts or undercuts Prosecution evidence. And interestingly such an invitation, however inappropriate, nevertheless reflects an implied acknowledgement that in the absence of the supposedly contradictory evidence, the Prosecution's evidence that is taken at its highest demonstrates the requisite intent.

The Defence also invites this Chamber to simply ignore the standards applicable to 98 bis, skip to the end of the case and repeat what previous Chambers have said who have not found genocide. Now, apart from inviting an abdication of responsibility to follow our own rules, apart from depriving victims of a fully argued and reasoned decision, apart from encouraging the embedding of incorrect jurisprudence on perhaps the most important of crimes, the suggestion ignores a more important, a more pertinent fact and that is that previous Trial Chambers in this context have concluded that a reasonable Trial Chamber could find that a leadership figure such as Slobodan Milosevic or Momcilo Krajisnik could be held accountable on the basis of essentially the same evidence on generally the same crimes, contrary to the accused's submission, no victim, no objective observer could be expected to understand how accused persons, such accused persons, could be held accountable in reliance on the statements of intent by Krajisnik -- by Karadzic whose forces

effected these crimes but not Karadzic himself. In that regard I direct the Chamber to the decision on Rule 98 bis for judgement of acquittal of 16 June 2004 in the Milosevic case, paragraphs 238 through 245.

In sum, Your Honours, the evidence clearly established the convergence of the actus reus elements of Article 4(2) with the specific intent to destroy in whole or in part a national ethnical, racial or religious group as such. And on the basis of the evidence I've outlined alone, as well as the other evidence available to the Trial Chamber, a reasonable Trial Chamber could convict Karadzic of genocide under count 1.

My colleague Ms. Jarvis will now present the second part of the Prosecution's submission.

MS. JARVIS: Good morning, Mr. President and Your Honours. The evidence that Mr. Tieger has just outlined presents a compelling case that Karadzic, the paramount leader of the Bosnian Serbs, not only expressly stated his intention to destroy the Bosnian Muslim and Bosnian Croat communities in the territories he claimed for a Serb state, but that he unleashed a massive campaign of destruction including large scale physical destruction to achieve this objective.

Yet the Trial Chamber did not consider this enough to sustain a genocide charge at the 98 bis stage. In my submissions, I'm going to look at four misconceptions about the crime of genocide that help to explain how we've ended up with the wrong result when it comes to count 1. Some of these misconceptions are evident in the Trial Chamber's 98 bis decision as discrete errors, and others are reflected in the

Defence arguments that have been made on the crime of genocide in this case. By identifying these misconceptions in my submissions today, I aim to explain how this case has veered from the twin compasses of the elements of Article 4 of the Statute and the Rule 98 bis standard, and why Your Honours' intervention is necessary. We also, of course, maintain the additional arguments in our appeal brief that I won't go over today.

The first misconception is the objective genocide misconception. This is the notion that to prove genocide we must be able to look objectively at a particular scenario on ground and affix the label "genocide" in isolation from the accused person in question. It's a trap, because it wrongly makes the question of genocidal intent solely dependent on what can be inferred from events on the ground to the exclusion of other factors that show that accused was acting with genocidal intent. And this is at odds with the legal elements of the crime of genocide.

Karadzic falls into the objective genocide trap in his respondent's brief. He has a whole section called "Genocidal rhetoric but no genocide." And I refer you to paragraphs 223 forward in the respondent's brief. He says at paragraph 250:

"The Prosecution's argument fails to come to grips with the fact that Dr. Karadzic could have genocidal intent and yet be acquitted because no genocide, in fact, took place."

I also refer you to the respondent's brief at paragraph 228. What's more, he apparently accepts that the evidence of his statements

taken at its highest could support an inference of genocidal intent and that's only by weighing that evidence against other factors on the record that genocidal intent is undermined. That's the respondent's brief at footnote 336.

The Trial Chamber's decision reflects the same misconception. The Trial Chamber started by looking at the events on the ground and asking whether these events taken in isolation could be branded genocide. Having not been satisfied that there was an objective genocide it then brushed aside all the evidence, the direct evidence of Karadzic's statements that taken at their highest show he was acting with genocidal intent. In particular the Trial Chamber stated that it considered Karadzic' express statements of intent "in light of the scale and context of the alleged crimes in the municipalities in 1992, and the inability to infer genocidal intent from other factors."

The Chamber found that:

"Notwithstanding the statements of the accused, there is no evidence which, if accepted, a reasonable trier of fact could use to find the acts of killing, serious bodily or mental harm and conditions of life inflicted on the Bosnian Muslims and Croats were perpetrated with the dolus specialis for genocide." That's in the Trial Chamber's decision transcript 28769, lines 12 to 21.

That was an error, Your Honours. The crime of genocide simply requires that an accused acting with intent to destroy a protected group in whole or in part a responsible for underlying acts of genocide. Those requirements are satisfied here for the reasons given by Mr. Tieger and

the Trial Chamber was wrong to require anything more.

The Jelisic case, this Tribunal's case, underscores this point. The Jelisic Appeals Chamber held that a reasonable Trial Chamber could have been satisfied under the Rule 98 bis standard that Jelisic had genocidal intent based on statements he made and his own acts of killing and mistreatment of Muslims. That's Jelisic appeal judgement paragraph 68. Looked at objectively and in isolation from Jelisic, the crimes in question would not necessarily have been branded genocide. The Trial Chamber had previously found there was insufficient evidence of a broader plan to commit genocide in Brcko, beyond Jelisic himself. That's the trial judgement paragraph 98 and 108.

The objective genocide misconception is an easy trap to fall into. Particularly when we're dealing with senior figures, it is often our standard methodology to start by looking to see whether the crimes have occurred on the ground and then we seek to link it up the chain of command to the most senior figures. The Trial Chamber used this methodology in its Rule 98 bis decision for every single crime in the indictment and there's nothing inherently wrong with that approach, per se, and certainly we accept one methodology of inferring genocidal intent is to look at the events on the ground, but the events on the ground can't be used to exclude direct evidence from Karadzic himself that he was acting with genocidal intent. That's the problem with what the Trial Chamber has done here. It disregarded direct evidence of his intent in search for an objective genocide. That's at odds with the legal elements of the crime of genocide and of course also with the

98 bis standard which prohibits the weighing of evidence.

The second misconception, and it's related to the first, is the genocidal acts threshold misconception. This led the Trial Chamber to incorrectly impose a threshold or group impact requirement for the actus reus of genocide whereby it found that acts of killing and serious bodily or mental harm that happened in this case were not sufficient.

But to meet the actus reus requirement of genocide, Article 4(2) only requires proof that one of the enumerated acts took place; in this case, killing, serious bodily or mental harm and/or the infliction on the group of conditions of life calculated to bring about their destruction. So long as the evidence shows one or more of these acts occurred, the actus reus of genocide is satisfied.

As is often stated, even one killing or one act of serious bodily or mental harm could be genocide as long as its carried out with the required intent; for example, the Akayesu trial judgement at paragraph 497.

Despite the overwhelming evidence described by Mr. Tieger and outlined in greater detail in our appeal brief, the Chamber did not find the actus reus proven. When it came to the killings, it stated it could not conclude that:

"A significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of the members of these groups were targeted for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such."

That's transcript 28765, lines 10 to 13.

There is nothing in the plain language of the actus reus element for killing that supports this threshold requirement and the Trial Chamber was wrong to impose it here. The actus reus requirement of killing was met, and Karadzic acknowledges this fact in his respondent's brief at paragraph 28.

Similarly when it came to serious bodily and mental harm, the Trial Chamber considered:

"It has not heard evidence even when taken at its highest which could support a conclusion by a reasonable trier of fact that the harm caused reached a level where it contributed to or tended to contribute to the destruction of the Bosnian Muslims and/or Bosnian Croats in whole or in part ..."

That's transcript 28766, lines 6 to 11.

Again, Your Honours, there's nothing in the plain wording of the provision or the preparatory works of the genocide convention that justifies imposing this threshold requirement. The same types of acts at issue in this case including torture, inhumane living conditions, sexual violence and beatings have been accepted as sufficient in other cases. And I refer you generally to our appeal brief at paragraph 27.

Certainly when it comes to serious bodily or mental harm, the Seromba Appeals Chamber stated that to support a conviction for genocide:

"The bodily harm or the mental harm inflicted on members of the group must be of such a serious nature as to threaten its destruction in whole or in part."

Seromba appeal judgement, paragraph 46.

But this should not be interpreted as imposing a requirement that the harm must inflict a destructive impact at a certain level on the group. The Seromba Appeals Chamber accepted, for example, that rape and torture would obviously constitute examples of serious bodily or mental harm for the purposes of genocide. And this of course is consistent with a long line of ICTY and ICTR case law which has not imposed this kind of group impact requirement. We set these cases out in our appeal brief at paragraphs 27, and we ask Your Honours to clarify this point in your judgement.

Generally, the genocidal acts threshold misconception is an easy trap to fall into. Genocide very often involves destructive acts on a massive scale, as indeed, and as reflected in the discussion between Your Honour Judge Robinson and Mr. Tieger, the evidence in this case showed that very fact. Very often the underlying acts of genocide will have an impact on the group or part of the group but that is not a legal requirement, and the Trial Chamber was wrong not to find the actus reus satisfied here.

The third misconception I want to mention is the killing all the group members misconception.

JUDGE MERON: Please continue.

MS. JARVIS: Yes, thank you. The third misconception I want to mention is the killing all the group members misconception. The trap is thinking that genocidal intent necessarily equates with an intention to kill all of the group members. We see this misconception dramatically reflected in the respondent's brief at paragraphs 212 to 216 where he

emphasises the high number of killings in other genocides, particularly the Holocaust and the situation in Rwanda in 1994. He even goes so far as to argue there's no point proceeding with the genocide charge in this case because the events in Bosnia and Herzegovina in 1992 didn't follow the same pattern as the Holocaust or Rwanda.

Again, it's an easy trap to fall into. The Holocaust, a genocide targeting a group with acts overwhelmingly involving killings, was the event that led to the genocide convention being drafted. But if we pause even for a moment, it's obvious that this historical example does not define the parameters of the legal definition of genocide ultimately adopted and which we see reflected in Article 4 of our Statute. For a start, the definition extends to intent to destroy not just the whole group but a part of the group, so by definition genocide can include situations where large parts of the group are not targeted for killing or even targeted at all.

Second, genocide can also indisputably be constituted by acts other than killing as reflected in Articles 4(2)(b) through (e) of the Statute. These acts included serious or bodily or mental harm do not necessarily result in the death of the group members, the individual group members.

Overly focusing on examples of genocide like the Holocaust and like Rwanda in 1994 where the intent extended to targeting a whole group primarily with killing is a trap and it does not help us here.

In this case, count 1 concerning genocide in the municipalities in 1992 has put before this Tribunal quite a different question: Did

Karadzic commit genocide against a part of the Bosnian Muslim and Bosnian Croat groups through acts that included but were not limited to killing? The answer, we say, is yes, and the most helpful precedent is the case of Srebrenica which also involved genocide of a part of the Bosnian Muslim group with acts not limited to killing.

The Appeals Chamber in the Krstic case confirmed that the intent must of course be to physically destroy the group or part of the group, but the Appeals Chamber accepted that the intent to destroy a community through a combination of acts not limited to killing is sufficient. In Srebrenica the key was the combination of killings and expulsions which led to the community's inability to reconstitute itself, and in Judge Shahabuddeen's words, left its family structures in tatters. I refer you to the Krstic appeal judgement at paragraphs 28 and 31 and Judge Shahabuddeen's opinion at paragraph 47.

The Appeals Chamber accepted that this combination of acts was sufficient to ensure "the physical demise" of the Bosnian Muslim community of Srebrenica thereby satisfying the intent to destroy requirement. Krstic appeal judgement at paragraph 35.

The Tolimir trial judgement reinforces this point at 764, reaffirming that "the physical or biological destruction of a group is not necessarily the death of the group members," and it's citing the Blagojevic and Jokic trial judgement at paragraph 666.

So its clear from the Tribunal's Srebrenica precedents that the intent to destroy does not equate with an intent to kill all and each of the members of the group or part of the group. From a legal point of

view, it's entirely irrelevant to Karadzic's individual responsibility whether what happened in Bosnia and Herzegovina in 1992 followed the same pattern, factual pattern, as the Holocaust or Rwanda.

This leads me to the fourth and final misconception I want to mention: The displacement versus genocide dichotomy. This is the idea that the ethnic cleansing campaign in the municipalities in 1992 was only about displacing the Bosnian Muslim and Bosnian Croat populations and therefore incompatible with the legal definition of genocide; for example we see this --

JUDGE MERON: Just to draw your attention to the fact that we have five minutes left.

MS. JARVIS: Thank you. We see this misconception reflected in the respondent's brief, paragraph 217 and 244. It's a trap because it suggests that genocide and displacement are mutually exclusive crimes which is not correct. We fully accept that displacement is not, per se, equivalent to an intention to destroy a group. But the Srebrenica precedents confirm that the intent to destroy is not undone because some, even a significant number, of the community were targeted with displacement. To the contrary, the combination of physically destructive acts and displacements can very effectively lead to the physical demise of a community as they did in Srebrenica and indeed as they did in the municipalities in 1992. To see whether there's an intention to physically destroy a community we have to look at the total effect of the acts the accused intends to inflict on that community. It is a mistake to pass those acts out into isolated and disconnected events. As

Judge Shahabuddeen said in his opinion in the Krstic appeal judgement, paragraph 35, regarding the Srebrenica genocide:

"... standing alone, forcible transfer did to the constitute genocide. But in this case forcible transfer did not stand alone ... it was part - an integral part - of one single genocidal scheme ... involving killings, forcible transfer and destruction of homes."

Similarly, the Tolimir Trial Chamber looked at the combined effect of all of the acts: Houses burned, mosques destroyed, forcible transfer, and killings, and found an intent to physically destroy the Muslim community of Srebrenica. That's Tolimir trial judgement at paragraph 766.

We have evidence of a very similar formula of destructive acts in this case.

To conclude, Your Honours, Karadzic should answer the genocide charge against him in count 1 certainly the municipalities in 1992. Certainly the low Rule 98 bis threshold has been satisfied.

But we don't bring this appeal as a technical matter simply because they applied the wrong standard, we bring this appeal because the interests of justice require that Karadzic's responsibility for genocide should be given full and careful consideration, the end of the case on the totality of the evidentiary record and with the benefit of full legal argument. Dismissal of account at the Rule 98 bis stage is only appropriate in a very rare situation where the Prosecution case is broken down and there is no evidence of either the actus reus or the mens rea of a crime. That's Dragomir Milosevic Rule 98 bis decision of 3 May 2007.

Your Honours, the question to be determined at the end of this trial is whether Radovan Karadzic, the supreme military and political leader of the Bosnian Serbs who expressed his intent to eliminate the Muslims and Croats and unleashed a violent destructive campaign engulfing Bosnia-Herzegovina in 1992 is guilty of genocide. Over the past 20 years here at the Tribunal, we have perhaps become so used to hearing about the horrific destructive intent behind these crimes that we're perhaps at risk of becoming inured to it. It's worth recalling, Your Honours, the Karadzic and Mladic Rule 61 decision back in 1996 where having heard the evidence the Prosecution adduced, the Trial Chamber invited the Prosecution to expand the genocide charge to include the one that we have -- have before us today.

The Trial Chamber summed it up this way at page 53 of its decision. It said:

"At this stage the Trial Chamber considers that certain acts submitted for review could have been planned or ordered with genocidal intent. This intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts from the massive scale of their destructive effect and from the specific nature which undermines -- which aims at undermining what is considered to be the foundation of the group."

Fifteen years later we have indeed presented our evidence in relation to that very charge. As Mr. Tieger's outlined, as explained in our brief, that evidence more than satisfies the 98 bis standard. And as Your Honours well known, it is important for this Tribunal to get this

question right. It's important for the coherent development of the law, and it's important especially for the Bosnian Muslims and Bosnian Croats who were in the targeted municipalities in 1992. They heard Karadzic threaten genocide and they saw and experienced the destructive acts unleashed all around them. They deserve to hear Radovan Karadzic answer that charge, and the law requires it.

Thank you, Your Honours.

JUDGE MERON: Thank you. And let me just clarify one point. You -- basically your argument refers to the combined effects, effect of the various facts on the ground.

MS. JARVIS: Your Honours, we say, technically speaking, you could simply look at the evidence of the -- the direct evidence of -- the direct evidence of Mr. Karadzic's intent combined with the fact that the actus reus of genocide is satisfied, that at the 98 bis standard would certainly be enough. But of course there is so much more than that, Your Honours, when you look at the evidence on the record in this case. The direct evidence is complemented and reinforced by the pattern of what happened on the ground, and we say that the combination of those things certainly, Your Honours, is sufficient at the 98 bis standard and justifies reinstating count 1 of the indictment.

JUDGE MERON: Thank you, Ms. Jarvis. We will now adjourn for 20 minutes, and meet about 10.32.

--- Recess taken at 10.12 a.m.

--- On resuming at 10.31 a.m.

JUDGE MERON: Please be seated.

The response by Mr. Karadzic, Mr. Robinson.

MR. ROBINSON: Thank you, Mr. President.

Mr. President and member of the Appeals Chamber, the Prosecution's arguments, as eloquent as they were, made no mention of the standard of review of the Trial Chamber's decision which defines the job that we have to do here. And I have to say that Dr. Karadzic and I are delighted to be in the role of respondent before the Appeals Chamber, because we've been the appellant 14 times in this case, and we've lost every time. We've been told that Trial Chamber's enjoy broad discretion in evaluating evidence, that Trial Chambers are best placed to hear, assess, and weigh the evidence presented at trial. We've been told that decisions of Trial Chambers are endowed with the considerable degree of discretion and that Trial Chamber decisions are entitled to substantial deference and will only be overturned where they are found to be patently incorrect or unreasonable. So Dr. Karadzic contends that the standard of review for this appeal is whether no reasonable Trial Chamber could have reached the decision that it reached, not whether, as the Prosecution has implied, that decision was correct or not.

The Prosecution in its brief has mentioned the Jelisic case and argued for a lower standard of review under this Rule 98 bis decision, and we believe that that was a completely different situation, and I'd like to tell you why.

In the Jelisic case the Trial Chamber departed from the deferential standard of review which it had followed since the Tadic appeal, only because it found that the Trial Chamber had erred in its

approach to Rule 98 bis. After finding that the Trial Chamber had issued its decision without giving the Prosecution an opportunity to be heard, the Appeals Chamber also found that the Trial Chamber had erred in acquitting Jelisic by choosing certain facts over others at the end of the Prosecution's case instead of taking the Prosecution's case at its highest.

The Appeals Chamber said that the Tadic principle applies only where the decision in question was one which the trier of fact was authorised to make. It has no bearing on the principle question here, whether the Trial Chamber was entitled to make its own evaluation of the relevant evidence. And the Appeals Chamber found that rather than taking the Prosecution's evidence at its highest, the Trial Chamber had instead picked and chosen among parts of the evidence, such as the accused's disturbed personality and the random nature of his acts, while ignoring his express intention to kill the majority of Muslims in Brcko made contemporaneously with murders that he carried out personally.

This contrasts greatly with the approach of the Trial Chamber in our case. First, our Trial Chamber gave the Prosecution a full and fair opportunity to be heard, and they heard many of the same things that Mr. Tieger told you today.

Second, the Trial Chamber expressly considered and discussed the evidence of genocide presented by the Prosecution in totality and did not pick and chose among the evidence before it. Third, our Trial Chamber employed the exact same methodology as the International Court of Justice did in the case of Bosnia versus Serbia and the Trial Chamber did in the

Brdjanin case, examining the evidence of each form of actus reus for genocide, killings, infliction of serious harm, and imposing conditions of life calculated to bring about the destruction of the group as well as other evidence from which genocidal intent might be inferred.

The Trial Chamber listed vast categories of evidence from which if might infer such intent --

JUDGE ROBINSON: When you cite the ICJ decision, they weren't considering anything equivalent to 98 bis.

MR. ROBINSON: Well, I would say that the standard that the ICJ decision operated under was lower that Rule 98 bis. They were operating under a civil standard of essentially clear and convincing evidence, and they expressly indicated that that was the standard they were using; whereas, even under 98 bis we're still dealing with evidence that must be capable of convincing a finder of fact beyond a reasonable doubt. So in our submission, the ICJ actually had a lower standard than that which we are to employ in this criminal case. But the trial -- the Trial Chamber carefully considered and recognised that it had the right to consider this vast categories of evidence from which it might infer intent. The general context case -- yes, Judge Liu.

JUDGE LIU: Yes, I'm sorry. Did you finish your answer?

MR. ROBINSON: I finished my answer to Judge Robinson, yes.

JUDGE LIU: I just want you to elaborate a little bit on the differences of the standards of 98 bis as well as the final convictions after end of the trial.

MR. ROBINSON: Yes, and I am actually intending to make a whole

submission with respect to Rule 98 bis, and I think that's the core of the case is whether or not this meets that standard as opposed to the standard at the end of the case. But if you allow me to at least go through this standard of review which we think is extremely important before establishing the standards under Rule 98 bis, because looking at what the Trial Chamber did --

JUDGE ROBINSON: Sorry, I didn't realise you had finished your answer to my question or query, because I still don't consider the ICJ comparison apt, because the basic difference of course is that they're not dealing with a criminal case. So in my view that comparison doesn't help very much.

MR. ROBINSON: I understand. However, when you look at cases; for example, companion cases, let's say securities violation, which judged as a civil matter in a securities proceeding or a criminal matter in which somebody is charged with securities fraud, it's recognised that the standard in that civil companion matter is always lower than the standard in a criminal case of beyond a reasonable doubt. So although the standards are not identical and there's certainly differences between the two proceedings, I think it's normally been recognised that these criminal proceedings in which a person's life and liberty is at stake are always subject to a higher burden of proof than civil proceedings even when the responsibility of states are being debated.

Turning back to the issue of the Trial Chamber's handling of this 98 bis procedure, they considered all of the factors that are indicated by the Prosecution as relevant to whether genocide was committed and

whether there was evidence from which genocidal intent could be inferred. And you'll see that I've listed them all there. And in concluding at that there was no evidence capable of supporting a conviction, our Trial Chamber didn't pick and choose among the Prosecution's evidence but examined that evidence in the whole and at its highest. And it was particularly well suited to do so having sat through more than 2.5 years of trial in which it heard 196 Prosecution witnesses, admitted the testimony of another 148 witnesses under Rule 92 bis and 92 quater, admitted more than 7.000 exhibits, and took judicial notice at the request of the Prosecution of more than 2.300 adjudicated facts. The Jelisic case was one of those rare cases where the Pre-Trial Chamber's flawed procedure resulted in a departure from the traditional standard of review but there was no such flawed procedure in this case, and therefore there's no reason for you to have to substitute your judgement for that of the Trial Chamber.

I would like to turn now to the standard under Rule 98 bis, and that is the core of the appeal, the legal standard to be applied to a motion for judgement of acquittal at the close of the Prosecution case. The Prosecution's complaint isn't so much that the Trial Chamber acquitted Dr. Karadzic at all, but it's that they acquitted him too early.

Let's look at the Rule. At the close of the Prosecution's case the Trial Chamber shall by oral decision after hearing the oral submissions of the party enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction. It doesn't say

no evidence of the crime charged, and that's how the Prosecution reads it.

Mr. Tieger and today in the transcript, page 7, line 1, said that there has to be no evidence supporting a particular count. That's not correct. There can be evidence, but the evidence has to rise to the level of being capable of supporting a conviction. That means being capable of convincing a Chamber beyond a reasonable doubt that the crime of genocide had been committed in the municipalities in 1992, and that was exactly the standard that the Trial Chamber employed in our case.

Let's look what they said.

First, they quoted the Rule correctly and exactly. Second, they cited the jurisprudence under Rule 98 bis and correctly expressed the test whether there's evidence upon which, if accepted, a reasonable trier of fact could be satisfied beyond a reasonable doubt of the guilt of the particular accused on the count in question.

They said what the Appeals Chamber has expressed on many occasions. The test is not whether a Trial Chamber would convict but whether it could do so. They went on to say that where there's no evidence to sustain a count or whether the only relevant evidence is capable -- incapable of belief, a judgement of acquittal would be entered. That's the correct standard.

It said that it wasn't going to evaluate the credibility of witnesses or the strengths and weaknesses of contradictory evidence. That's also the correct standard. And finally, if the Chamber's convinced after taking the totality of the evidence presented by the

Prosecution, even after its highest, there's no evidence of which it could convict the accused of genocide under count 1 the Chamber should enter a judgement of acquittal for count 1 at this stage, and that's what at the did. They applied the correct standard and they applied it to this case.

Now, Rule 98 bis used to say that the Trial Chamber shall order the entry of a judgement of acquittal on motion of the accused or proprio motu if it finds that the evidence is insufficient to sustain a conviction on that or those charges. And I'd like to address the question of whether this change in the wording of the Rule from insufficient to no evidence changed the requirement that the evidence be capable of proof beyond -- of the charge beyond a reasonable doubt. In Jelisic under the old Rule, the Appeals Chamber explicitly held that the notions of proof beyond a reasonable doubt applied to the inquiry under Rule 98 bis.

In cases decided after Rule 98 bis was amended in 2004, in the face of challenges by accused whose trials commenced before the Rule had been amended, that the Rule should not apply to them retroactively, Trial Chamber's explicitly assured those accused that the standard under the Rule had not changed. In the Oric case in June 2005, the Trial Chamber said this Chamber highlights that there is agreement between the parties that the last amendment of Rule 98 bis does not in any way change the standard of review to be applied by the Trial Chamber in its Rule 98 bis exercise. In the Krajisnik case in August 2005, the Trial Chamber rejected the argument of any prejudice to the accused from

the amendment of the Rule stating that the standard of review remained the same. In the Dragomir Milosevic case, the Trial Chamber explicitly discussed the effect of the 2004 amendment. The Trial Chamber said that the new formulation clarifies that a judgement of acquittal is to be entered if there is no evidence capable of supporting a conviction, and the Court went on to say but this has always been the standard and quoted from the Jelisic Appeals Chamber judgement. The Rule 98 bis standard was examined in detail by the Trial Chamber in the Slobodan Milosevic case and one part of its ruling taken from the jurisprudence of the United Kingdom is particularly applicable here. The Chamber pointed out that there were three situations that could arise under the Rule. The first situation was where there was no evidence to sustain a charge. In that situation it said that the motion for acquittal is to be allowed.

The third situation was where there was some evidence but such that its strength or weakness depended on the view taken of a witness's credibility and reliability, and on one possible view of those facts a Trial Chamber could convict, and in that circumstance the motion of acquittal was to be denied. But the second situation is the one that applies here where there is some evidence but it is such that taken at its highest a Trial Chamber could not convict on it the motion is to be allowed. This same formulation of three situations was repeated in the Milutinovic Rule 98 bis decision taken in 2007 after Rule 98 bis was amended. So it applied then and it applies now. And it refutes the Prosecution's argument in this case that once you have some evidence a Rule 98 bis motion must be denied.

And if I could just take a minute to discuss the function of Rule 98 bis in a system where we don't have juries, a point that was considered in Judge Robinson's concurring opinion in the Slobodan Milosevic case.

An important purpose of the no-case to answer procedure is indeed to prevent an unjust conviction by a layperson serving on juries who could be swayed by inflammatory yet insufficient evidence. But as Judge Robinson pointed out, motions for judgement of acquittal at the close of the Prosecution's case also serve the important function of promoting judicial economy, a function which is particularly applicable at this Tribunal where trials are expensive and where we're spending United Nations funds which could otherwise go to feeding the hungry, curing the sick and sheltering the homeless --

JUDGE ROBINSON: That's part of Judge Robinson's statement?

MR. ROBINSON: No, that's part of attorney Robinson's statement. Hopefully the transcript will accurately reflect that. So therefore the Prosecution's contention that once it has introduced some evidence, a bell has been rung and a motion for judgement of acquittal cannot succeed is belied by the express language of Rule 98 bis by the interpretation of that Rule by Chambers both before and after its amendment and by the purpose behind the Rule itself.

Having established that the Trial Chamber applied the correct standard under Rule 98 bis and that its decision is not to be disturbed unless it is one that no reasonable judge could have made. Now let's turn to the merits.

The Prosecution says we have actus reus and we have mens rea and therefore we have genocide. The fallacy behind that is that genocide is the confluence of those two ingredients, not the mere existence of two separate element. In his book "Unimaginable Atrocities," Professor Schabas explained the words mens rea and actus reus come from a Latin maximum that holds there to be no punishable act that is not the result of a guilty mind. An act that is not the result of a guilty mind is not a crime. And just because you have evidence of actus reus and mens rea does not mean you have a genocide. There has to be a result. The act has to result from the mens rea or from the intent. I can have a loaf of bread, I can have a package of ham, I don't have a ham sandwich. There has to be a confluence in order for you to have a genocide.

Let's look at what happened in the municipality of Bosnia in 1992, taking the Prosecution's evidence at its highest. What they term as Bosnian Serb forces surrounded and then attacked a village. They entered the village and rounded up the Muslim population. Some would be killed, some would be captured, and by far the largest number would be safely transported to territory controlled by the Bosnian Muslims. Those who were captured were taken to detention facilities where they were often subject to mistreatment. Some died in those places, but the vast majority were exchanged for Serb prisoners or released. Time after time, in village after village, town after town in these detention facilities the Bosnian Serb forces would have tens of thousands of Bosnian Muslims in their custody and control. They had the opportunity and the means to destroy them, and they let the overwhelming majority of them go, and

that's why there was no genocide in the municipalities, notwithstanding as the Trial Chamber put it, statements that at their highest could -- from which genocidal intent could be interred from Dr. Karadzic, General Mladic, Momcilo Krajisnik, Radoslav Brdjanin, and other alleged members of the JCE. There was simply no evidence that anyone acted OP these statements and committed acts intended to destroy the Bosnian Muslims. If indeed Radovan Karadzic as the Supreme Commander or General Ratko Mladic had the intent to destroy the Muslims as a group, how did 98 per cent of them manage to slip through the fingers of Bosnian Serb forces? Those forces controlled 70 per cent of the territory of Bosnia in 1992, yet the Prosecution's own expert testified at that less than 2 per cent of the Bosnian Muslim population died. Time after time these forces of Radovan Karadzic and Ratko Mladic not only let them get away but arranged for their transport. And you don't have to take my word for that or even the Trial Chamber's. The International Court of Justice look at these same facts, these same statements, in these same municipalities after 14 years of litigation and came to the same conclusion.

As that Court put it, the applicant's argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership to create a larger Serb state by war or conquest if necessary did not necessarily require the destruction of the Bosnian Muslim and other communities but their expulsion.

According to the International Court of Justice, what you had in the municipalities of Bosnia in 1992 and what was intended was

displacement not destruction.

The decision by the International Court of Justice that there was no genocide in the municipalities of Bosnia in 1992 was clear and unequivocal. It was also based on a great deal of comity given by the --

JUDGE ROBINSON: Sorry. The Prosecution's argument is that it's not just the displacement, it's displacement plus other factors. And I'm still -- I still don't believe I'm helped by your references to the ICJ judgement. In fact, I think they work against you because I believe they would -- that judgement would be closer to the situation at the end of the case, and I have a feeling that the positions that you are positing are based on a decision by the Trial Chamber at the end of the case. In Jelisic the Appeals Chamber made the distinction, in fact, they say the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt. Of course beyond reasonable doubt is there, but the test is not whether the trial would, in fact, arrive at a conviction beyond reasonable doubt on the Prosecution evidence but whether it could. So all you are looking for is evidence that raises the possibility of conviction, evidence that raises the possibility of guilt, not the certainty, not the certainty of guilt. And that is where I think a fine line of distinction has to be drawn between the situation at the end of the case and the situation at the halfway stage.

Again, I don't understand the Prosecution to be saying that if there is any evidence then the case must go to the end of the case. There I'm referring to your comment about some evidence. It is some evidence that raises reasonably the possibility of a conviction.

MR. ROBINSON: Yes, I agree. That's what the Rule says, capable of sustaining a conviction. So I think we agree. And then the question is what is the evidence capable of staining a conviction? Well, the Trial Chamber looked at that in detail. They heard all of the same evidence that you've heard, and they decided that that evidence was not capable of sustaining a conviction.

JUDGE ROBINSON: But, you know, that is only right in my view. If when you look at the evidence you can say, Oh, the Prosecution's case amounts to nothing, that's the only situation in which it is right, in my view, and the submission would succeed if you can say the Prosecution's case has completely broken down. Once the Trial Chamber has to weigh the evidence in order to come to a decision, then the 98 bis regime requires that the case must go to the end of the case, because once it has to weigh the evidence, it is acting improperly. It means that there is some evidence. The fact that you have to weigh the evidence necessarily means that there is some evidence present on the basis of which a reasonable trier of fact could convict, and so the case must go to the end.

MR. ROBINSON: Exactly, and I believe that the Trial Chamber thinks exactly like you do, and so do we. And the problem was that they --

JUDGE ROBINSON: Are you saying that the Prosecution's case totally broken down on these matters?

MR. ROBINSON: No, I think broken down is a different concept. I think that's when they present some evidence and that relates more to credibility where they present some witness and the witness is destroyed

on cross-examination and the case has broken down. So that aspect is only one part of a way the Prosecution can fail at the 98 bis standard. But where it failed here is that it had no evidence of genocide in the first place. It had no evidence to show that any of the acts that were committed in the municipalities were committed with the intent to destroy, not that its evidence was not capable of belief or that it was somehow broken down, but that there was no evidence in the first place. And that's what the International Court of Justice is saying.

JUDGE ROBINSON: Never mind the International Court of Justice.

MR. ROBINSON: Let me try out --

JUDGE ROBINSON: But the question as to whether the acts were committed with the intent, in my view, in my humble view, is not such that it is beyond doubt that there is no intent. Would you agree with that?

MR. ROBINSON: I think you're switching the standard. The standard is whether you could find intent beyond a reasonable doubt, not whether you could find for the Prosecution and the Defence has the burden of showing that there is beyond a reasonable doubt no evidence. So I don't think that is beyond reasonable doubt formulation actually works for Rule 98 bis.

JUDGE ROBINSON: Once there is a reasonable question as to whether the evidence raises genocidal intent. It must be left to the end of the case.

MR. ROBINSON: If there is some evidence taken at its highest as capable of showing genocidal intent, it should be left to the end of the

case. And that was the question that the Trial Chamber had before it, and that's the question that they decided no, there's nothing. That's not the same question you have before it. The question you have before it is whether that decision by the Trial Chamber was so unreasonable that no one in their right mind could have made it, but --

JUDGE ROBINSON: But I'd like to differ on that, and no doubt the Appeals Chamber will have to grapple with this, you know. In my view the fundamental issue raised by 98 bis decision is in terms of the formulation of 98 bis itself, whether on the record there is evidence that reasonably raises the possibility of conviction. So what we are -- what we have to be involved in, in my view, is an evidence examination exercise essentially. We have to look at the evidence. Of course your point comes into play because the Trial Chamber may have made mistakes in an assessing the evidence. I don't say by my analysis that what the Trial Chamber did is irrelevant, but if you find when you examine the evidence that there is evidence capable, reasonably capable of supporting a conviction, evidence that reasonably raises the possibility of guilt, then in my view the case must be left to the end and not be determined at the halfway stage.

No, of course, what the Trial Chamber did comes into play, and of course many grounds of appeal have been filed, but in my own view is that all of those grounds of appeal must be shown to relate to that essential question of whether there is on the record evidence that reasonably raises the possibility of conviction, and if that -- because if you find -- if we were to find that there is on that record such evidence

then it means that the Trial Chamber made a mistake. It means that the Trial Chamber made a mistake.

MR. ROBINSON: I think that we don't disagree on what the job and Rule 98 bis is. Is there evidence identified either at the Trial Chamber level or even today that shows that the acts that were committed in the municipalities were committed with the intent to destroy. The Trial Chamber looked at it carefully, applied the right standard, did everything they were supposed to do, and came to the conclusion unanimously that there was no evidence. So they didn't make a mistake in their approach. They didn't make a mistake in their methodology. If you disagree with their conclusion, I don't think it's to you to substitute your own judgement for that, but if you find that they're so wrong that they were so unreasonable that no reasonable judge could have come to that conclusion, then you are free to disregard their conclusion and reverse it. But I don't see that the Prosecution has pointed to any evidence where there as been this confluence of active intent in the municipalities of Bosnia such as to make the Trial Chamber's decision incorrect, less unreasonable.

But since we -- you don't like the International Court of Justice case, let me try out some other cases on you.

JUDGE ROBINSON: I'm not against the International Court of Justice, let me clarify that. I just don't think the reference to the case is very helpful.

MR. ROBINSON: They certainly had a lot of regard for your decisions because that is the basis on which they decided the case,

essentially was to take the ICTY's decision --

JUDGE ROBINSON: As well they should.

MR. ROBINSON: They took the ICTY's decision and they gave a tremendous amount of deference and comity to them in coming to their conclusion. And I think that the public even -- or it would be very difficult to understand how two courts in The Hague one kilometre from each other could come to different conclusions on the same evidence, and that's exactly what it was, the same evidence. But let's put that to the side and let's talk about what happens in this building, in these Tribunal -- in this Tribunal, and we can just begin with the case of Momcilo Krajisnik, the President of the Republika Srpska Assembly, described by the Prosecution as Dr. Karadzic's right-hand man who was charged with these same acts, these same municipalities, and these same statements were considered by the Trial Chamber, and the Trial Chamber unequivocally found that there was no genocide in the municipalities. We had the same result in the Brdjanin case involving the president of the Autonomous Region of the Krajina; the Stakic case involving the president of the municipality of Prijedor; and the Sikirica case involving the commander of one the notorious Bosnian Serb prison carps.

Now, the Prosecution might have overcome the weight of this authority if they had provided something new in our trial, but in their appeal brief and their reply brief they haven't pointed to a single piece of evidence that is new to the Karadzic case. They recycled the same old speeches that they used in Stakic and Brdjanin and Krajisnik, and they got the same result.

Now, I'd like to finally deal with the Prosecution's argument that Trial Chambers have denied Rule 98 bis motions for judgement of acquittal on charges of genocide in the municipalities and that therefore the Trial Chamber should also deny our motion at this stage of the case. And it is indeed true that in the Stakic, Brdjanin, Slobodan Milosevic, and Krajisnik cases the Trial Chamber denied such motions during the period 2003 and 2005, and I'd ask you to think about it this way: Suppose you had a son or a daughter who wanted to go to Harvard and their grades were good but not great, and we all love our children and we think they're brilliant and so when your child comes to you and ask you, Do you think I'm capable of being admitted to Harvard, you would certainly say Yes, go ahead and apply, and let's say they apply and it's rejected, just like the Prosecution's application for genocide was rejected in Stakic case in 2003. But the second year they come back, Am I capable of getting into Harvard, and you say, Sure, give it a try, and they try and they're rejected just like the Prosecution was rejected in the Brdjanin case in 2004. Their evidence wasn't capable of proving genocide. And the third year they come back to you again and you still say, Well, you never know, give it a try, and they're rejected, just as the Prosecution's evidence was rejected in the Krajisnik case in 2006.

Then some international body comes along and says that people with your sons and daughter's grades aren't qualified for Harvard, just like the International Court of Justice said that what happened in the municipalities doesn't qualify for genocide. And then your son or daughter comes back to you after all of that and says, Am I capable of

getting into Harvard, and I think at that point, much as you would love your child, it would be reasonable and maybe even prudent to say, No, you're not capable of getting into Harvard. And that's what the Trial Chamber did here. They told the Prosecution in 2012 after all of these decisions, after these events had been scrutinised so many times: Your evidence is not capable of proving genocide.

Thank you very much.

JUDGE MERON: So, Mr. Robinson, you are finished?

MR. ROBINSON: Yes, I am.

JUDGE MERON: Well, since we are ahead of time, I think we will now turn to the Prosecution for a reply. Or, actually, yes, I mean we could use the next 20 minutes and we will have a break. No use now to have a break now. So why don't you start and then we will have a break at 11.30.

MR. TIEGER: I was going to suggest a break, Mr. President, in part because my LiveNote wasn't working, so I couldn't revert.

JUDGE MERON: Sorry?

MR. TIEGER: I was going to suggest a break in part because the normal transcript availability wasn't technically available here, so I couldn't scroll back to arguments that were being made. I think it would be -- from our point of view it would be more efficient if we could break now and then resume following consultation. Obviously I'm not rejecting what the Court wishes to do, but I think that would be preferable.

JUDGE MERON: All right, but could I ask you just to stay in your seat, please.

[Trial Chamber and legal officer confer]

JUDGE MERON: Okay. We will now adjourn for 20 minutes, which means we will reconvene at 11.30.

--- Recess taken at 11.10 a.m.

--- On resuming at 11.33 a.m.

JUDGE MERON: Please be seated.

Before we go to the Prosecution, Judge Robinson, I believe that you had a point still to clarify.

JUDGE ROBINSON: Just a clarification. Mr. Robinson, in your submissions you made reference to the well-known appellate rule that the Appeals Chamber pays deference to the findings of the Trial Chamber, but that of course relates to findings of fact. What is being said here is that the Trial Chamber made an error of law in its application, in its interpretation and application of Rule 98 bis, but of course the deferential principle has no application in relation to errors of law.

MR. ROBINSON: Well, Your Honour, I would respectfully submit that what has been raised as questions of law don't go to the issue of whether they apply 98 bis correctly, but they go to other issues such as the serious bodily harm for actus reus which is not dispositive of this appeal but the issue that's actually in contention whether there was evidence capable of supporting a conviction, that's the -- that's the question that the Prosecution is disputing. They say they have evidence capable of supporting a conviction. We say they didn't. That to me is a question of fact and a question of evaluation of evidence. That in all of your decisions, whenever you evaluate evidence from a final judgement,

you apply the deferential standard to. So I don't see how you could distinguish this situation from an appellant, an accused, who was convicted after a trial and says that they applied the standard of beyond a reasonable doubt incorrectly, because, in fact, the evidence showed that there was reasonable doubt. The Prosecution is saying the same thing here, that the evidence showed that there was evidence capable of sustaining a conviction for genocide, and I think that you have to apply the same deferential standard that you do in the situation of appeal from a final judgement of conviction.

JUDGE ROBINSON: [Microphone not activated] ... the situation, but if we find that they have misunderstood the meaning of 98 bis then that really, to my mind, is a question of law, yes?

MR. ROBINSON: Well, if you -- yes, if you find that they applied the wrong 98 bis standard and -- as in Jelisic you could reverse on that basis as a question of law, but I question how you could read the Trial Chamber's decision and all of the approach that it took and find any error in its methodology for 98 bis. Maybe you disagree with their conclusion --

JUDGE ROBINSON: Yes, there's no error in the articulation. The articulation is a hundred per cent correct. It's where I have difficulties is in the application of those principles.

MR. ROBINSON: Thank you.

JUDGE MERON: Thank you, Judge Robinson. Before giving the floor to the Prosecution, I have a question to ask of Mr. Tieger, if I may.

I believe that earlier today and on page 30 and 31 of your brief

you identified a statement by Mr. Karadzic in Exhibit D92 where you claim he said that, and I quote, "This conflict was aroused in order to eliminate the Muslims."

I have looked at this exhibit, and my understanding is that Mr. Karadzic was stating that there was truth in the statement that Europe had aroused the conflict in order to eliminate "the Muslims." If I am correct about this context, would you still claim that the full statement of Mr. Karadzic taken at its highest is evidence that Mr. Karadzic possessed genocidal intent? And I'm not speaking of other statements. I'm speaking of this one specifically.

MR. TIEGER: Thank you, Mr. President. I don't dispute the context, either the factual context of the discussion in the Assembly or the general backdrop that you have identified, although I don't have the statement in front of me at this moment. What I would emphasise, however, is that in attributing responsibility for the initiation or outbreak of the conflict to the Europeans or to the European Community, that does not in any way again say the nature of the destructive acts that were unfolding thereafter. In other words, it is not a matter of suggesting that somehow it is the Europeans whose forces are engaged in the process of eliminating Muslims, but instead it is that a further iteration of claims seen in other context by Dr. Karadzic, that we have been forced by circumstances to do what we are doing; in this case to eliminate the Muslims who are vanishing. And they're vanishing as the context of this Assembly session makes clear in just the manner I described in my submissions earlier. They're vanishing by virtue of

their placement in detention facilities with horrific conditions. They're vanishing as a result of attacks on their communities resulting in massive killings, and they are vanishing as a result of the various acts that have been described before.

So sorry to be a bit long-winded, but what I mean is the -- again focusing on the Europeans' alleged responsibility does not undercut the intent related to the acts being perpetrated by Mr. Karadzic's forces.

JUDGE MERON: Still I think we would all agree that it would have been preferable to cite exactly what Mr. Karadzic said and not have an approximation. I understand your explanation.

Yes, Judge Liu.

JUDGE LIU: Yes. Mr. Tieger, I think I'm not very much assisted by Mr. Robinson's answer to my question, so I would like you to articulate your response on your understanding of the review of the procedure in the 98 bis. Is it the reasonableness or beyond a reasonable doubt? Thank you very much.

MR. TIEGER: Thank you, Judge Liu. Let me do two things quickly. Let me foreshadow that this was a matter I believe Ms. Jarvis intended to respond to in greater detail, but I certainly would respond immediately to your inquiry by saying that I think you've identified precisely the distinction that exists. This is that the difference is between -- the difference between 98 bis and the determination at the conclusion of trial embraces the difference that Judge Robinson referred to repeatedly during his colloquy with Mr. Robinson, and that is the difference between assessing all the evidence at the conclusion of the trial to determine

whether or not it rises to the level of proving the allegations beyond a reasonable doubt and the dramatically different standard that exists at the 98 bis stage for very good reasons when the matter proceeds by way of brief oral argument without the full explication of written briefs and without a full assessment of the totality of the evidence, and the standard there is whether or not there is any evidence capable of supporting conviction.

As I say, Ms. Jarvis may address that in greater detail, but I think you have identified an important distinction that the Defence submissions tried to blur.

JUDGE MERON: I have one more question to you, Mr. Robinson.

I am looking at Prosecution Exhibit 3405, paragraph 95, and I will read it to you: Witness statement said that he met with Sveto Veselinovic, a municipal leader, who told the witness that he had meetings with Karadzic where:

"It had been decided that one-third of Muslims would be killed, one-third would be converted to the Orthodox religion, and one-third will leave on their own, and thus the Muslims would disappear from the territory."

A statement like that, doesn't it provide direct evidence of genocidal intent?

MR. ROBINSON: Yes. Now the question is whether it was ever acted upon or whether the genocide ever actually took place. So that is evidence which taken at its highest could be considered evidence of genocidal intent.

JUDGE MERON: Thank you, Mr. Robinson.

Okay. Now we are at reply by the Prosecution.

MS. JARVIS: Thank you, Mr. President and Your Honours. We can be very brief in reply. We just have a few points we wanted to highlight arising out of the respondent's submissions today and picking up on some of the questions that Your Honours have also asked in the course of the hearing. And the first thing I wanted to address is the standard of review issue for a Rule 98 bis appeal. Mr. Robinson in his submissions suggested that we hadn't addressed it in our submissions today, but we've certainly addressed this issue at length in our appeal briefs and in particular our reply brief at paragraph 20, and the reason why we don't emphasise it in the hearing today is that we, at the position we take, is that the law is very much settled on this. There really is no discussion to be had. The Jelisic Appeals Chamber that the Chamber first seized of, a Rule 98 bis appeal, set the matter out very clearly and we've described the relevant holding from the Jelisic Appeals Chamber at the end of paragraph 20 of our reply brief. So we say the Appeals Chamber, Your Honours, may reverse the Chamber's decision if it determines that there was evidence which could have provided a basis for any reasonable Trial Chamber to find the accused guilty of the offence charged.

And of course in applying that legal proposition, we also take into account the prohibitions on weighing evidence and picking and choosing amongst the evidence. So we say that's clear. We see no basis for limiting the Jelisic holding in any way. There's nothing in that finding that suggests it would not equally be applicable to the Rule 98

bis appeal in this case here today.

Of course the respondent's submissions in relation to the Rule 98 bis standard are also very much bound up in the notion that there were no legal errors made by the Trial Chamber in the course of assessing count 1. For us it is important to bear in mind that not only were there Rule 98 bis application errors as clearly evidenced by their language, the language of taken in light of and notwithstanding, but there were also legal errors in its approach to the elements of genocide. And it is the confluence of those two things that have led us to such a problematic place in the outcome in relation to count 1.

Your Honours, the second point I want to mention, and in some respects I hesitate to mention it, but it is the ICJ decision, and I won't spend long on it.

We of course would fully endorse the comments that Your Honour Judge Robinson has already made about why this case is not helpful to us in this particular circumstance. First of all, it's not a criminal proceeding. It wasn't dealing with the individual criminal responsibility of a single accused person, Dr. Radovan Karadzic, which is what this Tribunal is dealing with here.

The ICJ didn't have the same evidence of the direct statements that Dr. Karadzic made that we have evidence in our case, so even on the basis of the evidence considered it's not comparable.

In terms of the standard as Your Honour Judge Robinson has very eloquently described, it was a different standard being applied by the ICJ, and it is a higher standard than the one that is applicable at the

Rule 98 bis stage. They were looking to see whether they were fully convinced of the position being put forward by the applicant. It necessarily involves weighing the evidence, the type of assessment that will have to be made at the end of this case but not at the Rule 98 bis stage.

And of course as Mr. Robinson has acknowledged, the ICJ decision was very heavily bound up in what this Tribunal had said on the final question of genocide, not at the 98 bis stage, but at the end of -- at the end of the proceedings in other cases. Well, Your Honour, at that begs the question of what this Tribunal is going to do in this case in relation to the genocide charge for Radovan Karadzic. So for all of those reasons our strong position is that the ICJ genocide case is of little assistance, particularly at the 98 bis stage.

The third point I want to mention is the argument made by the respondents that we don't have -- we might have independently the actus reus, we might have independently the mens rea, but we don't have the confluence of those two things.

Your Honours, we submit precisely the opposite. We say here what you need is the confluence of the actus reus and the mens rea in relation to the accused person in question, and that is exactly what the evidence on record supports. The only way you reach the conclusion that Mr. Robinson proposed is if you fall into the objective genocide trap. If you separate out the question of what was Dr. Karadzic's intent and you look for evidence of an objective genocide on the ground. So, Your Honours, there really is no basis for saying that we don't have the

necessary confluence of actus reus and mens rea required for criminal responsibility in this case.

My fourth point is that of course, again and as within the brief, the respondent is making much of the fact that so far the Prosecution at this Tribunal has not succeeded in proving genocide in the municipalities to the standard applicable at the end of the case. Obviously that is the situation, but it's not correct to say that the Prosecution hasn't come quite close, and I would point you to the Stakic appeal decision where the Appeals Chamber accepted, in fact, that in relation to Prijedor municipality, the Trial Chamber's factual findings could be enough to sustain a conviction for genocide but it wasn't prepared to say under the standard of deference that the Trial Chamber was wrong to reach another conclusion. So let's not be too hasty in thinking that the Prosecution's genocide charge for 1992 has been very easily and lightly dismissed. It hasn't. But of course what is much more important is what has happened at the 98 bis stage, applying the 98 bis standard. And there, Your Honours, the Prosecution has succeeded every time. And if you follow that same pattern, if you apply the standard correctly there is no basis for reaching a different conclusion in this case. Indeed as Mr. Tieger said how would we explain to the victims that other accused like Slobodan Milosevic could be held at the 98 bis stage to answer for a charge of genocide based on Dr. Karadzic's statements, at least in part, and yet we don't ask Dr. Karadzic himself to answer to those same charges.

And then finally, Your Honour, obviously everything the

respondent has suggested in terms of the 98 bis standard and the final conclusion reached in this case depends upon a weighing of the evidence. In answer to Your Honour Judge Meron's just now about whether the particular statements of Dr. Karadzic that you mentioned taking at its highest would be sufficient, he said yes. That is an extraordinary concession, Your Honour, in the context of the Rule 98 bis standard. It is only by misapplying the standard that we reach the conclusion that the Trial Chamber reached.

I can --

JUDGE ROBINSON: I believe Mr. Robinson added something to the yes.

MS. JARVIS: I think Mr. Robinson again, what he added, shows that what he is relying on is a weighing of the evidence. What he is suggesting is that you simply have to look and see whether weighing all of the competing factors it's enough to sustain a genocide charge. And we say that's the fundamental problem, that's the question for the end of the case, as Your Honour Judge Robinson has pointed out numerous times.

It would, Your Honours, just to conclude, be unbelievably problematic for this Tribunal to prematurely terminate count 1 at this stage of the proceedings. It really is one of the fundamental questions arising out of the criminal campaign in Bosnia in 1992, and that's a question that deserves the fullest most careful consideration by this Tribunal based on the full evidentiary record and full argument by the parties.

Thank you very much.

JUDGE MERON: Thank you very much, and I would like to express my appreciation to the parties for the brevity and focus of their arguments today which makes the very difficult task of the Appeals Chamber a bit easier.

Now, the question is whether Mr. Karadzic would like to make a personal statement. Up to ten minutes, Mr. Karadzic.

THE ACCUSED: [Interpretation] Thank you, your Excellencies. Good day, and I highly appreciate this opportunity to address you.

JUDGE MERON: Just a second. We must switch to translation. Try now.

THE ACCUSED: [Interpretation] Thank you, your Excellencies. I would like to express my gratitude for this opportunity to address you. However, with your leave, I believe that my advisor, Mr. Robinson, did leave some of his time to me, so I hope you will allow me to speak for more than ten minutes altogether in view of the time that was left over by Mr. Robinson.

I do understand that today at this session it is not probative value that is being discussed. I'm not a lawyer, and from that point of view I fully rely on my exceptional advisor Mr. Robinson and his associates. Also on the fact that the Trial Chamber and this Chamber are not jury-based courts so therefore I don't have to engage in a performance that would -- being that I was trying to persuade someone of something. That's why I'm going to address you the way an honourable man addresses honourable people.

Although I'm not a lawyer, better than anyone else in the world I

know the factual state of war in Bosnia-Herzegovina, and I know also what my responsibility was. It's not only that I know what I did. I also know what I thought, what I wanted, what I was saddened by, what I worked for - I and my associates - and I had insight into their thoughts and actions, too, and intentions.

I am not going to speak now about my not being guilty of genocide as mentioned in count 1. I'm trying to say that no one was responsible for genocide because genocide did not happen. There could not have been a war crime without war, and the Trial Chamber has an abundance of evidence showing that the Serb side led by yours truly -- and I personally made every effort to prevent a war. Once the war happened, it broke out where the other side wanted it to break out. In most municipalities where war happened, that war broke out for six weeks after the war broke out in Sarajevo; that is to say for four or six weeks they managed to preserve the peace in those areas that were Serb controlled.

In most municipalities there was no war. There were no crimes. Entire settlements, purely Muslim from the beginning until the end of the war remained as they were, and they do remain to this day. Even in those municipalities where there were conflicts and where there were crimes, as is the case in a civil war, there were purely Muslim or purely Croat villages that were not put in harm's way at all. So it was not religious affiliation or ethnic affiliation that led to crime and problems. Where there was fighting there were crimes, and we will agree that the Serb side did not have any interest in having armed conflicts happen within its territory. That would have been insane, and after all, that would

not involve criminal liability because the feeble-minded cannot be held accountable.

There are villages deep in Serb territory that remained intact. Different allegations and constructions of the Prosecution to the effect that we were against the Muslims do not hold water. With the Muslim leaders of a European orientation, we had agreements and we made every effort to have peace. We gave up on all our plans in the interest of preserving Bosnia and Herzegovina as a whole within Yugoslavia and our life together with Muslims, and in such a state there would have been as many Muslims as there were Serbs almost.

While I was in politics, and I'm a physician and a writer, not a politician, I gave hundreds of interviews, hundreds of statements. I issued hundreds of documents, orders, decisions, but the Prosecution cannot find a single consistent paragraph that would give even a bit of context that would identify genocidal intent on my part or any kind of intent.

His Excellency Judge Meron noted very well what was missing in that citation. It was my speech made on the 15th of October, 1991, at the joint Assembly that was cited. It is an eminently antiwar speech. I'm not trying to persuade the Muslims to go to war. I'm trying to dissuade them. Even what was shown here was antiwar. I am dissuading all three ethnic communities. I'm telling them not to go to war, and I'm offering concessions in order to preserve the peace and in order to avert the danger of war.

The highest representatives of the international community, like

the late Cyrus Vance -- the Prosecution has the document of the 8th of March, 1992, that states that Karadzic is prepared to do his best to avert war at all costs. However, what was not played for your Excellencies from this speech of the 15th of October, 1991, is D1270, pages 122 to 124 in Serbian and in English pages 116 to 118, and this is what I say there:

"I have to clarify a particular matter that stems from the interpretation of what we are saying at this rostrum. This actually pertains to the question of war and peace. I must repeat for the hundredth time that Serbs are not threatening with war," and so on and so forth.

And then is says:

"Serbs never attacked Muslims, nor will they ever attack Muslims, or is there any kind of feeling of that kind vis-a-vis the Muslims."

Let me stop this citation now and let me say that the Serbs consider the Croats to be their main enemy, and they consider the Muslims to be Serbs of Muslim faith or at least we are of the same ethnic roots.

And now I go on quoting:

"The chaos that would be caused by irregular decisions of out-voting, the chaos that could happen, the chaos that no one would start but that has the logic of its own and we all spoke about that, it's not chaos that is in our hands. It is order that in our hands. This chaos could lead to a situation that would be ungovernable by anyone."

And then on the next page, I say that:

"... it be made public to the entire world tonight that Serbs,

Croats, and Muslims do not wish to have war. So our message would be that there will be no war, and in that way we can guarantee there would be no chaos because order is in our hands and chaos is no longer in anyone's hands."

THE INTERPRETER: Interpreter's note: We did not have the text.

THE ACCUSED: [Interpretation] The Trial Chamber also had in mind my speech made in January 1992 where I accepted the proposals of the Muslim side to postpone the referendum and that we should go for referendum once regionalisation is over. The distinguished lady Prosecutor said today when she responded that you did not have all the statements at your disposal. However, what you did say does not confirm what they said. The Trial Chamber did have all of that when they made their decision. They had what you do not have, so those who made the decision had all of that.

What the Prosecutor showed today does not confirm what they're trying to say. Also, brief statements were quoted, especially what his Excellency Meron noted. I am not pleased to see war. I am saddened by war. I am not pleased to see Muslims suffering and Muslim victims. I am saddened by it, and I am sad that their leadership is leading them along a path that leads to the suffering of us all, and them in particular. So as far as mens rea is concerned, and I have already adopted the term by now, in thousands of documents, my speeches, my interviews they could not find a single trace of any genocidal intent.

In the documents that I issued during the war, 80 per cent, around 80 per cent of these documents are documents about restraint,

about cessation of hostilities, about the passage of humanitarian aid, assistance to all three communities, especially civilians. There is no trace whatsoever of any genocidal intent. In the documents that the Assembly adopted that belong to the Assembly, to the legislation, there is not a single document, a single norm that would discriminate against Muslims and Croats. However, when we take all of that together, when we leave that aside, if you will, on the ground there was no genocide. Excellencies, no, there was no genocide, because the war was where the other side wanted it to happen, where fighting was caused. That's what the Trial Chamber had at their disposal. That's where chaos happened. The state was always against crimes.

The Trial Chamber could see that when a perpetrator commits a crime he is already afraid of the first next level. For example, if it is a guard that commits a crime, he's afraid that the shift leader might see that, and so on and so forth. So this is far below me and far away from me. There were a lot of perpetrators of crimes. So it's between the perpetrators of crimes and myself. There are many, many instances and these perpetrators were afraid already of the first instance. They didn't want their supervisors to find out. And there is an abundance of such evidence.

JUDGE MERON: I would appreciate it if you would come to conclusion. I gave you some extra time already.

THE ACCUSED: [Interpretation] Thank you. I got carried away. I thought that I would be able to take up the time left over by Mr. Robinson.

Mr. Robinson didn't mention that the Prosecution expert said what the percentage was among the Muslims that suffered or perished over the five years, but among the Serbs it was about 2.5 per cent, because the Serbs waged a war against the Croats and against the Muslim forces led by Mr. Adzic.

Your Excellencies, there was no genocide. There were crimes, but the state was working to prevent them and punish them, and the Chamber will see that over time these efforts only increased and served as a confirmation proving what I say is correct and the Prosecution case is wrong.

Thank you, Your Honours. I have nothing further to add.

JUDGE MERON: Thank you, Mr. Karadzic.

Let me again thank the parties for the work they have done on the case and the presentations they have done today. Let me thank my colleagues on the Bench, also thanks to the Registry and to the interpreters for their excellent assistance.

The hearing is now concluded and the judgement of the Appeals Chamber will be delivered in due course, and we are adjourned.

--- Whereupon the Appeals Hearing adjourned at 12.10 p.m.