

23 Chamber in Stakic had applied indirect perpetration in order to attribute
24 the acts of the physical perpetrators to a small group of high-level
25 co-perpetrators. That's what the Trial Chamber did.

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1 And if Your Honours could go to your screens again. There's a
2 slide we've prepared which pictorially represents what the Trial Chamber
3 effectively did.
4 The co-perpetrators at a hierarchically senior level and the
5 physical perpetrators indirectly perpetrating -- sorry, the
6 co-perpetrators indirectly perpetrating their crimes through the physical
7 perpetrators.
8 Now, the Appeals Chamber corrected the Trial Chamber to the extent
9 that the Trial Chamber had applied the wrong mode of co-perpetration with
10 regard to the group of high-level co-perpetrators. The mode that the
11 Trial Chamber had described this was co-perpetration by joint control over
12 the act. The Appeals Chamber substituted JCE to uphold Stakic's
13 convictions.
14 And if Your Honours could turn back to your screens, the slide
15 which will appear in front of you depicts what the Appeals Chamber
16 basically did. Hopefully. Yes, there it is.
17 So it substituted the JCE at the level of the high-level
18 perpetrators.
19 However --
20 JUDGE MERON: I'm not sure we got it.
21 MS. BRADY: Okay.
22 JUDGE MERON: We just got the first slide.

23 MS. BRADY: It's an interactive slide. One slide moves into the
24 other. We can do it again.
25 The first slide shows -- you should have the first slide. This is

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1 the Trial Chamber's findings, and then it moves into what the Appeals
2 Chamber basically did.
3 JUDGE MERON: Yes. That's okay.
4 MS. BRADY: Okay.
5 However, significantly the Appeals Chamber, in changing the mode
6 from co-perpetration at that level to JCE, the Appeals Chamber left
7 untouched, or another way of putting this is it didn't feel the need to
8 correct the Trial Chamber's findings in paragraphs 741 to 743 and 746
9 and 818, where the Trial Chamber had explained that Stakic and his
10 co-perpetrators carried out their crimes indirectly through the physical
11 perpetrators who were used as tools.
12 Neither the Trial Chamber -- this is very important, because
13 neither the Trial Chamber nor the Appeals Chamber in Stakic analysed the
14 physical perpetrators in that case as JCE members. There were no findings
15 that the physical perpetrators had agreed to the common criminal plan to
16 deport or had the intent to deport. They were findings that they had the
17 discriminatory intent but not -- there were no findings on the intent to
18 deport. Rather, the Appeals Chamber identified as the JCE members Stakic
19 and the other municipal leaders, the chief of police and the prominent
20 members of the military. Nevertheless, the Appeals Chamber in Stakic
21 found Mr. Stakic liable for the crimes of the physical perpetrators
22 through the application of JCE.

23 Therefore, in Stakic the Appeals Chamber recognised that physical
24 perpetrators are not required to be members of the JCE but, rather, that
25 those who are JCE members can perpetrate crimes through them. The case

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1 endorses a JCE at a leadership level whose members used physical
2 perpetrators to carry out crimes in furtherance of the JCE's objective.
3 Judge Bonomy in his separate opinion in the Milutinovic case also
4 endorsed this approach, finding no inconsistency in -- with Tribunal
5 jurisprudence for a participant in a JCE to be found guilty of commission
6 where crimes are perpetrated by persons who are not members of the JCE but
7 who act as the instruments of it.

8 Finally, Your Honours, the case of Krajisnik. The Trial Chamber
9 in that case also took this approach. It found Mr. Krajisnik criminally
10 responsible for persecution and extermination on the basis that the JCE
11 members were the republic, the regional and the municipal leaders. It
12 didn't find it possible or - and this is important - even desirable or
13 necessary to find that the physical perpetrators of the crimes were also
14 members of the JCE.

15 In paragraph 883 -- and I invite Your Honours to again look at
16 your screens. In paragraph 883 the Krajisnik trial judgement
17 held: "Moreover, a JCE may exist even if none or only some of the
18 principal perpetrators are part of it, because, for example, they are not
19 aware of the JCE or its objective and are procured by members of the JCE
20 to commit crimes which further that objective."

21 Why? Why could it reach this conclusion? Because it held that an
22 accused could participate in implementing the common criminal objective

23 either by himself committing a crime, forming part of the common
24 objective, or by procuring or giving assistance to the execution of a
25 crime forming the common objective.

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1 The position we're advocating is also supported by World War II
2 precedents.
3 It's true that post-World War II cases did not explicitly apply
4 JCE by its name. They determined responsibility more on the basis of
5 criminal participation than on a strict application of modes of liability.
6 But as this Chamber, the ICTR Appeals Chamber observed in the Rwamakuba
7 case, the legal elements used by those cases to find accused liable were
8 sufficiently similar to JCE, such as to define JCE's contours.
9 And what clearly emerges from these World War II cases is that
10 high-level accused who agreed to a criminal plan and contributed to it
11 were held responsible for the physical perpetrators who carried out the
12 crimes of the plan. This was regardless, regardless of whether the
13 physical perpetrators were part of formulating that plan or agreed with or
14 acted on behalf of the common purpose. In fact, what was in their minds
15 or their criminal liability was rarely discussed.
16 We've referred in our appeal brief to two cases under control
17 Council Law Number 10 which illustrate this, so I won't go into any detail
18 now because we have handled it at quite some length in our appeal brief.
19 But just to summarise, both of these cases, Rusha case and the Justice
20 case, accused were held liable for the physical perpetrators' actions
21 without even considering whether they adhered to the criminal plan; that
22 is, without finding that they were members of the criminal enterprise.

23 The final question or issue I want to turn to in this ground is
24 this: How, then, can crimes of physical perpetrators who are not members
25 of the JCE be attributed to the members of the JCE? How does that make

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1 sense legally?

2 A member of a JCE can contribute to the JCE either directly or
3 indirectly through other people. There's no difference in principle if an
4 accused uses a bomb or himself places a barricade or uses a police or
5 military unit.

6 The actions of physical perpetrators can be linked to members of a
7 JCE by indirect perpetration. If an accused in a JCE uses another person
8 as his instrument, the instrument's actions become his actions. They
9 become his contributions to the JCE and, as such, they can be imputed to
10 all JCE members.

11 Notably the Association of Defence Counsel concede in their
12 response to our appeal that the physical perpetrator of a crime need not
13 be a member of the JCE where he or she is used as a tool or instrument to
14 do so by someone who is a member of the JCE. In that case, they agree
15 that JCE members can be attributed with their crimes.

16 Virtually all systems, all legal system, recognise an accused can
17 commit acts by indirectly perpetrating them. Your Honour, Judge
18 Shahabuddeen, in your separate opinion in the Gacumbitsi ICTR appeals case
19 put it very nicely when you recognised that: "Just as a person can use a
20 JCE as his instrument through which he performs a crime, so too an accused
21 can" - I quote from Your Honour at paragraph 24 - "perpetrate his crime
22 through the instrumentality of another, even though no JCE is involved and

23 though there is no personal contact between the accused and the victim."

24 It's almost universally accepted in national systems that an

25 accused can be liable if he uses another person as a tool to commit a

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1 crime. And I refer to our authorities in our appeal brief citing to a

2 number of jurisdictions, as well as in our supplemental book of

3 authorities referring to another two jurisdictions in addition to those in

4 our appeal brief.

5 There are jurisdictions which limit indirect perpetration to

6 innocent agents, while others recognise that even culpable physical

7 perpetrators can also function as tools of a person who somehow controls

8 their acts.

9 For example, by using a structure of power to carry out his

10 crimes, such as in the Border Guards case in -- where high-ranking GDR

11 politicians were found responsible by the German Supreme Court as

12 committers for the killings by the border guards at the East German border.

13 It's also very significant that the ICC also recognises in their

14 Rome Statute Article 25(3)(a) that someone can commit a crime through

15 another person regardless of whether that person is criminally

16 responsible. And that theory is -- is one presently being pursued in the

17 Lubanga case at the ICC, and in fact it's being used in combination both

18 with what -- the ICC's equivalent of co-perpetration by joint control but

19 also in combination with their equivalent of JCE, which is in

20 Article 25(3)(d) of the Rome Statute.

21 To conclude on this, Your Honours, the physical perpetrators need

22 not be members of the JCE in order to attribute their crimes to those in a

23 JCE. If the JCE members agree on a common criminal goal and use others to
24 carry out acts in pursuance of their criminal goal, those acts can be
25 ascribed to all members of the JCE.

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1 Those conclude my submissions, and I'd be happy to answer
2 questions Your Honours may have.

3 JUDGE MERON: I would invite my colleagues to ask questions on
4 this complex of joint criminal enterprise.

5 Judge Shahabuddeen, please.

6 JUDGE SHAHABUDEEN: Would I be correct, Ms. Brady, in
7 understanding the burden of your submissions to be this: That if A has a
8 one-to-one agreement with B to commit a particular crime and that
9 crime is committed by B, his criminal responsibility does not depend at
10 all upon JCE, it depends upon the normal principles of criminal liability,
11 including, in particular, agency.

12 Would that be an appreciation of the burden of your submissions?

13 MS. BRADY: Well, Your Honours, I think that there are two ways of
14 viewing the matter. Either A and B have this agreement, one-to-one
15 agreement to commit a crime and they both jointly act, they both make a
16 contribution and therefore they can be liable under JCE; or Your Honour is
17 quite correct, that A and B can have an agreement. I don't think it
18 actually has to be a one-to-one, but it can be inferred that they have a
19 common agreement together, and then B either commits the crime himself or
20 he does it through somebody else, and in that case, yes, I think there is
21 an agency principle underlying the situation. But they are -- they are
22 two different ways of approaching the problem.

23 JUDGE SHAHABUDEEN: Well, we can deal separately with the
24 proposition involving an outsider to the JCE whose actions are in
25 question.

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1 What I have in mind is this: It seems to me it all turns upon the
2 notion of an agreement, depending on the circumstances, the law can
3 extrapolate the existence of an agreement from a variety of factors. What
4 makes the difference in this case is your reference to the Trial Chamber's
5 insistence that there has to be a one-to-one agreement between one member
6 of the JCE and another member of the JCE to commit a particular crime, but
7 in both situations there is an agreement. What makes the difference in
8 this case from your submissions is the insistence of the Trial Chamber
9 that JCE is applicable only when there is a particular kind of agreement.

10 MS. BRADY: Your Honour is quite right. For, as I said, the
11 majority of cases, it will amount to the same thing because the agreement
12 can be -- it was definitely very problematic, the Trial Chamber's use of
13 this one-to-one agreement. That was its first error. It was problematic
14 because it was requiring something which is -- it's too much. It's
15 impossible to find this one-to-one agreement. That was problematic.

16 In most cases you're correct. The people on the ground, the
17 physical perpetrators, will agree with the common plan. They will agree
18 with the person A in your example. But not in every case. And that's
19 why, for example, there may be physical perpetrators who don't even --
20 they're not even aware of how they're being used.

21 Not here. In this case the facts were clear. The physical
22 perpetrators shared the agreement. They were in the agreement. So that

23 approach "works" for this case.

24 However, there may be cases where it does not and that was the

25 import of my submissions when I was speaking about ground 1 and why it is

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1 important not to always require that the physical perpetrator be

2 necessarily in the JCE, because he may be used. He may not -- he may not

3 share it. He may be directed. He may be ordered. And this is actually

4 the type of situations that we are confronted with in the Tribunal very

5 often. These are the factual cases that are before us.

6 JUDGE SHAHABUDEEN: Let me ask you a third question. Would I be

7 right from the impression I've formed of your submissions that the problem

8 is this: A and B are both members of a JCE. B then gets an outsider to

9 commit a JCE type of crime, and then what is involved is the criminal

10 responsibility of A.

11 Now, I have the impression that the difficulty is this: That the

12 criminal responsibility of A is erroneously focused on the criminal

13 responsibility of the outsider. A only has a criminal responsibility for

14 the crime committed by a fellow member of the JCE, but that fellow, that

15 fellow member of the JCE may well have a criminal responsibility for the

16 outsider's crime.

17 Is that a correct way of analysing the --

18 MS. BRADY: It is. It is a correct way of analysing our position,

19 Your Honour.

20 JUDGE SHAHABUDEEN: Thank you. Thank you.

21 JUDGE MERON: Judge Van Den Wyngaert.

22 JUDGE VAN DEN WYNGAERT: Thank you.

23 Ms. Brady, if I understand you correctly, your position is that
24 the Trial Chamber erred, your ground 1, by not applying the principle that
25 the RPP -- or by requiring that the RPP should have been a member of the

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1 JCE.

2 My question is: You seem to apply that to the three forms of JCE,
3 one, two, and three, because your submission is that the Trial Chamber
4 should have applied the JCE III to the greatest number of the charges.
5 My question is in the authorities that you quote both in the
6 post-Second World War jurisprudence and in our own jurisprudence, what are
7 the examples that are relevant for JCE III? I can see JCE II and I,
8 especially I, but JCE III, what would be the cases, the precedents that we
9 were to follow if we were to follow you on that point? Thank you.

10 MS. BRADY: In relation to the World War II cases, such as the
11 ones of the Justice case and the Rusha case, the co-perpetrators who were
12 responsible for crimes which indeed did fall within the common plan, the
13 extermination plan in relation to the Justice case, and the same thing for
14 the Rusha case.

15 I can't at this point point Your Honour in a direction towards a
16 specific case, a specific World War II case that would have applied --
17 that would have allowed for responsibility for crime that
18 wasn't "intended" but was foreseen.

19 I would make the observation that the World War II cases are
20 dealing -- are using knowledge as their basis for mens rea, not intention
21 in the strict sense. As you'll recall, our jurisprudence requires for
22 JCE 1, the aiming at type of intent, the World War II cases for knowledge.

23 So already there is a precedent for there being a slightly lower mens rea
24 under those World War II cases.

25 However, what we say about the World War II cases is that they do

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1 not necessarily restrict you -- you can have -- when you're interpreting
2 JCE, JCE is clearly -- JCE is clearly established under customary
3 international law. This case raises an aspect of JCE's application, and
4 as the Chamber emphasised in the Hadzihasanovic command decision, it's not
5 an objection to the application of the principle to a particular situation
6 to say that the situation is new if it reasonably falls within the
7 application of the principle.

8 Your Honour Judge Shahabuddeen in the Stakic dissenting opinion
9 gave several examples where there'd been this -- that the principle is
10 established under customary international law and this is an application.
11 This is an interpretation to apply it to these facts.

12 In addition, Your Honour, we note that the Stakic Appeals Chamber,
13 which is a binding precedent, of course, on us for this case, this
14 judgement applied JCE III and in effect indirect perpetration, and that,
15 in our submission, would also take care of it in -- on this case.

16 JUDGE VAN DEN WYNGAERT: So to be absolutely clear, your
17 proposition is that this is now part of customary international law. So
18 the contours of JCE, as you describe them, are defined as such by
19 customary international law.

20 MS. BRADY: Your Honour, yes, that's our primary position. It is
21 customary international law, and especially in terms of how customary
22 international -- how it can be interpreted on these supposedly new facts.

23 It actually what happened in Stakic, but that's our first position.
24 There's also another way of looking at the issue. In our
25 submission, the principle of JCE is customary international law, and of

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1 course this Chamber can have recourse to general principles of law to
2 determine the scope of parameters of application. This was done by the
3 Furundzija Trial Chamber, looked to principles of criminal law common to
4 major legal systems to define the elements of rape. The Chamber did the
5 same -- took the same course in the Blaskic appeals decision in order to
6 distil the mens rea for ordering. And that is also an approach that we
7 would advocate in this case.

8 JUDGE MERON: Judge Guney.

9 JUDGE GUNEY: Ms. Brady, during your submission you argued that
10 the forcible transfer or deportation may be amounted to the most tenuous
11 crime, which is the crime of the crimes genocide. Is it correct -- am I
12 correct in my recollection?

13 MS. BRADY: No, Your Honour. I didn't use the term "genocide" at
14 all in my submissions, except in relation to referring to a decision of
15 Karemera on JCE and genocide. But I didn't actually say that genocide was
16 involved. Because, of course, it wasn't found in this case.

17 JUDGE GUNEY: Okay. Then I'm not going to put the second question
18 in the light of your explanation. Thank you.

19 JUDGE MERON: Thank you, Judge Guney.

20 Judge Vaz.

21 JUDGE VAZ: [Interpretation] Thank you, Mr. President.

22 Ms. Brady, I have a question in relation to the comments you made

23 yesterday -- earlier on when you said that high-ranking accused should be
24 held fully responsible for their actions, and you seemed to exclude the
25 principle of complicity for high-ranking accused. Why would you exclude

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1 the possibility of complicity as a mode of liability? Because that's the
2 way I understood your comments.

3 MS. BRADY: Your Honour, we wouldn't necessarily exclude
4 complicity or aiding and abetting. Depending on the facts, it may be an
5 appropriate legal characterisation. However, for the majority of cases,
6 what -- what we say is that because aiding and abetting in this Tribunal
7 carries or incurs a lesser degree of responsibility, it's -- it's not
8 appropriate to label people who are essentially the masterminds, the
9 people who are at this high level orchestrating and coordinating. It's an
10 inappropriate label. It doesn't -- it -- it denies the full
11 responsibility concept which commission gives, and that's -- that's why we
12 say that aiding and abetting is just not appropriate to describe
13 perpetrators at this level who are basically the major implementers, the
14 major controllers of the crime, the crimes that occur.

15 JUDGE VAZ: [Interpretation] Thank you very much for this
16 additional information.

17 JUDGE MERON: Thank you, Judge Vaz.

18 I have a question to ask you, if I may.

19 MS. BRADY: Yes.

20 JUDGE MERON: I'm referring to Prosecution's appeal brief,
21 paragraph 348. In that brief, you argue that we should find that the
22 physical perpetrators need not be members of the JCE. You suggested were

23 we to find that physical perpetrators must be members of the JCE it would
24 be, and I quote: "Difficult, if not impossible, to ever convict the
25 seniors leaders based on the JCE."

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1 And I quote again: "Since the only way of proving that the
2 on-the-ground actor acted with the requisite intent would be to identify
3 each individual actor and put on proof of his intent."

4 And then in your response, the response of the Prosecutor on the
5 JCE, which is a more recent statement, you -- last month you suggested we
6 should -- we should hold that every physical perpetrators here was in fact
7 a member of the JCE, even though you have not identified each individual
8 actor and put on proof of each actor's intent.

9 Could you explain how we should reconcile these two statements or
10 these two positions, which obviously are different?

11 MS. BRADY: Yes, Your Honour.

12 In relation to the first point, I think that in the brief that was
13 filed a couple of years ago, I think we were stating the case a bit highly
14 then. As I've said in my submissions, it is possible to find common
15 criminal plan, and in fact on these facts you can find common criminal
16 plan. You can find the agreement. That can be established, because you
17 can infer it from the pattern.

18 So I think that we put the position a bit too high in terms of --
19 it was a bit dramatic in some ways what we put in our brief about the fact
20 that we would have to call evidence on the intention of every single
21 person on the ground. I think a better way of saying this, and in
22 particular in light of recent jurisprudence which has provided a lot of

23 assistance on this matter, Krajisnik and other decisions, that the
24 intention, the agreement can be inferred from the pattern of crimes, from
25 the fact that they're committed against the same victims at the same time,

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1 all the factors that I spoke about in my submissions earlier.

2 I think -- on your second question, let me just see if I got it

3 right.

4 JUDGE MERON: It's the same question.

5 MS. BRADY: It's really the same question. Would we have to put

6 on evidence of every single actor's intent, and I think your question was

7 well, where is it in this case? Well, no, we wouldn't have to put on

8 evidence of every single actor's intent, but what must be found, and the

9 facts of the Trial Chamber did find this, it was established, is that the

10 relevant physical perpetrators were acting in accordance with the common

11 criminal plan, and I've set it out -- we've set it out in some detail in

12 the filing. And that is a sufficient way to find agreement and intent,

13 because of course it can be inferred.

14 JUDGE MERON: Thank you. Thank you, Ms. Brady.

15 Do we have any further questions? I do not see any. So I believe

16 that under our Scheduling Order we now should have a break of 15 minutes.

17 So at five minutes past 4.00 sharp we will reconvene.

18 --- Recess taken at 3.47 p.m.

19 --- On resuming at 4.08 p.m.

20 JUDGE MERON: Please be seated.

21 Ms. Brady, the Prosecution strictly speaking, you know that the

22 Prosecution's time is really up, and I believe that you still have two

23 grounds to address. So we will give you 10 minutes for them.

24 MS. BRADY: We're grateful to Your Honour. Ms. Margetts --

25 JUDGE MERON: I think we should all manage our time more

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1 carefully.

2 MS. BRADY: Yes, indeed. Indeed, Your Honours. And we're

3 grateful to Your Honours for this extra 10 minutes.

4 Your Honours, I now turn to Ms. Margetts, who will address you on

5 the third and the fourth grounds of the Prosecution's appeal.

6 Thank you.

7 JUDGE MERON: Yes. Ms. Margetts, you can start.

8 MS. MARGETTS: Good afternoon, Your Honours.

9 In light of the time, I will only address the Prosecution's fourth

10 ground appeal, extermination, because I believe that our third ground of

11 appeal is fully briefed, and I would just rely on our submissions in the

12 brief. And with respect to Your Honours' question on omission liability

13 relevant to that ground, Ms. Goy will address you tomorrow morning in the

14 Prosecution's response.

15 So I will now turn to the Prosecution's fourth ground of appeal,

16 extermination.

17 Brdjanin should be convicted for aiding and abetting extermination

18 because he was found guilty of aiding and abetting massive killings which

19 individually constitute extermination.

20 The Trial Chamber erred when it acquitted Brdjanin of

21 extermination on two grounds: (1), that he did not have the necessary

22 knowledge that extermination would be committed; and, (2), because

23 extermination was not necessarily envisaged by the strategic plan. The
24 findings are in paragraphs 477 and 478.

25 The Trial Chamber was wrong in its conclusion because it convicted

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1 Brdjanin of three large-scale killing incidents which were committed
2 during the attacks on villages. The convictions can be found in
3 paragraph 476.

4 These killing incidents are the killing of around 300 victims in
5 Biscani, Prijedor; the killing of 140 victims in Kozarac; and the killing
6 of 68 victims in Brsevo. These killings each individually constitute
7 extermination and the Trial Chamber found that Brdjanin knew of them. The
8 findings are in 474 to 476 of the judgement.

9 This knowledge, in our submission, is sufficient to find him
10 guilty for extermination, because the only difference between
11 extermination and wilful killings is that the extermination requires an
12 element of massiveness to be met. Brdjanin's knowledge of these
13 individual killing incidents already satisfies this massive element that
14 is required. He also knew that his acts would assist in killings on a
15 massive scale.

16 The Trial Chamber found that he knew that the ARK Crisis Staff
17 decisions on disarmament would assist the forces carrying out the
18 large-scale attacks and who committed the large-scale killings that
19 occurred during those attacks.

20 THE INTERPRETER: Could counsel please slow down a little bit.

21 MS. MARGETTS: [Previous translation continues] ... and 474 of the
22 judgement.

23 In addition, for the reasons set out in ground 3 of our written
24 submissions, we submit that Brdjanin also knew and substantially
25 contributed to large-scale killing incidents committed during detention,

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1 which individually constitute extermination. These killing incidents are
2 referred to in paragraphs 456, 460, and 462 of the judgement. And they
3 are the killing of 190 persons committed in the room 3, Keraterm massacre;
4 the killing of 200 men during the transport from Trnopolje at
5 Koricanska Stijena; and the killing of 144 men in Biljani.

6 Finally, the Trial Chamber was wrong in its conclusion that
7 extermination was not envisaged as part of the execution of the strategic
8 plan because these large-scale killings were committed with the very aim
9 of implementing the strategic plan. The Trial Chamber described these
10 crimes committed in implementation of the plan in paragraphs 100, 104,
11 and 115 of the judgement, which included the killings during attack and
12 the killings in detention facilities.

13 They individually constitute extermination and, therefore,
14 extermination was part of the execution of the strategic plan.

15 Thank you, Your Honours. That concludes my submissions on
16 ground 4. If you have any questions, I would be glad to answer them.

17 JUDGE MERON: Thank you. Thank you for your example of brevity.

18 Questions? I don't see anyone so I think we will now move on.

19 Thank you, Ms. Margetts.

20 MS. MARGETTS: Thank you, Your Honour.

21 JUDGE MERON: We will move on to the response of the Defence. Mr.

22 Ackerman, you have 45 minutes.

23 Mr. Ackerman, since I gave a few more minutes to the Prosecution,
24 I will also try to equalise this, if you need, by giving you a few more
25 minutes.

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1 MR. ACKERMAN: Well, Your Honour, I appreciate that and I probably
2 won't need it.

3 Good afternoon, Your Honours. It's a pleasure for me to appear
4 before such an august body.

5 I was -- I walked in the courtroom this morning and I was reminded
6 of 40 years ago when I -- I think made my first court appearance as a
7 lawyer. It was in a small town in Wyoming.

8 JUDGE MERON: You realise most of us were not alive yet.

9 MR. ACKERMAN: Yes, Your Honour, that's true.

10 It was in a small town in Wyoming, and we were up on the second
11 floor of an old courthouse with a wooden floor, and the lawyer I was
12 working for was a crusty old western Wyoming lawyer. And there was
13 several law enforcement officers in the room because it was a criminal
14 case. And he stood up and said, Your Honour, I'd like the record to show
15 how many guns they've got and how many guns we've got. And I was reminded
16 of that today when I came in and looked across at the breadth of the
17 Prosecutor's bench over there; how many guns they've got, and how many
18 guns we've got. But we will persist in our proceedings here.

19 I want to -- I want to try to stay within my time, Your Honour,
20 and I think I can do that. I'll talk briefly about some things and a
21 little more at length about others that the Prosecution has talked about.
22 I want to first begin with some of the things that you heard

23 Chamber in Stakic had applied indirect perpetration in order to attribute
24 the acts of the physical perpetrators to a small group of high-level
25 co-perpetrators. That's what the Trial Chamber did.

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1 And if Your Honours could go to your screens again. There's a
2 slide we've prepared which pictorially represents what the Trial Chamber
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5 physical perpetrators indirectly perpetrating -- sorry, the
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7 perpetrators.
8 Now, the Appeals Chamber corrected the Trial Chamber to the extent
9 that the Trial Chamber had applied the wrong mode of co-perpetration with
10 regard to the group of high-level co-perpetrators. The mode that the
11 Trial Chamber had described this was co-perpetration by joint control over
12 the act. The Appeals Chamber substituted JCE to uphold Stakic's
13 convictions.
14 And if Your Honours could turn back to your screens, the slide
15 which will appear in front of you depicts what the Appeals Chamber
16 basically did. Hopefully. Yes, there it is.
17 So it substituted the JCE at the level of the high-level
18 perpetrators.
19 However --
20 JUDGE MERON: I'm not sure we got it.
21 MS. BRADY: Okay.
22 JUDGE MERON: We just got the first slide.

23 MS. BRADY: It's an interactive slide. One slide moves into the
24 other. We can do it again.
25 The first slide shows -- you should have the first slide. This is

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1 the Trial Chamber's findings, and then it moves into what the Appeals
2 Chamber basically did.
3 JUDGE MERON: Yes. That's okay.
4 MS. BRADY: Okay.
5 However, significantly the Appeals Chamber, in changing the mode
6 from co-perpetration at that level to JCE, the Appeals Chamber left
7 untouched, or another way of putting this is it didn't feel the need to
8 correct the Trial Chamber's findings in paragraphs 741 to 743 and 746
9 and 818, where the Trial Chamber had explained that Stakic and his
10 co-perpetrators carried out their crimes indirectly through the physical
11 perpetrators who were used as tools.
12 Neither the Trial Chamber -- this is very important, because
13 neither the Trial Chamber nor the Appeals Chamber in Stakic analysed the
14 physical perpetrators in that case as JCE members. There were no findings
15 that the physical perpetrators had agreed to the common criminal plan to
16 deport or had the intent to deport. They were findings that they had the
17 discriminatory intent but not -- there were no findings on the intent to
18 deport. Rather, the Appeals Chamber identified as the JCE members Stakic
19 and the other municipal leaders, the chief of police and the prominent
20 members of the military. Nevertheless, the Appeals Chamber in Stakic
21 found Mr. Stakic liable for the crimes of the physical perpetrators
22 through the application of JCE.

23 Therefore, in Stakic the Appeals Chamber recognised that physical
24 perpetrators are not required to be members of the JCE but, rather, that
25 those who are JCE members can perpetrate crimes through them. The case

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1 endorses a JCE at a leadership level whose members used physical
2 perpetrators to carry out crimes in furtherance of the JCE's objective.
3 Judge Bonomy in his separate opinion in the Milutinovic case also
4 endorsed this approach, finding no inconsistency in -- with Tribunal
5 jurisprudence for a participant in a JCE to be found guilty of commission
6 where crimes are perpetrated by persons who are not members of the JCE but
7 who act as the instruments of it.

8 Finally, Your Honours, the case of Krajisnik. The Trial Chamber
9 in that case also took this approach. It found Mr. Krajisnik criminally
10 responsible for persecution and extermination on the basis that the JCE
11 members were the republic, the regional and the municipal leaders. It
12 didn't find it possible or - and this is important - even desirable or
13 necessary to find that the physical perpetrators of the crimes were also
14 members of the JCE.

15 In paragraph 883 -- and I invite Your Honours to again look at
16 your screens. In paragraph 883 the Krajisnik trial judgement
17 held: "Moreover, a JCE may exist even if none or only some of the
18 principal perpetrators are part of it, because, for example, they are not
19 aware of the JCE or its objective and are procured by members of the JCE
20 to commit crimes which further that objective."

21 Why? Why could it reach this conclusion? Because it held that an
22 accused could participate in implementing the common criminal objective

23 either by himself committing a crime, forming part of the common
24 objective, or by procuring or giving assistance to the execution of a
25 crime forming the common objective.

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1 The position we're advocating is also supported by World War II
2 precedents.
3 It's true that post-World War II cases did not explicitly apply
4 JCE by its name. They determined responsibility more on the basis of
5 criminal participation than on a strict application of modes of liability.
6 But as this Chamber, the ICTR Appeals Chamber observed in the Rwamakuba
7 case, the legal elements used by those cases to find accused liable were
8 sufficiently similar to JCE, such as to define JCE's contours.
9 And what clearly emerges from these World War II cases is that
10 high-level accused who agreed to a criminal plan and contributed to it
11 were held responsible for the physical perpetrators who carried out the
12 crimes of the plan. This was regardless, regardless of whether the
13 physical perpetrators were part of formulating that plan or agreed with or
14 acted on behalf of the common purpose. In fact, what was in their minds
15 or their criminal liability was rarely discussed.
16 We've referred in our appeal brief to two cases under control
17 Council Law Number 10 which illustrate this, so I won't go into any detail
18 now because we have handled it at quite some length in our appeal brief.
19 But just to summarise, both of these cases, Rusha case and the Justice
20 case, accused were held liable for the physical perpetrators' actions
21 without even considering whether they adhered to the criminal plan; that
22 is, without finding that they were members of the criminal enterprise.

23 The final question or issue I want to turn to in this ground is
24 this: How, then, can crimes of physical perpetrators who are not members
25 of the JCE be attributed to the members of the JCE? How does that make

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1 sense legally?

2 A member of a JCE can contribute to the JCE either directly or
3 indirectly through other people. There's no difference in principle if an
4 accused uses a bomb or himself places a barricade or uses a police or
5 military unit.

6 The actions of physical perpetrators can be linked to members of a
7 JCE by indirect perpetration. If an accused in a JCE uses another person
8 as his instrument, the instrument's actions become his actions. They
9 become his contributions to the JCE and, as such, they can be imputed to
10 all JCE members.

11 Notably the Association of Defence Counsel concede in their
12 response to our appeal that the physical perpetrator of a crime need not
13 be a member of the JCE where he or she is used as a tool or instrument to
14 do so by someone who is a member of the JCE. In that case, they agree
15 that JCE members can be attributed with their crimes.

16 Virtually all systems, all legal system, recognise an accused can
17 commit acts by indirectly perpetrating them. Your Honour, Judge
18 Shahabuddeen, in your separate opinion in the Gacumbitsi ICTR appeals case
19 put it very nicely when you recognised that: "Just as a person can use a
20 JCE as his instrument through which he performs a crime, so too an accused
21 can" - I quote from Your Honour at paragraph 24 - "perpetrate his crime
22 through the instrumentality of another, even though no JCE is involved and

23 though there is no personal contact between the accused and the victim."
24 It's almost universally accepted in national systems that an
25 accused can be liable if he uses another person as a tool to commit a

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1 crime. And I refer to our authorities in our appeal brief citing to a
2 number of jurisdictions, as well as in our supplemental book of
3 authorities referring to another two jurisdictions in addition to those in
4 our appeal brief.

5 There are jurisdictions which limit indirect perpetration to
6 innocent agents, while others recognise that even culpable physical
7 perpetrators can also function as tools of a person who somehow controls
8 their acts.

9 For example, by using a structure of power to carry out his
10 crimes, such as in the Border Guards case in -- where high-ranking GDR
11 politicians were found responsible by the German Supreme Court as
12 committers for the killings by the border guards at the East German border.

13 It's also very significant that the ICC also recognises in their
14 Rome Statute Article 25(3)(a) that someone can commit a crime through
15 another person regardless of whether that person is criminally
16 responsible. And that theory is -- is one presently being pursued in the
17 Lubanga case at the ICC, and in fact it's being used in combination both
18 with what -- the ICC's equivalent of co-perpetration by joint control but
19 also in combination with their equivalent of JCE, which is in
20 Article 25(3)(d) of the Rome Statute.

21 To conclude on this, Your Honours, the physical perpetrators need
22 not be members of the JCE in order to attribute their crimes to those in a

23 JCE. If the JCE members agree on a common criminal goal and use others to
24 carry out acts in pursuance of their criminal goal, those acts can be
25 ascribed to all members of the JCE.

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1 Those conclude my submissions, and I'd be happy to answer
2 questions Your Honours may have.

3 JUDGE MERON: I would invite my colleagues to ask questions on
4 this complex of joint criminal enterprise.

5 Judge Shahabuddeen, please.

6 JUDGE SHAHABUDEEN: Would I be correct, Ms. Brady, in
7 understanding the burden of your submissions to be this: That if A has a
8 one-to-one agreement with B to commit a particular crime and that
9 crime is committed by B, his criminal responsibility does not depend at
10 all upon JCE, it depends upon the normal principles of criminal liability,
11 including, in particular, agency.

12 Would that be an appreciation of the burden of your submissions?

13 MS. BRADY: Well, Your Honours, I think that there are two ways of
14 viewing the matter. Either A and B have this agreement, one-to-one
15 agreement to commit a crime and they both jointly act, they both make a
16 contribution and therefore they can be liable under JCE; or Your Honour is
17 quite correct, that A and B can have an agreement. I don't think it
18 actually has to be a one-to-one, but it can be inferred that they have a
19 common agreement together, and then B either commits the crime himself or
20 he does it through somebody else, and in that case, yes, I think there is
21 an agency principle underlying the situation. But they are -- they are
22 two different ways of approaching the problem.

23 JUDGE SHAHABUDEEN: Well, we can deal separately with the
24 proposition involving an outsider to the JCE whose actions are in
25 question.

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1 What I have in mind is this: It seems to me it all turns upon the
2 notion of an agreement, depending on the circumstances, the law can
3 extrapolate the existence of an agreement from a variety of factors. What
4 makes the difference in this case is your reference to the Trial Chamber's
5 insistence that there has to be a one-to-one agreement between one member
6 of the JCE and another member of the JCE to commit a particular crime, but
7 in both situations there is an agreement. What makes the difference in
8 this case from your submissions is the insistence of the Trial Chamber
9 that JCE is applicable only when there is a particular kind of agreement.

10 MS. BRADY: Your Honour is quite right. For, as I said, the
11 majority of cases, it will amount to the same thing because the agreement
12 can be -- it was definitely very problematic, the Trial Chamber's use of
13 this one-to-one agreement. That was its first error. It was problematic
14 because it was requiring something which is -- it's too much. It's
15 impossible to find this one-to-one agreement. That was problematic.

16 In most cases you're correct. The people on the ground, the
17 physical perpetrators, will agree with the common plan. They will agree
18 with the person A in your example. But not in every case. And that's
19 why, for example, there may be physical perpetrators who don't even --
20 they're not even aware of how they're being used.

21 Not here. In this case the facts were clear. The physical
22 perpetrators shared the agreement. They were in the agreement. So that

23 approach "works" for this case.

24 However, there may be cases where it does not and that was the

25 import of my submissions when I was speaking about ground 1 and why it is

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1 important not to always require that the physical perpetrator be

2 necessarily in the JCE, because he may be used. He may not -- he may not

3 share it. He may be directed. He may be ordered. And this is actually

4 the type of situations that we are confronted with in the Tribunal very

5 often. These are the factual cases that are before us.

6 JUDGE SHAHABUDEEN: Let me ask you a third question. Would I be

7 right from the impression I've formed of your submissions that the problem

8 is this: A and B are both members of a JCE. B then gets an outsider to

9 commit a JCE type of crime, and then what is involved is the criminal

10 responsibility of A.

11 Now, I have the impression that the difficulty is this: That the

12 criminal responsibility of A is erroneously focused on the criminal

13 responsibility of the outsider. A only has a criminal responsibility for

14 the crime committed by a fellow member of the JCE, but that fellow, that

15 fellow member of the JCE may well have a criminal responsibility for the

16 outsider's crime.

17 Is that a correct way of analysing the --

18 MS. BRADY: It is. It is a correct way of analysing our position,

19 Your Honour.

20 JUDGE SHAHABUDEEN: Thank you. Thank you.

21 JUDGE MERON: Judge Van Den Wyngaert.

22 JUDGE VAN DEN WYNGAERT: Thank you.

23 Ms. Brady, if I understand you correctly, your position is that
24 the Trial Chamber erred, your ground 1, by not applying the principle that
25 the RPP -- or by requiring that the RPP should have been a member of the

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1 JCE.

2 My question is: You seem to apply that to the three forms of JCE,
3 one, two, and three, because your submission is that the Trial Chamber
4 should have applied the JCE III to the greatest number of the charges.
5 My question is in the authorities that you quote both in the
6 post-Second World War jurisprudence and in our own jurisprudence, what are
7 the examples that are relevant for JCE III? I can see JCE II and I,
8 especially I, but JCE III, what would be the cases, the precedents that we
9 were to follow if we were to follow you on that point? Thank you.

10 MS. BRADY: In relation to the World War II cases, such as the
11 ones of the Justice case and the Rusha case, the co-perpetrators who were
12 responsible for crimes which indeed did fall within the common plan, the
13 extermination plan in relation to the Justice case, and the same thing for
14 the Rusha case.

15 I can't at this point point Your Honour in a direction towards a
16 specific case, a specific World War II case that would have applied --
17 that would have allowed for responsibility for crime that
18 wasn't "intended" but was foreseen.

19 I would make the observation that the World War II cases are
20 dealing -- are using knowledge as their basis for mens rea, not intention
21 in the strict sense. As you'll recall, our jurisprudence requires for
22 JCE 1, the aiming at type of intent, the World War II cases for knowledge.