

# 'Face to face with horror':<sup>1</sup> the Tomašica mass grave and the trial of Ratko Mladić

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## Abstract

This article focuses on the judicial consideration of the scientific analysis of the Tomašica mass grave, in the Prijedor municipality of Republika Srpska in Bosnia-Herzegovina. Often referred to as the largest mass grave in Europe since the Second World War, this grave was fully discovered in September 2013 and the scientific evidence gathered was included in the prosecution of Ratko Mladić before the International Criminal Tribunal for the Former Yugoslavia. Based on the exhaustive analysis of all the publicly available trial transcripts, this article presents how the Tomašica evidence proved symptomatic of the way in which forensic sciences and international criminal justice intertwine and of the impact of the former over the latter on the admissibility of evidence, the conduct of proceedings and the qualification of the crimes perpetrated.

**Key words:** International Criminal Tribunal for the Former Yugoslavia, Tomašica, genocide, mass graves, forensic evidence, expert witnesses

## Introduction

The war that raged through the Former Yugoslavia at the end of the twentieth century generated unprecedented judicial and humanitarian responses. Judicially, the Security Council of the United Nations set up the first ad hoc International Criminal Tribunal, namely, the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>2</sup> This was the first judicial institution with specific jurisdiction over international crimes – war crimes, crimes against humanity and genocide – since the post-Second World War Tribunals in Nuremberg and Tokyo. From a humanitarian standpoint, the conflict in the Former Yugoslavia triggered a – so far unequalled – search for, and subsequent identification of, the victims.<sup>3</sup> Although distinct, these paralleled reactions are not completely independent from one another, and the outcomes of the humanitarian efforts, initially partially conducted by ICTY investigators themselves, have been instrumental in the prosecution of the crimes perpetrated, notably through the presentation before the Tribunal of forensic evidence – that is, evidence ‘obtained through scientific testing’<sup>4</sup> – by forensic experts.

The use of forensic evidence in trials before the ICTY has been well documented<sup>5</sup> and the present article proposes to contribute to the existing literature by focusing on the judicial consideration of the scientific analysis of one particular mass grave located in an abandoned iron mine in Tomašica, a small village in the Prijedor municipality of Republika Srpska in Bosnia-Herzegovina, the forensic analysis of which was included as evidence in the case against Ratko Mladić. Often referred to as the largest mass grave in Europe since the Second World War, 'the grave stretches over 5,000 square meters (53,820 sq. feet) and is 10 meters (about 30 feet) deep'.<sup>6</sup> By and of itself the size of the mass grave is an indicator of the large scale of the crimes perpetrated and of the importance of studying the sequence of events that led to the atrocities; an importance which was made even more salient at trial when the demographic and forensic evidence – cited by the Trial Chamber in its judgment – revealed that the site did not operate in a vacuum. It was a primary mass grave linked to other crimes: 'the remains exhumed from the Tomašica mass grave included victims' from Kozarac, Benkovac, Jaskići, Čarakovo, Biščani, Kratalj, Čemernica, Mrkalji, Hegići, Ljubija as well as from Keraterm (Room 3) and Omarska camps, both in the municipality of Prijedor'.<sup>7</sup>

As this article will present, based on an exhaustive analysis of all the publicly available transcripts of the *Mladić* case, the forensic analysis and the judicial consideration of the mass grave in Tomašica are symptomatic of how forensic sciences and international criminal justice intertwine and are intrinsically linked both at the investigation (Section 2) and at the trial (Section 3) stages. In terms of the legal qualification of the crimes perpetrated, this impact was admittedly more limited: in line with constant ICTY case law, the Trial Chamber characterised the crimes as crimes against humanity, reserving the qualification of genocide for the crimes perpetrated in Srebrenica, and Srebrenica only (Section 4).<sup>8</sup>

### **The impact of the challenges to the forensic investigation on the admissibility of evidence**

From a forensic viewpoint, the mass grave in Tomašica is symptomatic of the challenges raised by the scientific search for victims of international crimes. Fully discovered in September 2013, the site had already been searched in 2002, and again in 2004 and 2006. As recalled by the Prosecution in the case against Radovan Karadžić,

it first received information that bodies had been buried in the area of Tomašica in 2001, and [...] a Tribunal forensic archaeologist conducted unsuccessful excavations of the site in 2002. In 2004 and 2006, the BiH Missing Persons Institute ('MPI') conducted excavations of the site which exhumed some bodies and isolated body parts but gave no indication as to the actual number of bodies contained in the grave.<sup>9</sup> [...] In September 2013, after the Prosecution had closed its case, the MPI received additional information on the basis of which it began a new excavation which found the grave structures.<sup>10</sup>

As soon as the grave was discovered, the Prosecution – pursuant to Rules 73, 85 and 89 of the Tribunal’s Rules of Procedure and Evidence – requested that its case-in-chief against Radovan Karadžić be reopened to allow for the evidence gathered in Tomašica to be included within its case and to thus ‘introduce previously unavailable evidence regarding the Tomašica mass grave in the Prijedor municipality, Bosnia and Herzegovina.’<sup>11</sup> Specifying that ‘the exhumation process [was] still ongoing’, the Prosecution ‘request[ed] to present the evidence which [was] currently available as quickly as possible and to present additional evidence as soon as it becomes available or, in the alternative, to present the totality of the evidence altogether when the additional evidence becomes available.’<sup>12</sup> In support of its request, and here outlining the obstacles faced by the forensic investigators, the Prosecution explained that ‘previous discovery efforts were largely thwarted by factors outside of its control, including waste dumping at the site which “drastically altered the landscape” and deepened the level at which the remains were found.’<sup>13</sup> In response, and while noting ‘the importance of the Proposed Evidence,’<sup>14</sup> the Accused requested ‘that the Re-opening Motion be denied.’<sup>15</sup>

On 20 March 2014, in the case against Radovan Karadžić for which hearings had started on 26 October 2009 and completed on 7 October 2014, the ICTY Trial Chamber rejected the Prosecution’s motion to reopen its case. It recalled that:

The Rules do not specifically address whether a party may reopen its case-in-chief in order to introduce additional evidence. Past jurisprudence has held that a party may seek leave to re-open its case to present ‘fresh’ evidence, that is, evidence that could not be obtained by the moving party by the conclusion of its case-in-chief despite exercising all reasonable diligence to do so.<sup>16</sup>

Satisfied that the evidence related to the excavation of the Tomašica mass grave met ‘the threshold requirement of freshness,’<sup>17</sup> the Trial Chamber then turned to the consideration of the probative value of this evidence to find that ‘[a]t this stage, the Prosecution possesses only some of the Proposed Evidence’ and that ‘any probative value attributed to the entirety of the Proposed Evidence by the Prosecution [was] speculative at best.’<sup>18</sup> It is slightly unclear why this evidence was at this stage speculative, since the Trial Chamber itself noted that ‘the current excavation by MPI began and recovered approximately 275 complete and 118 incomplete bodies.’<sup>19</sup> Not only were the findings of the excavation evidence that the grave was a large mass grave, but the fact that some bodies were incomplete should have – by and of itself – alarmed the Trial Chamber to the fact that Tomašica was most probably part of the wider pattern of mass graves used by the perpetrators, a *modus operandi* already identified in the *Krstić* judgment issued in August 2001 and thus well known by the ICTY.<sup>20</sup> Perhaps more convincingly, considering the time frame, the Trial Chamber ultimately ruled that authorising the admissibility of this evidence would incur delay and, ‘given the very late stage of the trial’, would not be in the ‘interests of justice.’ It thus denied the Prosecution’s motion.<sup>21</sup>

By contrast, in the case against Ratko Mladić, for which the hearings started on 3 June 2011, the Trial Chamber allowed the Prosecution to reopen its case to include

the evidence gathered in Tomašica,<sup>22</sup> finding that, in this instance, ‘the probative value of the Material [was] not outweighed by the need to ensure a fair trial.’<sup>23</sup> While the Defence submitted ‘that the Chamber should consider the Karadžić Trial Chamber’s denial of a similar motion to re-open the Prosecution’s case when deciding on the Motion,’<sup>24</sup> the Trial Chamber here found that

the Motion was filed early during the Defence case. The Defence will have ample opportunity to present any evidence in response to the Material as part of its case. As for the Defence’s submissions about a delay in the trial to be caused by the re-opening, the Chamber acknowledges that the re-opening would prolong the trial. However, considering the Material, the Chamber is satisfied that the suggested re-opening at this stage of the proceedings would not unduly prolong the trial.<sup>25</sup>

In reopening its case-in-chief, the Prosecution showed particular concern for the rights of the accused to a fair trial and specified in court that:

This evidence relates to charges already in the indictment. The Prosecution will not be seeking new or additional charges. Additionally, I have put in place a procedure in which documentary materials detailing the exhumation and forensic work will be disclosed to the Defence shortly after we receive them and will be clearly marked as Tomašica materials. This should facilitate any investigations or analysis the Defence would decide to undertake. Should the Defence believe there are other steps the Prosecution can appropriately take to minimise the impact of this developing situation on their work, I invite Mr. Lukic to speak with me. We will certainly do everything we can appropriately do to ensure that this new evidence has no impact whatsoever on the fairness of this trial.<sup>26</sup>

The full discovery of the Tomašica mass grave in September 2013 was probably *in extremis* in terms of the admissibility before the ICTY of the evidence gathered: discovered too late to be reasonably included in the *Karadžić* case, for which the hearings completed just over a year later, it was however deemed to still be on time to be considered in the *Mladić* case, that is, in the last case before the ICTY in which it could possibly be included before the closing of the Tribunal.<sup>27</sup> Duly taking into account the practical hurdles faced by forensic investigators while considering the right of the accused to a fair trial, the *Mladić* Trial Chamber ultimately issued a reasonable decision, which in turn ensured that the crimes committed in Tomašica would not be forgotten by international criminal justice.

### **The impact of the forensic experts’ testimonies on the judicial understanding of the crimes perpetrated**

Pursuant to Rule 90 (A) of the ICTY’s Rules of Procedure and Evidence, ‘[e]very witness shall, before giving evidence, make the following solemn declaration: “I solemnly declare that I will speak the truth, the whole truth and nothing but the truth”’; a declaration which must also be undertaken by expert witnesses. In the course of trial, the judges also instruct the witnesses – including experts – that they

‘should not speak or communicate with whomever about [their] testimony, whether given already or still to be given.’<sup>28</sup>

For the ICTY, an expert witness is

a witness that ‘has at his or her disposal the special knowledge, experience, or skills needed to potentially assist the Trial Chamber in its understanding or determination of issues in dispute’. One of the distinctions between an expert witness and a fact witness is that due to the qualifications of an expert, he or she can give opinions and draw conclusions, within the confines of his or her expertise, and present them to the Trial Chamber. Furthermore, while a non-expert witness may be ‘called to testify about the crimes with which the accused is directly charged’, the testimony of an expert witness with special knowledge in a specific field is ‘intended to enlighten the Judges on specific issues of a technical nature.’<sup>29</sup>

As explained by Wilson, ‘for an expert report to be admissible in evidence, it must meet the “minimum standard of reliability”<sup>30</sup> and the content of the report must fall within the accepted area of expertise of the witness’<sup>31,32</sup>. He notes, however, that ‘[b]eyond that, very little guidance is given to international judges about how to evaluate expert reports or testimony.’<sup>33</sup> As detailed below, in the case against Ratko Mladić, the Trial Chamber heard several expert witnesses, called by both the Prosecution and the Defence<sup>34</sup> to present and/or discuss the forensic evidence gathered at the Tomašica site. These testimonies proved instrumental in enlightening the judges on several crucial issues related to the perpetration of the crimes, namely, the number of victims, the date of their death, their civilian character, the cause of their death and the disturbance of the mass grave.

### **The complex determination of the number of victims and of the date of their death**

The number of victims from the Tomašica mass grave was a point of discussion at trial and the determination of their exact number was made more complex by the fact that Tomašica was a primary grave, linked to a secondary site in Jakarina Kosa. Indeed, while on 27 November 2013 the Prosecution had explained that ‘over 470 sets of bodily remains have been recovered so far’<sup>35</sup> and had referred to ‘Mladić’s own notebook, where he recorded that 5,000 bodies were at the mine,’<sup>36</sup> the testimonies of the different experts referred to lower figures, most probably due to the investigative challenges generated by the location and disturbance of the grave. Before the Trial Chamber, the director of forensic science at the International Commission on Missing Persons (ICMP), Thomas Parsons, testified that the

total from Tomašica was 385 distinct DNA profiles indicating different individuals. [...] some of those individuals also had portions of bodies discovered at Jakarina Kosa. But for individuals found only in Jakarina Kosa, there is an additional 211 individuals. In addition we’ve recently provided information to the Office of the Prosecutor on eight DNA profiles from Jakarina Kosa that have not had matches. So if we

add all those – those figures together, the number of individuals detected by DNA in both of those graves is 604.<sup>37</sup>

Forensic pathologist John Clark specified that there were three women<sup>38</sup> and that ‘293 full or largely complete bodies had been recovered’.<sup>39</sup> Demographer Ewa Tabeau gave a total number of victims at the Tomašica site of 385,<sup>40</sup> specifying that ‘the overall number of individuals whose remains were split between the two sites is 98’.<sup>41</sup>

Likewise, the scientific determination of the date of the death of the victims was heavily hampered by the disturbance of the grave, and deputy director for archaeology and anthropology at the ICMP, Ian Hanson, testified that ‘[e]ntomological evidence indicate[d] the last bodies may have been put into the graves between April and October’,<sup>42</sup> without, however, indicating a year.<sup>43</sup> However, other information at his disposal enabled him to give the date of July 1992 in his report:

According to the information provided to ICMP in 2006, the Tomašica mine complex site was believed to have originally contained 100 to 200 individuals who died on or around the 20th of July 1992 in the Brdo area. There was further information that persons who died at the Keraterm camp around the 24th of July 1992 were also buried at the site.<sup>44</sup>

Summer 1992 was also the date unequivocally retained by Tabeau. In her words, ‘[a]ll three sources, ICMP, ICRC, and the Prijedor Book of Missing, are highly consistent and corroborate each other’s numbers. The other months, in the order of the size of the disappearances, is May and June, and the last, perhaps, considerably lower disappearance numbers, is August 1992.’<sup>45</sup> The forensic analysis of the Tomašica mass grave further confirmed the demographic findings of disappearances among the civilian population in the Prijedor municipality.

### **The civilian character of the victims**

Crucially, the forensic analysis of the Tomašica mass grave contributed to establishing the civilian character of the victims – a point which is always one of contention with the Defence, which, with the aim of refuting the criminality of the acts perpetrated, has, in strictly all the cases before the ICTY, either maintained that the victims were combat victims or attempted to instill doubt into the minds of the judges.<sup>46</sup> With respect to the Tomašica mass grave, Ian Hanson testified that:

The intact bodies were clothed. They had personal effects. There were documents with bodies, jewellery, money, everyday items normally carried on a person. [...] As observed during excavation, normal civilian attire seemed to be what bodies were wearing. [...] No military uniforms or other items associated with military activity were observed during this excavation.<sup>47</sup>

The fact that the victims were wearing civilian clothing was confirmed by John Clark:

All the clothing that we found – most people did have clothing on. All the clothing was just ordinary clothing that people would wear – shirts, sweatshirts, short-sleeve

shirts, trousers, et cetera. Some people had suit jackets, some people had work jackets or dungarees, but it was mostly sort of casual clothes with footwear as well. Some people did have a few – a few people did have what to me was an excessive amount of clothing, so perhaps two or more jackets, two or more pairs of trousers. One of the three women had an enormous number of clothes on, but generally this was fairly light clothing. Specifically, no military clothing whatsoever. And I include amongst that the footwear which was all of a light – generally of a light nature and not boots or anything like that.<sup>48</sup>

The evidence stemming from the clothing was further corroborated by the determination of the cause of death, which overwhelmingly demonstrated that the majority of the victims had been shot by high-velocity weapons and that a substantial number of them had been shot in the back of the head; findings which contribute to refuting any claim that the victims died in the course of combat.

### **The preservation of the bodies of the victims and the determination of the cause of death**

The scientific assessment of the cause of death is necessarily and understandably impacted upon by the degree of preservation of the bodies. In Tomašica, the unusual preservation of the bodies of the victims had both advantages and disadvantages when it came to the investigation. In his testimony, John Clark reported how 'pathologists and anthropologists' 'were all struck [. . .] by how well preserved many of these bodies were'.<sup>49</sup>

These were bodies which had reportedly been in the ground for up to 21 years. We would have expected most of these bodies to be reduced to a skeleton, but, in fact, a large number of them had not – a lot of soft tissue on the bones, in sometimes a great amount so that the complete shape of the body was still there. You could recognise facial features. One person we could even see a tattoo on their arm. And this was quite remarkable. I'd never seen or none of us had come across this degree of preservation of bodies before. It's a process in the – normally the body after death starts to decompose, and essentially the tissues will break up and liquify and you'll be reduced to a skeleton.<sup>50</sup> [. . .] I can't completely explain why that should be. But I think the reason why we had the adipocere here, this hardening, and the tissue preservation was probably a combination of the depth of the burial, the type of the soil.<sup>51</sup>

John Clark explained the consequences – positive and negative – of the preservation of the bodies on the investigation:

In preserving the bodies and holding them together, it made identification of injuries that little bit easier, in terms of tracks – bullet tracks particularly, so we could see it going through soft tissue and into bone. Because in skeletonised remains, the bones will just all come apart, but here we could still actually see very straightforward tracks. So that that was the main benefit of that. It also – any bullets in the body would be held in the tissues, embedded in the tissues, whereas in a skeletonised body, they'll

just fall out. So that was the two advantages: Bullet tracks and actually finding bullets. The disadvantage is that this tissue can sometimes become very, very hard and it becomes very difficult to open up the body and to work with it. It also made the bodies heavy, and undoubtedly, the weight of all the bodies on top of each other undoubtedly produced fractures after death of particularly the ribs.<sup>52</sup>

In terms of the cause of the death of the victims, John Clark testified that the main cause of death was death by shooting with high-velocity weapons<sup>53</sup> and reported to the Trial Chamber that ‘97 per cent of the 293 full or largely complete bodies had gun-shot injuries’.<sup>54</sup>

I found that the vast majority of the people in this grave-site had been shot, many of them just once, one man unusually nine times, but mostly a small number of times. Wounds to the head were a dominant feature, a regular common feature to find wounds to the head and particularly to the back of the head. And most injuries were from high-velocity weapons. So, in summary, just about everyone had been shot, and a very common finding was a bullet wound, bullet injury, to the back of the head.<sup>55</sup>

He also elaborated on the fact that the head had been a ‘specific target area’<sup>56</sup> as he explained that ‘if a gun was being fired randomly at people, then you would expect shots to hit the body roughly in proportion to the body area, so the figures we’ve got here rather go against that’,<sup>57</sup> and that there were ‘far more shots to the head than you would expect’.<sup>58</sup> Further, he pointed to ‘an unusual feature’,<sup>59</sup> namely, that ‘45 per cent of all shots to the head were to the back of the head. Only 17 per cent were to the front of the head, and then 27 per cent were either to the top or the side of the head’.<sup>60</sup> These findings were interpreted by the expert as a strong indicator that the victims had not been killed in combat. In his words, ‘in a combat situation, the injury that predominates in soldiers are explosive injuries, so shrapnel injuries, rather than gun-shots. More soldiers will die from explosive injuries than gun-shot injuries. That I do know. That has been well established and repeated’.<sup>61</sup>

The forensic investigators were thus unequivocal in their findings that the victims buried in Tomašica were civilians and were not killed in combat; findings further corroborated by the disturbance of the mass grave. As per the *Krstić* Trial Chamber, ‘Bosnian Serb forces dug up many of the primary mass gravesites and reburied the bodies in still more remote locations. [...] *Such extreme measures would not have been necessary had the majority of the bodies in these primary graves been combat victims*’.<sup>62</sup> Yet, the presentation in court of the evidence related to the Tomašica mass grave showed that the discussion was far from settled.

### **The pattern of mass graves: Tomašica as a primary site**

The forensic analyses of the mass graves discovered in Bosnia-Herzegovina revealed the strategic use by the perpetrators of a pattern of mass graves with primary graves, to place individuals ‘soon after their deaths’,<sup>63</sup> which were subsequently disturbed and (parts of) the same individuals reburied in secondary sites.<sup>64</sup> To be exposed,

this pattern required 'a combination of forensic excavation, examination of body parts, artefacts, soil samples and DNA' to 'confirm the link' between the graves.<sup>65</sup> The mass grave in Tomašica was no exception. As testified by the different experts in the case against Ratko Mladić, the site in Tomašica was linked with Jakarina Kosa, a secondary mass grave 'located west of the Tomašica site,'<sup>66</sup> discovered in 2001.<sup>67</sup>

Hanson, who worked on the mass grave in Tomašica from 6 September 2013 to May 2014,<sup>68</sup> described how the graves had been dug, specifying that '[t]he size of the graves, the width of trenches 1 and 2, and the finding of machine tool marks in the surface of the yellow-grey clay are consistent with the use of heavy machinery; that is, large excavators they used in construction and industry.'<sup>69</sup> Estimating that 'in volume [...] 30 to 40 per cent' of the mass grave had been disturbed,<sup>70</sup> Hanson further explained that:

The archaeological record, the evidence indicates bodies were truncated; that is, cut. Yellow-grey clay deposits are cut through. This is consistent with the use of heavy machinery to remove both clay and bodies from the grave, and there's nothing to indicate individual removal of bodies.<sup>71</sup> [...] the truncation and trauma to bodies and removal of parts of those bodies, which are then found mixed with the clay and also found outside the grave, is consistent with removal and transport of bodies using heavy machinery.<sup>72</sup>

Further evidencing the disturbance of the grave, the skeletonisation process was noted by Hanson, who explained that, 'in contrast to the preservation or relative preservation of the complete bodies found in the undisturbed areas,'<sup>73</sup> the body parts found in areas of disturbance were – for the most part – skeletonised,<sup>74</sup> since '[s]keletonisation of remains occurs where they have contact with soil and oxygen.'<sup>75</sup> The disturbance of the mass grave also explains 'why body parts were found outside the grave,' as this is 'consistent with bodies removed and then dropped when [...] being bulldozed over the site.'<sup>76</sup>

The importance of the disturbance of the grave did not escape the attention of Presiding Judge Orić, who put questions directly to the witness, asking him whether he had found 'anything that would give [judges] a clue as to whether the intention went beyond a partly removal of the grave' and whether there was any 'evidence which would shed some light on whether it was ever intended to remove the whole grave.'<sup>77</sup> Hanson replied in the negative, confirming that '[t]here were areas of the grave which are not disturbed,' that there was 'no evidence that the whole grave [was] disturbed simply because portions of the grave appear[ed] undisturbed,' and that there was no evidence that 'it was ever intended to remove the whole grave.'<sup>78</sup> Upon re-examination by the Prosecution, Hanson further confirmed that this partial disturbance of the grave was in fact 'very common' and that 'in all the years of [his] work, [he has] never encountered a mass grave where all remains have been removed.'<sup>79</sup>

Demographer Ewa Tabeau commented on the pattern of mass graves as an indicator of 'the violent nature of these deaths'.<sup>80</sup>

It is not only about causes of death. The conclusion about the dramatic circumstances is – has its foundation in the fact how they were buried. It is not just a regular grave that they were buried in. It is an old mine, Tomašica, or Jakarina Kosa, where the bodies were dropped, and for whatever reason, but obviously a significant reason, at some point a large number of bodies were moved and split. The image of these split bodies is not nothing. It is a further continuation of the – of the violent nature that already was there when the bodies were buried in an unmarked grave without their names listed and without even knowing by people that bodies are buried there. So I stand by this statement: All victims died violent deaths.<sup>81</sup>

This statement prompted an intervention of Presiding Judge Orić:

But, Ms. Tabeau, the fact that the body or the body parts were found in graves which were of a massive nature rather than individual graves, not necessarily – at least theoretically – means that all of them died from violent causes. I mean, you couldn't exclude for the possibility that someone got a stroke when seeing, for example, that others were shot in the head and were sharing the same fate to end up in such a grave. Purely theoretically, perhaps, but I'm just exploring exactly where the demographic expertise allows for such – such conclusions as you just expressed, that all of them died a violent death or whether, at least theoretically, there's still a possibility that they did not.<sup>82</sup>

If Tabeau accepted that 'this kind of a stroke is a possibility' and that she could not 'exclude this kind of causes of death [...] or combat',<sup>83</sup> this judicial intervention is nonetheless worth highlighting as, although it admittedly rightly questions the forensic expertise of a demographer, it ignores Tabeau's remark on the disturbance of the grave and, more generally, the pattern of mass graves, which had, however, been previously discussed before the Trial Chamber. Faced with a primary mass grave containing hundreds of bodies – some of which had been truncated – the conclusion that the victims suffered a violent death seems reasonable and not far fetched, mostly when earlier in her expert testimony Tabeau had specified that the victims identified all came from 'within the Prijedor municipality, including the three [concentration] camps, Keraterm, Trnopolje and Omarska',<sup>84</sup> which had all come under the ICTY's scrutiny for the atrocities perpetrated there.<sup>85</sup>

Tabeau's testimony also came under virulent attack from the demographic expert called by the Defence, Svetlana Radovanovic, who went much further than the expected criticism of her colleague's methodology<sup>86</sup> and altogether questioned her integrity,<sup>87</sup> accusing her of concealing information<sup>88</sup> and of manipulation,<sup>89</sup> arguing that: 'Dr. Tabeau would have been professionally correct if she had at least suggested the possibility that some of those that she lists as those who died and who were victims of Tomašica may have died in combat. *She could have suggested the same thing for Srebrenica.*'<sup>90</sup> This insidious reference by the Defence expert witness to Srebrenica victims as war casualties rather than as victims of genocide, as recognised in several cases before the ICTY,<sup>91</sup> once again reflects the recurrent Defence argument that the victims were combat victims, and, in this case, it is nothing short

of genocide denial. The virulence of the defence expert witness was also matched by the attitude of the defendant himself, who, during Ewa Tabeau's testimony, had to be put in his place by Presiding Judge Orić:

Mr. Mladić should refrain from seeking in any way to communicate with the public gallery and is advised to turn his face to – to whomever. It's here where it happens, Mr. Mladić, not anywhere else. So if would you turn to the Chamber, to the witness, that would be appreciated, and the Chamber will not allow any communication with the public gallery.<sup>92</sup>

This remark notwithstanding, Ewa Tabeau's testimony was specifically relied upon by the Trial Chamber in its judgment,<sup>93</sup> in which a whole section is devoted to the Tomašica mass grave as part of the 'first (overarching) joint criminal enterprise' (JCE),<sup>94</sup> a mode of liability which refers to a common purpose shared by the perpetrators.<sup>95</sup>

### **The impact of forensic evidence on the qualification of the crimes in Tomašica: crimes against humanity v. genocide**

On 22 November 2017 the Trial Chamber issued its judgment in the case of Ratko Mladić. Of the 2,475 pages of the judgment, eleven focus on Tomašica.<sup>96</sup> The Trial Chamber found that

in May 1992, the Prijedor Crisis Staff and the VRS controlled the Tomašica mine. Sometime in early May 1992, Radiša Ljesnjak, a member of the Prijedor SJB and of the Prijedor Crisis Staff, ordered the digging of a pit in a waste dump site in Tomašica. Between May and the end of July 1992, members of the VRS, including members of the 43rd Motorized Brigade Logistics Battalion, the Prijedor SJB and its Chief Simo Drljača, and the Prijedor Crisis Staff worked together to bury bodies [of victims] at Tomašica. From 1992 or 1993 until the end of the war, the VRS blocked access to the Tomašica site.<sup>97</sup>

Directly linking the mass grave to the defendant, the Trial Chamber found that 'Mladić told Bogojević that those responsible for the killings should get rid of the bodies [buried at Tomašica]. Mladić further noted that an investigation had to be launched in connection with the case and that the information was to be retained well to prevent it getting into the hands of unauthorized people.'<sup>98</sup> The Trial Chamber acknowledged the pattern of mass graves and found that 'at the end of 1995, the VRS, the Prijedor SJB, including Drljača, and the Prijedor Crisis Staff reburied some of the bodies from Tomašica in the Jakarina Kosa mass grave'<sup>99</sup> and that they all 'attempted to conceal the murder of a large number of Bosnian Muslims and Bosnian Croats in Prijedor Municipality by removing evidence of the crimes and thereby impeding potential future investigations.'<sup>100</sup>

Together with the demographic evidence presented, the forensic evidence enabled the Trial Chamber to link the Tomašica mass grave with other crimes

perpetrated in different places – including in Room 3 at Keraterm camp and in Omarska camp<sup>101</sup> – and contributed to convicting the defendant of a JCE, which encompassed murder and extermination as crimes against humanity.<sup>102</sup>

Based on all of these findings, the Trial Chamber concludes that there existed a JCE with the objective of permanently removing the Bosnian Muslims and Bosnian Croats from Bosnian-Serb-claimed territory in Bosnia-Herzegovina through persecution, extermination, murder, inhumane acts (forcible transfer), and deportation. This JCE existed from 1991 until 30 November 1995.<sup>103</sup>

This conclusion, however, did not follow the Prosecution's unequivocal statement that: 'This evidence [Tomašica] is important not only in establishing the death of victims but also the large killing and burial operation being revealed in Tomašica will be relevant to the Chamber's consideration of count 1 in the indictment, *genocide*.'<sup>104</sup>

In international criminal law, genocide is defined as a crime 'committed with *intent to destroy*, in whole or in part, a national, ethnical, racial or religious group',<sup>105</sup> while crimes against humanity are defined as 'acts committed as a part of a widespread or systematic attack directed against any civilian population'.<sup>106</sup> In her testimony, Ewa Tabeau had specified that 'exactly 95.8' per cent of the victims found in Tomašica had 'Muslim ethnicity'.<sup>107</sup> In the judgment, the Trial Chamber – Judge Orić dissenting – found that 'the physical perpetrators of the prohibited acts in Sanski Most, Vlasenica, and Foča Municipalities, and certain named perpetrators in Kotor Varoš and Prijedor Municipalities, *intended to destroy the Bosnian Muslims in those Count 1 Municipalities* as a part of the protected group'.<sup>108</sup> Yet, in line with the Tribunal's constant case law,<sup>109</sup> the Trial Chamber also found that, in these municipalities, the perpetrators had not perpetrated their acts with the intent to destroy the Bosnian Muslims and Bosnian Croats as a '*substantial part*' of the protected groups in Bosnia-Herzegovina.<sup>110</sup> The crimes were thus not qualified as genocide but as crimes against humanity. This read-in requirement of substantiality – which is nowhere in the definition of the crime – calls for a series of remarks.

First, although generally supported by the legal doctrine and by case law,<sup>111</sup> substantiality is not an element in the definition of the crime of genocide. It can constitute useful circumstantial evidence to determine the specific intent to destroy a protected group,<sup>112</sup> but when such intent is established, it seems inept to still require evidence of substantiality. The point here is certainly not to stretch the definition of genocide to cover crimes that do not fall within its ambit, nor is it to dismiss the seriousness of crimes against humanity. Rather, it is to emphasise that genocide is characterised by a very specific intent to destroy a protected group: an act will be genocidal if, and only if, it is perpetrated with this intent and will, generally, be qualified instead as a crime against humanity precisely because of the hardship of proving this intent. In this case, the Trial Chamber came 'to the unsustainable conclusion that acts committed with the intent to destroy a protected group as such do not constitute genocide'<sup>113</sup> because the evidence did not show that the perpetrators had the intent to destroy a *substantial part* of the group protected. By dismissing

the intent to destroy, which is ‘the very essence of the crime of genocide’,<sup>114</sup> the Trial Chamber here ‘[misread] the text of the law’<sup>115</sup> and erroneously made of genocide a crime of scale, not of intent.<sup>116</sup>

Second, even if one were to accept that substantiality is an element of the crime of genocide, the municipality-based methodology used by the ICTY to assess it is perhaps surprising. In *Mladić*, the Trial Chamber recalled

that in determining the substantiality of the group, the numerical size of the targeted part of the protected group in absolute terms is one factor among many. Other factors include: numerical size of the part in relation to the overall size of the group; the prominence of the part of the group within the larger whole and whether it is emblematic of the overall group or essential to its survival; the area of the perpetrators’ activity and control; and the perpetrators’ potential reach.<sup>117</sup>

When considering the crime of genocide against the Bosnian Muslim population, the ICTY has consistently proceeded per municipality and has never viewed the crime at state level, as was/is the case for all other genocides.

Third, even if one were to accept both the definitional value of substantiality and the ICTY’s method to assess it, substantiality with respect to the Count 1 municipalities was established by the Trial Chamber itself. By qualifying the crimes as crimes against humanity, the Trial Chamber recognised that – by definition – they were massive or systematic,<sup>118</sup> and thus substantial. Yet, in spite of the scientific evidence that the great majority of the victims of these massive or systematic crimes belonged to a group protected under the Genocide Convention, the Trial Chamber characterised as genocide only the crimes perpetrated in Srebrenica; a genocide for which Mladić was found guilty.

### Conclusion

Charged with eleven counts, Ratko Mladić was found guilty on all counts but one, namely, genocide in relation to crimes perpetrated between 31 March 1992 and 31 December 1992 in different municipalities of Bosnia-Herzegovina: Foča, Ključ, Kotor Varoš, Prijedor, Sanski Most and Vlasenica.<sup>119</sup> This is not to say that these crimes went unpunished, as Mladić was convicted of crimes against humanity, including extermination and murder,<sup>120</sup> for these acts. However, he was not found guilty of genocide for the crimes perpetrated in these municipalities. According to the judges, the evidence failed to show substantiality. Put differently, for the judges, the number of victims was not sufficient to constitute genocide but was so to characterise crimes against humanity, which are by definition massive or systematic. Ultimately, this conclusion confuses genocide with crimes against humanity, and back again. It also misconstrues both the text of the law and the reality of the crimes committed.<sup>121</sup>

Unless it is overturned on appeal, which seems highly unlikely in light of the ICTY precedents, the *Mladić* judgment was the last opportunity for the Tribunal to qualify as genocide not only the crimes perpetrated in Srebrenica in July 1995

but also other crimes committed against the Bosnian Muslim population in other municipalities in Bosnia-Herzegovina at some other time in the conflict. While visiting the Tomašica site on 25 November 2013, the President of the Tribunal, Judge Theodor Meron, said: 'It is very difficult for me to speak at this place, where one stands face to face with the horror a man can do to another man.'<sup>122</sup> In law, this horror, when perpetrated with the intent to destroy a protected group, has a name: genocide.

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### Notes

- 1 The quote is from Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia: 'UN Tribunal's President Visits Bosnian Mass Grave', *The Times of Israel*, 26 November 2013, [www.timesofisrael.com/un-tribunals-president-visits-bosnian-mass-grave/](http://www.timesofisrael.com/un-tribunals-president-visits-bosnian-mass-grave/), accessed 24 June 2020.
- 2 See Resolution of the United Nations Security Council 827, adopted at its 3217th meeting on 25 May 1993, S/RES/827 (1993).
- 3 As of June 2020, 6,993 of the 8,372 Srebrenica victims had been found and identified:  
[www.icmp.int/wp-content/uploads/2017/06/srebrenica-english-2020.pdf](http://www.icmp.int/wp-content/uploads/2017/06/srebrenica-english-2020.pdf), accessed 6 October 2020.
- 4 S. Brammertz and M. Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford, Oxford University Press, 2016), p. 157, n. 291.
- 5 On the use of forensic evidence at the ICTY, see e.g. J. P. Baraybar and M. Gasior, 'Forensic Anthropology and the Most Probable Cause of Death in Cases of Violations against International Humanitarian Law: An Example from Bosnia and Herzegovina', *Journal of Forensic Sciences*, 51:1 (2006), 103–8; C. Fournet, 'Nothing Must Remain: The (In)Visibility of Atrocity Crimes and the Perpetrators' Strategies Using the Corpses of Their Victims', in A. Smeulders, M. Weerdesteijn, and B. Holá (eds), *Perpetrators of International Crimes – Theories, Methods, and Evidence* (Oxford, Oxford University Press, 2019), pp. 241–55; M. Klinkner, 'Karadžić's Guilty Verdict and Forensic Evidence from Bosnia's Mass Graves', *Science and Justice*, 56:6 (2006), 498–504.
- 6 See M. Jovanović, 'Tomasica', *Peščanik.net*, 20 November 2013, <https://pescanik.net/tomasica-2/>, accessed 24 June 2020.
- 7 See ICTY, *Prosecutor v. Mladić*, Case No. IT-09-92-T, Trial Chamber I, Judgment, 22 November 2017, para. 4087 in conjunction with para. 3051.
- 8 *Mladić Judgment*.

- 9 ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Decision on Prosecution Motion to Re-Open its Case and Prosecution Motion for Protective Measures for Witness KDZ614, 20 March 2014, para. 2.
- 10 *Ibid.*, para. 3.
- 11 *Ibid.*, para. 1.
- 12 *Ibid.*, para. 1.
- 13 *Ibid.*, para. 5.
- 14 *Ibid.*, para. 7.
- 15 *Ibid.*, para. 7.
- 16 *Ibid.*, para. 9.
- 17 *Ibid.*, para. 16.
- 18 *Ibid.*
- 19 *Ibid.*, para. 15.
- 20 See e.g. ICTY, *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Chamber, Judgment, 2 August 2001.
- 21 *Karadžić Decision*, 20 March 2014, para. 18.
- 22 ICTY, *Prosecutor v. Mladić*, Case No. IT-09-92-T, Trial Chamber I, Decision on Prosecution Motion to Re-Open its Case-in-Chief, 23 October 2014.
- 23 *Ibid.*, para. 10.
- 24 *Ibid.*, para. 3.
- 25 *Ibid.*, para. 10.
- 26 ICTY, *Prosecutor v. Mladić*, Case No. IT-09-92-T, Transcripts, 27 November 2013, p. 20023, line 25 and p. 20024, lines 1–14.
- 27 The ICTY closed on 31 December 2017. Remaining cases – including the appeals in the *Mladić* case – fall under the jurisdiction of the International Residual Mechanism for Criminal Tribunals (IMCT).
- 28 See e.g. *Mladić Transcripts*, 1 July 2015, p. 36748, lines 18–20.
- 29 ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Trial Chamber, Decision on Defence Rule 94bis Notice Regarding Prosecution Expert Witness Richard Butler, 19 September 2007, para. 23. See A. Appazov, *Expert Evidence and International Criminal Justice* (London, Springer, 2016), p. 32.
- 30 ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-T, Trial Chamber, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Professor Radinajoj, para. 9. Footnote in original.
- 31 ICTY, *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Trial Chamber, Decision on Second Prosecution Motion for the Admission of Evidence Pursuant to Rule 92bis (Two Expert Witnesses), 23 July 2008, para. 15. Footnote in original.
- 32 R. A. Wilson, *Incitement on Trial – Prosecuting International Speech Crimes* (Cambridge, Cambridge University Press, 2017), pp. 181–2. See also Rule 89 of the ICTY’s Rules of Procedure and Evidence.
- 33 R. A. Wilson, *Incitement on Trial*, p. 182. He further notes that ‘Article 69, which governs evidence in the ICC statute, does not mention experts.’ *Ibid.*
- 34 For Tomašica, the *Mladić* Prosecution called Thomas Parsons, director of the ICMP; Ian Hanson, deputy director for archaeology and anthropology at the ICMP; John Clark, forensic pathologist; Bruno Franjic, ballistic expert; Ewa

- Tabeau, demographic expert. The Defence called Zoran Stankovic, expert in forensic medicine and Svetlana Radovanovic, demographic expert.
- 35 *Mladić Transcripts*, 27 November 2013, p. 20022, line 11.
- 36 *Ibid.*, lines 24–5.
- 37 *Ibid.*, 29 June 2015, p. 36417, lines 19–25 and p. 36418, line 1. Baraybar and Gasior report that, when excavated in 2001, the mass grave in Jakarina Kosa was found to contain 139 bodies and 259 body parts. See Baraybar and Gasior, ‘Forensic Anthropology and the Most Probable Cause of Death’, 103–8.
- 38 *Mladić Transcripts*, 1 July 2015, p. 36614, line 8.
- 39 *Ibid.*, p. 36591, lines 14–17.
- 40 *Ibid.*, 2 July 2015, p. 36729, lines 10–25.
- 41 *Ibid.*, p. 36732, lines 1–5. See also *ibid.*, p. 36731, lines 7–17. Later in her testimony, Tabeau mentions 99 victims who were split between the two graves. See *ibid.*, 7 July 2015, p. 36782, lines 20–5. Parsons also indicated the figure of 99 victims, see *ibid.*, 29 June 2015, p. 36418, line 5.
- 42 *Ibid.*, 24 June 2015, p. 36303, lines 16–21.
- 43 *Ibid.*
- 44 *Ibid.*, p. 36304, lines 12–16.
- 45 *Ibid.*, 25 June 2015, p. 36740, lines 14–23.
- 46 See *Mladić Transcripts*, 7 July 2015, p. 36804, lines 14–24. For an analysis of the defence strategy, see Fournet, ‘Nothing Must Remain’, pp. 241–55. For a scientific demonstration that there were ‘significant differences between the Bosnian and combat contexts’, see M. C. Dussault, I. Hanson and M. J. Smith, ‘Blast Injury Prevalence in Skeletal Remains: Are There Differences between Bosnian War Samples and Documented Combat-related Deaths?’, *Science and Justice*, 57:6 (2017), 439–47.
- 47 *Mladić Transcripts*, 24 June 2015, p. 36287, lines 9–18.
- 48 *Ibid.*, 1 July 2015, p. 36589, lines 12–23. See also *ibid.*, p. 36655, lines 15–23.
- 49 *Ibid.*, p. 36586, line 21.
- 50 *Ibid.*, lines 1–12.
- 51 *Ibid.*, lines 22–4.
- 52 *Ibid.*, p. 36587, lines 4–17.
- 53 *Ibid.*, p. 36602, line 12.
- 54 *Ibid.*, p. 36591, lines 4–17. Although see *ibid.*, p. 36604, lines 18–20, where the percentage mentioned is 96 rather than 97.
- 55 *Ibid.*, p. 36590, lines 23–5 and p. 36591, lines 1–5.
- 56 *Ibid.*, p. 36595, line 22.
- 57 *Ibid.*, p. 36596, lines 3–5.
- 58 *Ibid.*, p. 36595, line 24.
- 59 *Ibid.*, p. 36620, lines 1–9.
- 60 See *ibid.*, p. 36598, lines 10–12.
- 61 *Ibid.*, p. 36679, lines 1–4. See Dussault, Hanson and Smith, ‘Blast Injury Prevalence in Skeletal Remains’, 439–47.
- 62 *Krstić Judgment*, para. 78. Emphasis added.

- 63 ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Trial Chamber, Judgment, 17 January 2005, para. 381.
- 64 *Blagojević and Jokić Judgment*. See also *Mladić Judgment*, para. 2990. See Fournet, 'Nothing Must Remain', pp. 241–55.
- 65 Klinkner, 'Karadžić's Guilty Verdict', 501.
- 66 See *Mladić Transcripts*, 24 June 2015, p. 36252, line 25.
- 67 See Hanson's testimony, *ibid.*, p. 36297, lines 22–3; p. 36251, lines 10–14; p. 36284, lines 15–25. The first exhumations in Jakarina Kosa started in 2001. They were analysed between July and October 2015. See D. Džidić, 'Bosnia Finds 600 Body Parts in Mass Grave', *Balkan Transitional Justice* (29 October 2015), <https://balkaninsight.com/2015/10/29/six-hundred-mortal-remains-found-in-bosnia-grave-10-29-2015/>, accessed 24 June 2020.
- 68 *Mladić Transcripts*, 24 June 2015, p. 36297, lines 22–3.
- 69 *Ibid.*, p. 36272, lines 19–24.
- 70 *Ibid.*, p. 36300, lines 12–14.
- 71 *Ibid.*, p. 36280, lines 9–13.
- 72 *Ibid.*, p. 36284, lines 3–10.
- 73 *Ibid.*, p. 36286, lines 1–2.
- 74 *Ibid.*, p. 36285, lines 23–5.
- 75 *Ibid.*, p. 36286, lines 4–14.
- 76 *Ibid.*, p. 36284, lines 3–10.
- 77 *Ibid.*, p. 36322, lines 2–15.
- 78 *Ibid.*
- 79 *Ibid.*, 25 June 2015, p. 36359, lines 12–18.
- 80 *Ibid.*, 7 July 2015, p. 36814, line 10.
- 81 *Ibid.*, p. 36814, lines 10–24.
- 82 *Ibid.*, p. 36815, lines 6–13.
- 83 *Ibid.*, p. 36815, lines 14–16.
- 84 *Ibid.*, 25 June 2015, p. 36735, lines 11–23.
- 85 See ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber, Judgment, 2 November 2001 and Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005.
- 86 *Mladić Transcripts*, 26 April 2016, p. 43777. Questioning the methodology of the opposing party's experts is common. In this case, the Defence forensic medicine expert Zoran Stankovic questioned John Clark's methodology. See *ibid.*, 18–25 April 2016.
- 87 *Ibid.*, p. 43777.
- 88 *Ibid.*, 2 May 2016, pp. 43848–50.
- 89 *Ibid.*, p. 43852.
- 90 *Ibid.*, 26 April 2016, p. 43682, lines 4–9. Emphasis added.
- 91 For the recognition of Srebrenica as genocide, see notably *Krstić Judgment*; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016 and Case No. MICT-13-55-A, Appeals Chamber, Judgment, 20 March 2019; *Mladić Judgment*.

- 92 *Mladić Transcripts*, 7 July 2015, p. 36789, lines 9–14. From the transcripts, it also appears that the defendant was vocal during Hanson’s testimony, prompting Presiding Judge Orić to – twice – remind him that he ‘should not speak aloud’. *Ibid.*, 24 June 2015, p. 36304, line 23 and p. 36305, lines 15–16.
- 93 See *Mladić Judgment*, para. 4087 and notes 15019–20.
- 94 *Ibid.*, section 9.2.11, paras 4071–93.
- 95 See R. Cryer, D. Robinson and S. Vasiliev, *An Introduction to International Criminal Law and Procedure*, 4th edn (Cambridge, Cambridge University Press, 2019), pp. 344–9.
- 96 *Mladić Judgment*, pp. 2028–38.
- 97 *Ibid.*, para. 4090.
- 98 *Ibid.*, para. 4091.
- 99 *Ibid.*, para. 4092.
- 100 *Ibid.*, para. 4093.
- 101 See *ibid.*, para. 4087 in conjunction with para. 3051.
- 102 See e.g. *ibid.*, para. 3116.
- 103 *Ibid.*, para. 4232.
- 104 *Mladić Transcripts*, 27 November 2013, p. 20023, lines 6–9. Emphasis added.
- 105 Article II of the U.N. Convention for the Prevention and Punishment of the Crime of Genocide; reproduced verbatim in Article 4 of the ICTY Statute.
- 106 Article 7 of the Statute of the International Criminal Court (ICC). Although the language of Article 5 of the ICTY Statute differed in that it required a connection to an armed conflict, the *Mladić* Trial Chamber explicitly referred to a widespread or systematic attack as an element of crimes against humanity. See *Mladić Judgment*, para. 5172.
- 107 *Mladić Transcripts*, 25 June 2015, p. 36733, lines 2–11.
- 108 *Mladić Judgment*, para. 3526. Emphasis added.
- 109 See ICTY, *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Chamber, Judgment, 19 April 2004, para. 8.
- 110 *Mladić Judgment*, para. 3536. Emphasis added.
- 111 See e.g. N. Robinson, *The Genocide Convention – A Commentary* (New York, Institute of Jewish Affairs – World Jewish Congress, 1960), p. 58; B. Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc. E/CN.4/Sub.2/1985/6, p. 16, para. 29. *Contra*, see P. N. Drost, *The Crime of State – Penal Protection for Fundamental Freedoms of Persons and Peoples, Book II: Genocide – United Nations Legislation on International Criminal Law* (Leyden, A. W. Sythoff, 1959), p. 85. For case law, see e.g. ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber, Judgment, 21 May 1999, para. 97; ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Chamber, Judgment, 7 June 2001, para. 64. ICTY, *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, Trial Chamber, 14 December 1999, paras 81–2. At the domestic level, it seems only the US legislation requires that the acts be committed ‘with the specific intent to destroy, in whole or in substantial part’ a protected group. See T. Hoffmann, ‘The Crime of Genocide in Its (Nearly) Infinite Domestic Variety’, in M. Odello and P. Łubiński (eds), *The*

- Concept of Genocide in International Criminal Law: Developments after Lemkin* (Abingdon: Routledge, 2020), pp. 67–97, at p. 74. Emphasis added.
- 112 See B. Bryant, ‘Substantive Scope of the Convention’, in ‘Comment: The United States and the 1948 Genocide Convention, Part I’, *Harvard International Law Journal*, 16:3 (1975), 686–98, at 692: ‘the number of victims may be of evidentiary value with respect to proving the necessary intent’.
- 113 C. Fournet, ‘The (Expected) Guilty Verdict against Ratko Mladić’, *International Law Under Construction, Blog of the Groningen Journal of International Law* (2017), <https://grojil.org/2017/12/27/the-expected-guilty-verdict-against-ratko-mladic/>, accessed 24 June 2020.
- 114 *Ibid.*
- 115 *Ibid.*
- 116 The *travaux préparatoires* are vague on the meaning of genocide ‘in part’; the draft Convention merely observed that ‘the systematic destruction even of a fraction of a group of human beings constitutes an exceptionally heinous crime’. Draft Convention for the Prevention and Punishment of Genocide presented by the Secretary-General, 26 June 1947, U.N. Doc. E/447, p. 24. During the drafting, France suggested that the definition of genocide should be broad enough to include the murder of a single person. U.N. Doc., 3 U.N. GAOR, Sixth Committee (1948), 91–2. The *Ad Hoc* Committee expressed the view that the murder of an individual could be considered an act of genocide if it was part of a series of similar acts aimed at the destruction of the group to which the victim belongs. See Robinson, *The Genocide Convention*, p. 62. Article 6(a) of the Elements of Crimes of the ICC Statute specifies that ‘one or more persons’ may be the victim of the crime of genocide. Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002, part II. B. At the domestic level, section 6 of the German 2002 Code of Crimes Against International Law (Völkerstrafgesetzbuch) refers to ‘a member of a group’ rather than to ‘members of a group’. See S. Wirth, ‘Germany’s New International Crimes Code: Bringing a Case to Court’, *Journal of International Criminal Justice*, 1:1 (2003), 151–68 at 156.
- 117 *Mladić Judgment*, para. 3528. See also *ibid.*, para. 3437.
- 118 Massiveness is key for the qualification of extermination, see *ibid.*, para. 3116. For Prijedor, see para. 3036.
- 119 ICTY, *Prosecutor v. Mladić*, Case No. IT-09-92-PT, Fourth Amended Indictment, 16 December 2011, paras 35–9.
- 120 See *Mladić Judgment*, paras 3021–431. See also *ibid.*, para. 3116.
- 121 This conclusion disregards the fact that all the victims have yet to be found, as evidenced by the discovery in Knezevo of remains thought to be of Bosnian Muslim victims from Večići-Kotor Varoš. ‘Several Remains of Persons from the Previous War Found in Knezevo’, *Sarajevo Times*, 6 June 2020, [www.sarajevotimes.com/several-remains-of-persons-from-the-previous-war-found-in-knezevo/](http://www.sarajevotimes.com/several-remains-of-persons-from-the-previous-war-found-in-knezevo/), accessed 24 June 2020.
- 122 ‘UN Tribunal’s President Visits Bosnian Mass Grave’, *The Times of Israel*.