

## COMMENTARY

### The ICTY's Approach to 'Large-Scale' Killing: Reflections on the Lukić & Lukić Case

Andrea Ewing\*

#### 1. INTRODUCTION

Even against the backdrop of Bosnia and Herzegovina's brutal 1992-1995 war, the situation in eastern Bosnia in mid-1992 stands out for the sheer brutality and scale of the atrocities inflicted. Two of those involved in inflicting this damage, Milan Lukić and his cousin Sredoje Lukić, were recently convicted by the Trial Chamber of the ICTY, for war crimes and crimes against humanity committed against Muslim civilians in the municipality of Višegrad.<sup>1</sup>

Although Lukić's crimes generally were marked with a callous disregard for human life, the two most culpable incidents charged related to the burning to death of a large number of Muslim civilians in houses in Pionirska St. and Bikavac, both located in Višegrad township. On both occasions Lukić, together with a group of armed men, herded over 50 civilians into a single house, which had been prepared for the purpose. Lukić and his accomplices then set the houses alight and guarded the victims as they burned, ignoring their cries for help and shooting at those that attempted to escape. Needless to say, for crimes of such overwhelming cruelty, the sentence of life imprisonment imposed on Milan Lukić was richly deserved.

However, the Trial Chamber's treatment of extermination in relation to both the Pionirska St. and Bikavac murders raises some interesting questions about the definition of that crime under international law. The *actus reus* of that crime is clear: it requires simply that murders were committed on a 'massive' scale. But the Trial Chamber relied on several arguably irrelevant factors in determining that both the Pionirska St. and Bikavac incidents met this threshold, highlighting a lack of consensus on exactly what 'massiveness' means.

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\* Andrea Ewing (LLB/BA, LLM) is an intern at the Special Department for War Crimes, Prosecutor's Office of Bosnia and Herzegovina.

<sup>1</sup> Prosecutor v. Milan Lukić & Sredoje Lukić, Judgement, Case No. IT-98-32/1, 20 July 2009 (hereinafter 'Lukić Judgement').

## 2. THE MAJORITY JUDGEMENT

### 2.1. THE FACTS

Milan Lukić was convicted of two counts of extermination as a crime against humanity, based on the murders at Pionirska St. and Bikavac.<sup>2</sup> The Trial Chamber found that Milan Lukić, as a member of a group of armed men, persuaded a large group of Muslim civilians from a small village to gather in a single house in Pionirska St. Višegrad, suggesting that this was necessary for their safety.<sup>3</sup> Once the victims were trapped inside, the house was then set alight; the soldiers remained outside, shooting at the victims that jumped from the windows in an attempt to escape.<sup>4</sup> At least 59 individuals were killed in the Pionirska St. burning.<sup>5</sup>

The second incident took place in Bikavac, some two weeks later, and followed a similar pattern: armed men gathered civilians from several houses in Bikavac, telling them a convoy had been organised to transport them out of the area.<sup>6</sup> Milan Lukić assisted in forcing the group into a single house, before throwing in grenades and igniting the house.<sup>7</sup> The burning in Bikavac resulted in the death of approximately 60 Muslim civilians;<sup>8</sup> just one person survived the fire, and sustained horrific burns to most of her body.<sup>9</sup> The Trial Chamber noted evidence demonstrating that both of the killings were premeditated: the house in Pionirska St. had been prepared with an incendiary substance, while the windows and doors of the house in Bikavac had been blocked.<sup>10</sup>

### 2.2. THE LAW

The Trial Chamber set out the law relating to extermination, defining extermination as “killing on a large scale”<sup>11</sup> and noting that the *actus reus* of the crime is distinguished from that of murder by this element of mass destruction.<sup>12</sup> However,

<sup>2</sup> Sredoje Lukić was also charged with two counts of extermination, based on his alleged participation in the same incidents. However, he was acquitted on both counts: in respect of the Pionirska St. incident, although the Trial Chamber found by majority that Sredoje Lukić had assisted in transferring the group of civilians to the house, Judge Van den Wyngaert dissented as to whether the act constituted extermination (Lukić Judgement, paras. 637, 953). As to the Bikavac burning, the Trial Chamber (also by majority) found that Sredoje Lukić was not present during this incident (*Id.*, paras. 739, 955).

<sup>3</sup> Lukić Judgement, para. 566.

<sup>4</sup> *Id.*, paras. 560-561.

<sup>5</sup> *Id.*, para. 567.

<sup>6</sup> *Id.*, para. 641.

<sup>7</sup> *Id.*, para. 709.

<sup>8</sup> *Id.*, para. 709.

<sup>9</sup> *Id.*, paras. 659-661.

<sup>10</sup> *Id.*, paras. 560, 645, 945.

<sup>11</sup> *Id.*, para. 937.

<sup>12</sup> *Id.*, para. 938.

there is no numerical minimum of victims necessary to meet this threshold: the necessary scale is to be established “on a case-by-case basis, taking into account all relevant factors”.<sup>13</sup>

The Trial Chamber did not expressly set out the factors that might inform this assessment. However, it placed particular emphasis on several factors: a) the number and type of victims of the fire (around 60 people, mainly women, children and elderly); b) the manner in which the fire was prepared in the context of surrounding events (apparently a reference to the premeditation and organisation involved);<sup>14</sup> and, in respect of the Pionirska St. fire, c) the area from which the victims came (Koritnik, a small and less densely populated village some distance from Višegrad township). These factors were regarded as supporting the majority finding of mass destruction necessary for the *actus reus* of extermination.<sup>15</sup>

As to the last point, the majority (Judge Van den Wyngaert dissenting) held that the population density of the affected area was a relevant consideration in assessing the scale of killings. “In other words, while there may be a higher threshold for a finding of extermination in a densely-populated area, it would not be inappropriate to find extermination in a less densely-populated area on the basis of a lower threshold, that is, fewer victims.”<sup>16</sup> Based on the above features, the majority concluded that both the Pionirska St. and the Bikavac incidents *individually* met the threshold for extermination.

### 3. JUDGE VAN DEN WYNGAERT’S DISSENT

Judge Van den Wyngaert dissented on the relevance of the last factor, namely population density.<sup>17</sup> She noted that extermination requires neither discriminatory intent, nor a pre-existing plan or policy.<sup>18</sup> Accordingly, the massive scale of an extermination is the single factor giving it its unique gravity, distinct from murder.<sup>19</sup> In order to preserve this gravity, she argued, it is necessary to retain a high threshold for the requirement of massiveness.<sup>20</sup> She suggested that an extermination “almost necessarily must be of such a scale of killing as to be

<sup>13</sup> *Id.*, para. 938.

<sup>14</sup> Lukić Judgement, paras. 943-945, para. 949 (“In relation to the charge of extermination, the Trial Chamber has considered, in particular, the manner in which [the house burned in Bikavac] was prepared and the Muslim victims were herded into the house.”)

<sup>15</sup> Lukić Judgement, para. 945.

<sup>16</sup> *Id.*, para. 938.

<sup>17</sup> Prosecutor v. Milan Lukić & Sredoje Lukić, Partly Dissenting Opinion of Judge Van Den Wyngaert, IT-98-32/1, 20 July 2009 (hereinafter ‘Van Den Wyngaert Dissenting Opinion’), paras. 1114 *et seq.*

<sup>18</sup> Van Den Wyngaert Dissenting Opinion, para. 1115 (citing Akayesu Appeal Judgement, para. 469, regarding the lack of discriminatory intent; and Prosecutor v. Krstić, Appeal Chamber Judgement, Case No. IT-98-33-A, 17 April 2004, para. 225, for the lack of plan or policy).

<sup>19</sup> Van Den Wyngaert Dissenting Opinion, para. 1115.

<sup>20</sup> *Id.*, para. 1116.

prohibitive to identifying, naming, or counting the victims with specificity”,<sup>21</sup> citing the killings of thousands of individuals in Rwanda and Srebrenica as killings warranting this additional indicium of gravity.<sup>22</sup>

Although acknowledging that the circumstances of the killing might be relevant in determining massiveness, Judge Van den Wyngaert took the view that the primary factor remained “the sheer scale of killings”,<sup>23</sup> and rejected the view that the circumstances in which a mass killing was committed could replace this threshold requirement.<sup>24</sup> In particular, she regarded consideration of population density as inappropriate, noting that this introduced a new and unacceptably subjective element to the crime: “[a]n analysis of population density is dependent upon how one defines the relevant reference area.”<sup>25</sup> Even if an objective standard for defining the reference area could be found, she noted that such a flexible standard could lead to several problematic outcomes. For example, the killing of twenty people in a small village could constitute extermination, whereas the killing of thousands of persons in a large city might not. Similarly, where the victims of a single incident of killing came from different geographical areas, only some of the victims might be regarded as having been ‘exterminated’, while the rest were simply murdered.<sup>26</sup> She pointed out that the population of Višegrad at the time was over 21,000; against a reference group of this size, 60 or 70 killings would not meet the ‘large-scale’ threshold.<sup>27</sup>

Judge Van Den Wyngaert suggested that to lower the threshold for extermination took insufficient account of the already very high culpability ascribed to the crime of murder. She regarded murder charges as appropriate to convey the gravity of both individual and multiple killings, noting that the circumstances of the killing would in any case be taken into account during sentencing.<sup>28</sup> By contrast, retaining a high threshold for the crime of extermination was necessary to enable it to describe, with sufficient seriousness, killings on a scale comparable to genocide but lacking in genocidal intent. “Extermination therefore must be distinguished as a crime that, like genocide, is distinct from and of higher gravity than the individual murders that make up the entire incident.”<sup>29</sup>

Judge Van Den Wyngaert did not regard either of the incidents with which Lukić was charged as meeting the threshold for extermination. Although noting that single incidents of killing had previously been held to meet the threshold for extermination – notably by the Appeals Chamber in *Brđanin*<sup>30</sup> – the Judge noted that in those cases, several separate incidents of killing were aggregated into a single charge of extermination, meaning that the total number of victims

<sup>21</sup> *Id.*, para. 1115.

<sup>22</sup> *Id.*, para. 1122.

<sup>23</sup> *Id.*, para. 1117.

<sup>24</sup> *Id.*, para. 1117.

<sup>25</sup> *Id.*, para. 1118.

<sup>26</sup> *Id.*, para. 1119.

<sup>27</sup> *Id.*, para. 1127.

<sup>28</sup> *Id.*, para. 1121.

<sup>29</sup> *Id.*, para. 1123.

<sup>30</sup> Prosecutor v. Brđanin, Appeals Chamber Judgement, Case No. IT-99-36, 3 April 2007, paras. 467-473, 480-482.

were in the thousands.<sup>31</sup> She compared the present case to *Martić*, in which the Trial Chamber held that the killing of 30 civilians, although organised and callous, did not meet the required threshold for extermination.<sup>32</sup> Nor, in that case, did several incidents of multiple killings meet the threshold for ‘accumulated’ extermination, given the limited timeframe and territory within which the killings were committed.<sup>33</sup> Accordingly, she was unable to concur that the killings at Pionirska St. and Bikavac constituted extermination.<sup>34</sup>

#### 4. THE THRESHOLD FOR EXTERMINATION: WHAT CONSTITUTES ‘MASSIVENESS’

Extermination emerged as a crime against humanity at Nuremberg, for example in the *Justice* case.<sup>35</sup> The defendants in that case were convicted for their role as Prosecutors, Judges and officials in the Special Courts of the Third Reich’s Justice Ministry, tribunals that were used to sentence Jews, Poles and other allied national civilians to death. The Tribunal noted that the charge required proof of “(1) the fact of the great pattern or plan of racial persecution or extermination; and (2) specific conduct of the individual defendant in furtherance of the plan.”<sup>36</sup> On the facts, the accused had, by participating in the enactment and enforcement of the relevant German laws, contributed to a plan “for the persecution and extermination of Jews and Poles”.<sup>37</sup> Beyond this, the precise meaning of ‘extermination’ was not discussed.

Subsequent jurisprudence has established that extermination requires the same physical elements as murder, but with the additional requirement that the killings occur on a massive scale.<sup>38</sup> Given the scale of the killings involved in the Holocaust, there was little need to consider this threshold at Nuremberg;

<sup>31</sup> Van Den Wyngaert Dissenting Opinion, para. 1124-1125.

<sup>32</sup> Prosecutor v. Martić, Trial Chamber Judgement, Case No. IT-95-11, RSK, paras. 404-405.

<sup>33</sup> Van Den Wyngaert Dissenting Opinion, para. 1126.

<sup>34</sup> *Id.*, para. 1128.

<sup>35</sup> See US v. Joseph Altstotter, Law Reports of the Trials of War Criminals (UN War Crimes Commission), Vol. VI, p. 1 (hereafter ‘the *Justice* case’). The word ‘extermination’ was also used to describe massive killings in the context of war crimes trials. See e.g. UK v. Bruno Tesch and others, Law Reports of the Trials of War Criminals (UN War Crimes Commission), Vol. I, p. 93 (hereafter ‘the *Zyklon B* case’), Tesch was prosecuted for supplying poison gas used for killing allied nationals in concentration camps, including Auschwitz.

<sup>36</sup> *Id.* In convicting the defendants in the *Justice* case, the Tribunal noted that none of the accused had himself murdered an individual; the more important aspect was the wider design to which they had contributed. The gravamen of the charge was not “[s]imple murder and isolated incidents of atrocities”, but the “nationwide governmentally organised system of cruelty and injustice.” *Id.*, p. 49.

<sup>37</sup> *Justice* case, p. 62.

<sup>38</sup> Prosecutor v. Brđanin, Trial Chamber Judgement, Case No. IT-99-36, 1 September 2004 (hereafter ‘Brđanin Trial Chamber Judgement’), para. 388.

however, this key element of the crime of extermination has since been expressed in a number of ways in ICTY jurisprudence, for example as “mass killing”,<sup>39</sup> or killing on a “massive”,<sup>40</sup> “vast”,<sup>41</sup> or “large”<sup>42</sup> scale.

As *Lukić* confirmed, the established position is that there is no minimum number of victims that will meet this threshold for extermination; rather, the circumstances of the killings are to be assessed “on a ‘case-by-case basis’, taking account of all the relevant factors.”<sup>43</sup> However, the factors that might be relevant to this assessment, and the rationale behind them, are rarely fully articulated.<sup>44</sup> In this context, the lack of an ascertainable ‘floor’ for the *actus reus* of the crime has seen a steady decline in its perceived seriousness. Thus extermination, having begun as a crime describing the systematic and widespread execution of millions of Jews and other civilians, has recently been applied to the killing of 24 civilians imprisoned in a detention facility.<sup>45</sup>

Given that there is no numerical minimum of victims, the assessment of the requisite scale for extermination must necessarily be influenced by contextual factors. The Trial Chamber Judgement in *Lukić* demonstrates the ongoing difficulty that this flexibility creates in determining with precision which fact patterns will meet the requisite threshold of massiveness, and more importantly, why.

#### 4.1. FACTORS RELEVANT TO ‘MASSIVE’ SCALE

The majority in *Lukić* took several factors into account in concluding that each house-burning constituted extermination. On closer examination, however, several of these factors have little if any bearing on the massiveness of the crime.

First, the Trial Chamber appears to have regarded as relevant the vulnerability of the victims, noting that those killed in Pionirska St. included elderly and children. This factor undoubtedly increases the culpability of the crime, and rendering victims vulnerable before killing them might also provide cogent evidence of an intent to kill. But it does not affect the key requirement of scale. Many murder victims are also vulnerable; this feature does not distinguish the nature of the crime unless the killing was also on a massive scale.

Second, the Trial Chamber referred to the preparation of the Pionirska St. fire in the context of the events occurring on that date, and the fact that Milan Lukić, along with the other men involved, duped victims into gathering there on false

<sup>39</sup> Prosecutor v. Blagojević, Trial Chamber Judgement, Case No. IT-02-60, 17 January 2005 (hereafter ‘Blagojević Trial Chamber Judgement’), para. 571.

<sup>40</sup> Blagojević Trial Chamber Judgement, para. 716.

<sup>41</sup> Prosecutor v. Vasiljević, Trial Chamber Judgement, Case No. IT-98-32, 29 November 2002, para. 224 (hereafter ‘Vasiljević Trial Judgement’).

<sup>42</sup> Lukić Judgement; Blagojević Trial Chamber Judgement, para. 576.

<sup>43</sup> Lukić Judgement, para. 938; Blagojević Trial Chamber Judgement, para. 573.

<sup>44</sup> See e.g. Prosecutor v. Brđanin, Appeals Chamber Judgement, Case No. IT-99-36, 3 April 2007 (hereafter ‘Brđanin Appeal Judgement’), simply concluding that five individual incidents of killing each independently met the threshold for massiveness, “in the circumstances in which they occurred”: para. 472.

<sup>45</sup> Krajišnik Trial Chamber Judgement, para. 720-721 (see incident relating to Kalinovik, p. 267).

pretences. This appears to refer to the premeditation and planning involved in the crime; although this was noted to be evidence of intent to kill on a large scale, it was also cited as a factor tending to show the massiveness of the crime.<sup>46</sup>

The suggestion that premeditation and planning establishes the large scale of a crime is a *non sequitur*. The reality is exactly the converse: if a crime is of sufficient scale, it will necessarily involve planning. That planning or organisation is a factual corollary of mass killing, rather than a legal element of the crime, was recognised in *Krstić*: the Trial Chamber held that the massiveness required for extermination necessarily assumed a substantial degree of organisation and preparation.<sup>47</sup> Similarly, the Trial Chamber in *Stakić* held that massiveness “assumes a degree of planning”.<sup>48</sup> However, the Appeals Chamber in *Krstić* unequivocally rejected the suggestion that a plan or policy was an element of the underlying crime of extermination.<sup>49</sup>

As against this, planning and organisation may contribute to a finding of massive scale by linking several separate incidents of killing into a single extermination, a point that will be considered later. However, this point holds only where the extermination is alleged to have been perpetrated over a number of separate incidents. By contrast, Lukić was charged with a single count of extermination in respect of each incident. This being so, the planning involved in the crime may increase its culpability, but does not increase its scale.

The last factor considered in *Lukić* in determining the massiveness of the crime – population density – arguably is relevant to a determination of scale, but for reasons other than those suggested by the majority. This point merits exploration in greater depth.

#### 4.2. THE RELEVANCE OF POPULATION DENSITY

The majority in *Lukić* took the view that the low population density of a given geographical area reduces the necessary threshold for killings in that area to constitute extermination. In other words, the massiveness of an extermination should be determined by assessing the proportion of the local population that is killed.

Contrary to Judge Van Den Wyngaert’s view, I believe that population density conceivably has some relevance to an assessment of scale. In fact, excluding resort to a simple numerical ‘body count’, the proportion of local population killed is possibly the most objective measure by which the scale of killings in a given area could be determined. In this regard, the majority’s approach finds

<sup>46</sup> Lukić Judgement, paras. 944-955.

<sup>47</sup> Prosecutor v. Krstić, Trial Chamber Judgement, Case No. IT-98-33, para. 501 (hereafter ‘Krstić Trial Judgement’).

<sup>48</sup> Prosecutor v. Stakić, Trial Chamber Judgement, Case No. IT-97-24, 31 July 2003, para. 640 (hereafter ‘Stakić Trial Chamber Judgement’).

<sup>49</sup> Prosecutor v. Krstić, Appeals Chamber Judgement, Case No. IT-98-33, 19 April 2004, para. 225.

support in the Appeal Chamber Judgement in *Kunarac*, which suggested that the impact of an attack on the targeted community is a factor to be taken into account in determining whether it was widespread.

In that case, the Appeals Chamber confirmed that the appropriate approach is to determine the civilian population targeted, then to assess whether *within that context* the attack was widespread. Relevant factors for consideration include the number of victims, means, methods and resources used and – importantly, for present purposes – the consequences of the attack on the targeted population.<sup>50</sup> This implies that a comparison between the number of victims and the wider civilian population is relevant to determining whether it is widespread; a similar test could be applied to determine whether exterminatory killings occurred on a ‘massive’ scale.

However, population density is a useful measure of scale only if it is consistently applied to a similar, and relatively large, geographical area. Massiveness is an objective standard, and while ‘impact on the population’ represents a more nuanced measure than simply ‘number of victims’, the size of the reference area should nevertheless be fairly stable.

This is where the Trial Chamber in *Lukić* erred: by defining the geographical reference area for ‘local population’ to cover only the area from which the victims came. If the geographical reference area can be framed to fit the group of victims targeted, the inquiry is no longer about the proportion of a population killed; rather, it is about the proportion of the *targeted group* that was killed. But the destruction of a group cannot, in and of itself, establish the scale necessary for an extermination.

#### 4.3. THE IRRELEVANCE OF DESTRUCTION OF AN IDENTIFIABLE GROUP

Arguably, underpinning the majority reasoning on extermination is a more questionable assumption: that the obliteration of an identifiable group of individuals might constitute extermination, even if numerically the murders involved did not suggest killing on a massive scale. The victims of the Pionirska St. burning were viewed as a distinct group, united by their geographical origin (the village of Koritnik), which group had been targeted and effectively wiped out by *Lukić* and his accomplices.

This echoes a similar approach in *Krstić*,<sup>51</sup> in which the Trial Chamber suggested that the destruction of a distinct and identifiable group can replace – or at least, reduce – the requirement of ‘massive’ scale. The Trial Chamber in that case distinguished genocide from extermination, pointing out that the latter crime lacked both the requirement for discriminatory intent and the intent to destroy.<sup>52</sup> However, it suggested that the requisite scale for extermination could be replaced by the fact that a particular group was targeted:

<sup>50</sup> Prosecutor v. *Kunarac*, Appeals Chamber Judgement, Case No. IT-96-23-A, 12 June 2002, paras. 95-96 (hereafter ‘*Kunarac Appeal Judgement*’).

<sup>51</sup> *Krstić* Trial Judgement, para. 499.

<sup>52</sup> *Id.*, para. 500 (referring to the Commentary on the International Law Commission’s Draft Code).

The very term ‘extermination’ strongly suggests the commission of a massive crime, which in turn assumes a substantial degree of preparation and organisation. It should be noted, though, that ‘extermination’ could, theoretically, be applied to the commission of a crime *which is not ‘widespread’ but nonetheless consists in eradicating an entire population, distinguishable by some characteristic(s) not covered by the Genocide Convention, but made up of only a relatively small number of people*. In other words, while extermination generally involves a large number of victims, it may be constituted even where the number of victims is limited.<sup>53</sup>

The view that the word ‘extermination’ connotes the eradication of an identifiable group may be the result of inaccurate or ambiguous use of that term, both at Nuremberg and since. During the Nuremberg trials, the term ‘extermination’ was used to describe acts that would now likely be characterised as genocide, such as the “persecution and extermination” of religious or national groups, such as Jews and Poles.<sup>54</sup> Other post-World War II cases used the terms ‘extermination’ and ‘genocide’ interchangeably,<sup>55</sup> and suggest that extermination contains an element of total destruction or “annihilation”.<sup>56</sup> Similarly, ICTY Trial Chambers have sometimes used the term ‘extermination’ to describe the *actus reus* of genocidal killings.<sup>57</sup> Inevitably, such ambiguous uses of the word fuel the misconception that the obliteration or destruction of a particular group constitutes extermination, irrespective of the scale on which the killings occur.

Despite the popular connotation of the word ‘extermination’, however, its legal meaning includes no such element of destruction. The victims of an extermination need not be united by any particular characteristic: for example, the victims may comprise individuals that are *not* members of the political ruling party, or may be united by nothing more than their presence in a particular geographical area.<sup>58</sup> Indeed, not even this level of unity is required: an extermination would still be

<sup>53</sup> Krstić Trial Judgement, para. 501. Emphasis added.

<sup>54</sup> See e.g. the *Justice Trial*; *Barbie*, cited in *Prosecutor v. Kupreskić*, Trial Chamber Judgement, Case No. IT-95-16, 14 January 2000 (hereafter ‘*Kupreskić Trial Chamber Judgement*’), para. 602. See also pre-Nuremberg debate discussed in *Vasiljević Trial Judgement*, para. 218.

<sup>55</sup> *Attorney-General v. Adolf Eichmann*, District Court of Jerusalem, Criminal Case No. 40/61 (hereafter *Eichmann*), cited in *Vasiljević Trial Chamber Judgement*, para. 224, p. 85, n. 578; see also *Kupreskić Trial Chamber Judgement*, para. 602.

<sup>56</sup> See e.g. *Vasiljević Trial Chamber Judgement*, para. 224, noting that in *Eichmann* extermination was variously used to connote “killing on a vast scale, annihilation, extinction, death, elimination.”

<sup>57</sup> See e.g. *Kupreskić Trial Chamber Judgement*, para. 602; *Jelisić Trial Chamber Judgement*, para. 82 (holding that “international custom admits the characterisation of genocide even when the *exterminatory* intent only extends to a limited geographical zone.” Emphasis added. See also ICTR jurisprudence, e.g. *Prosecutor v. Kayishema*, Trial Chamber Judgement, para. 630 (“the terms extermination and destroy are interchangeable in the context of [the crimes of extermination and genocide].”))

<sup>58</sup> *Prosecutor v. Stakić*, Trial Chamber Judgement, Case No. IT-97-24, 31 July 2003, para. 639 (hereafter *Stakić Trial Chamber Judgement*).

an extermination if all the victims shared were their identity as human beings.<sup>59</sup> What is necessary is that the crime is collective, rather than being directed against singled-out individuals.<sup>60</sup>

As there is no required ‘target group’, it follows that there can be no requirement that any proportion of a particular group be destroyed.<sup>61</sup> It is the lack of both these elements that enables a single course of conduct to support cumulative convictions for genocide, persecution and extermination. Factually, of course, it is true that the lack of a discriminatory or destructive intent as a required element of the crime means that extermination will often catch the annihilation of a targeted group of people, either where intent to destroy the group cannot be made out,<sup>62</sup> or where the victims are united by a characteristic not covered by the Genocide Convention.<sup>63</sup> But this protection is incidental to the special value protected by the crime of extermination, which might be termed ‘the right of humanity to exist’.<sup>64</sup> As reflected by the *actus reus*, all that is necessary to violate this right is mass killing; and the killing may be indiscriminate, provided that the victims are predominantly civilian.

Of course, the fact that destruction of a group is not *required* does not mean that it is wholly irrelevant to an assessment of scale. On the contrary, the fact that an entire sub-group of society was wiped out is a factor that legitimately might support a finding of massiveness. However, the destruction of an identifiable group cannot replace this requirement altogether. As an example, the killing of the only three Hindu inhabitants in a Christian town of 1,000 may well be persecutory murder or even genocide, but it cannot be described as ‘massive’ simply because a high proportion of the targeted group was killed.

The position is different for genocide, because the necessary *mens rea* – intent to destroy a group in whole or part – is necessarily relative. The fact that a high proportion of a targeted population were killed is therefore highly probative of genocidal intent, irrespective of the scale on which the killings occurred.<sup>65</sup> Further, it is possible to commit genocide within a limited geographical area,<sup>66</sup>

<sup>59</sup> The Commentary on the International Law Commission’s *Draft Code of Crimes against the Peace and Security of Mankind* (1996), although written post-1992, states that “[e]xtermination covers situations in which a group of individuals who do not share any common characteristics are killed”. See *Prosecutor v. Ntakirutimana*, Appeals Chamber Judgement, Case No. ICTR-96-17-A, 13 December 2004, para. 518.

<sup>60</sup> *Brđanin Trial Chamber Judgement*, para. 390; *Stakić Trial Chamber Judgement*, para. 639-640 (holding that “killings need not be limited in place or time”).

<sup>61</sup> See e.g. *Vasiljević Trial Judgement*, para. 228 (noting that discrimination – or motives generally – were irrelevant to the *mens rea* requirement of extermination).

<sup>62</sup> See e.g. *Krstić Trial Chamber Judgement*, para. 505.

<sup>63</sup> *Krstić Trial Chamber Judgement*, para. 501.

<sup>64</sup> See UN General Assembly Resolution on the Crime of Genocide, 1948 96(1), 11 December 1948 (stating that “[g]enocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings.”)

<sup>65</sup> *Krajišnik Trial Chamber Judgement*, para. 868 (considering the number of Muslims and Croats present in the area where the killings took place, and the selection of the victims, as relevant to genocidal intent).

<sup>66</sup> *Jelišić Trial Chamber Judgement*, para. 82 (holding that ‘international custom admits the characterisation of genocide even when the exterminatory intent only extends to a limited

where this is the case, the meaning of a ‘substantial part’ of the targeted group can only be assessed against the population of the targeted group within that geographical area.

By contrast, for an extermination to be termed *objectively* massive, the scale of the killings must be assessed against a population broader than simply those killed. There is an element of tautology in first identifying the individuals targeted, defining the group’s identity and size based on the characteristics that these victims share, then deeming that they were ‘exterminated’ on the basis that the entire group was destroyed. If, as the *Lukić* majority Judgement demonstrates, a group may be defined by characteristics as transient and manipulable as place of residence, there will be few groups of victims that cannot be found to have something in common.

This highlights a further problem with the approach taken in *Lukić*, and advocated in *Krstić*: the lack of any clearly defined characteristics that may unite a group, and thereby substitute for a finding of massiveness.

First, retaining the distinction between extermination, persecution and genocide would seem to require that the only groups that could be ‘exterminated’ on a smaller scale would be those united by features *other* than national, ethnic, racial, religious or political characteristics. *Krstić* suggested that groups protected by the Genocide Convention would not qualify for this diluted numerical threshold, presumably because such an approach would create problems for cumulative convictions.<sup>67</sup> The unique element of extermination, as distinct from genocide and persecution, is the massive scale on which the killings take place.<sup>68</sup> If the targeting and destruction of a racial or political group can constitute extermination, even if its destruction does not involve killings on an objectively massive scale, there is nothing to distinguish extermination from charges of genocide or persecutory murder.

Unfortunately, excluding political, racial, religious, national or ethnic identity leaves little in the way of objectively verifiable characteristics that could unite the victims of an extermination. And the lack of any limits on the kind of group that may replace the threshold of massiveness introduces the risk that the group will be tailored to fit the victims actually killed.

Nor is geographical origin a sufficiently ascertainable means of defining the relevant group. Defining the victims as a group united by their geographical origin tends to obscure the individuals’ membership of a larger population; the victims of the Pionirska St. burning were residents of Koritnik, but were also residents

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geographical zone.’ Accordingly, the meaning of ‘substantial part of the group’ would be assessed within that context.

<sup>67</sup> The position consistently taken by the ICTY Appeals Chamber is that extermination is not subsumed by genocide or persecution, because it requires a distinct element, namely killing on a massive scale. See *Krstić Appeals Chamber Judgement*, paras. 225-226; for the approach applied, see *Krajišnik Appeals Chamber Judgement*, paras. 388-391. If the elimination of groups protected by the Genocide Convention could constitute extermination even if the number of victims were limited, there would be nothing to distinguish extermination from genocide. Arguably, the same problem persists in respect of persecution; if groups targeted for their political affiliations could be ‘exterminated’ even in limited numbers, persecutory murder would subsume extermination.

<sup>68</sup> *Krstić Appeals Chamber Judgement*, paras. 225-226.

of Višegrad township, Višegrad municipality, and Bosnia and Herzegovina. As Judge Van Den Wyngaert noted, it is unclear why the reference area for ‘population density’ was so narrow, rather than encompassing the much larger civilian population of Višegrad from which the rest of Lukić’s victims came.

The majority’s analysis was therefore flawed not because they took population density into account, but because they regarded the relevant population density as that of the victim group’s village of origin. Essentially, the majority treated the victims as constituting their own community, against which the massiveness of the crime could be assessed. But ‘massiveness’ is an objective, not a relative standard, and while the meaning of that term might vary depending on the context, it will not necessarily be met simply because an identifiable group was entirely eliminated. There must, therefore, be some objective population against which the destruction of a group or community can be termed ‘massive’.

Arguably, the fact that killings targeted a specific group of victims is of greater relevance as a factor linking the incidents of murder said to amount to an extermination. Evidence suggesting that individuals sharing the same characteristics were targeted over a wider geographical area might therefore assist a finding of massive scale not because it points to the destruction of a group, but because it links killings by different perpetrators in different locations, enabling a larger number of murders to be taken into account. Thus in *Krajišnik* the Trial Chamber held that the killings forming a single extermination “must form part of the same incident, taking into account the time and place of the killings, *the selection of the victims*, and the manner in which they were targeted.”<sup>69</sup> This raises a point not considered by the majority in *Lukić*: the possibility that the Pionirska St. and Bikavac killings constituted a single incident of extermination.

#### 4.4. SINGLE VS. MULTIPLE INCIDENTS

As Judge Van Den Wyngaert noted in her dissenting opinion, extermination generally has been charged as a single count, constituted of several smaller incidents of multiple murder. Establishing a link between killings perpetrated by different people in different locations by different methods is necessary to establish not only *actus reus*, but *mens rea*: if the individual killings are not of themselves massive, there must be some other factor that would alert the individual perpetrators to the fact they were participating in a wider set of killings.<sup>70</sup> Indeed, earlier cases place greater focus on the scale of the wider enterprise of murder, and note that it is unnecessary that the accused personally committed murders on a massive scale.<sup>71</sup>

<sup>69</sup> Prosecutor v. Krajišnik, Trial Chamber Judgement, Case No. IT-00-39-T, 27 September 2006, para. 716. Emphasis added.

<sup>70</sup> This was noted by the Appeals Chamber in *Brđanin*, which held that the Trial Chamber had failed to consider the *mens rea* of the direct perpetrators of the extermination. *Brđanin* Appeals Chamber Judgement, paras. 471-472.

<sup>71</sup> In convicting the defendants in the *Justice* case, the Tribunal noted that none of the accused had himself murdered an individual; the more important aspect was the wider design to which they had contributed. The gravamen of the charge was not “[s]imple murder and isolated incidents of atrocities”, but the “nationwide governmentally organised system of cruelty and injustice.” *Justice*

Extermination has been said to require killings committed in close proximity in time and place,<sup>72</sup> and *Krajišnik* suggests the means of killing and selection of the victims may also provide the necessary link between separate killings. In practice, however, these factors are rarely consistently applied – if they are applied at all.

In *Brđanin*, for example, it was suggested that the *actus reus* of extermination could be constituted by “the accumulation of separate *and unrelated* incidents, meaning on an aggregated basis”.<sup>73</sup> The extermination alleged in that case was comprised of a large number of killings that had occurred in the relevant municipality, resulting in a total of 1,669 dead. However, the Trial Chamber did not explain the grounds on which these killings had been selected to form a ‘single incident’ of extermination: the individual killings ranged in size from 3 to 300 victims; some had occurred in detention facilities, some during civilian convoys or forced transfers, and others during attacks on villages by Bosnian Serb armed forces.<sup>74</sup>

The ostensibly more analytical approach set out in *Krajišnik* did not yield any more sensible result. Having articulated the factors that would link disparate killings into a single extermination, the Trial Chamber then went on to apply this analysis to determine which of the individual incidents of multiple murder charged *independently* met the threshold for extermination.

This is an unhelpful use of a potentially helpful analysis. Where several individual murders are committed in the course of a single incident, the criteria linking killings to one another are so easily met that they add little to the inquiry. The more pertinent question – given that *Krajišnik* was convicted of just one count of extermination – is what linked each of the separate incidents of multiple murder to one other, such that regarding them as a single extermination was justified.

Arguably, the trend towards regarding single incidents of killing as constituting an extermination is problematic. For a number of reasons, the threshold of seriousness for extermination should require a particularly high number of victims where only a single incident of killing is charged.

First, killings concentrated over a small area and short time may be less likely to meet the threshold for massive scale. In *Martić*, therefore, evidence that killings were committed “within a limited period of time and within a limited territory” meant this element of the crime had not been met.<sup>75</sup> The fact that individual

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case, p. 49. See also *Prosecutor v. Akayesu*, Trial Chamber Judgement, Case No. ICTR-96-4-T, 2 September 1998, paras. 735-743. Akayesu was personally implicated in just 16 murders, but was convicted of extermination because he knew those murders were connected to others.

<sup>72</sup> *Prosecutor v. Kayishema and Ruyindana*, Trial Chamber Judgement, Case No. ICTR-95-1-T, 21 May 1999, para. 147.

<sup>73</sup> *Brđanin* Trial Chamber Judgement, para. 391. Emphasis added.

<sup>74</sup> *Id.*, paras. 400-408.

<sup>75</sup> *Prosecutor v. Martić*, Trial Chamber Judgement, Case No. IT-95-11, RSK, para. 404. This finding can be seen to result from a misreading of *Stakić*. In *Stakić* the Trial Chamber held that there was *no* requirement that killings occur on a vast scale within a confined time and place (but the defence submission that this is an element of extermination suggests that those elements would make killing *more* like an extermination). By *Martić*, however, this was being combined with

killings are strongly linked, or even perpetrated by the same perpetrators, does not dilute the requirement that, taken together, they meet the threshold of seriousness necessary for extermination.

On the contrary, where an extermination is alleged to occur in the course of a single transaction, the only factor available to establish its scale may be the number of victims. Perhaps for this reason, some of the distinctions drawn in *Krajišnik* appear relatively arbitrary. One ‘killing’ involved the shooting of 20 detainees in the Dom Kultur, Zvornik, on a single day by a single perpetrator;<sup>76</sup> it is difficult to see how this incident differs, on any of the grounds identified as relevant, from the execution of 24 detainees by Serb soldiers and police in an ammunition warehouse in Kalinovik. Yet the latter was held to constitute an extermination.<sup>77</sup>

Moreover, single incidents of extermination must be particularly serious to justify the same nomenclature that is applied to regimes that systematically kill thousands of individuals. Although an extermination need not involve repetitious conduct, it can be assumed that, the fewer the acts constituting an extermination, the greater the gravity of that single incident must be to qualify for the same marker of culpability. Again, the definition of a ‘widespread’ attack is instructive: in *Blaškić* the Trial Chamber indicated that “a crime may be widespread or committed on a large-scale by ‘the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude’”.<sup>78</sup> Likewise, we would expect that, if a single incident were to meet the threshold for a crime as serious as extermination, it would have to cause a very significant number of deaths to make it equally concerning.

Comparing ‘massive’ killings to ‘widespread’ crimes does not exaggerate the meaning of massiveness; on the contrary, the two standards are sometimes regarded as equivalent. In *Ntakirutimana*, for example, the ICTR Appeals Chamber suggested that extermination required participation in widespread or systematic killing.<sup>79</sup> Similarly, the Trial Chamber in *Blaškić* noted that

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the idea of aggregation (in *Brđanin*) to suggest that extermination could be proved based on “the accumulation of separate and unrelated incidents, meaning on an aggregated basis, *where* a large number of killings did not occur during a single incident in a concentrated place over a short period”. Emphasis added. Clearly, *Stakić* is not authority that killings concentrated in time and place might *not* constitute an extermination.

<sup>76</sup> Prosecutor v. Krajišnik, Trial Chamber Judgement, Case No. IT-00-39-T, 27 September 2006, para. 718 (see incidents relating to Zvornik, p. 266).

<sup>77</sup> Krajišnik Trial Chamber Judgement, para. 720-721 (see incident relating to Kalinovik, p. 267).

<sup>78</sup> Prosecutor v. Blagojević & Jokić, Trial Chamber Judgement, Case No. IT-95-14, 17 January 2005, para. 545.

<sup>79</sup> Prosecutor v. Ntakirutimana, Appeals Chamber Judgement, Case No. ICTR-96-10, para. 552 (holding that the *actus reus* of extermination included participation in widespread or systematic killing, or “subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death”. See also Stakić Appeal Chamber Judgement, paras. 259-260. See also International Law Commission *Draft Code of Crimes against the Peace and Security of Mankind* (1996), Article 18: the *chapeau* element for crimes against humanity in that Code requires that they be committed on a “large scale”. This suggests that the ‘large-scale’ killings required for extermination could be comparable in scale to a ‘widespread’ attack.

the words ‘directed against any civilian population’ and some of the sub-characterisations set out in the text of the Statute imply, both by their very nature and by law, an element of being widespread or organised, whether as regards to the acts or the victims. ‘Extermination’, ‘enslavement’ and ‘persecution’ do not refer to single events.<sup>80</sup>

The above analysis suggests that single incidents of multiple murder should rarely rise to the scale of an extermination. Absent the wider geographical impact, prolonged duration and large numbers of perpetrators involved in more repetitive and widespread killings, the only factor available to establish that a single mass killing crimes had a ‘massive’ impact is the number of victims killed, and the proportion of the civilian population that they represent. Taking this into account, it is questionable whether some of the incidents held to constitute extermination in *Lukić*, and in *Krajišnik* and *Brđanin* were sufficiently serious, in and of themselves, to qualify.

## 5. CONCLUSION: EXTERMINATION IN THE LUKIĆ CASE

The two sets of killings perpetrated by Milan Lukić would have constituted a clearer example of ‘massive’ killing had both incidents been considered together. Because the Pionirska St. and Bikavac murders were charged as two separate exterminations, the majority in *Lukić* did not consider the possibility of accumulating them into a single charge. However, there was arguably evidence that would have enabled them to do so, particularly given Lukić’s involvement in both incidents. At the time Milan Lukić forced the second group of civilians into the house in Bikavac and ignited it, he knew that he was committing a second incident of multiple murder, closely linked in place and time, and using identical means to those he had employed to murder the first group. If in these circumstances the killings cannot be regarded as sufficiently linked to be aggregated, there must be few that will.

Notably, aggregating the two incidents would have revealed the artificiality of treating the Pionirska St. victims as coming from a definable geographical area, given that the rest of Lukić’s victims were not from the village of Koritnik. While considering population density is an appropriate means of assessing the massiveness of the crime within its geographical context, the relevant reference area must be cast sufficiently widely to retain an objective comparator between different cases.

Nor was the majority entitled to assume that the destruction of a geographically defined group of individuals would necessarily constitute extermination. The impact of killings on the community is clearly relevant to their scale, but the relevant ‘community’ cannot be defined to fit the victims targeted. Rather, individual incidents of killing face a particularly high threshold of seriousness,

<sup>80</sup> Blaškić Trial Chamber Judgement, para. 202. The Trial Chamber refuted the suggestion that the elements of ‘widespread or systematic’ apply to the *actus reus* of extermination. See (to similar effect) Prosecutor v. Krstić, Appeal Chamber Judgement, Case No. IT-98-33-A, 17 April 2004, para. 225.

given that they lack other features that might establish massiveness. Although Lukić's crimes were inherently very *culpable*, the necessary threshold is one of scale; and the massiveness of a crime can be determined only against the broader context in which it occurred.