

**Declassified to Public
06 September 2012**

ANNEX A

AUTHORITY 21

**UNITED
NATIONS**

International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-02-60-T
Date: 17 January 2005
Original: English

IN TRIAL CHAMBER I, SECTION A

Before: Judge Liu Daqun, Presiding
Judge Volodymyr Vassilenko
Judge Carmen Maria Argibay

Registrar: Mr. Hans Holthuis

Judgement of: 17 January 2005

PROSECUTOR

v.

**VIDOJE BLAGOJEVIĆ
DRAGAN JOKIĆ**

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter McCloskey
Mr. Stefan Waespi
Ms. Antoinette Issa
Mr. Milbert Shin
Mr. Salvador Viada

Counsel for the Accused:

Mr. Michael Karnavas and Ms. Suzana Tomanović for Vidoje Blagojević
Mr. Miodrag Stojanović and Mr. Branko Lukić for Dragan Jokić

2. Article 5

541. Article 5 of the Statute enumerates crimes which can constitute crimes against humanity. In order to amount to a crime against humanity, the acts of an accused must be part of a widespread or systematic attack directed against any civilian population.¹⁸³⁹ This phrase encompasses the following elements:

- (i) there must be an attack;
- (ii) the attack must be widespread or systematic;
- (iii) the attack must be directed against any civilian population;
- (iv) the acts of the perpetrator must be part of the attack; and
- (v) the perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern.¹⁸⁴⁰

542. Additionally, the Statute of the Tribunal requires that the crimes be “committed in armed conflict, whether international or internal in character”.¹⁸⁴¹ The Appeals Chamber has considered this requirement to be a jurisdictional requirement.¹⁸⁴²

543. “Attack” in the context of a crime against humanity can be defined as a course of conduct involving the commission of acts of violence.¹⁸⁴³ It “is not limited to the use of armed force; it encompasses any mistreatment of the civilian population.”¹⁸⁴⁴ It can precede, outlast or run parallel to the armed conflict.¹⁸⁴⁵

544. The term “civilian” refers to persons not taking part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds detention or any other cause.¹⁸⁴⁶ It is a principle of customary international law that these persons are protected in armed conflicts.¹⁸⁴⁷ The presence within a population of members of resistance groups or former combatants who have laid down their arms does not alter its civilian

¹⁸³⁹ See also *Tadić* Appeal Judgement, para. 248.

¹⁸⁴⁰ *Kunarac* Appeal Judgement, para. 85.

¹⁸⁴¹ For the definition of “armed conflict”, see *supra* para. 536.

¹⁸⁴² *Tadić* Appeal Judgement, para. 249.

¹⁸⁴³ *Kunarac* Appeal Judgement, para. 89, endorsing the *Kunarac* Trial Judgement, para. 415.

¹⁸⁴⁴ *Kunarac* Appeal Judgement, para. 86.

¹⁸⁴⁵ *Id.*

¹⁸⁴⁶ *Blaškić* Appeal Judgement, paras 113-114. The term ‘civilian’ has been further defined in Article 50 of Additional Protocol I to the Geneva Conventions. This article states that a civilian is “any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.” Read together, Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention establish that members of armed forces and members of militias or volunteer corps forming part of such armed forces cannot claim civilian status.” *Blaškić* Appeal Judgement, para. 113. See also *Krnjelac* Trial Judgement, para. 56.

¹⁸⁴⁷ *Blaškić* Appeal Judgement, para. 113, fn. 220.

character.¹⁸⁴⁸ A population is considered a “civilian population” if it is predominantly civilian in nature.¹⁸⁴⁹ It is not necessary to demonstrate that the victims are linked to any particular side of the armed conflict.¹⁸⁵⁰ The Appeals Chamber has recently emphasised that “there is an absolute prohibition on the targeting of civilians in customary international law.”¹⁸⁵¹

545. The term “widespread” refers to the large-scale nature of the attack and the number of the victims.¹⁸⁵² A crime may be widespread by the “cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude”.¹⁸⁵³ The term “systematic” refers to an “organised nature of the acts of violence and the improbability of their random occurrence,”¹⁸⁵⁴ and is often expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis.¹⁸⁵⁵

546. The Appeals Chamber further provided a non-exhaustive list of factors that could be taken into account in determining whether an attack meets the requirements of “widespread” or “systematic”. These factors are: the consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes.¹⁸⁵⁶ Neither the attack nor the acts of the accused need to be supported by a “policy” or “plan”.¹⁸⁵⁷

547. A nexus is required between the acts of the accused and the attack on the civilian population. This nexus consists of two elements:

- (i) the commission of an act which, by its nature or consequences, is objectively part of the attack; and
- (ii) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof.¹⁸⁵⁸

The act or acts must not be isolated or random; they may not be so far removed from the attack that, having considered the context and circumstances in which it occurred, the act or acts cannot reasonably be said to have been part of the attack.¹⁸⁵⁹

¹⁸⁴⁸ *Blaškić* Appeal Judgement, paras 112-113.

¹⁸⁴⁹ *Krnjelac* Trial Judgement, para. 56; *Tadić* Trial Judgement, para. 638.

¹⁸⁵⁰ *Kunarac* Appeal Judgement, para. 89, in which the Appeals Chamber approved the interpretation of the Trial Chamber in *Kunarac* Trial Judgement, para. 423.

¹⁸⁵¹ *Blaškić* Appeal Judgement, para. 109.

¹⁸⁵² *Kunarac* Appeal Judgement, para. 94.

¹⁸⁵³ Yearbook of the International Law Commission 1996, Volume II, part 2, Report of the Commission to the General Assembly on the work of its forty-eight session, p. 47.

¹⁸⁵⁴ *Kunarac* Appeal Judgement, para. 94.

¹⁸⁵⁵ *Blaškić* Appeal Judgement, para. 101; *Kunarac* Appeal Judgement, para. 94.

¹⁸⁵⁶ *Kunarac* Appeal Judgement, para. 95.

¹⁸⁵⁷ *Kunarac* Appeal Judgement, para. 98.

¹⁸⁵⁸ *Kunarac* Appeal Judgement, para. 99. See also *Tadić* Appeal Judgement, para. 248.

548. The accused must possess the necessary *mens rea*, which includes:

- (i) the intent to commit the underlying offence or offences with which he is charged;
- (ii) the knowledge that there is an attack against the civilian population; and
- (iii) the knowledge that his acts comprise part of that attack.¹⁸⁶⁰

The *mens rea* requirement, however, does not entail knowledge of the details of the attack.¹⁸⁶¹ Furthermore, the accused need not share the purpose or the goal behind the attack.¹⁸⁶²

3. Findings

549. It has not been disputed that an armed conflict existed between the Republic of Bosnia and Herzegovina and its forces, and the Republika Srpska and its forces during the period relevant for the Indictment.¹⁸⁶³ Nor has it been disputed that this armed conflict existed in eastern Bosnia.¹⁸⁶⁴

Based on the evidence set out above in the Factual Background relevant to this case, the Trial Chamber finds that there is sufficient evidence to establish that there was an armed conflict in eastern Bosnia between 11 July and 1 November 1995.¹⁸⁶⁵

550. Based on all the evidence in this case, the Trial Chamber also finds that the underlying crimes with which the Indictment is concerned were closely related to the armed conflict. The acts with which the Accused are charged were committed as a result of the hostilities.

551. The Trial Chamber further finds that the attack was widespread or systematic. The attack, carried out by the VRS and MUP was planned and defined in the "Krivaja 95" order. The attack continued after the fall of Srebrenica and affected the approximately 40,000 people who lived within the Srebrenica enclave at the time of the attack.¹⁸⁶⁶

552. The attack was clearly directed against the Bosnian Muslim civilian population in the Srebrenica enclave. The Trial Chamber has heard evidence that the 28th Division of the ABiH was located in the Srebrenica enclave and that members of that division were among the men that formed the column.¹⁸⁶⁷ However, The Trial Chamber finds that the estimated number of members of the ABiH present in the enclave and among the column, ranging from about 1,000 soldiers to

¹⁸⁵⁹ *Blaškić* Appeal Judgement, para. 101. See also *Kunarac* Appeal Judgement, paras 96 and 100.

¹⁸⁶⁰ *Blaškić* Appeal Judgement, para. 124. See also *Kunarac* Appeal Judgement, paras 99,102.

¹⁸⁶¹ *Kunarac* Appeal Judgement, para. 102.

¹⁸⁶² *Kunarac* Appeal Judgement, para. 103.

¹⁸⁶³ Agreed Facts, paras 8, 9-14, 16-22, 32, 35-36, 46-47, 49, 51, 66-74, 77

¹⁸⁶⁴ Agreed Facts, 9-14 16-22, 32, 35-36, 46-47, 49, 51, 66-74, 77.

¹⁸⁶⁵ See *supra* section II, C.

¹⁸⁶⁶ See *supra* section II, C.

¹⁸⁶⁷ See *supra* section II, C and D.

C. Extermination

1. Applicable Law

570. The general requirements for crimes against humanity have been considered above.¹⁹⁰⁸

571. The jurisprudence of this Tribunal and the ICTR has on several occasions held that the core elements of extermination are essentially similar to those required for wilful killing under Article 2 and murder under Articles 3 and 5 of the Statute.¹⁹⁰⁹ The scale of the crimes is, however, distinct: extermination is “to be interpreted as murder on a larger scale - mass murder”.¹⁹¹⁰ The International Law Commission has found that “the act used to carry out the offence of extermination involves an element of mass destruction which is not required for murder.”¹⁹¹¹

572. The Trial Chamber finds that the elements for the crime extermination are as follows:

- a) act or omission that results in the death of persons on a massive scale (*actus reus*), and
- b) the intent to kill persons on a massive scale, or to inflict serious bodily injury or create conditions of life that lead to the death in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons (*mens rea*).¹⁹¹²

573. The *actus reus* of extermination consists of acts or omissions, which directly or indirectly lead to the death of a large number of persons. The Jokić Defence proposes that even though the number of victims “is not precisely defined [...] it should be in the thousands in order to meet the threshold of the severity and gravity of the crime of extermination.”¹⁹¹³ While some Trial Chamber’s have discussed whether the element of mass destruction includes a minimum number

¹⁹⁰⁸ See *supra* paras 541-554.

¹⁹⁰⁹ See *Krstić* Trial Judgement, paras 490-503; *Vasiljević* Trial Judgement, para. 229; *Stakić* Trial Judgement, para. 229. See also *Akayesu* Trial Judgement, paras 591-592; *Kayishema* Trial Judgement, para. 142-413; *Rutaganda* Trial Judgement, para. 82; *Bagilishema* Trial Judgement, para. 86; *Ntakirutimana* Appeal Judgement, para. 522. For the elements of murder, see *supra* para. 556.

¹⁹¹⁰ *History of the United Nations War Crimes Commission and the Development of the Laws of War*, compiled by the United Nations War Crimes Commission, 1948, p. 194, commenting on the interpretation of “extermination” in the Charter of the International Military Tribunal. See also Commentary on Fourth Geneva Conventions, in relation to Article 32, p. 223: “The idea of ‘murder’ may be compared with that of ‘extermination’, in the first sentence of this Article. While murder is the denial of the right of an individual to exist, extermination refuses the same right to whole groups of human beings; it is a collective crime consisting of a number of individual murders.”

¹⁹¹¹ Report of the International Law Commission on the work of its forty-eighth session 6 May-26 July 1996, Documents of the United Nations General Assembly’s 51st session, Supplement no. 10 (A/51/10), p. 97.

¹⁹¹² See, e.g., *Krnjelac* Trial Judgement, para. 324; *Krstić* Trial Judgement para. 485; *Stakić* Trial Judgement paras 641-642. The *Stakić* Trial Chamber clarified that the intent required for the crime of extermination should be the same as the *mens rea* of murder as a crime against humanity, namely *dolus directus* or *dolus eventualis*, and does not include a threshold of negligence or gross negligence. *Stakić* Trial Judgement para. 642.

¹⁹¹³ Jokić Defence Final Brief, para. 289.

of victims,¹⁹¹⁴ the Trial Chamber finds that there is no such requirement. In the Trial Chamber's opinion, any such attempt to set a minimum number of victims in the abstract will ultimately prove unhelpful; the element of massive scale must be assessed on a case-by-case basis in light of the proven criminal conduct and all relevant factors.¹⁹¹⁵

574. As mentioned above, the *mens rea* required for the crime of extermination consists of the intent to kill persons on a massive scale or to inflict serious bodily injury or create conditions of life that lead to the death of a large number of individuals.¹⁹¹⁶

575. Both the Blagojević and Jokić Defence refer to the definition of extermination adopted by the *Vasiljević* Trial Chamber, which considered that in addition to the intent to cause the death of a large number of individuals, the crime of extermination requires that the perpetrator "must also have known of the vast scheme of collective murder and have been willing to take part therein."¹⁹¹⁷ The Prosecution does not make reference to this purported element in its submissions.

576. The Appeals Chamber held in the *Krstić* case that extermination does not require the proof of a plan or policy to carry out the underlying act, adding that the presence of such a plan or policy may be important evidence of the widespread or systematic nature of the attack.¹⁹¹⁸ In view of this holding, the *Brđanin* Trial Chamber recently found that "the *Vasiljević* 'knowledge that [the offender's] action is part of a vast murderous enterprise in which a larger number of individuals are systematically marked for killing or killed', if proven, will be considered as evidence tending to prove the accused's knowledge that his act was part of a widespread or systematic attack against a civilian population, and not beyond that."¹⁹¹⁹ This Trial Chamber endorses this view and does not consider the existence of a "vast scheme of collective murder" or "vast murderous enterprise" as a separate element of the crime nor as an additional layer of the *mens rea* required for the commission of the crime.

2. Findings

577. The Trial Chamber finds that the killings established above were part of one murder operation, which led to the death of more than 7,000 thousands Bosnian Muslim men and boys.

¹⁹¹⁴ See, e.g., *Krstić* Trial Judgement, paras 498, 501-502; *Vasiljević* Trial Judgement, paras 227-228.

¹⁹¹⁵ The *Stakić* Trial Chamber listed factors such as evidence of preparation and organisation of the crime as indicia in this respect. *Stakić* Trial Judgement, para. 640.

¹⁹¹⁶ The Trial Chamber concurs with the *Brđanin* Trial Judgement that among the conditions created to cause death are the depravation of food and medicine. *Brđanin* Trial Judgement, para. 389.

¹⁹¹⁷ Blagojević Final Brief, para. 132 and Jokić Final Brief, para. 290, referring to *Vasiljević* Trial Judgement, paras 228-229. It appears that the *Vasiljević* Trial Judgement uses the terms "vast scheme of collective murder" and "vast murderous enterprise" interchangeably.

¹⁹¹⁸ *Krstić* Appeal Judgement, para. 225, referring to *Kunarac* Appeal Judgement, para. 98.

¹⁹¹⁹ *Brđanin* Trial Judgement, para. 394 (emphasis added).

The crime of extermination in the present case is clearly indicated by the massive scale of the number of victims and by the intent of the perpetrators to kill on massive scale. The Trial Chamber inferred this intent from the nature of the murder operation, which, as it has been described above, was carried out in a short time period, with similar pattern of killings, in locations near to each other and by perpetrators who in some cases were active in more than one of these locations.¹⁹²⁰

D. Persecutions

1. Applicable Law

578. The general requirements for crimes against humanity have been considered above.¹⁹²¹

579. The crime of persecutions consists of an act or omission which:

- (i) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (*actus reus*); and
- (ii) is carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (*mens rea*).¹⁹²²

580. It is settled in the jurisprudence of the Tribunal that the acts or omissions that can amount to persecutions not only include acts or omissions enumerated in other sub-clauses of Article 5,¹⁹²³ but also acts or omissions of equal gravity to the acts listed in Article 5 of the Statute.¹⁹²⁴ The requirement of “equal gravity” defines the limits on the types of acts which qualify as persecutions. The Trial Chamber concurs with the finding of the *Kupreškić* Trial Chamber that “although the realm of human rights is dynamic and expansive, not every denial of a human right may constitute a crime against humanity.”¹⁹²⁵

581. While the crime of persecutions is considered to be an “umbrella” crime,¹⁹²⁶ the Appeals Chamber has warned that “[p]ersecution cannot, because of its nebulous character, be used as a

¹⁹²⁰ See *supra* paras 568-569.

¹⁹²¹ See *supra* paras 541-554.

¹⁹²² *Blaškić* Appeal Judgement, para. 131. See also *Vasiljević* Appeal Judgement, para. 113; *Krnojelac* Appeal Judgement, para. 185.

¹⁹²³ *Kupreškić* Trial Judgement, para. 605.

¹⁹²⁴ *Kordić* Appeal Judgement, para. 671; *Blaškić* Appeal Judgement, para. 135; *Krnojelac* Appeal Judgement, para. 199; *Kupreškić* Trial Judgement, paras 617-19.

¹⁹²⁵ *Kupreškić* Trial Judgement, para. 618. To reach the level of gravity required by Article 5 the act or omission needs to be a gross or blatant denial of a fundamental human right. *Naletilić* Trial Judgement, para. 635; *Krnojelac* Trial Judgement, para. 434; *Kupreškić* Trial Judgement, paras 620, 621, 627.

¹⁹²⁶ *Kupreškić* Appeal Judgement, para. 98.

catch-all charge.”¹⁹²⁷ The Prosecution must plead particular acts or omissions which it alleges amount to persecutions in the Indictment.¹⁹²⁸

582. The acts or omissions may be evaluated separately or together in their context considering their cumulative effect.¹⁹²⁹ The Appeals Chamber has found that “although persecution often refers to a series of acts, a single act may be sufficient, as long as this act or omission discriminates in fact and is carried out deliberately with the intention to discriminate on one of the listed grounds.”¹⁹³⁰ While persecutory acts might often be part of a discriminatory policy, the existence of a discriminatory policy is not a necessary requirement for persecutions.¹⁹³¹

583. An act is discriminatory when a victim is targeted because of his or her membership in a group defined by the perpetrator on a political, racial or religious basis.¹⁹³² The act or omission needs to discriminate in fact, *i.e.*, a discriminatory intent is not sufficient, but the act or omission must have discriminatory consequences.¹⁹³³

584. The intent to discriminate must be related to the particular act(s) charged as persecutions. When those acts formed part of an attack of a discriminatory nature, this context can be a sufficient basis to infer the discriminatory intent in relation to each particular act.¹⁹³⁴ The Appeals Chamber has found that “such a context may not in and of itself evidence discriminatory intent,” but “that discriminatory intent may be inferred from such a context as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent.”¹⁹³⁵

¹⁹²⁷ *Kupreškić* Appeal Judgement, para. 98.

¹⁹²⁸ *Kupreškić* Appeal Judgement, para. 98. *See also Blaškić* Appeal Judgement, para. 139.

¹⁹²⁹ *Blaškić* Appeal Judgement, para. 135; *Krnojelac* Trial Judgement, para. 434; *Kupreškić* Trial Judgement, para. 615.

¹⁹³⁰ *Blaškić* Appeal Judgement, para. 135; *Vasiljević* Appeal Judgement, para. 113.

¹⁹³¹ *Vasiljević* Trial Judgement, para. 248. When a discriminatory policy existed, it is not required that the accused took part in the formulation of that discriminatory policy or practice by an authority; *Vasiljević* Trial Judgement, para. 248; *Kupreškić* Trial Judgement, para. 625.

¹⁹³² *Naletilić* Trial Judgement, para. 636, referring to the *Kvočka* Trial Judgement, para. 195. Despite the fact that Article 5(h) reads “persecutions on political, racial and religious grounds”, the three listed grounds are alternatives and the establishment of one of the grounds is a sufficient basis for a finding of persecutions. *Tadić* Trial Judgement, para. 712. *See also Kordić* Appeal Judgement, para. 674; *Krnojelac* Trial Judgement, para. 431.

¹⁹³³ *See Krnojelac* Appeal Judgement, paras 185 and 200-02, citing with approval *Krnojelac* Trial Judgement, para. 431; *Stakić* Trial Judgement, para. 733; *Vasiljević* Trial Judgement, para. 245.

¹⁹³⁴ *Tadić* Trial Judgement, para. 652. *See also Kvočka* Trial Judgement, paras 201, 202, 203 in relation to inferring a discriminatory intent from a “knowing participation” in a criminal enterprise.

¹⁹³⁵ *Krnojelac* Appeal Judgement, para. 184. *See also Kordić* Appeal Judgement, para. 674; *Blaškić* Appeal Judgement, para. 164.

enough impact on the victims to reach the threshold of equal gravity as the acts listed in Article 5 of the Statute.

621. In summary the Trial Chamber finds that the murder, cruel and inhumane treatment, terrorising and forcible transfer of the Bosnian Muslim civilians constituted a persecutorial campaign against the Bosnian Muslim population.

622. The Trial Chamber will examine the individual criminal responsibility of Vidoje Blagojević for this crime below.

E. Other Inhumane Acts (forcible transfer)

1. Applicable Law

623. The general requirements for crimes against humanity have been considered above.²⁰²⁵

624. Mindful of the principle *nullum crimen sine lege*, the Trial Chamber finds that the category of Other Inhumane Acts, as a residual category of crimes against humanity, forms part of customary international law.²⁰²⁶ It should be stressed that other inhumane acts is in itself a crime under international criminal law. The Trial Chamber observes that convictions have been entered on this ground by the International Military Tribunal at Nuremberg, this Tribunal and the Rwanda Tribunal.²⁰²⁷

²⁰²⁵ See *supra* section V. A. 2.

²⁰²⁶ In his Report pursuant to Security Council Resolution 808 (1993) concerning the establishment of the International Tribunal, the United Nations Secretary-General stated that:

“the application of the principle *nullum crime sine lege* requires that the international tribunal should apply Rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.”

Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UNSC, UN Doc. S/25704 (1993), para. 34, reprinted in 32 ILM (1993) 1163. The Secretary-General continued that “[t]he part of conventional international law which has beyond doubt become part of international customary law is the law applicable in armed conflicts as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims [...]”. *Ibid.*, para. 35, reprinted in 32 ILM (1993) 1163. See also the Čelebići Appeal Judgement, para. 113.

Other Inhumane Acts has been included in the following international legal instruments: the Article 6(c) of the Nuremberg Charter; Article 5(c) of the Tokyo Charter; Article II(c) of Control Council Law No. 10; and Article 3 of the Statute of the Rwanda Tribunal, which in substance mirrors Article 5 of this Tribunal’s Statute. The crime of other inhumane acts is also found in the ILC Draft Code of Crimes against the Peace and Security of Mankind, Article 18, see Report of the International Law Commission on the work of its 48th session, 6 May-26 July 1996, Official Documents of the United Nations General Assembly’s 51st session, Supplement no. 10 (A/51/10).

²⁰²⁷ Regarding the International Military Tribunal at Nuremberg, see e.g. the Medical Case, the Justice Case, the Ministries Case, and the High Command Case, *Trials of War Criminals*, Volume I p. 16, Volume II p. 175-180, Volume III p. 23; Volume XIV p. 467, Volume X p. 29, 36, 462; regarding this Tribunal, see e.g. *Kupreškić* Trial Judgement, *Kvočka* Trial Judgement, *Naletilić* Trial Judgement, *Galić* Trial Judgement; regarding the Rwanda Tribunal, see e.g. *Akayesu* Trial Judgement.

625. The crime of Other Inhumane Acts exists in order not to unduly restrict the Statute's application with regard to crimes against humanity.²⁰²⁸ It must be stressed, however, that the principle of legality requires that a trier of fact exercise great caution in finding that an alleged act, not regulated elsewhere in Article 5 of the Statute, forms part of this crime: norms of criminal law must always provide individuals with sufficient notice of what is criminal behaviour and what is not.²⁰²⁹

626. In order to fall within the category of Other Inhumane Acts, an act or omission must fulfil the following requirements:

- a) there was an act or omission of similar seriousness to the other acts enumerated in Article 5;
- b) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and
- c) the act or omission was performed intentionally by the accused, or by a person or person for whose acts and omissions the accused bears criminal responsibility.²⁰³⁰

627. The element of "similar seriousness" is to be evaluated in light of all factual circumstances, such as the nature of the act or omission, the context within which it occurred, the individual circumstances of the victim(s) as well as the physical, mental and moral effects on the victim(s).²⁰³¹ There is no requirement that the effects on the victim(s) be long-lasting, however the fact that such were the effects will impact the determination of the seriousness of the act or omission.²⁰³²

628. It is required that the perpetrator, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim(s), or that the perpetrator knew that his act or omission was likely to cause such suffering to, or amount to a serious attack on, the human dignity of the victim(s) and, with that knowledge, acted or failed to act.²⁰³³

²⁰²⁸ See e.g. the jurisprudence of the Rwanda Tribunal in relation to sexual offences charged as other inhumane acts. *Niyitegeka* Trial Judgement, para. 460 and *Kajelijeli* Trial Judgement, para. 931.

²⁰²⁹ See regarding the principle of legality, the Appeals Chamber's Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 21, in *Prosecutor v Milan Milutinović, Nikola Šainović, and Dragoljub Ojdanić*, Case No. IT-99-37-AR72.

²⁰³⁰ *Galić* Trial Judgement, para. 152.

²⁰³¹ *Galić* Trial Judgement, para. 153.

²⁰³² *Vasiljević* Trial Judgement, para. 235.

²⁰³³ *Krnjelac* Trial Judgement, para. 132.

629. As established above, the Trial Chamber is of the opinion that the prohibition against forcible population displacements, whether in international or non-international armed conflicts, forms part of customary international law. The Trial Chamber finds that the crime of forcible transfer as defined²⁰³⁴ satisfies the three requirements above.²⁰³⁵ This crime, therefore, clearly forms part of the category of Other Inhumane Acts under Article 5(i) of the Statute.

630. Consequently, it is a crime against humanity to forcibly displace members of the civilian population unless any of the law's exceptions applies justifying the displacement.

2. Findings

631. As has already been established, the Trial Chamber has found that the crime of forcible transfer, as a component crime of persecution, was committed.²⁰³⁶

632. The Trial Chamber will examine the individual criminal responsibility of Vidoje Blagojević for this crime below.

F. Complicity in Genocide

1. Introduction

633. Vidoje Blagojević was originally charged with, *inter alia*, genocide and, alternatively, complicity to commit genocide.²⁰³⁷ In January 2002, the Prosecutor withdrew the charge of genocide.²⁰³⁸ Therefore, in the Indictment, Vidoje Blagojević is charged in Count 1B²⁰³⁹ with "complicity in genocide, punishable under Article 4(3)(e), and Articles 7(1) and 7(3) of the Statute".

634. Article 4 ("Genocide") of the Statute provides:

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;

²⁰³⁴ See *supra* section V. D. 2. (e) for the elements of forcible transfer.

²⁰³⁵ The Trial Chamber finds no distinction in the gravity of deportation under Article 5(d) of the Statute and forcible transfer as either an underlying act for persecutions or as an inhumane act.

²⁰³⁶ See *supra* section V. D. 3. (e).

²⁰³⁷ See Annex 2 "Procedural History", para. 1.

²⁰³⁸ Joinder Indictment, Case No IT-02-53-PT, 22 January 2002.

²⁰³⁹ Following the guilty plea of Momir Nikolić and the filing of a new indictment, the Indictment does not contain a Count 1A, as this count (genocide) was limited to Momir Nikolić.

1B, complicity in genocide, with a charge of aiding and abetting genocide, pursuant to Article 4(3)(a) of the Statute.²⁰⁴⁵ The Blagojević Defence objected to the amendment.²⁰⁴⁶ It also objected to the Prosecution's submission that aiding and abetting genocide is already included in the charge of complicity in genocide,²⁰⁴⁷ and argued that complicity in genocide always requires specific intent, as opposed to aiding and abetting genocide for which "mere knowledge" is to be proved.²⁰⁴⁸ The Blagojević Defence concluded that the amendment sought would amount to a charge of a lesser gravity that was never pled and for which the Trial Chamber could not enter a conviction on the basis of the Indictment.²⁰⁴⁹ Without addressing the submissions of the Parties as to the elements of complicity in genocide, the Trial Chamber denied the Prosecution's motion to amend the Indictment, considering that the proposed amendment at that stage of the proceedings was not in the interests of justice.²⁰⁵⁰ The Blagojević Defence reiterates in its Final Brief that there must be a specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group for an accused to be liable for complicity to commit genocide.²⁰⁵¹

2. Discussion

638. Complicity in genocide refers to the liability incurred by those who associate themselves in the *commission* of the crime, and does not encompass association in an attempt or any other preparatory act which does not result in the commission of the crime: complicity in genocide requires that genocide was committed.²⁰⁵² For this reason, the Trial Chamber will first determine whether genocide was committed in July 1995 following the fall of the Srebrenica enclave, and if it determines that it was committed, it will consider the legal requirements for complicity in genocide.

²⁰⁴⁵ Prosecution's Motion for Leave to File Fourth Amended Joinder Indictment, 14 May 2004.

²⁰⁴⁶ Vidoje Blagojević's Response to Prosecution's Motion for Leave to File Fourth Amended Joinder Indictment, 26 May 2004, para. 9.

²⁰⁴⁷ Vidoje Blagojević's Response to Prosecution's Motion for Leave to File Fourth Amended Joinder Indictment, 26 May 2004, para. 9.

²⁰⁴⁸ Motion Hearing of 8 June 2004, T. 10457. The Defence pointed out that the definition of "aiding and abetting genocide" as laid down in the *Krstić* Appeal Chamber should be taken with caution as this definition may be altered or at least qualified in future judgements by the Appeals Chamber that specifically address complicity in genocide. *Ibid.*, T. 10459-60.

²⁰⁴⁹ Motion Hearing, 8 June 2004, T. 10461-63.

²⁰⁵⁰ Decision on Prosecution's Motion for Leave to File Fourth Amended Joinder Indictment, 10 June 2004.

²⁰⁵¹ Blagojević Final Brief, para. 121.

²⁰⁵² *Stakić* Trial Judgement, para. 561; *Akayesu* Trial Judgement, paras 527, 530; *Musema* Trial Judgement, paras 171, 172. Both the *Akayesu* and *Musema* Trial Judgements noted that the *travaux préparatoires* of the Genocide Convention confirm this interpretation as they show that "only complicity in the completed offence of genocide was intended for punishment and not complicity in an attempt to commit genocide, complicity in incitement to commit genocide nor complicity in conspiracy to commit genocide, all of which were, in the eyes of some states, too vague to be punishable under the Convention". *Akayesu* Trial Judgement, fn. 105; *Musema* Trial Judgement, para. 172.

The Accused **Dragan Jokić** is found **GUILTY** pursuant to Article 7(1), through aiding and abetting, of the Statute of the following counts:

- **Count 2:** Extermination, as a crime against humanity;
- **Count 4:** Murder, as a violation of the laws or customs of war; and
- **Count 5:** Persecutions, as a crime against humanity

861. The Trial Chamber sentences **Dragan Jokić** to a single sentence of imprisonment for **9 years**.

862. Dragan Jokić voluntarily surrendered to the Tribunal on 15 August 2001. He was granted provisional release during the pre-trial phase. Accordingly, he has been in custody now for 917 days. He is entitled to credit for that period towards service of the sentence imposed, together with the period he will serve in custody pending a determination by the President pursuant to Rule 103(A) as to the State where the sentence is to be served. He is to remain in custody until such determination is made.

Done in English and French, the English text being authoritative.

Liu Daqun
Presiding

Volodymyr Vassilenko

Carmen Maria Argibay

Dated this seventeenth day of January 2005,
At The Hague
The Netherlands

[Seal of the Tribunal]