ANNEX A

AUTHORITY 24

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-99-36-T

Date: 1 September 2004

Original: English

IN THE TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge Ivana Janu
Judge Chikako Taya

Registrar: **Mr. Hans Holthuis**

Judgement of: **1 September 2004**

PROSECUTOR

v.

RADOSLAV BRĐANIN

JUDGEMENT

The Office of the Prosecutor:

Ms. Joanna Korner
Ms. Anna Richterova
Ms. Ann Sutherland
Mr. Julian Nicholls

Counsel for the Accused:

Mr. John Ackerman
Mr. David Cunningham

the State, the establishment of the overall character of the control suffices.[320] The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in (i) organising, coordinating or planning the military actions of the military group, in addition to (ii) financing, training and equipping or providing operational support to that group.[321] These two elements must both be satisfied.

125. Each of the four 1949 Geneva Conventions respectively sets out the conditions under which a person or property is protected by its provisions.[322] Persons not entitled to protection under the first three Geneva Conventions, necessarily fall within the ambit of Geneva Convention IV, which applies to civilians, provided that the requirements of Article 4 of Geneva Convention IV are satisfied.[323] Geneva Convention IV defines "protected persons" as those "in the hands of a party to the conflict or Occupying Power of which they are not nationals"[324]. The criterion of nationality might exclude certain victims of crimes from the category of protected persons. However, it is settled jurisprudence of this Tribunal that protected persons should not be defined by the strict requirement of nationality, as opposed to more realistic bonds demonstrating effective allegiance to a party to a conflict, such as ethnicity.[325] This Trial Chamber agrees with and will follow this approach.

B. Article 3 of the Statute: Violations of the Laws or Customs of War

126. Article 3 of the Statute refers to a broad category of offences, namely all "violations of the laws or customs of war".[326] It has thus been interpreted as a residual clause covering all violations of humanitarian law not falling under Articles 2, 4 or 5 of the Statute, more specifically : (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches " by those Conventions; (iii)

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has issued specific instructions concerning the commission of that particular act or that it has publicly endorsed or approved the unlawful act *ex post facto*; 2) for armed forces, militias or paramilitary units acting as *de facto* organs of the State, the establishment of the overall character of the control suffices and 3) private individuals who are assimilated to State organs on account of their actual behaviour within the structure of the State may be regarded as *de facto* organs of the State, regardless of any possible requirement of State instructions.

[320] *Tadić* Appeal Judgement, paras 117-145.

[321] *Tadić* Appeal Judgement, para. 145.

[322] *Tadić* Jurisidiction Decision, para. 81: "For the reasons set out above, this reference is clearly intended to indicate that the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as "protected" by the Geneva Conventions under the strict conditions set out by the Conventions themselves. This reference in Article 2 to the notion of "protected persons or property" must perforce cover the persons mentioned in Articles 13, 24, 25 and 26 (protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I; in Articles 13, 36, 37 (protected persons) and 22, 24, 25 and 27 (protected objects) of Geneva Convention II; in Article 4 of Convention III on prisoners of war, and in Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57, etc. (protected property) of Convention IV on civilians."

[323] *Čelebići* Appeal Judgement, para. 271.

[324] Article 4 (1) of Geneva Convention I.

[325] *Tadić* Appeal Judgement, paras 164-168; *Blaškić* Appeal Judgement, paras 172-176; *Čelebići* Appeal Judgement, paras 83, 98; *Naletilić* Trial Judgement, para. 207.

violations of common Article 3 of the Geneva Conventions ("common Article 3") and other customary rules on internal armed conflicts, and (iv) violations of agreements binding upon the parties to the conflict, considered *qua* treaty law, *i.e.*, agreements which have not turned into customary international law.[327]

127. The application of Article 3 of the Statute presupposes that the alleged acts of the accused have been committed in an armed conflict.[328] It is immaterial whether this conflict was internal or international in nature.[329]

128. A close nexus must exist between the alleged offence and the armed conflict.[330] This is satisfied when the alleged crimes are "closely related to the hostilities".[331]

129. The jurisprudence of this Tribunal has established four additional conditions which must be fulfilled for an offence to be prosecuted under Article 3 of the Statute: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. [332] Some of the prerequisites for the application of Article 3 of the Statute may differ depending on the specific basis of the relevant charges brought under this Article.[333]

C. Article 5 of the Statute: Crimes Against Humanity

130. Article 5 of the Statute enumerates offences which, if committed in an armed conflict, whether international or internal in character, and as part of a widespread or systematic attack directed against any civilian population, will amount to crimes against humanity. It is settled

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[326] *Tadić* Jurisdiction Decision, para. 87.
[327] *Tadić* Jurisdiction Decision, paras 89-91; *Krnojelac* Trial Judgement, para. 52; *Kunarac* Trial Judgement, para. 401; *Naletilić* Trial Judgement, para. 224.
[328] *Kunarac* Appeal Judgement, paras 57 and 58.
[329] *Čelebići* Trial Judgement, para. 303; *Čelebići* Appeal Judgement, paras 140, 150; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998 (*"Furundžija* Trial Judgement"), para. 132; *Blaškić* Trial Judgement, para. 161.
[330] *Tadić* Jurisdiction Decision, para. 70; *Kunarac* Trial Judgement, para. 402; *Krnojelac* Trial Judgement, para. 51.
[331] *Tadić* Jurisdiction Decision, para. 70 endorsed in *Krnojelac* Trial Judgement, para. 51; *Naletilić* Trial Judgement, para. 225.
[332] *Tadić* Jurisdiction Decision, para. 94; *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-T, Judgement, 2 November 2001 ("*Kvočka* Trial Judgement"), para. 123; *Krnojelac* Trial Judgement, para. 52; *Kunarac* Trial Judgement, para. 403; *Kunarac* Appeal Judgement, para. 66.
[333] *Kunarac* Trial Judgement, para. 404; *Krnojelac* Trial Judgement, para. 52.

jurisprudence of this Tribunal that the following elements must be met for an offence to constitute a crime against humanity:[334]

(a) there must be an 'attack';[335]

(b) the acts of the accused must be part of the attack;[336]

(c) the attack must be directed against any civilian population;[337]

(d) the attack must be widespread or systematic;[338]

(e) the accused 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.[339]

131. An "attack" for the purpose of Article 5 is described as a "course of conduct involving the commission of acts of violence".[340] In the context of a crime against humanity, an "attack" is not limited to the use of armed force; it also encompasses any mistreatment of the civilian population.[341] The concepts of "attack" and "armed conflict" are distinct and independent from each other. The attack could precede, outlast or continue during the armed conflict, without necessarily being part of it.[342] To establish whether there was an attack, it is not relevant that the other side also committed atrocities against its opponent's civilian population.[343] Each attack against the other side's civilian population would be equally illegitimate and crimes committed as part of such attack could, all other conditions being met, amount to crimes against humanity.[344]

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[334] *Kunarac* Appeal Judgement, para. 85; *Kunarac* Trial Judgement, para. 410; *Krstić* Trial Judgement, para. 482; *Kvočka* Trial Judgement, para. 127; *Krnojelac* Trial Judgement, para. 53; *Prosecutor v. Mitar Vasiljević,* Case No. IT-98-32-T, Judgement, 29 November 2002 *("Vasiljević* Trial Judgement"), para. 28. For jurisprudence of the ICTR, *see Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998 ("*Akayesu* Trial Judgement"), paras 565-584; *Prosecutor v. Alfred Musema,* Case No. ICTR-96-13-T, Judgement, 27 January 2000 ("*Musema* Trial Judgement"), paras 199-211; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999 ("*Rutaganda* Trial Judgement"), paras 64-76; *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999 ("*Kayishema* Trial Judgement"), paras 119-134; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement"), paras 460-469.

[335] *Tadić* Appeal Judgement, para. 251; *Kunarac* Appeal Judgement, paras 85-89.

[336] *Tadić* Appeal Judgement, para. 248; *Kunarac* Appeal Judgement, paras 85, 99-100.

[337] *Kunarac* Appeal Judgement, paras 85, 90-92.

[338] *Kunarac* Appeal Judgement, paras 85, 93-97.

[339] *Tadić* Appeal Judgement, para. 248; *Kunarac* Appeal Judgement, paras 85, 102-104.

[340] *Kunarac* Trial Judgement, para. 415; *Kunarac* Appeal Judgement, paras 86, 89.

[341] *Kunarac* Appeal Judgement, para. 86.

[342] *Tadić* Appeal Judgement, para. 251; *Kunarac* Appeal Judgement, para. 86; *Krnojelac* Trial Judgement, para. 54.

[343] *Kunarac* Trial Judgement, para. 580; *Kunarac* Appeal Judgement, para. 87.

[344] *Kunarac* Appeal Judgement, para. 87.

132. The acts of the accused need to objectively "form part" of the attack by their nature or consequences,[345] as distinct from being committed in isolation, but they do not need to be committed in the midst of the attack. For instance, the *Kunarac* Trial Chamber found that a crime committed several months after, or several kilometres away from the main attack could still, if sufficiently connected otherwise, be part of that attack.[346]

133. Article 5 of the Statute provides that a crime against humanity requires that it be "committed in armed conflict". This is a jurisdictional requirement. The Appeals Chamber in *Kunarac* held that this is not equivalent to the requirement contained in Article 3 of the Statute, where a 'close relationship' between the acts of the accused and the armed conflict is required.[347] By contrast, according to the Appeals Chamber, the nexus with the armed conflict under Article 5 is

> ... a purely jurisdictional prerequisite which is satisfied by proof that there was an armed conflict and that objectively the acts of the accused are linked geographically as well as temporally with the armed conflict.[348]

134. The armed conflict can be international as well as internal in nature.[349] The civilian population must be the primary object of the attack.[350] It is not required that every single member of that population be a civilian – it is enough if it is predominantly civilian in nature, and may include, *e.g.*, individuals *hors de combat*.[351] Further, the presence of soldiers, provided that they are on leave and do not amount to "fairly large numbers", within an intentionally targeted civilian population does not alter the civilian nature of that population.[352] In order to determine whether the attack may be said to have been directed against a civilian population, the means and methods used in the course of the attack may be examined, the number and status of the victims, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.[353] It is also not necessary that the entire civilian population of the geographical entity in which the attack is taking place be targeted by the attack. It must, however,

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[345] *Tadić* Appeal Judgement, para. 248; *Kunarac* Appeal Judgement, paras 85, 99-101.
[346] *Kunarac* Trial Judgement, para. 417 *et seq.*
[347] *Kunarac* Appeal Judgement, paras 57-60, 83.
[348] *Kunarac* Appeal Judgement, para. 83.
[349] *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Judgement, 14 December 1999 ("*Jelisić* Trial Judgement"), para. 50.
[350] *Kunarac* Appeal Judgement, para. 91.
[351] *Jelisić* Trial Judgement, para. 54; *Blaškić* Appeal Judgement, paras 111-113. For ICTR jurisprudence, *see Akayesu* Trial Judgement, para. 582; *Kayishema* Trial Judgement, para. 128.
[352] *Blaškić* Appeal Judgement, para. 115.
[353] *Kunarac* Appeal Judgement, para. 91.

be shown that the attack was not directed against a limited and randomly selected number of individuals.[354]

135. The requirement that the attack be "widespread" or "systematic" is disjunctive rather than cumulative.[355] For an attack to be "widespread", it needs to be of a large-scale nature, which is primarily reflected in the number of victims,[356] whereas the term "systematic" refers to the organised nature of the acts of violence and the non-accidental recurrence of similar criminal conduct on a regular basis.[357] Only the attack as a whole, not the individual acts of the accused, must be widespread or systematic.[358] Consequently, even a single or relatively limited number of acts on his or her part could qualify as a crime against humanity, unless these acts may be said to be isolated or random.[359]

136. The jurisprudence of this Tribunal has identified some factors to be considered in determining whether an attack is widespread or systematic: (i) the consequences of the attack upon the targeted population, (ii) the number of victims, (iii) the nature of the acts, and (iv) the possible participation of officials or authorities or any identifiable patterns of crimes.[360]

137. There is no requirement under customary international law that the acts of the accused need to be supported by any form of policy or plan. The existence of a policy or plan may evidentially be relevant to the requirements of a widespread or systematic attack and the accused's participation in the attack, but it is not a legal element of the crime. [361]

138. In addition to the intent to commit the underlying crime, the accused must be aware that there is an attack on the civilian population and that his or her acts form part of that attack.[362] This requirement does not imply knowledge of the details of the attack.[363] In addition, the accused need not share the ultimate purpose or goal underlying the attack: the motives for his or her participation

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[354] *Kunarac* Appeal Judgement, para. 90.
[355] *Kupreškić* Trial Judgement, para. 544; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001 ("*Kordić* Trial Judgement"), para. 178; *Blaškić* Appeal Judgement, para. 101.
[356] *Kunarac* Trial Judgement, para. 428; *Blaškić* Appeal Judgement, para. 101; *Akayesu* Trial Judgement, para. 580.
[357] *Kunarac* Trial Judgement, para. 429; *Kunarac* Appeal Judgement, para. 94 ; *Blaškić* Appeal Judgement, para. 101.
[358] *Kunarac* Trial Judgement, para. 431; *Kunarac* Appeal Judgement, para. 96; *Blaškić* Appeal Judgement, para. 101.
[359] *Kunarac* Appeal Judgement, para. 96; *Simić* Trial Judgement, para. 43; *Blaškić* Appeal Judgement, para. 101.
[360] *Kunarac* Appeal Judgement, para. 95.
[361] *Kunarac* Appeal Judgement, paras 98-101; *Simić* Trial Judgement, para. 44; *Blaškić* Appeal Judgement, para. 120.
[362] *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić (aka "Vlado"),* Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić* Trial Judgement"), para. 556; *Blaškić* Appeal Judgement, para. 126; *Kunarac* Trial Judgement, para. 434; *Kunarac* Appeal Judgement, para. 102.
[363] *Kunarac* Trial and Appeal Judgements, *ibid.*

in the attack are irrelevant, and a crime against humanity may even be committed exclusively for personal reasons.[364]

D. Findings in respect of the General Requirements for Articles 2, 3 and 5 of the Statute

1. Findings in respect of the general requirements common to Articles 2, 3 and 5

139. The application of Articles 2, 3 and 5 of the Statute is subject to the existence of an armed conflict and a nexus between the alleged offences and the armed conflict.

140. The Defence does not dispute that an armed conflict existed at the time and place relevant to the Indictment.[365] On the basis of the findings of fact set out above in the General Overview, the Trial Chamber is satisfied beyond reasonable doubt that there was an armed conflict between 1 April and 31 December 1992 in the ARK.[366]

141. The Chamber is satisfied beyond reasonable doubt that the crimes with which the Accused is charged were committed in the course of the armed conflict in the ARK. Although the Accused did not take part in any fighting, his acts were closely related to the conflict. Indeed, the Accused was a prominent member of the SDS and later also President of the ARK Crisis Staff[367], a regional body vested with both executive and legislative powers within the ARK where the armed conflict was taking place.[368] Its effective powers extended to the municipal authorities of the ARK and the police and its influence encompassed the army and paramilitary organisations.[369] In the following Chapter of this judgement, the Trial Chamber will establish the ARK Crisis Staff's involvement in the implementation of the Strategic Plan.[370] The Trial Chamber will later establish that, after the ARK Crisis Staff was abolished and throughout the period relevant to the Indictment, the Accused continued to wield great power and acted in various positions at the republican level in the course of the armed conflict.[371]

142. The Trial Chamber is thus satisfied that the general requirements common to Articles 2 and 3 of the Statute are fulfilled.

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[364] *Tadić* Appeal Judgement, paras 248, 252; *Kunarac* Appeal Judgement, para. 103; *Blaškić* Appeal Judgement, para. 124.
[365] Defence Final Brief, p. 41(confidential).
[366] *See* paras 64, 75 *supra*.
[367] *See* VIII., "The Accused's Role and his Responsibility in General", *infra*.
[368] *See* VI.C., "Authority of the ARK Crisis Staff", *infra*.
[369] *See* paras 173-175 *infra*.
[370] *See* VII., "Individual Criminal Responsibility", *infra*.
[371] *See* VIII., "The Accused's Role and his Responsibility in General", *infra*.

support.[726] An accused may be convicted for having aided and abetted a crime which requires specific intent even where the principal offender has not been tried or identified.[727]

272. The *mens rea* of aiding and abetting consists of knowledge – in the sense of awareness – that the acts performed by the aider and abettor assist in the commission of a crime by the principal offender.[728] It is not necessary that the aider and abettor has knowledge of the precise crime that was intended or that was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually perpetrated.[729]

273. In addition, the aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's state of mind. However, the aider and abettor need not share the intent of the principal offender.[730]

274. The fact that the aider and abettor does not share the intent of the principal offender generally lessens his criminal culpability *vis-à-vis* that of an accused acting pursuant to a JCE who does share the intent of the principal offender.[731]

B. Superior Criminal Responsibility under Article 7(3) of the Statute[732]

1. Responsibility pursuant to Article 7(3) in general

275. The Appeals Chamber has held that "[t]he principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law."[733] This applies both in the context of international as well as internal armed

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[725] *Blaškić* Appeal Judgement, para. 48; *Kunarac* Trial Judgement, para. 391; *Blaškić* Trial Judgement, para. 285; *Naletilić* Trial Judgement, para. 63; *Simić* Trial Judgement, para. 162; *Kvočka* Trial Judgement, para. 256.

[726] *Aleksovski* Trial Judgement, para. 65. The *Akayesu* Trial Chamber found a mayor guilty of abetting by considering his passive presence next to the scene of the crime in connection with his prior encouraging behaviour: *Akayesu* Trial Judgement, para. 693.

[727] *Krstić* Appeal Judgement, para. 143.

[728] *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 49.

[729] *Blaškić* Appeal Judgement, para. 50; *Naletilić* Trial Judgement, para. 63; *Kvočka* Trial Judgement, para. 255; *Furundžija* Trial Judgement, para. 246.

[730] *Aleksovski* Appeal Judgement, para. 162; *Kunarac* Trial Judgement, para. 392.

[731] *Vasiljević* Trial Judgement, para. 71.

[732] The Trial Chamber uses the term 'superior criminal responsibility' instead of 'command responsibility' so as to make clear that the doctrine applies to civilian as well as to military superiors.

[733] *Čelebići* Appeal Judgement, para. 195. In the present case, it is not alleged that the Accused was a military superior, but a civilian superior. Consequently, the Trial Chamber views the statement of law in the *Čelebići* Appeal Judgement, para. 195, in the context of Article 86(2) of Additional Protocol I to the 1949 Geneva Conventions, rather than Article 87(3), which refers to military superiors. In addition, the Trial Chamber notes that it is Article 86(2) that deals with the requirement of the failure to act.

conflicts.[734] The jurisprudence of the Tribunal has established the following three-pronged test for criminal liability pursuant to Article 7(3) of the Statute:

1. the existence of a superior-subordinate relationship between the superior (the accused) and the perpetrator of the crime;

2. the accused knew or had reason to know that the crime was about to be or had been committed; and

3. the accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof.[735]

276. The existence of a superior-subordinate relationship is characterised by a formal or informal hierarchical relationship between the superior and subordinate.[736] The hierarchical relationship may exist by virtue of a person's *de jure* or *de facto* position of authority.[737] The superior-subordinate relationship need not have been formalised or necessarily determined by formal status alone.[738] Both direct and indirect relationships of subordination within the hierarchy are possible[739] whilst the superior's effective control over the persons committing the offence must be established.[740] Effective control is defined as the material ability to prevent or punish the commission of the

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[734] *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura,* Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović et al.* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility"), paras 13 and 31; *see* also, *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura,* Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002 ("*Hadžihasanović et al.* Decision on Joint Challenge to Jurisdiction"), paras 178-179.

[735] *Čelebići* Trial Judgement, para. 346; *Čelebići* Appeal Judgement, paras 189-198, 225-226, 238-239, 256, 263. The Trial Chamber's conclusions as to the first two elements of the test were upheld by the Appeals Chamber. The third element of the test did not form part of the appeal. *See* also *Aleksovski* Trial Judgement, para. 69; *Blaškić* Trial Judgement, para. 294; *Kordić* Trial Judgement, para. 401; *Kunarac* Trial Judgement, para. 395; *Krstić* Trial Judgement, para. 604, *Kvočka* Trial Judgement, para. 314; *Galić* Trial Judgement, para. 173.

[736] *Čelebići* Appeal Judgement, para. 303. *See* also ICRC Commentary on Additional Protocol I, para. 3544. Under the jurisprudence of the Tribunal, circumstantial evidence of "actual knowledge " has been found to include the number, type and scope of the illegal acts; the period over which the illegal acts occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the speed of the operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the superior at the time: *Čelebići* Trial Judgement, para. 386 (citing Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), (U.N. Document S/1994/674), p. 17). Considering geographical and temporal circumstances, this means that the more physically distant the superior was from the commission of the crimes, the more additional indicia are necessary to prove that he knew of them. On the other hand, if the crimes were committed next to the superior's duty-station this suffices as an important *indicium* that the superior had knowledge of the crimes, and even more so if the crimes were repeatedly committed: *Aleksovski* Trial Judgement, para. 80.

[737] According to the *Čelebići* Appeal Judgement, para. 193, a formal letter of commission or appointment is not necessary. A *de facto* superior must "wield substantially similar powers of control over subordinates" as a *de jure* superior: *Ibid.*, para. 197. *See* also *Aleksovski* Appeal Judgement, para. 76.

[738] *Čelebići* Trial Judgement, para. 370.

[739] *Čelebići* Appeal Judgement, para. 252.

[740] *Čelebići* Appeal Judgement, para. 197.

offence.[741] Substantial influence over subordinates that does not meet the threshold of effective control is not sufficient under customary law to serve as a means of exercising superior criminal responsibility.[742] A superior vested with *de jure* authority who does not actually have effective control over his or her subordinates would not incur criminal responsibility pursuant to the doctrine of superior responsibility, whereas a *de facto* superior who lacks formal letters of appointment or commission but does, in reality, have effective control over the perpetrators of offences might incur criminal responsibility.[743]

277. In all circumstances, and especially when an accused is alleged to have been a member of collective bodies with authority shared among various members, "it is appropriate to assess on a case-by-case basis the power or authority actually devolved on an accused,"[744] taking into account the cumulative effect of the accused's various functions.[745]

278. As regards the mental element of superior responsibility, it must be established that the superior knew or had reason to know that his subordinate was about to commit or had committed a crime. Superior responsibility is not a form of strict liability.[746] It must be proved that the superior had: (i) actual knowledge, established through either direct or circumstantial evidence, that his subordinates were about to commit or had committed crimes within the jurisdiction of the Tribunal, *or* (ii) constructive knowledge, meaning that the superior had in his or her possession information that would at least put him or her on notice of the present and real risk of such offences, such information alerting him or her to the need for additional investigation to determine whether such crimes were about to be committed or had been committed by his or her subordinates.[747] Knowledge may be presumed if a superior had the means to obtain the relevant information of a crime and deliberately refrained from doing so.[748]

279. Finally, it must be established that the superior failed to take the necessary and reasonable measures to prevent or punish the crimes of his or her subordinates. The measures required of the superior are limited to those within his power, that is, those measures that are within his material possibility.[749] The superiors' duty to prevent and punish their subordinates' crimes includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent

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[741] *Čelebići* Trial Judgement, para. 378, affirmed in *Čelebići* Appeal Judgement, para. 256.
[742] *Čelebići* Appeal Judgement, para. 266.
[743] *Čelebići* Appeal Judgement, para. 197.
[744] *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Judgement, 3 July 2003 ("*Bagilishema* Appeal Judgement"), para. 51, endorsing the finding in the *Musema* Trial Judgement, para. 135.
[745] *Stakić* Trial Judgement, para. 494.
[746] *Čelebići* Appeal Judgement, para. 239.
[747] *Čelebići* Appeal Judgement, paras 223, 241.
[748] *Čelebići* Appeal Judgement, para. 226.
[749] *Čelebići* Trial Judgement, para. 395.

authorities, if the superior does not have the power to sanction himself.[750] A superior is not obliged to perform the impossible.[751] However, he has a duty to exercise the measures reasonably possible under the circumstances,[752] including those that may be beyond his formal powers.[753] What constitutes such measures is not a matter of substantive law but of evidence.[754] The failure to take the necessary and reasonable measures to prevent an offence of which a superior knew or had reason to know cannot be remedied simply by subsequently punishing the subordinate for the commission of the offence.[755]

280. Notwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates. Hence, it is not necessary that the commander's failure to act caused the commission of the crime.[756]

2. Responsibility of Civilian Superiors Pursuant to Article 7(3)

281. Article 7(3) is applicable both to military and civilian leaders, be they elected or self-proclaimed, once it is established that they had the requisite effective control over their subordinates.[757] As in the case of military superiors, civilian superiors will only be held liable under the doctrine of superior criminal responsibility if they were part of a superior-subordinate relationship, even if that relationship is an indirect one.[758] A showing that the superior merely was an influential person will not be sufficient; however, it will be taken into consideration, together with other relevant facts, when assessing the civilian superior's position of authority.[759] Nevertheless, the concept of effective control for civilian superiors is different in that a civilian superior's sanctioning power must be interpreted broadly.[760] It cannot be expected that civilian superiors will have disciplinary power over their subordinates equivalent to that of military superiors in an analogous command position. For a finding that civilian superiors have effective control over their subordinates, it suffices that civilian superiors, through their position in the

[750] *Kordić* Trial Judgement, para. 446.
[751] *Čelebići* Trial Judgement, para. 395.
[752] *Krnojelac* Trial Judgement, para. 95.
[753] *Čelebići* Trial Judgement, para. 395.
[754] *Blaškić* Appeal Judgement, para. 72. For example, it is a superior's degree of effective control - his material ability - that may guide a Trial Chamber in determining whether he reasonably took the measures required either to prevent the commission of a crime or to punish the perpetrator thereof. Under some circumstances, a superior may discharge his obligation to prevent or punish by reporting the matter to the competent authorities, *Blaškić* Trial Judgement, para. 335.
[755] *Blaškić* Appeal Judgement, paras 78-85; *Blaškić* Trial Judgement, para. 336.
[756] *Čelebići* Trial Judgement, para. 398; *Kordić* Trial Judgement, para. 447.
[757] *Čelebići* Appeal Judgement, paras 195-196, 240; *Aleksovski* Appeal Judgement, para. 76.
[758] *Kordić* Trial Judgement, para. 415.
[759] *Ibid.*
[760] *Aleksovski* Trial Judgement, para. 78.

IX. CHARGES AND FINDINGS

A. Extermination (count 4) and Wilful Killing (count 5)

378. In Counts 4 and 5 of the Indictment, the Accused is charged with extermination as a crime against humanity and with wilful killing as a grave breach of the Geneva Conventions of 1949, punishable respectively under Articles 5(b) and 2(a) of the Statute.

1. The law

379. The Trial Chamber will first define the elements[901] of the crime of wilful killing, before turning to the elements specific to the crime of extermination.[902]

(a) Wilful killing

380. It is clear from the Tribunal's jurisprudence that the elements of the underlying crime of wilful killing under Article 2 of the Statute are identical to those required for murder under Article 3 and Article 5 of the Statute.[903]

381. Save for some insignificant variations in expressing the constituent elements of the crime of murder and wilful killing, which are irrelevant for this case, the jurisprudence of this Tribunal has consistently defined the essential elements of these offences as follows:

1. The victim is dead;

2. The death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and

3. The act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention:

- to kill, or

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[901] The concept 'elements' is restricted to constituent elements of these offences. The Trial Chamber is satisfied that the general requirements for crimes against humanity and grave breaches of the Geneva Conventions have been met, *see* V.D., "Findings in Repect of General Requirements for Articles 2, 3 and 5 of the Statute".

[902] The Trial Chamber is aware that this approach does not follow the sequence of the counts as charged in the Indictment, but believes that this structure serves better the purpose of a clear and sound analysis.

[903] *See Čelebići* Appeal Judgement, paras 422-423; *Čelebići* Trial Judgement, para. 422, which make this finding with respect to wilful killing under Article 2 of the Statute and murder under Article 3 of the Statute. *See Krstić* Trial Judgement, para. 485; *Krnojelac* Trial Judgement, para. 323; *Vasiljević* Trial Judgement, para. 205; *Stakić* Trial Judgement, para. 631, which make this finding with respect to murder under Article 3 and 5 of the Statute. *See Kordić* Trial Judgement, para. 236; *Naletilić* Trial Judgement, para. 248, which make this finding with respect to wilful killing under Article 2 and murder under both Article 3 and 5 of the Statute. *See* V.A., "Article 2 of the Statute: Grave Breaches of the 1949 Geneva Conventions".

- to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.[904]

382. The *actus reus* consists in the action or omission of the accused resulting in the death of the victim.[905] The Prosecution need only prove beyond reasonable doubt that the accused's conduct contributed substantially to the death of the victim.[906]

383. The Trial Chamber concurs with the *Tadić* Trial Chamber that:

> Since these were not times of normalcy, it is inappropriate to apply rules of some national systems that require the production of a body as proof to death. However, there must be evidence to link injuries received to a resulting death.[907]

384. A similar position was taken by a Trial Chamber of the ICTR rejecting a defence motion to have witness testimony struck off the record, on the basis that there was no proof of *corpus delictus* (proof of death). The Trial Chamber held that the ICTR Statute did not have any

> ... rule or requirement or practice for the production of the body, or the body of the crime, particularly not in the light of the crimes for which the ICTR was created; particularly genocide, crimes against humanity and violations of Article Three common to the Geneva Convention.[908]

385. In *Krnojelac*, the Trial Chamber held that:

> Proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered. [T]he fact of a victim's death can be inferred circumstantially from all of the evidence presented to the Trial Chamber.[909]

The Trial Chamber added that a victim's death may be established by circumstantial evidence provided that the *only* reasonable inference is that the victim is dead as a result of the acts or omissions of the accused.[910]

386. With respect to the requisite *mens rea* of wilful killing under Article 2 of the Statute, the Trial Chamber notes that there has been some debate within the jurisprudence of this Tribunal and the ICTR regarding the question whether the *mens rea* threshold for murder, and *mutatis mutandis*

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[904] For jurisprudence of this Tribunal, *see Čelebići* Appeal Judgement, paras 422-423; *Čelebići* Trial Judgement, paras 424-439; *Blaškić* Trial Judgement, para. 217; *Kupreškić* Trial Judgement, paras 560-561; *Kordić* Trial Judgement, paras 235-236; *Krstić* Trial Judgement, para. 485; *Kvočka* Trial Judgement, para. 132; *Krnojelac* Trial Judgement, para. 324; *Vasiljević* Trial Judgement, para. 205; *Naletilić* Trial Judgement, para. 248; *Stakić* Trial Judgement, para. 747 with reference to paras 631, 584-587. For ICTR jurisprudence, *see Kayishema* Trial Judgement, para. 140; *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgement, 7 June 2001 ("*Bagilishema* Trial Judgement"), para. 84-85.
[905] *Čelebići* Trial Judgement, para. 424; *Kordić* Trial Judgement, para. 229; *Kupreškić* Trial Judgement, para. 560, in the context of murder under Article 5 of the Statute.
[906] *Čelebići* Trial Judgement, para. 424.
[907] *Tadić* Trial Judgement, para. 240.
[908] *Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27, Oral Decision, 21 June 2001.
[909] *Krnojelac* Trial Judgement, para. 326.
[910] *Ibid.* In the context of prison camp cases, the *Krnojelac* Trial Chamber listed several examples of circumstantial fact from which it may be inferred that the victim died: *ibid.*, para. 327.

wilful killing, requires a mental element of premeditation.[911] The Trial Chamber finds that the *mens rea* for murder and wilful killing does not require premeditation.[912] In this respect it endorses the *Stakić* Trial Chamber findings that:

> [B]oth a dolus directus and a dolus eventualis are sufficient to establish the crime of murder [...] The technical definition of dolus eventualis is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he 'reconciles himself' or 'makes peace' with the likelihood of death. [...][913]

The threshold of *dolus eventualis* thus entails the concept of recklessness, but not that of negligence or gross negligence.[914] To satisfy the *mens rea* for murder and wilful killing, it must be established that the accused had an intention to kill or to inflict grievous bodily harm or serious injury in the reasonable knowledge that it would likely lead to death.[915]

387. In addition, the Trial Chamber notes that the *mens rea* may also be inferred either directly or *circumstantially* from the evidence in the case.[916]

(b) Extermination

388. The jurisprudence of this Tribunal and the ICTR has consistently held that, apart from the question of scale, the core elements of wilful killing (Article 2) and murder (Article 3 and Article 5) on the one hand and extermination (Article 5) on the other are the same.[917] In addition to the

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[911] Based upon a comparison between the English (murder) and French (assassinat) provision of the Statute with respect to crimes against humanity, some Trial Chambers held that murder as a crime against humanity includes the act of murder, and need not reach the level of 'assassinat', meaning that premeditation is not required. *See Akayesu* Trial Judgement, para. 588; *Rutaganda* Trial Judgement, para. 79; *Musema* Trial Judgement, para. 214; *Kupreškić* Trial Judgement, para. 561; *Blaškić* Trial Judgement, para. 216; *Kordić* Trial Judgement, para. 235. Other Trial Chambers were of the opinion that murder as a crime against humanity requires a higher mental element and therefore only premeditated murder (assassinat) constitutes a crime against humanity. *See Bagilishema* Trial Judgement, para. 84; *Kayishema* Trial Judgement, para. 139; *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003 ("*Semanza* Trial Judgement"), paras 338-339.

[912] 'Killings' as underlying act of the charge of genocide under Article 4(2)(a) are also understood to refer to intentional but not necessarily premeditated murder, *see Kayishema* Appeal Judgement, para. 151.

[913] The *Stakić* Trial Chamber adopted this approach in its findings with respect to murder under Article 3 of the Statute. As the constitutive requirements of murder and wilful killing under the different provisions of the Statute are the same, this formulation applies *mutatis mutandis* to the offence of wilful killing under Article 2 and murder under Article 5 of the Statute. *See Stakić* Trial Judgement, paras 587, 747.

[914] *Ibid.*, para. 587.

[915] *Čelebići* Appeal Judgement, para. 422.

[916] *Čelebići* Trial Judgement, para. 437; *Krnojelac* Trial Judgement, para. 326, with respect to the crime of murder under Articles 3 and 5 of the Statute.

[917] *See Akayesu* Trial Judgement, paras 591-592, which for the first time addressed the legal definition of extermination within the jurisprudence of the ICTR and this Tribunal. This approach has been endorsed by the jurisprudence of the Trial Chambers within this Tribunal and the ICTR. For jurisprudence of this Tribunal, *see Krstić* Trial Judgement, para. 492; *Vasiljević* Trial Judgement, para. 226; *Stakić* Trial Judgement, para. 638. For ICTR jurisprudence, *see Kayishema* Trial Judgement, para. 142; *Rutaganda* Trial Judgement, para. 82; *Bagilishema* Trial Judgement, para. 86; *Prosecutor v. Elizaphan and Gerard Ntakirutimana*, Case No. ICTR-96-10 & ICTR-96-17-T, Judgement, 21 February 2003 ("*Ntakirutimana* Trial Judgement"), para. 813; *Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-A, Judgement, 9 July 2004 ("*Niyitegeka* Trial Judgement"), para. 450; *Prosecutor v. Juvenal Kajelijeli, Case No. ICTR-98-44A-T, Judgement and Sentence*, 1 December 2003 ("*Kajelijeli* Trial Judgement"), paras 886 (with respect to murder under Article 5), 891 (with respect to extermination); *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and*

preconditions which must be established for a finding of a crime against humanity under Article 5 of the Statute,[918] the elements of the crime of extermination under Article 5(b) are the following:

1. the killing of persons on a massive scale (*actus reus*), and

2. the accused's intention to kill persons on a massive scale or to create conditions of life that lead to the death of a large number of people (*mens rea*).[919]

389. The *actus reus* of the crime of extermination consists of any act, omission or combination thereof which contributes directly or indirectly to the killing of a large number of individuals.[920] An act amounting to extermination may include the killing of a victim as such as well as conduct which creates conditions provoking the victim's death and ultimately mass killings, such as the deprivation of food and medicine, calculated to cause the destruction of part of the population.[921]

390. Criminal responsibility for extermination can also be established in situations where the accused's participation in mass killings is remote or indirect.[922] This Trial Chamber also recalls that, although "the charge of extermination seems to have been restricted to individuals who, by reason of either their position or authority, could decide upon the fate or had control over a large number of individuals"[923], the Prosecution is not required to prove that the accused had *de facto* control over a large number of individuals because of his position or authority.[924] Moreover, it should be noted that extermination "must be collective in nature rather than directed towards singled out individuals. However, in contrast to genocide, the offender need not have intended to destroy the *group* or part of the group to which the victims belong."[925]

Hassan Ngeze, Case No. ICTR-99-52-T, Judgement, 3 December 2003 ("*Nahimana* Trial Judgement"), para. 1061; *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-95-54A-T, 22 January 2004 ("*Kamuhanda* Trial Judgement"), paras 686 (with respect to murder under Article 5), 691 (with respect to extermination). The difference between the ICTR Statute and the Statute of this Tribunal with respect to the crime of extermination lies in the requirement that offences under Article 3 of the ICTR Statute (crimes against humanity) be committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds (*see Akayesu* Appeal Judgement, paras 460-469). Article 5 of the Statute of this Tribunal does not prescribe that the enumerated crimes as a crime against humanity be committed on discriminatory grounds.

[918] *See* V.C., "Article 5 of the Statute: Crimes Against Humanity".

[919] *Stakić* Trial Judgement, paras 638, 641.

[920] *See, e.g., Vasiljević* Trial Judgement, para. 229. This definition was accepted by this Trial Chamber in its Rule 98*bis* Decision, para. 72.

[921] *See Krstić* Trial Judgement, para. 498, citing Article 7(2)(b) of the Statute of the International Criminal Court, which elaborates in more detail the definition of the legal term 'extermination'. The *Kayishema* Trial Judgement clarified for the first time what is meant by the 'creation of conditions of life that lead to mass killings': "imprisoning a large number of people and withholding the necessities of life which results in mass death; introducing a deadly virus into a population and preventing medical care which results in mass death.", *see ibid.*, para. 146. *See* also *Bagilishema* Trial Judgement, para. 90.

[922] *Vasiljević* Trial Judgement, para. 227. *See* also *Ntakirutimana* Trial Judgement, para. 813; *Niyitegeka* Trial Judgement, para. 450.

[923] *Vasiljević* Trial Judgement, para. 222.

[924] *See* Rule 98*bis* Decision, para. 74.

[925] *Vasiljević* Trial Judgement, para. 227; *Stakić* Trial Judgement, para. 639 (emphasis added).

391. The question has often arisen whether the element of killings on a massive scale implies a numerical requirement. The Trial Chamber agrees with the approach adopted by the *Krstić* Trial Chamber that:

> The very term 'extermination' strongly suggests the commission of a massive crime, which in turn assumes a substantial degree of preparation and organisation. [...] [W]hile extermination generally involves a large number of victims, it may be constituted even where the number of victims is limited.[926]

Furthermore, the Trial Chamber recalls that the element of massiveness of the crime allows for the possibility to establish the evidence of the *actus reus* of extermination on an accumulation of separate and unrelated incidents, meaning on an aggregated basis.[927] The Trial Chamber in that respect agrees with the finding of the *Stakić* Trial Chamber, which clarified that the requirement of massiveness as a constitutive element of the *actus reus* of extermination has to be determined on a case-by-case analysis of all relevant factors.[928]

392. The *mens rea* of the crime of extermination has not been defined consistently in the jurisprudence of this Tribunal and of the ICTR. In general, three approaches can be differentiated.[929] The first approach was articulated by the *Kayishema and Ruzindana* Trial Chamber, which stated that extermination may encompass intentional, reckless or grossly negligent killing.[930] The second approach was formulated by the *Krstić* Trial Judgement in which the mental elements of murder (not necessarily premeditated) and extermination were linked. The *Krstić* Trial Chamber held that:

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[926] *Krstić* Trial Judgement, para. 501. This finding was endorsed by the *Stakić* Trial Chamber (*see Stakić* Trial Judgement, para. 640). The *Vasiljević* Trial Chamber rightly indicated that the finding of the *Kayishema* Trial Chamber that only one single killing could qualify as extermination if it forms part of a mass killing event, is not based on state practice (*see Vasiljević* Trial Judgement, para. 227, fn. 586, with reference to *Kayishema* Trial Judgement, para. 147; *see* also *Semanza* Trial Judgement, para. 335). However, this Trial Chamber agrees with the *Kayishema* Trial Chamber's finding that "[t]he term 'mass', which may be understood to mean 'large scale', does not command a numerical imperative, but may be determined on a case-by-case basis using a common sense approach." (*see Kayishema* Trial Judgement, para. 145; *Bagilishema* Trial Judgement, para. 87). In this context, the Trial Chamber also recalls the *Vasiljević* Trial Chamber, which "is not aware of cases which, prior to 1992, used the phrase 'extermination' to describe the killing of less than 733 persons. The Trial Chamber does not suggest, however, that a lower number of victims would disqualify that act as 'extermination' as a crime against humanity, nor does it suggest that such a threshold must necessarily be met." (*Vasiljević* Trial Judgement, fn. 587).

[927] *See* Rule 98*bis* Decision, para. 73.

[928] *Stakić* Trial Judgement, para. 640. *See* also *Bagilishema* Trial Judgement, para. 87; *Kayishema* Trial Judgement, para. 142; *Kajelijeli* Trial Judgement, para. 891; *Kamuhanda* Trial Judgement, para. 692. The *Kajelijeli* and *Kamuhanda* Trial Chambers both state with respect to the charge of extermination that "the Chamber may consider evidence under this charge relating to the murder of specific individuals as an illustration of the extermination of the targeted group", which supports the aggregated basis upon which the 'large scale' element of extermination could be assessed (*see Kajelijeli* Trial Judgement, para. 893; *Kamuhanda* Trial Judgement, paras 692, 694).

[929] This Trial Chamber already highlighted this inconsistency in its Rule 98*bis* Decision and indicated that, in the absence of settled jurisprudence, it favoured the definition of *mens rea* as identified in the *Vasiljević* Trial Judgement. *See* Rule 98*bis* Decision, paras 75-78.

[930] *Kayishema* Trial Judgement, para. 146. *See* also *Rutaganda* Trial Judgement, para. 80; *Musema* Trial Judgement, para. 218; *Bagilishema* Trial Judgement, para. 89.

> The offences of murder and extermination have a similar element in that they both intend the death of the victims. They have the same mens rea, which consists of the intention to kill or the intention to cause serious bodily injury to the victim which the perpetrator must have reasonably foreseen was likely to result in death.[931]

The *Stakić* Trial Chamber has refined this second approach by finding that, in accordance with the character of the crime of extermination and with the construction of Article 5, 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*.[932]

393. The third approach was adopted by the *Vasiljević* Trial Chamber. The threshold for *mens rea* of extermination was defined as follows:

> The offender must intend to kill, to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such an act or omission is likely to cause death, or otherwise intends to participate in the elimination of a number of individuals, in the knowledge that his action is part of a vast murderous enterprise in which a large number of individuals are systematically marked for killing or killed.[933]

The question arises whether the *mens rea* for extermination entails an additional element vis-à-vis the second approach formulated by the *Krstić* and *Stakić* Trial Chambers, namely the requirement to prove 'knowledge of a vast murderous enterprise'.

394. The Trial Chamber recalls what it had stated in its Rule 98*bis* decision regarding the elements required for the crime of extermination, namely, that the *Vasiljević* approach was being preferred for the sole purpose of the Rule 98*bis* exercise because it is more beneficial to the accused.[934] Since then, the *Krstić* Appeal Judgement has crystallised the legal position on the matter in stating that for the purpose of extermination, no proof is required of the existence of a plan or policy to commit that crime.[935] In its decision, the Appeals Chamber added that the presence of such a plan or policy may be important evidence that the attack against a civilian population was widespread or systematic.[936] In view of this pronouncement, the Trial Chamber makes it clear that the *Vasiljević* "knowledge that his action is part of a vast murderous enterprise in which a larger number of individuals are systematically marked for killing or killed"[937], if proven, will be

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[931] *Krstić* Trial Judgement, para. 495, endorsed by the *Semanza* Trial Judgement, para. 341.
[932] *Stakić* Trial Judgement, para. 642. It is important to note that within the ICTR jurisprudence, the *Kajelijeli* and *Kamuhanda* Trial Chambers adopted an *intermediate* approach by stating that: "We do not interpret *Bagilishema* and *Kayishema and Ruzindana* to suggest that a person may be found guilty of a Crime against Humanity if he or she did not possess the requisite *mens rea* for such a crime, but rather to suggest that reckless or grossly negligent conduct are indicative of the offender's *mens rea*. Understood in that way, the *Semanza* position is not at odds with the *Bagilishema* and *Kayishema and Ruzindana* judgements." (*see Kajelijeli* Trial Judgement, para. 894; *Kamuhanda* Trial Judgement, para. 696). This Trial Chamber however does not support this approach.
[933] *Vasiljević* Trial Judgement, para. 229 (Emphasis added).
[934] *See* Rule 98*bis* Decision, para. 78.
[935] *Krstić* Appeal Judgement, para. 225.
[936] *Ibid.*
[937] *Vasiljević* Trial Judgement, para. 229.

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.

395. The Trial Chamber thus endorses the *mens rea* formulation as identified in the *Krstić* and *Stakić* Trial Judgements as the correct legal one for the final determination of the factual findings in this case.[938] The *mens rea* standard for extermination is the same as the *mens rea* required for murder as a crime against humanity with the difference that "extermination can be said to be murder on a massive scale".[939] The Prosecution is thus required to prove beyond reasonable doubt that the accused had the intention to kill persons on a massive scale or to create conditions of life that led to the death of a large number of people.[940] The *mens rea* standard required for extermination does not include a threshold of negligence or gross negligence: the accused's act or omission must be done with intention or recklessness (*dolus eventualis*).[941]

396. It is in the light of the constitutive elements of wilful killing and extermination as described above that the evidence relating to each of the alleged acts of killings is assessed and the appropriate conclusions are reached in the section below.

2. The facts and findings

397. The Trial Chamber heard testimony from a large number of Prosecution witnesses about killings that occurred in various municipalities of the ARK. As a preliminary matter, the Trial Chamber finds that evidence was adduced with respect to a number of killings which were not charged in the Indictment.[942] While such evidence may support the proof of the existence of an armed conflict or a widespread or systematic attack on a civilian population, no finding of guilt for the crimes of wilful murder or extermination may be made in respect of such uncharged incidents.

398. With respect to those killings that were alleged in the Indictment, the Trial Chamber finds that the following incidents were not proved beyond reasonable doubt:

- The killing of a number of men in Lišnja on or about 1 June 1992 - Prnjavor municipality;[943]

[938] *See Krstić* Trial Judgement, para. 495; *Stakić* Trial Judgement, para. 642. The Trial Chamber in this respect accepts the Prosecution submission (Prosecution Final Brief, paras 670-685) and dismisses the Defence submission that the *Vasiljević* approach should not be followed (Defence Final Brief (confidential), pp. 98-99).
[939] *Stakić* Trial Judgement, para. 638.
[940] *Stakić* Trial Judgement, paras 638, 641.
[941] *See Stakić* Trial Judgement, para. 587: "The technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he 'reconciles himself' or 'makes peace' with the likelihood of death".
[942] Such evidence has been included in the General Overview section where appropriate.
[943] Rusmir Mujanić, T. 16017, to whom the Prosecution Final Brief (fn. 881) refers, merely mentions a Serb called Tito Potok who boasted about the killing of a number of Muslims from Lišnja. *See*, ex. P657, "Regular Combat Report"

B. Torture (counts 6 and 7)

480. Torture is charged in counts 6 and 7 pursuant to Articles 2(b) and 5(f) of the Statute.[1253]

1. The law

481. Both this Tribunal and the ICTR have adopted a definition of the crime of torture along the lines of that contained in the Convention against Torture ("CAT"),[1254] which comprises the following constitutive elements:

1. the infliction, by act or omission, of severe pain or suffering, whether physical or mental;[1255]
2. the act or omission must be intentional;[1256] and
3. the act or omission must have occurred in order to obtain information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.[1257]

482. The definition of "torture" remains the same regardless of the Article of the Statute under which the Accused has been charged.[1258] The *mens rea* as set out above is not controversial in the jurisprudence of the Tribunal. However, a number of issues regarding the *actus reus* may usefully be addressed.

(a) Severity of pain or suffering

483. The seriousness of the pain or suffering sets torture apart from other forms of mistreatment.[1259] The jurisprudence of this Tribunal and of the ICTR has not specifically set the

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[1253] Indictment, paras 53-56. The Trial Chamber is satisfied that the general requirements for grave breaches of the Geneva Conventions and crimes against humanity have been met, *see* V., "General Requirements for the Crimes Alleged in the Indictment".

[1254] *See* Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, UNTS Vol. 1465, ("CAT"), p. 85.

[1255] *Furundžija* Trial Judgement, para. 162; *Čelebići* Trial Judgement, para. 468; *Semanza* Trial Judgement, para. 343.

[1256] *Furundžija* Trial Judgement, para. 162; *Akayesu* Trial Judgement, para. 594.

[1257] *Kunarac* Trial Judgement, para. 497; *Krnojelac* Trial Judgement, paras 179, 186. According to both Trial Chambers, "humiliation" is not a purpose of torture acknowledged under customary international law, which has been stated so by the *Furundžija* and *Kvočka* Trial Chambers in their judgements (paras 162 and 141 respectively). This approach has subsequently been confirmed by the *Furundžija* Appeals Chamber (para. 111 of the *Furundžija* Appeal Judgement). *See* also *Naletilić* Trial Judgement, para. 338, and *Semanza* Trial Judgement, para. 343.

[1258] *Krnojelac* Trial Judgement, para. 178; *Furundžija* Trial Judgement, para. 139; *Kunarac* Trial Judgement, para. 497; *Kvočka* Trial Judgement, para. 158.

[1259] Article 1(2) of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 9 December 1975, G.A. Res. 3452, annex, 30 U.N. GAOR Supp. (No. 34) at 91 U.N. Doc. A/10034 (1975) states: "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment".

threshold level of suffering or pain required for the crime of torture, and it consequently depends on the individual circumstances of each case.[1260]

484. In assessing the seriousness of any mistreatment, the objective severity of the harm inflicted must be considered, including the nature, purpose and consistency of the acts committed. Subjective criteria, such as the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim's age, sex, state of health and position of inferiority will also be relevant in assessing the gravity of the harm.[1261] Permanent injury is not a requirement for torture;[1262] evidence of the suffering need not even be visible after the commission of the crime.[1263]

485. The criteria mentioned in the previous paragraph will be used by this Trial Chamber in assessing whether the treatment alleged by the Prosecution in counts 6 and 7 amounts to severe pain or suffering. Some acts, like rape, appear by definition to meet the severity threshold. Like torture, rape is a violation of personal dignity and is used for such purposes as intimidation, degradation, humiliation and discrimination, punishment, control or destruction of a person.[1264] Severe pain or suffering, as required by the definition of the crime of torture, can be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.[1265]

(b) Prohibited purpose

486. Acts of torture aim, through the infliction of severe mental or physical pain, to attain a certain result or purpose.[1266] Thus, in the absence of such purpose or goal, even a very severe infliction of pain would not qualify as torture for the purposes of Article 2 and Article 5 of the Statute.[1267]

487. The prohibited purposes mentioned above[1268] do not constitute an exhaustive list, and there is no requirement that the conduct must *solely* serve a prohibited purpose.[1269] If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose is immaterial.[1270]

[1260] *Čelebići* Trial Judgement, para. 469; *Kunarac* Trial Judgement para. 476.
[1261] *Kvočka* Trial Judgement, para. 143; *Krnojelac* Trial Judgement, para. 182.
[1262] *Kvočka* Trial Judgement, para. 148.
[1263] *Kunarac* Appeal Judgement, para. 150.
[1264] *Akayesu* Trial Judgement, para. 597.
[1265] *Kunarac* Appeal Judgement, para. 151; *Čelebići* Trial Judgement, paras 480 *et seq.*, which quotes reports and decisions of organs of the UN and regional bodies, in particular, the Inter-American Commission on Human Rights and the European Court of Human Rights, stating that rape may be a form of torture.
[1266] *See* para. 481 above (third element of the torture definition).
[1267] *Krnojelac* Trial Judgement, para. 180.
[1268] *See* para. 481 above.
[1269] *Čelebići* Trial Judgement, para. 470; *Kunarac* Appeal Judgement, para. 155.
[1270] *Kunarac* Appeal Judgement, para. 155.

would like to say a heart-felt bravo to Mr. Kalinić. In all my appearances in this joint Assembly, it has never crossed my mind that though he seems to be quiet, while I seem hawkish, his opinions are the closest to mine. I believe that this is a formula and we should adhere to this formula."[2481] This speech is not unequivocal. The most that can safely be gleaned from it is that the Accused ultimately endorsed the war option, as suggested by Dragan Kalinić, and not the negotiation option. His response to Kalinić does not allow the finding that he had genocidal intent.

(d) Conclusion

989. Although the factors raised by the Prosecution have been examined on an individual basis, the Trial Chamber finds that, even if they were taken together, they do not allow the Trial Chamber to legitimately draw the inference that the underlying offences were committed with the specific intent required for the crime of genocide. On the basis of the evidence presented in this case, the Trial Chamber has not found beyond reasonable doubt that genocide was committed in the relevant ARK municipalities, in April to December 1992.

990. The Appeals Chamber has stated that:

> The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements –the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part – guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name.[2482]

991. When these requirements are not satisfied beyond reasonable doubt, as in this case, an accused must be acquitted of the charge. The Accused is therefore acquitted of the charges of genocide and complicity in genocide in counts 1 and 2 of the Indictment.

F. Persecutions (count 3)

1. The law

(a) Chapeau elements

992. Persecution is charged pursuant to Article 5(h) of the Statute.[2483] The crime of persecution consists of an act or omission which:

[2481] Ex. P50, "Minutes of the 16th session of the SerBiH Assembly held on 12 May 1992", pp. 22, 29-30.
[2482] *Krstić* Appeal Judgement, para. 37.
[2483] Indictment, paras 45-48. The Trial Chamber is satisfied that the general requirements for crimes against humanity have been met. *See* V.,"General Requirements for the Crimes Alleged in the Indictment".

1. discriminates in fact and denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and

2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race,[2484] religion or politics (the *mens rea*).[2485]

993. With respect to the discriminatory element of the *actus reus*, although Tribunal jurisprudence is clear that the act must have discriminatory consequences,[2486] the Appeals Chamber has stated that it is not necessary that the victim of the crime of persecution be a member of the group against whom the perpetrator of the crime intended to discriminate. In the event that the victim does not belong to the targeted ethnic group, "the act committed against him institutes discrimination in fact, *vis-à-vis* other [members of that different group] who were not subject to such acts, effected with the will to discriminate against a group on grounds of ethnicity".[2487]

994. The act or omission constituting the crime of persecution may assume different forms.[2488] However, the principle of legality requires that the Prosecution must charge particular acts amounting to persecution rather than persecution in general.[2489] While a comprehensive list of such acts has never been established,[2490] it is clear that persecution may encompass acts which are listed in the Statute,[2491] as well as acts which are not listed in the Statute.[2492] The persecutory act or

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[2484] The Trial Chamber finds that the concept of 'race' includes 'ethnicity', which it finds more appropriate to refer to in the context of the present case.

[2485] *Krnojelac* Appeal Judgement, para. 185; *Krnojelac* Trial Judgement, para. 431; *Vasiljević* Trial Judgement, para. 244; *Stakić* Trial Judgement, para. 732; *Simić* Trial Judgement, para. 47. *See* also *Tadić* Trial Judgement, para. 715; *Kupreškić* Trial Judgement, para. 621; *Kordić* Trial Judgement, paras 189, 195. Although the Statute refers to the listed grounds in the conjunctive, it is settled in the jurisprudence of the Tribunal that the presence of discriminatory intent on any one of these grounds is sufficient to fulfil the *mens rea* requirement for persecution: *see Tadić* Trial Judgement, para. 713.

[2486] The *Tadić* Trial Judgement requires "the occurrence of a *persecutory act or omission* and a discriminatory basis for that act or omission on one of the listed grounds" (emphasis added), para. 715; the *Kupreškić* Trial Judgement requires that the *act* of persecution be done "on discriminatory grounds", para. 621, as distinct from the requirement of discriminatory intent detailed later in that judgement, para. 633; the *Kordić* Trial Judgement requires the occurrence of a "*discriminatory* act or omission" (emphasis added), para. 189, and expressly incorporates the requirement "on discriminatory grounds" into the *actus reus* of the offence, para. 203; *Krnojelac* Trial Judgement, para. 431; *Vasiljević* Trial Judgement, para. 244; *Stakić* Trial Judgement, para. 732; *Krnojelac* Appeal Judgement, para. 185; *Simić* Trial Judgement, para. 47.

[2487] *Krnojelac* Appeal Judgement, para. 185.

[2488] *Kupreškić* Trial Judgement, para. 568; *Blaškić* Trial Judgement, para. 218; *Krnojelac* Trial Judgement, para. 433; *Vasiljević* Trial Judgement, para. 246; *Stakić* Trial Judgement, para. 735; *Simić* Trial Judgement, para. 50.

[2489] *Kupreškić* Trial Judgement, para. 626; *Krnojelac* Trial Judgement, para. 433; *Vasiljević* Trial Judgement, para. 246; *Stakić* Trial Judgement, para. 735; *Simić* Trial Judgement, para. 50.

[2490] *Tadić* Trial Judgement, para. 694; *Kupreškić* Trial Judgement, para. 567; *Blaškić* Trial Judgement, para. 219; *Kordić* Trial Judgement, para. 192; *Vasiljević* Trial Judgement, para. 246; *Stakić* Trial Judgement, para. 735.

[2491] *Kupreškić* Trial Judgement, para. 605; *Kvočka* Trial Judgement, para. 185; *Krnojelac* Trial Judgement, para. 433; *Vasiljević* Trial Judgement, para. 246; *Naletilić* Trial Judgement, para. 635, *Stakić* Trial Judgement, para. 735; *Simić* Trial Judgement, para. 48.

[2492] *Tadić* Trial Judgement, para. 703; *Kupreškić* Trial Judgement, paras 581, 614; *Blaškić* Trial Judgement, para. 233; *Kordić* Trial Judgement, paras 193-194; *Kvočka* Trial Judgement, para. 185; *Krnojelac* Trial Judgement, para. 433; *Vasiljević* Trial Judgement, para. 246; *Naletilić* Trial Judgement, para. 635; *Stakić* Trial Judgement, para. 735; *Simić* Trial Judgement, para. 48.

omission may encompass physical and mental harm, as well as infringements upon fundamental rights and freedoms of individuals.[2493] Although persecution usually refers to a series of acts, a single act may be sufficient.[2494]

995. Not every act or omission denying a fundamental right is serious enough to constitute a crime against humanity.[2495] While acts or omissions listed under other sub-paragraphs of Article 5 of the Statute are by definition serious enough, others (either listed under other Articles of the Statute or not listed in the Statute at all) must meet an additional test. Such acts or omissions must reach the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute. This test will only be met by gross or blatant denials of fundamental rights.[2496] When invoking this test, acts should not be considered in isolation but rather should be examined in their context and with consideration of their cumulative effect.[2497] Separately or combined, the acts must amount to persecution, though it is not required that each alleged underlying act be regarded as a violation of international law.[2498]

996. The crime of persecution also derives its unique character from the requirement of a specific discriminatory intent.[2499] It is not sufficient for the accused to be aware that he is in fact acting in a way that is discriminatory; he must consciously intend to discriminate.[2500] There is no requirement under persecution that a discriminatory policy exist or that, in the event that such a policy is shown to have existed, the accused need to have taken part in the formulation of such discriminatory policy or practice by a governmental authority.[2501]

997. Discriminatory intent may not be inferred directly from the general discriminatory nature of an attack against a civilian population. However, it may be inferred from the context of the acts "as

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[2493] *Blaškić* Trial Judgement, para. 233; *Krnojelac* Trial Judgement, para. 433; *Vasiljević* Trial Judgement, para. 246.
[2494] *Kupreškić* Trial Judgement, para. 624; *Krnojelac* Trial Judgement, para. 433; *Simić* Trial Judgement, para. 50.
[2495] *Kupreškić* Trial Judgement, para. 618; *Kordić* Trial Judgement, para. 196; *Kvočka* Trial Judgement, para. 185; *Krnojelac* Trial Judgement, para. 434; *Stakić* Trial Judgement, para. 735; *Simić* Trial Judgement, para. 48.
[2496] *Kupreškić* Trial Judgement, para. 621; *Krnojelac* Trial Judgement, para. 434; *Naletilić* Trial Judgement, para. 635; *Stakić* Trial Judgement, para. 736; *Simić* Trial Judgement, para. 48.
[2497] *Kupreškić* Trial Judgement, paras 615(e), 622; *Krnojelac* Trial Judgement, para. 434; *Vasiljević* Trial Judgement, para. 247; *Naletilić* Trial Judgement, para. 637; *Stakić* Trial Judgement, para. 736; *Simić* Trial Judgement, para. 48.
[2498] *Kvočka* Trial Judgement, para. 186; *Krnojelac* Trial Judgement, para. 434; *Vasiljević* Trial Judgement, para. 247; *Simić* Trial Judgement, para. 48.
[2499] *Kordić* Trial Judgement, para. 217; *Blaškić* Trial Judgement, para. 235; *Tadić* Appeal Judgement, para. 305; *Vasiljević* Trial Judgement, para. 248; *Naletilić* Trial Judgement, para. 638; *Krnojelac* Appeal Judgement, para. 184; *Simić* Trial Judgement, para. 51.
[2500] *Kordić* Trial Judgement, para. 217; *Krnojelac* Trial Judgement, para. 435; *Vasiljević* Trial Judgement, para. 248; *Simić* Trial Judgement, para. 51.
[2501] *Kupreškić* Trial Judgement, para. 625; *Krnojelac* Trial Judgement, para. 435; *Vasiljević* Trial Judgement, para. 248; *Stakić* Trial Judgement, para. 739; *Simić* Trial Judgement, para. 51.

long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent".[2502]

2. The facts and findings

998. In the Indictment, the Prosecution has charged five different broad categories of acts as persecution.[2503] Several of these acts have also been charged as separate offences, and have been dealt with above. In relation to those underlying acts that have already been established, the Trial Chamber must also consider the additional criteria necessary to render such acts persecutory. Those underlying acts not already examined as separate charges (physical violence, rape, sexual assault, constant humiliation and degradation; denial of fundamental rights) will necessarily be addressed in greater detail before the Trial Chamber turns to consider whether the requisite criteria for the crime of persecution have been met.

(a) Killings (para. 47(1) of the Indictment)

999. The Prosecution charges "the killing of Bosnian Muslims and Bosnian Croats by Bosnian Serb forces (including units of the 5th Corps/1st KK) in villages and non-Serb areas, in detention camps and other detention facilities" as persecutions.[2504] These acts are charged separately as genocide/complicity in genocide,[2505] extermination (a crime against humanity under Article 5(b) of the Statute) and wilful killing (a grave breach under Article 2(a) of the Statute).[2506] Because the elements of acts of wilful killings are identical to those required for murder under Article 5 of the Statute,[2507] they are as such of sufficient gravity to constitute persecution.

1000. Earlier in this Judgement, the Trial Chamber defined the legal requirements for the crime of killings[2508] and established that at least 1669 Bosnian Muslims and Bosnian Croats were killed in the ARK at the time relevant to the Indictment.[2509] The Trial Chamber finds that these killings were discriminatory in fact.

1001. With respect to the requisite *mens rea*, the Trial Chamber observes that the use of pejorative names such as 'Balijas' for Muslims, 'Ustašas' for Croats and other verbal abuse often

[2502] *Krnojelac* Appeal Judgement, para.184.
[2503] Para. 47 of the Indictment.
[2504] Para. 47(1) of the Indictment.
[2505] Counts 1 and 2 respectively.
[2506] Counts 4 and 5 respectively.
[2507] See IX.A., "Extermination and wilful killing".
[2508] See IX.A., "Extermination and wilful killing".
[2509] *See* para. 465 *supra*.

1154. Radoslav Brđanin was arrested on 6 July 1999. Accordingly, he has been in custody now for five years, one month, and 26 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.

Judge Carmel Agius
Presiding

Judge Ivana Janu

Judge Chikako Taya

Dated this 1st day of September 2004
At The Hague
The Netherlands

[Seal of the Tribunal]