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ANNEX A

AUTHORITY 39

**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-98-33-T
Date: 02 August 2001
Original: English

IN THE TRIAL CHAMBER

Before: Judge Almiro Rodrigues, Presiding
Judge Fouad Riad
Judge Patricia Wald

Registrar: Mr. Hans Holthuis

PROSECUTOR**v.****RADISLAV KRSTIC**

JUDGEMENT

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Peter McCloskey
Mr. Andrew Cayley
Ms. Magda Karagiannakis

Counsel for the Accused:

Mr. Nenad Petrušić
Mr. Tomislav Višnjić

3. the unlawful act or omission must be part of a widespread or systematic attack;
4. the attack must be against the civilian population[.]¹¹³⁴

493. The Prosecutor submits¹¹³⁵ that the crime of extermination must, by its very nature, be directed against a group of individuals, that it requires an element of mass destruction and that it embraces situations where a large number of people who do not share any common characteristic are killed.¹¹³⁶ No discriminatory element is required.¹¹³⁷

494. The pre-trial Brief of the Defence¹¹³⁸ argues that the act of extermination is distinguishable from genocide by the fact that it is not committed on account of a person's national, ethnical, racial or religious affiliation and that, moreover, the commission of the act does not require any special intention, that is, the intent to destroy the group in whole or in part.¹¹³⁹

495. 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.¹¹⁴⁰ The Trial Chamber will now identify what extermination further involves and whether the requirements of that crime are met in this case.

496. To this end, the Trial Chamber notes the common definition of "extermination". According to the French Dictionary *Nouveau Petit Robert*, "exterminer" (to exterminate) derives from the Latin *exterminare*, meaning "to drive out", which comes from "ex" meaning "out" and "terminus" meaning "border". Likewise, the *Oxford English Dictionary* gives the primary meaning of the word "exterminate"¹¹⁴¹ as the act of driving out or banishing a person or group of persons beyond the boundaries of a state, territory or community. The ordinary use of the term "extermination",¹¹⁴²

¹¹³⁴ *Akayesu* Judgement, para. 592. This Judgement further refers to the conditions required for a crime against humanity pursuant to the ICTR Statute, which also involve that the attack "be on discriminatory grounds, namely: national, political, ethnic, racial, or religious grounds." There is no such requirement in Article 5 of the ICTY Statute regarding crimes against humanity other than persecution.

¹¹³⁵ Prosecutor's pre-trial Brief pursuant to Rule 65 *ter* (E)(i), 25 February 2001.

¹¹³⁶ *Ibid.*, para. 129.

¹¹³⁷ In accordance with the *Tadić* / Appeals Judgement, paras. 273-305. Conversely, see *Akayesu* Judgement, para. 592, *Kayishema/Ruzindana* Judgement, para. 144, *Rutaganda* Judgement, paras. 83-84, and *Musema* Judgement, paras. 218-219.

¹¹³⁸ *The Prosecutor v. Radislav Krstić*, case no. IT-98-33-PT, Pre-trial Brief of the Defence pursuant to Rule 65 *ter* (E)(i), 29 February 2000.

¹¹³⁹ *Ibid.*, paras. 35-36.

¹¹⁴⁰ *Akayesu* Judgement, para. 589; *Blaškić* Judgement, para. 217; *Jelisić* Judgement, para. 35; *Kupreški* Judgement, paras. 560-561.

¹¹⁴¹ The term appeared in the Christian Latin language in the twelfth century but was hardly used before the sixteenth. See *The Oxford English Dictionary* (2nd Edition) Vol. V, p. 601. *Le Nouveau Petit Robert*, French language dictionary (Dictionnaires Le Robert - Paris, 1994), p. 871.

¹¹⁴² *Ibid.* Meaning which appeared first in Vulgate and then in French.

however, has come to acquire a more destructive connotation meaning the annihilation of a mass of people.

497. Thus, the International Law Commission insists on the element of mass destruction in defining extermination:

[Extermination is a] crime which by its very nature is directed against a group of individuals. In addition, the act used to carry out the offence of extermination involves an element of mass destruction which is not required for murder. In this regard, extermination is closely related to the crime of genocide ?...g¹¹⁴³

498. Given the limited precedents in the matter, it is useful to refer further to Article 7(2)(b) of the Statute of the International Criminal Court, which goes into more detail on the definition of the term "extermination" and specifies that:

Extermination includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of the population.

From the insertion of this provision, we surmise that the crime of extermination may be applied to acts committed with the intention of bringing about the death of a large number of victims either directly, such as by killing the victim with a firearm, or less directly, by creating conditions provoking the victim's death.¹¹⁴⁴ The Report of the ICC Preparatory Commission on the Elements of the crimes provides further guidance. It indicates that "the perpetrator [should have] killed one or more persons" and that the conduct should have taken place "as part of a mass killing of members of a civilian population."¹¹⁴⁵

499. It is necessary, then, to identify the victims. Article 5 of the ICTY Statute covering crimes against humanity refers to acts "directed against any civilian population". The victims need not share national, ethnical, racial or religious characteristics. In accordance with the *Tadić* Appeals Judgement,¹¹⁴⁶ the Trial Chamber is of the view that it is unnecessary that the victims were discriminated against for political, social or religious grounds, to establish the crime of extermination.

500. According to the commentary on the ILC Draft Code, extermination distinguishes itself from the crime of genocide by the fact that the targeted population does not necessarily have any

¹¹⁴³ See in particular the commentary on the ILC Draft Code of Crimes against the Peace and Security of Mankind (hereinafter, "ILC Draft Code"), *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), Article 18, p. 118.

¹¹⁴⁴ Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd edition, 1999), p. 295.

¹¹⁴⁵ Report of the Preparatory Commission for the International Criminal Court, Finalized draft text of the Elements of Crimes, PCNICC/2000/1/Add.2, 2 November 2000 (footnotes omitted).

¹¹⁴⁶ *Tadić* I Appeals Judgement, paras. 281-305.

common national, ethnical, racial or religious characteristic, and that it also covers situations where "some members of a group are killed while others are spared".¹¹⁴⁷ For this reason, extermination may be retained when the crime is directed against an entire group of individuals even though no discriminatory intent nor intention to destroy the group as such on national, ethnical, racial or religious grounds has been demonstrated; or where the targeted population does not share any common national, ethnical, racial or religious characteristics.

501. The very term "extermination" strongly suggests the commission of a massive crime, which in turn assumes a substantial degree of preparation and organisation.¹¹⁴⁸ It should be noted, though, that "extermination" could also, theoretically, be applied to the commission of a crime which is not "widespread" but nonetheless consists in eradicating an entire population, distinguishable by some characteristic(s) not covered by the Genocide Convention, but made up of only a relatively small number of people. In other words, while extermination generally involves a large number of victims, it may be constituted even where the number of victims is limited.

502. In this respect, the ICC definition of extermination indicates that it would be sufficient that the criminal acts be "calculated to bring about the destruction of *part* of the population." The Trial Chamber notes that this definition was adopted after the time the offences in this case were committed. In accordance with the principle that where there is a plausible difference of interpretation or application, the position which most favours the accused should be adopted, the Chamber determines that, for the purpose of this case, the definition should be read as meaning the destruction of a numerically significant part of the population concerned.

503. In sum, the Trial Chamber finds that for the crime of extermination to be established, in addition to the general requirements for a crime against humanity, there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population.

¹¹⁴⁷ See note 1143 above.

¹¹⁴⁸ In para. 207, the Bla{ki} Judgement provides: "in practice, these two criteria ?widespread and systematic attackg will often be difficult to separate since a widespread attack targeting a large number of victims generally relies on some form of planning or organisation. The quantitative criterion is not objectively definable as witnessed by the fact that neither international texts nor international and national case-law set any threshold starting with which a crime against humanity is constituted."

H. Criminal Responsibility of General Krsti}

1. Introduction

600. The Prosecution alleges that General Krsti} is criminally responsible for his participation in the crimes charged in the indictment, pursuant to Article 7(1) of the Statute,¹³³⁹ which states that:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

601. The Trial Chambers of the ICTY and the ICTR and the Appeals Chamber of the ICTY have identified the elements of the various heads of individual criminal responsibility in Article 7(1) of the Statute.¹³⁴⁰ The essential findings in the jurisprudence may be briefly summarised as follows:

- "Planning" means that one or more persons design the commission of a crime at both the preparatory and execution phases;¹³⁴¹
- "Instigating" means prompting another to commit an offence;¹³⁴²
- "Ordering" entails a person in a position of authority using that position to convince another to commit an offence;¹³⁴³
- "Committing" covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law;¹³⁴⁴
- "Aiding and abetting" means rendering a substantial contribution to the commission of a crime;¹³⁴⁵ and
- "Joint criminal enterprise" liability is a form of criminal responsibility which the Appeals Chamber found to be implicitly included in Article 7(1) of the Statute. It entails individual responsibility for participation in a joint criminal enterprise to commit a crime;¹³⁴⁶

¹³³⁹ Para. 18 of the Indictment. In its Final Trial Brief (para. 27), the Prosecution makes reference to each head - except "committing" - mentioned in Article 7(1) as well as the "common purpose doctrine" (discussed below) as a basis for General Krsti}'s guilt.

¹³⁴⁰ Cf. Article 6(1) of the Statute of the ICTR. In its Final Trial Brief (para. 3), the Prosecution incorporates by reference its submissions on Article 7 in its Pre-Trial Brief (paras 13-86). Likewise, the Defence's submissions on Article 7 in its Pre-Trial Brief (paras 13-29) are incorporated in its Final Trial Brief (para. 2).

¹³⁴¹ *Akayesu* Judgement, para. 480; *Blaskic* Judgement, para. 279; *Kordic and Cerkez* Judgement, para. 386.

¹³⁴² *Akayesu* Judgement, para. 482; *Blaskic* Judgement, para. 280; *Kordic and Cerkez* Judgement, para. 387.

¹³⁴³ *Akayesu* Judgement, para. 483; *Blaskic* Judgement, para. 281; *Kordic and Cerkez* Judgement, para. 388.

¹³⁴⁴ *Tadic* Appeal Judgement, para. 188; *Kunarac et al.* Judgement, para. 390.

¹³⁴⁵ *Aleksovski* Appeal Judgement, paras. 162-164.

V. DISPOSITION

727. Based upon the facts and the legal findings as determined by the Trial Chamber and for the foregoing reasons, the Trial Chamber:

FINDS Radislav Krsti} **GUILTY of:**

- Genocide;
- Persecution for murders, cruel and inhumane treatment, terrorising the civilian population, forcible transfer and destruction of personal property of Bosnian Muslim civilians;
- Murder as a violation of the Laws and Customs of War;

SENTENCES Radislav KRSTI] to Forty six years of imprisonment and **STATES** that the full amount of time spent in the custody of the Tribunal will be deducted from the time to be served.

Done on second of August 2001 in English and French, the English text being authoritative.

At The Hague, The Netherlands

Judge Fouad Riad

Judge Almiro Rodrigues

Judge Patricia Wald

Presiding