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Case No. 001/18-07-2008/ECCC/OCIJ

D96

ANNEX A

AUTHORITY 47

**UNITED
NATIONS**

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

Case No. IT-95-13/1-T
Date: 27 September 2007
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christine Van Den Wyngaert
Judge Krister Thelin

Registrar: Mr Hans Holthuis

Judgement of: 27 September 2007

PROSECUTOR

v.

**MILE MRKŠIĆ
MIROSLAV RADIĆ
VESELIN ŠLJIVANČANIN**

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr Marks Moore
Mr Philip Weiner
Mr Bill Smith
Mr Vincent Lunny
Ms Meritxell Regue
Mr Alexis Demirdjian

Counsel for the Accused:

Mr Miroslav Vasić and Mr Vladimir Domazet for Mile Mrkšić
Mr Borivoje Borović and Ms Mira Tapusković for Miroslav Radić
Mr Novak Lukić and Mr Momčilo Bulatović for Veselin Šljivančanin

violence and the improbability of their random occurrence.¹⁶⁵³ This requirement only applies to the attack itself, not to the individual acts of the accused.¹⁶⁵⁴ Only the attack, not the accused's individual acts, must be widespread or systematic.¹⁶⁵⁵

438. Article 5 further requires the existence of a nexus between the acts of the accused and the attack on a civilian population. According to the Tribunal's jurisprudence, the acts of the perpetrator must be objectively part of the attack, as opposed to being isolated acts. They need not be committed in the midst of that attack provided that they are sufficiently connected to that attack.¹⁶⁵⁶

439. Concerning the required *mens rea* in relation to the attack, the Appeals Chamber has held that in addition to the intent to commit the underlying offence charged, the accused must have known that there is an attack on the civilian population and that his acts comprise part of that attack, or at least that he took the risk that his acts were part of the attack.¹⁶⁵⁷ This requirement does not entail knowledge of the details of the attack.¹⁶⁵⁸ It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof.¹⁶⁵⁹

(c) Directed against any civilian population

440. The attack must be directed against any civilian population. As held by the Appeals Chamber "in the context of a crime against humanity the civilian population is the primary object of the attack."¹⁶⁶⁰ Factors relevant to the consideration whether an attack was directed against a civilian population include, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, 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.¹⁶⁶¹

¹⁶⁵³ *Blaškić* Appeals Judgement, para 101.

¹⁶⁵⁴ *Kunarac* Appeals Judgement, para 96; *Kordić* Appeals Judgement, para 94; *Naletilić* Trial Judgement, para 236; *Kunarac* Trial Judgement, para 431.

¹⁶⁵⁵ *Kunarac* Appeals Judgement, para 96.

¹⁶⁵⁶ *Tadić* Appeals Judgement, para 248; *Naletilić* Trial Judgement, para 234; see also *Kunarac* Appeals Judgement, para 96 and para 100 for a definition of an 'isolated act'; *Kordić* Trial Judgement, para 178.

¹⁶⁵⁷ *Kunarac* Appeals Judgement, paras 102, 105.

¹⁶⁵⁸ *Kunarac* Appeals Judgement, paras 102, 105.

¹⁶⁵⁹ *Kunarac* Appeals Judgement, paras 103, 105.

¹⁶⁶⁰ *Kunarac* Appeals Judgement, para 91 (footnotes omitted); *Naletilić* Trial Judgement, para 235.

¹⁶⁶¹ *Kunarac* Appeals Judgement, para 91.

441. The nationality of the victims is irrelevant for the purposes of Article 5 of the Statute. Historically, this was one of the main distinguishing factors between war crimes and crimes against humanity: whereas war crimes could only be committed against enemy nationals (combatants and civilians), crimes against humanity could also be committed against the state's own population. This factor is now obsolete for war crimes, as the jurisprudence has accepted that war crimes can also be committed against a state's own nationals.¹⁶⁶² It stays, however, relevant to an understanding of the difference between the two categories of crimes.

442. The term "civilian population" must be interpreted broadly and refers to a population that is predominantly civilian in nature. A population may qualify as "civilian" even if non-civilians are among it, as long as it is predominantly civilian.¹⁶⁶³ The presence within a population of members of armed resistance groups, or former combatants, who have laid down their arms, does not as such alter its civilian nature.¹⁶⁶⁴ This jurisprudence is in line with Article 50(3) of Additional Protocol I ("Definition of civilians and civilian population"), which states that "[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character".

(d) Applicability of Article 5 to non-civilian victims

443. A related but distinct legal issue arises in the circumstances of the present case. While it has been clarified by the jurisprudence of the Tribunal that the mere presence of non-civilians among what is a predominantly civilian population does not alter the civilian character of the *population* for the purposes of the *chapeau* requirements of Article 5, the jurisprudence of the Tribunal has not yet been called upon to pronounce on the question whether the notion of crimes against humanity is intended to apply to crimes listed in Article 5 when the *individual victims* of such crimes are not civilians. On 14 March 2007 the Chamber sought submissions from the Parties on this issue. It put to the Parties the following question:

"Is the question whether the victims of a crime against humanity were civilians or not relevant to the applicability of Article 5? In other words, is the general condition of the civilian status of the targeted population that is required for a *chapeau* requirement [...] identical to the condition of the civilian status of the victims of the underlying crime?"¹⁶⁶⁵

The Parties' arguments in response, delivered orally on 16 March 2007, are briefly reviewed below.

¹⁶⁶² See *Tadić* Appeals Judgement, paras 164-166. The Appeals Chamber confirmed that the nationality criterion (or the formal bond) has been replaced by the substantial relations criterion, *i.e.* control by a party of a conflict over persons in a given territory. (*Tadić* Appeals Judgement, para 166) This will be the case, for example, of war crimes committed by Bosnian Serbs against Bosnian Croats or Bosnian Muslims and *vice versa*.

¹⁶⁶³ *Jelisić* Trial Judgement, para 54; *Kupreškić* Trial Judgement, paras 547-549; *Naletilić* Trial Judgement, para 235; *Kordić* Trial Judgement, para 180; *Blagojević* Trial Judgement, para 544.

IX. RESPONSIBILITY

A. Law

540. It is alleged that each of the three Accused is responsible, under Article 7(1) of the Statute, for planning, instigating, ordering, committing through participation in a joint criminal enterprise, or otherwise aiding and abetting the planning, preparation or execution of the crimes charged in the Indictment.¹⁸⁸³ The liability of each of the three Accused is also alleged to arise, pursuant to Article 7(3) of the Statute, from their position of superior authority over the Serbian forces, including members of the JNA, TO, volunteer and paramilitary soldiers, who allegedly committed the crimes charged in the Indictment.¹⁸⁸⁴

1. Responsibility under Article 7(1)

541. Article 7(1) of the Statute reads:

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.

542. The Appeals Chamber has held that Article 7(1) “covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law.”¹⁸⁸⁵ However, criminal liability not only attaches to the physical perpetrator of a particular crime but in certain circumstances, it extends to those who participate in and contribute to its commission in various ways.¹⁸⁸⁶

(a) Committing through participation in a joint criminal enterprise

543. The Indictment alleges that the three Accused are individually criminally responsible for the crimes charged through their participation in a joint criminal enterprise (“JCE”).

544. In *Tadić*, the Appeals Chamber held that JCE as a form of accomplice liability was firmly established in customary international law at the time covered in that indictment, 1992.¹⁸⁸⁷ The crimes charged in the present Indictment occurred in November 1991. The Appeals Chamber conclusion in *Tadić* was based on sources dating back to the 1940s¹⁸⁸⁸ and, therefore, this Chamber

¹⁸⁸³ It is expressly pleaded in the Indictment that the form of liability “committing” is limited to the participation of each Accused in a joint criminal enterprise and that it is not alleged that any of the accused physically committed any or all of the crimes charged; Indictment, para 4.

¹⁸⁸⁴ Indictment, paras 13-20.

¹⁸⁸⁵ *Tadić* Appeals Judgement, para 188.

¹⁸⁸⁶ *Kordić* Trial Judgement, para 373; *Tadić* Appeals Judgement, para 192.

¹⁸⁸⁷ *Tadić* Appeals Judgement, para 220.

¹⁸⁸⁸ *Tadić* Appeals Judgement, paras 193-220.

accepts that JCE existed in customary international law at the time of the events charged in the present Indictment.

545. The jurisprudence of the Tribunal has established three categories of JCE. The *actus reus* of a participant in a JCE is common to all three categories. First, a plurality of persons is required.¹⁸⁸⁹ They need not be organised in a military, political, or administrative structure.¹⁸⁹⁰ Secondly, the existence of a common plan, design or purpose, which amounts to or involves the commission of a crime provided for in the Statute, must be established.¹⁸⁹¹ There is no need for the plan, design or purpose to have been previously arranged or formulated. Nor does JCE liability require an understanding or an agreement between the accused and the principal perpetrator of the crime to commit that particular crime. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in a unison to put into effect a JCE.¹⁸⁹² Thirdly, the accused must have participated in the common design, either by participating directly in the commission of the agreed crime itself, or by assisting or contributing to the execution of the common purpose.¹⁸⁹³ The accused's contribution need not be necessary, in a sense of *sine qua non*, to achieve the common criminal purpose;¹⁸⁹⁴ indeed, the accused's contribution to the common purpose does not even need to be substantial, as a matter of law.¹⁸⁹⁵ However, the contribution of the accused in the common plan should at least be a *significant* one.¹⁸⁹⁶ Not every type of conduct amounts to a significant enough contribution to the common purpose to impute criminal liability to the accused for the crimes committed.¹⁸⁹⁷ The presence of the participant in the JCE at the time the crime is committed by the principal offender is not required.¹⁸⁹⁸

546. As to the *mens rea*, the requirements of the three categories of JCE differ. In the first, basic type of JCE the accused intends to perpetrate a crime and this intent is shared by all co-perpetrators.¹⁸⁹⁹ In the second type, embracing the so-called "concentration camp" cases, or systemic JCE, the accused has knowledge of the system of repression, in the enforcement of which he participates, and the intent to further the common concerted design to ill-treat the inmates of a concentration camp.¹⁹⁰⁰ The third type concerns cases in which one of the participants commits a

¹⁸⁸⁹ *Vasiljević* Appeals Judgement, para 100.

¹⁸⁹⁰ *Tadić* Appeals Judgement, para 227; *Stakić* Appeals Judgement, para 64.

¹⁸⁹¹ *Tadić* Appeals Judgement, para 227; *Vasiljević* Appeals Judgement para 100.

¹⁸⁹² *Tadić* Appeals Judgement, para 227; *Krnjelac* Appeals Judgement, para 97, *Vasiljević* Appeals Judgement, paras 100, 109; *Brdanin* Appeals Judgement, paras 415, 418.

¹⁸⁹³ *Tadić* Appeals Judgement, para 227.

¹⁸⁹⁴ *Kvočka* Appeals Judgement, para 98.

¹⁸⁹⁵ *Kvočka* Appeals Judgement, para 97.

¹⁸⁹⁶ *Brdanin* Appeals Judgement, para 430.

¹⁸⁹⁷ *Brdanin* Appeals Judgement, para 427.

¹⁸⁹⁸ *Krnjelac* Appeals Judgement, para 81.

¹⁸⁹⁹ *Tadić* Appeals Judgement, paras 220, 228.

¹⁹⁰⁰ *Tadić* Appeals Judgement, paras 202-203; 227-228.

crime outside the common design. The *mens rea* in such cases is twofold. First, the accused must have the intention to take part in and contribute to the common criminal purpose. Secondly, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take that risk by joining or continuing to participate in the enterprise.¹⁹⁰¹ Whether the crimes committed outside the common purpose of the JCE were “a natural and foreseeable consequence thereof” must be assessed in relation to the knowledge of a particular accused, *i.e.* the Prosecution must prove that the accused had sufficient knowledge that the additional crimes were a natural and foreseeable consequence.¹⁹⁰²

547. The Chamber notes that the Appeals Chamber has recently clarified that the principal perpetrators carrying out the *actus reus* of the crimes set out in the indictment do not have to be members of the JCE. What matters in such cases is whether the crime in question forms part of the common purpose¹⁹⁰³ and whether at least one member of the JCE used the principal perpetrator acting in accordance with the common plan.¹⁹⁰⁴ In this respect, when a member of the JCE uses a person outside the JCE to carry out the *actus reus* of a crime, the fact that this person knows of the existence of the JCE, *i.e.* of the common purpose, may be a factor taken into consideration when determining whether the crime forms part of the common criminal purpose.¹⁹⁰⁵ When the direct perpetrator commits a crime beyond the common purpose of the JCE, but which is its natural and foreseeable consequence¹⁹⁰⁶ the accused may be found responsible if he participated in the common criminal purpose with the requisite intent and if, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk – that is the accused, with the awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise.¹⁹⁰⁷

(b) Planning

548. The *actus reus* of “planning” requires that one or more persons plan or design, at both the preparatory and execution phases, the criminal conduct constituting one or more crimes provided

¹⁹⁰¹ *Tadić* Appeals Judgement, paras 204; 227-228; *Kvočka* Appeals Judgement, para 83.

¹⁹⁰² *Kvočka* Appeals Judgement, para 86.

¹⁹⁰³ *Brdanin* Appeals Judgement, paras 410, 418.

¹⁹⁰⁴ *Brdanin* Appeals Judgement, paras 413, 430.

¹⁹⁰⁵ *Brdanin* Appeals Judgement, para 410.

¹⁹⁰⁶ *Brdanin* Appeals Judgement, paras 431.

¹⁹⁰⁷ *Brdanin* Appeals Judgement, para 411.

Count 7: Torture, a violation of the laws or customs of war, under Article 3 of the Statute, for having aided and abetted the torture of prisoners of war at the hangar at Ovčara on 20 November 1991;

but finds the Accused Veselin Šljivančanin **NOT GUILTY** on all other counts in the Indictment.

716. The Chamber hereby sentences Veselin Šljivančanin to a single sentence of 5 (five) years imprisonment. Veselin Šljivančanin has been in custody since 13 June 2003. Pursuant to Rule 101(C) of the Rules, he is entitled to credit for time spent in detention so far. Pursuant to Rule 103(C) of the Rules, Veselin Šljivančanin shall remain in custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where he shall serve his sentence.

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

Dated this twenty-seventh day of September 2007
At The Hague
The Netherlands

Judge Kevin Parker
Presiding

Judge Christine Van Den Wyngaert

Judge Krister Thelin

[Seal of the Tribunal]