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**ANNEX A**

**AUTHORITY 48**

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**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-98-34-T  
Date: 31 March 2003  
Original: English

**IN THE TRIAL CHAMBER**

**Before:** Judge Liu Daqun  
Judge Maureen Clark  
Judge Fatoumata Diarra

**Registrar:** Mr. Hans Holthuis

**Judgement of:** 31 March 2003

**PROSECUTOR**

v.  
Mladen NALETILIC, aka "TUTA"  
And  
Vinko MARTINOVIC, aka "ŠTELA"

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**JUDGEMENT**

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**The Office of the Prosecutor:**

Mr. Kenneth Scott  
Mr. Douglas Stringer  
Mr. Vassily Poriouvaev  
Mr. Roeland Bos

**Counsel for the Accused:**

Mr. Krešimir Krsnik            For Mladen Naletilic  
Mr. Christopher Meek

Mr. Branko Šeric                For Vinko Martinovic  
Mr. Želimir Par

(a) Individual criminal responsibility under Article 7(1) of the Statute

58. Article 7(1) of the Statute provides 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.

59. "Planning" means that, "one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases".<sup>148</sup> The existence of a plan can also be proved by circumstantial evidence.<sup>149</sup> An accused held responsible for having committed a crime will not be found responsible for planning such crime.<sup>150</sup>

60. "Instigating" has been defined as "prompting another to commit an offence"<sup>151</sup> either through an act or an omission.<sup>152</sup> The *actus reus* requires a clear contribution to the act of the other person, but it needs not to be shown that the offence would not have been perpetrated without the participation of the accused.<sup>153</sup> The requisite *mens rea* is that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts.<sup>154</sup>

61. "Ordering" "implies a superior-subordinate relationship between the person giving the order and the one executing it".<sup>155</sup> A formal superior-subordinate relationship is not required, but it must be established that the accused possessed the authority to order.<sup>156</sup> The order does not need to be given in any particular form and can be explicit or implicit.<sup>157</sup> That the order was given can be proved through circumstantial evidence.<sup>158</sup> It is not necessary that the order be given directly to the individual conducting it.<sup>159</sup>

62. "Committing" means physically and personally perpetrating a crime or engendering a culpable omission in violation of a rule of criminal law.<sup>160</sup> There can be several perpetrators regarding the same crime as long as each of them fulfils the requisite elements of the crime.<sup>161</sup>

<sup>148</sup> *Akayesu* Trial Judgement, para 480, quoted in the *Blaskic* Trial Judgement, para 279.

<sup>149</sup> *Blaskic* Trial Judgement, para 279.

<sup>150</sup> *Kordic* Trial Judgement, para 386.

<sup>151</sup> *Akayesu* Trial Judgement, para 482, quoted in the *Blaskic* Trial Judgement, para 280, and endorsed in the *Kordic* Trial Judgement, para 387.

<sup>152</sup> *Blaskic* Trial Judgement, para 280; *Kordic* Trial Judgement, para 387.

<sup>153</sup> *Kordic* Trial Judgement, para 387; *Kvočka* Trial Judgement, para 252.

<sup>154</sup> *Kvočka* Trial Judgement, para 252 referring to *Akayesu* Trial Judgement, para 482.

<sup>155</sup> *Akayesu* Trial Judgement, para 483, endorsed in the *Blaskic* Trial Judgement, para 281.

<sup>156</sup> *Kordic* Trial Judgement, para 388.

<sup>157</sup> *Kordic* Trial Judgement, para 388, endorsing the *Blaskic* Trial Judgement, para 281.

<sup>158</sup> *Blaskic* Trial Judgement, para 281; *Kordic* Trial Judgement, para 388.

<sup>159</sup> *Blaskic* Trial Judgement, para 282.

<sup>160</sup> *Tadic* Appeal Judgement, para 188.

63. "Aiding and Abetting" is defined as rendering a substantial contribution to the commission of a crime. The contribution can consist of practical assistance, encouragement or moral support.<sup>162</sup> It is not necessary to prove that a cause-effect relationship existed between the participation and the commission of the crime.<sup>163</sup> The participation may happen before, during or after the commission of a crime.<sup>164</sup> Aiding and abetting can also be committed through an omission as long as the omission had a significant effect on the commission of the crime and was accompanied by the necessary *mens rea*.<sup>165</sup> An individual's position of superior authority does not suffice to conclude from his mere presence on the scene of the crime, that he encouraged or supported the crime. However the presence of a superior can be perceived as an important *indicium* for encouragement or support.<sup>166</sup> Regarding concomitant behaviour, the *Furundžija* Trial Chamber held that the accused had assisted another accused in the commission of a rape because he was continuing with the interrogation of the victim while being raped.<sup>167</sup> Concerning the *mens rea* it is required that the aider and abettor must have known, in the sense of being aware, that he was assisting in the commission of the crime.<sup>168</sup> It has to be shown that he was aware of the essential elements of the crime, which also means the necessary *mens rea* on the part of the principal.<sup>169</sup> The abettor need not have known the precise crime being committed as long as he was aware that one of a number of crimes would be committed, including the one actually perpetrated.<sup>170</sup>

(b) Command or superior responsibility under Article 7(3) of the Statute

64. Article 7(3) of the Statute provides that:

[t]he fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

<sup>161</sup> *Kunarac* Trial Judgement, para 390.

<sup>162</sup> *Tadic* Appeal Judgement, para 229; *Aleksovski* Appeal Judgement, para 164. *Celebici* Appeal Judgement, para 352.

<sup>163</sup> *Aleksovski* Trial Judgement, para 61, confirmed by the *Aleksovski* Appeal Judgement, para 164.

<sup>164</sup> *Aleksovski* Trial Judgement, para 62; *Kunarac* Trial Judgement, para 391; *Kvočka* Trial Judgement, para 256.

<sup>165</sup> *Blaškić* Trial Judgement, para 284.

<sup>166</sup> *Aleksovski* Trial Judgement, para 65; *Blaškić* Trial Judgement, para 284. 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.

<sup>167</sup> *Furundžija* Trial Judgement, para 273-274, confirmed by the *Furundžija* Appeal Judgement, para 126.

<sup>168</sup> *Tadic* Appeal Judgement, para 229; *Aleksovski* Appeal Judgement, para 162 referring to *Furundžija* Trial Judgement, para 249.

<sup>169</sup> *Aleksovski* Appeal Judgement, para 162 referring to the *Furundžija* Trial Judgement, paras 245 and 249.

<sup>170</sup> *Furundžija* Trial Judgement, para 246; followed by the *Blaškić* Trial Judgement, para 287. The finding in the *Tadic* Appeal Judgement, para 229, that it has to be shown that the aider and abettor knew that he was assisting the specific crime committed is not contradictory because it has to be read only in the context of contrasting aiding and abetting with the participation in a common purpose or design. See also *Aleksovski* Appeal Judgement, para 163.

Naletilic was in a village above Raštani on 23 September 1993<sup>490</sup> and effected command by radio communication on his Motorola.<sup>491</sup>

#### **D. Requirements under Article 2 of the Statute**

176. Article 2 of the Statute deals with grave breaches of the Geneva Conventions of 1949.<sup>492</sup> The applicability of Article 2 of the Statute is subject to four prerequisites: an armed conflict must exist;<sup>493</sup> there must be a nexus between this conflict and the crimes alleged;<sup>494</sup> the armed conflict must be international in scope;<sup>495</sup> and the persons or property subject of grave breaches must be defined as "protected" in the Geneva Conventions.<sup>496</sup>

##### **1. Armed Conflict and nexus to the alleged crimes**

177. According to the jurisprudence of the Tribunal, an armed conflict exists:

whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State ?...? whether or not actual combat takes place there.<sup>497</sup>

Once it is established that an armed conflict occurred in a territory, the norms of international humanitarian law apply.<sup>498</sup> It is not necessary to further establish that actual combat activities occurred in a particular part of the territory.<sup>499</sup> The existence of an armed conflict nexus is established if the alleged crimes "were closely related to the hostilities".<sup>500</sup>

178. The Naletili} Defence does not dispute the armed conflict between the HVO and the ABiH.<sup>501</sup> It disputes the nature of the conflict. The Martinovi} Defence does not challenge the

<sup>490</sup> Witness SS identified Mladen Naletilic in the courtroom, only testified that he saw Mladen Naletilic, whom he knew from the media, in a village above Raštani on 23 September 1993, witness SS, T 6573-6574, 6590-6591.

<sup>491</sup> See witnesses VV and SS's testimonies.

<sup>492</sup> Article 2 of the Statute reads as follows: "The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (a) wilful killing; (b) torture or inhumane treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages".

<sup>493</sup> *Tadi}* Jurisdiction Decision, para 84.

<sup>494</sup> *elebi}* Trial Judgement, paras 182-185, 193-195.

<sup>495</sup> *Tadic* Jurisdiction Decision, para 84.

<sup>496</sup> *Tadi}* Jurisdiction Decision, para 80.

<sup>497</sup> *Tadi}* Jurisdiction Decision, para 70.

<sup>498</sup> *Tadic* Jurisdiction Decision, para 70.

<sup>499</sup> *Tadic* Jurisdiction Decision, para 70.

<sup>500</sup> *Tadic* Jurisdiction Decision, para 70.

<sup>501</sup> Naletili} Final Brief, p 116, "Of course, there is no dispute that *in the time and place covered by the Indictment* in Herzegovinian municipalities, and in Central Bosnia occurred an armed conflict between BiH Croats and BiH Muslims, but there is not any reason at all to estimate the character of this type of conflict as international" (emphasis added).

existence of a conflict. The Chamber is not clear on which date the Martinovi} Defence agrees that the conflict started.<sup>502</sup>

179. The Chamber is satisfied that an armed conflict existed during the time relevant to the Indictment, *i.e.* at least between 17 April 1993 and the end of February 1994.<sup>503</sup>

180. The Chamber is satisfied that the acts with which Mladen Naletili} and Vinko Martinovi} are charged were committed in the course, and as a consequence, of the armed conflict between the HVO and the ABiH. The victims of this conflict were living within the relevant territory in the relevant period. Further, both accused were members of the armed forces taking part in the hostilities. The Chamber is thus satisfied that the nexus requirement has been met in the present case.

## 2. Character of the conflict

181. In the Pre-Trial Brief, the Prosecution sets out to prove the existence of an international armed conflict in two ways: (1) through the active participation of the Croatian Army HV in Bosnia and Herzegovina, engaged with the HVO against the ABiH,<sup>504</sup> and (2) through the overall control exercised by the Republic of Croatia over the HVO throughout the conflict.<sup>505</sup>

182. In this respect, the Appeals Chamber has held that an internal conflict may be deemed international if "another State intervenes in that conflict through its troops or "...? some of the participants in the internal armed conflict act on behalf of that other State."<sup>506</sup> Concerning the first of these two legal tests, namely the direct participation of foreign troops on the territory of a State, both Defences acknowledge that an armed conflict is international if the troops of another State intervene in an internal armed conflict.<sup>507</sup>

<sup>502</sup> Martinovic Final Brief, p 15, "the conflict nevertheless broke out on 23 October 1992?"; on p 17, "the beginning of the conflict between BH Army and HVO took place on 9.5.1993"; on p 18, "in the early morning of 30.6.1993 "...?the real conflict broke out between Muslims and Croats in the municipality of Mostar".

<sup>503</sup> The evidence before the Chamber shows that fighting ensued in the Sovi}i-Doljani area on the morning of 17 April 1993 as part of a larger offensive to take Jablanica. In those same days, incidents between military formations of the HVO and of the ABiH were taking place in Mostar. In the early hours of 9 May 1993, large-scale hostilities broke out in Mostar. Single attacks went on during the summer and autumn of 1993 and ended only in late February 1994 as a consequence of the Washington Agreement.

<sup>504</sup> Concerning this first test, the Prosecution relies on the definition given in the Commentary of Article 2 of the Geneva Convention IV, according to which an international armed conflict exists whenever "any difference arising between two States lead?s?to the intervention of members of the armed forces". Prosecution Pre-trial Brief, p 37.

<sup>505</sup> Concerning this second test, the Prosecution relies on the jurisprudence of the Appeals Chamber defining what constitutes overall control and when armed forces may be regarded as acting on behalf of a foreign power, thereby rendering an apparently internal conflict international. Prosecution Pre-trial Brief, p 38, relying on the *Tadi}* Appeal Judgement, para 137.

<sup>506</sup> *Tadic* Appeal Judgement, para 84.

<sup>507</sup> Naletili} Final Brief, pp 111, 116-117; Martinovi} Final Brief, p 21.

Several months ago, I told you about the situation and gave the tasks to the Minister of Defence Mr [U[AK and General BOBETKO, /as regards/ our help and our engagement in Herceg-Bosna. I told them that this was where the future borders of the Croatian state are being resolved. That is when I pointed out that it was very important that they defended the positions and the territory the HVO was holding there ...? The general political situation is such today that very few of the international factors think that the union of Bosnia and Herzegovina will survive.<sup>554</sup>

201. To allow for the implementation of this common goal, the Croatian leadership issued orders for HVO or HV troop movements<sup>555</sup> and military strategies<sup>556</sup> in Bosnia and Herzegovina. It further ensured control over the HVO by appointing HV officers at the most senior positions in the HVO command structure.<sup>557</sup>

202. For the foregoing reasons, the Chamber finds that the Republic of Croatia exercised overall control over the HVO in the context of the conflict relevant to the present case.

### 3. Protected persons and property

#### (a) Civilians and Prisoners of war

203. The Prosecution relies on Article 4 (1) of Geneva Convention IV, which defines protected persons as "those civilians who find themselves" in the hands of a Party to the conflict or Occupying Power of which they are not nationals.<sup>558</sup> It further submits that the expression "in the hands of" should not be interpreted literally, and that persons who find themselves in territory that is under the control of an occupying power are protected under Article 4 (1) of the Geneva Convention IV.<sup>559</sup>

204. The Naletili} Defence submits that in order for victims to gain "protected persons" status, it is required that the person be of a different nationality than the perpetrators of the alleged offence.<sup>560</sup> For its part, the Martinovi} Defence argues that the conflict was political rather than

<sup>554</sup> Exhibit PP892/PT-11, pp R0180830-31. In spite of the fact that according to Defence witness Milan Kovac, the issue of the annexation of the Croatian regions in Bosnia and Herzegovina was never expressly included as a goal of any Croatian political party, Defence witness Milan Kovac, T 11194, referring to exhibit D1/301; witness Paddy Ashdown confirmed that President Tu|man's aspiration to that effect, witness Paddy Ashdown, BT 7344-7348. Witness Sir Martin Garrod testified that President Tu|man and Mate Boban shared views on this matter, witness Sir Martin Garrod, T 8402.

<sup>555</sup> Exhibits PPIAC-7; PPIAC-8; PPIAC-10; PPIAC-13.

<sup>556</sup> Exhibit PPIAC-37. In this respect, Mate Boban stated during one of the meetings held in Zagreb with President Tu|man: "there is no document which has been addressed from any Croatian area to me or our services that we have organised that has not been transmitted to President Tu|man or Minister [u{ak", exhibit PP 892/PT-7, p R0181130. See also exhibit PP 562.12.

<sup>557</sup> For example, Milivoj Petkovi} was replaced by Slobodan Praljak as the commander of the HVO Main Staff on 24 July 1993, exhibit PP 534.1. Subsequently Slobodan Praljak was replaced by Ante Roso who was appointed commander of the HVO Main Staff pursuant to an order by Franjo Tudman, exhibit PP 664.2.

<sup>558</sup> Prosecution Pre-trial Brief, p 39.

<sup>559</sup> Prosecution Pre-trial Brief, p 39.

<sup>560</sup> Naletili} Pre-trial Brief, p 11.

ethnic and that the victims may not be considered as protected persons "since they were of the same nationality as the opposing forces".<sup>561</sup>

205. Article 4 of Geneva Convention IV defines as protected persons "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."<sup>562</sup> According to the Commentary to Geneva Convention IV there are two main types of protected persons: (i) "enemy nationals" and (ii) "the whole population" of occupied territories (excluding nationals of the Occupying Power).<sup>563</sup>

206. In the *Tadić* Appeal Judgement, it was found that the Geneva Conventions intend to protect civilians "who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons",<sup>564</sup> bearing in mind that "already in 1949, the legal bond of nationality was not regarded as crucial".<sup>565</sup> In doing so, the Appeals Chamber determined that:

Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. ... In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.<sup>566</sup>

207. This approach was further confirmed in the *elebići* Appeal Judgement which stated that "formal nationality may not be regarded as determinative in this context, whereas ethnicity may reflect more appropriately the reality of the bonds".<sup>567</sup> The Chamber abides by the consistent

<sup>561</sup> "It is submitted that the prosecution would have to establish, and has not, that this was a conflict between ethnic groups as opposed to a conflicts ?sic? between political factions within a state. Evidence has shown, or at least raised a reasonable doubt to the effect, that at least in the zone of conflict of Mr Martinovi}, the conflict was political and not ethnic since BH Muslims were employed in the HVO and in particular the Mr Martinovi}'s unit. Consequently, it is submitted that the victims in the relevant zone of conflict cannot be considered as protected persons for the purposes of the fourth Geneva Convention since they were of the same nationality as the opposing forces." Martinovi} Final Brief, p 38.

<sup>562</sup> Article 4 of Geneva Convention IV reads as follows: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. ...? Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, shall not be considered as protected persons within the meaning of the present Convention."

<sup>563</sup> Commentary to Geneva Convention IV, p 46.

<sup>564</sup> *Tadić* Appeal Judgement, para 164.

<sup>565</sup> *Tadić* Appeal Judgement, para 165.

<sup>566</sup> *Tadić* Appeal Judgement, para 168. See also, *Aleksovski* Appeal Judgement, paras 151, 152.

<sup>567</sup> *elebići* Appeal Judgement, para 82. The Appeals Chamber held: "Article 4 of Geneva Convention IV is to be interpreted as intending to protect civilians who find themselves in the midst of an international, or internationalised, conflict to the maximum extent possible. The nationality requirement of Article 4 should therefore be ascertained upon a review of ?the substance of the relations? and not based on the legal characterisation ?...? In today's ethnic



jurisprudence on this issue and will review, on a case by case basis, the effective allegiance of the victims rather than their formal nationality.

208. Furthermore, the Chamber accepts the argument of the Prosecution that the expression "in the hands of" a party or occupying power, as it appears in Article 4 of Geneva Convention IV, refers to persons finding themselves on the territory controlled by that party or occupying power.<sup>568</sup>

(b) Prisoners of war

209. Article 4 of Geneva Convention III protects prisoners of war, *i.e.* persons who have fallen into the power of the enemy<sup>569</sup> and belong to one of the specified categories listed in Article 4.<sup>570</sup> Article 5 of Geneva Convention III states that prisoners of war are protected "from the time they fall into the power of the enemy and until their final release and repatriation."<sup>571</sup>

(c) Occupation

210. Occupation is relevant in dealing with the charges of unlawful labour of civilians (Count 5), forcible transfer of a civilian (Count 18) and destruction of property (Count 19). The Prosecution relies on provisions of Geneva Convention IV, which have no application in the absence of a state

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conflicts, the victims may be "assimilated" to the external State involved in the conflict, even if they formally have the same nationality as their captors, for the purposes of the application of humanitarian law, and of Article 4 of Geneva Convention IV specifically. The Appeals Chamber thus agrees with the *Tadić* Appeal Judgement that "even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable." *Elebić* Appeal Judgement, para 83.

<sup>568</sup> Commentary to Geneva Convention IV, p47, relating to Article 4 of Geneva Convention IV states: "The expression 'in the hands of' is used in an extremely general sense. It is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or 'hands' of the Occupying Power".

<sup>569</sup> The expression "fallen into the power of the enemy" has a wide significance and covers the case of soldiers who became prisoners without fighting, for example following a surrender. Commentary to Geneva Convention IV, p 10.

<sup>570</sup> Article 4 of Geneva Convention III provides: "(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognisable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war. (3) Members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power. (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorisation from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model. (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law. (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war."

<sup>571</sup> Article 5 of Geneva Convention III.

Chamber has clarified that the existence of a policy or plan may serve as evidence in establishing that an attack was directed against a civilian population and that it was widespread or systematic. It does not however constitute a separate and additional legal element of the crime as it is neither enshrined in the Statute of the Tribunal nor a requirement under customary law.<sup>624</sup>

235. The term "population" in the meaning of Article 5 of the Statute does not imply that the entire population of a geographical entity in which an attack is taking place must be subject to the attack. The element is fulfilled if it can be shown that a sufficient number of individuals were targeted in the course of an attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian population, and not only against a limited number of individuals who were randomly selected.<sup>625</sup> An attack is "directed against" a civilian population if the civilian population is the primary object of the attack.<sup>626</sup> The population against whom the attack is directed is considered civilian if it is predominantly civilian.<sup>627</sup> This means not only that the definition of civilian population includes individuals who may at one time have performed acts of resistance and persons *hors de combat* but also that the presence of a number of non-civilians cannot refute the predominantly civilian character of a population.<sup>628</sup>

236. The attack must be either widespread or systematic in nature. The element "widespread" refers to the large-scale nature of the attack and the number of the victims. The element "systematic" requires an organised nature of the acts and the improbability of their random occurrence.<sup>629</sup>

237. The accused must further possess the necessary *mens rea*. The accused must have the intent to commit the underlying offence with which he is charged, and he must have knowledge that there is an attack against the civilian population and that his act comprises part of that attack.<sup>630</sup>

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a policy or plan as a separate element of Article 5 of the Statute but concurred with the findings in the *Kordi* Trial Judgement that such plan or policy may be indicative to determine that an attack is widespread or systematic and that the acts of the accused are part of the attack, *Kronojetac* Trial Judgement, para 58.

<sup>624</sup> *Kunarac* Appeal Judgement, para 98.

<sup>625</sup> *Kunarac* Appeal Judgement, para 90.

<sup>626</sup> *Kunarac* Appeal Judgement, para 91. In the determination whether there was an attack upon a civilian population, it is not relevant that the other side may also have committed atrocities against its opponent's civilian population, *Kunarac* Appeal Judgement, para 87.

<sup>627</sup> *Tadi* Trial Judgement, para 638; *Kordi* Trial Judgement, para 180; *Kronojetac* Trial Judgement, para 56.

<sup>628</sup> *Tadi* Trial Judgement, paras 638-639.

<sup>629</sup> *Kunarac* Appeal Judgement, para 94, citing the *Kunarac* Trial Judgement, para 429 and the *Tadi* Trial Judgement, para 648.

<sup>630</sup> As a minimum, he must willingly have taken the risk that his act was part of said attack. The accused, however, does not need to have knowledge of the details of the attack, neither does he have to share the purpose or goal behind the attack to be held responsible for a crime against humanity, all other elements being met; *Kunarac* Appeal Judgement, paras 102-103.

### III. FINDINGS ON THE RESPECTIVE COUNTS

#### A. Counts 2-8: Unlawful labour and human shields

245. Vinko Martinovi} and Mladen Naletili} are charged with seven counts on the basis of their alleged use of BH Muslims detainees for forced labour and as human shields.<sup>646</sup> The practice of unlawful labour is cumulatively charged as inhumane act (Count 2), inhuman treatment (Count 3) and cruel treatment (Count 4). Furthermore, the deaths resulting from this practice are charged as murder and wilful killing (Counts 6 to 8). This Tribunal has held that the use of detainees for certain forms of labour and as human shields may amount to inhumane acts, inhuman treatment, cruel treatment<sup>647</sup> and/or murder and wilful killing, where the elements specific to these offences are also met.

#### 1. The law

##### (a) Inhuman treatment, cruel treatment and inhumane acts

246. The jurisprudence of the Tribunal shows that the offences of inhuman treatment and cruel treatment are residual clauses under Articles 2 and 3 of the Statute respectively.<sup>648</sup> Materially, the elements of these offences are the same.<sup>649</sup> Inhuman treatment is defined as a) an intentional act or omission, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity,<sup>650</sup> b) committed against a protected person.<sup>651</sup> Cruel treatment is constituted by a) an intentional act or omission, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity,<sup>652</sup> b) committed against a person taking no active part in the hostilities.<sup>653</sup> The degree of physical or mental suffering required to prove either one of those offences is lower than the one required for torture, though at the same level as the one required to prove a charge of "wilfully causing great suffering or serious injury to body or health".<sup>654</sup>

<sup>646</sup> Indictment, paras 35-44.

<sup>647</sup> *Blaskić* Trial Judgement, para 713; *Kordić* Trial Judgement, para 773.

<sup>648</sup> *Celebici* Judgement, para 552.

<sup>649</sup> In the *Celebici* Appeal Judgement, the Appeals Chamber held that as between the offences of cruel treatment and inhumane treatment, the "sole distinguishing element stems from the protected person requirement under Article 2 of the Statute".

*Celebici* Appeal Judgement, para 426.

<sup>650</sup> *Blaskić* Trial Judgement, para 154; applied in *Celebici* Appeal Judgement, para 426.

<sup>651</sup> *Celebici* Appeal Judgement, para 426.

<sup>652</sup> *Jelisić* Trial Judgement, para 41; applied in *Celebici* Appeal Judgement, para 424.

<sup>653</sup> *Celebici* Appeal Judgement, para 424.

<sup>654</sup> *Kvo-ka* Trial Judgement, para 161.

247. Similarly, Article 5(i) of the Statute (other inhumane acts) is a residual clause, which applies to acts that do not fall within any of other sub-clause of Article 5 of the Statute but are sufficiently similar in gravity to the other enumerated crimes.<sup>655</sup> Inhumane acts are "... acts or omissions intended to cause deliberate mental or physical suffering to the individual."<sup>656</sup> As constituting crimes against humanity, these acts must also be widespread or systematic.<sup>657</sup>

(b) Murder and wilful killing

248. The underlying elements of the offences of murder under Article 3 and 5 of the Statute and wilful killing under Article 2 of the Statute are the same.<sup>658</sup> These elements are:

- a. death of the victim as the result of the action(s) of the accused,
- b. who intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death,<sup>659</sup>

249. The general requirements under Articles 2, 3 and 5 of the Statute apply to these crimes.<sup>660</sup>

(c) Unlawful labour

250. The charge of unlawful labour is also brought under Article 51 of Geneva Convention IV and Articles 49, 50 and 52 of Geneva Convention III.<sup>661</sup> The alleged violations of those provisions fall under Article 3 of the Statute, and more specifically within the category, as defined by the Appeals Chamber,<sup>662</sup> constituted by infringements of the Geneva Conventions other than those classified as grave breaches. As such, they clearly infringe upon a rule of international humanitarian law. Moreover, it is apparent from the jurisprudence of the Tribunal that the Geneva Conventions as a whole, including the above-mentioned provisions, have become part of customary

<sup>655</sup> *Kvo-ka* Trial Judgement, para 206. The Chamber held that "mutilation and other types of severe bodily harm, beatings and other acts of violence, serious physical and mental injury, forcible transfer, inhumane and degrading treatment, forced prostitution and forced disappearance" were listed in the jurisprudence of the Tribunal as falling under this category, para 208.

<sup>656</sup> *Kayishema/Ruzindana* Trial Judgement, para 151; applied in *Blaškic* Trial Judgement, para 240.

<sup>657</sup> *Blaškic* Trial Judgement, paras 239-242.

<sup>658</sup> *Celebici* Trial Judgement, para 422, which discusses wilful killing in Article 2 of the Statute and murder in Article 3 of the Statute; *Kordic* Trial Judgement, para 236, which discusses wilful killing and murder under Articles 3 and 5 of the Statute; *Celebici* Appeal Judgement, para 422; *Blaškic* Trial Judgement, para 153.

<sup>659</sup> *Blaškic* Trial Judgement, para 153.

<sup>660</sup> For the purposes of Article 2 of the Statute, it must be committed against a protected person; *Celebici* Appeal Judgement, para 422. For the purposes of Article 3 of the Statute, it must be committed against a person taking no active part in the hostilities; *Celebici* Appeal Judgement, para 423. For the purposes of Article 5 of the Statute, the murder must be committed as part of a widespread or systematic attack against a civilian population; *Kordic* Trial Judgement, para 236. In the *Krstic* Trial Judgement, the Chamber cites the same definition for both Articles 3 and 5 of the Statute, *Krstic* Trial Judgement, para 485. See also, *Jelavic* Trial Judgement, para 51.

<sup>661</sup> Count 5 of the Indictment.

<sup>662</sup> *Tadić* Jurisdiction Decision, para 89.

[t]he elements of torture in an armed conflict require that torture: (i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition (ii) this act or omission must be intentional; (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person; (iv) it must be linked to an armed conflict; (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g., as a de facto organ of a State or any other authority-wielding entity.<sup>893</sup>

338. The Trial Chamber in *Kunarac* held that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied in human rights law.<sup>894</sup> It abandoned the element that the perpetrator of the crime of torture must be a public official. It also held the view that humiliation is not a purpose of torture acknowledged under customary law.<sup>895</sup> The *Kunarac* Appeal Judgement confirmed the position of the *Kunarac* Trial Chamber in excluding the public official requirement when considering criminal responsibility of an individual for torture outside the framework of the Torture Convention.<sup>896</sup> It remained silent with regard to the exclusion of "humiliation" as a purpose of torture by the *Kunarac* Trial Judgement. The Chamber finds that the underlying facts of the case do not require the Chamber to take position on this question since the torture allegations contained in the Indictment do not refer to humiliation as a purpose of torture.<sup>897</sup>

(b) Wilfully causing great suffering or serious injury to body or health

339. The offence of wilfully causing great suffering or serious injury to body or health under Article 2(c) of the Statute is defined as:

- a. an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health,
- b. committed against a protected person.<sup>898</sup>

340. The Commentary to Article 147 of Geneva Convention IV describes the offence of wilfully causing great suffering as referring to suffering which is inflicted without ends in view for which torture or biological experiments are carried out. It could be inflicted for other motives such as punishment, revenge or out of sadism, and could also cover moral suffering. In describing serious

<sup>893</sup> *Furundžija* Trial Judgement, para 162.

<sup>894</sup> *Kunarac* Trial Judgement, para 496. It stated that "[i]n particular, the Chamber is of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law".

<sup>895</sup> *Kunarac* Trial Judgement, para 497.

<sup>896</sup> *Kunarac* Appeal Judgement, para 148.

<sup>897</sup> Paragraphs 33 and 45 of the Indictment allege that severe physical and mental suffering was inflicted to obtain information, to punish, to retaliate and to intimidate. The Prosecution has not alleged or argued during the trial that humiliation was a purpose of any severe physical or mental suffering inflicted.

<sup>898</sup> *Celebici* Appeal Judgement, para 424.

injury to body or health, it states that the concept usually uses as a criterion of seriousness the length of time the victim is incapacitated for work.<sup>899</sup>

341. This offence includes those acts that do not fulfil the conditions set for torture even though acts of torture may also fit the definition given.<sup>900</sup> The *Kordic* Trial Judgement concurred with the *Celebici* Trial Judgement that the words "great" and "serious" in the definition "merely require a finding that a particular act of mistreatment, in order to fall within the ambit of this crime, must possess suffering or injury of the requisite level of seriousness."<sup>901</sup> It stated that the requisite level of suffering or injury must be proven:

This crime is distinguished from that of inhuman treatment (under Article 2) in that it requires a showing of serious mental or physical injury. Thus, acts where the resultant harm relates solely to an individual's human dignity are not included within this offence. Provided the acts of causing injuries alleged in the Indictment meet the requirements set forth by the Chamber, they may be characterised as the crime of wilfully causing great suffering.<sup>902</sup>

342. In the *Krstic* Trial Judgement, the Chamber considered how the term serious should be interpreted and stated:

Serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment, or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life.<sup>903</sup>

343. The gravity of the suffering is determined on a case by case basis taking into account the circumstances of the case.<sup>904</sup>

(c) Inhuman treatment, cruel treatment and inhumane acts

344. The law on these crimes has been considered above.<sup>905</sup>

## 2. The findings

(a) Torture and mistreatment in Sovi}i and Doljani by Mladen Naletili}

345. Paragraph 46 of the Indictment alleges that Mladen Naletili} committed and instigated the commission of torture or the infliction of great suffering to BH Muslim detainees on 20 April 1993, following the attack against the BH Muslim population of Sovi}i and Doljani carried out by HV and HVO forces under his overall command.

<sup>899</sup> Commentary to Geneva Convention IV, p 599, referred to in *Kordic* Trial Judgement, para 243.

<sup>900</sup> *Celebici* Trial Judgement, para 511, followed in the *Blaskic* Trial Judgement, para 156.

<sup>901</sup> *Kordic* Trial Judgement, para 244, citing the *Celebici* Trial Judgement, para 510.

<sup>902</sup> *Kordic* Judgement, para 245.

<sup>903</sup> *Krstic* Trial Judgement, para 513 referring to the *Akayesu* Trial Judgement. The Chamber made this statement when defining serious bodily or mental harm as crime of genocide within Article 4 of the Statute.

Done in English and French, the English being authoritative.

Dated this thirty-first day of March 2003  
At The Hague  
The Netherlands

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**Judge Liu Daqun  
Presiding**

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**Judge Maureen Clark**

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**Judge Fatoumata Diarra**

**Seal of the Tribunal?**