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ANNEX A

AUTHORITY 50

**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-95-9-T
Date: 17 October 2003
Original: English

IN TRIAL CHAMBER II

Before: Judge Florence Ndepele Mwachande Mumba, Presiding
Judge Sharon A. Williams
Judge Per-Johan Lindholm

Registrar: Mr. Hans Holthuis

Judgement: 17 October 2003

PROSECUTOR

v.

**BLAGOJE SIMIĆ
MIROSLAV TADIĆ
SIMO ZARIĆ**

JUDGEMENT

The Office of the Prosecutor:

**Mr. Gramsci Di Fazio
Mr. Philip Weiner
Mr. David Re**

Counsel for the Accused:

**Mr. Igor Pantelić and Mr. Srdjan Vuković for Blagoje Simić
Mr. Novak Lukić and Mr. Dragan Krgović for Miroslav Tadić
Mr. Borislav Pisarević and Mr. Aleksandar Lazarević for Simo Zarić**

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.⁷⁸

46. The requirement is therefore that the intention of the accused be “to commit the underlying offence or offences with which the accused is charged”,⁷⁹ and also that the accused has the knowledge that “there is an attack on the civilian population and that his acts comprise part of that attack, or at least [that the accused took] the risk that his acts were part of that attack”.⁸⁰

B. Law on persecution

1. General requirements: chapeau elements

47. The *Kupreškić* Trial Chamber defines persecution as “the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.”⁸¹ The Trial Chamber considers the crime of persecution comprises an act or omission which:⁸²

1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary law 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, religion, or politics (the *mens rea*).

48. Not every denial of a fundamental human right is serious enough to constitute a crime against humanity.⁸³ It is clear that, for the purposes of this Tribunal, persecution may encompass acts which are listed in the Statute,⁸⁴ as well as acts which are not listed in the Statute.⁸⁵ Acts or omissions enumerated under other sub-paragraphs of Article 5 of the Statute are by definition

⁷⁸ *Kunarac* Appeal Judgement, para. 103; see also *Vasiljević* Trial Judgement, para. 37.

⁷⁹ *Kunarac* Appeal Judgement, para. 102.

⁸⁰ *Kunarac* Appeal Judgement, para. 102.

⁸¹ *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000 (“*Kupreškić* Trial Judgement”), para. 621.

⁸² See *Kupreškić* Trial Judgement, para. 621; *Prosecutor v. Dario Kordić and Mario Čerkez.*, Case No. IT-95-14/2-T, Judgement, 26 February 2001 (“*Kordić* Trial Judgement”), paras 189, 195; *Krnojelac* Trial Judgement, paras 431-436; *Vasiljević* Trial Judgement, para. 244; *Naletilić* Trial Judgement, para. 634; as submitted by the Prosecution in its Final Brief, para. 89; and submitted in the *Tadić* Final Brief, para. 27.

⁸³ *Kordić* Trial Judgement, para. 196; *Kvočka* Trial Judgement, para. 185; *Krnojelac* Trial Judgement, para. 434. To reiterate the words of the *Kupreškić* Trial Chamber, “[a]lthough the realm of human rights is dynamic and expansive, not every denial of a human right may constitute a crime against humanity”, para. 618; as submitted by the *Simić* Final Brief, para. 156; The Trial Chamber notes the submissions of the *Simić* Pre-Trial Brief, para. 51, and *Simić* Final Brief para. 154; of the *Tadić* Pre-Trial Brief, para. 40, and the *Zarić* Pre-Trial Brief, para. 9; however in light of the settled jurisprudence on this issue the Trial Chamber will not address these submissions.

⁸⁴ *Kupreškić* Trial Judgement, para. 605; *Kvočka* Trial Judgement, para. 185; as submitted by the Prosecution Pre-Trial Brief, para. 110.

⁸⁵ *Tadić* Trial Judgement, para. 703; *Kupreškić* Trial Judgement, paras 581, 614; *Kordić* Trial Judgement, paras 193-194; *Kvočka* Trial Judgement, para. 185; *Naletilić* Trial Judgement, para. 635; as submitted by the Prosecution in its Final Brief, para. 90.

serious enough. Others (either listed under other Articles of the Statute or not listed in the Statute at all) must meet an additional test:⁸⁶

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 human rights.

When invoking this test, acts or omissions should not be considered in isolation but rather, in their context by looking at their cumulative effect.⁸⁷ The *Krnjelac* Trial Chamber went on to state that, jointly or severally, “the acts must amount to persecution, though it is not required that each alleged underlying act be regarded as a violation of international law”.⁸⁸

49. In relation to the targeted group’s possession of the religious, racial or political characteristics required for the crime of persecution, the Trial Chamber refers to the *Naletilić* Trial Judgement:

... the targeted group does not only comprise persons who *personally* carry the (religious, racial, or political) criteria of the group. The targeted group must be interpreted broadly, and may, in particular include such persons who are *defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group*.⁸⁹

50. The act(s) or omission(s) constituting the crime of persecution may assume diverse forms⁹⁰ but the principle of legality requires that the Prosecution must identify and prove particular acts amounting to persecution rather than charge persecution in general.⁹¹ The persecutory act(s) or omission(s) may encompass physical and mental harm, infringements upon individual freedom, as well as acts which appear less serious, such as those targeting property, provided that the victimised persons were specially selected or discriminated on political, racial, or religious grounds.⁹² The *Krnjelac* Trial Chamber held that “although persecution usually refers to a series of acts, a single act may be sufficient”.⁹³

⁸⁶ *Krnjelac* Trial Judgement, para. 434; *Kupreškić* Trial Judgement, para. 621; *Naletilić* Trial Judgement, para. 635; as submitted in the Prosecution Final Brief, para. 90.

⁸⁷ *Kupreškić* Trial Judgement, paras 615(e), 622; *Kvočka* Trial Judgement, para. 185.

⁸⁸ *Krnjelac* Trial Judgement, para. 434; *Kvočka* Trial Judgement, para. 186.

⁸⁹ *Naletilić* Trial Judgement, para. 636 (emphasis in the original); *Kvočka* Trial Judgement, para. 195. The Appeals Chamber in *Krnjelac* found that the Trial Chamber’s adopting of a “discriminatory consequences” interpretation was wrong and constituted an erroneous interpretation of the requirement of a discriminatory act in the definition of persecution, *Prosecutor v. Milorad Krnjelac*, Case No. IT-97-25-A, Arrêt, 17 September 2003 (“*Krnjelac* Appeal Judgement”), para. 185. Discriminatory intent is sufficient even if some of the victims are targeted wrongly.

⁹⁰ *Kupreškić* Trial Judgement, para. 568; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000 (“*Blaškić* Trial Judgement”), para. 218.

⁹¹ *Kupreškić* Trial Judgement, para. 626.

⁹² *Blaškić* Trial Judgement, para. 233; In its Final Brief the Prosecution asserts that the discriminatory acts may also include non-physical acts of an economic or a judicial nature, including the destruction of property of persons belonging to the targeted group, paras. 91-92 and 95.

⁹³ *Krnjelac* Trial Judgement, para. 433; *Kupreškić* Trial Judgement, para. 624; The Trial Chamber notes the view of Blagoje Simić’s Defence that the crime of persecution encompasses the commission of many crimes within a single

51. The crime of persecution is uniquely distinguishable from the other Article 5 crimes by the requirement of an intent to discriminate on racial, religious or political grounds.⁹⁴ 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.⁹⁵ The *Krnjelac* Trial Chamber stated that “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 has taken part in the formulation of such discriminatory policy or practice by a governmental authority.”⁹⁶ Trial Chambers have inferred discriminatory intent through a perpetrator’s knowing participation in a system or enterprise that discriminates on political, racial or religious grounds.⁹⁷ The discriminatory intent must relate to the specific act or omission underlying the charge of persecution as opposed to the attack in general, notwithstanding the fact that the attack may also in practice have a discriminatory aspect.⁹⁸

52. 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.⁹⁹

2. Law on underlying acts

(a) Forcible takeover of the Municipality of Bosanski Šamac as persecution

53. The forcible takeover of a city or town does not constitute a separate crime under Article 5 or any other Article of the Statute.

54. The Tribunal has held that an attack on cities, towns or villages is analogous to an “attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings,” and thus constitutes “a violation of the laws or customs of war enumerated under Article 3 (c) of the Statute.”¹⁰⁰ As a violation of the laws or customs of war under Article 3 of the Statute, the attack

coordinated campaign of crimes that are committed with a specific intent to discriminate (*Simić* Final Brief, para. 156), but in light of the existing jurisprudence on the matter finds no requirement to elaborate further on the issue.

⁹⁴ *Naletilić* Trial Judgement, para. 638; *Kordić* Trial Judgement, para. 217; *Blaškić* Trial Judgement, para. 235; *Tadić* Appeal Judgement, para. 305; as submitted in *Zarić* Final Brief, para. 469.

⁹⁵ *Kordić* Trial Judgement, para. 217; *Krnjelac* Trial Judgement, para. 435; as submitted in the Prosecution Final Brief, para. 94; and submitted in the *Tadić* Final Brief, para. 28.

⁹⁶ *Krnjelac* Trial Judgement, para. 435; *Kupreškić* Trial Judgement, para. 625; as submitted by the Prosecution in its Final Trial Brief, para. 94; However, a determination as to a discriminatory intent may require a careful analysis of the underlying policies of the regime.

⁹⁷ *Kvočka* Trial Judgement, para. 201.

⁹⁸ *Krnjelac* Trial Judgement, para. 436; as submitted in the *Tadić* Final Brief, para. 29.

⁹⁹ *Naletilić* Trial Judgement, para. 638; *Tadić* Trial Judgement, para. 713; as submitted in the Prosecution Final Brief, para. 94.

¹⁰⁰ *Kordić* Trial Judgement, para. 203.

The U.S. Military Tribunal held that lesser forms of persecution included the adoption of decrees expelling Jews from public service, educational institutions, and from many business enterprises.¹⁰⁷

58. The Trial Chamber finds that the issuance of discriminatory orders, policies, decisions or other regulations may constitute the *actus reus* of persecution, provided that these orders infringe upon a person's basic rights and that the violation reaches the level of gravity of the other crimes against humanity listed in Article 5 of the Statute. Such a determination has to be made on a case by case basis, taking account of the specific factual circumstances, and of the cumulative effect of such decisions or regulations.

(c) Unlawful arrest, detention, and confinement of Bosnian Croats, Bosnian Muslims, and other non-Serb civilians

59. Unlawful arrest and detention do not appear as separate offences under Article 5 or other provisions of the Statute. However, the *Blaskić* Trial Chamber has considered unlawful detention as a form of the crime of persecution, defining unlawful detention as "unlawfully depriving a group of discriminated civilians of their freedom".¹⁰⁸ The *Kupreškić* Trial Chamber also held that the organised detention of civilians may constitute persecution.¹⁰⁹ Unlawful confinement of civilians is a grave breach of the Geneva Conventions of 1949 found in Article 2 (g) of the Statute, and the crime of imprisonment is listed as a crime against humanity in Article 5 (e) of the Statute.

60. Unlawful arrest has not been defined in the jurisprudence of the Tribunal. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ("Body of Principles"), defines an arrest as "the act of apprehending a person for the alleged commission of an offence or by the action of an authority."¹¹⁰ International Conventions enshrine the right to be free from arbitrary arrest and imprisonment. Article 5 of the European Convention of Human Rights provides for the right to liberty and security and that no one shall be deprived thereof except in particular cases detailed in that Convention and in accordance with a procedure prescribed by law.¹¹¹ Article 9 of the International Covenant on Civil and Political Rights provides that everyone has the right to liberty and security of the person and no one shall be subjected to arbitrary arrest or

¹⁰⁷ U.S. Military Tribunal, Indictment, *Justice* trial, NMT Vol. III, pp. 1063-64, cited in *Kupreškić* Trial Judgement, para. 612.

¹⁰⁸ *Blaskić* Trial Judgement, para. 234.

¹⁰⁹ *Kupreškić* Trial Judgement, para. 629.

¹¹⁰ The Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, as adopted by General Assembly Resolution 43/173, 9 December 1988.

¹¹¹ European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), 213 U.N.T.S. 221, E.T.S. 5, Article 5.

detention, except in accordance with procedures established by law.¹¹² The Trial Chamber considers, therefore, that the act of unlawful arrest means to apprehend a person, without due process of law.

61. While unlawful detention, confinement and imprisonment have each been considered acts of persecution and constituting crimes against humanity, the Trial Chamber must consider whether unlawful arrests, may also constitute the crime of persecution as a crime against humanity.

62. The Trial Chamber is of the opinion that while unlawful arrest may in itself not constitute a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5, when considered in context, together with unlawful detention or confinement, such acts may constitute the crime of persecution as a crime against humanity.

63. Unlawful confinement has been considered by the Tribunal to constitute persecution and a crime against humanity.¹¹³ The Trial Chamber in *Kordić* held that the elements of the crime of unlawful confinement under Article 2 of the Statute, and the elements of the crime of imprisonment under Article 5 of the Statute are identical.¹¹⁴ The Trial Chamber in the *Krnjelac* Judgement shared this view, but also considered that as a crime against humanity, the definition of imprisonment was not restricted by the grave breaches provisions of the Geneva Conventions.¹¹⁵

¹¹² Article 9 of the International Covenant on Civil and Political Rights (1976), 999 U.N.T.S. 171, sets out the rights of the arrested person that include:

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

¹¹³ *Krnjelac* Trial Judgement, para. 111; *Kordić* Trial Judgement, paras 301-302.

¹¹⁴ *Kordić* Trial Judgement, para. 292.

¹¹⁵ *Krnjelac* Trial Judgement, para. 111; The Trial Chamber in *Kordić* held that imprisonment of civilians will be unlawful where:

(a) civilians have been detained in contravention of Article 42 of the Geneva Convention IV, i.e. they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary;

64. The Trial Chamber in *Kordić* concluded that imprisonment in Article 5 (e) of the Statute should be understood as arbitrary imprisonment, defined as “deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against the civilian population”.¹¹⁶ The Trial Chamber in *Krnjelac* held that “any form of arbitrary physical deprivation of liberty of an individual may constitute imprisonment under Article 5 (e) as long as the other requirements of the crime are fulfilled”.¹¹⁷ The Trial Chamber considered that deprivation of an individual’s liberty is arbitrary if imposed without due process of law.¹¹⁸ The Trial Chamber outlined the following elements to establish a crime of imprisonment (or unlawful confinement) as a crime against humanity under Article 5 (e) of the Statute:

1. An individual is deprived of his or her liberty.
2. The deprivation of liberty is imposed arbitrarily, that is, no legal basis can be invoked to justify the deprivation of liberty.
3. The act or omission by which the individual is deprived of his or her physical liberty is performed by the accused or a person or persons for whom the accused bears criminal responsibility with the intent to deprive the individual arbitrarily of his or her physical liberty or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.¹¹⁹

65. Based upon the above reasoning, the Trial Chamber adopts the elements of the crime of imprisonment under Article 5 (e) of the Statute, as set out in the *Krnjelac* Trial Judgement, and applies this test to the charge of unlawful detention and confinement in the Amended Indictment.

66. The Trial Chamber considers that the elements of the offence of unlawful detention are the same as those for unlawful confinement and imprisonment as set out in the *Krnjelac* Judgement above. It has noted that the Body of Principles refers to the terms detention and imprisonment interchangeably, and defines detention and imprisonment as the condition of detained or imprisoned persons, which is further described as “any person deprived of personal liberty except as a result of conviction for an offence”.¹²⁰

(b) the procedural safeguards required by Article 43 of the Geneva Convention IV are not complied with in respect of detained civilians, even where initial detention may have been justified; and

(c) they occur as part of a widespread or systematic attack directed against a civilian population. (para. 303)

¹¹⁶ *Kordić* Trial Judgement, para. 302.

¹¹⁷ *Krnjelac* Trial Judgement, para. 112.

¹¹⁸ *Krnjelac* Trial Judgement, para. 113.

¹¹⁹ *Krnjelac* Trial Judgement, para. 115.

¹²⁰ *Supra* note 109.

A. Committing

137. The meaning to be attached to “committed”, the highest degree of participation in a crime, is not controversial. Any finding of commission requires the personal or physical, direct or indirect, participation of the accused in the relevant criminal act, or a finding that the accused engendered a culpable omission to the same effect, where it is established that he had a duty to act, with the requisite knowledge.²⁴⁶ An accused person will be held criminally responsible if he actually carries out the *actus reus* of the enumerated crimes.²⁴⁷ There can be several perpetrators in relation to the same crime where the conduct of each of them fulfils the elements of the definition of the substantive offence.²⁴⁸ The requisite *mens rea* is that the accused intended that a criminal offence occur as a consequence of his conduct.

138. The Appeals Chamber recently confirmed that an accused found criminally liable for his participation in a joint criminal enterprise should be regarded as having “committed” that crime, as opposed to having aided and abetted the crime; in other words, participation in a joint criminal enterprise is a form of co-perpetration.²⁴⁹ The Trial Chamber is thus addressing issues in relation to joint criminal enterprise in the context of this section.

1. Preliminary consideration on form of the Amended Indictment

(a) Form of liability

139. The Amended Indictment charges under Count 1 (Persecutions) that the Accused “acting in concert together, and with other Serb civilian and military officials, planned, instigated, ordered, committed, or otherwise aided and abetted the planning, preparation, or execution of a crime against humanity”.²⁵⁰

²⁴⁶ *Stakić* Trial Judgement, para. 439; *Naletilić* Trial Judgement, para. 62; *Vasiljević* Trial Judgement, para. 62; *Kvočka* Trial Judgement, paras 250-251; *Krstić* Trial Judgement, para. 601; *Kunarac* Trial Judgement, para. 390; *Kordić* Trial Judgement, para. 376.

²⁴⁷ In relation to the offence of unlawful confinement, the Appeals Chambers in *Čelebići* held that a finding of “committed” required “something more [...] than mere knowing ‘participation’ in a general system or operation pursuant to which civilians are confined. [...] Such liability is reserved for persons responsible in a more direct or complete sense for the civilian’s unlawful detention.” (paras 342 and 343) The Appeals Chamber further held that a finding of liability pursuant to Article 7(1) for detention requires a demonstration that the accused had the authority to detain or release the persons detained, or that his acts or omissions had a substantial effect on the continued detention. A greater degree of involvement than the mere awareness that some persons were detained without reasonable grounds to suspect that they posed a security risk is required to establish primary responsibility. (*Čelebići* Appeal Judgement, para. 364)

²⁴⁸ *Naletilić* Trial Judgement, para. 62; *Kunarac* Trial Judgement, para. 390.

²⁴⁹ *Ojdanić* Decision on Joint Criminal Enterprise, para. 20; *Krnjelac* Appeal Judgement, para. 29.

²⁵⁰ Amended Indictment, para. 11; see also para. 33. Paragraphs 13, 14, 15 and 16 of the Amended Indictment read slightly differently: the Accused “acting in concert with others” (paras. 13-15); the Accused “acting in concert together and with others” (para. 16).

Dated this seventeenth day of October 2003,

At The Hague,

The Netherlands.

Judge Florence Ndepele Mwachande Mumba
Presiding

Judge Sharon A. Williams

Judge Per-Johan Lindholm

[Seal of the Tribunal]