Declassified to Public
06 September 2012

ANNEX A

AUTHORITY 51

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-97-24-T

Date: 31 July 2003

Original: English

IN TRIAL CHAMBER II

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Volodymyr Vassylenko
Judge Carmen Maria Argibay

Registrar: **Mr. Hans Holthuis**

Judgement of: **31 July 2003**

PROSECUTOR

v.

MILOMIR STAKIĆ

JUDGEMENT

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Nicholas Koumjian
Ms. Ann Sutherland

Counsel for the Accused:

Mr. Branko Lukić
Mr. John Ostojic

442. In respect of the *mens rea*, the Trial Chamber re-emphasises that modes of liability can not change or replace elements of crimes defined in the Statute and that the accused must also have acted in the awareness of the substantial likelihood that punishable conduct would occur as a consequence of coordinated co-operation based on the same degree of control over the execution of common acts. Furthermore, the accused must be aware that his own role is essential for the achievement of the common goal.

(b) Planning

443. The Trial Chamber follows the established jurisprudence and considers that planning implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.[952] The Trial Chamber agrees that where an accused is found guilty of having committed a crime, he can not be convicted of having planned the same crime,[953] even though his involvement in the planning may be considered an aggravating factor.

(c) Ordering

444. The Prosecution submits in respect of 'ordering' that proof is required that one or more persons performed the *actus reus* of the crime in question as a perpetrator, with or without the participation of the accused. Such proof, in the Prosecution's opinion, includes the perpetrator's having acted "in execution of or otherwise in furtherance of an express or implied order by the accused to the perpetrator as a subordinate or other person over whom the accused possessed *de jure* or *de facto* authority to order."[954] A formal superior-subordinate relationship between the accused and the perpetrator need not have existed; it is sufficient that the accused possessed the authority to order and that that authority can be reasonably implied.[955] Finally, the Prosecutor contends with regard to 'ordering' that the accused must fulfil the relevant *mens rea* requirement of the crime in question and have been aware of the substantial likelihood that the crime committed would be a consequence of the implementation of the order given.[956]

445. The Trial Chamber considers 'ordering' to refer to "a person in a position of authority using that position to convince another to commit an offence."[957] The person 'ordering' must have the

[952] *Krstić* Trial Judgement, para. 601.
[953] *Kordić* Trial Judgement para. 386.
[954] Prosecution Final Trial Brief, para. 161, citing the *Blaškić* Trial Judgement, paras 281-282 and *Kordić* Trial Judgement, para. 388.
[955] *Ibid.*
[956] *Ibid.*
[957] *Krstić* Trial Judgement, para. 601.

required *mens rea* for the crime with which he is charged[958] and must have been aware of the substantial likelihood that the crime committed would be the consequence when executing or otherwise furthering the implementation of the order. The Trial Chamber considers, however, that an additional conviction for ordering a particular crime is not appropriate where the accused is found to have committed the same crime.

(d) Aiding and Abetting

446. The Trial Chamber notes the submissions of the parties relating to aiding and abetting but holds that a discussion of this mode of liability is not relevant to its findings in this case.

(e) Article 7(3)

(i) Arguments of the parties

a. Prosecution

447. The Prosecution submits that Article 7(3) of the Statute applies where a superior failed to exercise his or her power to prevent subordinates from committing offences or failed to punish them afterwards.[959] According to the Prosecution, the pre-requisites for individual criminal responsibility under Article 7(3) of the Statute are that:

> (1) the accused exercised superior authority over the perpetrator(s) of the offence;
>
> (2) the accused knew or had reason to know that the perpetrator was about to commit the offence or had done so, and
>
> (3) the accused failed to take the necessary and reasonable measures to prevent the offence or to punish the perpetrator.[960]

448. The Prosecution argues that Article 7(3) covers not only military leaders or international conflicts but also civilian leaders in internal or unclassified armed conflicts.[961]

---

[958] *Blaškić* Trial Judgement, paras 278 and282.
[959] Prosecution's Final Brief, para. 91, citing *Aleksovski* Appeal Judgement, para. 76.
[960] Prosecution's Final Pre-trial Brief (Revised April 2002) of 5 April 2002, para. 145, and Prosecution Final Trial Brief of 5 May 2003, para. 92.
[961] See Prosecution Final Trial Brief, para. 91, citing *Hadžihasanović* Jurisdiction Decision, para. 179. The Prosecution also referred to para. 174 "...the purpose of command responsibility is to ensure that persons vested with *responsibility over others* fulfil their *duty* to ensure that their subordinates do not commit criminal acts. The absence of an express limitation—or an additional element or jurisdictional requirement—in the language of Article 7(3) was deemed as evidence that under customary law the doctrine of command responsibility could be applied to non-military superiors. Likewise, this Trial Chamber observes [that] the absence of any express limitation, or conversely, any requirement of an international armed conflict—or even armed conflict—on the applicability of the doctrine of command responsibility would indicate that the doctrine applies regardless of the nature of the conflict."

561. In order for Dr. Stakić to be held responsible for complicity in genocide, it must be proved that genocide in fact occurred. On the basis of the evidence presented in this case, the Trial Chamber has not found beyond a reasonable doubt that genocide was committed in Prijedor in 1992. For this reason Dr. Stakić is acquitted of complicity in genocide under Count 2.

[...]

(d) deportation;

[...]

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts.

1. *Chapeau* Elements of Crimes Against Humanity

(a) The Applicable Law

(i) Additional pre-requisites for the application of Article 5 of the Statute

618. The Trial Chamber recalls its finding that a jurisdictional requirement for the applicability of Article 5 is the existence of an armed conflict.

a. Arguments of the parties

619. The Prosecution submits that all crimes against humanity share the following four elements: (i) the existence of an armed conflict, (ii) the existence of a widespread or systematic attack directed against a civilian population, (iii) that the accused's conduct was related to the widespread or systematic attack, and (iv) that the accused had knowledge of the wider context in which his conduct occurred.[1248]

620. The Defence submits that five elements must be proved before an act can be found to constitute a crime against humanity: (i) there must be an "attack", (ii) the acts of the accused must be part of the attack, (iii) the attack must be directed against any civilian population, (iv) the attack must be widespread or systematic, and (v) the principal offender must know of the wider context in which his acts occur and know that his acts are part of the attack.[1249]

b. Discussion

621. The jurisprudence of this Tribunal has established that for the acts of an accused to amount to a crime against humanity the following five elements must be present:

1. There must be an attack;

[1248] Prosecution Final Brief, para. 302.
[1249] Defence Final Brief, para. 397.

2. The acts of the perpetrator must be part of that attack;

3. The attack must be directed against any civilian population;

4. The attack must be widespread or systematic;

5. The perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern.[1250]

622. The Trial Chamber will merely recall and reconfirm points of clarification in relation to these requirements as set out in the jurisprudence which are relevant to this case.

623. The concept of "an attack" must be distinguished from that of "an armed conflict". An attack can "precede, outlast, or continue during the armed conflict, but it need not be part of it",[1251] and "is not limited to the use of armed force; it encompasses any mistreatment of the civilian population."[1252]

624. The entire population of the geographical entity in which the attack takes place need not be the object of that attack, "[i]t is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was directed against a civilian 'population', rather than against a limited and randomly selected number of individuals."[1253] In addition, the phrase "directed against" should be interpreted as meaning that the civilian population is the primary object of the attack.[1254]

625. "Widespread" refers to the large-scale nature of the attack and the number of victims, whereas "systematic" refers to "the organised nature of the acts of violence and the improbability of their random occurrence."[1255] Factors to consider in determining whether an attack satisfies either or both requirements of a widespread or systematic attack are enumerated in the jurisprudence, and include (i) the consequences of the attack upon the targeted population, (ii) the number of victims, (iii) the nature of the acts, (iv) the possible participation of officials or authorities or any identifiable patterns of crimes.[1256] Moreover, the acts of the accused "need only be a part of this attack."[1257]

[1250] These elements are set out in the *Kunarac* Appeal Judgement, para. 85.
[1251] *Kunarac* Appeal Judgement, para. 86.
[1252] *Kunarac* Appeal Judgement, para. 86.
[1253] *Kunarac* Appeal Judgement, para. 90.
[1254] *Kunarac* Appeal Judgement, para. 91.
[1255] *Kunarac* Appeal Judgement, para. 94.
[1256] *Kunarac* Appeal Judgement, para. 95.
[1257] *Kunarac* Appeal Judgement, para. 96.

626. It must be proven that the accused knew that there was an attack on the civilian population and that his acts formed part of that attack "or at least [that he took] the risk that his acts were part of the attack."[1258]

(b) Trial Chamber's findings

(i) Requirement that there be an attack directed against a civilian population

627. The Trial Chamber is satisfied that the events which took place in Prijedor municipality between 30 April and 30 September 1992 constitute an attack directed against a civilian population. The scale of the attack was such that it cannot be characterised as having been directed against only a limited and randomly selected group of individuals. Rather, most of the non-Serb population in the Municipality of Prijedor was directly affected. Moreover, it is clear from the combat reports that the Serb military forces had the overwhelming power as compared to the modest resistance forces of the non-Serbs.[1259] General Wilmot, who testified as the military expert in the Defence case, acknowledged that the scale of the attack on Hambarine was disproportionate to the threat posed by the resistance forces active in those areas.[1260] Those attacks, and the ones that followed in the broader Brđo region, coupled with the arrests, detention and deportation of citizens that came next, were primarily directed against the non-Serb civilian population in the Municipality of Prijedor.

(ii) Requirement that the attack be widespread or systematic

628. Recalling that the requirement that an attack be widespread or systematic is disjunctive, the Trial Chamber is nonetheless satisfied beyond reasonable doubt that the attack has to be characterised as both widespread and systematic.

629. The Chamber is satisfied that the attack directed against the civilian population was prepared as of 7 January 1992 when the Assembly of the Serbian People in Prijedor was first established. The plan to rid the Prijedor municipality of non-Serbs and others not loyal to the Serb authorities was activated through the takeover of power by Serbs on 30 April 1992. Thereafter the attack directed against the civilian population intensified, according to the plan, culminating with the attacks on Hambarine and Kozarac in late May 1992. Attacks on predominantly non-Serb areas including the Brđo region ensued, with hundreds of non-Serbs killed and many more arrested and detained by the Serb authorities, *inter alia* in detention facilities.

[1258] *Kunarac* Appeal Judgement, para. 102.
[1259] See *supra*, para. 474.
[1260] *General Wilmot*, T. 14071.

collective murder", i.e. a "criminal plan" to commit extermination, which requirement follows from the *Krstić* case.[1269]

637. The Defence argues in relation to the *mens rea* that the crime of extermination requires that the Prosecution prove three mental elements (i) the accused must have the general "intent to kill a large number of individuals,"[1270] (ii) the accused must have knowledge of the existence of the "vast scheme of collective murder" or the "criminal plan" and in this context, further argues that "the 'negligence' standard of 'should have known' does not apply and cannot be substituted to expand and broaden the crime of extermination as a crime against humanity"[1271] and (iii) the perpetrator must have "willingly participated" in the vast scheme of collective murder and that this participation must be "significant and substantial".[1272]

(ii) Discussion

a. Objective element: *actus reus*

638. This Trial Chamber agrees with the parties that the core element of extermination is the killing of persons on a massive scale. The Trial Chamber in *Krstić* examined the common definition of the French "exterminer" and the English "exterminate" and the ordinary use of this term and concluded that, as compared to the killing of persons on a massive scale, it has "a more destructive connotation meaning the annihilation of a mass of people". The same Trial Chamber quotes the commentary on the ILC Draft Code of Crimes against the Peace and Security of Mankind, according to which

> [e]xtermination 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.[1273]

The *Krstić* Trial Chamber also held that

> [t]he very term "extermination" strongly suggests the commission of a massive crime, which in turn assumes a substantial degree of preparation and organisation. 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

[1269] Defence Final Brief, paras 429-31.
[1270] Defence Final Brief, para. 428.
[1271] Defence Final Brief, paras 432- 433.
[1272] Defence Final Brief, paras 434-435.
[1273] *Prosecutor v. Radislav Krstić*, Trail Judgement, paras 496-497 and ILC Draft Code of Crimes against the Peace and Security of Mankind, *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.

> 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.[1274]

639. Extermination must form part of a widespread or systematic attack against a civilian population. An act amounting to extermination, as explained by the Trial Chamber in *Prosecutor v. Vasiljević,* "must be collective in nature rather than directed towards singled out individuals. However, in contrast to genocide, the offender need not have intended to destroy the *group* or part of the group to which the victims belong,"[1275] and it is not required that the victims share national, ethnical, racial or religious characteristics.[1276] In this context it should be emphasised that the crime of extermination may apply to situations where some members of a group are killed but others spared.[1277] It suffices that the victims be defined by political affiliation, physical attributes or simply the fact that they happened to be in a certain geographical area. Moreover, the victims may be defined in the negative, *i.e.* as not belonging to, not being affiliated with or not loyal to the perpetrator or the group to which the perpetrator belongs.

640. This Trial Chamber does not find that the case-law provides support for the Defence submission that the killings must occur on a vast scale in a concentrated place over a short period. Such a claim does not follow from the requirement that the killings must be massive. Nor does the Trial Chamber believe that a specific minimum number of victims is required. As the Trial Chamber in *Prosecutor v. Vasiljević* held, the lowest figure from the Second World War cases to which the crime of extermination was applied was a total of 733 killings. The Chamber added in a footnote however that it does not suggest "that a lower number of victims would disqualify that act as 'extermination' as a crime against humanity, nor does it suggest that such a threshold must necessarily be met."[1278] In the opinion of this Trial Chamber, an assessment of whether the element of massiveness has been reached depends on a case-by-case analysis of all relevant factors. As the Trial Chamber in *Krstić* held, the massiveness of the crime automatically assumes a substantial degree of preparation and organisation which may serve as indicia for the existence of a murderous "scheme" or "plan", but not, as proposed by the Defence, of a "vast scheme of collective murder" as a separate element of crime.

b. Subjective element: *mens rea*

[1274] *Krstić* Trail Judgement, para. 501.
[1275] *Vasiljević* Trail Judgement, para. 227.
[1276] *Krstić* Trail Judgement, paras 499-500.
[1277] *Krstić* Trail Judgement, para. 500 and ILC Draft Code of Crimes against the Peace and Security of Mankind, *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.
[1278] *Vasiljević* Trail Judgement, para. 227 and footnote 587.

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

Judge Wolfgang Schomburg
Presiding

Judge Volodymyr Vassylenko

Judge Carmen Maria Argibay

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

[Seal of the Tribunal]