

**Declassified to Public
06 September 2012**

ANNEX A

AUTHORITY 55

IN THE TRIAL CHAMBER

Before:

**Judge Gabrielle Kirk McDonald, Presiding
Judge Ninian Stephen
Judge Lal Chand Vohrah**

Registrar:

Mrs. Dorothee de Sampayo Garrido-Nijgh

Opinion and Judgment of: 7 May 1997

PROSECUTOR

v.

DUSKO TADIC a/k/a/ "DULE"

OPINION AND JUDGMENT

The Office of the Prosecutor:

**Mr. Grant Niemann
Ms. Brenda Hollis
Mr. Alan Tieger
Mr. William Fenrick
Mr. Michael Keegan**

Counsel for the Accused:

**Mr. Michaïl Wladimiroff
Mr. Steven Kay
Mr. Milan Vujin
Mr. Alphons Orié
Ms. Sylvia de Bertodano
Mr. Nikola Kostic**

I. INTRODUCTION

A. The International Tribunal

have to be present but the connection between the act contributing to the commission and the act of commission itself can be geographically and temporally distanced.

3. Legal Findings

688. The I.L.C. Draft Code draws on these cases from the Nürnberg war crimes trials and other customary law, and concludes that an accused may be found culpable if it is proved that he "intentionally commits such a crime" or, *inter alia*, if he "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime . . ." ²²¹

The commentary to the I.L.C. Draft Code provides that the "accomplice must knowingly provide assistance to the perpetrator of the crime. Thus, an individual who provides some type of assistance to another individual without knowing that this assistance will facilitate the commission of a crime would not be held accountable." ²²² In addition, the commentary notes that:

the accomplice must provide the kind of assistance which contributes *directly* and *substantially* to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime. Thus, the form of participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way. ²²³

While there is no definition of "substantially", it is clear from the aforementioned cases that the substantial contribution requirement calls for a contribution that in fact has an effect on the commission of the crime. This is supported by the foregoing Nürnberg cases where, in virtually every situation, the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed. For example, if there had been no poison gas or gas chambers in the *Zyklon B* cases, mass exterminations would not have been carried out in the same manner. The same analysis applies to the cases where the men were prosecuted for providing lists of names to German authorities. Even in these cases, where the act in complicity was significantly removed from the ultimate illegal result, it was clear that the actions of the accused had a substantial and direct effect on the commission of the illegal act, and that they generally had knowledge of the likely effect of their actions.

689. The Trial Chamber finds that aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present. Under this theory, presence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it.

690. Moreover, when an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would have an encouraging effect, even if he does not physically take part in this second beating, and he should be viewed as participating in this second beating as well. This is

assuming that the accused has not actively withdrawn from the group or spoken out against the conduct of the group.

691. However, actual physical presence when the crime is committed is not necessary; just as with the defendants who only drove victims to the woods to be killed, an accused can be considered to have participated in the commission of a crime based on the precedent of the Nürnberg war crimes trials if he is found to be "concerned with the killing". However, the acts of the accused must be direct and substantial.

692. In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.

VII. LEGAL FINDINGS

693. The Trial Chamber has held, by a majority, that the Prosecution has failed to prove beyond reasonable doubt that the victims of the acts alleged in the Indictment were protected persons under the provisions of the Geneva Conventions. Accordingly, as found by the Appeals Chamber, Article 2 of the Statute proscribing grave breaches of those Conventions is inapplicable; therefore, the evidence will be assessed by considering Article 3 of the Statute and its invocation of Common Article 3 of the Geneva Conventions, and Articles 5 and 7, paragraph 1 of the Statute. The Trial Chamber now turns to the application of that law, much of which has already been discussed, and to the facts as already found, dealing with each count in turn.

A. Paragraph 4

1. Persecution as a Crime against Humanity

(a) Definition of persecution

694. In Count 1 the Prosecution charges that the accused committed the crime of persecution. As discussed in Section VI. D above, one of the categories of crimes against humanity recognized by the Nürnberg Charter was persecution on political, racial or religious grounds, the other category being crimes of the murder type, namely murder, extermination, enslavement and deportation. In order to constitute persecution there must be a persecutory act or omission, and that act or omission must be based on one of the listed grounds. Unfortunately, although often used, the term has never been clearly defined in international criminal law nor is persecution known as such in the world's major criminal justice systems²²⁴. As explained by one expert: "While the first category [crimes of the murder type] is composed of acts which will be found more or less in the

(1) By a majority, Judge McDonald dissenting,

Decides that the charges brought under Article 2 of the Statute of the International Tribunal were, in the present case, inapplicable at the time in opstina Prijedor because it has not been proved that the victims were protected persons, which is an element of those offences charged, and therefore finds the accused, Dusko Tadic, not guilty on counts 5, 8, 9, 12, 15, 18, 21, 24 and the alternative charge under count 27, counts 29 and 32; (2) Unanimously finds on the remaining charges as follows:

Count 1: Guilty

Count 6: Not guilty

Count 7: Not guilty

Count 10: Guilty

Count 11: Guilty

Count 13: Guilty

Count 14: Guilty

Count 16: Guilty

Count 17: Guilty

Count 19: Not guilty

Count 20: Not guilty

Count 22: Guilty

Count 23: Guilty

Count 25: Not guilty

Count 26 and the alternative charge under count 28: Not guilty

Count 30: Not guilty

Count 31: Not guilty

Count 33: Guilty in respect of Beido Balic, Sefik Balic, Ismet Jaskic and Salko Jaskic, Not Guilty as to Ilijas Elkasovic, Nijas Elkasovic, Meho Kenjar and Adam Jakupovic.

Count 34: Guilty in respect of Beido Balic, Sefik Balic, Ismet Jaskic and Salko Jaskic, Not Guilty as to Ilijas Elkasovic, Nijas Elkasovic, Meho Kenjar and Adam Jakupovic.

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

Gabrielle Kirk McDonald Presiding

Ninian Stephen

Lal Chand Vohrah

Judge McDonald appends a Separate and Dissenting Opinion to this Opinion and Judgment.

Dated this seventh day of May 1997
The Hague
The Netherlands

[Seal of the Tribunal]