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

ANNEX A

AUTHORITY 57

UNITED
NATIONS



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

Case: IT-98-32-T
Date: 29 November 2002
Original: English

IN TRIAL CHAMBER II

Before: Judge David Hunt, Presiding
Judge Ivana Janu
Judge Chikako Taya

Registrar: Mr Hans Holthuis

Judgment of: 29 November 2002

PROSECUTOR

v

Mitar VASILJEVIC

JUDGMENT

Counsel for the Prosecution:

Mr Dermot Groome
Mr Frédéric Ossogo
Ms Sabine Bauer

Counsel for the Accused:

Mr Vladimir Domazet
Mr Radomir Tanaskovic

- (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

27. Common Article 3 of the 1949 Geneva Conventions is now part of customary international law,²⁰ and a serious violation thereof would at once satisfy the four requirements mentioned above.²¹

B. General requirements of Article 5 of the Statute

28. Article 5 of the Statute provides a list of offences which, if committed in an armed conflict and as part of "an attack directed against any civilian population", will amount to crimes against humanity. The expression "an attack directed against any civilian population" encompasses the following five sub-elements:²²

- (i) There must be an attack.²³
- (ii) The acts of the offender must be part of the attack.²⁴
- (iii) The attack must be "directed against any civilian population".²⁵
- (iv) The attack must be "widespread or systematic".²⁶
- (v) The offender must know of the wider context in which his acts occur and know that his acts are part of the attack.²⁷

²⁰ *Tadic* Jurisdiction Decision, par 70; *Kunarac* Trial Judgment, par 408.

²¹ *Tadic* Jurisdiction Decision, par 134; *Kunarac* Appeals Judgment, par 68.

²² *Kunarac* Appeals Judgment, par 85. See also *Kunarac* Trial Judgment, par 410; *Prosecutor v Radislav Krstic*, Case IT-98-33-T, Judgment, 2 Aug 2001 ("Krstic Trial Judgment"), par 482; *Prosecutor v Kvočka et al*, Case IT-98-30/1-T, Judgment, 2 Nov 2001 ("Kvočka Trial Judgment"), par 127; *Krnjelac* Trial Judgment, par 53.

²³ *Tadic* Appeal Judgment, par 251; *Kunarac* Appeals Judgment, pars 85-89.

²⁴ *Ibid*, par 248; *Kunarac* Appeals Judgment, pars 85, 99-100.

²⁵ Art 5 of the Statute expressly uses the expression "directed against any civilian population". See *Kunarac* Appeals Judgment, pars 85, 90-92, and *Prosecutor v Tadic*, Case IT-94-1-T, Judgment 14 July 1997 ("*Tadic* Trial Judgment, pars 635-644.

²⁶ *Tadic* Appeals Judgment, par 248; *Kunarac* Appeals Judgment, pars 85, 93-97; *Prosecutor v Mrkšić and Others*, Case IT-95-13-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 Apr 1996 ("*Mrkšić and Others* Rule 61 Decision"), par 30.

²⁷ *Kunarac* Appeals Judgment, pars 85, 102-104; *Tadic* Appeals Judgment, par 248.

29. An "attack" may be described as a course of conduct involving the commission of acts of violence.²⁸ In the context of a crime against humanity, the phrase "attack" is not limited to the use of armed force;²⁹ it also encompasses any mistreatment of the civilian population.³⁰

30. The concepts of "attack" and "armed conflict" are distinct and independent. As the *Tadic* Appeals Chamber stated:³¹

The two – the "attack on the civilian population" and the "armed conflict" – must be separate notions, although of course under Article 5 of the Statute the attack on "any civilian population" may be part of an "armed conflict".

The attack could precede, outlast or continue during the armed conflict, without necessarily being a part of it.³²

31. As stated by the Appeals Chamber:³³

When establishing whether there was an attack upon a particular civilian population, it is not relevant that the other side also committed atrocities against its opponent's civilian population.

...g

The existence of an attack from one side against the other side's civilian population would neither legitimize the attack against the civilian population nor displace the conclusion that those forces were in fact targeting a civilian population as such. Each attack against the other's civilian population would be equally illegitimate and crimes committed as part of this attack could, all other conditions being met, amount to crimes against humanity.

32. The acts of the accused must be part of the attack.³⁴ In effect, as stated by the Appeals Chamber, the nexus between the acts of the accused and the attack consists of the following two elements:³⁵

- (i) the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with
- (ii) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof.

²⁸ *Kunarac* Trial Judgment, par 415; *Krnjelac* Trial Judgment, par 54. See also *Kunarac* Appeals Judgment, pars 86 and 89.

²⁹ *Kunarac* Appeals Judgment, par 86.

³⁰ *Kunarac* Appeals Judgment par 86; *Kunarac* Trial Judgment, par 416.

³¹ *Tadic* Appeal Judgment, par 251.

³² *Kunarac* Appeals Judgment, par 86; *Tadic* Appeal Judgment, par 251; *Krnjelac* Trial Judgment, par 54.

³³ *Kunarac* Appeals Judgment par 87. See also *Kunarac* Trial Judgment, par 580.

³⁴ *Tadic* Appeal Judgment, pars 248 and 255; *Kunarac* Appeals Judgment, par 100.

³⁵ *Kunarac* Appeals Judgment, par 99. See also *Kunarac* Trial Judgment, par 418; *Tadic* Appeal Judgment, pars 248, 251 and 271; *Tadic* Trial Judgment, par 659; *Mrksic and Others* Rule 61 Decision, par 30.

33. The expression "directed against any civilian population" specifies that, in the context of a crime against humanity, a civilian population is the primary object of the attack.³⁶ The protection of Article 5 extends to "any" civilian population including, if a state takes part in the attack, that state's own population.³⁷ It is therefore unnecessary to demonstrate that the victims were linked to any particular side of the conflict.³⁸

34. The phrase "population" does not mean that the entire population of the geographical entity in which the attack is taking place must be subject to the attack.³⁹ As stated by the Appeals Chamber:⁴⁰

It is sufficient to show that enough individuals were targeted, or that they were targeted in such a way, so that the court is satisfied that the attack was in fact directed at the civilian "population", rather than at a number of selected individuals.

35. In addition, the attack must either be "widespread" or "systematic", thereby excluding isolated or random acts from the scope of crimes against humanity.⁴¹ The phrase "widespread" connotes the large-scale nature of the attack and the number of victims, whilst the phrase "systematic" connotes the organised nature of the acts of violence and the improbability of their random occurrence.⁴² As stated by the Appeals Chamber:⁴³

Patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence.

36. The Appeals Chamber has stated that neither the attack nor the acts of the accused need to be supported by any form of "policy" or "plan".⁴⁴ There is nothing under customary international law which requires the imposition of an additional requirement that the acts be connected to a policy or plan.⁴⁵ At most, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.⁴⁶

³⁶ *Kunarac Appeals Judgment*, par 91; *Kunarac Trial Judgment*, par 421.

³⁷ *Kunarac Trial Judgment*, par 423; *Tadic Trial Judgment*, par 635.

³⁸ *Kunarac Trial Judgment*, par 423.

³⁹ *Kunarac Appeals Judgment*, par 90; *Tadic Trial Judgment*, par 644; *Kunarac Trial Judgment*, par 424.

⁴⁰ *Kunarac Appeals Judgment*, par 90.

⁴¹ *Kunarac Trial Judgment*, par 427; *Tadic Trial Judgment*, par 648.

⁴² *Kunarac Appeals Judgment*, par 94; *Kunarac Trial Judgment*, pars 428-429; *Krnojelac Trial Judgment*, par 57; *Tadic Trial Judgment*, par 648; *Prosecutor v Blaskic*, Case IT-95-14-T, Judgment, 3 Mar 2000 ("*Blaskic Trial Judgment*"), pars 203 and 206.

⁴³ *Kunarac Trial Judgment*, par 429.

⁴⁴ *Kunarac Appeals Judgment*, par 98; see also *Krnojelac Trial Judgment*, par 58.

⁴⁵ *Kunarac Appeals Judgment*, par 98.

⁴⁶ *Kunarac Appeals Judgment*, par 98; see also *Krnojelac Trial Judgment*, par 58; *Prosecutor v Kordic and Cerkez*, Case IT-95-14/2-T, Judgment, 26 Feb 2001 ("*Kordic and Cerkez Trial Judgment*"), par 182; *Kunarac Trial Judgment*, par 432.

37. Concerning the required state of mind, the accused⁴⁷ -

...g must have had the intent to commit the underlying offence or offences with which he is charged, and ...g he must know "that there is an attack on the civilian population and that his acts comprise part of that attack, or at least that he took the risk that his acts were part of the attack".

Furthermore, when it comes to his criminal liability, the motives of the accused for taking part in the attack are irrelevant, and a crime against humanity may be committed for purely personal reasons.⁴⁸

38. In addition to these five requirements, the Statute provides that a crime against humanity may only be committed, pursuant to Article 5, "when committed in armed conflict". This jurisdictional requirement requires the existence of an armed conflict at the time and place relevant to the indictment, but it does not necessitate any material nexus between the acts of the accused and the armed conflict.⁴⁹

C. Findings of facts relevant to the general requirements of Article 3 and Article 5 of the Statute

39. The municipality of Višegrad is located in south-eastern Bosnia and Herzegovina, bordered on its eastern side by the Republic of Serbia. Its main town, Višegrad, is located on the eastern bank of the Drina River. In 1991, about 21,000 people lived in the municipality, about 9,000 in the town of Višegrad. Approximately 63% of the population was of Muslim ethnicity, while about 33% was of Serb ethnicity.⁵⁰

40. In November 1990, multi-party elections were held in this municipality. Two parties, the primarily Muslim SDA (Party for Democratic Action) and the primarily Serb SDS (Serbian Democratic Party), shared the majority of the votes. The results closely matched the ethnic composition of the municipality, with 27 of the 50 seats that composed the municipal assembly being allocated to the SDA and 13 to the SDS.⁵¹ Serb politicians were dissatisfied with the

⁴⁷ *Kunarac Appeals Judgment*, par 102; see also *Krnojelac Trial Judgment*, par 59; *Kunarac Trial Judgment*, par 434; *Blaškić Trial Judgment*, pars 247 and 251.

⁴⁸ *Kunarac Appeals Judgment*, par 103 and *Kunarac Trial Judgment*, par 433. See also *Prosecutor v Tadić*, Case IT-94-1-A, Judgment, 15 July 1999 ("Tadić Appeal Judgment"), pars 248 and 252.

⁴⁹ *Kunarac Appeals Judgment*, par 83; *Tadić Appeals Judgment*, pars 249 and 251; *Kunarac Trial Judgment*, par 413; *Kupreškić Trial Judgment*, par 71.

⁵⁰ Admissions by the Parties and Matters which are not in Dispute, Ex P 36.1, let (3)(d), (e) and (f). See also Ex P 41.1, *Changes in the Ethnic Composition in the Municipality of Višegrad, 1991 and 1997*, 17 Aug 2001.

⁵¹ VG-22 (T 134-135, 165-169); VG-14 (T 417); Omer Branković (Ex P 143, p 548789-91); Mehmed Tvrtković (Ex P 143, p 584584); Snezana Nesković (T 3616).

the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission.¹³³

68. The Prosecution must also establish that the person charged shared a common state of mind with the person who personally perpetrated the crime charged (the "principal offender") that the crime charged should be carried out, the state of mind required for that crime.¹³⁴ Where the Prosecution relies upon proof of state of mind by inference, that inference must be the only reasonable inference available on the evidence.¹³⁵

69. If the Trial Chamber is not satisfied that the Prosecution has proved that the Accused shared the state of mind required for the commission of any of the crimes in which he is alleged to have participated pursuant to a joint criminal enterprise, it may then consider whether it has nevertheless been proved that the Accused incurred criminal responsibility for any of those crimes as an aider and abettor to their commission.

C. Aiding and Abetting

70. An accused will incur individual criminal responsibility for aiding and abetting a crime under Article 7(1) where it is demonstrated that the accused carried out an act which consisted of practical assistance, encouragement or moral support to the principal offender of the crime.¹³⁶ The act of assistance need not have caused the act of the principal offender, but it must have had a substantial effect on the commission of the crime by the principal offender.¹³⁷ The act of assistance may be either an act or omission, and it may occur before or during the act of the principal offender.¹³⁸ Mere presence at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant encouraging effect on the principal offender.¹³⁹

71. To establish the *mens rea* of aiding and abetting, it must be demonstrated that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender.¹⁴⁰ The aider and abettor must be aware of the

¹³³ *Brdanin and Talic* Form of the Second Indictment Decision, par 15; *Krnjelac* Trial Judgment, par 82.

¹³⁴ *Krnjelac* Trial Judgment, par 83; *Brdanin and Talic* Decision on Form of Further Amended Indictment, par 26.

¹³⁵ *Krnjelac* Trial Judgment, par 83.

¹³⁶ *Furundžija* Trial Judgment, pars 235, 249.

¹³⁷ *Furundžija* Trial Judgment pars 223, 224, 249; *Prosecutor v Aleksovski*, Case IT-95-14/1-T, Judgment, 25 June 1999 ("*Aleksovski* Trial Judgment"), par 61; *Kunarac* Trial Judgment, par 391; *Kordic and Cerkez* Trial Judgment, par 399.

¹³⁸ *Aleksovski* Appeal Judgment, 24 Mar 2000 par 162; *Kunarac* Trial Judgment, par 391.

¹³⁹ *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgment, 10 Dec 1998 ("*Furundžija* Trial Judgment"), par 232; *Tadic* Appeal Judgment 7 May 1997, par 689; *Kunarac* Trial Judgment par 393.

¹⁴⁰ *Aleksovski* Appeal Judgment par 162; *Tadic* Appeal Judgment par 229; *Kunarac* Trial Judgment, par 392.

essential elements of the crime committed by the principal offender, including the principal offender's state of mind. However, the aider and abettor need not share the intent of the principal offender.¹⁴¹ The fact that the aider and abettor does not share the intent of the principal offender generally lessens his criminal culpability from that of an accused acting pursuant to a joint criminal enterprise who does share the intent of the principal offender.

¹⁴¹ *Aleksovski* Appeal Judgment 24 Mar 2000 par 162; *Kunarac* Trial Judgment, par 392.

B. Credit for Time Served

310. Mitar Vasiljevic was arrested on 25 January 2000, and he has accordingly been in custody now for 2 years, 10 months and 4 days. He is entitled to credit for that period towards service of the sentence imposed, together with the period he will serve in custody pending a determination by the President pursuant to Rule 103(1) as to the State where the sentence is to be served. He is to remain in custody until such determination is made.

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

Judge David Hunt
Presiding

Judge Ivana Janu

Judge Chikako Taya

Dated this the 29th day of November 2002,
At The Hague,
The Netherlands.

?Seal of the Tribunal?