IN THE TRIAL CHAMBER

Before:
Judge Carmel Agius, Presiding
Judge Ivana Janu
Judge Chikako Taya

Registrar:
Hans Holthuis

PROSECUTOR

v.

RADOSLAV BRDJANIN

DECISION ON MOTION FOR ACQUITTAL PURSUANT TO RULE 98 *BIS*

The Office of the Prosecutor:

Ms. Joanna Korner

Counsel for the Accused:

Mr. John Ackerman
Mr. David Cunningham

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I. INTRODUCTION

A. Procedural background

1. On 22 August 2003, the Defence filed a partly confidential "Motion for Judgement of Acquittal – Rule 98 *Bis*".[1] The Prosecution filed a confidential "Prosecutor's Response to Defendant Radoslav Brdanin's 'Motion for Judgement of Acquittal – Rule 98 *Bis*'" on 5 September 2003 and a "Public Version of "Prosecutor's Response to the 'Motion for Judgement of Acquittal – Rule 98 *Bis'* filed on 5 September and Addendum filed on 16 -17 September 2003" on 2 October 2003.[2] The oral decision with respect to the Defence Motion was rendered by the Trial Chamber on 9 October 2003.[3]

B. Rule 98 *bis*: the law and standard of proof

2. Rule 98 *bis* (Motion for Judgement of Acquittal) of the Rules of Procedure and Evidence ("Rules") states as follows:

> (A) An accused may file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor's case and, in any event, prior to the presentation of evidence by the defence pursuant to Rule 85 (A)(ii).
>
> (B) The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or those charges.

3. Both the Defence and the Prosecution agree[4] that the Rule 98 *bis* standard of review to be applied is correctly set out in *Jelisic* Appeals Judgement:

> The Appeals Chamber considers that the reference in Rule 98 *bis* to a situation in which "the evidence is insufficient to sustain a conviction" means a case in which, in the opinion of the Trial Chamber, the prosecution evidence, if believed, is insufficient for any reasonable trier of fact to find that guilt has been proved beyond reasonable doubt. In this respect, the Appeals Chamber follows its recent holding in the *Delalic* appeal judgement, where it said: "[t]he test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question". The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently

> adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt.[5]

4. The factual findings in this decision are reached using this "98 *bis* standard", namely whether a reasonable trier of fact could be satisfied beyond reasonable doubt that the evidence adduced, if believed, could sustain a finding of guilt of Radoslav Brdjanin ("the Accused").

II. PRELIMINARY MATTERS

A. Acts not challenged by the Defence

5. The Trial Chamber notes that, for the purposes of the Defence Motion, the Defence does not contest the occurrence of several of the specific incidents alleged by the Prosecution in the Indictment[6] to have taken place, on the basis of which the charges were brought.[7] Irrespective of this, the Trial Chamber is itself further satisfied as far as the occurrence of these events is concerned that the 98 *bis* standard has been reached.[8]

B. Acts conceded by the Prosecution not to be proved beyond a reasonable doubt

6. In Appendix C attached to the Prosecution Response, the Prosecution concedes that it has not produced sufficient evidence of a number of criminal acts charged in the Indictment. These concessions are divided into two categories: first, in part A of Appendix C, with respect to criminal acts in the municipalities of Bihac -Ripac, Bosanska Dubica and Bosanska Gradiska; second, in part B of Appendix C, with respect to the destruction and wilful damage of Bosnian Muslim and Bosnian Croat religious and cultural buildings, as charged in paragraphs 47(3)(b), 62 and 63 of the Indictment.

7. The legal consequences of these concessions are that some counts of the Indictment are necessarily affected. For reasons of brevity and cohesion, the concessions will be dealt with together, rather than by addressing parts A and B separately.

8. Based on the Prosecution's concession regarding paragraph 38 of the Indictment, concerning killings, the Trial Chamber has come to the conclusion that there is no case to answer with regard to

> [t]he killing of a number of people in the market place and surrounding area in Bosanska Gradiska town on or about August 1992 - Bosanska Gradiska municipality

> [t]he killing of a number of people in the villages of Orasce and Duljci between 20 and 23 September 1992 – Bihac-Ripac municipality

for the purposes of counts 1 (genocide), 2 (complicity in genocide), 3 (persecutions), 4 (extermination) and 5 (wilful killing).

9. Based on the Prosecution's concession regarding paragraph 40 of the Indictment, with reference to camps, the Trial Chamber has come to the conclusion that there is no case to answer with regard to the alleged camps and detention facilities, staffed and operated by military and police personnel under the direction of the Crisis Staffs and the Army of the

Republika Srpska ("VRS"), at

Bosanska Dubica municipality (SUP building)

Bihac-Ripac municipality (Traktorski Servis in Ripac)

for the purposes of counts 1 (genocide), 2 (complicity in genocide) and 3 (persecutions) with regard to any incidents alleged to have occurred in either of these two camps.

10. Based on the Prosecution's concession regarding paragraph 42 of the Indictment, dealing with causing serious bodily or mental harm, the Trial Chamber has come to the conclusion that there is no case to answer with regard to the following events:

Bihac-Ripac

From 9 June 1992, the village of Ripac was sealed off and became a *de facto* centre of detention for the Bosnian Muslim inhabitants. A hangar (*Traktorski Servis*) was utilised as a detention facility for inhabitants and Bosnian Muslims from other areas. Some detainees were tied up, beatings took place outside and during interrogations when detainees were accused of being members of the "Green Berets ". Detainees were subject to forced labour. All detainees were non-combatants.

Bosanska Dubica

Between 1 April 1992 and 30 September 1992, number of Bosnian Muslim non-combatants were detained by members of the Bosnian Serb authorities (police forces and military). They were taken to the police (SUP) building. Beatings, involving the use of fists, feet, batons, electric cables and rifle butts, were administered by members of the police, military police and SDS. The beatings were both arbitrary and during interrogations, the object of which was to persuade detainees to confess to involvement in the activities of the SDA, a legitimate political party. Some detainees were rendered unconscious as a result and/or suffered serious injury. Beatings were witnessed by other detainees.

Bosanska Gradiska

After 15 July 1992, some Bosnian Muslim non-combatants were detained by the police, reserve police and military police at the school in Bistrica and the police station in Bosanska Gradiska.

At Bistrica and the police station in Bosanska Gradiska detainees were interrogated, beaten and tortured.

for the purposes of counts 1 (genocide), 2 (complicity in genocide) and 3 (persecutions).

11. With respect to counts 6 and 7 (torture), the Trial Chamber notes that paragraph 53 of the Indictment re-alleges and re-incorporates the incidents dealing with causing serious bodily or mental harm mentioned in paragraph 42, including those alleged to have taken place in Bihac-Ripac, Bosanska Dubica and Bosanska Gradiska. However, the Trial Chamber is not of the opinion that it needs to make any declaration on whether there is a case to answer

with respect to these incidents under these counts because they are not pleaded by the Prosecution in paragraph 55 as amounting to torture.

12. Based on the Prosecution's concession regarding paragraph 47(3)(a) of the Indictment, the Trial Chamber has come to the conclusion that there is no case to answer to the charge of

> [d]estruction, wilful damage and looting of the residential and commercial properties in the parts of towns, villages and other areas inhabited predominantly by a Bosnian Muslim and Bosnian Croat population, in
>
> - The Town of Ripac
>   Orasac
> - The Town of Bosanska Dubica
> - The Town of Bosanska Gradiska
>   Liskovac
>   Orahovo

for the purposes of counts 3 (persecutions), 10 (unlawful and wanton extensive destruction and appropriation of property not justified by military necessity) and 11 (wanton destruction of cities, towns or villages, or devastation not justified by military necessity).

13. Based on the Prosecution's concession regarding paragraph 47(3)(b) of the Indictment, the Trial Chamber has come to the conclusion that there is no case to answer to the charge of

> the destruction and wilful damage to the Bosnian Muslim and Bosnian Croat religious and cultural buildings

listed in part B of Appendix C to the Prosecution Response, subject to the following qualification. The Trial Chamber observes that Appendix C to the Prosecution Response refers to *Kljevci Roman Church* under the heading of Sanski Most municipality, but specifies that it is in fact in Prijedor. Paragraph 47(3)(b) of the Indictment locates the *Kljevci Roman Catholic Church* in Sanski Most municipality. Despite the small discrepancy in the name of the building in question, the Trial Chamber finds that the building referred to is the same one.[9]

14. Accordingly, the Trial Chamber holds that there is no case to answer with respect to the following incidents listed in part B of Appendix C to the Prosecution Response under counts 3 (persecutions) and 12 (destruction or wilful damage done to the institutions dedicated to religion):

Banja Luka municipality

Banja Luka city	Cathedral St. Bonaventura
	Ferhadija Mosque
	Arnaudija Mosque
	Sefer Beg Mosque
Budzak	Roman Catholic Subsidiary Church
	Pastoral Centre
Dervisi	Roman Catholic Chapel
Durbica Brdo	Roman Catholic Subsidiary Church
Kuljani	Roman Catholic Subsidiary Church

Rekavice	Roman Catholic Chapel

Bihac-Ripac municipality

Ripac town	Mosque
Cukovi hamlet	Mosque
Kulen Vakuf	Sultan Ahmad's Mosque
Orasac hamlet	Mosque

Bosanska Dubica municipality

Bosanska Dubica town	Gradska Town Mosque
	Carsijska Mosque
	Puhalska Mosque
	Roman Catholic Church

Bosanska Gradiska municipality

Bosanska Gradiska town	Mosque
Bukvik	Roman Catholic Chapel
Catrnja	Roman Catholic Subsidiary Church
Mackovac	Roman Catholic Subsidiary Church
Orahova	Mosque
Rovine	Mosque
Nova Topola	Roman Catholic Parish Church/Monastery

Bosanska Krupa municipality

Otoka	Mosque

Bosanski Novi municipality

Bosanska	Mosque
Kostajnica	Roman Catholic Church
Brdjani	Mosque
Hozici	Mosque

Bosanski Petrovac municipality

Bjelaj	Mosque

Celinac municipality

Basici	Mosque
Presnace	Roman Catholic Church
Stara Dubrava	Roman Catholic Church

Donji Vakuf municipality

Balhodzici	Mosque

Cehajici	Mosque
Dobro Brdo	Mosque
Jemanlici	Mosque
Korjenici	Mosque
Stara Selo	Mosque
Suhodol	Mosque
Torklakovac	Mosque

Kljuc municipality

Kljuc town	Roman Catholic Church
Husici	Mosque
Kamicak	Mosque
Ramici	Mosque

Kotor Varos municipality

Kotor Varos town	Mosque
Bilice	Roman Catholic Branch Church
Jakotina	Roman Catholic Church
Orahova	Roman Catholic Subsidiary Church
Rujevica	Roman Catholic Subsidiary Church
Sokoline	Roman Catholic Parish Church
Vrbanjci	Roman Catholic New Parish Church

Prijedor municipality

Brdani	Mosque
Hrustici	Mosque
Kalate	Mosque
Ljubija	Roman Catholic Parish Church
Mahmuljani	Mosque
Mujkanovici	Mosque
Donja Ravska	Parish Church
Softici	Mosque
Srednji Jakupovici	Mosque
Stara Rijeka	Roman Catholic Church
	Roman Catholic Parish House
Tomasica	Roman Catholic Subsidiary Church

Prnjavor municipality

Prnjavor town	Roman Catholic Church
Galjipovci	Mosque
Konjuhovci	Mosque
Kulasi	Roman Catholic Church
Macino Brdjo	Roman Catholic Chapel
Ralutinac	Roman Catholic Parish Church
Stivor	Roman Catholic Church

Sanski Most municipality

Cirkici	Mosque
Kljevci	Roman Catholic Church
Sasina	Roman Catholic Church
	Religious Centre

Sipovo municipality

Vrazic	Mosque

Teslic municipality

Gornji Teslic	Mosque
Hrankovici	Mosque
Kamenica	Mosque
Marica	Mosque
Pribinic	Mosque
Stenjak	Mosque
Trnovaca	Mosque

15. Based on the Prosecution's concession regarding paragraph 47(4) of the Indictment, the Trial Chamber has come to the conclusion that there is no case to answer to the charge of

> deportation or forcible transfer of Bosnian Muslims and Bosnian Croats […] from areas within the ARK municipalities listed in paragraph 4 [of the Indictment] to areas under the control of the legitimate government of Bosnia and Herzegovina (Travnik) and to Croatia (Karlovac)

in respect of Bihac-Ripac, Bosanska Dubica and Bosanska Gradiska municipalities for the purposes of counts 8 (deportation) and 9 (inhumane acts (forcible transfer)).

16. Based on the Prosecution's concession regarding paragraph 47(5) of the Indictment, the Trial Chamber has come to the conclusion that there is no case to answer to the charge of

> the denial of fundamental rights to Bosnian Muslims and Bosnian Croats, including the right to employment, freedom of movement, right to proper judicial process, or right to proper medical care

in respect of Bihac-Ripac, Bosanska Dubica and Bosanska Gradiska municipalities for the purposes of count 3 (persecutions).

C. Acts alleged by the Prosecution to be proved beyond a reasonable doubt, but which are not set out in the Indictment

17. In Appendix D of the Prosecution Response, the Prosecution lists incidents for which, although not listed in the Indictment, it submits that sufficient evidence has been provided such that, if believed, a reasonable trier of fact could arrive at a conviction beyond reasonable doubt. The Prosecution states that "it has proved the damage or destruction of other religious buildings not listed in the Indictment ?…g and will apply to amend the Indictment accordingly".[10]

18. Oral argument on this point was heard following the delivery of the oral decision. The

Prosecution submitted that the Indictment should be amended to include these acts as additional bases for the counts for which the Accused is charged. Alternatively, it was submitted that these acts be included in the Indictment as similar fact evidence.[11] The Defence objected to any amendment incorporating these acts as part of the bases for the counts, on the grounds that there had been no motivation for the Defence to conduct cross-examination of any of the Prosecution witnesses regarding those matters.[12]

19. Following the submissions by the parties the Trial Chamber issued an oral decision denying the Prosecution's request to amend the Indictment[13] by including these acts as the bases for the charges, but allowing the inclusion of the relevant evidence of these acts in the records, the final probative value of which remains to be decided by the Chamber at a later stage.[14]

III. DEFENCE CHALLENGES

20. The Defence challenges a number of issues. For ease of reference the Trial Chamber will address these in an order different to that set out in the Defence Motion.

A. Individual criminal responsibility

21. The Prosecution cumulatively charges the Accused for the crimes alleged in counts 1 through 12 under different modes of liability. These are:

> 1. responsibility for knowingly and wilfully participating in a joint criminal enterprise ("JCE"), entailing the Accused's individual criminal responsibility under Article 7(1) of the Statute of the Tribunal ("Statute");[15]
>
> 2. responsibility under Article 7(1) of the Statute for having planned, instigated, ordered or otherwise aided and abetted in the planning, preparation, or execution of the crimes charged in the Indictment;[16]
>
> 3. responsibility under Article 7(3) of the Statute for the crimes committed by the Accused's subordinates whilst he was holding positions of superior authority.[17]

22. The Trial Chamber has examined in relation to each of these modes of individual criminal responsibility whether, on the basis of the Prosecution evidence, if believed, a reasonable trier of fact could be satisfied beyond reasonable doubt that the Accused is individually responsible for the crimes charged in the Indictment. In order to avoid significant repetition, for the purposes of this 98 *bis* Decision, the Trial Chamber will address all modes of liability in relation to all the crimes charged in the Indictment together.

1. Article 7(1): Joint Criminal Enterprise

23. The Trial Chamber relies on the definition of JCE as set out by the Appeals Chamber in the *Tadic* Appeals Judgement, and the three categories of JCE identified therein.[18]

24. During the pre-trial stage, the parties were put on notice by the Pre Trial Judge that the

Prosecution was understood to have alternatively pleaded in the Indictment a first category of JCE case (paragraph 27.1) and a third category of JCE case (paragraph 27.3).[19] The Trial Chamber finds that the second category of JCE was not pleaded. In view of this, the Trial Chamber considers that it would be unfair to the Accused to allow the Prosecution to invoke the second category of JCE for whatever purpose.[20] The submissions of both the Defence and the Prosecution in relation to the second category of JCE are therefore of no relevance and will not be considered by the Trial Chamber.[21]

25. In relation to the first category of JCE, the Defence submits that none of the offences which qualify as crimes under the Tribunal's Statute "can be laid at ?the Accused'sg feet". The Defence specifies that "StChere is not a case where the Accused knew specifically that a crime would be committed and assisted in the commission of that crime in some active 'hands-on' way".[22]

26. The Trial Chamber notes that the submission by the Defence that one of the requirements to establish a JCE is to prove the 'hands-on' role of an accused is not supported by the jurisprudence of this Tribunal.[23] Participants in a JCE may contribute to the common plan in a variety of roles. Indeed, the term participation is defined broadly and may take the form of assistance in, or contribution to, the execution of the common plan or purpose.[24] Participation includes both direct participation and indirect participation. An accused's involvement in the criminal act must form a link in the chain of causation, but it is not necessary that the participation be a *conditio sine qua non*, or that the offence would not have occurred but for the participation.[25]

27. The Trial Chamber accepts that, while a JCE may have a number of different criminal objects, it is not necessary for the Prosecution to prove that every participant agreed to every one of the crimes being committed.[26] However, it is necessary for the Prosecution to prove that, between the member of the JCE responsible for committing the material crime charged and the person held responsible under the JCE for that crime, there was an agreement to commit at least that particular crime.[27]

28. On this basis, the Trial Chamber is satisfied that a reasonable trier of fact could, on the basis of the evidence before it, if believed, find beyond reasonable doubt that the Accused shared with other members of the JCE a common plan which amounted to and involved the commission of the crimes charged in the Indictment in counts 1 through 12. Solely for the purposes of the 98 *bis* standard, the Trial Chamber is satisfied that each of the members of the JCE was in one way or another involved in the commission of one or more of the crimes charged in the Indictment in counts 1 through 12 and that the Accused intended the result of the common plan and voluntarily participated in furthering the crimes in question.

29. In relation to the third category of JCE, the Defence again submits that the 'hands-on' requirement for the establishment of a JCE is not met in relation to the Accused, since he was remote from the events in question and did not participate in them in any significant way. The Trial Chamber dismisses this argument on the basis of its previous reasoning.[28]

30. In applying the 98 *bis* standard, the Trial Chamber is satisfied that the Accused and all other members of the JCE identified in the Indictment shared a common plan which amounted to, and involved the commission of the crimes of deportation and forcible transfer as described in paragraphs 58 and 59 of the Indictment. The Trial Chamber is further satisfied according to the 98 *bis* standard that the crimes charged in counts 2 to 7 inclusive and counts 10, 11

and 12 were natural and foreseeable consequences of the crimes of deportation and forcible transfer as agreed upon. With respect to count 1, however, the Trial Chamber finds that in order to arrive at a conviction for genocide under Article 4(3)(a) the specific intent for genocide must be met. As explained further in paragraphs 55-57 below, this specific intent is incompatible with the notion of genocide as a natural and foreseeable consequence of a crime other than genocide agreed to by the members of the JCE. For this reason the Trial Chamber finds that there is no case to answer with respect to count 1 in the context of the third category of JCE.

31. The Trial Chamber finds that on the basis of the evidence available, if believed, a reasonable trier of fact could also find beyond reasonable doubt that the Accused was aware of the risk that the crimes charged in the Indictment in counts 2 to 7 inclusive and counts 10, 11 and 12 would be committed by other members of the JCE. Notwithstanding his awareness, the Accused wilfully furthered the deportation and forcible transfer of a large proportion of the Bosnian Muslim and Bosnian Croat population from areas within the Autonomous Region of Krajina ("ARK") municipalities to areas under the control of the legitimate government of Bosnia and Herzegovina (Travnik) and to Croatia (Karlovac). The Accused intended to force these persons to leave their territory "without grounds permitted under international law"[29]. Solely for the purposes of the 98 *bis* standard, the Trial Chamber is satisfied that each of the members of the JCE was in one way or another involved in the commission of one or more of the crimes charged in the Indictment in counts 2 through 12. The Trial Chamber does not find support for the Defence submission that the third category of JCE requires specific knowledge of the events and "presence" in the sense of participation in the activities resulting in the commission of a crime that could have been foreseen by the Accused.[30]

32. For the reasons set out above, the Trial Chamber upholds the Defence Motion with respect to count 1 in the context of the third category of JCE, and dismisses it in respect of all other challenges related to JCE.[31]

2. Other modes of liability under Article 7(1) of the Statute

33. Although the Defence, solely for the purposes of the Rule 98 *bis* exercise, does not specifically challenge the evidence in relation to the modes of liability under Article 7(1) of the Statute other than 'committing' in the context of JCE, the Trial Chamber has examined the evidence in relation to each individual mode of liability for which the Accused is charged.[32]

(a) Planning

34. In applying the 98 *bis* standard, the Trial Chamber is satisfied on the basis of the evidence available, that the Accused, in concert with other individuals identified in the Indictment, planned, designed and organised the commission of the crimes charged in the Indictment in counts 1 through 12 at both the preparatory and execution phases, whereby his participation in formulating a criminal plan and endorsing a plan proposed by others was substantial.[33] For the purposes of the present decision, the Trial Chamber is further satisfied that, on the basis of the evidence before it, if believed, a reasonable trier of fact could find beyond reasonable doubt that the crimes in question were actually committed and that the Accused intended these crimes to be committed.[34]

(b) Instigating

35. In applying the 98 *bis* standard, the Trial Chamber is satisfied that on the basis of the evidence available, a reasonable trier of fact could find beyond reasonable doubt that the Accused, by his acts and conduct, prompted other individuals identified in the Indictment to commit the crimes charged in the Indictment in counts 1 through 12.[35] It is not necessary to prove that these crimes would not have been perpetrated without his involvement.[36] In applying the 98 *bis* standard, the Trial Chamber is satisfied that there is, however, sufficient evidence to find that the acts and conduct of the Accused constitute a clear contributing factor to the conduct of the physical perpetrators of the crimes in question: the Accused intended to provoke and induce the commission of these crimes, and was aware of the substantial likelihood that the commission of these crimes would be a probable consequence of his acts and conduct.[37]

(c) Ordering

36. In applying the 98 *bis* standard, the Trial Chamber is satisfied on the basis of the evidence available that the Accused possessed the authority to give orders. The relevant evidence suggests that his orders were in fact implemented by other individuals identified in the Indictment. Furthermore, the relevant evidence, if believed, suggests that the Accused knowingly and wilfully used his position of authority to order those individuals to commit the crimes charged in the Indictment in counts 1 through 12.[38]

(d) Aiding and Abetting

37. In applying the 98 *bis* standard, the Trial Chamber is further satisfied on the basis of the evidence available, that the Accused aided and abetted other individuals identified in the Indictment in committing the crimes charged in counts 1 through 12 of the Indictment. The relevant evidence, if believed, suggests that he rendered a substantial contribution to the commission of these crimes: his acts and omissions, although for the most part geographically and temporally unconnected to the actual commission of the crimes in question, had a decisive effect on the commission of these crimes. They consisted in facilitating and giving assistance to the commission of the crimes in question, as well as in encouraging and giving moral support to the physical perpetrators thereof.[39] For the purposes of the present decision, the Trial Chamber is satisfied that the 98 *bis* standard is reached suggesting that the Accused knew that the respective principals intended to commit the crimes in question and he was aware that his acts assisted the principal offenders in the commission of these crimes, and that therefore, based on this evidence, a reasonable trier of fact, could find the Accused criminally responsible for aiding and abetting.[40]

(e) Findings

38. For the above reasons, the Trial Chamber dismisses the Defence Motion in respect of the Accused's liability for planning, instigating, ordering or otherwise aiding and abetting in the planning, perpetration or execution of the crimes charged in the Indictment in counts 1 through 12.[41]

3. Article 7(3)

39. The jurisprudence has established the following three-pronged test for criminal liability

pursuant to Article 7(3) of the Statute:

1. the existence of a superior-subordinate relationship between the commander (the accused) and the perpetrator of the crime;

2. the accused knew or had reason to know that the crime was about to be or had been committed; and

3. the accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof.[42]

40. The Defence submits that the Prosecution has failed to meet its burden with regard to the first prong of this test, having failed to prove the existence of a superior-subordinate relationship between the Accused and any of the offenders who committed any of the specific acts alleged in any of the substantive counts charged in the Indictment.[43] The Prosecution responds that sufficient evidence has been adduced to prove each of the three elements necessary to establish responsibility under Article 7(3) of the Statute in relation to the Accused.[44]

41. The Trial Chamber is satisfied that sufficient evidence has been tendered, on the basis of which, if believed, a reasonable trier of fact could be satisfied beyond reasonable doubt that the Accused is responsible pursuant to Article 7(3) of the Statute for the crimes charged in the Indictment in counts 1 through 12.

42. For the purposes of the present decision, i.e. according to the 98 *bis* standard, the Trial Chamber is satisfied that there is sufficient evidence that the Accused (a) held a number of government and party positions which involved varying degrees of authority; (b) as *inter alia* President of the ARK Crisis Staff, exercised effective control over members of municipal governments and Crisis Staffs of the ARK municipalities, the police on both the regional level (CSB) and the municipal level (SJBs), the military and paramilitary groups, and (c) possessed both *de jure* and *de facto* power to prevent his subordinates' crimes and to punish or ensure the punishment of the perpetrators of these crimes after they had been committed.

43. In addition, the Trial Chamber is satisfied that based on the evidence available, if believed, a reasonable trier of fact could be satisfied beyond reasonable doubt that the Accused knew or had reason to know that the crimes in question were about to be or had been committed. Moreover, in applying the 98 *bis* standard, it is satisfied that the Accused did nothing to prevent those crimes or punish the perpetrators thereof.

44. The Trial Chamber, therefore, dismisses the Defence Motion in respect of the Accused's responsibility pursuant Article 7(3) of the Statute for the crimes charged in the Indictment in counts 1 through 12.[45]

B. Genocide

45. Under count 1, the Accused is charged with genocide, punishable under Articles 4(3)(a), and 7(1) and 7(3) of the Statute of the Tribunal.

46. The Defence submits that there is no evidence to show the existence of a plan at the level of the Serbian Democratic Party ("SDS"), of the Republika Srpska or of the ARK to destroy in whole or in part a national, ethnical, racial or religious group, as such.[46] In the absence of such a plan, the Defence concludes that there was no JCE to commit genocide.[47] The Defence also submits that there is no evidence to show that the Accused had such a plan, and that in any case there is no evidence to show that genocide was committed during the period covered by the Indictment in the area contemplated therein.[48]

47. The Prosecution responds that the evidence demonstrates that a plan to forcibly and permanently remove the Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state existed at all levels (republic, regional and municipal), "and that by the Summer of 1992 that plan encompassed an intent to destroy the Bosnian Muslim and Bosnian Croat groups in the [ARK]".[49] The Prosecution further submits that the Accused devised this plan or at the very least was privy to it and willingly embraced it with the intent to destroy the Bosnian Muslim and Bosnian Croat groups.[50] Finally, the Prosecution submits that a genocidal campaign against the Bosnian Muslim and Bosnian Croat groups was implemented in the ARK between April and December 1992.[51]

1. The law

48. Both parties have made submissions regarding the law applicable to counts 1 (genocide) and 2 (complicity in genocide). The Trial Chamber will address the applicable law only with respect to those issues on which the parties disagree or which in its view need to be clarified at this stage.[52]

(a) The objective element: *actus reus*

49. The Prosecution submits that the Bosnian Muslim and Bosnian Croat groups are the protected groups in this case.[53] The Defence is silent on this matter. In applying the 98 *bis* standard, the Trial Chamber finds that there is sufficient evidence that the Prosecution's submission is correct.

50. In the Indictment, the Prosecution pleads that the execution of the campaign designed to destroy, in whole or in part, the Bosnian Muslim and Bosnian Croat groups in the municipalities contemplated in the Indictment consisted of conduct specified in Article 4(2)(a), (b) and (c) of the Statute, namely killing Bosnian Muslim and Bosnian Croat non-combatants, causing them serious bodily or mental harm and detaining them under conditions calculated to bring about the physical destruction of a part of them.[54] According to the Indictment, in the camps and detention facilities these conditions consisted of beatings or other physical maltreatment, starvation rations, contaminated water, insufficient or non-existent medical care, unhygienic conditions and lack of space.[55]

51. The Prosecution Response adds the submission that "the mass deportation of the Bosnian Muslim and Bosnian Croat groups" constituted conditions of life calculated to bring about their physical destruction, within the meaning of Article 4(2)(c) of the Statute.[56] As paragraphs 37 (3) and 43 of the Indictment unmistakably show, this submission is not pleaded in the Indictment. The Trial Chamber thus finds that the Defence was not adequately put on notice of this aspect of the Prosecution case for counts 1 and 2, and as a consequence the Trial Chamber will not entertain it.[57]

(b) The subjective element: *mens rea*

52. The specific intent required for genocide under Article 4(3)(a) of the Statute is the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[58]

53. The parties do not dispute that the specific intent requirement is satisfied by the intent to destroy the protected groups "in part" as within a limited geographic area, in this case, the Bosnian Muslim and Bosnian Croat groups in the ARK.[59] The Tribunal's jurisprudence supports this view.[60]

54. The Prosecution submits in the alternative that the specific intent requirement is met by the targeting for destruction of the Bosnian Muslim and Bosnian Croat leadership and military aged men, because they constitute significant sections of those groups.[61] The Defence opposes the view that military aged men constitute a significant section of the group for the purposes of meeting the specific intent requirement.[62] Given the current jurisprudence of this Tribunal,[63] for the purposes of this decision the Trial Chamber deems it inappropriate to rule out at this stage that targeting military aged men could, all things being equal, constitute evidence of the intent to destroy in part a national, ethnical, racial or religious group, as such.

55. As stated earlier,[64] in the Indictment the Prosecution pleads *inter alia* that the Accused is responsible for genocide on the basis that it was a natural and foreseeable consequence of the campaign designed to eliminate the Bosnian Muslim and Bosnian Croat populations from the municipalities contemplated in the Indictment through their deportation or forcible transfer.[65] The Defence opposes this submission and contends that as a matter of law a conviction for genocide under the third category of JCE is not permissible because of the specific intent requirement.[66] The Prosecution responds that "a conviction under Article 4(3)(a) would not require proof of specific intent where the Accused willingly assumed the risk that genocide might be committed as a natural and foreseeable consequence of the execution of the [JCE]".[67]

56. As already stated,[68] the Trial Chamber relies on the definition of the third category of JCE put forward by the Appeals Chamber in the *Tadic* case, according to which it consists of "a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose".[69]

57. The Trial Chamber reiterates that the specific intent required for genocide is set out in paragraph 52 above. This specific intent cannot be reconciled with the *mens rea* required for a conviction pursuant to the third category of JCE. The latter consists of the Accused's awareness of the risk that genocide would be committed by other members of the JCE. This is a different *mens rea* and falls short of the threshold needed to satisfy the specific intent required for a conviction for genocide under Article 4(3)(a).[70] For this reason, the Trial Chamber has found that there is no case to answer with respect to count 1 in the context of the third category of JCE.[71]

2. Conclusions regarding count 1

58. In addition to and in the context of the Defence challenges identified earlier, the Defence

specifically disputes that two items of evidence, namely the "Variant A and B document" (Exhibit P 25) and the "Six strategic goals of the Serbian people" (Exhibit P 189) support the existence of a genocidal plan or reflect the specific intent required for genocide.[72] The Trial Chamber finds that it is outside the scope of Rule 98 *bis* to address at this stage whether specific items of evidence taken in isolation support any such conclusion.

59. Based on the evidence of the Accused's participation in the first category of JCE, if believed, the Trial Chamber finds that a reasonable trier of fact could be satisfied beyond reasonable doubt that the Accused shared with other members of the JCE a common plan which amounted to and involved the commission of genocide against the Bosnian Muslim and Bosnian Croat groups in the ARK during the period relevant to the Indictment in the area contemplated therein.[73] Consistent with this finding and based on the same 98 *bis* standard criteria, there is sufficient evidence on the basis of which a reasonable trier of fact could be satisfied beyond reasonable doubt that the Accused possessed the specific intent for count 1.

60. The Trial Chamber finds that there is sufficient evidence of killings, infliction of serious bodily harm and the deliberate imposition of conditions of life calculated to bring about physical destruction, carried out against Bosnian Muslims and Bosnian Croats and intended to bring about the destruction in part of the groups as such which, if believed, could satisfy a reasonable trier of fact beyond reasonable doubt that genocide was committed in the municipalities mentioned in the Indictment between April and December 1992.

61. Finally, for the purposes of Rule 98 *bis* only and based on the said 98 *bis* standard criteria exclusively, the Trial Chamber finds that there is sufficient evidence that the Accused knowingly furthered the crime of genocide which, if believed, could lead a reasonable trier of fact to be satisfied beyond reasonable doubt of the Accused's criminal responsibility for genocide under count 1 of the Indictment.

62. Naturally, the considerations of this Trial Chamber in paragraphs 59 to 61 are at the core of the case against the Accused and will engage the members of this Trial Chamber considerably for the final stage of this trial. There is in fact other evidence that argues in favour of the Accused which the Trial Chamber is fully aware of but which for the purposes of the current exercise, i.e. meeting the 98 *bis* standard, cannot have any consequences. It will of course be given all due weight when the Trial Chamber comes to its final decision, when it will also be in a position to assess all the evidence currently available in the light of the evidence that may be brought forward by the Defence.

63. Consequently, with the exception of the finding of the Trial Chamber in paragraph 57 above, the Defence Motion fails with respect to count 1. Whilst the majority of the Trial Chamber supports this conclusion, Judge Janu dissents.[74]

C. Complicity in genocide

64. Under count 2, the Accused is charged with complicity in genocide, punishable under Articles 4(3)(e), and 7(1) and 7(3) of the Statute of the Tribunal.

65. The Defence submits that there is no evidence to prove that genocide was committed in the ARK and that consequently it is not possible to sustain a conviction for complicity in

genocide.[75] The Prosecution responds that it has made a case with respect to genocide as well as with respect to complicity in genocide.[76] The Trial Chamber has already stated above that a reasonable trier of fact could, on the evidence adduced so far in this case, if believed, be satisfied beyond reasonable doubt that genocide was committed in the municipalities mentioned in the Indictment, between April and December 1992.[77]

66. Although not specifically raised in the Defence Motion, the Trial Chamber finds it necessary to address the *mens rea* requirement for complicity in genocide. The Prosecution submits that the mental element for complicity in genocide is that "the Accused knew that the crime was being committed in furtherance of the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[78] The Trial Chamber notes that, according to the jurisprudence of the ICTR, an accused may be convicted for complicity in genocide if the Prosecution proves beyond reasonable doubt that an accused knew that his own acts assisted in the commission of genocide by the principal offender and was aware of the principal offender's state of mind;[79] it need not show that an accused shared the specific intent of the principal offender. Considering this, the Trial Chamber does not find it appropriate at this stage to dismiss the count of complicity in genocide with respect to the third category of JCE.

1. Conclusions regarding count 2

67. With respect to the charge of complicity in genocide, the Trial Chamber is satisfied that a reasonable trier of fact could, on the evidence adduced so far in this case, if believed, be satisfied beyond reasonable doubt that the Accused assisted in the commission of genocide in the knowledge that he was so doing. As a consequence, a reasonable trier of fact could on the basis of this evidence be satisfied beyond reasonable doubt of the Accused's guilt of complicity in genocide.

68. The Defence Motion therefore fails with respect to count 2. Whilst the majority of the Trial Chamber supports this decision, Judge Janu dissents.[80]

D. Extermination

69. Under count 4, the Accused is charged with extermination, a crime against humanity punishable under Articles 5(b), and 7(1) and 7(3) of the Statute.[81]

70. In its Motion, the Defence submits in general that "StChe Prosecutor has failed to present sufficient evidence to support a conviction of extermination".[82] More specifically with regard to the *actus reus* element of extermination, the Defence explains that the primary requirement for establishing the crime of extermination is that "the killings must have been done on a massive scale".[83] The Defence further argues that there is no evidence to support mass killings of the kind that would be required to prove the commission of the crime of extermination and that "such evidence cannot be established by an accumulation of separate and unrelated incidents".[84] In addition the Defence believes that there is no evidence that the Accused, "by reason of either his position or authority, could decide upon the fate or had control over a large number of individuals".[85] With respect to the *mens rea* element of extermination, the Defence finally submits that there is no evidence that the Accused "had knowledge that his action was part of a vast murderous enterprise in which large numbers of individuals were systematically marked for killing or were killed".[86]

71. In its Response, the Prosecution concurs with the Defence description of the *actus reus* element of the crime of extermination.[87] However, the Prosecution refutes the Defence submissions that there is insufficient evidence to establish the killing of persons on a massive scale and that the crime of extermination cannot be proved by an accumulation of incidents.[88] The Prosecution maintains that "StChe Defence Motion offers no legal or factual arguments to support these assertions and ignores case law".[89] In addition, the Prosecution notes that the *mens rea* of extermination has been formulated differently within the jurisprudence of this Tribunal and the ICTR.[90] The Prosecution submits that, irrespective of which *mens rea* standard will ultimately be applied by this Trial Chamber, it has met its burden under Rule 98 *bis* to prove that a reasonable Trial Chamber could convict the Accused on the charge of extermination.[91]

1. The law

(a) Objective element: *actus reus*

72. The Trial Chamber concurs with the parties that the *actus reus* of extermination is the killing of persons on a massive scale.[92] The Trial Chamber accepts the definition of the *actus reus* element of extermination as identified by the *Vasiljevic* Trial Chamber:

> The material element of extermination consists of any act or combination of acts which contributes to the killing of a large number of individuals.[93]

73. The Trial Chamber observes that there is no basis in law or jurisprudence for the Defence submission that the commission of the crime of extermination cannot be established by an accumulation of separate and unrelated incidents. On the contrary, the Trial Chamber is of the opinion that the element of the massiveness of the crime on the territory covered by the Indictment allows for the possibility to establish the evidence of the *actus reus* of extermination on an aggregated basis.[94]

74. The Trial Chamber also notes in relation to the *actus reus* of extermination that there is no requirement that the Prosecution prove that the Accused had control over a large number of individuals because of his position or authority, as submitted by the Defence. In order to establish the material element of the crime of extermination, it suffices that the evidence shows that the Accused has committed any act or combination of acts which contributed to the killing of a large number of individuals.[95]

(b) Subjective element: *mens rea*

75. The Trial Chamber observes that the *mens rea* for the crime of extermination is not defined uniformly in the jurisprudence of this Tribunal and the ICTR. In general, three different approaches can be identified. Pursuant to the first approach, which is formulated by the *Kayishema* Trial Chamber, the *mens rea* for extermination is that an accused through his act (s) or omission(s) must have intended the killing, or be reckless or grossly negligent as to whether the killing would result and be aware that his acts(s) or omission(s) forms part of a mass killing event.[96] The Trial Chamber in *Krstic* adopted a second approach and held that the crimes of murder and extermination have the same *mens rea*

> which consists of the intention to kill or the intention to cause serious bodily injury to the victim which the perpetrator must have reasonably foreseen was

likely to result in death.[97]

76. The *Stakic* Trial Chamber has refined this standard. Arguing that the *mens rea* standard for extermination cannot be lower than the *mens rea* required for murder as a crime against humanity, the Trial Chamber found that the general standard is *dolus directus* or *dolus eventualis*.[98] The Trial Chamber emphasised that

> it would be incompatible with the character of the crime of extermination and with the system and construction of Article 5 if *recklessness or gross negligence* sufficed to hold an accused criminally responsible for such a crime.[99]

77. The third approach, which has been articulated in the *Vasiljevic* Trial Judgement and upon which the Defence relied in its Motion,[100] defines the *mens rea* standard as follows:

> The offender must intend to kill, to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission is likely to cause death, or otherwise intends to participate in the elimination of a number of individuals, *in the knowledge that his action is part of a vast murderous enterprise* in which a large number of individuals are systematically marked for killing or killed.[101]

78. In the absence of settled jurisprudence and for the purposes of this Rule 98 *bis* decision, the Trial Chamber favours the formulation of the *mens rea* as set out in the *Vasiljevic* Trial Judgement. This includes the requirement that the Accused had knowledge that his action was part of a vast murderous enterprise in which large number of individuals were systematically marked for killing or were killed. The Trial Chamber notes that the *mens rea* element of extermination is *sub judice* before the Appeals Chamber in another case,[102] and thus defers its final decision on the matter until a later stage.

2. Factual Findings

(a) Objective element: *actus reus*

79. The Trial Chamber is satisfied that, on the basis of the evidence adduced by the Prosecution, if believed, a reasonable trier of fact could be satisfied beyond reasonable doubt that the material element of the crime of extermination, i.e. the killings which took place, independently or cumulatively reach the requisite level of massiveness to prove the crime of extermination. In applying the 98 *bis* standard, the Trial Chamber therefore finds that extermination was committed in the municipalities listed in paragraph 4 of the Indictment, which formed part of the ARK, between 1 April 1992 and 31 December 1992. For the purposes of this decision and applying the 98 *bis* standard, the Trial Chamber has already found above that the Accused participated in the crime of extermination as charged.[103]

(b) Subjective element: *mens rea*

80. The Trial Chamber is also satisfied that sufficient evidence has been presented, in terms of the 98 *bis* standard criteria which, if believed, could lead a reasonable trier of fact to the conclusion that the Accused possessed the requisite intent to kill, to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission was

likely to cause death, or otherwise to participate in the elimination of a number of individuals, in the knowledge that his action was part of a vast murderous enterprise in which large number of individuals were systematically marked for killing or were killed. In this respect the Trial Chamber refers back to its previous findings on the individual responsibility of the Accused, finding *inter alia* that the Accused possessed the requisite intent in relation to the crime of extermination as charged in the Indictment.[104]

3. Conclusion regarding count 4

81. On the basis of the Trial Chamber's findings as to the legal elements for extermination and on the basis of the evidence presented to date, if believed, the Trial Chamber finds that a reasonable trier of fact could be satisfied beyond reasonable doubt of the guilt of the Accused with regard to extermination as a crime against humanity. The Defence Motion therefore fails with respect to count 4.

E. Persecutions

82. Under count 3, the Accused is charged with persecutions, a crime against humanity punishable under Article 5(h), and 7(1) and 7(3) of the Statute of the Tribunal.[105]

83. The Defence submits that the denials of rights alleged as persecution are not denials of internationally recognised *fundamental* rights, and that "[s]uch charges and the vagueness associated with them are a denial of the principal of *nullum crimen sine lege*".[106]

84. In paragraph 47(5) of the Indictment, the Prosecution alleges that the following acts amount to persecution:

> the denial of fundamental rights to Bosnian Muslims and Bosnian Croats, including the right to employment, freedom of movement, right to proper judicial process, or right to proper medical care.

85. The jurisprudence of this Tribunal, as accepted by the Defence, states that the *actus reus* of the crime of persecution consists of

> [a]n act or omission that: 1. discriminates in fact and which denies or infringes upon a fundamental right laid down in customary international or treaty law[.][107]

86. Within the context of this definition, the need to clarify what would amount to a fundamental right obviously arises. The Trial Chamber favours the approach taken in *Kupreskic* Trial Judgement that there is no list of established fundamental rights and the relative decision is best taken on a case by case basis.[108]

87. In the instant case, the Prosecution submits in its Response that each of the rights alleged to have been denied in the Indictment amounting to persecution is fundamental.[109] Basing itself on the jurisprudence of this Tribunal, and particularly the *Kupreskic* Trial Judgement, the Trial Chamber is satisfied that within the context of the conflict in the ARK between April and December 1992, the denial of the rights to employment, freedom of movement, proper judicial process, and proper medical care, based on the evidence available, if believed, could lead a reasonable trier of fact to come to a finding beyond reasonable doubt

that given all circumstances they amounted to fundamental rights within the context of the alleged persecution.

88. The Trial Chamber considers it necessary to make a point of clarification with respect to the manner in which the Prosecution pleaded the denial of fundamental rights in the Indictment, notably by using of the word "including". The jurisprudence of this Tribunal makes it clear that an accused is entitled to know the case against him and is entitled to assume that any list of alleged acts contained in an indictment is exhaustive, regardless of the inclusion of words such as "including", which may imply that other unidentified acts are being charged as well.[110] The Trial Chamber agrees with the approach taken in the *Stakic* Trial Judgement :

> [T]he Trial Chamber will not consider any denial of fundamental rights not expressly mentioned by the Prosecution in the Indictment. The Accused is not sufficiently informed of, and therefore unable to defend against, any charges other than those explicitly stated in the Indictment.[111]

89. In the instant case, the Trial Chamber considers that only four specific rights (employment, freedom of movement, proper judicial process and proper medical care) are alleged in the Indictment to have been denied and has restricted its analysis accordingly.

90. In its Motion, the Defence also submits that there is no evidence connecting the Accused to any of the underlying acts alleged to amount to persecution. The Trial Chamber, applying the 98 *bis* standard, has already found above that the crime of persecution was committed[112] and that the Accused participated with the requisite intent in this crime as charged[113]. For these reasons, the Defence Motion with respect to count 3 is dismissed.

F. Torture

91. Under counts 6 and 7, the Accused is charged with torture both as a crime against humanity and a grave breach of the Geneva Conventions of 1949, punishable respectively under Articles 5(f) and 2(b), and 7(1) and 7(3) of the Statute.[114]

92. With respect to the charge of torture, the Defence submits as follows regarding the evidence adduced during the Prosecution case:

> Whether it rises to the widespread or systematic nature that would justify a finding of the commission of a Crime Against Humanity is the question with regard to this count of the indictment.[115]

93. The Trial Chamber finds that the Defence confuses the legal requirements for the chapeau elements of crimes against humanity (including the necessity that there be a *widespread or systematic* attack) with the legal requirements for the crime of torture. There is no such legal requirement for the crime of torture. What the Prosecution has to establish for count 6 is that there was a widespread or systematic attack against a civilian population, in the context of which the crime of torture was committed, and not that the commission of the crime of torture itself was of a widespread or systematic nature.

94. In its Motion, the Defence further submits that there is no evidence connecting the Accused to any torture.[116] The Trial Chamber, applying the 98 *bis* standard, has already found above

that the Accused participated with the requisite intent in the commission of the crime of torture as charged.[117] For these reasons, the Trial Chamber dismisses the Defence's challenges in relation to counts 6 and 7.

G. Deportation

95. Under counts 8 and 9, the Accused is charged with deportation and inhumane acts, crimes against humanity, punishable respectively under Articles 5(d) and 5 (i), and 7(1) and 7(3) of the Statute of the Tribunal.[118]

96. With respect to the charge of deportation, the Defence submits that "the Prosecution ha?sg failed to present sufficient evidence to support a conviction for deportation as a grave breach of the Geneva Convention under count 9 of the indictment".[119] The reference to count 9 may be intentional or accidental. But even if posed in the context of count 8 which specifically deals with deportation, the Defence argument would still not be valid as the notion itself would remain alien to the grave breaches of the Geneva Conventions.

97. The Defence also raises a challenge concerning the law applicable to deportation.[120] Specifically, the Defence submits that the law is correctly set out in the *Krnojelac* Trial Judgement in that deportation requires "the displacement of persons across a national border, to be distinguished from forcible transfer which may take place within national boundaries" [121]. The Defence contrasts this with the approach taken in the *Stakic* Trial Judgement, which focuses on forcible removal rather than the destination resulting from such removal, though acknowledging that there must at least be a transfer to territory controlled by another party to the conflict.[122]

98. The Trial Chamber notes that deportation and forcible transfer were addressed in the recent *Krnojelac* Appeals Judgement. However, the principles laid down therein were set out in the context of deportation and/or forcible transfer as one of the ways of committing persecution. The *Krnojelac* Appeals Judgement expressly does not take any decision with regard to the definition of deportation as it may be different from forcible transfer.[123] Therefore, the Trial Chamber does not find the *Krnojelac* Appeals Judgement to be of assistance in the instant matter.

99. The Trial Chamber notes that, if the *Stakic* approach were to be applied in the instant case, for the purposes of and based on the 98 *bis* standard, one would have to dismiss the charge of forcible transfer on a legal basis and concentrate on the charge of deportation in which case, in the opinion of this Trial Chamber, the 98 *bis* standard is reached. On the same 98 *bis* standard, there is sufficient evidence of forced displacement of part of the population across either internal borders (i.e. established by the areas controlled by the respective parties to the conflict) or international borders.

100. If, in the alternative, the *Krnojelac* Trial Judgement approach were to be applied using the 98 *bis* standard, there would be a case to answer with respect to both counts, as there is abundant evidence of forcible displacements both within and across international borders that, if believed, could lead a reasonable trier of fact to so conclude beyond a reasonable doubt.

101. It is the opinion of the Trial Chamber that it should not pre-empt the issue at the Rule 98 *bis* stage when a definitive pronouncement by the Appeals Chamber on this subject matter may

be forthcoming before the final judgement of the Trial Chamber in this case,[124] and in view of what is stated in the second part of paragraph 99 *supra*, it would be improper for this Trial Chamber, at this stage, to eliminate the crime of forcible transfer from the remaining proceedings.

102. In its Motion, the Defence further submits that there is no evidence connecting the Accused to any deportations or forcible transfers.[125] The Trial Chamber, applying the 98 *bis* standard, has already found above that the Accused participated with the requisite intent in the commission of the crimes of deportation and forcible transfer as charged.[126] For these reasons, the Trial Chamber dismisses the Defence's challenges with respect to counts 8 and 9.

H. Remaining counts

103. The Defence has not raised any specific challenge in relation to count 5 (wilful killings, a grave breach of the Geneva Conventions, punishable under Articles 2(a), 7(1) and 7(3) of the Statute), count 10 (unlawful and wanton extensive destruction and appropriation of property not justified by military necessity, a grave breach of the Geneva Convention of 1949, punishable under Articles 2(d), 7(1) and 7(3) of the Statute), count 11 (wanton destruction of cities, towns or villages, or devastation not justified by military necessity, a violation of the laws or customs of war, punishable under Articles 3(b), 7(1) and 7(3) of the Statute) or count 12 (destruction or wilful damage done to institutions dedicated to religion, a violation of the laws or customs of war, punishable under Articles 3(d), 7(1) and 7(3) of the Statute of the Tribunal). Although the Defence admitted that in accordance with Rule 98 *bis* standard the Trial Chamber could find that these crimes have been committed, it argued that there is no evidence which would connect the Accused with any of these crimes.[127]

104. In this respect, the Trial Chamber recalls that it has already found that on the basis of the evidence before it, if believed, a reasonable Trial Chamber could be satisfied beyond reasonable doubt that the Accused, as charged in the Indictment, furthered with the requisite intent the crimes of wilful killings, unlawful and wanton extensive destruction and appropriation of property not justified by military necessity, wanton destruction of cities, towns or villages, or devastation not justified by military necessity, and destruction or wilful damage done to institutions dedicated to religion.[128] Accordingly, the Defence Motion with respect to counts 5, 10, 11 and 12 fails.

IV. DISPOSITION

For the foregoing reasons, the Trial Chamber pursuant to Rule 98 *bis*:

(1) unanimously GRANTS the Defence Motion insofar as the Accused is acquitted of count 1 of the Indictment in the context of the third category of joint criminal enterprise;

(2) unanimously STRIKES OUT those factual allegations in the Indictment detailed in paragraphs 8-16 of this Decision;

(3) by majority (Judge Ivana Janu dissenting) DISMISSES the remaining issues in the Defence Motion with regard to count 1 of the Indictment and all issues in the Defence Motion with regard to count 2 of the Indictment;

(4) unanimously DISMISSES all issues in the Defence Motion with regard to counts 3 through 12 of the Indictment.

A Partial Dissenting Opinion of Judge Ivana Janu is attached to the present decision.

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

_____
Judge Carmel Agius
Presiding

_____
Judge Ivana Janu

_____
Judge Chikako Taya

Dated this 28th day of November 2003
At The Hague
The Netherlands

[Seal of the Tribunal]

PARTIAL DISSENTING OPINION OF JUDGE IVANA JANU

1. While I agree with the findings of the majority of the Trial Chamber to grant the Defence Motion insofar as the Accused is acquitted of count 1 of the Indictment in the context of the third category of joint criminal enterprise, to strike out those factual allegations in the Indictment detailed in paragraphs 8-16 of this Decision and to dismiss all issues in the Defence Motion with regard to counts 3 through 12 of the Indictment, I respectfully disagree with the remaining factual findings of the majority of the Trial Chamber in relation to count 1 (genocide) and its factual findings in relation to count 2 (complicity in genocide).

2. I am not satisfied that any reasonable trier of fact could, on the basis of the evidence before this Trial Chamber, if believed, find beyond reasonable doubt that :

(i) the Accused held the intent to destroy in whole or in part the Bosnian Muslim and Bosnian Croat groups in the ARK as such;[129]

(ii) the killings, infliction of serious bodily harm and deliberate imposition of conditions of life calculated to bring about physical destruction against Bosnian Muslims and Bosnian Croats, have been committed with the intent to destroy in whole or in part the Bosnian Muslim and Bosnian Croat groups in the ARK as such;[130]

(iii) genocide was committed in the municipalities mentioned in the Indictment

between April and December 1992;[131] and

(iv) the Accused assisted in the commission of genocide in the knowledge that he was so doing.[132]

3. I therefore come to the following conclusions:

1. the Accused is not guilty under any head of liability of Articles 7(1) or 7(3) of the Statute for the crime of genocide, and should, therefore, be acquitted of count 1; and

2. the Accused is not guilty under any head of liability of Articles 7(1) or 7(3) of the Statute for the crime of complicity in genocide, and should, therefore, be acquitted of count 2.

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

_____
Judge Ivana Janu

Dated this 28th day of November 2003,
At The Hague,
The Netherlands

[Seal of the Tribunal]

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1 - Motion for Judgement of Acquittal – Rule 98 *Bis*, 22 August 2003 ("Defence Motion").
2 - Public Version of "Prosecutor's Response to the 'Motion for Judgement of Acquittal – Rule 98 *Bis*'" filed on 5 September and Addendum filed on 16-17 September 2003, 2 October 2003 ("Prosecution Response").
3 - Transcript pp ("T.") 20780-20797.
4 - Defence Motion, p. 2; Prosecution Response, para. 8.
5 - *Prosecutor v. Goran Jelisic*, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisic* Appeals Judgement"), para. 37 (emphasis added).
6 - Fifth Amended Indictment, 7 October 2002 ("Indictment").
7 - The Defence has clearly stated, however, that it is not making any admissions: "Your honour, I want to make something very clear […]. By my not contesting certain factual matters, I said I think very clearly in the motion that for the purposes of the motion I would not be contesting those matters but I was not making any admissions that the Prosecution has proven any of those factual matters beyond a reasonable doubt. And I want to make that very clear." T. 20800.
8 - Reference to "these events" concerns those incidents which the Defence does not dispute for the purposes of the Defence Motion.
9 - This discrepancy was highlighted by the Trial Chamber during the discussion following its oral decision rendered on 9 October 2003 (T. 20788), and the Prosecution was invited to address it. However, despite undertaking orally to do so ("Your Honour, I'm sorry about that, those two aspects of confusion in our list in Annex B. We'll check that and get back to Your Honours over whether it is mosques or Catholic churches." T. 20803), the Prosecution's "Corrigendum to Appendix C to 'Prosecutor's Motion in Respect of Response to Defendant Radoslav Brdanin's Motion for Judgement of Acquittal – Rule 98 *bis*'" ("Corrigendum"), filed on 31 October 2003, did not address it. In its oral decision rendered on 9 October 2003, the Trial Chamber also noted that Appendix C to the Prosecution Response refers to *Ljubija Mosque* in Prijedor Municipality, whereas the incident charged under paragraph 47(3)(b) of the Indictment refers to *Ljubija Roman Catholic*

Parish Church. The Corrigendum clarified that paragraph B of Appendix C should read "Ljubija – Roman Catholic Parish Church" (*vide* para. 3). The Trial Chamber accordingly finds that the Indictment and the Prosecution Response are referring to the same building.
10 - Prosecution Response, footnote 1.
11 - T. 20797-20798.
12 - T. 20798-20799.
13 - *Prosecution v. Radoslav Brdjanin*, Case No. IT-99-36-T, Confidential Addendum to the "Prosecutor's Response to the "Motion for Judgement of Acquittal – Rule 98 *bis*"", 16 September 2003.
14 - T. 20827-20828.
15 - Indictment, paras 27.1-27.4.
16 - Indictment, paras 33 and 27.4.
17 - Indictment, para. 34.
18 - *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadic* Appeals Judgement"), paras 185-229: The first category of JCE consists of "[c]ases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) The accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitate the activities of his co-perpetrators), and (ii) The accused, even if not personally effecting the killing, must nevertheless intend the result." (*Tadic* Appeals Judgement, para. 196). The second category of JCE "is in many respects similar to that set forth above, and embraces the so-called "concentration camp" cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan." (*Tadic* Appeals Judgement, para. 202).
The third category of JCE "concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk." (*Tadic* Appeals Judgement, para. 204).
The Trial Chamber notes that what has been stated in the *Tadic* Appeals Judgement in relation to JCE has come up repeatedly in judgements before the Tribunal, and that both the definition and classification set out therein have recently been confirmed by the Appeals Chamber in *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeals Judgement").
19 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No. IT-99-36-P, Decision on Form of Third Amended Indictment, 21 September 2001, para. 22.
20 - *Vide Krnojelac* Appeals Judgement, paras 124-144, in which a similar decision was reached.
21 - Defence Motion, p. 32; Prosecution Response, p. 65.
22 - Defence Motion, pp. 31-32. According to the Defence, the "hands-on" participation requirement does not necessarily require presence at the scene, but it does require an active form of participation (p. 31). It is added that the doctrine requires a specific knowledge of the events and a "presence" in the sense of participation in the activities resulting in the commission of a crime that could have been foreseen by the Accused (p. 36).
23 - Defence Motion, pp. 31-32.
24 - *Tadic* Appeals Judgement, para. 227.
25 - *Tadic* Appeals Judgement, para. 199, referring to the to *Ponzano* case (*Trial of Feurstein and others*, Proceedings of a War Crimes Trials held at Hamburg, Germany, Judgement of 24 August 1948).
26 - *Trial of the Major War Criminals before the International Military Tribunal*, Judgement, Nuremberg 1947, (1995), Vol XXII, p. 468.
27 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No. IT-99-36-P, Decision on Form of Further

Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 44.
28 - Para. 26 *supra*.
29 - Indictment, para. 27.1.
30 - Defence Motion, p. 36.
31 - Judge Janu dissents with the finding of the majority of the Trial Chamber with respect of the Accused's responsibility under count 1 under the fist category of JCE and his responsibility under count 2 under the first and the third category of JCE (vide Partial Dissenting Opinion of Judge Ivana Janu).
32 - For the purposes of this decision, the Trial Chamber does not find it necessary to discuss the relationship between the modes of liability other than 'committing' under Article 7(1) and Article 4(3) of the Statute.
33 - *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998 ("*Akayesu* Trial Judgement"), para. 480, reiterated in *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krstic* Trial Judgement"), para. 601, in *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Blaskic* Trial Judgement"), para. 279 and in *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001 ("*Kordic and Cerkez* Trial Judgement"), para. 386.
34 - *Akayesu* Trial Judgement, para. 473; *Blaskic* Trial Judgement, para. 278; *Kordic and Cerkez* Trial Judgement, para. 386.
35 - *Blaskic* Trial Judgement, para. 280, *Krstic* Trial Judgement, para. 601, *Kordic and Cerkez* Trial Judgement, para. 387, see also for the International Criminal Tribunal for Rwanda ("ICTR"), *Akayesu* Trial Judgement, para. 482.
36 - *Kordic and Cerkez* Trial Judgement, para. 387.
37 - *Prosecutor v. Miroslav Kvocka et al*., Case No. IT-98-30/1-T, Judgement, 2 November 2001 ("*Kvocka* Trial Judgement"), para. 252.
38 - *Kordic and Cerkez* Trial Judgement, para. 388; *Krstic* Trial Judgement, para. 601; *Blaskic* Trial Judgement, para. 282.
39 - *Krstic* Trial Judgement, para. 601; *Prosecutor v. Zlato Aleksovski*, Case No. IT-95-14/1-A, Judgement, 30 May 2001 ("*Aleksovski* Appeals Judgement"), paras 162-164; *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998 ("*Furundzija* Trial Judgement"), paras 209, 232-233, endorsed by the *Prosecutor v. Ignace Bagilishema* Case No. ICTR-95-1A-T, Judgement, 7 June 2001 ("*Bagilishema* Trial Judgement"), para. 33; *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement, 27 January 2000 ("*Musema* Trial Judgement"), para. 125.
40 - *Furundzija* Trial Judgement, para. 245-246.
41 - Judge Janu dissents with the finding of the majority of the Trial Chamber in respect of the Accused's responsibility under Article 7(1) of the Statute for planning, instigating, ordering or otherwise aiding and abetting in the planning, preparation, or execution of the crimes charged in the Indictment in counts 1 and 2 (vide Partial Dissenting Opinion of Judge Ivana Janu).
42 - *Prosecutor v. Zejnil Delalic et al*., Case No. IT-96-21-T, Judgement, 16 November 1998, para. 346 and *Prosecutor v. Zejnil Delalic et al*., Case No. IT-96-21-A, Judgement, 20 February 2001, paras 189-198, 225-226, 238-239, 256, 263 (the Trial Chamber's conclusions as to the first two elements were confirmed by the Appeals Chamber. The third element was not in issue in this Appeal).
43 - Defence Motion, p. 43.
44 - Prosecution Response, paras 207-247.
45 - Judge Janu dissents with the finding of the majority of the Trial Chamber in respect of the Accused's responsibility under Article 7(3) of the Statute regarding the crimes charged in the Indictment in counts 1 and 2 (*vide* Partial Dissenting Opinion of Judge Ivana Janu).
46 - Defence Motion, p. 20.
47 - Defence Motion, p. 20.
48 - Defence Motion, p. 20.
49 - The Trial Chamber notes that the Prosecution is not entirely consistent in its submissions as to the date the genocidal campaign commenced to be implemented in the ARK. The earliest it submits is Spring 1992, and April 1992 (Prosecution Response, paras 249, 356). The latest it submits is Summer 1992 (Prosecution Response, para. 251).
50 - Prosecution Response, para. 311.
51 - Prosecution Response, para. 249.
52 - Article 4 of the Statute provides as follows:

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide.

53 - Indictment, para. 36; Prosecution Response, para. 290.
54 - Indictment, para. 36-37.
55 - Indictment, paras 37(3) and 43.
56 - Prosecution Response, para. 250.
57 - The Indictment fulfils "the fundamental purpose of providing the accused with a description of the charges against him with sufficient particularity to enable him to mount his defence" (*Prosecutor v. Zoran Kupreskic et al*, Case No. IT-95-16-A, Judgement, 23 October 2001 ("*Kupreskic* Appeals Judgement"), para. 95). In this respect, the Appeals Chamber emphasised "that the Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds" (*Kupreskic* Appeals Judgement, para. 92).
58 - Statute, Article 4(2).
59 - Defence Motion, p. 15; Prosecution Response, paras 290 and 298.
60 - *Prosecutor v. Goran Jelisic*, Case No. IT-95-10-T, Judgement, 14 December 1999 ("*Jelisic* Trial Judgement"), para. 83. *Prosecutor v. Dusko Sikirica et al.*, Case No. IT-95-8, Judgement on Defence Motions to Acquit ("*Sikirica* 98 *bis* Decision"), para. 68. *Krstic* Trial Judgement, paras 589-590. *Prosecutor v. Milomir Stakic*, Case No. IT-97-24-T, Judgement, 31 July 2003 ("*Stakic* Trial Judgement"), para. 523.
61 - Prosecution Response, para. 298.
62 - Defence Motion, p. 14.
63 - *Vide Krstic* Trial Judgement, para. 595; *Sikirica* 98 *bis* Decision, para. 81.
64 - *Vide* paras 21, 24, 29-32 *supra*.
65 - Indictment, para. 27.3; Prosecution Response, para. 188.
66 - The "specific intent requirement (…) would not permit a genocide conviction on the extended form of a joint criminal enterprise which does not require the accused to share the intent of the perpetrator" (Defence Motion, page 17).
67 - Prosecution Response, para. 283. The Trial Chamber does not believe that the *Krstic* Trial Judgement supports the Prosecution's position: *vide* footnote 70 *infra* and *Krstic* Trial Judgement, paras 633-635.
68 - *Vide* para. 23.
69 - *Tadic* Appeals Judgement, para. 204.
70 - The *Stakic* Trial Chamber stated the following: "[t]he notions of "escalation" to genocide, or genocide as a "natural and foreseeable consequence" of an enterprise not aimed specifically at genocide are not compatible with the definition of genocide under Article 4(3)(a)" (*Stakic* Trial Judgement, para. 530). Although this Trial Chamber concurs to an extent, it is unable to agree with the *Stakic* Trial Chamber that the notion of "escalation" to genocide is irreconcilable with a conviction for genocide under Article 4(3)(a). "Escalation" to genocide merely designates a factual allegation that the specific intent for genocide was formed at a stage later than the onslaught of an initial operation not amounting to genocide. According to the *Krstic* Trial Chamber, "[i]t is conceivable that, although the intention at the outset of an operation was not the destruction of a group, it may become the goal at some later point during the implementation of the operation" (*Krstic* Trial Judgement, para. 572). In the context of the first category of JCE, the factual

scenario described does not rule out that genocide may have been within the common purpose of the JCE.
71 - *Vide* para. 30 *supra*.
72 - Defence Motion, p. 20.
73 - *Vide* para. 28 *supra*.
74 - *Vide* Partial Dissenting Opinion of Judge Ivana Janu.
75 - Defence Motion, p. 22.
76 - Prosecution Response, paras 253 and 359.
77 - *Vide* para. 60 *supra*.
78 - Prosecution Response, para. 350. *Vide* also *ibid*., para. 353. The Indictment pleads that the Accused shared the requisite intent for complicity in genocide, which it identifies as that he "knew that he was providing assistance in a crime being committed by others in furtherance of the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (Indictment, para. 27.1).
79 - *Akayesu* Trial Judgement, paras 540, 544; *Musema* Trial Judgement, para. 182; *Bagilishema* Trial Judgement, para. 71; *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement, 15 May 2003, para. 394.
80 - *Vide* Partial Dissenting Opinion of Judge Ivana Janu.
81 - Indictment, paras 49-52.
82 - Defence Motion, p. 49.
83 - Defence Motion, p. 49.
84 - Defence Motion, p. 50.
85 - Defence Motion, pp. 50-51.
86 - Defence Motion, p. 51.
87 - Prosecution Response, para. 395.
88 - Prosecution Response, para. 396.
89 - Prosecution Response, para. 396.
90 - Prosecution Response, para. 405.
91 - Prosecution Response, para. 407.
92 - *Vide Krstic* Trial Judgement, para. 501; *Stakic* Trial Judgement, para. 638.
93 - *Prosecutor v. Mitar Vasiljevic*, Case No. IT-98-32-T, Judgement, 29 November 2002 ("*Vasiljevic* Trial Judgement"), para. 229.
94 - In this respect, the Trial Chamber finds support in the approach adopted by the *Stakic* Trial Chamber, which stated that "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"; *Stakic* Trial Judgement, para. 640.
95 - *Vide Vasiljevic* Trial Judgement, para. 229.
96 - *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999 ("*Kayishema* Trial Judgement"), para. 144.
97 - *Krstic* Trial Judgement, para. 495.
98 - *Stakic* Trial Judgement, para. 642.
99 - *Stakic* Trial Judgement, para. 642 (emphasis added).
100 - Defence Motion, p. 51.
101 - *Vasiljevic* Trial Judgement, para. 229 (emphasis added).
102 - The formulation of the *mens rea* required for the crime of extermination has been appealed by the Defence in the case *Prosecutor v. Milomir Stakic*, IT-97-24.
103 - *Vide* section on individual criminal responsibility at paras 23-44 *supra*.
104 - *Vide* section on individual criminal responsibility at para. 28.
105 - Indictment, paras 45-48.
106 - Defence Motion, p. 48.
107 - *Vide Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgement"), para. 431, being a consolidation of the requirements set out in *Tadic* Trial Judgement, para. 715, *Prosecutor v. Zoran Kupreskic et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreskic* Trial Judgement"), para. 621 and *Kordic and Cerkez* Trial Judgement, paras 189, 195.
108 - *Vide Prosecutor Kupreskic* Trial Judgement, para. 623: "The Trial Chamber does not see fit to identify which rights constitute fundamental rights for the purposes of persecution. The interests of justice would not be served by so doing, as the explicit inclusion of particular fundamental rights could be interpreted as the implicit exclusion of other rights (*expressio unius est exclusio alterius*). This is not the approach taken to crimes against humanity in customary international law, where the category of "other inhumane acts" also allows courts flexibility to determine the cases before them, depending on the forms which attacks on

humanity may take, forms which are ever-changing and carried out with particular ingenuity. Each case must therefore be examined on its merits."
109 - Prosecution Response, para. 364.
110 - *Stakic* Trial Judgement, paras 770-772. See also *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Decision on the Defence Motion to Dismiss the Indictment based upon Defects in the Form thereof, 4 April 1997, para. 22.
111 - *Stakic* Trial Judgement, para. 772.
112 - Para. 34.
113 - *Vide* section on individual criminal responsibility at paras 23-44 *supra*.
114 - Indictment, paras 53-56.
115 - Defence Motion, p. 51.
116 - Defence Motion, p. 47.
117 - *Vide* section on individual criminal responsibility at paras 23-44 *supra*.
118 - Indictment, paras 57-60.
119 - Defence Motion, p. 53.
120 - Defence Motion, p. 52-53.
121 - The following definition is set out in the *Krnojelac* Trial Judgement at para. 474: "Deportation may be defined as the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law. Deportation requires the displacement of persons across a national border, to be distinguished from forcible transfer which may take place within national boundaries." (Footnotes omitted).
122 - *Stakic* Trial Judgement, para. 679: "The crime of deportation in this context is therefore defined as the forced displacement of persons by expulsion or other coercive acts for reasons not permitted under international law from an area in which they are lawfully present to an area under the control of another party".
123 - Para. 224: "…the Appeals Chamber considers that it is not necessary to express a view either supporting or rejecting the Trial Chamber's definition of the terms 'deportation' or 'expulsion'". See also the Separate Opinion of Judge Shahabuddeen at para. 4: "…the Appeals Chamber has made it clear that it is expressing no views either by way of affirmation or by way of rejection of the definition given by the Trial Chamber".
124 - The definition of deportation and specifically the existence of a cross border element has been appealed by the Prosecution in the case *Prosecutor v. Mladen Naletilic and Vinko Martinovic*, IT-98-34.
125 - Defence Motion, p. 47.
126 - *Vide* section on individual criminal responsibility at paras 23-44 *supra*.
127 - Defence Motion, pp. 51, 54 and 55.
128 - *Vide* section on individual criminal responsibility at paras 23-44 *supra*.
129 - *Vide Prosecution v. Radoslav Brdjanin*, IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, 28 November 2003, ("Rule 98 *bis* Decision"), paras 28, 34-36, 41-43 and 59.
130 - *Vide* Rule 98 *bis* Decision, para. 60.
131 - *Vide* Rule 98 *bis* Decision, paras 31, 34-37, 43, 60 and 65.
132 - *Vide* Rule 98 *bis* Decision, para. 31, 34-37, 42-43 and 67.