THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-05/18-PT

IN TRIAL CHAMBER No. 3

Before: Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Registrar: Mr. John Hocking

Date: 29 June 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

***Public***

# KARADZIC PRE-TRIAL BRIEF

The Office of the Prosecutor:
Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:
Radovan Karadzic

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**Introduction**

1. Dr. Radovan Karadzic hereby files his pre-trial brief as ordered by the Trial Chamber and pursuant to Rule 65 *ter* (F).

2. Pursuant to Rule 65 *ter* (F)(i), Dr. Karadzic indicates, in general terms, that the nature of his defence is that he never planned, instigated, ordered, committed, or otherwise aided and abetted any of the crimes charged. He was never a member of any joint criminal enterprise. He has no responsibility as a superior for the crimes charged in the indictment. He is not guilty of each and every charge alleged in the indictment.

3. Dr. Karadzic does not rely on the defence of alibi, or any special defences within the meaning of Rule 67(B).

4. Pursuant to Rule 65 *ter* (F)(ii), Dr. Karadzic states that, at this time, he takes issue with all matters in the Prosecutor's pre-trial brief.

5. Pursuant to Rule 65 *ter* (F)(iii), Dr. Karadzic states that the reason why he takes issue with the prosecution's entire pre-trial brief is that he does not wish to facilitate his own conviction. Rather, he wishes to have a trial based on time honored principles that require the prosecution to prove its case beyond a reasonable doubt. As the ICTY Manual on Developed Practices (2009) states:

> It should be noted that, since the burden is on the Prosecution to prove its case, the accused is under no obligation to agree to the narrowing of the issues in dispute, and may simply refuse to agree to any facts."[1]

6. Dr. Karadzic is unwilling and unable to shoulder the burden of reducing the scope of the trial, given the great breadth of the indictment and the short time in which he has had to deal with the massive disclosure. He suggests that the Trial Chamber exercise its power under Rule 73 *bis* (D) and (E) to order the prosecution to reduce the scope of the case that he has to meet. If that is done, Dr. Karadzic may be able to focus his preparation and ultimately be in a position to be of more assistance to the Trial Chamber on the facts.

7. Because of the help of his pro bono legal associates and legal interns, Dr. Karadzic has been able to brief the legal issues in his case, and offers the following observations on those issues:

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[1] Section B3, para. 19, page 58

**The Charges**

8. Dr. Karadzic is charged in an eleven count Third Amended Indictment with war crimes in violation of Article 3 of the ICTY Statute, genocide in violation of Article 4 of the ICTY Statute, and crimes against humanity in violation of Article 5 of the ICTY Statute.

**War Crimes**

9. Article 3 of the Statute, pertaining to war crimes, applies only if two jurisdictional requirements are satisfied. First, there must have been an armed conflict at the time the offences were allegedly committed. Second, there must have been a nexus between the armed conflict and the alleged offence, which means that the acts of the accused must have been "closely related" to the hostilities.[2]

10. The existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.[3]

11. The Prosecutor must also establish that the victim took no active part in the hostilities. It is the victim's situation at the time of the crime that is determinative. Factors to be considered include whether the victim's age, gender, and clothing, as well as whether the victim was carrying weapons.[4]

12. In terms of *mens rea*, the Prosecutor must prove that the perpetrator was aware or should have been aware that the victim was a person not taking an active part in the hostilities. It must also prove that no reasonable person could have believed the victim was a combatant.[5]

13. The armed conflict does not have to be causally connected to the commission of the crime, but the existence of the armed conflict must have at least played a

[2] Prosecutor v. Stakic, No. IT-97-24-A, Judgment (22 Mar. 2006), para. 342.
[3] Prosecutor v. Stakic, No. IT-97-24-A, Judgment (22 Mar. 2006), para. 342.
[4] Prosecutor v. Halilovic, No. IT-01-48-T, Judgment (16 Nov. 2005), at para.34.
[5] Prosecutor v. Halilovic, No. IT-01-48-T, Judgment (16 Nov. 2005), at para.36.

substantial part in the perpetrator's ability to commit it, the manner in which it was committed, or the purpose for which it was committed.[6]

14. The perpetrator's alleged crimes need not have been committed in the area of armed conflict, but they must at least be "substantially related" to the area, which includes all of the territory under the control of the parties engaged in the conflict. It is essential that the Prosecutor establish the existence of a geographical and temporal linkage between the crimes ascribed to the accused and the armed conflict.[7]

15. The following factors must be considered when evaluating whether an alleged offence is sufficiently connected to an armed conflict:

(1) whether the perpetrator is a combatant;

(2) whether the victim is a non-combatant;

(3) whether the victim is a member of the opposing party;

(4) whether the act may be said to serve the ultimate goal of a military campaign;

(5) whether the crime is committed as part of or in the context of the perpetrator's official duties.[8]

16. The specific crimes alleged as war crimes in the Third Amended Indictment include murder (Count 6), terror (Count 9), and hostage-taking (Count 11).

**Murder**

17. The English texts of both the ICTY and ICTR statute uniformly give the respective tribunals jurisdiction over murder. Yet where the English texts speak of "murder", the French version speaks of "*assassinat.*" The French law notion of "*assassinat,*" unlike the English notion of murder which captures a range of conducts beyond the premeditation to kill another human being, is equivalent only to the premeditated kind of murder or "first degree murder" as it is popularly known in American[9] and Canada.[10]

18. Between the ICTY and the ICTR, this variation in the English and the French texts of the statutes has generated considerable judicial debate. It started with the ICTR case of *Akayesu* where the Trial chamber considered variation briefly and held, in the

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[6] Prosecutor v. Kunarac et al., No. IT-96-23-T, Judgment (12 June 2002), at para. 58.
[7] Prosecutor v. Stakic, No. IT-97-24-A, Judgment (22 Mar. 2006), at para. 342.
[8] Prosecutor v. Kunarac et al., No. IT-96-23-T, Judgment (12 June 2002), at para.59.
[9] J.Bell, S.Boyron, & S. Whittaker, PRINCIPLES OF FRENCH LAW 242 (1998).
[10] *See* Criminal Code of Canada, R.S.C. 1985, s.222(2).

end, that the difference resulted from a translation error. They then resolved the variation in favor of the English text, which they held to be more consistent with developments in customary international law.[11] The Chamber outlined elements of murder as follows:

1) "The victim is dead;
2) The death resulted from an unlawful act or omission of the accused or a subordinate;
3) At the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not."[12]

19. The Trial Chamber I subsequently followed the decision in *Akayesu* in *Rutaganda*[13] and *Musema.*[14] However, the Trial Chamber II departed from the position of Trial Chamber I in *Akayesu* in *Kayishema and Ruzindana*[15] finding 'intentional and premeditated' killing as the standard of *mens rea.*[16]The Trial Chamber II outlined the elements of murder (subsequently concurred in *Bagilishema*[17]) as follows:

1) Causes the death of another;
2) By a premeditated act or omission;
3) Intending to kill any person or;
4) Intending to cause grievous bodily harm to any person.

20. Similarly, in *Semanza,*[18] the chamber explained that "[w]here a difference in meaning exists between the two equally authoritative versions of the statute, the chamber applies the well-established principle of interpretation embodied in Article 33(4) of the Vienna Convention on the law of treaties ("VICLT"), which directs that when

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[11] "[t]he Chamber notes that article 3(a) of the English version of the statute refers to "Murder," whilst the French version of the Statute refers to '*Assassinat.*" Customary International Law dictates that it is the act of "Murder" that constitutes a crime against humanity and not "*Assassinat.*" There are therefore sufficient reasons to assume that the French version of the Statute suffers from an error in translation."Case No. ICTR-96-4, at paras. 588 and 589.
[12] *Id.* at para. 589.
[13] Case No. ICTR-96-3, at para. 79.
[14] Case No. ICTR-9613, at para. 214.
[15] Case No. ICTR-95-01, at paras. 137-40.
[16] "The result is premeditated when the actor formulated his intent to kill after a cool moment of reflection. The result is intended when it is the actor's purpose, or the actor is aware that it will occur in the ordinary course of events." *Id.* at para 139.
[17] Case No. ICTR-95-1A, at paras 84, 85.
[18] *Prosecutor v. Semanza,* Case No. ICTR-97-20.

interpreting a bilingual or multilingual instrument the meaning which best reconciles the equally authoritative texts shall be adopted."[19] The chamber further explained that "*assassinat* is a specific form of murder requiring premeditation," and thus is more precise than the English reference to "murder." "The Chamber [found] that it is possible to harmonize the meaning of the two texts by requiring premeditation. This result is in accord with the general principles that criminal statutes should be strictly construed and that any ambiguity should be interpreted in favor of the accused."[20]

21. In the ICTY, on the other hand, only the *Kupreskic* Trial has held that "the standard of *mens rea* required is intentional and premeditated killing', although it did also state in the same paragraph that the standard is satisfied by "the intent to inflict serious injury in reckless disregard of human life.'[21] Other ICTY trial judgments have uniformly resolved themselves in favor of the *Akayesu* proposition that premeditation is not required for murder as crimes against humanity.[22] The description in the *Brdanin* trial judgment is thus typical of ICTY trial judgments defining murder as an underlying offence for an international crime within the jurisdiction of the Tribunal:

1. the victim is dead;
2. the death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and
3. the act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention:
    i. to kill, or
    ii. to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.[23]

[19] *Id.* at para 336.
[20] *Id.* at para. 337.
[21] *Kupreskic et al.* Trial Judgment, para. 561.
[22] *See Prosecutor v. Jelesic*, Case No. IT-95-10-T, at paras. 35 & 51; *Prosecutor v. Kupreskic*, Case No. IT-95-16, at paras 560 and 561; *Prosecutor v. Blaskic*, Case No. IT-95-14, at paras. 216 and 217; *Prosecutor v. Kordic*, Case No. IT-95-14/2 at paras. 555 and 556; *Prosecutor v. Vasiljevic*, Case No. IT-98-32 at para. 205; *Prosecutor v. Naletilic & Martinovic*, Case No. IT-98-34, at paras. 248 and 249; *Prosecutor v. Stakic*, Case No. IT-97-24 at paras 594-87 and 631; *Prosecutor v. Krajisnik*, IT-00-39-T, at para. 714; *Prosecution v. Oric*, Case No. IT-03-06-8-T, para. 347-48.
[23] *Brdnin* Trial Judgment, IT-99-36-T, para. 381.

22. The ICTY and ICTR statutes have been referred to as *sui generic* instruments that resemble treaties,[24] 'proximate in nature to a treaty.'[25] The principle consequence of this analogy between international treaties and the ICTY and ICTR statues has been recourse to the interpretive provisions of the VCLT, which are to a large extent codification of customary legal norms.[26] Article 31(3) of VCLT provides that "A special meaning shall be given to a term if it is established that the parties so intended." The drafters of the ICTY statute chose to use the term *assassinat* rather than meutre [in the French text], while employing the term "murder" in the English text. In the Secretary-General's report that presaged the ICTY statute, the explanatory paragraph to Article 5 opts to use the term "willful killing" instead, stating that "[c]rimes against humanity refer to inhumane acts of a very serious nature, such as willful killing, torture or rape, committed as a part of widespread killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[27]

23. Thus, the U.N. Security Council in enacting the ICTY statute intended premeditated murder as the applicable notion of homicide under the ICTY statute.[28]The ICTR statute adopted in 1994, a year after the ICTY statute, continued to use *assassinat* as a crime against humanity under article 3 in the French text. Moreover, any ambiguity must be resolved in favor of an accused. Thus, the trial chamber must require exacting standard of *mens rea* i.e. premeditated killing following *Kupreskic* and *Kayishema and*

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[24] *Kanyabashi*, Case No. ICTR-96-150A, Joint and Separate Opinion of Judge McDonald and Judge Vohra, June 3 1999, para. 15; *Nsengiyumva*, Case No. ICTR-96-13-A, Joint and Separate Opinion of Judge McDonald and Judge Vohra, para. 14; *Tadic*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, para. 18.

[25] *Kanyabashi*, Case No. ICTR-96-15-A, Dissenting Opinion of Judge Shahabuddeen, at p. 21.

[26] *See* William A. Schabas, THE U.N. INTERNATIONAL CRIMINAL TRIBUNALS 79 (Cambridge University Press); M. Beyers, *The Shifting foundations of International Criminal Law: A decade of forceful measures against Iraq*, 13(1) EUR. J. INT'L L. 21, 27 (2002).

[27] Report of the Secretary General Pursuant to paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, at 13, U.N. Doc. S/25704 (1993).

[28] This was also the rationale of the ICTR trial chamber in *Kayishema and Ruzindana* holding that "the common denominator is the premeditated type of murder- for "murder" as understood in the English-speaking legal world also includes premeditated murder (the equivalent of "*asassinat*"), while "*assassinat*" means only premeditated murder in the French system. *Id.* para. 138.

*Ruzindana*.[29] Premeditation requires that "actor formulated his intent to kill after a cool moment of reflection."[30]

**Terror**

24. The ICTY Statute does not include terror as a specific crime over which the Tribunal has jurisdiction. Dr. Karadzic contends that the crime of terror is not established in customary international law. "The Tribunal does not exercise jurisdiction over purely treaty-based crimes because it cannot: it has no such jurisdiction."[31]

25. Dr. Karadzic recognizes that the Appeals Chamber in *Galic* has decided otherwise, and that its decision is binding on this Trial Chamber.[32] However, he wishes to preserve his right to argue on appeal that the split decision of the Appeals Chamber was erroneous.

26. The *actus reus* of the crime of terror consists of "[a]cts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population."[33] Those violent acts must involve unlawful attacks on civilians; "legitimate attacks on combatants" do not qualify.[34] And that is true even if a legitimate attack on combatants has the incidental effect of sowing terror among a civilian population: as recognized by the ICRC, "there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces."

27. The *mens rea* of terrorism is two-fold. First, the prosecution must prove that "The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence."[35] In this context, "wilfully"

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[29] *See* Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L L. 307 (2000). Guy Cumes, *Murder as Crime against Humanity in International Law: Choice of Law and Prosecution of Murder in East Timor*, 11 EUR. J. CRIME, CRIME. L. & CRIM. JUST. 40-66 (2003).
[30] *Kayishema*, Case No. ICTR-95-1-T, p. 139. *Id.* Simon Chesterman.
[31] Prosecutor v Galic, No. IT-98-29-A, Judgment (30 November 2006),Shahabuddeen Opinion, at para. 2
[32] Prosecutor v Galic, No. IT-98-29-A, Judgment (30 November 2006)
[33] Prosecutor v Galic, No. IT-98-29-T, Judgment (5 December 2003), at para. 133.
[34] Prosecutor v Galic, No. IT-98-29-T, Judgment (5 December 2003), at para. 135.
[35] Prosecutor v Galic, No. IT-98-29-T, Judgment (5 December 2003), at para. 133.

includes the intent to attack civilians or recklessness toward the possibility that civilians would be attacked; negligence toward that possibility does not suffice.[36]

28. Second, the prosecution must prove that the wilful attacks were "committed with the primary purpose of spreading terror among the civilian population."[37] Terror is, therefore, a specific-intent crime: "the Prosecution is required to prove not only that the accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that that was the result which he specifically intended." [38] Recklessness toward the possibility that terror would result is not enough.[39]

**Hostage-Taking**

29. The offence of hostage taking has three specific elements:

a. The accused unlawfully seizes or detains and

b. threatens to kill, injure, or continue to detain another person or group of people in order to

c. compel a third party to do or abstain from doing something as a condition for the safe release of the person or group.[40]

30. As stated by the Appeal Chamber in *Blaškić*, "the essential element in the crime of hostage-taking is the use of a threat concerning detainees so as to obtain a concession or gain an advantage."[41] Hostage taking is thus a specific-intent offence. The Prosecutor must prove not only that the accused intended to commit the act that caused the detention, but also that he intended to detain the hostages in order to obtain a concession or to gain an advantage.

31. In addition, the threat to kill, injure, or continue to detain must be communicated to a third party with the intent of compelling that party to act or refrain from acting as a condition of the safety or release of the detainees.[42] This intent must be present either before or at the moment of the original detention. Even if a concession or

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[36] Prosecutor v Galic, No. IT-98-29-T, Judgment (5 December 2003), at para. 54.
[37] Prosecutor v Galic, No. IT-98-29-T, Judgment (5 December 2003), at para. 133.
[38] Prosecutor v Galic, No. IT-98-29-T, Judgment (5 December 2003), at para. 136.
[39] Prosecutor v Galic, No. IT-98-29-T, Judgment (5 December 2003), at para. 136.
[40] Prosecutor v. Blaškić, No. IT-95-14-A, Judgment, (29 July 2004), at para. 639; see also Prosecutor v. Sesay, Case No. SCSL-04-15-T, SCSL, Judgment, (2 March 2009), at paras. 1962-1964.
[41] Prosecutor v. Blaškić, No. IT-95-14-A, Judgment, (29 July 2004), at para. 639.
[42] Prosecutor v. Sesay, Case No. SCSL-04-15-T, SCSL, Judgment, (2 March 2009), at para. 1964.

advantage is eventually sought, the accused cannot be held liable if there is no proof that he performed the original act of detention for this purpose. In other words, if the intent is formed only once the detainees had already been detained, as was the case in the *Sesay* case as the Special Court for Sierra Leone, then the *mens rea* requirement is not met.[43]

32. The accused cannot be held responsible, even via JCE, if he did not personally or directly threaten the welfare of the detainees or did not have *de jure* or *de facto* control over those who did.[44] Mario Cerkez's initial conviction was overturned precisely because such proof was lacking.[45]

33. In addition, there must be a close causal link between the act of taking hostages and the concession or advantage sought. In *Blaškić*, the Appeals Chamber overturned the accused's original conviction on this basis. Although Tihomir Blaškić was the highest ranking military commander in Vitez at the time that civilians were taken into custody, the Appeal Chamber found that "there [was] no necessary causal nexus between an order to defend a position and the taking of hostages."[46]

34. As the Trial Chamber has already found in this case, the detention must also be unlawful.[47] In both *Blaškić* and *Kordić and Cerkez*, the relevant time-frame is the point when the person is detained.[48]

35. The ICTY has not specifically addressed whether the detention of combatants can qualify as hostage-taking. The accused in both *Blaškić* and *Kordić and Cerkez* were charged with taking both civilians and members of armed forces who had been placed 'hors de combat' hostage.[49] The Special Court for Sierra Leone, however, specifically held in *Sesay* that "consistent with the general requirements for a war crime... it is the law that the person or persons held hostage must not be taking a direct part in the hostilities at the time of the alleged violation."[50] The Chamber further noted that attacks

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[43] Prosecutor v. Sesay, Case No. SCSL-04-15-T, SCSL, Judgment, (2 March 2009), at para. 1967.
[44] Prosecutor v. Kordić and Cerkez, Case No. IT-95-14/2-A, Judgment (17 Dec. 2004), at para. 939.
[45] Prosecutor v. Kordić and Cerkez, Judgment, 17 December 2004, Case No.: IT-95-14/2-A, ICTY (Appeals Chamber), at paras. 938-939.
[46] Prosecutor v. Blaškić, No. IT-95-14-A, Judgment, (29 July 2004), at para. 644.
[47] Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Decision on Six Preliminary Motions Challenging Jurisdiction (28 April 2009), at para. 65.
[48] Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, (3 March 2000), at para. 158;
[49] See, e.g., Prosecutor v. Blaškić, Case No. IT-95-14-T, Second Amended Indictment (25 April 1997), Counts 17 and 18.
[50] Prosecutor v. Sesay, Case No. SCSL-04-15-T, SCSL, Judgment, (2 March 2009), at p. 299.

on UN personnel are "a particularisation of the general and fundamental prohibition in international humanitarian law, in both international and internal conflicts, against attacking civilians and civilian property."[51] In order to be afforded extra protection because of their special status, therefore, a peacekeeping force has to act more like civilians than like an armed force, and it cannot be or become a party to the conflict.

36. In order to determine whether peacekeepers are entitled to the same protections as civilians, it is necessary to consider the totality of circumstances surrounding the establishment, deployment, and operation of their mission, as well as their interactions with the parties in order to determine whether or not they were taking a direct part in the hostilities.[52] This involves an examination at the mandate, the rules of engagement, and the manner in which the peacekeepers acted while in the field.

**Crimes Against Humanity**

37. The threshold elements of a violation of Article 5 are:

1. there must be an attack;
2. the attack must be directed against any civilian population;
3. the attack must be widespread or systematic;
4. the acts with which the accused has been charged must be part of that attack; and
5. the accused must know that there is a widespread or systematic attack on a civilian population and know that his acts form part of this attack.[53]

38. The Statute of the ICTY also imposes two jurisdictional requirements for crimes against humanity:

1. there must be an armed conflict; and
2. the offences charged in the indictment must be objectively linked, both geographically and temporally, with the armed conflict.[54]

39. The Appeals Chamber has held that an "attack" referred to in Article 5 of the Statute is not the same as an "armed conflict." Indeed, an "attack could precede, outlast,

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[51] Prosecutor v. Sesay, Case No. SCSL-04-15-T, SCSL, Judgment, (2 March 2009), at para. 218.
[52] Prosecutor v. Sesay, Case No. SCSL-04-15-T, SCSL, Judgment, (2 March 2009), at para. 1906.
[53] Prosecutor v. Kunarac, et al, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment (22 June 2002) at para. 85.
[54] Prosecutor v. Tadić, No. IT-94-1-A, Appeal Judgment (15 July 1999) at paras. 149-151; Prosecutor v.Kunarac, et al, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment (22 June 2002) at para. 83.

or continue during the armed conflict, but it need not be a part of it."[55] Likewise, the Trial Chamber has repeatedly stated that an attack cannot be an isolated act or event. Instead, an "[a]ttack in the context of a crime against humanity can be defined as a course of conduct involving the commission of acts of violence."[56]

40. The attack must be directed against a civilian population in order to come within the jurisdiction of Article 5 of the Statute. The term "civilian population" requires the population targeted by the broader attack to be "predominantly civilian in nature."[57] The term 'civilian' itself does not include members of armed forces, militias or volunteer corps forming part of such armed forces, organized resistance groups, or a *levée en masse*, even when such persons have been rendered *hors de combat*.[58]

41. The presence of soldiers amongst a civilian population may, in certain circumstances, deprive that population of its civilian status. The Trial Chamber must consider the number of soldiers present as well as their combat status (whether they on active duty or on leave) in determining whether their presence renders the population of which they are part to be non-civilian in nature.[59]

42. The term "population" serves two functions, setting out the type and number of victims which must be targeted in order to constitute an attack under Article 5. First, "a "population" is a sizeable group of people who possess some distinctive features that mark them as targets of the attack... A group of people randomly or fortuitously assembled – such as a crowd at a football game – could not be regarded as a "population" under this definition."[60]

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[55] Prosecutor v. Kunarac, et al, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment (22 June 2002) at para. 86; see also Prosecutor v. Tadić, No. IT-94-1-A, Appeal Judgment (15 July 1999) at para. 251.
[56] Prosecutor v. Milutinović, et al, No. IT-05-87-T, Trial Judgment (26 February 2009) at para. 144 [emphasis added], quoting Prosecutor v. Blagojević, No. IT-02-60-T, Trial Judgment (17 January 2005) at para. 543.
[57] Prosecutor v. Mrkšić, et al, No. IT-95-13/1-A, Appeal Judgment (5 May 2009) at para. 25; Prosecutor v. Blaškić, No. IT-95-14-A, Appeal Judgment (29 July 2004) at para. 115.
[58] Prosecutor v. Martić, No.: IT-95-11-A, Appeal Judgment (8 October 2008) at paras. 291-302; Prosecutor v. Kordić and Čerkez, No. IT-95-14/2-A, Appeal Judgment (17 December 2004) at para. 97; Prosecutor v. Blaškić, No. IT-95-14-A, Appeal Judgment (29 July 2004) at paras. 110-114.
[59] Prosecutor v. Blaškić, No. IT-95-14-A, Appeal Judgment (29 July 2004) at para. 115.
[60] G. Mettraux, "Crimes against humanity in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and for Rwanda," 43 Harvard International Law Journal, 237 (2002) at p. 255 [emphasis added].

43. Second, the term "population" implies a numeric threshold, requiring the Prosecutor to demonstrate that the attack targeted a sufficiently large number of people to constitute a population, and not merely a limited number of individuals.[61]

44. The term "directed against" requires the Prosecutor to demonstrate that "the civilian population [was] the primary object of the attack" of which the accused's alleged act forms a part.[62] "[C]rimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime."[63] In this respect, it is the object of an attack – and not its effects alone – which attracts criminal liability under Article 5 of the Statute. An attack whose primary target was a non-civilian object does not qualify as a crime against humanity. This is the case regardless of whether that attack caused incidental or even disproportionate civilian casualties.[64]

45. The Prosecutor must prove that the broader attack was either widespread or systematic in order for acts which occurred as part of it to amount to a crimes against humanity.[65] "[T]he phrase "widespread" refers to the large-scale nature of the attack and the number of victims, while the phrase "systematic" refers to "the organized nature of the acts of violence and the improbability of their random occurrence."[66]

46. Not all widespread or systematic attacks will amount to an "attack" within the meaning of Article 5 of the Statute. Under customary international law, a widespread or systematic attack must still attain a certain degree of gravity and magnitude as to "endanger[ ] the international community or shock[ ] the conscience of mankind" before it becomes a matter of international concern:

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[61] Prosecutor v.Kunarac, et al, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment (22 June 2002) at para. 90.
[62] Prosecutor v.Kunarac, et al, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment (22 June 2002) at para. 91 [emphasis added]; Prosecutor v. Blaškić, No. IT-95-14-A, Appeal Judgment (29 July 2004) at para. 105.
[63] Prosecutor v. Tadić, No. IT-94-1-A, Appeal Judgment (15 July 1999) at para. 271.
[64] "The mere fact that the military operated breached either or both principles of distinction and proportionality does not conclusively determine that there was an 'attack' within the meaning of Article of the ICTY Statute, or that the attack wad directed against a civilian population." G. Mettraux, "Crimes against humanity in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and for Rwanda," 43 Harvard International Law Journal, 237 (2002) at p. 247.
[65] Prosecutor v. Tadić, No. IT-94-1-A, Appeal Judgment (15 July 1999) at para. 248; Prosecutor v.Kunarac, et al, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment (22 June 2002) at para. 93.
[66] Prosecutor v.Kunarac, et al, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment (22 June 2002) at para. 94; Prosecutor v. Blaškić, No. IT-95-14-A, Appeal Judgment (29 July 2004) at para. 101.

> [o]nly crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.[67]

47. The Tribunal's jurisdiction extends only to conduct that was proscribed by customary international law as of 1991-1995.[68] As such, in determining whether an attack comes within the purview of Article 5 of the Statute, customary international law requires the Tribunal to be convinced that the attack was not only widespread or systematic, but also of such gravity and magnitude that it implicates the international legal order as a whole. That criterion is inherent in the Statute of the ICTY itself, which limits the Tribunal to prosecuting individuals responsible only for "serious" violations of the international humanitarian law.[69] Attacks which cause large scale killing or destruction meet this criterion. Attacks on the scale of a village or a small town, however, would not.

48. The Prosecutor must demonstrate that the accused's alleged acts formed "part of" the widespread or systematic attack on a civilian population.[70] The accused's alleged acts cannot be "so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack."[71]

49. In addition to the nexus required between the accused's alleged acts and the broader attack, the *chapeau* for Article 5 of the Statute also requires such acts to be

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[67] History of the United Nations War Crimes Commission and the Development of the Laws of War, compiled by the United Nations War Crimes Commission (1948), at p. 196. Quoted in Prosecutor v.Kunarac, et al, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment (22 June 2002) at para. 119.

[68] Report Of The Secretary-General Pursuant To Paragraph 2 Of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, at para. 35; Prosecutor v. Blaškić, No.: IT-95-14-A, Appeal Judgment (29 July 2004) at para. 110; Prosecutor v. Kordić and Čerkez, No. IT-95-14/2-A, Appeal Judgment (17 December 2004) at para. 97.

[69] See Article 1, Statute of the International Criminal Tribunal for the former Yugoslavia.

[70] Prosecutor v.Kunarac, et al, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment (22 June 2002) at para. 99.

[71] Prosecutor v.Kunarac, et al, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment (22 June 2002) at para. 100; see also Prosecutor v. Mrkšić, et al, No. IT-95-13/1-A, Appeal Judgment (5 May 2009) at para. 41; Prosecutor v. Milutinović, et al, No. IT-05-87-T, Trial Judgment (26 February 2009) at para. 145.

"committed in armed conflict."[72] The "part of" requirement is far more demanding and essential to the offence of Crimes Against Humanity than the "committed in" requirement. The requirement of a nexus between the accused's alleged acts and the broader attack is a substantive element (i.e., it contains both an *actus reus* and *mens rea* component) and is part of the customary international law definition of the offence.[73] The requirement that those acts be committed in armed conflict is merely a jurisdictional element (there is no *mens rea* requirement) and is unique to the ICTY Statute.[74]

50. Likewise, the natural and ordinary meaning of the words "part of" imports a far higher level of participation required by that nexus than the words "committed in," which imply only a temporal or geographic connection.

51. The Prosecutor must demonstrate that the accused knew that there was a widespread or systematic attack on a civilian population and knew that his acts formed part of this attack.[75] The *Kunarac* Appeal Chamber has suggested that the accused "must have known that there is an attack on the civilian population and that his acts comprise part of that attack, or at least [took] the risk that his acts were part of the attack,"[76] suggesting that recklessness will satisfy this requirement. That suggestion, however, departs from the *Tadić* Appeals Chamber's without providing any reasoning or cause,[77] and it has since been refuted by the *Blaškić* and *Mrkšić* Appeals Chambers.[78]

52. The specific crimes alleged as crimes against humanity in the Third Amended Indictment are persecution (Count 3), extermination (Count 4), murder (Count 5), deportation (Count 7) and forcible transfer (Count 8).

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[72] Prosecutor v.Kunarac, et al, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment (22 June 2002) at para. 83; Prosecutor v. Tadić, No. IT-94-1-A, Appeal Judgment (15 July 1999) at paras 249, 251.
[73] Prosecutor v. Tadić, No. IT-94-1-A, Appeal Judgment (15 July 1999) at paras. 248, 271.
[74] Prosecutor v. Tadić, No. IT-94-1-A, Appeal Judgment (15 July 1999) at paras. 249, 251.
[75] Prosecutor v. Mrkšić, et al, No. IT-95-13/1-A, Appeal Judgment (5 May 2009) at para. 41; Prosecutor v. Blaškić, No. IT-95-14-A, Appeal Judgment (29 July 2004) at para. 124.
[76] Prosecutor v.Kunarac, et al, No. IT-96-23 & IT-96-23/1-A, Appeal Judgment (22 June 2002) at para. 102.
[77] Prosecutor v. Tadić, No. IT-94-1-A, Appeal Judgment (15 July 1999) at para. 248.
[78] Prosecutor v. Mrkšić, et al, No. IT-95-13/1-A, Appeal Judgment (5 May 2009) at para. 41.

**Persecution**

53. The *actus reus* of persecution consists of an act or omission that discriminates against or denies or infringes upon a fundamental right guaranteed by treaty or by customary international law.[79]

54. Actual discrimination must result from the allegedly persecutory act.[80] The Trial Chamber in *Blagojevic and Jokic* stated that "[t]he act or omission needs to discriminate in fact, *i.e.*, a discriminatory intent is not sufficient, but the act or omission must have discriminatory consequences."[81] The question of whether 'discrimination in fact' should be evaluated objectively or subjectively has been the subject of some dispute among ICTY Trial Chambers, and the early jurisprudence of the Tribunal has suffered from a lack of internal cohesion.[82] Initially, the Chambers adopted an objective approach.[83] Such an approach follows from the ordinary meaning of the term used in the jurisprudence. The Trial Chamber in *Krnojelac* observed that "logic argues in favour of [such] a requirement [because without it] an accused could be convicted of persecution without anyone actually having being persecuted." [84]

55. Furthermore, the Trial Chamber observed that "the existence of a mistaken belief that the intended victim will be discriminated against together with an intention to discriminate against that person because of that mistaken belief, may in some circumstances amount to the inchoate offence of *attempted* persecution, but no such crime falls within the jurisdiction of this Tribunal."[85]

56. The Trial Chamber in *Naletilic and Martinovic* subsequently broadened the definition of those discriminated against 'in fact' to include those persons "who are defined by the perpetrators as belonging to the victim group due to their close affiliations

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[79] Prosecutor v Blagojevic & Jokic, No.IT-02-60-T, Judgment (17 January 2005) at para. 579; Prosecutor v Kvocka et al, No. IT-98-30/1-A, Judgment (28 February 2005) at para. 320; Prosecutor v Kordic & Cerkez, No. IT-65-14/2-A, Judgment (17 December 2004) at paras. 101, 671.
[80] Prosecutor v Blagojevic & Jokic, No. IT-02-60-T, Judgment (17 January 2005) at para. 583; Prosecutor v Stakic, No. IT-97-24-T, Judgment (31 July 2003) at para. 733.
[81] Prosecutor v Blagojevic & Jokic, No. IT-02-60-T, Judgment (17 January 2005) at para. 583.
[82] Ken Roberts, "Striving for Definition, The Law of Persecution from its Origins to the ICTY", The Dynamics of International Criminal Justice, Edited by Hirad Abtahi and Gideon Boas, at p. 283.
[83] Prosecutor v Krnojelac, No. IT-97-25-T, Judgment (15 March 2002) at para. 432 n.1293.
[84] Prosecutor v Krnojelac, No. IT-97-25-T, Judgment (15 March 2002) at para. 432.
[85] Prosecutor v Krnojelac, No. IT-97-25-T, Judgment (15 March 2002) at para.432 n.1293.

or sympathies form the victim group."[86] The Chamber stated in that case that while it "generally agrees with the finding that victim of persecution must be a member of the targeted group", it disagreed with the narrow interpretation of the term "targeted group" as applied by the Trial Chamber in *Krnojelac*.[87]

57. The Appeals Chamber in *Krnojelac* issued a judgment on this issue, with which Radovan Karadzic respectfully disagrees.[88] Previous Tribunal jurisprudence, including the first judgment to address the issue, had required a discriminatory element as part of the *actus reus* – that is, the act or omission must in fact have discriminatory consequences rather than merely be done with discriminatory intent.[89] However the Appeals Chamber in *Krnojelac* appears to have turned emptied that requirement of content, given that, according to the Chamber's reasoning, any act would be discriminatory in fact as long as the requisite discriminatory intent existed.[90] Consequently, according to Appeals Chamber's definition, *all* crimes may be considered to be discriminatory in fact, thus effectively removing that requirement from the crime of persecution.[91]

58. In addition, both genocide and persecution require an intent which discriminates against a particular group, with genocide going much further to require the intent to destroy in whole or in part that group. Given that both crimes appear to serve a similar purpose, with the distinction that the crime of genocide requires a more extreme intent and result, it is not clear why genocide would necessitate a result corresponding to the intent, while persecution would not. Logically, it would appear that both offences should be applied in the same manner. [92]

59. Dr. Karadzic argues that a subjective approach undermines the very definition of the crime of persecution. Accepting that persecution requires a discriminatory element to the *actus reus*, a subjective determination of discrimination in fact means that a persecutory act *can only be* discriminatory in fact. It would appear to be meaningless to

[86] Prosecutor v Naletilic & Martinovic, No. IT-98-34-T, Judgment (31 March 2003) at para. 636.
[87] Prosecutor v Naletilic & Martinovic, No. IT-98-34-T, Judgment (31 March 2003) at para. 636, n1572
[88] Prosecutor v Krnojelac, No. IT-97-25-A, Judgment (17 September 2003) at para. 185.
[89] Prosecutor v Krnojelac, No. IT-97-25-T, Judgment (15 March 2002) at para. 432.
[90] Ken Roberts, "Striving for Definition, The Law of Persecution from its Origins to the ICTY", The Dynamics of International Criminal Justice, Edited by Hirad Abtahi and Gideon Boas, at p. 281
[91] Ibid.
[92] Ibid. at p. 279.

argue that "the victim of persecution must be a member of the targeted group" when, according to the subjective approach adopted every victim is by definition a part of the targeted group.[93] The result of this approach is that it is solely the specific intent to discriminate against a person on a prohibited basis that characterises the crime. As soon as that specific intent to discriminate against a person is established, it will be impossible for the *actus reus* to be anything but discriminatory in fact.

60. Persecution also requires the *actus reus* of the offence to be carried out with the intention to discriminate on one of the listed grounds, specifically race, religion or politics.[94]

61. The *mens rea* required for persecution is higher than that for other crimes against humanity. In addition to proving the intent to commit the underlying act, persecution "requires evidence of a specific intent to discriminate on political, racial or religious grounds."[95] It is not sufficient for the accused to be aware that he is in fact acting in a way that is discriminatory; he must consciously intend to discriminate.[96] Discriminatory intent describes the 'specific intent to cause injury to a human being because he belongs to a particular community or group.'[97] It may be inferred from the context in which the conduct of a physical perpetrator occurred,[98] but it should not be presumed merely because the attack of which it is alleged to be a part is itself discriminatory.[99]

62. Determining how this specific intent is to be established has been a matter of dispute among ICTY trial chambers. Early judgments derived this discriminatory intent from the context of acts.[100] The *Krnojelac* Trial Judgment adopted a different approach, rejecting the idea that in order to prove that each individual act charged amounts to

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[93] Ibid. at p. 280
[94] Prosecutor v Blagojevic & Jokic, No.IT-02-60-T, Judgment (17 January 2005) at para. 579; Prosecutor v Kvocka et al, No. IT-98-30/1-A, Judgment (28 February 2005) at para. 320; Prosecutor v Kordic & Cerkez, No. IT-65-14/2-A, Judgment (17 December 2004) at para. 101, 671.
[95] Prosecutor v Kvocka et al, No. IT-98-30/1-A, Judgment (28 February 2005) at para. 460.
[96] Prosecutor v Krnojelac, No. IT-97-25-T, Judgment (15 March 2002) at para. 435.
[97] Prosecutor v Blaskic, No. IT-9-14-T, Judgment (3 March 2000) at para 235, quoted with approval in Prosecutor v Blaskic, No. IT-9-14-A, Judgment (29 July 2004) at para. 165.
[98] Prosecutor v Kvocka et al, No. IT-98-30/1-A, Judgment (28 February 2005) at paras. 366, 460; Prosecutor v Krnojelac, No. IT-97-25-A, Judgment (17 September 2003) at para. 184.
[99] Prosecutor v Kvocka et al, No. IT-98-30/1-A, Judgment (28 February 2005) at para. 460
[100] Prosecutor v Krstic, No. IT-98-33-T, Judgment (2 August 2001) at para. 536; Prosecutor v Kvocka et al, No. IT-98-30/1-T, Judgment (2 November 2001) at para. 195

persecution, it is sufficient to look at the attack.[101] The *Vasiljevic* Trial Judgment followed this reasoning, stating that the previous approach:

> may lead to the correct conclusion with respect to most of the acts carried out within the context of a discriminatory attack, but there may be acts committed within the context that were committed either on discriminatory grounds not listed in the Statute, or for purely personal reasons. Accordingly, this approach does not necessarily allow for an accurate inference regarding intent to be drawn with respect to all acts that occur within that context.[102]

63. The Appeals Chamber resolved any doubt as to the determination of discriminatory intent by clearly rejecting the automatic inference of the necessary discriminatory intent from an attack, stating:

> [t]he Appeals Chamber may not hold that the discriminatory nature of beatings can be inferred directly from the general discriminatory nature of an attack characterized as a crime against humanity. According to the Appeals Chamber, such a context may not in and of itself evidence discriminatory intent.[103]

**Murder**

64. The underlying elements of murder as a crime against humanity are the same as those for murder as a violation of the customs of war.[104]

**Extermination**

65. Extermination requires the Prosecutor to prove two elements in addition to proving the underlying elements of murder. First, the perpetrator must have participated in causing the deaths of a massive number of victims.[105] Under customary international law does, a single killing does not qualify as extermination, regardless of its context.[106]

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[101] Prosecutor v Krnojelac, No. IT-97-25-T, Judgment (15 March 2002) at para. 436 cited in Ken Roberts, "Striving for Definition, The Law of Persecution from Its Origins to the ICTY", The Dynamics of International Criminal Justice, Edited by Hirad Abtahi and Gideon Boas, at p286

[102] Prosecutor v Vasiljevic, No. IT-98-32-T, Judgment (29 November 2002) at para. 249

[103] Prosecutor v Krnojelac, No. IT-97-25-A, Judgment (17 September 2003) at para. 183

[104] Prosecutor v. Krnojelac, No. IT-95-14/2 (26 February 2001), at para. 323-24.

[105] See, e.g., Prosecutor v Ntakirutimana, Case No. ICTR-96-10-A & ICTR-96-17-A, Judgment (13 Dec. 2004), at para. 522.

[106] See Prosecutor v. Vasiljevic, No IT-98-32-T, Judgement (29 November 2002), at para. 227..

There is, however, no precise threshold for the number of victims that qualifies as "massive."[107] There must be a numerically significant group of victims for the deaths to constitute extermination,[108] but the element of massiveness must be evaluated on a case-by-case basis.[109]

66. Second, the perpetrator must have intended to participate in a mass killing.[110] It is not enough that the perpetrator simply knew or was reckless toward the possibility that he was participating in mass killing.[111]

**Deportation and Forcible Transfer**

67. The *actus reus* of deportation and forcible transfer is:

1) displacement of persons by expulsion or other coercive acts,
2) from an area in which those persons were lawfully present,
3) without grounds permitted under international law. [112]

68. Displacement is only illegal if it is forced.[113] The term "force" is not limited to physical violence and can include the threat of force or coercion, [114] but transfers motivated by an individual's genuine choice to leave are lawful.[115] The determination as to whether a deported person had a "real choice" has to be made in the context of all relevant circumstances on a case by case basis.[116]

69. ICTY jurisprudence reveals an unfortunate trend to broaden the scope of the relationship between force and involuntary consent. In 2001, the *Krstic* Trial Chamber established the first definition of the term "force." Relying on the Preparatory Commission for the International Criminal Court, the *Krstic* Chamber defined 'forcibly' as:

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[107] See, e.g., Prosecutor v Ntakirutimana, Case No. ICTR-96-10-A & ICTR-96-17-A, Judgment (13 Dec. 2004), at para. 516; Stakic Appeal Judgment, para. 260.
[108] See , e.g., Prosecutor v Ntakirutimana, Case No. ICTR-96-10-A & ICTR-96-17-A, Judgment (13 Dec. 2004), at para. 521-22.
[109] Prosecutor v. Stakic, No IT-97-24-T, Judgement, (31 July 2003) at para. 640.
[110] Prosecutor v Semanza, Case No. ICTR-97-20-T, Judgement (15 May 2003) at para. 341
[111] Prosecutor v Ntakirutimana, Case No ICTR-96-10-A & ICTR-96-17-A, Judgment (13 Dec. 2004), at para. 522
[112] Prosecutor v. Milutinovic et al, No. IT-05-87-T, (26 February 2009), at para 164.
[113] Prosecutor v. Krstic No. IT-98-33-T, Judgment (2 August 2001) at para 528, citing Article 49 of Commentary to Article 49 of Geneva Convention IV.
[114] Prosecutor v. Stakic, No. IT-97-24-A (22 March 2006) at para. 281.
[115] Prosecutor v. Naletilic & Martinovic, No. IT-98-34-T,Judgment, (31 March 2003) at para. 519, see Prosecutor v. Milutinovic et al, No. IT-05-87-T, (26 February 2009) at para. 165 holding that "the absence of genuine choice makes a given act of displacement unlawful."
[116] Prosecutor v. Naletilic & Martinovic, No. IT-98-34-T,Judgment, (31 March 2003) at para. 519.

> not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.[117]

70. Subsequent Chambers have expanded this definition. In *Krajisnik*, for example, the Trial Chamber held that "[n]ews of [massacres]"[118] and the Appeals Chamber held that "severe living conditions created by Serb authorities"[119] rose to a sufficient level of coercion to establish culpability for the crime of deportation or forced transfer.

71. The definition of force underlying the *Krajisnik* judgments is an unwarranted expansion of the definition originally put forth by *Krstic*. Indeed, in *Krstic*, the Chamber carefully noted that "departures motivated by the fear of discrimination are not necessarily in violation of the law"[120] and the standard for determining whether civilians were deported or forcibly transferred was established because "threats...[to Srebrenica civilians] far transcended mere fear of discrimination."[121]

72. The Prosecution must also prove that deported persons were lawfully present in the area from which they were displaced. Although ICTY jurisprudence "routinely refer to the victims' lawful presence as an objective element of the underlying offense of forcible displacement, it does not appear to have been defined or analyzed in any trial or appeal to date."[122]

73. In the absence of any definition, Dr. Karadzic respectfully suggests that determining whether persons were 'legally present in the area' requires examining the legal status of the person displaced in relation to the location from where they were removed.[123] The phrase 'lawfully present' suggests that persons may be found

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[117] Prosecutor v. Krstic No. IT-98-33-T, Judgment (2 August 2001) at para. 529, citing Report of Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of the Crimes, UN Doc. PCNICC/2000/INF/3/Add.2 (6 July 2000), p. 11.
[118] Prosecutor v. Krajisnik, IT-00-39-T, Judgment, (27 September 2006) at para. 729.
[119] Prosecutor v. Krajisnik IT-00-39-A, Judgment, (17 March 2009) at para. 308.
[120] Prosecutor v. Krstic No. IT-98-33-T, Judgment (2 August 2001) at para. 528.
[121] Prosecutor v. Krstic No. IT-98-33-T, Judgment (2 August 2001) at para. 530.
[122] Boas, Gideon, James Bischoff and Natalie Ried, "International Criminal Law Practitioner Library: Elements of Crimes Under International Law," Vol. II, page 70, 2008.
[123] Prosecutor v. Stakic, No. IT-97-24-A, Judgment (22 March 2006) at para. 300; Prosecutor v. Naletilic & Martinovic, No. IT-98-34-T, Judgment, (31 March 2003), para 534.

unlawfully present in an area, and although the Appeals Chambers has upheld the right to remain in one's home or community,[124] it has that those terms does not extend to "an area of a State where one has grown up and where the family has its roots but where one no longer lives."[125] Such a distinction can be essential to establishing the *actus reus* of deportation, just as the distinction between the *actus reus* of "deportation" and the *actus reus* of "forcible transfer" is determined by the destination to which the individuals are displaced.[126]

74. Finally, the Prosecution carries the burden of proving that the forced displacement of persons was not permissible under international law. ICTY jurisprudence clearly recognizes at least two grounds that renders forcible displacement permissible: the security of the civilian population, and imperative military reasons.[127] For example, evacuation may be ordered if "an area is in danger as a result of military operations or is liable to be subjected to intense bombing."[128] In such instances, evacuation is permitted if "overriding military considerations make it imperative."[129]

75. Whether military necessity justified the forcible displacement is determined by reference to the subjective understanding of the accused. As the Nuremberg Military Tribunal pointed out in acquitting General Lothar Rendulic of forcibly displacing Russian civilians from an area in which he expected his troops to engage in combat with the Russian Army:

> It is our considered opinion that the conditions as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. That being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act.[130]

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[124] Prosecutor v. Stakic, No. IT-97-24-A, Judgment, (22 March 2006) at para. 277.
[125] Loizidou v. Turkey, European Court of Human Rights, 1996, 23 E.H.R.R. 513. Para. 66.
[126] Prosecutor v. Brdjanin, IT-99-36-T, Judgment, (1 September 2004) at para 540.
[127] Prosecutor v. Milutinovic et al, No. IT-05-87-T, (26 February 2009), at para. 166, Prosecutor v. Blagojevic and Jokic No. IT-02-60-T, Judgment, (17 January 2005) at para. 597, Prosecutor v. Stakic, No. IT-97-24-A Judgment (22 March 2006) para 284, 285.
[128] Commentary to Geneva Convention IV, page 280.
[129] Commentary to Geneva Convention IV, page 280.
[130] Wilhelm List and others, Law Reports of Trials of War Criminals, Vol VIII, case No. 47, p. 69 (1948).

76. In addition, at least one Trial Chamber has upheld evacuations for humanitarian reasons as an exception to the general prohibition against forcible displacements:

> The Commentary to [Additional Protocol II] indicates that for other reasons – such as outbreak of epidemics, natural disasters, or the existence of a generally untenable and life-threatening situation—forcible displacement of the civilian population may be lawfully carried out by the parties to the conflict. [131]

77. In terms of *mens rea*, the crimes of deportation and forcible transfer require the Prosecutor to prove that the accused intended to displace the affected persons on a non-provisional basis.[132] Intent to transfer people temporarily does not satisfy the *mens rea* requirement for deportation. Indeed, in at least two cases at the ICTY where accused have been convicted of forcible transfer, the significant factor was that the displaced persons were permanently, rather than provisionally displaced.[133]

**Genocide**

78. Genocide is a specific-intent crime.[134] "The specific intent requires that the perpetrator, by one of the prohibited acts enumerated in Article 4 of the Statute, seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such."[135]

79. Whether genocide requires the Prosecutor to prove the existence of a plan or policy remains a contentious issue in ICTY jurisprudence. The Appeals Chamber held in *Jelisic* that "the existence of a plan or policy is not a legal ingredient of the crime," although it emphasized that "in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of plan or policy may facilitate proof of the crime."[136]

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[131] Prosecutor v. Blagojevic and Jokic No. IT-02-60-T, Judgment, (17 January 2005) at para. 600.
[132] Prosecutor v. Stakic, No. IT-97-24-A, Judgment (22 March 2006) at para 319.
[133] Prosecutor v. Krstic, No. 98-33-T, judgment (2 august 2001) at para 528; Prosecutor v. Naletilic & Martinovic, No. IT-98-34-T, Judgment (31 March 2003) at para 526.
[134] Prosecutor v. Jelisic, Case No. IT-95-10-A, Judgment (5 July 5, 2001), para. 45.
[135] Prosecutor v. Jelisic, Case No. IT-95-10-A, Judgment (5 July 5, 2001), para. 46.
[136] Prosecutor v. Jelisic, Case No. IT-95-10-A, Judgment (5 July 2001), para. 48.

80. More recently, in *Krstic*, the Trial Chamber declined to follow *Jelisic*, holding that a plan or policy is indeed an element of the crime of genocide:

> As discussed above, acts of genocide must be committed in the context of a manifest pattern of a similar conduct, or themselves constitute a conduct that could in itself effect the destruction of the group, in whole or in part, as such.[137]

81. Indeed, in concluding that General Krstic was responsible for genocide, the Trial Chamber emphasized his knowledge of the overall genocidal plan:

> The plan to execute the Bosnian Muslim men may not have been of his own making, but it was carried out within the zone of his responsibility of the Drina Corps. Furthermore, Drina Corps resources were utilized to assist with the executions from 14 June onwards. By virtue of his position as Drina Corps Commander, General Krstic must have known about this.[138]

82. The Appeals Chamber ultimately reversed the Trial Chamber on this point, stating that "the requirement that the prohibited conduct be part of a widespread or systematic attack does not appear in the Genocide Convention and was not mandated by customary international law."[139] Nevertheless, more recently, the Appeals Chamber followed the Trial Chamber's approach in overturning a conviction for complicity in genocide on the ground that the accused had no knowledge of the mass executions and thus could not have possibly known of the overall plan to commit them.[140]

83. The inconsistency in the ICTY jurisprudence on this issue is further highlighted by some early decisions of the Tribunal. In its original consideration of indictment for Dr. Radovan Karadzic, the Tribunal spoke of a "project" or a "plan" while reviewing the sufficiency of evidence for the commission of the crime of genocide and specifically states that the existence of the genocidal intent can be inferred by reference to the "pattern of conduct."[141] Moreover, in *Tadic*, the Trial Chamber stressed that genocide

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[137] Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment (2 August 2001), para. 85-87.
[138] Ibid, par. 421. See also Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment (19 April 2004), para. 238.
[139] Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment (19 April 2004), para. 224.
[140] Prosecutor v. Blagojevic, Case No. IT-02-60-A, Judgment, (9 May 2007), para. 122-124..
[141] Prosecutor v. Karadzic and Mladic, Case No. IT-95-5-R61 and IT-95-18-R61, Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence (11 July 1996), para. 94.

can only be an organized and not a spontaneous crime, since a "a policy must exist to commit these acts".[142]

84. William A. Schabas[143] advocates in favor of the inclusion of the plan requirement as an element of the crime of genocide. He reasons that genocide is closely associated with a State plan or policy, so that "*it is nearly impossible to imagine genocide that is not planned or organized either by the State itself or a state like entity or by some clique associated with it*".[144]

85. Raphael Lemkin, the prominent international criminal lawyer who coined the term '*genocide*' in his work "*Axis Rule in Occupied Europe*"[145] and was instrumental in the drafting of the Genocide Convention, spoke regularly of a plan as if this was a *sine qua non* for the crime of genocide. He defines genocide as "*a coordinated **plan** of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves*".[146]

86. In the most significant judicial proceedings before the establishment of ICTY on the interpretation of the definition of genocide, the *Eichmann* case,[147] the Israeli Courts followed the approach suggested by Lemkin. In essence, the Court's entire judgment is based upon evidence of the Nazi plan or policy and the Israeli judges considered it a formal element of the crime of genocide in the application of *mens rea*. In particular, the Court ruled that Eichmann knew of "*the secret of the plan for*

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[142] Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment (7 May 1997), para. 655; see also William A. Schabas, Genocide in international law: the crimes of crimes, Cambridge University Press, Cambridge, 2000, pg 208, footnote 9.

[143] The works of whom have been cited with approval repeatedly by the Appeals Chamber of the ICTY and, thus, amount to persuasive authority on genocide issues – See, *inter alia*, Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment (19 April 2004), footnotes 16, 17, 23, 39, 53, 246 and 515.

[144] William A. Schabas, *Developments in the law of Genocide*, Yearbook of International Humanitarian Law, 5(2002), pg 156.

[145] Raphael Lemkin, *Axis Rule in Occupied Europe, Laws of Occupation, Analysis of Government, Proposals for Redress*, Carnegie Endowment for World Peace, Washington 1944.

[146] William A. Schabas, *Genocide: New interpretations of an Old Crime*, Interights Bulletin, 14(2002):1, pg 35 – See also William A. Schabas, *Genocide in international law: the crimes of crimes*, Cambridge University Press, Cambridge, 2000, pg 207.

[147] A.-G. Israel v. Eichmann, Criminal Case 40/61, 36 I.L.R., District Court of Jerusalem (12 December 1961) confirmed by Eichmann (The Appellant) v. A.-G. Israel, Criminal Appeal 336/61, Supreme Court of Israel sitting as Court of Criminal Appeal (29 May 1962).

*extermination*" only since June 1941 and, therefore, acquitted him for genocide prior to this date.[148]

87. Moreover, the position adopted by International Law Commission on its 1996 Commentary on the Draft code of Crimes against Peace and Security of Mankind reiterates that a State plan is central to the crime of genocide:

> "The extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or the military command structure. This does not mean that a subordinate who actually carries out a plan or policy cannot be held responsible for the crime of genocide because he did not possess the same degree of information concerning the overall plan or policy as his superiors. The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide".[149]

88. The same approach was followed by the Guatemalan Truth Commission which examined charges of genocide with regard to atrocities committed during the country's civil war in the early 1980's.[150] To substantiate the charges, the Commission considered it necessary to demonstrate the existence of plan to exterminate the Mayan communities that "*obeyed a higher, strategically planned policy, manifested in actions which had a logical and coherent sequence*".[151]

89. The jurisprudence of the International Criminal Court (hereinafter, 'ICC') on this issue is of critical importance. The "Elements of Crime" (hereinafter, 'Elements') adopted by the Assembly of States Parties of the ICC in September 2002 provide that any

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[148] William A. Schabas, *Was genocide committed in Bosnia and Herzegovina? first judgments of the International Criminal Tribunal for the Former Yugoslavia*, Fordham International Law Journal, 25(2001):23, pg 5 – referring to para. 235 of the District Court's Decision.

[149] Draft code of Crimes against Peace and Security of Mankind, "*Report of the International Law Commission on the Work of its Forty-Eight Session, 6 May-26 July 1996*", U.N. GAOR, 51st session, U.N. Doc. A/51/10, Article 17, Commentary 10, pg 90.

[150] William A. Schabas, *Was genocide committed in Bosnia and Herzegovina? first judgments of the International Criminal Tribunal for the Former Yugoslavia*, Fordham International Law Journal, 25(2001):23, pg 4.

[151] Conclusion, Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, Conclusions and Recommendations, para. 120, available at http://shr.aaas.org/guatemala/ceh/report/english/conc2.html - see also William A. Schabas, *Developments in the law of Genocide*, Yearbook of International Humanitarian Law, 5(2002), pg 156.

of the five acts of Genocide enumerated in Article 6 of the Rome Statute must be committed with a genocidal plan. In particular, the particular element reads as follows:

> "*The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction*"[152].

90. In practice, pursuant to recent ICC jurisprudence, it has been indisputably recognized that a genocidal plan or policy amounts to a formal element of the crime.[153] The majority at Pre-Trial Chamber I unequivocally come to this definitive finding in the course of discussing the recurring debate in ICC scholarship as to whether the plan requirement is a formal element of the crime or is simply a jurisdictional prerequisite to the Court's exercise of jurisdiction. This distinction is significant, since if it is a formal element, the aforementioned Article 30's default *mens rea* applies and the prosecution will have to prove that the defendant either intended his conduct to be part of the larger genocidal plan or policy or at least knew that his conduct was part of that plan or policy. By contrast, if it were simply a jurisdictional prerequisite, the prosecution would only have to prove the existence of the genocidal plan or policy and not have to prove a nexus between the plan or policy and the defendant's act.

91. In addition, the Pre-Trial Chamber makes continuous reference to the overall counter-insurgency campaign initiated by the Government of Sudan and it is the particularities of this State organized policy that the Chamber examines in order to decide whether a genocidal intent may be inferred from them.[154] In this respect, the majority of the Chamber concluded that the evidence produced by the Prosecution failed "[...] *to provide reasonable grounds to believe that the GoS [Government of Sudan] acted with dolus specialis*".[155]

92. In its February 2007 judgment on the claim filed by Bosnia and Herzegovina against Serbia and Montenegro pursuant to Article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice (hereinafter,

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152 Elements of Crimes, Article 6.a(4), b(4), c(5), d(5) and e(7).

153 Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (4 March 2009), para. 121, footnote 142.

154 *Ibid*, para. 165-201.

155 *Ibid*, para. 206.

'ICJ') discussed whether or not the policy of Serbia and its Bosnia allies was one of ethnic cleansing or genocide.[156]

93. Although it was a case of state liability, it is widely accepted that the ICJ followed a rather criminal approach on the issue.[157] To this end, its judgment on responsibility is pertinent to the question of criminal liability and is heavily grounded on an analysis of the elements of the crime of genocide.

94. The ICJ paid particular attention to establishing the mental element of the crime of genocide through the lens of State responsibility. Schabas points out that what the court was looking for was evidence of State plan or policy and, absent such evidence, it concluded that genocide was not committed.[158] Indeed, the Court did not focus its inquiry on the nature of acts committed by individuals that could be attributed to then Federal Republic of Yugoslavia, but on the existence of a State plan to commit such acts that apparently considered it a formal element of the crime of genocide.[159]

95. The ICTY should join its sister Tribunals in concluding that the existence of a plan is a required element of genocide.

**Forms of Liability**

**Planning**

96. In order to be liable for planning a crime, the accused must have been involved in designing the commission of a crime "at both the preparatory and execution phases."[160] The plan must have substantially contributed to the commission of the crime. "While the Prosecution need not prove that the crime or underlying offence with which the accused is charged would not have been perpetrated but for the accused's plan, [...] the plan must have been a factor substantially contributing to [...] [the] criminal conduct constituting one or more statutory crimes that are later perpetrated."[161]

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[156] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. 70 (26 February), para. 190.

[157] William A. Schabas, *Whither genocide? The International Court of Justice finally pronounces*, Journal of Genocide Research, 9(2007):2. See also Anja Scheibert Fohr, *The ICJ Judgment in the Bosnian Genocide Case and Beyond: a Need to Reconceptualize?* (20 February 2009), available at SSRN: http://ssrn.com/abstract=1342817, pg. 9.

[158] *Ibid*, pg 189.

[159] William A. Schabas, *State Policy as an Element of International Crimes*, The Journal of Criminal Law and Criminology, Vol. 98, No. 3, pg 968.

[160] Prosecutor v. Krstic, No IT-98-33-T, Judgement, (02 August 2001) at para 601.

[161] Prosecutor v. Milutinovic et al., No IT-05-87-T, Judgement, (26 February 2009) at para 82.

97. The *mens rea* of planning requires the Prosecute to prove either (1) "that the accused intentionally designed an act or omission with the intent that a crime or underlying offence be committed in the execution of that design," or (2) "with the awareness of the substantial likelihood that a crime or underlying offence would be committed in the execution of that design".[162]

**Instigating**

98. "Instigating means prompting another to commit an offence."[163] Although the Prosecutor is not required to prove that the crime would not have been committed but for the perpetrator's prompting, there must be a direct causal link between that prompting and the commission of the crime.[164]

99. The person who instigates a crime must intend for that crime to be committed[165] or must at least be aware of the substantial likelihood that his prompting will result in its commission.[166] Unlike aiding and abetting, instigation requires that the accused share the intent of the perpetrator.

**Ordering**

100. The accused may be held criminally responsible for ordering if he instructed another person to commit a crime or if he instructed another person to commit a certain act or omission that lead to the commission of that crime.[167] The accused need not have effective control over the person ordered, but he must have authority over him.[168] Furthermore, the person who gave the order must use his position of authority to convince the person ordered to engage in criminal conduct.[169]

101. Although the order need not be the *condition sine qua non* of the crime, the accused's order must have substantially contributed to the commission of the crime.[170]

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[162] Prosecutor v. Milutinovic et al., No IT-05-87-T, Judgement, Vol 1/4 (26 February 2009) at para 81.
[163] Prosecutor v. Krstic, No IT-98-33-T, Judgement, (02 August 2001) at para 601.
[164] Prosecutor v. Kordic et Cerkez, No IT-95-14/2-A, Judgement, (17 December 2004) at para 27.
[165] Prosecutor v. Kordic et Cerkez, No IT-95-14/2-A, Judgement, (17 December 2004) at para 29.
[166] Prosecutor v. Kordic et Cerkez, No IT-95-14/2-A, Judgement, (17 December 2004) at para 30.
[167] Prosecutor v. Galic, No IT-98-29-A, Judgement, (30 November 2006) at paras 176 & 152.
[168] Prosecutor v. Gacumbitsi, ICTR-2001-64-T, Judgement, (17 June 2004) at para 282.
[169] Prosecutor v. Stakic, No IT-97-24-T, Judgement, (31 July 2003) at para 445; Prosecutor v. Krstic, No IT-98-33-T, Judgement, (02 August 2001) at para 601; Prosecutor v. Blaskic, No IT-95-14-T, Judgement, (03 March 2000) at para 281.
[170] Prosecutor v. Strugar, No IT-01-42-T, Judgement, (31 January 2005) at para 332.

A person who orders another to commit a crime must either intend for the crime to be committed[171] or be aware of the substantial likelihood that the crime will be committed as a result of the order.[172]

**Joint Criminal Enterprise**

102. To establish Dr. Karadžić's responsibility via JCE, the Prosecutor must prove that Dr. Karadžić and at least one other person listed in the Indictment[173] participated in the JCE.[174] The Prosecution must also prove the existence of "[a]n arrangement or understanding amounting to an *agreement* between two or more persons that a particular crime will be committed."[175]

103. Not every type of participation in a JCE gives rise to criminal responsibility. The participation must be *significant.* [176] A significant contribution is an act or omission "that makes an enterprise efficient or effective, e.g. a participation that enables the system to run more smoothly or without disruption."[177] In *Brdanin,* the Appeals Chamber emphasized that "not every type of conduct would amount to a significant enough contribution to the crime for this to create criminal liability for the accused regarding the crime in question."[178] Dr. Karadzic contends that the element of significant contribution cannot be satisfied by omission.

104. In terms of *mens rea*, JCE I requires the Prosecutor to prove that the accused had "the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise."[179] If the agreed-upon crime requires specific intent, the Prosecutor must prove that the accused possessed that specific intent.[180]

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[171] Prosecutor v. Kordic et Cerkez, No IT-95-14/2-A, Judgement, (17 December 2004) at para 29.
[172] Prosecutor v. Kordic et Cerkez, No IT-95-14/2-A, Judgement, (17 December 2004) at para 30; Prosecutor v. Galic, No IT-98-29-A, Judgement, (30 November 2006) at para 52 ; Prosecutor v. Blaskic, No IT-95-14-A, Judgement, (29 July 2004) at para 42.
[173] Simba, TJ, para 389 ; Prosecutor v. Brdanin, No IT-99-36-T, Judgement, (01 September 2004) at para 346.
[174] Prosecutor v. Kvocka et al., No IT-98-30/1-T, Judgement, (02 November 2001) at para 307.
[175] Prosecutor v. Simic et al., No IT-95-9-T, Judgement, (17 October 2003) at para 158 (emphasis added).
[176] Prosecutor v. Kvocka et al., No IT-98-30/1-T, Judgement, (02 November 2001) at para 309.
[177] Prosecutor v. Kvocka et al., No IT-98-30/1-T, Judgement, (02 November 2001) at para 309.
[178] Prosecutor v. Brdanin, No IT-99-36-A, Judgement, (03 April 2007) at para 427.
[179] Prosecutor v. Tadic, No IT-94-1-A, Judgement, (15 July 1999) at para 220.
[180] Prosecutor v. Kvocka et al., No IT-98-30/1-T, Judgment, (02 November 2001) at para 110.

105. To be responsible under JCE III for a crime that was not part of the agreement, the Prosecutor must prove that the unplanned crime was a natural and foreseeable consequence of the agreement and that, despite knowing the unplanned crime would likely occur, continued to participate in the JCE.[181]

106. Dr. Karadzic reiterates his position that JCE III cannot be applied to genocide and persecution, which require special intent.[182]

**Aiding and Abetting**

107. Aiding and abetting means assisting or encouraging another to commit a crime.[183] The assistance or encouragement or must substantially contribute to the commission of the crime[184] – it must have a 'significant legitimizing or encouraging effect' on the crime.[185] The crime must have actually been committed by the physical perpetrator.[186]

108. Regarding aiding and abetting by omission, it is Dr. Karadžić's position that the existence of this form of responsibility in international criminal law remains unsettled. In any case, a general rule on aiding and abetting by omission does not exist and the judgements that consider aiding and abetting by omission as being an established form of criminal liability refer only to cases where the accused was present at the scene of the crime and failed to intervene or where he failed to discharge a duty to intervene.[187] At most, however, this kind of conduct gives rise to liability under Article 7(3) of the ICTY Statute, which is a separate form of criminal liability[188] and is charged separately in the indictment.

109. The *mens rea* of aiding and abetting requires the Prosecutor to prove that the accused knew that his acts would assist in the commission of the crime and that he made

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[181] Prosecutor v. Kvocka et al., No IT-98-30/1-T, Judgement, (02 November 2001) at para 65.
[182] He incorporates by reference the arguments contained in his *Preliminary Motion to Dismiss JCE III—Special Intent Crimes* (27 March 2009).
[183] Prosecutor v. Simic et al., No IT-95-9-A, Judgement (28 November 2006) at para 85; Prosecutor v. Blaskic, No IT-95-14-A, Judgement, (29 July 2004) at para 45.
[184] Prosecutor v. Tadic, No IT-94-1-A, Judgement, (15 July 1999) at para 229 ; Prosecutor v. Blaskic, No IT-95-14-A, Judgement, (29 July 2004) at para 46.
[185] Prosecutor v. Furundzija, No IT-95-17/1-T, Judgement, (10 December 1998) at para 232.
[186] Prosecutor v. Furundzija, No IT-95-17/1-T, Judgement, (10 December 1998) at para 246; Prosecutor v. Blaskic, No IT-95-14-A, Judgement, (29 July 2004) at para 46.
[187] For an extensive view of this topic see Prosecutor v. Karadžić, IT-95-5-18, Preliminary motion on lack of jurisdiction concerning omission liability, (25 March 2009) at paras 10-12, which is incorporated by reference herein.
[188] Prosecutor v. Strugar, No IT-01-42-T, Judgement, (31 January 2005) at para 355.

a conscious decision to provide his assistance.[189] If the aided and abetted crime requires specific intent, such as genocide, persecution, and hostage-taking, the Prosecutor must also prove that the accused knew that the physical perpetrator possessed the *dolus specialis* required for that crime.[190]

110. ICTY jurisprudence concerning the level of knowledge required by the aider and abettor of is inconsistent. It is Dr. Karadžić's view that, in order to establish beyond a reasonable doubt that he aided and abetted a crime, the Prosecution must prove his awareness of the specific incidents that occurred in the specific crime sites identified in schedules A to G of the Indictment. This position is supported by the majority of the jurisprudence and properly reflects the mental state of an aider and abettor in international criminal law.

111. In the *Tadic* case the Appeals Chamber opined that the *mens rea* of aiding and abetting include "knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal."[191]

112. Similarly, the Appeals Chamber in *Aleksovski* affirmed the Trial Chamber's holding that 'what must be shown is that the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal'.[192]

113. In *Vasilevic* the Appeals Chamber confirmed the Trial Chamber's holding that the aider and abettor had to know that the specific crime was about to be committed by the physical perpetrator.[193]

114. In *Krnojelac*, the Trial Chamber held that the aider and abettor must know '[...] that his own acts assisted in the commission of a specific crime in question by the principal offender. The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's *mens*

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[189]Prosecutor v. Kunarac et al., No IT-96-23& 23/1-T, Judgement, (22 February 2001) at para 392; Prosecutor v. Aleksovski, No IT-95-14/1-T, Judgement, (25 June 1999) at para 61.
[190] Prosecutor v. Vasiljevic, No IT-98-32-A, Judgement, (25 February 2004) at par. 142; Prosecutor v. Krnojelac, No IT-97-25-T, Judgement, (15 March 2002) at para 52 ; Prosecutor v. Krstic, No IT-98-33-A, Judgement, (19 April 2004) at para 140.
[191] Prosecutor v. Tadic, No IT-94-1-A, Judgement (15 July 1999) at para 229.
[192] Prosecutor v. Aleksovski, No IT-95-14/1-A, Judgement, (24 March 2001) at para 162.
[193] Prosecutor v. Vasiljevic, No IT-98-32-T, Judgement (29 November 2002) at para 102.

*rea.*'[194] The Chamber also emphasized that the type of knowledge required is actual knowledge and that mere suspicions do not suffice.[195]

115. In line with these judgements is *Blagojevic* , in which the Trial Chamber not only held that the aider and abettor must be aware of the specific crime committed by the principle perpetrator,[196] but also engaged in a thorough examination of the accused's knowledge in regard to every single operation enumerated in the indictment, in order to conclude that the evidence was insufficient to find the accused guilty of aiding and abetting murder in relation to mass executions.[197]

116. The ICTR jurisprudence also supports this approach. In *Muhimana*, the Appeals Chamber held that knowledge of the specific crime committed is required.[198]

117. In *Bagosora*, the Trial Chamber required knowledge of the specific crime committed [199] before finding the accused Nsengiyumva guilty of aiding and abetting the killings of Tutsi in Bisesero. The Trial Chamber held that the Prosecutor had established that he was aware of the fact that certain militiamen were about to go to Bisesero in order to kill the Tutsi and in knowing so, he provided assistance in their killing.[200]

118. In *Seromba*, the Trial Chamber held that the requisite *mens rea* is knowledge of the essential elements of the crime.[201] It then found the accused guilty of aiding and abetting the murder of a group of Tutsi gathered in a church, because the Prosecution had proved that he had knowledge of the specific facts constituting the crime.[202]

119. The Trial Chamber in *Rutaganira* found the accused guilty of aiding and abetting the murder of Tutsi who had sought refuge at Mubuga church, because the Prosecution had established that the accused knew the Tutsi had found shelter in the church on the specific dates specified in the indictment.[203]

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[194] Prosecutor v. Krnojelac, No IT-97-25-T, Judgement, (25 February 2004) at para 90.
[195] Prosecutor v. Krnojelac, No IT-97-25-T, Judgement, (15 March 2002) at para 319.
[196] Prosecutor v. Blagojevic and Jokic, No IT-02-60-T, Judgement, (17 January 2005) at para 727.
[197] Prosecutor v. Blagojevic and Jokic, No IT-02-60-T, Judgement, (17 January2005) at para 742.
[198] Prosecutor v. Muhimana, ICTR-95-1B-A, Judgement, (21 May 2007) at para 189.
[199] Prosecutor v. Bagosora et al., ICTR-96-7-T, Judgement, (18 December 2008) at para 2009.
[200] Prosecutor v. Bagosora et al., ICTR-96-7-T, Judgement, (18 December 2008) at paras 2155-2157 & 2161.
[201] Prosecutor v. Seromba, ICTR-2001-66-T, Judgement, (13 December 2006) at para 309; Accord Prosecutor v. Seromba, ICTR-2001-66-A, Judgement, (12 March 2008) at para 56.
[202] Prosecutor v. Seromba, ICTR-2001-66-T, Judgement, (13 December 2006) at paras 364, 366.
[203] Prosecutor v. Rutaganira, ICTR-95-1C-T, Judgement, (14 March 2005) at para 95.

120. Therefore, it is not sufficient that the accused had general knowledge that crimes were being committed in a region—knowledge of the specified underlying crime is required.

**Superior Responsibility**

121. The elements of superior responsibility under Article 7(3) are:

(1) the existence of a superior-subordinate relationship (Element 1);

(2) the superior's failure to take necessary and reasonable measures to prevent the criminal act or punish the perpetrator (Element 3); and

(3) the superior's knowledge or reason to know that the criminal act was about to be or had been committed (Element 2).[204]

122. Individual criminal responsibility under Article 7(3) cannot be established without proof of the existence of a superior-subordinate relationship. A superior-subordinate relationship constitutes a hierarchical chain of command between senior leaders and the actual perpetrators of the crimes. Whether a superior-subordinate relationship exists depends on the formal legal status of the leader, and the leader's ability to exercise effective control over known subordinates and "prevent and punish" the perpetrators of the crimes.[205]

123. The identity of the culpable subordinates in relation to the superior must be specified for the accused to incur criminal responsibility under Article 7(3).[206] In the case of *Prosecutor v. Orić*, for example, the ICTY Appeals Chamber held members of the Military Police had to be identified and specifically implicated in the crimes in order to find Orić responsible for crimes they committed.[207]

124. The Prosecution's pleading of multiple-superior responsibility is also inconsistent with ICTY jurisprudence.[208]

125. The touchstone of the superior responsibility doctrine is the ability of the superior to exercise effective control over his subordinate(s).[209] Effective control

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[204] Prosecutor v Blagojević & Jovic, No. IT-02-60-T, Judgement, (17 January 2005) at para. 790; Prosecutor v Kordic et al., No. IT-65-14/2-A, Appeals Judgement (17 December 2004) at para. 826.
[205] Prosecutor v Delalic et al., No. IT-96-21-T, Judgement (16 November 1998) at paras. 377-8.
[206] Prosecutor v Orić, No. IT-03-68-A, Appeals Judgement (3 July 2008) at para. 35.
[207] Prosecutor v Orić, No. IT-03-68-A, Appeals Judgement (3 July 2008) at para. 35.
[208] See *Preliminary Motion on Lack of Jurisdiction: Superior Responsibility* (30 March 2009), which is incorporated by reference herein.
[209] Prosecutor v Kayishema and Ruzindana, No. ICTR-95-1-T, Judgement (21 May 1999) at para. 229.

requires the "ability to maintain or enforce compliance of others with certain rules and orders,"[210] as well as the "power to take effective steps to prevent and punish crime which others have committed or about to commit."[211]

126. In *Čelebići*, the ICTY Appeals Chamber underscored that effective control is required in cases involving both *de jure* and *de facto* superiors.[212] Effective control, however, is "inherently linked with the factual situation" in each case[213] and may not be determined solely by the accused's status. In *Kordic*, for example, the ICTY Trial Chamber found that despite having extensive influence and power as a political leader, the Prosecutor failed to prove that Kordic had effective control.[214]

127. The second element of superior responsibility is that the superior knew or had reason to know of his subordinates' offences and failed to take the necessary and reasonable measures to prevent the crimes or punish the perpetrators. The superior's duty to prevent or punish begins once he is put on notice that his subordinates committed or are about to commit an offence.[215]

128. The necessary and reasonable measures that must be taken to prevent or punish subordinates must be determined on a case-by-case basis.[216] The superior is not required to perform measures outside of his "material possibility and powers."[217] "Necessary measures" are those required to discharge the obligation to prevent or punish in the circumstances prevailing at the time, such as delegating investigative responsibility to other authorities. "Reasonable measures" are those that the commander was in a position to employ in the circumstances prevailing at the time.[218]

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[210] Prosecutor v Delalic et al, No. IT-96-21-T, Judgement (16 November 1998) at para. 354.
[211] Prosecutor v Orić, No. IT-03-68-T, Judgement (30 June 2006) para. 311.
[212] Prosecutor v Delalic et al, No. IT-96-21-A, Appeal Judgement (20 February 2001) at paras. 196, 256, 266; Prosecutor v Halilović, No. IT-01-48, Judgement (16 November 2005) at para. 59.
[213] Prosecutor v Kayishema and Ruzindana, No. ICTR-95-1, Judgement (21 May 1999) at para. 229.
[214] Prosecutor v Kordic et al., No. IT-95-14/2, Judgement (26 February 2001) at paras. 838-840.
[215] Prosecutor v Orić, No. IT-03-68-T, Judgement (30 June 2006) at para. 322, (citing Prosecutor v Strugar, No. IT-01-42-T, Judgement, (31 January 2005) at para. 416; Prosecutor v Čelebići, No. IT-96-21-T, Judgement (16 November 1998) at para. 387; Prosecutor v. Halilović, No. IT-01-48-T, Judgement (16 November 2005) at para. 69.
[216] Prosecutor v Blaškić, No. IT-95-14-A, Appeals Judgement (29 July 2004) at para. 417.
[217] Prosecutor v Blaškić, No. IT-95-14-A, Appeals Judgement (29 July 2004) at para. 417; see also Prosecutor v Delalic et al., No. IT-96-21, Judgement (16 November 1998) at para. 935; Prosecutor v Limaj et al., No. IT-03-66-T, Judgement (30 November 2005) at para. 526.
[218] Prosecutor v Blaškić, No. IT-95-14, Judgement (3 March 2000) at para. 333.

129. In terms of *mens rea*, the Prosecution must prove that the superior knew or had reason to know that his subordinates had committed or were about to commit the underlying offences. That *mens rea* requires the superior: (i) to have "actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under articles 2 to 5 of the Statute;" or (ii) to have "in his possession [specific][219] information of a nature, which at least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates."[220] The *mens rea* of superior responsibility cannot be inferred solely from the accused's formal position.[221]

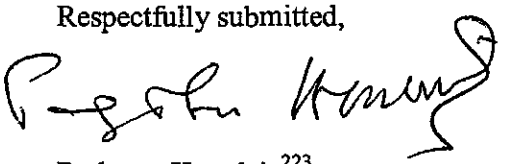
130. If a superior does not possess effective control or cannot perform the investigations himself, it is sufficient for the superior to order competent authorities to investigate the reported crimes.[222]

**Conclusion**

141. Dr. Karadzic intends to defend himself with respect and dignity. If the law is applied fairly and the truth about the events in Bosnia is allowed to come out, he is confident that the Trial Chamber will find him not guilty.

Word count: 14597

Respectfully submitted,



Radovan Karadzic[223]

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[219] Prosecutor v Delalic et al., No. IT-96-21-T, Judgement (16 November 1998) at para. 393; Prosecutor v Čelebići, No. IT-96-21-A, Judgement (20 February 2001) at para. 226; Prosecutor v Krnojelac, No. IT-97-25-T, Judgement (15 March 2002) at para. 94; Prosecution v Krnojelac, No IT-97-25-A, Judgement (17 September 2003) at para. 59.

[220] Prosecutor v Delalic et al., No. IT-96-21-T, Judgement (16 November 1998) at para. 383.

[221] Prosecutor v Kajelijeli, No. ICTR-98-44A, Judgement (1 December 2003) at para. 776.

[222] Prosecutor v Hadzihasanovic & Kubura, No. IT-01-47-T, Judgement (15 March 2006) at para. 1061.

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