



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

Case No. IT-94-2-R61
Date: 20 October 1995
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IN THE TRIAL CHAMBER

Before: Judge Jorda, Presiding
Judge Odio Benito
Judge Riad

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 20 October 1995

PROSECUTOR

v.

DRAGAN NIKOLIĆ a/k/a "JENKI"

**REVIEW OF INDICTMENT PURSUANT TO RULE 61
OF THE RULES OF PROCEDURE AND EVIDENCE**

The Office of the Prosecutor:

**Mr. Grant Niemann
Ms. Teresa McHenry**

I. Introduction

1. By a decision dated 16 May 1995, pursuant to Rule 61(A) of the Rules of Procedure and Evidence ("the Rules"), Judge Odio Benito ordered that the Prosecutor submit to this Trial Chamber for review the indictment against Dragan Nikolić, alleged to have been, during 1992, the commander of Sušica Camp located in the region of Vlasenica in Bosnia-Herzegovina. Pursuant to Rules 47 and 55, the same Judge had confirmed the indictment on 4 November 1994 and issued a warrant of arrest which to this day has not been executed.

2. The Chamber had the material which was initially submitted to the confirming Judge, but it has also heard in a public hearing during the week of 9 to 13 October 1995 a number of witnesses and alleged victims. The Chamber is now called on to determine the responsibility of Dragan Nikolić as alleged, that is, to determine if there are reasonable grounds for believing that he has committed all or any of the crimes charged in the indictment and, if so, to issue an international warrant for his arrest.

The execution of an international arrest warrant relies upon the obligation on States to cooperate and to render judicial assistance, as provided in Article 29 of the Statute. In effect, all States in the international community will be bound, if the warrant is issued, to cooperate in searching for and arresting the accused, who would in consequence become an international fugitive.

Moreover, should the Chamber consider that the failure to effect service of the indictment and to execute the original warrant of arrest is attributable to a State or, pursuant to the Rules, to a self-proclaimed entity, it may so certify and it may inform the Security Council through the President of the Tribunal.

3. Before reviewing the crimes allegedly committed by the accused, both as to the facts and the legal characterisation of those facts, it is appropriate to assess the scope of Rule 61 in the context of its first application. Recourse to Rule 61 means that the Tribunal, which does not have any direct enforcement powers, is not rendered ineffective by the non-appearance of the accused and can proceed nevertheless.

The review by a panel of Judges, sitting in a public hearing, of an indictment initially confirmed by a single Judge, reinforces both the rights of the accused and enhances the solemnity and gravity of the Judges' decision. The Rule 61 procedure, which is initiated by the Prosecutor, cannot be considered a trial *in absentia*; it does not culminate in a verdict nor does it deprive the accused of the right to contest in person the charges brought against him before the Tribunal. However, the rights of alleged victims should not be denied; the Rule 61 proceedings provide them with the opportunity to be heard in a public hearing and to become a part of history.

II. The Crimes

4. The crimes described hereunder were allegedly perpetrated during 1992 in eastern Bosnia in the municipality of Vlasenica and, for the most part, within the Sušica camp, a former military installation converted by Bosnian Serbs into a detention camp and of which Dragan Nikolić is alleged to have been the commander. The detainees were held in one of two main buildings within the camp, referred to as the hangar.

A. The Offences Charged

5. The Chamber now examines the evidence which has been tendered in support of the indictment in order to determine whether there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment.

The indictment against Dragan Nikolić consists of 24 counts. Each count relates to one set of facts for which the Prosecutor has proposed alternative legal characterisations. For the reasons discussed below, each count, with two exceptions, will here be presented under the most appropriate description, that is crimes against humanity.

1. Murder

(a) The murders of Durmo Handžić and Azim Zildžić¹

6. A number of witness statements, both written and oral, of persons detained in Sušica camp reported the murder of Durmo Handžić and Asim Zildžić. Those testimonies indicate that, allegedly, one evening in June 1992, Dragan Nikolić and some camp guards approached the hangar and called out Durmo Handžić and Azim Zildžić. Shortly after leaving the hangar, these

¹ See witness statements 7.2; 7.3; 7.4; 7.5; 7.7; 7.8; 7.9; 7.10; 7.13; 7.14; 7.19; 7.35; 7.40; 7.42; 7.47; 7.48.

two men were subjected to serious physical assaults for more than 45 minutes by Dragan Nikolić and the guards. They were punched and kicked and struck with truncheons and rifle butts. Some prisoners actually witnessed parts of these assaults and others heard the victims cry out, scream, moan and beg for an end to their torture. Durmo Handžić and Azim Zildžić were then brought back into the hangar. According to the eyewitness testimony of other prisoners, their bodies were covered with bruises and their clothes were soiled and torn. Azim Zildžić had been beaten so violently that his face was unrecognizable and one eye had come out of its socket. He died shortly after having been brought back. Dragan Nikolić ordered his body to be taken away and two prisoners, Hasim and Alija Ferhatović, to bury it.

Dragan Nikolić came into the hangar next morning and approached Durmo Handžić. The latter was suffering intensely from a beating the night before and Dragan Nikolić prohibited prisoners from helping him. Durmo Handžić thereupon begged Dragan Nikolić to kill him to put an end to his suffering. Dragan Nikolić answered that a bullet was worth more than Durmo Handžić's life, that it would be wasted on him and that he should suffer before dying. Durmo Handžić died shortly afterwards. He was buried the same day by Hasim and Alija Ferhatović.

(b) Murder of Mevludin Hatunić²

7. Mevludin Hatunić, his wife and daughter were interned in the Sušica camp in early July 1992. Mevludin Hatunić reportedly offered his home to a Serb guard in return for his family's release. He was authorized to accompany the guard to his house for that purpose and then returned to the camp. This was between 3 and 7 July 1992. That same evening, Dragan Nikolić announced to the camp prisoners that, after having handed over his home, Mevludin Hatunić had made a comment to the effect that he would be waiting for a chance to get even. Dragan Nikolić then struck Mevludin Hatunić. The following morning, Dragan Nikolić again beat him until he lost consciousness. Later, Dragan Nikolić returned, saw that Mevludin Hatunić had regained consciousness, and beat him savagely for the third time. Mevludin Hatunić died from his injuries. His body was put in a plastic bag by one of the Ferhatović brothers and removed from the hangar.

² See witness statements 7.6; 7.16; 7.34; 7.41.

(c) Murders of Rašid Ferhatbegović, Dževad Šarić, Muharem Kolarević and Ibrahim Zekić³

8. According to a number of witnesses, one night, probably that of 23 to 24 June 1992, Rašid Ferhatbegović, Dževad Šarić, Muharem Kolarević and Ibrahim Zekić were taken from the detainees' hangar by several guards including Goran Tešić. Some detainees saw Dragan Nikolić follow the prisoners out and heard his voice. Dževad Šarić and Muharem Kolarević were the first to be taken out. The hangar doors were closed again immediately. For about 30 minutes, the detainees heard screams of pain. Thereafter they heard gunshots, following which Goran Tešić asked Hasim and Alija Ferhatović to come out. The latter saw the bodies of Muharem Kolarević and Dževad Šarić, which seemed to have bullet wounds in the chest. Dragan Nikolić then ordered the Ferhatović brothers to put the bodies on a stretcher and take them behind a warehouse, where they could not be seen from the camp entrance. They then came to where Dragan Nikolić, Goran Tešić, another guard named Djuro, and Dragan Nikolić's brother were sitting with others. Goran Tešić told them: "Hold on a minute, you're going to get another".

9. Goran Tešić ordered Alija Ferhatović to go and get Ibrahim Zekić. Goran Tešić had him sit down on a metal chair and questioned him. Goran Tešić then asked another guard to give him his weapon, and once he had it, shot Ibrahim Zekić twice, who fell from the chair. Goran Tešić thereupon ordered the Ferhatović brothers to take Ibrahim Zekić away. When they returned to where they had left the bodies of Muharem Kolarević and Dževad Šarić, Muharem Kolarević's body was no longer there. They brought this to the attention of Goran Tešić. The prisoners who were in the hangar heard the guards yell: "Call the police, they're escaping". The police arrived some 15 minutes later and entered the hangar accompanied, according to some detainees, by Dragan Nikolić and Goran Tešić. When Rašid Ferhatbegović looked up, one of the police officers pointed at him and asked him if he was the one who had escaped. Goran Tešić replied: "Yes". Rašid Ferhatbegović was taken outside and the prisoners then heard a gunshot.

³ See witness statements 7.2; 7.3; 7.4; 7.6; 7.8; 7.9; 7.10; 7.12; 7.13; 7.14; 7.19; 7.35; 7.39; 7.40; 7.42; 7.43.

Towards 5 a.m., Dragan Nikolić came into the hangar and called Hasim and Alija Ferhatović. They went over to the toilets where they found the body of Muharem Kolarević. He was slumped over a barbed wire fence. Traces of blood led from where his body had been left the night before. Even though he seemed to be dead, Goran Tešić fired another bullet into the body. Hasim and Alija Ferhatović carried the body to where they had left the other bodies the previous evening. There they found Rašid Ferhatbegović's body, with a bullet in the middle of the forehead.

Hasim and Alija Ferhatović and Redjo Čakišić buried the bodies of those prisoners on 24 June 1992.

(d) Murder of Ismet Dedić⁴

10. Around 6 July 1992, Dragan Nikolić called Ismet Dedić out of the detainees' hangar. He closed the door and the detainees thereafter heard Ismet Dedić scream. Shortly after, Dragan Nikolić opened the hangar door and ordered two detainees to drag Ismet Dedić inside. The latter was seriously wounded and died a little while later. His body was put in a plastic bag and carried away by other detainees.

2. Inhumane Acts

(a) Inhumane acts committed against Galib Musić⁵

11. Dragan Nikolić committed serious physical assaults against Galib Musić in Sušica camp over a seven-day period. It is alleged that Dragan Nikolić:

"kicked him and beat him with a metal pipe [. . .] Musić was beaten to unconsciousness each time. The beatings appeared to become more severe with each day. Shortly before the last beating, Musić regained consciousness and was asking for water. He was not given any water, food, or medical attention during the entire time."

Galib Musić died as a result.

⁴ See witness statements 7.6; 7.8; 7.16.

⁵ See witness statements 7.6; 7.16; 7.34; 7.41.

(b) Inhumane acts committed against Sead Ambešković⁶

12. Dragan Nikolić and other guards committed physical assaults against Sead Ambešković in Sušica camp using axe handles, iron bars, wooden bats and rifle butts. According to Sead Ambešković's testimony, "as a result of [the] beatings, the back of my head was cut, four teeth on the left side of my mouth were knocked out, and three ribs were broken".

(c) Inhumane acts committed against Redjo Čakišić⁷

13. When he arrived in Sušica camp, Redjo Čakišić was told by Dragan Nikolić and the camp guards: "Look how you ended up by voting for Alija [Izetbegović] and the SDA party". According to his testimony at the hearing, Redjo Čakišić was called out by Dragan Nikolić one night. Dragan Nikolić told two men who were waiting outside: "Here, I brought you something for dinner". The two men beat Redjo Čakišić in the back with rifle butts and kicked him in the stomach as Dragan Nikolić was leaving.

(d) Inhumane acts committed against Hasna Čakišić⁸

14. On three occasions the guards called out Hasna Čakišić for interrogation. According to the record, the 68-year-old victim was slapped and beaten on her hands with a truncheon to force her to reveal the whereabouts of her son. Dragan Nikolić participated in this ill-treatment.

15. Generally speaking, civilians were detained in Sušica camp under inhumane conditions, especially as regards hygiene, health, safety and nutrition.⁹ Included in the approximately 500 civilians were women, children and elderly people. The detainees were crammed into a hangar with practically no ventilation and had to sleep on the concrete floor. They were given only one daily ration of food, and even that was usually spoiled. They were infrequently allowed to use the toilet outside and had to use a single bucket in the hangar for their bodily functions. No

⁶ See witness statement 7.3.

⁷ See witness statement 7.7.

⁸ See witness statement 7.6.

⁹ See all statements.

medical care was provided. Certain prisoners were specifically appointed to control the hangar. The detainees lived in constant fear for their lives, especially at night.

"During the night everybody waited for the day to come because day meant going out to work, not seeing what was happening. The maltreatment and suffering was a bit less severe, while the night was the night of horror."¹⁰

Elderly people were not spared this inhumane treatment. As one witness described:

"She [a woman more than 75-years-old] wanted to go to the toilet, they would not allow her, and then Dragan Nikolić came and said: 'Bind her', so they bound her hands and feet. They tied ropes around her hands and feet so that she could not actually go to the toilet and she had to urinate in the room where we were."¹¹

16. In addition to the four victims mentioned above, the indictment alleges that Mevludin Hatunić, Ismet Dedić and Fikret "Čiče" Arnaut were victims of inhumane acts (counts 3.6, 8.6, 11.3). As Dragan Nikolić is also charged with the murder of Mevludin Hatunić and Ismet Dedić, the relevant acts are described under Section II. A.1, Murder. As Dragan Nikolić is also charged with torturing Fikret "Čiče" Arnaut, the relevant acts are described under Section II. A.3, Torture.

3. Torture

(a) Torture of Fikret "Čiče" Arnaut¹²

17. Fikret "Čiče" Arnaut was allegedly assaulted by Dragan Nikolić on numerous occasions. Witnesses related how on one occasion, Dragan Nikolić came into the hangar and, while shouting to the women, "You are not here because of me, but because of him. He wanted to rape my mother and now we will rape you", forced Fikret "Čiče" Arnaut to put his hands behind his back and kneel on the floor, spreading his knees open. Dragan Nikolić kicked Fikret "Čiče" Arnaut in the stomach and lower back. Dragan Nikolić forced Fikret "Čiče" Arnaut to tilt his head back and he put a bayonet into his mouth. Witnesses saw blood on Dragan Nikolić's bayonet. Later, Fikret "Čiče" Arnaut was spitting and vomiting blood. He was heard begging, "Dragan, do not beat me to death, kill me with a bullet", to which Dragan Nikolić answered: "No, a bullet costs 5 DM and

¹⁰ See Transcript of 10 October 1995, p. 37.

¹¹ See Transcript of 13 October 1995, p. 13.

¹² See witness statements 7.2; 7.14; 7.16; 7.34; 7.40; 7.42; 7.44; 7.50.

you are not worth half a cigarette". Fikret "Čiče" Arnaut was also taken outside and beaten by Dragan Nikolić who was wearing brass knuckles. According to one eyewitness, at some point:

"Arnaut could no longer get up [. . .] He was covered with blood on his chest and his face was swollen. It appeared as though many of Arnaut's bones were broken".

(b) Torture of Mubin Music¹³

18. Mubin Music was mistreated while he was in Sušica camp. Once, when he was outside the hangar, Dragan Nikolić put a bayonet into his mouth, while constantly insulting and questioning him.

(c) Torture of Suad Mahmutović¹⁴

19. Suad Mahmutović was allegedly beaten repeatedly by Dragan Nikolić. Several witnesses, including the victim, asserted that during one beating seven of his ribs were broken. Another time, Dragan Nikolić kicked him in the face with his boots and hit him with a baton, gashing open his face. According to the witness:

"On another occasion, Nikolić walked up to me while I was in the hangar. He told me to open my mouth. He put a cocked pistol in my mouth and told me to admit my neighbor had a weapon. I feared for the safety of others and could not lie. He pulled the trigger. It was then that I learned the gun was not loaded."

It appears to the Chamber that several other victims of inhumane acts or torture committed by Dragan Nikolić in Sušica camp have not been identified as such in the indictment.

4. Imprisonment of civilians

20. According to the written statements as well as the oral testimony presented to the Chamber, large numbers of people were detained at Sušica camp during the period 1 June to 30 September 1992. The regular population of the camp is said to have been about 500 persons. The majority of the detainees were men but women and children were also part of that regular

¹³ See witness statement 7.13.

¹⁴ See witness statement 7.3; 7.8; 7.12; 7.14; 7.42; 7.43.

population. Over the entire period in question, 8,000 people are said to have been detained at Sušica camp in total.¹⁵

All the witnesses who testified to having been detained at Sušica camp emphasized that, at the time of their arrest, they had not been participating in a resistance movement against the authorities who had seized power in Vlasenica and who were responsible for the camp. It does not seem that such a movement could have taken shape in the Vlasenica region, where the detainees were locals, during the period in which the camp was operational. The arrests seem to have taken place only after the population had been totally disarmed. Thus it would appear that the establishment of Sušica camp was aimed at detaining a defenceless civilian population which was not organised into a resistance movement.

5. Persecution On Religious Grounds

21. The imprisonment of civilians under particularly inhumane conditions could, considering the relevant parts of the record, constitute an act of persecution, since it seems to have been motivated solely by a discriminatory intent based principally, if not exclusively, on the religious characterisation of the targeted population. It appears from the oral testimony that the camp population was exclusively Muslim.

6. Appropriation of property and plunder

22. Many witnesses have provided evidence of a system of unlawful appropriation or plunder of property at Sušica camp. On arrival at the camp, detainees were forced to hand over items of private property, especially valuable items such as gold or jewellery. Dragan Nikolić is alleged personally to have supervised the confiscation of property from a small building which he used for interrogations.

There is also evidence that, before women were deported from Sušica camp, they had to sign a document stating that they were leaving the area voluntarily and that they were giving up their possessions.¹⁶

¹⁵ See statement of Mr. Gow.

The Chamber considers that there are reasonable grounds for believing that the appropriations were not justified by military necessity and were carried out unlawfully and wantonly.

The Chamber further considers that the acts described above could also be considered as characterising persecution on religious grounds and so be covered by Article 5 of the Statute.

7. Unlawful transfer of civilians

23. Under the supervision and on the orders of the accused, Dragan Nikolić, a large number of detainees are said to have been unlawfully transferred from Sušica camp to Batković during the summer of 1992. Dragan Nikolić is said to have organised the transfers, calling out detainees from a list of names and telling them that they were to be exchanged for Serbian prisoners. In actual fact, the detainees were transferred to Batković camp; they were forced to travel by bus with their heads down, their hands behind their heads. They were beaten and forced to sing "patriotic Serbian" songs. At Batković camp conditions were similar to those at Sušica camp, if not worse¹⁷.

As submitted by the Prosecutor, the Chamber considers that Dragan Nikolić may have committed grave breaches of the Geneva Conventions of 1949 - in particular of Convention IV - which fall within the Tribunal's jurisdiction pursuant to Article 2 of the Statute.

The Chamber, however, also considers that the same set of facts could be characterised as deportation and, accordingly, come under Article 5 of the Statute.

¹⁶ See witness statement 7.1; 7.11.

¹⁷ See witness statements 7.3; 7.4; 7.5; 7.12.

**B. Type Of Responsibility Arising Out Of Dragan Nikolić's Position At Sušica
Camp**

24. The relevant part of the record provides reasonable grounds for believing that Dragan Nikolić held the position of camp commander at Sušica camp. The witnesses based their conclusions upon an analysis of the distribution of tasks within the camp. The guards were subjugated to Dragan Nikolić's orders; nothing, apparently, could be carried out without his consent. The witnesses also referred to declarations by Dragan Nikolić himself proclaiming his sovereign power within the camp. According to corroborated testimony, he would publicly state, "I am here, the commander, God, the stick and the law".¹⁸

The indictment and supporting material show that Dragan Nikolić's responsibility for the crimes against identified persons could arise not only from his direct participation in such crimes (Article 7 (1) of the Statute) but also by virtue of his position of authority where the evidence suggests not direct involvement, but a failure to prevent such crimes, as is the case for counts 4, 5, 6, 7 and 18. This latter principle of individual responsibility for omission, long recognized under international criminal law, is reaffirmed by Article 7(3) of the Statute of the Tribunal which provides:

"The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

However, with respect to the counts of the indictment concerning crimes committed against a group of persons (counts 20 to 24), it should be noted that the reference to Article 7(3) is less pertinent. Dragan Nikolić's position of authority in the Sušica camp makes him responsible not through his subordinates but for his own acts where imprisonment, appropriation, deportation, persecution and inhumane acts related to the very conditions of detention are concerned.

¹⁸ See Transcript 10 October 1995, p. 33.

III. Appraisal Of The General Context In Which The Crimes Are Alleged To Have Been Committed

25. The Chamber has noted the alternative presentation in the indictment of the legal characterisation of the crimes. On the basis of the relevant parts of the record, the Tribunal's jurisdiction may conceivably be founded on Articles 2 or 3 of the Statute. However, without prejudice to the determination of the Judges at an eventual trial in this matter, the Chamber considers that there are reasonable grounds for believing that the crimes are more appropriately characterised as crimes against humanity.

A. Evidence Which Justifies Appraisal Of The Crimes As Crimes Against Humanity

1. The context in which crimes must be committed to be characterised as crimes against humanity

26. Article 5 of the Statute reads:

“The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.”

This definition specifies the type of crimes which, if committed under certain circumstances, constitute crimes against humanity and, moreover, describes those circumstances.

The first circumstance referred to in the text is that of armed conflict. It is, in fact, common to Articles 2, 3 and 5 of the Statute, dealt with alternatively or cumulatively in the indictment, which is why it will be addressed below. The Appeals Chamber, thus confirming the findings of the Trial Chamber, considered that by requiring proof of an armed conflict, the Statute had narrowed the customary concept of crimes against humanity (Prosecutor v. Dusko Tadić (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, at para. 141 (hereinafter *Tadić Case* and *Decision on Appeal*)). Since the judgement at Nuremberg, that concept has taken on a certain autonomy as there is no longer any need to determine a link with a crime against the peace or a war crime.

The second circumstance, whereby crimes must be “directed against any civilian population” is specific to crimes against humanity. Set forth in broad terms in the Statute, it covers, according to prevailing opinion, three distinct components. First, the crimes must be directed at a civilian population, specifically identified as a group by the perpetrators of those acts. Secondly, the crimes must, to a certain extent, be organised and systematic. Although they need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone. Lastly, the crimes, considered as a whole, must be of a certain scale and gravity.

2. In 1992, did Dragan Nikolić through his alleged crimes participate in a systematic policy of a certain scale and gravity directed against a civilian population specifically identified as a group?

27. The evidence produced by the Prosecutor tends to show that in the spring of 1992, there was an authoritarian take-over by the Serbs in the Vlasenica region, which seems to have been largely facilitated by the intervention of elements of the Yugoslav People’s Army (“JNA”) and, in particular, the Novi Sad corps, which at the time, was under the command of the Government in Belgrade¹⁹. The eyewitnesses generally confirmed the existence of a new authoritarian power structure at Vlasenica and were unanimous in stating that discriminatory measures were directed against them as early as March and April 1992. Some banks imposed restrictions on accounts held by individuals of the Islamic faith. Laissez-passer were issued to control movement both within and outside the city. A witness said at the hearing:

¹⁹ See transcript of testimony of most witnesses and the statement of Mr. Gow, para. 173.

“A pass for leaving the Opstina of Vlasenica I never received, but I was given a pass to travel between my house and my land or farm.”²⁰

Lastly, the population was required to hand in any and all weapons²¹.

It follows from the relevant parts of the record that the civilian population subjected to such discrimination was identified by the perpetrators of the discriminatory measures, principally by its religious characteristics. The testimony is consistent on this point: the Muslim population was specifically, if not exclusively, targeted. The initial discriminatory measures seem to have been followed by still more radical ones: summary arrests, detention and torture at the police station, massive transfers of civilians to Sušica, and then to the Batković camp. On the basis of all the testimony, in September 1992 there remained only a few traces of the Muslim population of the Opstina of Vlasenica which, according to the 1991 census (the last census prior to the said events), amounted to 55.3% of the total population.

The implementation of that discriminatory policy, commonly referred to as “ethnic cleansing”, over the region of Vlasenica alone seems to have been so wide-spread as to fall within the Tribunal’s jurisdiction under Article 5.

28. However, the Chamber notes that these serious discriminatory acts do not seem to have been limited to the Vlasenica region. Camps like the one in Sušica were set up in a large part of the territory under Serb control in Bosnia²². This policy of ethnic cleansing covered other parts of Bosnia from the spring of 1992 on. According to the expert witness,

“The conduct of the spring 1992 attacks, including the manner in which the JNA and paramilitary groups deployed and treated the non-Serb population, was similar throughout Bosnia.”

The statement of this witness shows the wide-spread nature of the criminal acts as well as the fact that they were organised at the highest level. According to the witness,

“The speed and high level of co-ordination that these attacks required make clear that they were centrally co-ordinated and planned.”²³

²⁰ See Transcript 10 October 1995, p. 9.

²¹ See all witness statements.

²² See Transcript 9 October 1995, p. 99, 100.

²³ See Statement of Mr. Gow, para. 133.

The witness finished by saying:

“In conjunction with Serbian political leaders and Serbian irregular units, the JNA conceived, planned, prepared and implemented an armed campaign in Bosnia that involved a systematic use of terror to establish the borders of a new Yugoslavia.”²⁴

According to all of the witnesses, Dragan Nikolić commanded the Sušica camp at Vlasenica from late May 1992 to late September 1992. On that basis, and in light of all the above, the Chamber considers that there are reasonable grounds for believing that he participated in such a policy and committed crimes against humanity, pursuant to Article 5 of the Statute.

B. The Conditions For The Application Of Articles 2 And 3 Of The Statute (Grave Breaches Of The Geneva Conventions/Violations Of The Laws Or Customs Of War)

1. The Existence Of An Armed Conflict

29. In certain cases, a condition for the Tribunal's competence *ratione materiae* is a state of armed conflict. Accordingly the Chamber shall examine whether such a conflict existed in Vlasenica at the time that the crimes allegedly were committed.

The Appeals Chamber of the Tribunal in the *Tadic Case* noted that:

“[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised groups or between such groups within a State” (Decision on Appeal, at para. 70).

According to the statement of Mr. Gow, the expert witness, the armed conflicts in the former Yugoslavia began in the summer of 1991 and have continued, without peaceful settlement, to the present day. In this case, witnesses have provided testimony regarding the armed take-over of the town of Vlasenica, by both Bosnian Serbs and the JNA. Thus the Chamber considers that the crimes of which Dragan Nikolić is accused were committed in armed conflict.

²⁴ *Id.*, conclusion.

2. Specific requirements for the application of Article 2 of the Statute

30. For Article 2 of the Statute, relating to the grave breaches provisions of the Geneva Conventions of 1949, to apply, the victims of the alleged crimes must be “persons . . . protected under the provisions of the relevant Geneva Convention”.

The Muslim population of Vlasenica was systematically disarmed and it does not appear that there was any resistance movement in the region. The Chamber considers that all the detainees at Sušica camp were civilians and therefore “protected persons” within the meaning of Article 4 of Geneva Convention IV of 1949.

In the *Tadić Case*, the Appeals Chamber affirmed that the Tribunal has jurisdiction under Article 2 of the Statute only in the context of an international armed conflict (Decision on Appeal, at para. 84). The relevant parts of the record tend to show that JNA forces from Novi Sad, under the control of the government in Belgrade, took part in the occupation of Vlasenica after the Republic of Bosnia and Herzegovina had been recognised as an independent State.

The evidence of the expert witness, Mr. Gow, suggests, moreover, that the armed conflict in the territory of the former Yugoslavia may be viewed in its entirety as one “major armed conflict”, that reportedly began in the autumn of 1991, with its aim “to establish [. . .] a new [. . .] state”.²⁵ This conflict involved several States. This Chamber considers on the basis of all of the foregoing that the armed conflict was international in character and that Article 2 may therefore be applicable.

3. Specific requirements for the application of Article 3 of the Statute

31. In the *Decision on Appeal* in the *Tadić Case*, the Appeals Chamber affirmed that the Tribunal has jurisdiction under Article 3 of the Statute to prosecute as violations of the laws or customs of war:

“ . . . all violations of international humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva

²⁵ See Transcript 10 October 1995, p. 86.

Conventions other than those classified as “grave breaches” by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered *qua* treaty law . . .” (Decision on Appeal, at para. 89).

The indictment against Dragan Nikolić contains 20 charges of violating the laws or customs of war under Article 3 of the Statute. All but one of those charges concerns violations of Article 3 common to the four Geneva Conventions. In light of the decision of the Appeals Chamber, and in light of our finding that the detainees at Sušica camp were civilians and therefore “persons taking no active part in the hostilities”, the Chamber considers that Article 3 of the Statute may apply in this case. The only charge not coming under common Article 3 of the Geneva Conventions concerns the prohibition on plunder of private property but that is specifically mentioned in Article 3(e) of the Statute.

IV. Invitation To Amend The Indictment

32. Based on this review of the indictment and in the light of all the material submitted by the Prosecutor, the Chamber would like to draw the Prosecutor's special attention to two points which it deems to be particularly important.

Having regard to the Rules, it is the prerogative of the Prosecutor, not the Chamber, to amend the indictment (Rule 50). Under these circumstances, the Chamber can only express its belief and invite the Prosecutor to amend the indictment accordingly, should he share such belief.

A. Rape And Sexual Assault

33. From multiple testimony and the witness statements submitted by the Prosecutor to this Trial Chamber, it appears that women (and girls) were subjected to rape and other forms of sexual assault during their detention at Sušica camp²⁶. Dragan Nikolić and other persons connected with the camp are alleged to have been directly involved in some of these rapes or sexual assaults. These allegations do not seem to relate solely to isolated instances.

The Trial Chamber feels that the Prosecutor may be well-advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolić with rape and other forms of sexual assault, either as a crime against humanity or as grave breaches or war crimes.

Without prejudice to any subsequent decision by the Judges at trial, and having regard to the special provisions on this subject contained in the Rules, the Chamber considers that rape and

²⁶ See Transcript 10 October 1995, p. 36, 45, 73; 11 October 1995, p. 17, 25, 55, 62; 12 October, p. 5, 17, 18, 55, 56, 83, 107, 108; Statements 7.3, at 8; 7.29, at 4; 7.32, at 3, 4; 7.34, at 4; 7.37, at 3, 4; 7.38, at 2; 7.39, at 2; 7.40, at 5; 7.46, at 3, 4.

other forms of sexual assault inflicted on women in circumstances such as those described by the witnesses, may fall within the definition of torture submitted by the Prosecutor.

B. "Ethnic Cleansing" And Genocide

34. It emerged on the basis of the record that the policy of discrimination implemented at Vlasenica, of which Dragan Nikolić's acts formed a part, was specifically aimed at "cleansing" the region of its Muslim population.

In this instance, this policy of "ethnic cleansing" took the form of discriminatory acts of extreme seriousness which tend to show its genocidal character. For instance, the Chamber notes the statements by some witnesses which point, among other crimes, to mass murders being committed in the region.²⁷

More specifically, the constitutive intent of the crime of genocide may be inferred from the very gravity of those discriminatory acts.

That intent, according to some of the eyewitnesses at the hearing, was expressed by the accused himself. Dragan Nikolić reportedly said, "You Muslims never existed, you [. . .] will never exist, I will eradicate you, I will cut your throats, I will butcher you all."²⁸

The Chamber considers that the Tribunal may possibly have jurisdiction in this case under Article 4 of the Statute. It would therefore invite the Prosecutor to pursue his investigations, if feasible and advisable, with a view to indicting Dragan Nikolić for complicity in genocide or acts of genocide.

²⁷ See Transcript 11 October 1995, p. 87, 97; 12 October 1995, p. 45, 60.

²⁸ See Transcript 11 October 1995, p. 55.

V. Attempts To Serve The Indictment

35. The Chamber notes the efforts by the Prosecutor to effect service of the indictment and the subsequent warrants of arrest.

On 4 November 1994, the day the indictment against Dragan Nikolić was confirmed, two warrants for his arrest were issued, one addressed to the Republic of Bosnia and Herzegovina, the other addressed to the Bosnian Serb administration in Pale in accordance with Rules 2(A) and 55.

On 7 November 1994, the Registrar of the Tribunal forwarded the warrant addressed to the Republic of Bosnia and Herzegovina to the relevant authorities in Sarajevo. On 15 November 1994 the Registrar received official notification that the Republic of Bosnia and Herzegovina was unable to execute the arrest warrant due to the fact that Dragan Nikolić resides in the town of Vlasenica, which was stated to be "temporary occupied territory controlled by aggressors".

On 17 November 1994, the warrant addressed to the Bosnian Serb authorities was physically handed by an official of the Tribunal to members of the Bosnian Serb administration in Pale, including Mr. Koljević, the declared vice-president of the Bosnian Serb administration.

On 2 March 1995, the Prosecutor sought to advertise the indictment in newspapers having wide circulation in the territory, as provided for in Rule 60. Accordingly, on 13 March 1995, the Registrar forwarded to the Republic of Bosnia and Herzegovina a request for publication. A similar request was also forwarded the same day to the Bosnian Serb administration in Pale.

An article announcing the indictment against Dragan Nikolić was published in the newspaper "Oslobodenje", the largest daily newspaper circulating in the Republic of Bosnia and Herzegovina, on 8 April 1995. In addition, details of the indictment were broadcast repeatedly on Radio and Television of Bosnia and Herzegovina on 7 April 1995.

There has been no response from the Bosnian Serb administration concerning its willingness or ability to execute the warrant of arrest issued against Dragan Nikolić.

VI. DISPOSITION

36. FOR THE FOREGOING REASONS and

Pursuant to Rule 61 of the Rules of Procedure and Evidence,

Pursuant to the confirmation of the indictment by Judge Odio Benito dated 4 November 1994,

Pursuant to the decision of 16 May 1995 by which the same Judge ordered the Prosecutor to submit the case to the Trial Chamber,

And following the hearings of 9 to 13 October 1995 held at the seat of this Tribunal,

THE TRIAL CHAMBER UNANIMOUSLY:

DETERMINES that there are reasonable grounds for believing that Dragan Nikolić committed the offences with which he is charged in the indictment issued against him by the Prosecutor dated 1 November 1994,

CONFIRMS therefore this entire indictment comprised of 24 counts as described above,

ISSUES an international arrest warrant against Dragan Nikolić and STATES that such warrant shall be transmitted to all States,

TAKES FORMAL NOTE of the efforts by the Prosecutor to effect service of the indictment and STATES that the failure to effect service is due wholly to the failure or refusal of the Bosnian Serb administration in Pale to cooperate,

CERTIFIES this failure and INVITES the President of the Tribunal to notify the Security Council of the United Nations accordingly.

[Signed]

Claude Jorda

Presiding Judge

Dated this twentieth day of October 1995

The Hague

The Netherlands

[Seal of the Tribunal]