

**UNITED
NATIONS**

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-97-24-A
Date: 22 March 2006
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrézia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Judgement of: 22 March 2006

PROSECUTOR

v.

MILOMIR STAKIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Mark J. McKeon
Ms. Helen Brady
Mr. Xavier Tracol
Ms. Barbara Goy
Ms. Katharina Margetts

Counsel for the Appellant:

Mr. Branko Lukić
Mr. John Ostojić

(c) The effect of the Trial Chamber's error on the Appellant's convictions

312. Having established that the Trial Chamber erred in law, it is necessary for the Appeals Chamber to apply the correct legal definition of deportation to the factual findings of the Trial Chamber. In this way, the Appeals Chamber may establish whether it is convinced beyond reasonable doubt as to the challenged factual findings before that finding is confirmed on appeal.

(i) The Trial Chamber's treatment of forcible transfer

313. As a preliminary matter, the Appeals Chamber notes that forcible transfer was charged in the Indictment as an "other inhumane act" pursuant to Article 5(i) of the Statute.⁶⁴⁶ The Trial Chamber, however, found that the use of Article 5(i) to attach criminal liability to forcible transfers raised serious concerns, and held that:

the crime of 'other inhumane acts' subsumes a potentially broad range of criminal behaviour and may well be considered to lack sufficient clarity, precision and definiteness [which] might violate the fundamental criminal law principle *nullum crimen sine lege certa*.⁶⁴⁷

In light of this consideration, the Trial Chamber concluded that a conviction based on Article 5(i) for acts of forcible transfer as inhumane acts could not be entered.⁶⁴⁸

314. While neither party appealed this issue in the instant case, the Appeals Chamber finds that it is a matter of great importance to the consistency of the Tribunal's jurisprudence such that it warrants an examination *proprio motu*.

315. The Appeals Chamber notes first that the notion of "other inhumane acts" contained in Article 5(i) of the Statute cannot be regarded as a violation of the principle of *nullum crimen sine lege* as it forms part of customary international law.⁶⁴⁹ The function of this provision as a residual category is clear, as spelled out by the Trial Chamber in the *Kupreškić* Trial Judgement, which found that Article 5(i) was:

⁶⁴⁶ Indictment, paras 17(1), 19, 25, 41(1), 43 and 45 (within a genocidal campaign), 54(4) (within a persecutory campaign), 58, 59.

⁶⁴⁷ Trial Judgement, para. 719, citing the Rule 98*bis* Decision, para. 131.

⁶⁴⁸ Trial Judgement, para. 724.

⁶⁴⁹ The crime of other inhumane acts has been included in the following international legal instruments: Article 6(c) of the Nuremberg Charter; Article 5(c) of the Tokyo Charter; Article II(c) of Control Council Law No. 10. The crime of other inhumane acts is also referred to in Principle 6(c) of the Nuremberg Principles of 1950 and the ILC Draft Code (Article 18). Convictions have been entered on this ground pursuant to Control Council Law No. 10: *see e.g.* the Medical Judgment (p.198), the Justice Judgment (pp. 23, 972, 1200), the Ministries Judgment (pp. 467-475, 865), and the High Command Judgment (pp. 465, 580). The Appeals Chamber also notes that numerous human rights treaties also prohibit inhuman and degrading treatment: *see e.g.* ICCPR (Article 7), the European Convention on Human Rights (Article 3), the Inter-American Convention on Human Rights (Article 5) and the African Charter on Human and People's Rights (Article 5).

[d]eliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.⁶⁵⁰

316. The Appeals Chamber endorses this statement and notes that the provision has been widely used within the Tribunal's case-law.⁶⁵¹

317. In the instant case, the Prosecution charged forcible transfer (in Count 8 of the Indictment) as the act underlying Article 5(i).⁶⁵² Forcible transfer has been defined in the jurisprudence of the Tribunal as the forcible displacement of persons which may take place within national boundaries.⁶⁵³ The *mens rea* does not require the intent to transfer permanently. The Appeals Chamber notes that Article 2(g) of the Statute, Articles 49 and 147 of Geneva Convention IV, Article 85(4)(a) of Additional Protocol I, and Article 18 of the 1996 ILC Draft Code all condemn forcible transfer.⁶⁵⁴ The notion of forcible transfer had therefore clearly been accepted as conduct criminalised at the time relevant to this case, such that it does not violate the principle of *nullum crimen sine lege*. Furthermore, acts of forcible transfer have been accepted in other cases before the Tribunal as specifically substantiating the notion of other inhumane acts pursuant to Article 5(i).⁶⁵⁵ In view of the foregoing, the Appeals Chamber finds that acts of forcible transfer may be sufficiently serious as to amount to other inhumane acts.⁶⁵⁶ Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that a conviction based on Article 5(i) for acts of forcible transfer could not be entered.

318. The Appeals Chamber now turns to consider the findings of the Trial Chamber regarding deportation to see whether, in light of the correct definition of that crime, they may amount to either deportation or forcible transfer.

(ii) Applying the correct legal definitions of deportation and forcible transfer to the facts

319. The Trial Chamber's error with respect to the *mens rea* of deportation has no effect with respect to its findings on that crime. In reaching its conclusion that acts of deportation had taken

⁶⁵⁰ *Kupreškić* Trial Judgement, para. 563.

⁶⁵¹ *Kordić* Appeal Judgement, para. 117; *Vasiljević* Trial Judgement, para. 234; *Galić* Trial Judgement, paras 151-153; *Naletelić and Martinović* Trial Judgement, para. 247; *Krnojelac* Trial Judgement, para. 130; *Kvočka* Trial Judgement, para. 206; *Kordić* Trial Judgement, para. 269; *Kupreškić* Trial Judgement, para. 563. For the ICTR, see e.g. *Kayishema and Ruzindana* Trial Judgement, para. 150.

⁶⁵² Indictment, paras 58, 59.

⁶⁵³ *Krnojelac* Trial Judgement, para. 474; *Krstić* Trial Judgement, para. 521. See also *Stakić* Rule 98bis Decision, in which the Trial Chamber found that forcible transfer relates to displacement within a State.

⁶⁵⁴ Article 17 of Protocol II similarly prohibits the "displacement" of civilians.

⁶⁵⁵ See *Krstić* Trial Judgement, para. 523; *Kupreškić* Trial Judgement, para. 566.