

**UNITED
NATIONS**

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

Case No. IT-95-14/2-A
Date: 17 December 2004
Original: English

IN THE APPEALS CHAMBER

Before: Judge Wolfgang Schomburg, Presiding
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: Hans Holthuis

Judgement of: 17 December 2004

PROSECUTOR

v.

**DARIO KORDIĆ
AND
MARIO ČERKEZ**

JUDGEMENT**The Office of the Prosecutor:**

Mr. Norman Farrell
Ms. Helen Brady
Ms. Marie-Ursula Kind and Ms. Michelle Jarvis

Counsel for Dario Kordić:

Mr. Mitko Naumovski, Mr. Turner T. Smith, Jr. and Mr. Stephen M. Sayers

Counsel for Mario Čerkez:

Mr. Božidar Kovačić and Mr. Goran Mikuličić

116. The Appeals Chamber agrees with the Trial Chamber's finding "that the term imprisonment in Article 5(e) of the Statute should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual¹³⁹ without due process of law, as part of a widespread or systematic attack directed against a civilian population".¹⁴⁰

5. Inhumane acts pursuant to Article 5(i) of the Statute

117. The Appeals Chamber notes that inhumane acts as crimes against humanity were

deliberately 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.¹⁴¹

The Appeals Chamber considers that the potentially broad range of the crime of inhumane acts may raise concerns as to a possible violation of the *nullum crimen* principle. In the present case, however, "other inhumane acts" are charged exclusively as injuries.¹⁴² Inhumane acts as a crime against humanity is comprised of acts which fulfill the following conditions:

- the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case-by-case basis with due regard for the individual circumstances;
- the suffering must be the result of an act or omission of the accused or his subordinate; and
- when the offence was committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim.¹⁴³

¹³⁹ Read in context with para. 303 of the Trial Judgement, it becomes evident that the Trial Chamber referred to "individual" in the sense of "civilian".

¹⁴⁰ Trial Judgement, para. 302.

¹⁴¹ *Kupreškić et al.* Trial Judgement, para. 563.

¹⁴² Indictment, para. 42; Count 10 (Kordić), and Count 17 (Čerkez).

¹⁴³ *Cf.* Trial Judgement, para. 271.

384. The Appeals Chamber notes that the Trial Chamber did not in most cases make specific explicit factual findings with regard to each element of the crimes, but expressly concluded that the crimes were established. The Appeals Chamber considers that by finding that the crimes were established, the Trial Chamber implicitly found all the relevant factual findings required to cover the elements of the crimes.

385. However, the Appeals Chamber considers that such an approach falls short of what is required. The Trial Judgement must enable the Appeals Chamber to discharge its task pursuant to Article 25 of the Statute based on a sufficient determination as to what evidence has been accepted as proof of all elements of the crimes charged, and, if discussed, its assessment of, *inter alia*, the credibility and demeanour of a witness. Relying in part on a catch-all phrase⁵⁸³ cannot substitute the Trial Chamber's obligation to give "a reasoned opinion in writing" as envisaged in the aforementioned Article 23(2), sentence 2, of the Statute.

386. The Appeals Chamber considers, however, that this does not automatically lead to a dismissal of the charges and agrees with the Prosecution that, in this particular circumstance, the issue before it is to establish whether the Trial Chamber's findings that the crimes were established, are sustained on the record.

387. The failure of the Trial Chamber to discuss all constituent elements of all crimes charged and to request the Prosecution to further amend the Indictment has forced the Appeals Chamber to reassess a plethora of evidence in order to find out whether or not all constituent elements of the crimes were established during trial, instead of being in a position – as foreseen in the Statute – of focussing on the mere legal and factual issues of the case as described in Chapter II on the law governing appellate proceedings.

388. The Appeals Chamber must reconsider the crimes, and will do so location by location. The Appeals Chamber must determine element by element of the respective crimes whether the Trial Chamber's finding that that particular element was factually established is a finding that a reasonable trier of fact could have made. As Kordić and Čerkez are co-accused under certain counts, a finding that a particular crime was not established on the record is applicable to both of them.⁵⁸⁴

⁵⁸¹ Trial Judgement, para. 20.

⁵⁸² Trial Judgement, para. 20.

⁵⁸³ Trial Judgement, para. 20.

⁵⁸⁴ Čerkez Appeal Brief, p. 4.