

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-T
Date: 26 February 2001
Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar: Mr. Hans Holthuis

Date: 26 February 2001

PROSECUTOR

v.

DARIO KORDI]]
&
MARIO ^ ERKEZ

JUDGEMENT

The Office of the Prosecutor:

Mr. Geoffrey Nice, Q.C.
Mr. Patrick Lopez-Terres
Mr. Kenneth R. Scott
Ms. Susan Somers
Mr. Fabricio Guariglia

Counsel for the Accused:

Mr. Mitko Naumovski, Mr. Turner T. Smith, Jr., Mr. Stephen M. Sayers,
Mr. Robert Stein and Mr. Christopher G. Browning, Jr., for Dario Kordi]

Mr. Božidar Kovač] and Mr. Goran Mikulič], for Mario ^ erkez

4. Cruel Treatment (Article 3)

(a) Arguments of the parties

261. The Prosecution identifies the elements of this offence as follows:³⁵⁴ (1) the occurrence of acts or omissions causing serious mental or physical suffering or injury or constituting a serious attack on human dignity; (2) the acts or omissions were committed wilfully; (3) the victims of the acts or omissions were persons taking no active part in hostilities pursuant to Article 3 Common to the Geneva Conventions; (4) there was a nexus between the acts or omissions and an armed conflict; (5) the accused bears individual criminal responsibility for the acts or omissions under Article 7(1) or 7(3) of the Statute.

262. In respect of this offence, the Kordi} Defence “agrees with the ^ *elebi}* i Trial Chamber that cruel treatment under Article 3 is the same offense as inhuman treatment under Article 2” .³⁵⁵

263. The Prosecution Final Brief submits that

... the elements of the offense of cruel treatment are constituted by an accused’s participation in:
(a) an intentional act or omission that, judged objectively, is deliberate and not accidental; and (b) that causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.³⁵⁶

264. The Prosecution also suggests that “the *mens rea* of cruel treatment is similar to the *mens rea* for the offenses of inhuman treatment under Article 2 and outrages upon personal dignity under Common Article 3” .³⁵⁷ Considering that, in the existing case-law of the International Tribunal, this offence is considered to include acts of severe beatings, sexual mutilations, inflicting burns, forced eating of grass, contribution to an atmosphere of terror, and the use of human shields, the Prosecution “notes that the elements of cruel treatment under Common Article 3 carries the equivalent meaning and performs the same residual function as the offense of inhuman treatment under Article 2 of the Statute” .³⁵⁸

(b) Discussion

265. As the offence of “violence to life and person”, the offence of “cruel treatment” is prohibited in Common Article 3 of the Geneva Conventions. The ^ *elebi}* i Trial Chamber found that

³⁵⁴ Prosecution Pre-trial Brief, pp. 47-48.

³⁵⁵ Kordi} Pre-trial Brief, para. 74. In the context of the submissions, Articles 2 and 3 are those of the Statute.

³⁵⁶ Prosecution Final Brief, para. 124.

³⁵⁷ Prosecution Final Brief, para. 125.

³⁵⁸ Prosecution Final Brief, para. 128. See also para. 127.

cruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.³⁵⁹

The *^elebici* Trial Chamber went on to conclude that “cruel treatment” is “equivalent to the offence of inhuman treatment in the framework of the grave breaches provisions of the Geneva Conventions.”³⁶⁰ The Trial Chamber sees no reason to depart from these findings.

5. Inhumane Acts (Article 5)

(a) Arguments of the parties

266. The Prosecution submits that the specific elements of the crime of inhumane acts are identical to the elements of the Article 2 crime of inhumane treatment: (a) the infliction of serious mental or physical suffering or injury, or a serious attack on human dignity; and (b) the accused must have intended unlawfully to inflict such suffering or to attack human dignity.³⁶¹ The Prosecution further contends that there is no additional requirement that these acts or omissions be committed with the specific intent to cause suffering or attack human dignity. The *mens rea* element is fulfilled as long as the act “judged objectively, is deliberate and not accidental”.³⁶²

267. With respect to the *actus reus* for inhumane acts, the Kordic Defence submits that the acts must have caused intense and severe mental or physical suffering, and that under the circumstances, the acts were unjustifiable.³⁶³ As for the *mens rea*, the Defence asserts that the acts must have been committed with a specific intent to take part in the furtherance of formal government policy or plan and with discriminatory intent.³⁶⁴

268. The Cerkez Defence submits that inhumane treatment is defined as action of violent behaviour, but not as violent as torture. Relevant factors in determining inhuman treatment are premeditation, long duration, intensive physical and psychological suffering and acute psychiatric disturbances.³⁶⁵

³⁵⁹ *Celebici* Trial Judgement, para. 552.

³⁶⁰ *Celebici* Trial Judgement, paras. 551 and 552. The *^elebici* Trial Chamber noted the observation of the *Tadić* Trial Chamber that “cruel treatment is treatment that is inhuman”; *Celebici* Trial Judgement, para. 550.

³⁶¹ Prosecution Final Brief, Annex 5, para. 212.

³⁶² Prosecution Final Brief, Annex 5, para. 212, citing *Celebici* Trial Judgement, para. 543, and *Blaškić* Trial Judgement, paras. 154-155.

³⁶³ Kordic Pre-trial Brief, Vol. III, p. 11.

³⁶⁴ Kordic Pre-trial Brief, Vol. III, p. 11.

³⁶⁵ Cerkez Final Brief, p. 109.