

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-96-21-A  
Date: 20 February 2001  
Original: ENGLISH

IN THE APPEALS CHAMBER

Before: Judge David Hunt, Presiding  
Judge Fouad Riad  
Judge Rafael Nieto-Navia  
Judge Mohamed Bennouna  
Judge Fausto Pocar

Registrar: Mr Hans Holthuis

Judgement of: 20 February 2001

PROSECUTOR

V

**Zejnir DELALIC, Zdravko MUCIC (aka "PAVO"), Hazim DELIC  
and Esad LANDŽO (aka "ZENGA")**

(" ^ *ELEBICI* Case")

JUDGEMENT

Counsel for the Accused:

Mr John Ackerman and Ms Edina Rešidovi} for Zejnir Delalic  
Mr Tomislav Kuzmanovic and Mr Howard Morrison for Zdravko Mucic  
Mr Salih Karabdic and Mr Tom Moran for Hazim Delic  
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

The Office of the Prosecutor:

Mr Upawansa Yapa  
Mr William Fenrick  
Mr Christopher Staker  
Mr Norman Farrell  
Ms Sonja Boelaert-Suominen  
Mr Roeland Bos

- b. committed against a protected person.

Cruel treatment as a violation of the laws or customs of war is

- a. an intentional act or omission [...] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity,<sup>656</sup>
- b. committed against a person taking no active part in the hostilities.

The offence of wilfully causing great suffering under Article 2 contains an element not present in the offence of cruel treatment under Article 3: the protected person status of the victim. Because protected persons necessarily constitute individuals who are not taking an active part in the hostilities, the definition of cruel treatment does not contain a materially distinct element—that is, it does not *require* proof of a fact that is not required by its counterpart. As a result, the first prong of the test is not satisfied, and it thus becomes necessary to apply the second prong of the test. Because wilfully causing great suffering under Article 2 contains an additional element and more specifically applies to the situation at hand, that conviction must be upheld, and the Article 3 conviction must be dismissed.

425. The third pair of double convictions at issue are torture under Article 2 and torture under Article 3. Because the term itself is identical under both provisions, the sole distinguishing element stems from the protected person requirement under Article 2. As a result, torture under Article 2 contains an element requiring proof of a fact not required by torture under Article 3, but the reverse is not the case, and so the first prong of the test is not satisfied. Again, it becomes necessary to apply the second prong of the test. Because torture under Article 2 contains an additional element that is required for a conviction to be entered, that conviction must be upheld, and the Article 3 conviction must be dismissed.

426. The final pair of double convictions at issue are “inhuman treatment” under Article 2 and “cruel treatment” under Article 3. Cruel treatment is defined above.<sup>657</sup> Inhuman treatment is

- a. an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity,<sup>658</sup>
- b. committed against a protected person.

<sup>656</sup> *Jelisić* Judgement, para 41; Trial Judgement, para 552; *Blaskić* Judgement, para 186.

<sup>657</sup> See para 424 above.

<sup>658</sup> *Blaskić* Judgement, para 154; see also Trial Judgement, para 543.

Again, the sole distinguishing element stems from the protected person requirement under Article 2. By contrast, cruel treatment under Article 3 does not require proof of a fact not required by its counterpart. Hence the first prong of the test is not satisfied, and applying the second prong, the Article 3 conviction must be dismissed.

#### B. Conclusion

427. For these reasons, the Appeals Chamber finds that, of the double convictions entered by the Trial Chamber, only the Article 2 convictions must be upheld, and the Article 3 convictions must be dismissed.

Mucic: Count 13: upheld

Count 14: dismissed

Count 33: upheld

Count 34: dismissed

Count 38: upheld

Count 39: dismissed

Count 44: upheld

Count 45: dismissed

Count 46: upheld

Count 47: dismissed.

Delic: Count 1: dismissed--see section on Deli} factual grounds

Count 2: dismissed--see section on Deli} factual grounds

Count 3: upheld

Count 4: dismissed

Count 11 (wilfully causing great suffering or serious injury to body or health under Article 2 of the Statute): upheld<sup>659</sup>

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<sup>659</sup> Deli} was found not guilty of the original charges under Counts 11 and 12 (as printed in the Amended Indictment), namely, a grave breach of the Geneva Conventions of 1949 (wilful killing) and a violation of the laws or customs of war (murder). He was, however, found guilty under these same counts for the crimes of a grave breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a violation of the laws or customs of war (cruel treatment).

Count 12 (cruel treatment under Article 3 of the Statute): dismissed

Count 18: upheld

Count 19: dismissed

Count 21: upheld

Count 22: dismissed

Count 42: upheld

Count 43: dismissed

Count 46: upheld

Count 47: dismissed.

Landžo: Count 1: upheld

Count 2: dismissed

Count 5: upheld

Count 6: dismissed

Count 7: upheld

Count 8: dismissed

Count 11 (wilfully causing great suffering or serious injury to body or health under Article 2 of the Statute): upheld<sup>660</sup>

Count 12 (cruel treatment under Article 3 of the Statute): dismissed

Count 15: upheld

Count 16: dismissed

Count 24: upheld

Count 25: dismissed

Count 30: upheld

Count 31: dismissed

Count 36: upheld

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<sup>660</sup> Landžo was found not guilty of the original charges under Counts 11 and 12 (as printed in the Amended Indictment), namely, a grave breach of the Geneva Conventions of 1949 (wilful killing) and a violation of the laws or customs of war (murder). He was, however, found guilty under these same counts for the crimes of a grave breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a violation of the laws or customs of war (cruel treatment).

Count 37: dismissed

Count 46: upheld

Count 47: dismissed

### C. Impact on Sentencing

428. If, on application of the first prong of the above test, a decision is reached to cumulatively convict for the same conduct, a Trial Chamber must consider the impact that this will have on sentencing. In the past, before both this Tribunal and the ICTR, convictions for multiple offences have resulted in the imposition of distinct terms of imprisonment, ordered to run concurrently.<sup>661</sup>

429. It is within a Trial Chamber's discretion to impose sentences which are either global, concurrent or consecutive, or a mixture of concurrent and consecutive.<sup>662</sup> In terms of the final sentence imposed, however, the governing criteria is that it should reflect the totality of the culpable conduct (the 'totality' principle),<sup>663</sup> or generally, that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate.

430. Therefore, the overarching goal in sentencing must be to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender. This can be achieved through either the imposition of one sentence in respect of all offences, or several sentences ordered to run concurrently, consecutively or both. The decision as to how this should be achieved lies within the discretion of the Trial Chamber.

431. Of the double convictions imposed on the accused in this case, only the Article 2 convictions have been upheld; the Article 3 convictions have been dismissed. The Appeals

<sup>661</sup> Such sentences have been confirmed by the Appeals Chamber in the *Tadic* Sentencing Appeal Judgement and the *Furund'ija* Appeal Judgement.

<sup>662</sup> See also Rule 101(C) of the Rules: "The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently."

<sup>663</sup> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate.' (footnote omitted) D.A. Thomas, *Principles of Sentencing* (Heinemann: London, 1980), p 56; See also *R v Bocskai* (1970) 54 Cr. App. R. 519, at 521: "[...] when consecutive sentences are imposed the final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive." Section 28(2)(b) Criminal Justice Act 1991 preserves this principle. It applies in all cases where consecutive sentences are imposed, e.g., *R v Reeves*, 2 Cr. App. R (S) 35, CA; *R v Jones*, [1996] 1 Ar. App.R (S) 153; In Canada see e.g., *R v M (CA)*, [1996] 1 SCR 500: "the global sentence imposed should reflect the overall culpability of the offender and the circumstances of the offence"; In Australia: *Postiglione v R*, 145 A.L.R. 408; *Mill v R* (1988) 166 CLR 59 at 63; *R v Michael Arthur Watts*, [2000] NSWCCA 167 (the court should look at the individual offences, determine the sentences for each of them and look at the total sentence and structure a sentence reflecting that totality); *R v Mathews*, Supreme Court of New South Wales, 16 July 1991.