

**Declassified to Public
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ANNEX A

AUTHORITY 26

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-T
Date: 16 November 1998
Original: English

IN THE TRIAL CHAMBER

Before: Judge Adolphus G. Karibi-Whyte, Presiding
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 16 November 1998

PROSECUTOR

v.

ZEJNIL DELALI]
ZDRAVKO MUCI] also known as "PAVO"
HAZIM DELI]
ESAD LAND@O also known as "ZENGA"

JUDGEMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Teresa McHenry

Counsel for the Accused:

Ms. Edina Re{idovi}, Mr. Eugene O'Sullivan, for Zejnil Delali}
Ms. Nihada Buturovi}, Mr. Howard Morrison, for Zdravko Muci}
Mr. Salih Karabdi}, Mr. Thomas Moran, for Hazim Deli}
Ms. Cynthia McMurrey, Ms. Nancy Boler, for Esad Land`o

(d) Necessary and Reasonable Measures

394. The legal duty which rests upon all individuals in positions of superior authority requires them to take all necessary and reasonable measures to prevent the commission of offences by their subordinates or, if such crimes have been committed, to punish the perpetrators thereof. It is the view of the Trial Chamber that any evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard *in abstracto* would not be meaningful.

395. It must, however, be recognised that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers. The question then arises of what actions are to be considered to be within the superior's powers in this sense. As the corollary to the standard adopted by the Trial Chamber with respect to the concept of superior, we conclude that a superior should be held responsible for failing to take such measures that are within his material possibility. The Trial Chamber accordingly does not adopt the position taken by the ILC on this point, and finds that the lack of formal legal competence to take the necessary measures to prevent or repress the crime in question does not necessarily preclude the criminal responsibility of the superior.⁴²⁵

(e) Causation

396. As noted above in sub-section (a), the Defence asserts the existence of a separate requirement of causation. It is contended that, if the superior's failure to act did not cause the commission of the offence, the commander cannot be held criminally liable for the acts of his subordinates. The Defence submits that this applies also to a commander's failure to punish an offence, as it may be argued that inaction in the form of failure to punish is the cause of future offences.⁴²⁶

commander, declaring them to be criminally liable if they "either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit" crimes within the jurisdiction of the court. See *ibid.*, Art. 28(2)(a).

⁴²⁵ ILC Draft Code, in which the International Law Commission stated its view as follows: "for the superior to incur responsibility, he must have had the legal competence to take measures to prevent or repress the crime and the material possibility to take such measures. Thus, a superior would not incur criminal responsibility for failing to perform an act which was impossible to perform in either respect", pp. 38-39.

⁴²⁶ Motion to Dismiss, RP D5629.

508. Thus, the Commentary first draws a distinction between this offence and the offence of torture, on the basis that the prohibited purpose required in order for an act to constitute the latter is not required for the former. While the Trial Chamber is in accord with this fundamental distinction, the presence of the prohibited purpose of punishment may raise the causing of great suffering or serious injury to the level of torture as defined above.

509. Secondly, the Commentary suggests that "causing great suffering" encompasses more than mere physical suffering, and includes moral suffering. This view is supported by the plain, ordinary meaning of the words "wilfully causing great suffering", which are not qualified by the words "to body or health", as is the case with "causing injury". Thus, the suffering incurred can be mental or physical.

510. Thirdly, the Commentary posits a possible criterion for judging the seriousness of the injury, being an incapacity to work. While this may well be the case in some situations, when ascertaining the meaning of the term "serious" in the absence of other interpretive material, the Trial Chamber must look to the plain ordinary meaning of the word. The Oxford English Dictionary defines this word as "not slight or negligible". Similarly, the term "great" is defined as "much above average in size, amount or intensity". The Trial Chamber therefore views these quantitative expressions as providing for the basic requirement that a particular act of mistreatment results in a requisite level of serious suffering or injury.

(iii) Findings

511. The Trial Chamber thus finds that the offence of wilfully causing great suffering or serious injury to body or health constitutes an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury. It covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could also fall within the ambit of this offence.

(d) Inhuman Treatment

512. There are several counts of the Indictment which charge the accused with inhuman treatment, punishable under Article 2(b) of the Statute. The following discussion seeks to establish the content of the prohibition on inhuman (or inhumane) treatment.

Bouton v. Uruguay, the Committee found that being forced to stand blindfolded and bound for 35 hours, while listening to the cries of other detainees being tortured, being threatened with punishment, and being forced to sit blindfolded and motionless on a mattress for many days, constituted inhuman treatment.⁵⁶⁴

541. Based on the Human Rights Committee's enumeration of the distinctions between torture and inhuman and degrading treatment, Nowak has remarked that inhuman treatment must include "all forms of imposition of severe suffering that are unable to be qualified as torture for lack of one of its essential elements."⁵⁶⁵ Furthermore, in his view, inhuman treatment also includes ill-treatment that does not reach the requisite level of severity to qualify as torture.⁵⁶⁶

542. Clearly, the international adjudicative bodies that have considered the application of this offence of inhuman(e) treatment have tended to define it in relative terms. That is, inhuman treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture. Furthermore, the offence need not have a prohibited purpose or be committed under official sanction as required by torture.

(iii) Findings

543. In sum, the Trial Chamber finds that inhuman treatment is 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. The plain, ordinary meaning of the term inhuman treatment in the context of the Geneva Conventions confirms this approach and clarifies the meaning of the offence. Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed "grave breaches" in the Conventions fall. Hence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment.

⁵⁶⁴ *Soriano de Bouton v. Uruguay*, (37/1978), Human Rights Committee, GAOR, 12th Session.

⁵⁶⁵ Manfred Nowak - UN Covenant on Civil and Political Rights, CCPR Commentary, p.131, (hereafter "Nowak Commentary").

⁵⁶⁶ Nowak Commentary, p.131.

544. In this framework of offences, all acts found to constitute torture or wilfully causing great suffering or serious injury to body or health would also constitute inhuman treatment. However, this third category of offence is not limited to those acts already incorporated into the other two and extends further to other acts which violate the basic principle of humane treatment, particularly the respect for human dignity. Ultimately, the question of whether any particular act which does not fall within the categories of the core group is inconsistent with the principle of humane treatment, and thus constitutes inhuman(e) treatment, is a question of fact to be judged in all the circumstances of the particular case.

(e) Cruel Treatment

545. The offences charged as cruel treatment in the Indictment are brought under Article 3 of the Statute, either in the alternative to charges of torture, or additional to charges of wilfully causing great suffering or serious injury or inhuman treatment, brought under Article 2 of the Statute.

(i) Arguments of the Parties

546. The Prosecution argues that cruel treatment has the same elements as the offence of inhuman treatment and encompasses situations where the accused mistreats the victim and subjects him or her to mental or physical pain or suffering, without thereby pursuing any of the purposes underlying the offence of torture.⁵⁶⁷ In its Response to the Motion to Dismiss,⁵⁶⁸ the Prosecution refers to the discussion in the *Tadić Judgment* of the meaning of "cruel treatment", in support of this proposition.⁵⁶⁹ In that case, Trial Chamber II held that the prohibition on cruel treatment is a means to an end, being that of "ensuring that persons taking no active part in the hostilities shall in all circumstances be treated humanely".⁵⁷⁰ The Judgement further refers to article 4 of Additional Protocol II, wherein the prohibition refers to "violence to the life, health, and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment."⁵⁷¹

⁵⁶⁷ Prosecution Closing Brief, RP D2717; Prosecution Pre-Trial Brief, RP D2825.

⁵⁶⁸ Prosecution Response to the Motion to Dismiss, RP D5765.

⁵⁶⁹ *Tadić Judgment*, paras. 723-726.

⁵⁷⁰ *Tadić Judgment*, para. 723.

⁵⁷¹ *Tadić Judgment*, para. 725.

1291. Pursuant to Rule 99 of the Rules, the Trial Chamber orders that Zejnil Delalic be released immediately from the United Nations Detention Unit. This order is without prejudice to any such further order as may be made by the Trial Chamber pursuant to sub-Rule 99(B).

Done in English and French, the English text being authoritative.

Adolphus G. Karibi-Whyte
Presiding

Elizabeth Odio Benito

Saad Saood Jan

Dated this sixteenth day of November 1998
At The Hague,
The Netherlands.

[Seal of the Tribunal]