

SUMMARY OF APPEALS CHAMBER JUDGEMENT

The Prosecutor v. Zlatko Aleksovski **24 March 2000**

This hearing is for the Appeals Chamber to announce its judgement in this case and to pass sentence. Oral submissions were heard on 9 February of this year. After hearing those oral submissions the Chamber dismissed the Appellant's appeal against conviction, with reasons to be given later, reserved judgement on the first two grounds of the Prosecution's appeal, but allowed the Prosecution appeal against sentence. First, two preliminary matters:

1. Judge Robinson and Judge Wang have participated in the hearing of the case, in deliberations and in the drafting of the judgement. Due to exceptional circumstances, they cannot attend today's hearing. The Acting President has made an Order authorising today's hearing in their absence.

2. Copies of the judgement, which is in writing, will be made available by the Registrar to the parties. The statement I read today is not the judgement of the Appeals Chamber, but, according to the Tribunal's practice, a summary of it.

First, the Appellant's Appeal. He appeals on four grounds:

Ground 1: The first of these grounds is that the Trial Chamber failed to establish that the accused had discriminatory intent, which the Appellant says is necessary to convict him for the offences under Article 3 of the Statute of the International Tribunal.

This ground of appeal is rejected. There is nothing in the nature of the crimes falling within Article 3 of the Statute, nor in the Statute generally, which leads to a conclusion that such offences are punishable only if they are committed with discriminatory intent. The general requirements which must be met for prosecution of offences under Article 3 are identified by the Appeals Chamber in the *Tadic* Jurisdiction Decision of October, 1995. The relevant violation of international humanitarian law must be "serious" in the sense that it "must constitute a breach of a rule protecting important values and the breach must involve grave consequences for the victim". This in no way imports a requirement that the violation must be committed with discriminatory intent.

There is nothing in the provisions of the major international instruments which are encompassed in Article 3 of the Statute to suggest that violations must be accompanied by a discriminatory intent. The language of common Article 3(1)(c) of the Geneva Conventions, which is applicable "without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria", does not restrict the acts prohibited by that article to acts committed with a discriminatory motivation. Nor is there evidence in customary international law, which would indicate the development of such a restriction. In the opinion of this Chamber, specific discriminatory intent is required only for the international crimes of persecution and genocide.

For these reasons the Chamber finds that a discriminatory intent or motive is not an element of offences under Article 3 of the Statute; nor of the offence of outrages upon personal dignity. This ground of appeal accordingly fails.

Ground two: This ground consists of two parts:

(1) that the conduct proved, in particular the violence against the detainees, was not sufficiently grave as to warrant a conviction under Article 3 of the Statute;

(2) that the Appellant's conduct may have been justified by necessity.

During the oral hearing on 9 February 2000, counsel for the Appellant appeared to abandon the first of these parts. Nevertheless, the Chamber has considered whether the Appellant's conduct was serious enough to constitute a violation of Article 3 of the Statute.

The Appeals Chamber can find no reason to doubt the seriousness of these crimes. The victims endured physical and psychological abuse and outrages upon personal dignity.

Secondly, the Appellant submits that the defence of extreme necessity is applicable, because he had attempted to protect the civilians from exposure to greater harm outside the Kaonik facility by detaining them. It is doubtful whether this defence was raised during the trial; and the Appeals Chamber considers that, in general, accused before this Tribunal have to raise all possible defences during the trial and cannot raise a defence for the first time on appeal. However, the Chamber has considered whether such a defence was available to the Appellant.

The Chamber is of the view that this ground of appeal is entirely misconceived. The Appellant does not and cannot argue, in the present case, that he was faced with only two options, namely, mistreating the detainees or freeing them. The Appellant, faced with the actual choice of ill-treating the detainees or not, was convicted for choosing the former. This ground of appeal thus fails.

Ground Three: The Appellant submits that the Prosecution has not proved beyond reasonable doubt that the alleged outrages upon personal dignity occurred; in particular, he challenges the Trial Chamber's reliance on subjective witness testimony, in the absence of medical reports or expert evidence.

The Appeals Chamber finds that neither the Statute nor the Rules oblige a Trial Chamber to require medical reports or other scientific evidence as proof of a material fact. Similarly, the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration. Trial Chambers are best placed to hear, assess and weigh the evidence, including witness testimonies, presented at trial. It is for a Trial Chamber to consider whether a witness is reliable and whether the evidence presented is credible.

The Appeals Chamber, therefore, has to give a margin of deference to the Trial Chamber's evaluation of the evidence presented at trial. The Appeals Chamber may overturn the Trial Chamber's finding of fact only where the evidence relied on could not have been accepted by any reasonable Tribunal or where the evaluation of the evidence is wholly erroneous.

The Appeals Chamber is satisfied that the Trial Chamber did not err in the exercise of its discretion when it evaluated the testimony of the various witnesses. The Trial Chamber accepted such testimony as sufficient and credible, as it was entitled to do. The Trial Chamber, therefore, applied the standard of proof correctly. This ground of appeal fails.

Ground 4: the Appellant submits that the Trial Chamber erred in the application of Article 7(3) of the Statute. The Appellant contests the Trial Chamber's findings that he "had factual authority over the guards" and that he failed to report them to superior authorities. He submits that he lacked control over the HVO Military Police and that his role was purely administrative and representative and of a civilian nature.

This ground of appeal is essentially one of fact. The Appeals Chamber finds that it does not matter whether the Appellant was a civilian or military superior. What must be proved is that he had the powers to prevent or to punish crimes in terms of Article 7(3). The Trial Chamber indeed found that he had such powers and concluded that he was a superior pursuant to Article 7(3). Unless there is good reason to believe that the Trial Chamber has drawn unreasonable inferences from the evidence, it is not open to the Appeals Chamber to disturb the factual conclusions of the Trial Chamber. In this

case, the Appellant has failed to convince the Chamber that unreasonable conclusions were drawn by the Trial Chamber in this respect. The fourth ground of appeal must fail for lack of merit.

The Appeals Chamber now turns to the Prosecution's Appeal, which consists of three grounds.

Ground one: The Prosecution submits that the Trial Chamber, in acquitting the Appellant on Counts 8 and 9, erred in its application of Article 2 of the Statute for these reasons: -

1. The Trial Chamber applied the wrong legal test to determine whether the armed conflict in the present case was international. The Prosecution submits that the correct test is the "overall control" test, as set out in the Judgement of the Appeals Chamber in *Tadic* of July, 1999.
2. The Trial Chamber erred in applying a strict nationality requirement to determine whether the victims were "protected persons" within the meaning of Article 4 of Geneva Convention IV.

The Prosecution submits that both requirements for the application of Article 2 of the Statute are in fact met in this case. It submits that the criminal liability of the Appellant under Counts 8 and 9 can be established on the basis of the trial record because it arises out of the same factual allegations as Count 10, on which the Appellant was convicted by the Trial Chamber.

The first question is whether the Appeals Chamber is bound by its previous decision in *Tadic*. The Chamber recognises that in both the common law and civil law systems, the highest courts, whether as a matter of doctrine or of practice, will normally follow their previous decisions and will only depart from them in exceptional circumstances. This is to preserve the principles of consistency, certainty and predictability. The need to preserve these principles is particularly great in criminal law where the liberty of the individual is implicated. The same principles apply in International Tribunals.

The fundamental purpose of this Tribunal is the prosecution of persons responsible for serious violations of international humanitarian law. The Appeals Chamber considers that this purpose is best served by an approach which, while recognising the need for certainty, stability and predictability, also recognises that there may be instances in which the strict, absolute application of that principle may lead to injustice.

The Chamber, therefore, concludes that a proper construction of the Statute, taking due account of its text and purpose, yields the following conclusion: in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice. It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception.

The Appeals Chamber will thus follow its findings on Article 2 in the *Tadic* Judgement, since, after careful analysis, it is unable to find any compelling reason to depart from it. The "overall control test", set out by the Appeals Chamber *Tadic* is the applicable law. The test provides greater protection for civilian victims of armed conflicts and is wholly consistent with the fundamental purpose of Geneva Convention IV, i.e. to ensure protection of civilians to the maximum extent possible. In the instant case, the Appeals Chamber finds that the Trial Chamber failed to apply the correct test.

The Appeals Chamber also accepts the Prosecution submission that if the conflict in this case is characterised as international, it follows that the victims were protected persons under Article 4 of Geneva Convention IV. However, Article 4 may also be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors. This extended application of Article 4 is particularly apposite in the context of present-day

inter-ethnic conflicts. In the instant case, the Appeals Chamber finds that the Trial Chamber erred in its conclusion that the victims were not protected persons.

As a result, the Appeals Chamber has considered whether it should reverse the acquittals on Counts 8 and 9. The Chamber has come to the conclusion that no useful purpose would be served in doing so. This is because:

1. The substantive issues for determination on this ground are questions of law rather than fact.
2. The acts underlying these counts and Count 10 are the same. Therefore, any additional sentence imposed would be concurrent on all counts, and would thus not lead to any increase in sentence. Accordingly, the Appeals Chamber will not remit the case to the Trial Chamber for re-examination and it declines to reverse the acquittals.

Ground two: The Prosecution submits that the Trial Chamber failed to deal with part of its case in support of Count 10, namely that the outrages on personal dignity constituted by physical and psychological harm took place not only inside the compound, but also outside it where the prisoners worked under the control of the HVO.

During the trial considerable evidence was given by prisoners of mistreatment while digging trenches outside the compound. Indeed, the defence did not dispute that such mistreatment took place. The Trial Chamber found that the accused was aware of such mistreatment but declined to find him responsible for it, although it did find that he aided and abetted forced labour and use of prisoners as human shields outside the prison.

The Appeals Chamber accepts that the only finding which could reasonably have been made by the Trial Chamber, in the light of its other findings, was that the Appellant was responsible for the mistreatment by the HVO outside the prison. The Appeals Chamber thus finds the Appellant guilty of aiding and abetting the mistreatment by the HVO outside the prison.

This finding does not alter the verdict of guilty entered by the Trial Chamber on Count 10. The additional finding is, strictly, a matter to be taken into account when the Appeals Chamber comes to impose a new sentence for Count 10; but, in view of its limited nature, the Appeals Chamber does not believe that the additional finding of itself warrants any heavier sentence.

Ground three: The Prosecution submits that the Trial Chamber erred in imposing a sentence of two-and-a-half years on the Appellant, arguing that this sentence is 'manifestly disproportionate' to the crimes committed.

Having considered the submissions and all the circumstances of the case, the Appeals Chamber has come to the conclusion that the Trial Chamber erred in its imposition of sentence. In particular, the Appeals Chamber finds that the Trial Chamber erred in not having sufficient regard to the gravity of the conduct of the Appellant for the following reasons. His offences were not trivial. Instead of preventing it, the Appellant as a superior involved himself in violence against those whom he should have been protecting, and allowed them to be subjected to psychological terror. He also failed to punish those responsible. Most seriously, the Appellant, by participating in the selection of detainees to be used as human shields and for trench digging, as he must have known, was putting at risk the lives of those entrusted to his custody. With his direct participation as a commander he provided additional encouragement to his subordinates to commit similar acts. The combination of these factors should, therefore, have resulted in a longer sentence and should certainly not have provided grounds for mitigation.

While the Appeals Chamber accepts the Prosecution submission on the general importance of deterrence as a consideration in sentencing for international crimes, it concurs with the Appeals

Chamber's statement in *Tadic* that "this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal". An equally important factor is retribution. This is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes.

The Appeals Chamber is satisfied that the Trial Chamber was in error in sentencing the Appellant to two and a half years imprisonment. The question then arises whether the Appeals Chamber should review the sentence. Appellate review of sentencing is available in the major legal systems but is usually exercised sparingly. In *Tadic*, the Appeals Chamber held that it should not intervene in the exercise of the Trial Chamber's discretion with regard to sentence unless there is a "discernible error".

In applying that test to the instant case the Appeals Chamber finds that there was a discernible error in the Trial Chamber's exercise of discretion in imposing sentence. That error consisted of giving insufficient weight to the gravity of the conduct of the Appellant and failing to treat his position as commander as an aggravating feature in relation to his responsibility under Article 7(1) of the Statute. The sentence imposed by the Trial Chamber was manifestly inadequate.

In imposing a revised sentence, the Appeals Chamber bears in mind the element of double jeopardy in this process in that the Appellant has had to appear for sentence twice for the same conduct, suffering the consequent anxiety and distress, and also that he has been detained a second time after a period of release of nine months. Had it not been for these factors the sentence would have been considerably longer.

For the foregoing reasons, THE APPEALS CHAMBER, UNANIMOUSLY,

1. DENIES the Appellant's four grounds of appeal against Judgement;
2. ALLOWS IN PART the Prosecution's first ground of appeal, but DECLINES to reverse the acquittals on Counts 8 and 9;
3. ALLOWS the Prosecution's second ground of appeal;
4. ALLOWS the Prosecution's third ground of appeal and REVISES the sentence the Appellant received at trial.

The Appeals Chamber sentences Zlatko Aleksovski to seven years' imprisonment, with deduction therefrom of 3 years and 12 days for the time served in detention.

It directs that the imprisonment be served in a State to be designated by the International Tribunal in accordance with Article 27 of the Statute and Rule 103 of the Rules.