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APPEALS CHAMBER

CHAMBRE D'APPEL

The Hague, 8 April 2003
JP/ P.I.S. / 743e

JUDGEMENT IN THE APPEAL

THE PROSECUTOR V. ZDRAVKO MUCIĆ, HAZIM DELIĆ AND ESAD LANDŽO

APPEALS CHAMBER REJECTS ACCUSED'S APPEALS AND CONFIRMS THEIR SENTENCES: 9 YEARS FOR ZDRAVKO MUCIĆ, 18 YEARS FOR HAZIM DELIĆ, 15 YEARS FOR ESAD LANDŽO

Please find below the summary of the Judgement delivered by the Appeals Chamber composed of Judge Theodor Meron (Presiding), Judge Fausto Pocar, Judge Mohamed Shahabuddeen, Judge David Hunt and Judge Asoka de Zoysa Gunawardana, read out by the Presiding Judge.

The Appeals Chamber is sitting today to deliver its second judgment in the case of Zdravko Mucić, Hazim Delić and Esad Landžo. Judge Gunawardana, who is hearing a trial in Arusha, has been unable to join the Bench today, but he has fully taken part in the preparation of the judgment. The proceedings without one judge are authorised by Rule 15*bis* of the Rules of Procedure and Evidence.

The three appellants were convicted after their trial on charges that, in their respective capacities as commander, deputy commander and guard at the Čelebići camp in Central Bosnia and Herzegovina, they were responsible for killing, torturing, sexually assaulting, beating and otherwise subjecting detainees in that camp to cruel and inhumane treatment. They received effective total sentences of imprisonment of, respectively, seven, twenty and fifteen years.

The appellants appealed against their convictions and sentences, and the Appeals Chamber previously dealt with those appeals in a judgment which:

- upheld their appeal against cumulative convictions based upon the same acts for both grave breaches of the Geneva Conventions and violations of the laws or customs of war, dismissing the charges for the violations of the laws or customs of war;
- upheld an appeal by Delić against one of his convictions for wilful killing;
- upheld an appeal by the prosecution against the inadequacy of the sentence imposed upon Mucić; and
- upheld a complaint by Mucić that the Trial Chamber had erred when sentencing him by making an adverse reference to the fact that he had not given evidence at the trial.

All the other grounds of appeal were dismissed, including a challenge by Delić to a number of counts of wilful killing and torture (constituted by rape and repeated incidents of forcible sexual intercourse).

The Appeals Chamber remitted to a new Trial Chamber a number of issues relating to the adjustment of the sentences which had been imposed as a result of the rulings which had been made in the judgment on appeal. The new Trial Chamber determined that:

- no adjustment should be made for the dismissal of the cumulative convictions;
- the twenty year sentence imposed upon Delić should be reduced to eighteen years to reflect the quashing of his conviction on one count of wilful killing;
- there should be "a small reduction" given to Mucić as a result of the adverse reference by the original Trial Chamber when sentencing him to the fact that he had not given evidence at the trial; and
- an appropriate revised sentence for Mucić was a sentence of imprisonment for nine years.

The three appellants have appealed again to the Appeals Chamber, and the judgment being delivered today disposes of that second appeal. For the purposes of this hearing, I propose to summarise briefly the issues which arose during the second appeal and the rulings of the Appeals Chamber in relation to those issues. I emphasise that this is a summary only, and that it forms no part of the judgment which is delivered. The only authoritative account of the Appeal Chamber's rulings, and of its reasons for those rulings, is to be found in the written judgment, copies of which will be made available to the parties and to the public at the conclusion of this hearing.

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- 1. All three appellants challenged the power of the Appeals Chamber to remit limited issues to a new Trial Chamber and the ruling by the Trial Chamber that further evidence upon the issue of sentencing was unnecessary.**

The Appeals Chamber considered its power to remit such issues at the time when it exercised that power in its judgment in the earlier appeal. An appeal from the Trial Chamber's determination of those limited issues does not give to the parties the opportunity to appeal against the earlier decision of the Appeals Chamber to remit those limited issues to the Trial Chamber. Nor does the Appeals Chamber consider it appropriate to reconsider its power to remit limited issues to a new Trial Chamber. Its power to remit limited issues is clear. The Appeals Chamber which heard the first appeal was prevented by circumstances from conducting a further hearing, before delivering its judgment, for the parties to make submissions as to the appropriate sentences to be imposed. It therefore had an inherent power to remit those issues to a Trial Chamber. None of the evidence which the appellants wished to tender at the hearing was relevant to the limited issues remitted, and the ruling by the new Trial Chamber, effectively that such evidence was inadmissible, was correct. There was in any event no prejudice suffered by the appellants, who gained benefits which they would not have had if the adjustments to their sentences had been determined by the Appeals Chamber itself – the opportunity to be heard further upon the remitted issues in the light of the judgment which had been given, and to appeal if they were dissatisfied by the resolution of those issues.

- 2. All three appellants challenged the finding by the Trial Chamber that no adjustment was appropriate despite the dismissal of the cumulative convictions.**

The Appeals Chamber had emphasised in its earlier judgment that the governing criterion in sentencing is that the sentence should reflect the totality of the offender's conduct (the "totality" principle), and that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate. The Trial Chamber in the judgment now under appeal concluded that the totality of the criminal conduct of each of the three appellants had not been reduced by reason of the quashing of the cumulative convictions.

The Appeals Chamber has accepted that the cumulative convictions of themselves involve an additional punishment – not only by reason of the social stigmatisation inherent in being convicted of that additional crime, but also the risk that, under the law of the State enforcing the sentence, the eligibility of a convicted person for early release will depend to some extent upon the number or nature of the convictions entered. The quashing of the cumulative convictions, however, removed the punishment involved in the additional convictions themselves. The issue which the new Trial Chamber had to determine in the circumstances of the present case was whether, in determining the length of the concurrent sentences imposed, the original Trial Chamber had also added to the length of those concurrent sentences because of those additional convictions. From statements made by the original Trial Chamber in the course of the proceedings and in its judgment, it was open to the new Trial Chamber to conclude, as it did, that the sentences would have been the same without the cumulative convictions.

- 3. Zdravko Mucić challenged the finding of the new Trial Chamber that there should be a "small" reduction to his sentence as a result of the adverse reference by the original Trial Chamber to the fact that he had not given evidence at the trial.**

The new Trial Chamber held that it was not possible to ascertain the precise effect, if any, which this comment may have had on the sentence imposed, but that it was not in a position to say that it had had no effect. Mucić has argued that the error made by the original Trial Chamber, by ignoring the burden and standard of proof, was so basic a defect that he was entitled to a reduction as substantial as the error which had been made. The Appeals Chamber has held that such an approach is fundamentally defective. An appellate tribunal does not compensate an appellant for the fact that an error was made; it adjusts the sentence to remove the effect of the error which was made. The Appeals Chamber has not been persuaded that the new Trial Chamber's characterisation of the reduction warranted by the error made by the original Trial Chamber as "small" was erroneous.

- 4. Zdravko Mucić has also challenged the nine year sentence imposed by the new Trial Chamber in substitution for the original Trial Chamber's sentence of seven years.**

The Appeals Chamber had earlier held that the original Trial Chamber, by imposing a sentence of seven years, had failed adequately to take into account (a) the influential effect of a camp commander encouraging or promoting crimes and an atmosphere of lawlessness within the camp by his ongoing failure to exercise his duties of supervision, (b) the gravity of his offences, and specifically the gravity of the underlying crimes, and (c) the fact that both direct and superior responsibility was involved in the wilful causing of great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp. The Appeals Chamber has now held that there was no error made by the new Trial Chamber in imposing a sentence of nine years, bearing in mind the

inherent gravity of the criminal conduct of Mucić, and the form and degree of his participation in the crimes for which he was convicted,

5. Hazim Delić has challenged the reduction to his twenty year sentence by only two years following the quashing of one conviction for wilful killing.

The new Trial Chamber assessed such a reduction upon the basis that there had been some reduction in the totality of Delić's criminality as a result of that conviction being quashed, but that the reduction was slight given the very serious offences for which Delić remains convicted. The Appeals Chamber has not been persuaded that the new Trial Chamber made any errors of law, or that it erred in the exercise of its discretion, in imposing the sentence of eighteen years for the remaining convictions. The new Trial Chamber had correctly approached its task upon an overall assessment of what was appropriate to the crimes for which Delić remained convicted without reference to the evidence supporting the count which had been quashed.

6. Hazim Delić has also sought the reconsideration by the Appeals Chamber of its judgment in the previous appeal, when it rejected his appeal against his conviction upon three other counts.

Delić has argued that there has been a "significant" change in the law relevant to the present case since the earlier judgment of the Appeals Chamber. He claims that, in the judgment of the Appeals Chamber in the *Kupreškić* case, the Appeals Chamber laid down a "new test" of the sufficiency of the evidence to support a conviction which, if it had been applied by the Appeals Chamber in its earlier judgment, would have resulted in the quashing of his convictions in respect of Counts 3, 18 and 31 of the indictment.

There were two issues which arose in relation to this application. The first was whether the Appeals Chamber has power to reconsider its judgments, as opposed to the power to review them in accordance with Article 26 of the Tribunal's Statute. The second was whether, if such a power exists, the Appeals Chamber should reconsider its previous judgment in the present case. The Appeals Chamber is unanimously of the view that the application for reconsideration should be rejected. Judges Shahabuddeen, Hunt and Gunawardana accept that the Appeals Chamber has the power to reconsider its judgments, but they are of the view that the application in this case should be rejected on its merits. Judge Meron and Judge Pocar do not find it necessary to determine whether the Appeals Chamber has such a power, and reserve their position on this issue. They agree that there was no intervening change in the governing legal standard. Judge Shahabuddeen has also filed a Separate Opinion in relation to this issue.

The Appeals Chamber is satisfied that, in considering whether the original Trial Chamber's conclusion of Delić's guilt beyond reasonable doubt upon those counts was one which no reasonable tribunal of fact could have reached, the Appeals Chamber had in its earlier judgment applied the same test as that applied in the *Kupreškić* case, and that the claim that the Appeals Chamber had applied a "new test" in the *Kupreškić* case is misconceived. The distinction to which the Appeals Chamber had referred in that judgment, between the reliability (or the quality) of a witness's evidence as opposed to the credibility (or truthfulness) of that witness, was directed to the issue of identification raised in that appeal in relation to the only witness who had identified the accused. The Trial Chamber in the *Kupreškić* case had acknowledged the criticisms of the credibility of that witness, but had stated that those criticisms had been outweighed by the impression which the witness had made upon the Chamber when she was giving evidence. When determining whether no reasonable tribunal of fact could have accepted that witness's evidence, it was appropriate for the Appeals Chamber to have referred to the uncertainty and the inherent frailties of identification evidence. That distinction is a well known one, and one which is not new to the Tribunal's jurisprudence. It was for these reasons that the application for reconsideration has been rejected.

7. Disposition

The Appeals Chamber makes the following orders:

1. The appeals against sentence are dismissed.
2. The sentences imposed by the Trial Chamber on 9 October 2001 are confirmed.
3. The time spent in custody for which each of the appellants is entitled to credit is, accordingly, as follows:
for Zdravko Mucić, from 18 March 1996 to the date of this Judgment; and
for both Hazim Delić and Esad Landžo, from 2 May 1996 to the date of this Judgment.
4. The application by Hazim Delić to have his appeal against conviction reconsidered is rejected.

The full text of the Judgment is available upon request at the Public Information Services and is also available on the Internet site of the Tribunal.