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International
Criminal Tribunal
for the former
Yugoslavia

Tribunal Pénal
International pour
l'ex-Yougoslavie

APPEALS JUDGEMENT SUMMARY

(Exclusively for the use of the media. Not an official document)

APPEALS CHAMBER

The Hague, 3 July 2008

Appeals Judgement Summary For Naser Orić

Please find below the summary of the appeals judgement today read out by Judge Schomburg:

Background information

The events giving rise to this case took place in the municipality of Srebrenica, in Bosnia and Herzegovina, and in its surrounding area, between June 1992 and March 1993. In its indictment, the Prosecution alleged that between 24 September 1992 and 20 March 1993, members of the Military Police of the municipality of Srebrenica under the control of Naser Orić detained Serb individuals at the police station in Srebrenica and at a “building behind the Srebrenica Municipal Building”, hereinafter referred to as “the Building”. A number of detainees were subjected to serious abuse and injury and some were beaten to death. The Prosecution also alleged that between 10 June 1992 and 8 January 1993, Bosnian Muslim armed units under the command and control of Naser Orić burned and destroyed buildings, dwellings and other property in the course of military operations against the villages of Ratkovići, Ježestica, Fakovići, Bjelovac, Kravica, Šiljkovići and surrounding or adjoining hamlets.

The Prosecution charged Naser Orić with individual criminal responsibility under Article 7(3) of the Statute of the Tribunal for murder and cruel treatment and for wanton destruction of cities, towns or villages not justified by military necessity as violations of the laws or custom of war. The Prosecution also charged Naser Orić with individual criminal responsibility under Article 7(1) of the Statute for instigating and aiding and abetting the crime of unlawful and wanton destruction not justified by military necessity.

In its Judgement of 30 June 2006, the Trial Chamber found that crimes of murder and cruel treatment were committed against Serbs detained in Srebrenica during two periods: first, from 24 September to 16 October 1992, and, second, from 15 December 1992 to 20 March 1993. It found that the Military Police was responsible for the occurrence of all these crimes. Furthermore, it found that the Military Police was subordinated to Naser Orić, through the successive Chiefs of Staff of the Srebrenica Armed Forces, only after 27 November 1992.

Naser Orić was found guilty pursuant to Articles 3 and 7(3) of the Statute for failing to discharge his duty as a superior to take necessary and reasonable measures to prevent the crimes of murder (Count 1) and cruel treatment (Count 2) committed against Serb detainees between 27 December 1992 and 20 March 1993. Because he was not found to have had effective control over the Military Police during the first period, Naser Orić was not found responsible for the crimes perpetrated during this period. He was also acquitted of all other charges of the Indictment. Naser Orić was sentenced to two years’ imprisonment.

Merits

Both the Prosecution and Naser Orić lodged appeals against the Trial Judgement. I will first address Naser Orić’s appeal, before turning to the Prosecution’s appeal.

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Naser Orić's Appeal

Naser Orić's appeal consists of thirteen grounds. His first and fifth grounds of appeal both raise the crucial issue of whether the Trial Chamber failed to make findings necessary to support a conviction under Article 7(3) of the Statute. Due to their possible impact on the remainder of his appeal, the Appeals Chamber has deemed it appropriate to consider these submissions first.

Alleged Failure to Make Findings Crucial to the Conviction

Naser Orić was convicted under Article 7(3) of the Statute. For a superior to incur criminal responsibility under Article 7(3), in addition to establishing beyond reasonable doubt that his subordinate is criminally responsible, the following elements must be established beyond reasonable doubt:

- i) the existence of a superior-subordinate relationship;
 - ii) that the superior knew or had reason to know that his subordinate was about to commit a crime or had done so; and
- that the superior failed to take the necessary and reasonable measures to prevent his subordinate's criminal conduct or punish his subordinate.

The Trial Chamber was obliged to make findings on each of these elements before being entitled to enter a conviction.

Identity of Naser Orić's Culpable Subordinates

Naser Orić submits that the Trial Chamber failed to specify who his "corresponding subordinates" were. The Appeals Chamber notes that none of the principal perpetrators were found to be members of the Military Police or directly subordinated to Naser Orić. The Trial Chamber found that "the head" of the Military Police after 27 November 1992, Atif Krdžić, was subordinated to him. Atif Krdžić, who was not an accused before this Tribunal, was found responsible for the crimes of murder and cruel treatment committed between December 1992 and March 1993. It follows that the Trial Chamber found that Orić's subordinate responsible for the crimes for which he was convicted was Atif Krdžić. Naser Orić's contention that no subordinate was identified is therefore dismissed.

In this respect, the Prosecution submits that even if Krdžić had not been identified as Military Police Commander, Naser Orić could still have been held responsible for other unidentified members of the Military Police who aided and abetted the crimes. The Appeals Chamber stresses that, notwithstanding the degree of specificity with which the culpable subordinates must be identified, their existence as such must be established in any event. In the present case, the Trial Chamber did not identify any member of the Military Police other than Krdžić who took part in the commission of the crimes for which Naser Orić was found responsible, not even by a mere reference to their membership in the Military Police. The Prosecution's argument fails.

Therefore, the Trial Chamber eventually identified only Atif Krdžić as Naser Orić's culpable subordinate.

Criminal Conduct of Naser Orić's Subordinate

Naser Orić also submits that it is unclear what theory of criminal liability the Trial Chamber applied to his alleged subordinates, and that this lack of clarity is in itself an error of law. The Prosecution concedes that the Trial Chamber did not expressly designate a legal classification for the responsibility of the Military Police, but submits that "it is reasonable to conclude" that the Trial Chamber found that the Military Police through their omissions aided and abetted the murders and cruel treatment committed by the principal perpetrators.

The Appeals Chamber notes that the Trial Chamber did not specify the basis for the criminal responsibility of Naser Orić's only identified culpable subordinate from the Military Police, Atif Krdžić. Having considered the Trial Judgement as a whole, the Appeals Chamber is left with only a small number of general findings without any indication of whether and how they relate to any form of criminal liability under the Tribunal's Statute as regards Atif Krdžić. These scattered fragments do not allow the Appeals Chamber to conclude on what basis the Trial Chamber found Naser Orić's only identified culpable subordinate criminally responsible. Yet such finding would have been required to determine Naser Orić's guilt. For these reasons, the Appeals Chamber finds that the Trial Chamber erred in failing to resolve the issue of whether Naser Orić's subordinate incurred criminal responsibility.

Naser Orić's Knowledge or Reason to Know of his Subordinate's Alleged Criminal Conduct

Under another part of his first ground of appeal, Naser Orić challenges the Trial Chamber's finding that he knew that the Military Police was responsible for the crimes committed in the detention facilities.

The Appeals Chamber notes that, although such a finding was crucial to Naser Orić's conviction, the Trial Chamber made no explicit finding on whether he knew or had reason to know of Atif Krdžić alleged criminal responsibility for the mistreatment of Serb detainees. A holistic reading of the Trial Judgement reveals only vague and inconclusive statements in this respect.

The difficulty in detecting the necessary findings by the Trial Chamber on this issue appears to arise from the approach taken in the Trial Judgement. Rather than examining Naser Orić's knowledge or reason to know of his own subordinate's alleged criminal conduct, the Trial Chamber concentrated its entire analysis on Naser Orić's knowledge of the crimes themselves, which were not physically committed by Krdžić, his only identified culpable subordinate. This approach was ultimately reflected in the Trial Chamber's conclusion on Naser Orić's mens rea, which was squarely limited to the question of whether he knew or had reason to know of the actual crimes committed at the two detention facilities, to the exclusion of any finding on his knowledge of the alleged criminal conduct of his subordinate, Atif Krdžić.

The Appeals Chamber considers that knowledge of the crimes and knowledge of a person's criminal conduct are, in law and in fact, distinct matters. Although knowledge of a person's criminal conduct may, depending on the circumstances, be inferred from knowledge of the crimes, the Appeals Chamber notes that such an inference was not made by the Trial Chamber. Instead, its enquiry was limited to Naser Orić's knowledge of the crimes committed in the detention facilities, and so was its conclusion.

The Appeals Chamber considers that the Trial Chamber's failure to make a finding on whether Naser Orić knew or had reason to know that Atif Krdžić was about to or had engaged in criminal activity constitutes an error of law.

Conclusion

In conclusion, the Appeals Chamber grants Naser Orić's first and fifth grounds of appeal insofar as he alleges therein that the Trial Chamber failed to make findings on the criminal responsibility of his only identified subordinate, Atif Krdžić. Additionally, the Trial Chamber failed to determine whether Naser Orić knew or had reason to know that Atif Krdžić was about to or had committed crimes. In the absence of these findings, Naser Orić's convictions under Article 7(3) of the Statute cannot stand. These errors therefore invalidate the Trial Chamber's decision to convict Naser Orić for his failure to prevent his subordinate's alleged criminal conduct in relation to the crimes committed against Serb detainees between December 1992 and March 1993.

Alleged Alternative Basis for Naser Orić's Conviction

In response to Naser Orić's appeal, the Prosecution submitted however that the Trial Chamber could have convicted Naser Orić for failing to prevent the guards at the detention facilities from committing the crimes or aiding and abetting the crimes of others. It argued that the Trial Chamber should not have stopped its enquiry after concluding that the guards

were not members of the Military Police, but should have gone further and found that they were nevertheless under Naser Orić's effective control. The Appeals Chamber dismisses the Prosecution's submission that Naser Orić could have been convicted based on a superior-subordinate relationship between him and unidentified guards regardless of their membership in the Military Police. Such a relationship was not pleaded in the Indictment. Therefore, the Appeals Chamber also dismisses the Prosecution's submission that Naser Orić's convictions could be sustained on an alternative basis.

Conclusion

Accordingly, the Appeals Chamber considers that it need not at this juncture address Naser Orić's remaining challenges to the Trial Chamber's factual and legal findings.

The Prosecution has raised a number of objections regarding the findings of the Trial Chamber, which, if accepted, could lead to a reversal of Naser Orić's acquittal in certain respects. Therefore, before addressing any implications of its findings on Naser Orić's appeal, the Appeals Chamber will first consider the Prosecution's appeal.

Prosecution's Appeal

The Prosecution's appeal was initially composed of five grounds of appeal. The third ground (alleging errors pertaining to wanton destruction in Je'estica) was subsequently withdrawn. The Appeals Chamber notes that the second and fourth grounds are rendered moot as a result of the Appeals Chamber's conclusion on Naser Orić's appeal. The Appeals Chamber therefore limits its analysis to the Prosecution's remaining grounds of appeal.

The Extent of Naser Orić's Criminal Responsibility for the Crimes of Murder and Cruel Treatment (Prosecution's Ground 1)

The Prosecution's first ground of appeal is composed of three sub-grounds that concern the extent of Naser Orić's criminal responsibility for the crimes of murder and cruel treatment.

Naser Orić's Effective Control Over the Military Police Between 24 September and 16 October 1992

In the first sub-ground, the Prosecution submits that the Trial Chamber erred both in law and in fact in finding that Naser Orić did not have effective control over the Military Police during the first period, between 24 September and 16 October 1992.

The Appeals Chamber finds that the Prosecution fails to demonstrate that the Trial Chamber misapplied the burden of proof or erred in failing to consider that Naser Orić's de jure command over the Military Police between 24 September and 16 October 1992 created a rebuttable presumption that he exercised effective control over that unit. In this respect, the Appeals Chamber acknowledges that its jurisprudence might have suggested otherwise, using the terms "presume" or "prima facie evidence of effective control". The import of such language has not always been clear. Although in some common law jurisdictions "prima facie evidence" leads by definition to a burden-shifting presumption, the Appeals Chamber underscores that before the International Tribunal the Prosecution still bears the burden of proving beyond reasonable doubt that the accused had effective control over his subordinates. The possession of de jure authority, without more, provides only some evidence of such effective control. Before the International Tribunal there is no such presumption to the detriment of an accused.

For reasons explained in its Judgement, the Appeals Chamber further finds that the Prosecution fails to demonstrate that the Trial Chamber erred in fact when it found that Naser Orić did not have effective control over the Military Police between 24 September and 16 October 1992.

Naser Orić's Duty to Punish Crimes Committed Before He Had Effective Control

The Prosecution further submits that the Trial Chamber erred in law in concluding that Naser Orić could not be held responsible under Article 7(3) of the Statute for failing to punish the crimes of murder and cruel treatment perpetrated between 24 September and 16 October 1992, because they were perpetrated before he assumed effective control over the Military Police. It argues that the Trial Chamber erred in applying the Appeals Chamber's governing law that an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate before the said accused assumed command over that subordinate. The Prosecution argues that there are cogent reasons for the Appeals Chamber to depart from this position.

The Appeals Chamber recalls that the ratio decidendi of its decisions is binding on Trial Chambers. Therefore, the Trial Chamber was correct in considering that it was bound to follow the precedent established by the Appeals Chamber in its decision of 2003 in the Hadžihasanović case.

Turning to the Prosecution's challenge to the ratio decidendi of the Appeals Chamber's decision in Hadžihasanović, the Appeals Chamber notes that the only member of the Military Police identified by the Trial Chamber before Orić assumed effective control over it was its Commander, Mirzet Halilović. Mirzet Halilović was never found to be Orić's subordinate. In the absence of any other military policeman who would have committed a crime in the detention facility prior to 27 November 1992, Orić's duty to punish, presuming its existence, was without subject.

The Appeals Chamber, Judge Liu and Judge Schomburg dissenting, declines to address the ratio decidendi of the Hadžihasanović Appeal Decision on Jurisdiction as it has no impact on the outcome of the present case.

The Prosecution's sub-ground of appeal is dismissed.

Naser Orić's Responsibility for Failure to Punish the Crimes Committed Between 27 December 1992 and 20 March 1993

The Trial Chamber found that Naser Orić did not have the required mens rea to be held criminally responsible for failing to punish his subordinates for the crimes committed at the detention facilities between December 1992 and March 1993. Under the last part of its first ground of appeal, the Prosecution alleges that, had the Trial Chamber applied the "had reason to know" standard correctly, it would have concluded that Naser Orić had reason to know that crimes of murder and cruel treatment had occurred between 27 December 1992 and 20 March 1993, and convicted him for failing to punish.

The Appeals Chamber notes that, whereas responsibility under Article 7(3) of the Statute requires proof of the superior's knowledge or reason to know of his subordinate's criminal conduct, the Prosecution contends that Naser Orić had reason to know that the crimes of murder and cruel treatment themselves had occurred. The Prosecution submits that, in the present case, knowledge or reason to know of the crimes and knowledge or reason to know of the subordinate's criminal conduct were "one and the same". The Appeals Chamber considers that the Prosecution fails to substantiate this assertion and, consequently, need not consider any further the Prosecution's present sub-ground of appeal.

Conclusion

The Prosecution's first ground of appeal is dismissed in its entirety.

Issues of general significance to the Tribunal's case law (Prosecution Ground 5)

The Appeals Chamber now turns to the Prosecution's fifth ground of appeal, in which the Prosecution alleges two errors of law that have no impact on the verdict or the sentence against Naser Orić but are, in its view, matters of general importance to the case law of the Tribunal.

The Prosecution first submits that the Trial Chamber erred in law in distinguishing between a “general” and a “specific” obligation under Article 7(3) of the Statute concerning the duty to prevent crimes as well as in stating that the superior’s failure to implement “general” preventative measures cannot give rise to criminal responsibility. The Appeals Chamber considers that it need not discuss the merits of this alleged error since the law on the issue was recently clearly stated in the Halilović Appeal Judgement.

Likewise, the Appeals Chamber declines to consider the second alleged error relating to pre-emptive destruction of civilian objects. The Appeals Chamber finds that the Prosecution fails to demonstrate how the particular issue it raises is of general significance to the Tribunal’s jurisprudence and considers that the issue raised cannot be properly discussed in abstracto in the context of the present case.

Conclusion

For the foregoing reasons, the Prosecution’s first ground of appeal is dismissed in its entirety. The Appeals Chamber declines to consider the Prosecution’s fifth ground of appeal and considers that the Prosecution’s remaining grounds of appeal are rendered moot as a result of the Appeals Chamber’s discussion and conclusion on Naser Orić’s appeal. The Appeals Chamber now turns to the implications of the conclusions it reached on both appeals.

Implications of the Appeals Chamber’s Findings

The Appeals Chamber has found that the Trial Chamber failed to resolve whether two legal elements required to hold Naser Orić criminally responsible under Article 7(3) of the Statute were met. Yet Naser Orić’s entire conviction rested on that mode of liability.

The Appeals Chamber notes that neither Party advocates a retrial. Moreover, the Prosecution could not point to any evidence, be it additional evidence or evidence on the trial record, supporting its allegations that Naser Orić’s subordinates incurred criminal responsibility and that he knew or had reason to know that they aided and abetted crimes against the detained Serbs. The Appeals Chamber therefore considers that, in the circumstances of this particular case, a remand would serve no purpose.

In light of the foregoing, the Appeals Chamber finds that the appropriate course of action can only be a reversal of Naser Orić’s convictions under Article 7(3) of the Statute.

Concluding Remarks

Before turning to the Disposition, the Appeals Chamber would like to underscore that, like the Trial Chamber, it has no doubt that grave crimes were committed against Serbs detained in Srebrenica at the Srebrenica Police Station and the Building between September 1992 and March 1993. Also, the Defence did not challenge that crimes were committed against Serb detainees. However, proof that crimes have occurred is not sufficient to sustain a conviction of an individual for these crimes. Criminal proceedings require evidence establishing beyond reasonable doubt that the accused is individually responsible for a crime before a conviction can be entered. Where an accused is charged with command responsibility pursuant to Article 7(3) of the Statute, as in the present case, the Prosecution must prove, inter alia, that his subordinate(s) bore criminal responsibility and that he knew or had reason to know about his or their criminal conduct. The Trial Chamber made no findings on either of these two fundamental elements. The Prosecution, when asked on appeal if there was evidence to support the two elements, failed to point to evidence that could sustain Naser Orić’s convictions for the crimes against Serb detainees. Consequently, the conclusion of the Appeals Chamber is the Disposition that follows.

Disposition

For the foregoing reasons, THE APPEALS CHAMBER,

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the Parties and the arguments they presented at the hearings of 1 and 2 April 2008;

SITTING in open session;

ALLOWS, in part, Orić's grounds of appeal 1(E)(1), 1(F)(2) and 5;

DISMISSES the Prosecution's first ground of appeal in its entirety;

DECLINES to consider all other grounds of appeal raised by the Parties;

REVERSES Orić's convictions under Article 7(3) of the Statute for failing to discharge his duty as a superior to take necessary and reasonable measures to prevent the occurrence of murder (Count 1) and cruel treatment (Count 2) from 27 December 1992 to 20 March 1993; and

FINDS Orić not guilty on these counts.

Judge Mohamed Shahabuddeen appends a declaration.

Judge Liu Daqun appends a partially dissenting opinion and declaration.

Judge Wolfgang Schomburg appends a separate and partially dissenting opinion.
