

**UNITED
NATIONS**



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-01-42-T
Date: 31 January 2005
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Krister Thelin
Judge Christine Van Den Wyngaert

Registrar: Mr. Hans Holthuis

Judgement of: 31 January 2005

PROSECUTOR

v.

PAVLE STRUGAR

JUDGEMENT

The Office of the Prosecutor:

Ms. Susan Somers
Mr. Philip Weiner

Counsel for the Accused:

Mr. Goran Rodić
Mr. Vladimir Petrović

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VI. THE CHARGES

A. Crimes against persons (Count 1 and 2)

1. Murder (Count 1)

234. The Indictment charges the Accused with criminal liability for murder as a violation of the laws or customs of war under Article 3 of the Statute. The alleged victims of this crime are Tonči Skočko and Pavo Urban.⁷⁹⁰

(a) Law

235. The elements of murder as a violation of the laws or customs of war under Article 3 of the Statute have been considered in many decisions of the Tribunal. The issue which has called for most consideration is the mental element, i.e. *mens rea*. It is now settled that the *mens rea* is not confined to cases where the accused has a direct intent to kill or to cause serious bodily harm, but also extends to cases where the accused has what is often referred to as an indirect intent. While the precise expression of the appropriate indirect intent has varied between decisions,⁷⁹¹ it has been confirmed by the Appeals Chamber that the awareness of a mere possibility that a crime will occur is not sufficient in the context of ordering under Article 7(1) of the Statute.⁷⁹² The knowledge of a higher degree of risk is required.⁷⁹³ In some cases the description of an indirect intent as *dolus eventualis* may have obscured the issue as this could suggest that *dolus eventualis* as understood and applied in a particular legal system had been adopted as the standard in this Tribunal.

236. The following formulation appears to reflect the understanding which has gained general acceptance in the jurisprudence of the Tribunal: to prove murder, it must be established that death resulted from an act or omission of the accused, committed with the intent either to kill or, in the absence of such a specific intent, in the knowledge that death is a probable consequence of the act or omission. In respect of this formulation it should be stressed that knowledge by the accused that his act or omission might *possibly* cause death is not sufficient to establish the necessary *mens rea*. The necessary mental state exists when the accused knows that it is *probable* that his act or omission will cause death. The Chamber notes that this formulation may prove to require amendment so that knowledge that death or serious bodily harm is a probable consequence is sufficient to establish the necessary *mens rea*, but the Chamber need not consider this in the present

⁷⁹⁰ Indictment, paras 16 and 18.

⁷⁹¹ *Delalić* Trial Judgement, para 439; *Blaškić* Trial Judgement, para 217; *Kordić* Trial Judgement, para 236; *Krstić* Trial Judgement, para 495.

⁷⁹² *Blaškić* Appeals Judgement, paras 41 and 42.

⁷⁹³ *Blaškić* Appeals Judgement, paras 41 and 42.

case; it has not yet received authoritative acceptance. This definition would appear to be applicable also to wilful killing and murder under Articles 2 and 5, respectively.⁷⁹⁴ In addition, to prove murder under Article 3 of the Statute, it must be shown that the victims were persons taking no active part in the hostilities.⁷⁹⁵ The Chamber will proceed on this basis in the present case.

237. In this case the charges of murder arise out of an artillery attack on the Old Town of Dubrovnik on 6 December 1991. The deaths that are the subject of the murder charge are alleged to have resulted from that shelling by forces of the JNA under the command of the Accused. The Chamber refers to its analysis later in these reasons in relation to the charge of attacks on civilians in Count 3 in which the Chamber finds the shelling to be unlawful. This finding is equally applicable to Counts 1 and 2 and the Chamber will proceed on that basis.

238. A review of the Tribunal's case-law reveals that deaths resulting from shelling have formed the basis for charges of murder or wilful killing in at least two cases to date. In the *Galić* case, the Chamber by majority convicted the accused on Count 5 of the indictment for murder under Article 5 of the Statute for his participation in "a coordinated and protracted campaign of artillery and mortar shelling onto civilian areas of Sarajevo and its civilian population."⁷⁹⁶ While the *Galić* Chamber did not specify the particular facts which, in its opinion, fulfilled the intent requirement for murder in relation to this charge, a review of the specific shelling incidents upon which the conviction is based reveals that while the Chamber found that certain civilians were deliberately targeted,⁷⁹⁷ it also made reference to incidents where civilian deaths resulted from an attack which was "indiscriminate as to its target (which nevertheless was primarily if not entirely a residential neighbourhood), and was carried out recklessly, resulting in civilian casualties".⁷⁹⁸ The impression left is that both situations were taken to constitute murder, although there is no specific consideration of the issue.

239. In the *Kordić* case, wilful killings and murder were charged under Articles 2, 3 and 5 of the Statute, respectively for, *inter alia*, deaths that occurred as a result of attacks on various towns and villages in the area of central Bosnia. The specific facts upon which the Chamber relied in convicting the accused of murder and wilful killing are not clearly identified in the judgement. However, the majority of incidents analysed appear to be ones in which a civilian town or village was attacked with artillery before being overrun by HVO soldiers who then carried out individual killings. There is no specific attention to the issue. However civilian deaths resulting from both the

⁷⁹⁴ See for example, *Stakić* Trial Judgement, para 584 (citing collected cases).

⁷⁹⁵ See for example, *Galić* Trial Judgement, para 150 (in the context of the definition of murder under Article 5 of the Statute); see generally *Naletilić* Trial Judgement, para 248.

⁷⁹⁶ *Prosecutor v. Galić*, Indictment, Counts 5 to 7.

⁷⁹⁷ See for example, *Galić* Trial Judgement, paras 438-496 (incident at Markale market).