

IT-95-14/2-PT
02 MARCH 1999
04935-04931

4935
HG

**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-95-14/2-PT
Date: 2 March 1999
Original: English

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 2 March 1999

PROSECUTOR

v.

**DARIO KORDIĆ
MARIO ČERKEZ**

**DECISION ON THE JOINT DEFENSE MOTION TO STRIKE
COUNTS 37 AND 40 FOR FAILURE TO PLEAD
ALL REQUIRED ELEMENTS UNDER ARTICLE 2(D)**

The Office of the Prosecutor

**Mr. Geoffrey Nice
Mr. Rodney Dixon**

Counsel for the accused

**Mr. Mitko Naumovski, Mr. Leo Andreis, Mr. David F. Geneson, Mr. Turner T. Smith, Jr.,
and Ms. Ksenija Turković, for Dario Kordić**

Mr. Božidar Kovačić, for Mario Čerkez

I. INTRODUCTION

Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") is the motion, "Joint Defense Motion to Strike Counts 37 and 40 for Failure to Plead All Required Elements Under Article 2(d)" ("the Motion") filed by counsel for the two accused, Dario Kordić and Mario Čerkez (together "the Defence") on 22 January 1999, together with the "Prosecutor's Response to Joint Defence Motion to Strike Counts 37 and 40 for Failure to Plead All Required Elements Under Article 2(d)" filed by the Office of the Prosecutor ("Prosecution") on 5 February 1999.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions of the parties,

HEREBY ISSUES ITS WRITTEN DECISION.

II. DISCUSSION

A. Arguments of the Parties

1. The Defence submits that Counts 37 and 40 of the Amended Indictment, which charge the accused with “extensive destruction of property,” a grave breach of the Geneva Conventions of 1949, falling under Article 2 of the Statute of the International Tribunal (“the Statute”), should be struck in their entirety. The Defence argues that to constitute a grave breach under Article 2 of the Statute, the property alleged to have been destroyed must be “protected” under the relevant Geneva Convention. The Amended Indictment fails to state that the property alleged to have been destroyed was “protected” in this way. The Defence asserts that the Prosecution’s failure to allege a requisite element of a crime renders the charge fatally defective.

2. The Defence further argues that Article 2(d) requires a showing of appropriation of property as well as destruction. The Defence argues that the Amended Indictment fails to allege that the property at issue was subject to “appropriation” by the accused and therefore that the allegations fail to make out a charge under Article 2(d).

3. The Prosecution submits that with respect to the charges contained in Counts 37 and 40, it has fulfilled its obligations at this stage of the proceedings adequately to inform the accused of the nature and cause of the charges against him. The Prosecution further contends that the Defence submissions regarding the elements of an offence under Article 2(d) of the Statute are incorrect. In fact, a review of the relevant provisions of the Geneva Conventions clearly illustrate that “appropriation” and “destruction” of property are considered as two separate offences.

B. Analysis

4. The Trial Chamber is of the view that failure to allege specifically in the Amended Indictment that the destroyed property was protected under the Geneva Conventions does not render the Amended Indictment invalid, as the accused is charged with a “grave breach as recognised by Article 2(d) . . . of the Statute,” and the provisions of that Article, which include the element of protection of property, are therefore incorporated by reference in Counts 37 and 40.

5. A reasonable construction of the relevant part of Article 2(d) of the Statute does not yield the conclusion that an accused person can only be indicted for appropriating and destroying protected property. There is nothing in the Article itself that suggests that the intention was to treat

destruction and appropriation of property as a single offence. Furthermore, the relevant provisions of the Fourth Geneva Convention of 1949, and the Commentary thereto, clearly demonstrate the separate nature of these two offences¹.

¹ See Article 53 of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949; Jean Pictet (ed.) – Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1958) – 1994 reprint edition, p.601.

III. DISPOSITION

For the foregoing reasons

PURSUANT TO Rule 72 of the Rules of Procedure and Evidence of the International Tribunal,

THE TRIAL CHAMBER DISMISSES the Joint Defence Motion to Strike Counts 37 and 40 for Failure to Plead All Required Elements Under Article 2(d).

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



Richard May
Presiding

Dated this second day of March 1999
At The Hague
The Netherlands

[Seal of the Tribunal]