

Switzerland, Military Tribunal of Division 1, Acquittal of G.

[Source: Divisional Court Martial I, Hearing of 14 to 18 April 1997; original in French, unofficial translation.]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

DIVISIONAL COURT MARTIAL I Hearing of April 14 to 18, 1997

[...] JUDGMENT [...]

PROCEEDINGS HAVE BEEN BROUGHT AGAINST G.

born on ... in ..., Bosnia-Herzegovina, [...], married, a driver, temporarily resident at the Registration Centre for Asylum Seekers in ..., presently remanded in custody at ... prison

who is charged with

a breach of the laws and customs of war (Article 109 of the CPM [Code pénal militaire – Military Penal Code, [see Switzerland, Military Penal Code]],

that is to say:

- a. a breach of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949 (Article 3(1)(a) and (c) and Articles 13, 14, 129 and 130),
- b. a breach of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Article 3(1)(a) and (c) and Articles 16, 27, 31, 32, 146 and 147),
- c. a breach of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Articles 4, 5 and 13),

- d. a breach of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International [sic] Armed Conflicts (Protocol I) (Articles 10, 11, 75, 76, 77 and 85).
- for having, in July 1992, in the company of three other persons unknown, probably soldiers, struck with his truncheon (beat) at least six prisoners detained at the Omarska camps, including at least one woman and a young adult male, and thus at least having caused injury to two of them;
 - for having, between May 30, and August 15, 1992, in the Keraterm prison camp, in the company of at least two other persons in uniform, participated at least in two rounds of beatings of several prisoners, including A., and thus having caused violence to their physical and mental well-being;
 - for having, between May 30, and August 15, 1992, in the Keraterm prison camp, in the company of at least two other persons in uniform, committed outrages upon the personal dignity of several prisoners, including A., by forcing one of them to lick the boots of a uniformed person in that group, [...]

The Court rules as follows:

THE FACTS

Overall situation with regard to the conflict in the former Yugoslavia

The facts of the case fall within the context of the conflict in the Former Yugoslavia. As far as the overall situation with regard to that conflict is concerned, the Court examined various public sources, in particular the Decision in the *Tadic* case by the Appeals Chamber of the International Criminal Tribunal in The Hague and the report compiled by [...] the Federal Office for Refugees which relates, in particular, to the Omarska and Keraterm camps.

The armed conflict in the former Yugoslavia broke out between the armed forces of the Federal Republic of Yugoslavia and those of Slovenia and Croatia shortly after the declaration of independence by Slovenia and Croatia on June 25, 1991.

Within the framework of that overall conflict various internal armed conflicts broke out, including the conflict between Bosnian, when the Bosnian Serb army attempted to implement the objective of the Federal Republic of Yugoslavia to create a new Yugoslav State from areas of Croatia and Bosnia-Herzegovina.

In the spring of 1992 the Bosnian Serb army, backed by Serb militias, launched military attacks throughout the territory of Bosnia-Herzegovina.

Therefore, the Government of Bosnia-Herzegovina, which considered itself to be the target of aggression on the part of the Republic of Serbia in particular, officially declared a state of war in the country on June 20, 1992.

From the beginning of the conflict it was possible to observe a deliberate policy of expelling and destroying the civilian Croat and Muslim population over the entire territory of Bosnia-Herzegovina (ethnic cleansing).

Particular situation in the Prijedor region

In that region Serb troops and militias conducted surprise attacks against towns in the north-west of Bosnia-Herzegovina, in particular Banja Luka, Kozarac and Prijedor.

During those attacks many civilians, principally Muslims, were arrested, rounded up and held prisoner. In addition to the ill-treatment inflicted on those people, a large number of summary executions were carried out.

The Omarska and Keraterm camps

A large proportion of the civilian population, which was considered hostile by the Serb forces, were deported to camps, with men and women often being separated. No distinction was made between civilian and military prisoners.

The Serb troops set up the camps after occupying the town of Prijedor, that is to say as of May 25, 1992, in the buildings of the Omarska mine situated some twenty kilometres from the town, and at Keraterm in an abandoned ceramics factory on the outskirts of the town of Prijedor.

It is apparent both from various reports which have been compiled and many witness testimonies, in particular those made during the hearing of this case, that the conditions under which people were held at the Omarska and Keraterm camps were catastrophic. The basic infrastructure failed to provide the prisoners with sufficient hygiene, food or water supplies, minimum medical care, or even sufficient space in which to sleep.

The organisation of camps such as the one in Omarska was in the hands of the civilian authorities. In addition to the prison conditions, the prisoners were also subject to the arbitrary will of the guards and those authorised to enter the camps. Thus, they were subjected daily to harassment and abuse, blows, brutality and acts of torture which most frequently resulted in death. Summary executions were a frequent occurrence.

In particular, many witnesses have described two small huts in Omarska camp situated away from the main buildings and particularly feared by the prisoners, i.e., the red house which, it is claimed, no prisoner left alive, and the white house where the guards had set up a torture chamber. There the prisoners were beaten, some of them to death. Many testimonies describe how the most frequent reason given for the beatings and executions was the simple desire of the guards to strike out indiscriminately.

The camp guards and the gangs of torturers

The Omarska and Keraterm camps were guarded by permanent uniformed guards armed with automatic weapons and subject to the camps civilian authorities.

In general they were from the region and knew one other. Many testimonies describe them as insulting and brutal to the prisoners, in particular the guards Bosko Baltic, Zivko Grahovac – known as Zika – and Zelko

Karlica – known as Zak – who served at Keraterm.

In addition to the permanent guards, many testimonies state that entry to the camps was also open to groups of people from outside who were not part of the camp organisation. They held no formal position and only remained in the camps for a short time. According to the testimonies of former prisoners, access to the camps was open to such people because they were known to the guards and the officials of the camp authorities.

Many testimonies concur with regard to the fact that the guards avoided being seen by the prisoners by making them remain face down on the ground and forcing them to keep their heads down while standing. Moreover, they avoided calling each other by their names and used nicknames instead.

Those groups have often been described as particularly brutal and cruel and sometimes persisted in beating their victims to death. They were generally uniformed soldiers, although not members of the organised armed forces. One of the most feared teams was that led by Dusko Tadic and one other led by Dusan Knejevic – known as Duca – accompanied by Zoran Zigiv, as has been confirmed in particular by the witness Dr. who was heard during the trial.

B., Ki., Ka., A. and J. in particular, who were also heard in their capacity as witnesses during the hearing, have confirmed the barbaric acts committed against civilian prisoners at the aforementioned camps, in particular the beatings and the torture carried out by the guards.

Personal situation of the accused

G. was born on ... in Prijedor, Bosnia-Herzegovina. [...] His father, who is now retired, was a policeman by profession.

The accused had average school results which led him to receive training as a locksmith. From September 1986 to September 1987 he performed his military service as a driver in Slovenia where he subsequently worked for a time.

On his return to Prijedor he worked as a taxi driver until 1989. In 1990 and 1991 the accused, who lived with his parents, was unemployed apart from a short period in 1991 when he worked as a lorry driver for a bakery.

On a personal level, the accused went out with a young woman, Mi., with whom he had a child., Al., who was born in mid-1992. However, it would appear that he no longer has any contact with his girlfriend or his son.

Dr D. Vlatkovic, the senior physician at the Bellelay psychiatric clinic, produced a psychiatric report on the accused dated March 27, 1997 from which it is evident, in particular, that he has never suffered from any mental illness which might diminish his criminal responsibility. At present he is suffering from depression which, in the opinion of the expert, is the result of his imprisonment. The accused finds his imprisonment an

injustice and is consequently finding it difficult to endure, so much so that he claims it may cause him to attempt to commit suicide. Furthermore, the expert suggests that the accused is of average intelligence. He is someone who submits but without losing his critical sense. The accused has little inclination towards the military and, on the contrary, displays a certain fear and anguish with respect to the tragic events threatening Bosnia. In response to that anguish the accused made plans to go abroad for reasons which remain unclear.

In general the accused's violent nature is evident from the file, in particular the statement made during the hearing of the judgment [by] Ka., former chief of police in Prijedor, who stated that at secondary school the accused had used a knife on a schoolmate. It is also clear from the file that the accused was allegedly convicted in Yugoslavia for carrying thieves in his taxi, that he entered Austria illegally and that he was convicted of car theft there.

Alleged acts

All the witnesses refer to the accused as Goran Karlica, brother of Zoran, the Chetnik commander killed on May 31, 1992 during the seizure of Prijedor.

When questioned by the Geneva police the accused gave his name as G. and categorically denied being Goran Karlica, having been in Omarska or Keraterm camps or having struck anyone. He claims that during the period during which the acts imputed to him were committed he was in Austria and Germany.

It is also evident from the case file that at some point in February 1992 the accused left Bosnia for Wels near Linz in Austria where he found a job at the firm of D. The latter sent him to work on a building site in Germany accompanied by another employee, R.

It is also apparent from the file that in May 1992 the accused and R. witnessed the murder of one of their colleagues, known as S., which was committed by a certain Bo. The next day the accused and R. returned to Austria to report that fact to their employer. Finally, on May 16, 1992 the accused and R. went to the police in Linz to report Bo's crime. The Austrian police then took the two men to Germany to hand them over to the German police authorities.

The exhibits produced (exhibits 147 ff) show that the accused G. was in Germany until May 12 or 13, 1992, then in Austria at Gasthof Bayerischer Hof until May 20, 1992, then at the Wohnheim Voest-Alpine in Linz, and subsequently at the Gasthof Steyermühl in Steyermühl.

Furthermore, it is also clear from the file that the accused submitted a request for a visa in Austria and took certain steps by twice appearing in person before the competent authority on June 12, 1992 and subsequently on July 3, 1992.

During his witness testimony A. stated that the accused, accompanied by Zoran Zigic and a certain Dusan,

had struck him during that period at the Keraterm camp. At a later stage the accused is claimed to have beaten the witness and other prisoners again at the same camp. On that occasion Zigic is claimed to have forced the witness to lick his shoe and the accused was allegedly present at that scene.

During his witness testimony Mu. also maintained that the accused was in Prijedor during May and July 1992. He stated that he had seen him wearing a speckled uniform. However, Mu. had never seen the accused beat or kill anyone.

Witness Bs. was held at the Omarska camp from May 27, to August 6, 1992. Around June 30, 1992 the witness saw a black car with four or five occupants arrive at the camp. A fellow prisoner then allegedly pointed out that G. was among them even though in his statement to the examining judge he stated that he had seen G. and Goran Karlica, who were two different people, at the camp.

In Geneva on April 24, 1995 witness Mu. thought that he recognised the accused as a torturer from the Trnopolje camp. On April 26, 1995 witness Ki. thought that he recognised him as a torturer from the Omarska and Keraterm camps. Witness B. considered him to be a guard at the Keraterm camp. As for witness Ki., he stated on April 28, 1995 that he considered him to be a torturer from the Omarska camp who violently struck six people, including his former physics teacher, Md., and his wife and his son of around twenty years of age.

Witness Ki. also thought that he had seen the accused present at, and perhaps even participate in, the killing of Md., his former physics teacher, in the White House at the Omarska camp. That sad event is said to have taken place at the end of June or the beginning of July 1992. However, it is established in the file that it was Duca who killed Md.

Witness Kl. claims to have seen the accused on May 27, 1992 on a tank in Kozarac while she was a prisoner and was passing in a column with other prisoners in front of that tank. She also states that she saw the accused again in mid-June 1992 in front of the Balkans Hotel attending a memorial ceremony for Zoran Karlica. She herself had been released from Trnopolje camp on June 10, 1992. Witness Kl. lost her husband, a Muslim and a policeman in Prijedor, and was arrested, according to her, by the Zoran Karlica unit in May 1992. He has not reappeared and in all likelihood is dead.

Witness Ka. stated that he saw the accused in a Serb uniform in Prijedor up until April 1992 and that he knows that he fought by the side of Zoran Karlica in Croatia in 1991. He says that he saw G. in Prijedor prior to May 24, 1992. The witness was vilely tortured by his former subordinates and lost a large number of his family members, including his father, his brother and the five sons of the latter.

THE LAW

Jurisdiction

The Court is of the opinion that the conflict in the former Yugoslavia must be approached in a comprehensive

manner and classified as an international conflict.

The armed conflict in the former Yugoslavia broke out between the armed forces of the Federal Republic of Yugoslavia and those of Slovenia and Croatia shortly after the declaration of independence by Slovenia and Croatia on June 25, 1991. That armed conflict must be classified as internal on account of the fact that the declarations of independence were suspended for three months at the request of the European Community. At the end of that period, on October 7, 1991, Slovenia declared its independence with effect from that date and Croatia followed with effect from October 8, 1991. Thus, the armed conflict in the former Yugoslavia should be classified as international as of October 8, 1991 since those two States were then independent. All those States have acceded to the Geneva Conventions.

Switzerland has ratified in particular the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, the Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949, and Protocols I and II Additional thereto.

Furthermore, the scope of Articles 109 ff of the CPM applies to all armed conflicts and Article 108(2) of the CPM specifically stipulates that violations of international agreements shall be punishable where such agreements provide for a more extensive scope than declared wars or other armed conflicts.

Thus, since the acts imputed to the accused, if they were in fact committed, constitute breaches of the laws of war within the meaning of Article 109 of the CPM, the Court has jurisdiction over this case.

Assessment of the evidence

[...] the Court assesses the evidence freely in accordance with the opinion that it formed in the course of the proceedings.

It is evident from the file that the accused had a room at the Wohnheim Voest-Alpine from May 15 to August 1, 1992. Furthermore, the accused was in Germany and Austria until May 20, 1992 and in Austria between 6 June and 3 July to carry out certain formalities in connection with his visa application. Witness D., who did not make a great impression, nevertheless made it appear likely that the accused was in Linz at the end of June and the beginning of July 1992. However, it has been impossible to establish for certain whether the accused always stayed in Linz or Steyermühl as he claims.

The Court is of the opinion that although the accuseds [sic] identity as G. is beyond doubt, the witnesses are confusing, albeit in good faith, the accused with someone else by the name of Karlica, a person hated in the region whom they believe they recognise as the accused. That is because all the witnesses have personally suffered physically and psychologically from atrocities committed by the guards at the Omarska or Keraterm camp and the visitors to those camps. They have lost everything and are now refugees in Switzerland. Their testimonies are disturbing and moving, but contain contradictions with regard to places, dates and identities of whom the [sic] are accusing.

The contradictory evidence before the Court fails to convince it that the accused was in Prijedor, Kozarac, Omarska and Keraterm between May 27, and the end of July 1992. As the presence of the accused has not been proven it is doubtful whether he committed the acts imputed to him.

[...]

Despite the minimal amount of credibility that can be generally accorded to what the accused has said, it must be acknowledged that he has never deviated in his statements concerning his absence from Prijedor and his stays in Germany and Austria. Any doubt must be to the benefit of the accused and therefore he shall be acquitted on all counts.

Compensation and non-pecuniary injury

G. was remanded in custody on May 8, 1995. Although he protested his imprisonment to Col Bieler, who was then president of the Court, he never asked to be released pending trial. Moreover, he never lodged an appeal with the Appeal Court against the decisions to extend his imprisonment.

As a refugee [...] G. would have been able to find work after being in Switzerland for six months. [...] Having regard to those facts, it appears fair to grant him damages of Fr. 30,000 as compensation for the injury resulting from his time remanded in custody.

On the other hand, the accusation that he was a war criminal, which was not proven beyond reasonable doubt, has caused him serious injury, but within the framework of the conflict in the former Yugoslavia it does not have the same magnitude as it might have had elsewhere. The fact that he was accused and then acquitted should in no way diminish the esteem which he may enjoy in the Serb part of Bosnia. Moreover, G. demonstrates in his correspondence in particular that he does not have high regard for the opinions and esteem of the Bosnian Muslims.

He has indeed suffered from his prolonged imprisonment and has had to be treated, in particular psychologically, by prison doctors.

Having regard to all those facts, it appears just to grant him the sum of Fr. 70,000 as compensation for non-pecuniary injury.

[...]

ON THOSE GROUNDS

Divisional Court Martial I [...]

HEREBY RULES THAT

G.

is acquitted,

[...]

and furthermore, he shall be awarded the sum of Fr. 30,000 as damages and the sum of Fr. 70,000 as non-pecuniary damages to be paid by the Federal Government,

and consequently the president of the Court orders the immediate release of G. [...]

Discussion

1. Why were the Swiss Courts competent to try G.? Was it because IHL prescribes universal jurisdiction over crimes such as those of which G. was accused? Does jurisdiction under Swiss law go beyond the jurisdiction prescribed by IHL? Would the Swiss courts have been competent under Swiss law even if the acts of which G. was accused did not violate IHL? (GC I-IV, Art. 2, and Arts 49/50/129/146 respectively; P I, Art. 85) [See Switzerland, Military Penal Code]
2.
 - a. Does the Court qualify the conflicts in the former Yugoslavia? Was such qualification necessary to have jurisdiction over G.? Under IHL? Under Swiss law? (GC I-IV, Art. 2, and Arts 49/50/129/146 respectively; P I, Art. 85) [See Switzerland, Military Penal Code]
 - b. When was the conflict between the Yugoslav Peoples' Army and Slovenia and Croatia an international armed conflict according to the Court? Since the latter's declaration of independence? Since the entry into force of the declaration of independence? Since its recognition by some other States? Did the Court use the proper standard to assess the status of the conflict? Do you think the Court would have applied the law of international armed conflicts to a hypothetical armed conflict between a Swiss Canton declaring its independence and the rest of Switzerland?
 - c. When the conflict between Croatia and Slovenia on one side and Yugoslavia on the other became classified as an international conflict, did that necessarily imply that the conflict in Bosnia and Herzegovina also had to be considered as an international armed conflict? Would you consider that the acts allegedly perpetrated by G. came within the ambit of the IHL of international armed conflicts? What is the opinion of the Court in that regard?
3.
 - a. Were the acts of which G. was accused violations of IHL? Even if the conflict was a non-international one? (GC III, Arts 3, 13 and 14; GC IV, Arts 3, 27, 31 and 32; P I, Arts 75 and 76; P II, Arts 4 and 5)
 - b. If the conflict was an international one, were the acts of which G. was accused considered as grave breaches of IHL? Could the victims be considered as "protected persons"? (GC I-IV, Arts 50/51/130/147 respectively; P I, 85)
 - c. Is the Court's qualification of the conflict in the Prijedor region the same as the one made by the ICTY in the Tadic case? [See ICTY, The Prosecutor v. Tadic [Part A., paras 72-73 and Part B., paras 584-608]]
4. Which particular problems may arise in assessing the credibility of witnesses in an inter-ethnic conflict? And in establishing the responsibility of a party for violations of IHL?

5. Does the case show particular problems in establishing universal jurisdiction over violations of IHL in countries not involved in a given conflict? Is such jurisdiction realistic? Are there alternatives? How could it become more effective?
6. Is the acquittal of G. satisfactory? Should he at least have been denied compensation for his pre-trial detention?
7. Did this case add to the credibility of IHL or instead diminish it? Should the prosecutor preferably not have charged G.?

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