The Notion of Control of the Crime and its Application by the ICTY in the Stakić Case

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1. Introduction

The International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY”) has jurisdiction over a set of crimes (genocide, crimes against humanity and war crimes) which, to an important extent, are committed through organised structures of power, such as the military or the police. This kind of criminality is characterised by the participation of a plurality of people in the planning, preparation and execution of the crime, many of whom make their contribution while remaining far from the scene of the crime. This physical and hierarchical separation between the people who directly and responsibly intervene in the execution of the actus reus of the crime and those who decide to commit the crime and direct its execution creates the problem of determining who are perpetrators of the crime as opposed to mere participants in the crime.

Normally, the political and military authorities involved in the crime plan, design, control and direct the crime, but they do not take an active part in the physical execution of the material elements of the crime. In addition, any situation in which a plurality of people, hierarchically organised, intervene in the commission of a crime, and where the conduct of the subordinates is due to a superior’s orders or instructions, also requires the analysis of the potential exemption of criminal liability of the direct perpetrators as a result of applying causes of justification or exculpation.

Legal writers, for the purposes of determining who the perpetrators of crimes are, have put forward several theories of criminal liability based on: (i) the loss of the effective prevention provided for by penal law if only the direct perpetrators of the crimes, who belong to the lowest echelons of the
organised structures of power and are used to commit the crime, are criminally liable as perpetrators; and (ii) the desirability of an anti-crime policy which prosecutes and punishes those persons who design the common plan and control the execution of the crime as true perpetrators of such crimes.

Further, we should keep in mind that crimes committed through organised structures of power, and particularly crimes committed through organised economic structures, present additional problems regarding the attribution of criminal liability to the people involved when the structures of power used to secure their commission are not only organised vertically in accordance with the principle of organisation into a hierarchy, but also organised horizontally in accordance with the principle of division of functions for the achievement of a common goal. We are referring for example to situations in which the common criminal plan is shaped by a body comprised of a plurality of people, where each member must make a co-ordinated contribution in order for the common criminal plan to be implemented by the subordinates.

From a horizontal perspective, the different participants in the planning, preparation and execution of the crime will be considered “co-perpetrators,” as opposed to mere participants in the crime, depending on their respective state of mind and/or relevance of their contributions. There are situations in which a plurality of persons enters in a common agreement to commit a crime, or design a common criminal plan. However, this does not entail, per se, the performance of the conduct prohibited by law. On the contrary, a common agreement or plan is just one requisite of the notion of “co-perpetration”. In addition to this it is necessary that the co-perpetrators jointly commit the crime by making co-ordinated contributions. Theories of co-perpetration vary in that some of them, such as joint criminal enterprise, put more emphasis on

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