“Just Convict Everyone!” – Joint Perpetration: From Tadić to Stakić and Back Again

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Prosecutor v. Milomir Stakić: Judgment of the Appeals Chamber¹

1. Introduction

On 22 March 2006, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) rendered its Judgment in the Stakić case.² Dr. Milomir Stakić, the former President of the Prijedor Municipal Assembly, was found guilty and sentenced to life imprisonment by the Trial Chamber for his participation in the murder, extermination and persecution (incorporating deportation) of the non-Serb population in Prijedor.³ Both the Defence and the Prosecution filed appeals against the Trial Chamber’s Judgment and Sentence.⁴ The Appeals Chamber affirmed the Trial


² Ibid.

³ Prosecutor v Milomir Stakić, Case No. IT-97-24-T, Trial Judgment, 31 July 2003, Disposition, (Stakić Trial Judgment).

⁴ The Appellant appealed on the grounds that the Trial Chamber allegedly: erred in law and fact by allowing an expansion of the Indictment; erred in law and fact during the course of the trial proceedings; erred in fact leading to a miscarriage of justice; erred in law and fact in the application of Article 5 of the Statute; erred in law and fact in the application of Article 3 of the Statute; erred in law and fact on the issue of sentencing; and erred in law and fact regarding cumulative convictions. The Prosecution appealed on the grounds that the Trial Chamber allegedly: erred in law in finding that the appellant did not have the requisite intent for genocide under Article 4 of the Statute; erred in law and/or fact in its consideration of Article 4(3)(c) of the Statute; erred in law in its conclusion that the Bosnian Croats did not form a group or part of a group targeted for genocide under Article 4 of the Statute; erred of law in failing to cumulatively convicted the Appellant on Counts 3 (murder as a crime against humanity) and 7 (deportation as a crime against humanity). In short, the first three Prosecution grounds were dismissed.
Chamber’s decision to convict Stakić for his responsibility in the aforementioned crimes. It also agreed with the Trial Chamber’s decision to acquit Milomir Stakić of genocide and complicity in genocide. The Appeals Chamber, however, found that the Trial Chamber incorrectly failed to convict Stakić for deporting and forcibly transferring the non-Serb population. Based on an error made by the Trial Chamber regarding the sentence, the Appeals Chamber imposed a global sentence of 40 years’ imprisonment on the Appellant.

One of the issues which the Appeals Chamber addressed proprio motu was the mode of liability attributed to the Appellant by the Trial Chamber. In examining the criminal responsibility of Dr. Milomir Stakić for the crimes alleged, the Trial Chamber applied a mode of liability which it termed ‘co-perpetratorship’ (committing ‘jointly with another person’), in lieu of ‘joint criminal enterprise’ (JCE). In so doing, the Stakić Trial Chamber avoided “the misleading impression that a new crime [membership in a criminal organization] not foreseen in the Statute of this Tribunal has been introduced through the backdoor.” However, “[t]he introduction of new modes of liability [co-perpetratorship] into the jurisprudence of the Tribunal”, the Appeals Chamber stressed, “may generate uncertainty, if not confusion, in the determination of the law by parties to cases before the Tribunal as well as in the application of the law by Trial Chambers.”

Most notably, some ICTY judges have welcomed and fully approved the JCE doctrine “as an effective tool for overcoming the problems of ascribing individual criminal responsibility for international crimes.” Others hold the opinion that the concept of ‘joint criminal enterprise’, since its foundation and integration into the jurisprudence of the ICTY by the Tadić Appeals Chamber, “has caused confusion and a waste of time” and has been considered as a

5 Stakić Appeals Judgment, Disposition.
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8 Neither party has appealed the Trial Chamber’s application of this mode of liability, notably, “co-perpetratorship”.
9 Stakić Trial Judgment, para. 441 (footnotes omitted). Unfortunately, the Stakić Trial Judgment did not make any effort to determine whether or not this concept, Mittäterschaft (“co-perpetratorship”), as it stands in German criminal law, may have reflected customary international law at the time the crimes at issue were committed. In footnote 949 of the Judgment, the Stakić Trial Chamber made references to two eminent common law scholars, but that was not sufficient to prove that this German concept may reflect customary international law.
10 Stakić Appeals Judgment, para. 59.
12 Prosecutor v Blagoje Simić et al., Case No. IT-95-9-T, Trial Judgment, 17 October 2003 (Simić Trial Chamber), Separate and Partly Opinion of Judge Per-Johan Lindholm, paras. 2–5.