

**Declassified to Public
06 September 2012**

ANNEX A

AUTHORITY 52

**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-97-24-A
Date: 22 March 2006
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Judgement of: 22 March 2006

PROSECUTOR

v.

MILOMIR STAKIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Mark J. McKeon
Ms. Helen Brady
Mr. Xavier Tracol
Ms. Barbara Goy
Ms. Katharina Margetts

Counsel for the Appellant:

Mr. Branko Lukić
Mr. John Ostojić

63. For these reasons, the Appeals Chamber finds that the relevant part of the Trial Judgement must be set aside. In order to remedy this error, the Appeals Chamber will apply the correct legal framework to the factual conclusions of the Trial Chamber to determine whether they support joint criminal enterprise liability for the crimes charged.

B. The requirements for joint criminal enterprise liability

64. The Tribunal's jurisprudence recognises three categories of joint criminal enterprise liability.¹⁵¹ Regardless of the category at issue, or the charge under consideration, a conviction requires a finding that the accused participated in a joint criminal enterprise. There are three requirements for such a finding. First, a plurality of persons is required. They need not be organised in a military, political or administrative structure.¹⁵² Second, the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required.¹⁵³ There is no need for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts.¹⁵⁴ Third, the participation of the accused in the common purpose is required.¹⁵⁵ This participation need not involve the commission of a specific crime under one of the provisions (for example murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose.

65. The *mens rea* required for a finding of guilt differs according to the category of joint criminal enterprise liability under consideration. For first category, or "basic" joint criminal enterprise liability, it must be shown that the accused and the other participants in the joint criminal enterprise intended that the crime at issue be committed.¹⁵⁶ For second category joint criminal enterprise liability, it must be shown that an organised criminal system exists – as is the case with concentration or detention camps. The accused must be shown to have personal knowledge of the system and intent to further the criminal purpose of the system¹⁵⁷ – the personal knowledge may be proven by direct evidence or by reasonable inference from the accused's position of authority.¹⁵⁸ The third or "extended" category of joint criminal enterprise liability allows conviction of a participant in a joint criminal enterprise for certain crimes committed by other participants in the joint criminal enterprise even though those crimes were outside the common purpose of the enterprise. The accused can be found to have third category joint criminal enterprise liability if he

¹⁵¹ *Vasiljević* Appeal Judgement, paras 96-99; see also *Tadić* Appeal Judgement, paras 195-225; *Krnjelac* Appeal Judgement, paras 83-84.

¹⁵² *Tadić* Appeal Judgement, para. 227.

¹⁵³ *Tadić* Appeal Judgement, para. 227.

¹⁵⁴ *Tadić* Appeal Judgement, para. 227.

¹⁵⁵ *Tadić* Appeal Judgement, para. 227.

¹⁵⁶ *Tadić* Appeal Judgement, para. 228.

¹⁵⁷ *Tadić* Appeal Judgement, paras 202-203.

¹⁵⁸ *Tadić* Appeal Judgement, para. 228.

or she intended to further the common purpose of the joint criminal enterprise and the crime was a natural and foreseeable consequence of that common purpose.¹⁵⁹ In other words, liability attaches “if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*”.¹⁶⁰ The crime must be shown to have been foreseeable to the accused in particular.¹⁶¹

C. The application of joint criminal enterprise to the factual findings

66. In the present case, the Indictment did not explicitly mention the categories of the joint criminal enterprise doctrine pursuant to which the Appellant was charged. But no such express language was necessary, because the Indictment’s allegations nonetheless made it clear that the Prosecution intended to rely on both the first and third categories of joint criminal enterprise. In paragraph 26 of the Indictment, the Prosecution alleged that the purpose of the joint criminal enterprise was a campaign of persecutions that encompassed the crimes alleged in counts 1 through 8 of the Indictment. In this paragraph, it was plainly alleging a basic joint criminal enterprise: the crimes alleged were within the common purpose. In paragraphs 28 and 29 of the Indictment, however, the Prosecution set out an alternative theory:

Alternatively, the accused is individually responsible for the crimes enumerated in Counts 1 to 8 on the basis that these crimes were natural and foreseeable consequences of the execution of the common purpose of the joint criminal enterprise and **Milomir STAKIĆ** was aware that these crimes were the possible consequence of the execution of the joint criminal enterprise.¹⁶²

Despite his awareness of the possible consequences, **Milomir STAKIĆ** knowingly and wilfully participated in the joint criminal enterprise. On this basis, he bears individual criminal responsibility for these crimes under Article 7(1) in addition to his responsibility under the same article for having planned, instigated, ordered or otherwise aided and abetted in the planning, preparation, or execution of these crimes.¹⁶³

The language of these paragraphs mirrors the requirements for the third category of joint criminal enterprise. The Appeals Chamber considers that this method of pleading satisfies the requirement, set forth in the *Kvočka* Appeal Judgement, that the Prosecution plead in the Indictment the specific category of joint criminal enterprise on which it intends to rely.¹⁶⁴

67. The Appeals Chamber will therefore first consider whether the Trial Chamber’s factual findings establish that the Appellant participated in a joint criminal enterprise as alleged in the Indictment, and in the process the Appeals Chamber will determine what crimes – according to the Trial Chamber’s factual findings – the common purpose of the joint criminal enterprise

¹⁵⁹ *Tadić* Appeal Judgement, para. 204.

¹⁶⁰ *Tadić* Appeal Judgement, para. 228 (emphasis in original). See also *Kvočka* Appeal Judgement, para. 83.

¹⁶¹ *Tadić* Appeal Judgement, para. 220.

¹⁶² Indictment, para. 28.

¹⁶³ Indictment, para. 29.

AFFIRMS, Judge Güney dissenting, the Appellant's conviction for Extermination, a Crime against Humanity (**COUNT 4**);

AFFIRMS the Appellant's conviction for Murder as a Violation of the Laws or Customs of War (**COUNT 5**);

AFFIRMS the Appellant's conviction for Persecutions, a Crime against Humanity (**COUNT 6**);

RESOLVES, Judge Güney dissenting, that the Trial Chamber incorrectly found the Appellant not guilty for Other Inhumane Acts (Forcible Transfer), a Crime against Humanity (**COUNT 8**);

IMPOSES a global sentence of 40 years' imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period the Appellant has already spent in detention;

SETS ASIDE the Disposition of the Trial Chamber insofar as it imposed an obligation on the Host State to review the Appellant's sentence after a specified time had elapsed;

ORDERS in accordance with Rule 103(C) and Rule 107 of the Rules, that the Appellant is to remain in the custody of the International Tribunal pending the finalisation of arrangements for his transfer to the State in which his sentence will be served.

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

Judge Fausto Pocar
Presiding

Judge Mohamed Shahabuddeen

Judge Mehmet Güney

Judge Andréia Vaz

Judge Theodor Meron