

Mladi?’s conviction and sentence upheld on appeal

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By: Dr Joseph Rikhof

Introduction

On 8 June 2021, the Appeals Chamber (AC) of the International Residual Mechanism for Criminal Tribunals (MICT) upheld the conviction and sentence of life imprisonment of Ratko Mladi? imposed by the Trial Chamber (TC) of the International Tribunal for the former Yugoslavia (ICTY) on November 22, 2017 (see AC judgment here). The TC had acquitted Mladi? of liability for genocide in certain municipalities in Bosnia and Herzegovina but convicted him of genocide in Srebrenica as well as crimes against humanity (persecution, extermination, murder, deportation, and inhumane acts), and

violations of the laws or customs of war (murder, terror, unlawful attacks on civilians, and taking of hostages) as a result of his “leading and grave role” in four joint criminal enterprises (JCEs). (paragraph 4 of the AC judgment).

The joint criminal enterprises were related to:

- the objective of permanently removing Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina between 12 May 1992 until 30 November 1995 (called the Overarching JCE, paragraphs 5 and 120);
- the objective of spreading terror among the civilian population of Sarajevo through a campaign of sniping and shelling between 12 May 1992 and November 1995 (Sarajevo JCE, paragraphs 6 and 276);
- the objective of eliminating the Bosnian Muslims in Srebrenica by killing the men and boys and forcibly removing the women, young children, and some elderly men from the days immediately preceding 11 July 1995 to at least October 1995 (Srebrenica JCE, paragraphs 7 and 347);
- and the objective of capturing United Nations (UN) personnel deployed in Bosnia and Herzegovina and detaining them in strategic military locations to prevent the North Atlantic Treaty Organization (NATO) from launching further military air strikes on Bosnian Serb military targets from approximately 25 May 1995 to approximately 24 June 1995 (Hostage-Taking JCE, paragraphs 8 and 480).

These JCEs were very similar to the ones in Radovan Karadži?’s conviction of March 24, 2016, which was upheld by the MICT AC on March 20, 2019; as a matter of fact, all four JCEs mention both Mladi? and Karadži?. (for a discussion of the latter judgment, see here)

This conviction and sentence were agreed upon by a majority of judges although two judges (N’gum and Panton) would also have allowed the prosecutor’s appeal on the acquittal on genocide in the communities other than Srebrenica (see paragraphs 752-800) while the presiding judge (Nyambe) did not agree with most of the grounds for the conviction (with the exception of the Hostage-Taking JCE) and would have instead imposed a 20-year sentence (see paragraphs 593-751 with a reference to the suggested sentence in paragraph 747).

Most of the judgment is concerned with procedural issues related to the trial, specifically violations of his fair trial rights (see paragraphs 22-275) and factual considerations. However, there are a number of legal issues, on which the AC elaborated and which will be discussed in this article, namely

- some of the parameters of JCE;
- the war crimes of causing terror;
- the war crime of hostage taking;
- the crime against humanity of forcible transfer;
- the notion of a substantial part of a group in the definition of genocide
- the sentencing consideration.

The Crimes

The war crime of causing terror

Mladi?'s argument with respect to the TC finding that he had engaged in the war crime of causing terror had three distinct aspects: first, he argued that the ICTY had no jurisdiction to try this crime as the prohibition of spreading terror among the civilian population was a norm under international humanitarian law but had not crystalized into a norm under international criminal law whereby an individual could be held responsible as there was no sufficient state practice of this development during the time of his indictment, between 1992 and 1995. Second, he argued that this crime had not been defined with sufficient specificity to be foreseeable at the time of the indictment and as such was as a violation of the principle of *nullum crimen sine lege* (paragraph 280); last, he argued that Sarajevo had been a valid military target, as a result of which the primary purpose of the campaign was not to cause terror in the civilian population and thus did not have the *mens rea* for the crime.(paragraph 296)

The AC was of the view that it had already settled the first issue in the Galic and D. Milosevic judgments in 2006 and 2009 respectively and that while there was no good reason to revise this view it did decide to address the argument of Mladi?, which was primarily based on the minority views in those two earlier decisions. It came to the conclusion that the methodology used in the two judgments had been the same by both the majority and minority and that the minority had only disagreed with the result of one of those elements of that methodology, namely whether there was sufficiently extensive and uniform practice to establish customary international law; the majorities in those judgments had been of the view that that there had been such practice while the minority had only doubted that the evidence pointed in that direction. (paragraphs 283-286).

The conclusion on this point by the majority was:

"Bearing in mind that "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence, both of which are reasonable", the Appeals Chamber finds that Mladi? fails to demonstrate that the finding by the ICTY Appeals Chamber that the ICTY had jurisdiction over the crime of terror was made on the basis of a wrong legal principle or was wrongly decided. In the absence of cogent reasons to depart from the controlling jurisprudence, the Appeals Chamber finds no error in the Trial Chamber's determination that the ICTY had jurisdiction over the crime of terror in the present case. (paragraph 287)"

Presiding judge Nyambe in her dissenting opinion sided with the minority judges in the Galic and D. Milosevic cases by indicating that in her view that was no evidence of a sufficiently extensive and uniform practice as the evidence pointed by the majority in the Galic case only amounted to the practice of eleven states. (paragraphs 685-693)

The second argument by Mladi?, the issue of *nullum crimen sine lege*, was based on the observation that the essence of the definition of the causing terror, namely "acts or threats of violence committed with the primary purpose of spreading terror among the civilian population and directed against the

civilian population or individual civilians not taking direct part in hostilities causing the victims to suffer grave consequences." (paragraph 288) was based on the assumption that international customary law has developed a comprehensive definition of terror and that the requirement of suffering grave consequences "did not provide a clear gravity threshold and was improperly determined through a jurisdictional analysis which was developed after the Indictment period." (paragraph 289). The response of the AC was that:

"the principle of *nullum crimen sine lege* requires that a person may only be found guilty of a crime in respect of acts which constituted a violation of a norm which existed at the time of their commission. Moreover, the criminal liability in question must have been sufficiently foreseeable and the law providing for such liability must have been sufficiently accessible at the relevant time. This principle does not, however, prevent a court from interpreting and clarifying the elements of a particular crime, nor does it preclude the progressive development of the law by the court. (paragraph 290)"

Based on this reasoning, the AC found that that in the Galic and D. Milosevic cases, it had not created a new crime but that this crime was already known in international law and that it had only clarified the elements of this crime, which was consistent with the principle of *nullum crimen sine lege*. (paragraph 291). As to foreseeability, according to the AC, the accused must be able to appreciate that his conduct was criminal, in the sense generally understood, without reference to any specific provision (paragraph 292), which was the case for Mladi? as the *Criminal Code of the Socialist Federal Republic of Yugoslavia* had a terrorism provision very similar to the one derived from customary international law and, as such, was known to him. (paragraph 293) Last, the fact that one the elements of the crime includes the suffering of grave consequences, "in no way detracts from the conclusion that Mladi? could reasonably have known that the commission of acts or threats of violence the primary purpose of which is to spread terror among the civilian population was prohibited and punishable". (paragraph 294) Again, judge Nyambe disagreed with this reasoning. (paragraph 694)

With respect to the last argument that Sarajevo was a legitimate military target due to its strategic military importance, nature, and location, the AC was of the view that even in such circumstances there is duty on "parties to a conflict to distinguish at all times between the civilian population and combatants, or civilian and military objectives, such that only military objectives may be lawfully attacked and the prohibition on targeting civilians is absolute". (paragraphs 300-301)

With respect to the *mens rea* of the war crime of causing terror, the AC had this to say:

"The Appeals Chamber recalls that the mens rea of the crime of terror consists of the intent to make the civilian population or individual civilians not taking direct part in hostilities the object of acts of violence or threats thereof, and of the specific intent to spread terror among the civilian population. Such intent may be inferred from the circumstances of the acts or threats of violence, such as, inter alia, their nature, manner, timing, and duration. Nothing precludes a reasonable trier of fact from relying on the same set of circumstances to infer that perpetrators willfully made civilians the object of acts or threats of violence, and, at the same time, that such acts or threats of violence were committed

with the primary purpose of spreading terror among the civilian population. Mladi?'s argument that the Trial Chamber erred in so doing because a finding of specific intent requires a "higher standard of proof" is accordingly ill-founded. (paragraph 313)"

The war crime of hostage-taking

Mladi?'s argument was that the prohibition against hostage taking only applies in international customary law to the hostage-taking of civilians and that UN personnel could not be considered civilians at the time of his indictment. (paragraph 484) The AC indicated that this issue had already been settled in the ICTY jurisprudence, including in its own fairly recent decision in the Karadži? case (for an overview of this decision including the issue of hostage taking, see here) This jurisprudence was clear that "there is an absolute prohibition of taking hostage of any person taking no active part in hostilities as well as detained individuals irrespective of their status prior to detention. It has also rejected the submission that the crime of hostage-taking is limited under customary international law to the taking of civilians hostage." (paragraph 489)

The crime against humanity of forcible transfer

The AC set out the essential elements of this crime in the following manner:

"The Appeals Chamber recalls that forcible transfer entails the displacement of persons from the area in which they are lawfully present, without grounds permitted under international law. The requirement that the displacement be forced in not limited to physical force but can be met through the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, or taking advantage of a coercive environment. It is the absence of genuine choice that makes the displacement unlawful. While fear of violence, use of force, or other such circumstances may create an environment where there is no choice but to leave, the determination as to whether a transferred person had a genuine choice is one to be made in the context of a particular case being considered. Displacement may be permitted by international law in certain limited circumstances, provided it is temporary in nature and conducted humanely. Notably, however, displacement is not permissible where the humanitarian crisis that caused the displacement is the result of the accused's own unlawful activity. In addition, the participation of a non-governmental organization in facilitating displacements does not in and of itself render an otherwise unlawful transfer lawful. (paragraph 356)"

Mladi? had argued that the displacement of Bosnian Muslim civilians in the area of Srebrenica had been an evacuation permissible under international law as those transfers had been necessary for humanitarian reasons and had been done in coordination and cooperation with international organizations. (paragraph 357). The response of the AC was that it had been forces under the command of Mladi? who had been responsible for the humanitarian crisis in the first place and those displacements had been conducted with such violence that the civilians who had left had no genuine choice but to leave. Last, the transfers were "not carried out for the security of the persons involved,

but rather to transfer them out of certain municipalities and that no steps were taken to secure the return of those displaced". (paragraph 358)

Genocide: the meaning of "in part"

The definition of genocide in all international instruments from the 1949 Genocide Convention to the 1998 *Rome Statute* is as follows: "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" followed by five enumerated acts. (for the text of the Rome Statute, see here, article 6).

One of these elements was specifically considered by the AC in the Mladi? case, namely the notion of "in part". As with the notion of forcible displacement, the AC set out the elements of this concept first by reiterating existing jurisprudence, which stands for the proposition:

"where a conviction for genocide relies on the intent to destroy a protected group "in part", the targeted part must be a substantial part of that group. The ICTY Appeals Chamber in the Krsti? case identified the following non-exhaustive and non-dispositive guidelines that may be considered when determining whether the part of the group targeted is substantial enough to meet this requirement: (i) the numeric size of the targeted part as the necessary starting point, evaluated not only in absolute terms, but also in relation to the overall size of the entire group; (ii) the targeted part's prominence within the group; (iii) whether the targeted part is emblematic of the overall group or essential to its survival; and/or (iv) the perpetrators' areas of activity and control, as well as the possible extent of their reach. The applicability of these factors, together with their relative weight, will vary depending on the circumstances of the particular case. (paragraph 576)"

Assessing the various factors just mentioned, the AC was of the view that since the communities in question, about which doubt was raised, namely Fo?a, Klju?, Kotor Varoš, Prijedor, Sanski Most, and Vlasenica (see here, paragraph 3) had much smaller Muslim populations then Srebrenica, namely between 0.6 and 2.6 per cent of the overall Bosnian Muslim group in Bosnia and Herzegovina, the requirement for a substantial numeric size was not met. (paragraph 577). On the other hand, the AC did consider the fact that "because the intent to destroy formed by perpetrators of genocide will always be limited by the opportunity presented to them, the perpetrators' areas of activity and control, as well as the possible extent of their reach, should be considered when determining whether the part of the protected group they intended to destroy was substantial" and the fact that the perpetrators had no control beyond these localities, resulted in the conclusion that on that one factor for the requirement of a substantial part was met. (paragraph 578).

However, the most important consideration was whether the communities in question were of special significance or were emblematic in relation to the protected group as a whole. On that issue, the prosecutor had argued that destruction of these communities had been significant enough to have had "an impact" on the Bosnian Muslim group as a whole. (paragraph 579) In the view of the AC, "it is not just any impact on a protected group that supports a finding of genocidal intent; rather, it is the impact

that the destruction of the targeted part will have on the overall survival of that group" and that unlike Srebrenica, this cannot be said for the communities in question as they do not meet the requirements set out for Srebrenica; these requirements were:

(i) Srebrenica having become a refuge to Bosnian Muslims in the region;
(ii) the symbolic impact of the murder of Bosnian Muslims in a designated UN safe area;1978 and
(iii) Srebrenica being one of the few remaining predominantly Bosnian Muslim populated territories in the area claimed as Republika Srpska. (paragraphs 580-581; see also paragraphs 588-589)

The two judges in dissent, judges N'gum and Panton, agreed with the methodology used by the majority of the AC to determine what amounts to a substantial part but disagreed with the application of this jurisprudence to the facts on the ground in respect to the numeric size of the targeted group (paragraph 759) and the impact of the destruction of the group in question on the Bosnian Muslim group as a whole (paragraph 761) while providing more details as to why it was of the view that the Muslim group in the communities in question had a special significance or were emblematic (paragraph 766) and as to why the destruction of this group was a threat to the viability of survival of the entire group (paragraphs 767-779). As a result, they reached the conclusion that these communities amounted to a substantial part of the Bosnian Muslim group in Bosnia and Herzegovina. (paragraph 780)

The second ground of the prosecutor's appeal, namely that the members of the Overarching JCE, including Mladi? did not have the special or "destructive" intent to commit genocide in the communities in question, was not addressed by the majority as it had already found that there was no genocide in those communities. The minority of the two judges did answer this particular question by saying:

"We recall that the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" may be inferred from, inter alia, the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, the repetition of destructive and discriminatory acts, as well as the existence of a plan or policy. In our opinion, as a matter of law, the jurisprudence does not restrict a trial chamber from inferring the genocidal intent of members of a joint criminal enterprise solely on the basis of prohibited acts of physical perpetrators who are acting as their tools. We recall that explicit manifestations of criminal intent are often rare in the context of criminal trials and in the absence of explicit direct proof, specific intent may be inferred from relevant facts and circumstances, in order to prevent perpetrators from escaping convictions simply because such manifestations are absent. In this regard, we take note of the Prosecution's submission that "the effect of the [Trial] Chamber's legal error is that it will only be possible to convict leadership accused in those rare situations where they unambiguously state their genocidal intent, because according to [the] Trial Chamber, without […] other unambiguous evidence, the entire pattern of crimes that a leader unleashes on a population is legally insufficient to prove genocidal intent. (paragraph 785)"

They went on to say that the prohibited acts committed by the perpetrators, the statements and conduct of Mladi? and other members of the Overarching JCE, and Mladi?'s knowledge of the crimes committed on the ground would lead the conclusion that those members of the Overarching JCE had such a special intent (paragraph 786) while providing a number of examples of Mladi?'s statements, which could be construed as such. (paragraphs 791-796)

Elements of JCE: significant contribution

The one element of JCE, which needed clarification according to the AC was whether Mladi? had made a significant contribution to the Overarching JCE (for an overview of all the elements of JCE, paragraphs 186 as well as here), specifically with respect to the special situation where previous jurisprudence had indicated that a person's position of authority and silent approval militate in favour of a finding that his participation was significant, which includes a failure to ensure the investigation and punishment of crimes committed. (see Robert J Currie and Dr. Joseph Rikhof, *International and Transnational Criminal Law, Third Edition*, Irwin Law Inc. 2020, p 726)

The starting point of the reasoning of the AC is:

"that members of a joint criminal enterprise may be held responsible for crimes carried out by principal perpetrators, provided that the crimes can be imputed to at least one member of the joint criminal enterprise and that the latter – when using the principal perpetrators – acted in accordance with the common objective. The Appeals Chamber notes the Trial Chamber's findings that MUP units were used as tools to commit the crimes in the Municipalities in furtherance of the common purpose of the Overarching JCE. (paragraph 193)"

The AC was of the view that Mladi? had made a significant contribution to the Overarching JCE via command and control of MUP (special police unit) forces (paragraphs 194 and 202) as well as the Srebrenica JCE where he actually issued orders to MUP forces (paragraph 392); in the latter situation the AC made the comment that "contribution to a joint criminal enterprise need not be in and of itself criminal, as long as he or she performs acts that in some way contribute to the furtherance of the common purpose" and "whether Mladi?'s orders were legitimate in the military context is not relevant to determining his significant contribution to the common purpose. What matters is that the accused significantly contributed to the commission of the crimes involved in the joint criminal enterprise." (paragraph 393)

With respect to the notion of a failure to act to ensure the investigation and punishment of crimes committed, the AC repeated that such failures need not involve carrying out any part of the actus reus of a crime forming part of the common purpose, or indeed any crime at all. (paragraph 414)
It found Mladi? liable for such failure because:

"(i) Mladi? commanded and controlled VRS and MUP units during the Srebrenica operation and its aftermath; and (ii) Mladi? failed to take adequate steps to investigate crimes and/or punish members of the VRS and other elements of the Serb forces under his effective control who committed such

crimes,1 despite his duty and ability to do so and his awareness of the crimes. The Trial Chamber further considered that the above-mentioned acts were so instrumental to the commission of the crimes that without them the crimes would not have been committed as they were. The Appeals Chamber recalls that a failure to intervene to prevent the recurrence of crimes or to halt abuses has been taken into account in assessing an accused's contribution to a joint criminal enterprise as well as his intent, where the accused had some power, influence, or authority over the perpetrators that was sufficient to prevent or halt the abuses but failed to exercise such power. Therefore, Mladi? fails to show that the Trial Chamber erred in considering his failure to take adequate steps to investigate crimes and/or punish perpetrators in determining whether he significantly contributed to the Srebrenica JCE. (paragraph 415; see also paragraphs 229, 231 and 236-237 in regards to the Overarching JCE)"

Sentencing

The AC provided an overview of the sentencing regime at the ICTY as developed by its jurisprudence by saying:
"The Appeals Chamber recalls that the primary goal in sentencing is to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender. While gravity of the offence is the primary factor in sentencing, the inherent gravity must be determined by reference to the particular circumstances of the case and the form and degree of the accused's participation in the crime. In this regard, the Appeals Chamber recalls that while a position of influence or authority, even at a high level, does not automatically warrant a harsher sentence, its abuse may constitute an aggravating factor. (paragraph 545)"

Based on the facts, it came to the conclusion that Mladi? had abused his position on numerous occasions, which could be considered an aggravating factor for sentencing purposes (paragraphs 546-548). As to mitigating factors, it took into consideration his age and health (paragraph 554), the death of his daughter as an exceptional circumstance (paragraph 555), benevolent treatment of and assistance to victims (paragraph 556), but was of the view that to the extent that they might have been present, which was uncertain for all factors, that these mitigating circumstances could not outweigh the gravity of the offences he had committed and kept the life imprisonment as imposed by the TC in place. (paragraph 567). The AC also dismissed the argument that according to the *ICTY Statute* there was requirement to take into account the sentencing practice in the former Yugoslavia during the indictment period, which only allowed for a maximum of 20 years by saying that the of the word "resource" in the Statute does not mean the ICTY chambers are bound by this practice (paragraphs 562-565). The dissent by the presiding judge would have imposed 20 years rather than life imprisonment because of the sentencing practice in the former Yugoslavia and because of his ailing health (paragraphs 746-747).

Conclusion

With the judgments by the MICT AC in the cases of Mladi? and Karadži? in the last two years, it would appear that the ICTY/ICTR jurisprudence is for all intents and purposes settled. Both cases confirmed

the existing jurisprudence of both institutions developed since 1995 while providing some elaboration on some of the details of that jurisprudence without changing its main tenets. The disagreement between the judges in the Mladi? case were not about the jurisprudence in question but the application of that jurisprudence to the facts at hand.

With the judgment in the Mladi? case and a judgment by the TC in the Staniši? & Simatovi? retrial at the end of June 2021 (see here), the MICT will only have one substantive case (there are two cases involving contempt of court charges, one of which will also be decided by the end of June) pending, namely the Kabuga trial, which is at the moment only in the pre-trial stage (see here) unless the Staniši? & Simatovi? is appealed.

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About the author

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