

Karadži? receives life imprisonment

April 11, 2019

By: Joseph Rikhof

On March 20, 2019, the Appeals Chamber of the International Residual Mechanism for Criminal Tribunals, the successor tribunal to both the International Criminal Tribunal (ICTY) for the former Yugoslavia and for Rwanda (ICTR) issued its decision in the case of Radovan Karadži? (Karadži?).

The Trial Chamber decision, from which Karadži? had appealed, had found that he had participated in a number of criminal enterprises against a multitude of victims. First of all, the Trial Chamber was of the view that he had participated in a joint criminal enterprise or JCE (see below for an explanation of this concept) to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in municipalities throughout Bosnia and Herzegovina between October 1991 and 30 November 1995 (which was called the “Overarching JCE”); the Trial Chamber had found him guilty, under the first form of JCE, of persecution, deportation, and other inhumane acts (forcible transfer) as crimes against humanity. It had also convicted him, under the third form of JCE, for the crimes of persecution, extermination, and murder as crimes against humanity as well as murder as a violation of the laws or customs of war (para. 4).

Secondly, the Trial Chamber had indicated that, between late May 1992 and October 1995 when the hostilities in Sarajevo had ceased, Karadži? had participated in a JCE to spread terror among the

civilian population of Sarajevo through a campaign of sniping and shelling (called the “Sarajevo JCE”). It had found him guilty under the first form of JCE of murder as a crime against humanity, and murder, terror, and unlawful attacks on civilians as violations of the laws or customs of war (para. 5).

Thirdly, the Trial Chamber had found that Karadži? had participated in a JCE to eliminate Bosnian Muslims in Srebrenica in 1995 (called the “Srebrenica JCE”) and had found him guilty, under the first form of JCE, of genocide, persecution, extermination, and other inhumane acts, namely forcible transfer as crimes against humanity and murder as a violation of the laws or customs of war. The Trial Chamber also convicted Karadži? for superior responsibility under article 7(3) of the ICTY Statute (here) for persecution and extermination as crimes against humanity and murder as a violation of the laws or customs of war (para. 6).

Finally, the Trial Chamber had concluded that, between 25 May and June 1995, Karadži? had participated in a JCE with the purpose of taking United Nations personnel hostage to compel the North Atlantic Treaty Organization (NATO) to abstain from conducting air strikes against Bosnian Serb targets (called the “Hostages JCE”). It had found Karadži? guilty under the first form of JCE of the crime of hostage-taking as a violation of the laws or customs of war (para. 7).

The Appeals Chamber (with one judge partially dissenting and another judge delivering a partially dissenting opinion as well as a separate concurring opinion) upheld the original decision almost completely (with the only exception being a disagreement on five specific incidents, which had no bearing on the overall appreciation of his involvement in the crimes committed, see paras. 460-475) while increasing his sentence from the original 40 years to life imprisonment.

While most of the decision by the Appeals Chamber is concerned with either evidentiary, procedural and factual issues, it did addresses four legal aspects of interest, which will be discussed below. They are: the parameters of the third form of JCE; the war crime of attacking civilians; the war crime of taking hostages; and the principles of sentencing. None of the pre-existing jurisprudence with respect to these legal aspects was overruled or changed but instead confirmed by the Appeals Chamber.

Joint Criminal Enterprise (JCE)

JCE has been the primary vehicle at the ICTY, ICTR, the Sierra Leone Special Court (SCSL) and the Extraordinary Chambers in the Court of Cambodia (ECCC) (which are discussed here) to allocate criminal responsibility to large numbers of individuals in international crimes. With respect to the legal aspects of this concept, in general, the jurisprudence has distinguished three types of JCE.

In the first form of joint criminal enterprise, all of the co-perpetrators possess the same intent to effect the common purpose, namely the crime. The second form of joint criminal enterprise, the ‘systemic’ form, a variant of the first form, is characterized by the existence of an organized criminal system, in particular in the case of concentration or detention camps. This form of joint criminal enterprise requires personal knowledge of the organized system and intent to further the criminal purpose of that system. The third, ‘extended’ form of joint criminal enterprise entails responsibility for crimes

committed beyond the common purpose, but which are nevertheless a natural and foreseeable consequence of the common purpose. The requisite *mens rea* for the extended form is twofold. First, the accused must have the intention to participate in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise. The general requirements for this type of responsibility are as follows:

- a plurality of persons, who do not need to be organized in a military, political or administrative structure;
- the existence of a common plan, design or purpose which amounts to or involves the commission of a crime. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise;
- participation of the accused in the common design involving the perpetration of one of the international crimes. This participation need not involve commission of a specific crime under one of those provisions but may take the form of assistance in, or contribution to, the execution of the common plan or purpose; the participation in the enterprise must be significant, meaning an act or omission that makes an enterprise efficient or effective; eg. a participation that enables the system to run more smoothly or without disruptions. (see Einarsen-Rikhof, A Theory of Punishable Participation, 2018, pages 389-391)

The issue under discussion in the *Karadži?* case were the parameters of the third form of JCE and specifically, whether the *mens rea* for this type of JCE required an awareness by that the accused of the natural and foreseeable consequences of the implementation of that enterprise were possible, rather than probable. The jurisprudence of the ICTY had been consistent that the correct level was the one of possibility but Karadži? had argued that this should be reconsidered in view of the recent important jurisprudence of the UK Supreme Court, namely the *R v. Jogee; Ruddock v. The Queen* case (here)(para. 425). The Appeals Chamber rejected this assertion by saying:

The Appeals Chamber observes that it is not bound by the findings of other courts domestic, international, or hybrid – or by the extrajudicial writings, separate or dissenting opinions of its Judges, or by views expressed in academic literature.(para. 434)

and:

Thus, while the ICTY Appeals Chamber in *Tadic* considered domestic case law in determining customary international law, contrary to Karadzic's claim, it found that the relevant principles were derived from 'customary international law, not the law of England and Wales. A shift in the law of

England and Wales and the jurisdictions bound by the Privy Council on this point therefore does not *per se* warrant the reversal of established appellate jurisprudence. (para. 435)

The Appeals Chamber also noted that the shift in the law in the *Jogee* case had not been followed in other common law jurisdictions. (para. 436)

As a result, the Appeals Chamber found that there was no need to change the *mens rea* for JCE III from the level of possibility to that of probability.

Attacks on Civilians

Under the principles of International Humanitarian Law, which has been followed in International Criminal Law, there is an absolute prohibition against targeting civilians, which may not be derogated from due to military necessity. However, this does not exclude the possibility of civilian casualties incidental to an attack aimed at legitimate military targets provided they are proportionate to the concrete and direct military advantage anticipated prior to the attack. Indiscriminate attacks, namely attacks, which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks on civilians. Military objectives are those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances, offer a definite military advantage.

In this regard, a direct attack against civilians can be inferred from the indiscriminate character of the weapon used. An attack, which may cause civilian casualties disproportionate to the concrete and direct military advantage anticipated, is to be considered as indiscriminate. Such an attack may also give rise to the inference that civilians were the objects of attack. The parties to a conflict have an obligation to remove civilians, to the maximum extent feasible, from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas. However, the failure of a party to abide by this obligation does not relieve the attacking side of its duty to follow by the principles of distinction between combatants and non-combatants and proportionality when launching an attack.

The *mens rea* element of this war crime is fulfilled if the perpetrator intended to make individual civilians not taking direct part in the hostilities, or the civilian population as a whole, the object of the attack and whether the attacker could have reasonably believed that the target was a legitimate military objective. A useful standard by which to assess the reasonableness of such belief is that of a reasonable commander in the position of the attacker (see Klamberg (ed.), Commentary on the Law of the International Criminal Court, 2016, pages 75 and 77).

While some of these principles have been alluded to or enunciated indirectly by previous ICTY jurisprudence, the Appeals Chamber took the opportunity to set out the basic principles of this prohibition, such as the fact that the inspiration for them came from article 51(4) of Additional Protocol to the 1949 Geneva Conventions (see here), elaborated on what amounts to a military objective and the *mens rea* of the war crime of an attack against civilians (paras. 486-489). This was done in the

context of the shelling of Sarajevo resulting in a finding that during the attack on this city not enough had been done to make a meaningful distinction between attacks on military targets and civilians.

Hostage Taking

The war crime of taking of hostages is provided for in the context of non-international conflict in article 4(c) of the ICTR Statute (here), article 3(c) of the SLSC Statute (here) and article 8.2(a)(viii) of the Statute of the International Criminal Court (here) but this provision has been judicially considered primarily by the SLSC.

The Trial Chamber of the SLSC identified three elements of the crime of taking of hostages:

- the accused seized, detained, or otherwise held hostage one or more persons;
- the accused threatened to kill, injure or continue to detain the hostage(s); and
- the accused intended to compel a State, an international organization, a natural or legal person or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of the hostage(s).

In addition to the element of confinement, there must be a threat made against the hostage, which will be realized if a particular condition is not fulfilled. This threat can be explicit or implicit. Communication of this threat to a third party does not comprise an element that needs proof; it is just a means to prove the second element of the offence.

This crime involves a specific *mens rea* intent since the threat to the hostage(s) must be intended as a coercive measure to achieve the fulfillment of a condition. The requisite intent may be present at the moment the hostage is first detained or it may be formed some time thereafter while the individual is being held (see *Sesay, Kallon and Gbao ('RUF')* case, March 2, 2009, paras. 240-243).

The contribution of the ICTY jurisprudence to the crime of hostage-taking has been the fact that it can be extended to UN peacekeepers, which was confirmed by the Appeal Chamber in the following words:

The Appeals Chamber recalls the 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. In this respect, the ICTY Appeals Chamber had previously dismissed Karadzic's submission that the UN Personnel were not entitled to protection under Common Article 3. In the Decision of 11 December 2012, the ICTY Appeals Chamber explained that "[t]he fact that detainees are considered *hors de combat* does not render their detention unlawful in itself. Rather, their *hors de combat* status triggers Common Article 3? s protections, including the prohibition on their use as hostages." Therefore, whether the detention of the UN Personnel was lawful or not would have no bearing on the applicability of the prohibition on hostage-taking under Common Article 3 (para. 659).

Sentencing

The prosecution had appealed the 40 year sentence as it was of the view that the sentence was inadequate given his “responsibility for the largest and gravest set of crimes ever attributed to a single person at the ICTY”. (para. 761) The Appeals Chamber agreed, especially given “the extraordinary gravity of Karadzic’s ‘crimes as well as his central and instrumental participation in four joint criminal enterprises, which spanned more than four years and covered a large number of municipalities in Bosnia and Herzegovina.” (para. 766). As well, the sentence was not sufficient given the fact that a number of other persons had been given a life sentence for crimes, which were only a fraction of the crimes for which Karadži? had been found responsible (paras. 767-772) and this incongruity could only be resolved by imposing the same sentence on Karadži?. (paras. 773-774).

Conclusion

This decision by the Appeal Chamber puts to rest one of the most reprehensible chapters considered by the ICTY in its history (although Karadži? sought a review of his sentence on March 28, 2019, here, it was rejected on April 3, 2019, here). There are still some cases outstanding, namely the appeal by Ratko Mladi? (here) and the retrial of Jovica Staniši? and Franko Simatovi? (here) but the legacy of the ICTY has been firmly cemented in history already, both from a historical as well as a legal perspective. With respect to the latter, the Appeals Chamber limited itself to providing some clarifications of the existing jurisprudence without venturing at this last stage into unexplored legal territory.

Please cite this article as: Joseph Rikhof, “Karadži? receives life imprisonment” (2018) 3 PKI Global Just J 49.

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