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Tribunal Pénal
International pour
l'ex-Yougoslavie

JUDGEMENT SUMMARY

(Exclusively for the use of the media. Not an official document)

APPEALS CHAMBER

The Hague, 15 December 2015

Appeal Judgement Summary for Stanišić and Simatović

Please find below the summary of the Judgement read out today by Judge Fausto Pocar.

Following the practice of the Tribunal, I will not read out the text of the Judgement, except for the disposition. Instead I will summarise the findings of the Appeals Chamber. This oral summary does not constitute any part of the official and authoritative Judgement of the Appeals Chamber, which will be distributed in writing to the parties at the close of this hearing.

I. BACKGROUND OF THE CASE

The events giving rise to this appeal took place between April 1991 and 31 December 1995 in the Serbian Autonomous Area of Krajina or the “SAO Krajina” and the Serbian Autonomous Area of Slavonia, Baranja, and Western Srem or the “SAO SBWS” in Croatia as well as in the municipalities of Bijeljina, Bosanski [amac, Dobo], Sanski Most, Trnovo, and Zvornik in Bosnia and Herzegovina.

Throughout 1991, Mr. Stanišić held the position of Deputy Chief of the State Security Service, also known as the SDB, in the Ministry of Interior of the Republic of Serbia. From 31 December 1991 and until October 1998, he was Chief of the Serbian SDB.

Mr. Simatović began to work in the Second Administration of the Serbian SDB in Belgrade from at least December 1990. On 29 April 1992, Mr. Simatović was appointed as the Deputy Chief of the Second Administration of the Serbian SDB, effective as of 1 May 1992. On 12 May 1993, Mr. Simatović was appointed as a special advisor in the SDB.

The Prosecution charged Mr. Stanišić and Mr. Simatović with committing crimes in the localities mentioned previously through their participation in a joint criminal enterprise (“JCE”), which allegedly came into existence no later than April 1991 and continued until at least 31 December 1995. The alleged common criminal purpose of the JCE was the forcible and permanent removal of the majority of non-Serbs, principally Croats, Bosnian Muslims, and Bosnian Croats from large areas of Croatia and Bosnia and Herzegovina. The Indictment alleged that this involved the commission of murder as a violation of the laws or customs of war and as a crime against humanity as well as deportation, other inhumane acts (forcible transfer), and persecution (through murder, deportation, and other inhumane acts (forcible transfer)) as crimes against humanity. Alternatively, the Indictment alleged that the objective of the JCE involved deportation and forcible transfer, while murder and persecution were reasonably foreseeable to Mr. Stanišić and Mr. Simatović.

In addition, Mr. Stanišić and Mr. Simatović were charged with having planned, ordered, and/or otherwise aided and abetted in the planning, preparation, and/or execution of the crimes alleged in the Indictment.

The Trial Chamber - composed of Judge Orić, Judge Picard, and Judge Gwaunza - found that many of the crimes alleged in the Indictment were indeed perpetrated by various Serb

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Forces in the above-mentioned localities in Croatia and in Bosnia and Herzegovina. However, the Trial Chamber, Judge Picard dissenting, found neither Mr. Stanišić nor Mr. Simatović responsible for committing these crimes pursuant to JCE liability, as it found that it was not established beyond reasonable doubt that they possessed the requisite mens rea for JCE liability.

The Trial Chamber also found that it was not proven beyond reasonable doubt that Mr. Stanišić or Mr. Simatović planned and/or ordered these crimes. Further, the Trial Chamber, Judge Picard dissenting, found that the actus reus for aiding and abetting liability was not established beyond reasonable doubt and thus neither Mr. Stanišić nor Mr. Simatović was responsible for aiding and abetting these crimes.

Consequently, the Trial Chamber, Judge Picard dissenting, concluded that Mr. Stanišić and Mr. Simatović were not guilty on all counts in the Indictment.

II. THE APPEALS

The Prosecution has filed an appeal against the Trial Judgement on three grounds. The Appeals Chamber heard the oral submissions of the parties on 6 July 2015.

I will first address the Prosecution's first ground of appeal. Under this ground of appeal, the Prosecution submits that the Trial Chamber erred in law and in fact in finding that the mens rea of Mr. Stanišić and Mr. Simatović for JCE liability was not established. Under this ground of appeal, the Prosecution presents three sub-grounds.

Under sub-ground of appeal 1(A), the Prosecution argues that the Trial Chamber erred in law in failing to adjudicate and/or provide a reasoned opinion on essential elements of JCE liability, in particular, the existence of a common criminal purpose and Stanišić's and Simatović's contribution to it.

The Appeals Chamber observes that, before arriving at its conclusion on the mens rea of Mr. Stanišić and Mr. Simatović, the Trial Chamber did not first adjudicate whether the elements of the actus reus of JCE liability were fulfilled, namely, the existence of a common criminal purpose, a plurality of persons, and Mr. Stanišić's and Mr. Simatović's contribution to the common criminal purpose of the JCE. The Appeals Chamber, Judge Afande dissenting, is of the view that, in the circumstances of the present case and for the reasons expressed in its Judgement, the Trial Chamber could only adjudicate, and provide a reasoned opinion on, Mr. Stanišić's and Mr. Simatović's mens rea under JCE liability after having established the existence and scope of a common criminal purpose shared by a plurality of persons and having assessed whether Mr. Stanišić's and Mr. Simatović's acts contributed to this common criminal purpose. In so doing, the Trial Chamber erred in law by failing to adjudicate, and provide a reasoned opinion on, essential elements of JCE liability. The Appeals Chamber, Judge Afande dissenting, therefore grants the Prosecution's sub-ground of appeal 1(A).

In light of its conclusion on the Prosecution's sub-ground of appeal 1(A), the Appeals Chamber, Judge Afande dissenting, need not consider the Prosecution's arguments under the remaining sub-grounds of its first ground of appeal and dismisses them as moot.

I now turn to the Prosecution's second ground of appeal. Under this ground of appeal, the Prosecution submits that the Trial Chamber erred in law and in fact in finding that the actus reus of aiding and abetting liability was not met with respect to Mr. Stanišić's and Mr. Simatović's conduct in relation to the crimes committed in the municipalities of Bosanski [amac and Dobo] in Bosnia and Herzegovina and in the SAO Krajina, and erroneously acquitted them of aiding and abetting these crimes. The Prosecution has further presented two sub-grounds.

Under sub-ground of appeal 2(A), the Prosecution argues that the Trial Chamber erred in law in requiring that the acts of the aider and abettor be specifically directed to assist the commission of a crime and that, had the Trial Chamber not so erred, it would have concluded that Mr. Stanišić and Mr. Simatović aided and abetted the crimes committed in the said localities.

The Appeals Chamber recalls that, in the Šainović et al. Appeal Judgement, which was issued subsequent to the Perišić Appeal Judgement, it clarified that specific direction is not an element of aiding and abetting liability. In arriving at this conclusion, it carefully reviewed the jurisprudence of the Tribunal and the International Criminal Tribunal for Rwanda (“ICTR”) in this regard and re-examined the elements of aiding and abetting liability under customary international law. The Appeals Chamber then observed that, neither in the jurisprudence of the Tribunal and the ICTR nor under customary international law, had specific direction been considered to be an element of aiding and abetting liability. As a result, the Appeals Chamber rejected the approach adopted in the Perišić Appeal Judgement, which required specific direction as an element of the actus reus of aiding and abetting, and held that this approach was “in direct and material conflict with the prevailing jurisprudence on the actus reus of aiding and abetting liability and with customary international law”. The Appeals Chamber also re-affirmed that, “under customary international law, the actus reus of aiding and abetting ‘consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime’” and that “the required mens rea is ‘the knowledge that these acts assist the commission of the offense’.” Subsequently, in the Popović et al. Appeal Judgement, the Appeals Chamber re-affirmed that “‘specific direction’ is not an element of aiding and abetting liability under customary international law”.

Accordingly, the Appeals Chamber, Judge Agius and Judge Afande dissenting, finds that the Trial Chamber erred in law in requiring that the acts of the aider and abettor be specifically directed to assist the commission of a crime. The Appeals Chamber, Judge Agius and Judge Afande dissenting, therefore grants the Prosecution’s sub-ground of appeal 2(A).

In light of its conclusion on the Prosecution’s sub-ground of appeal 2(A), the Appeals Chamber, Judge Agius and Judge Afande dissenting, need not consider the Prosecution’s arguments under the remaining sub-ground of its second ground of appeal and dismisses them as moot.

I now turn to the implications of the Appeals Chamber’s conclusions with regard to the Prosecution’s sub-grounds of appeal 1(A) and 2(A).

As a result of the error on JCE liability under its sub-ground of appeal 1(A), the Prosecution requests that the Appeals Chamber overturn Mr. Stanišić’s and Mr. Simatović’s acquittals, apply the correct legal standard to the evidence, and convict them pursuant to Article 7(1) of the Statute based on their participation in the alleged JCE under all counts in the Indictment. As a result of the error on aiding and abetting liability under its sub-ground of appeal 2(A), the Prosecution requests that the Appeals Chamber overturn Mr. Stanišić’s and Mr. Simatović’s acquittals, apply the correct legal standard to the evidence, and convict them pursuant to Article 7(1) of the Statute for aiding and abetting crimes under all counts in the Indictment.

Alternatively, with respect to both errors, the Prosecution requests that the Appeals Chamber “remand the case to a bench of the Tribunal to apply the correct legal standards to the trial record, and to determine the liability of Mr. Stanišić and Mr. Simatović as alleged in the Indictment”. At the appeal hearing, the Prosecution underlines that this would not be a retrial but “a process of remitting for re-adjudication based on the evidence already adduced at trial”.

Simatović also submits that, in the event that the Appeals Chamber finds the Prosecution’s appeal to be grounded, the Appeals Chamber should return the case to “a special bench of the Tribunal for reconsideration with the application of the appropriate legal standard”.

The Appeals Chamber recalls that, in accordance with the well-established standard of appellate review, where it finds an error of law in the trial judgement arising from the application of a wrong legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.

In light of the nature and scale of the errors of law identified by the Appeals Chamber under the Prosecution's sub-grounds of appeal 1(A) and 2(A), Judge Agius dissenting with respect to the error on aiding and abetting liability and Judge Afande dissenting with respect to the error on JCE liability and the error on aiding and abetting liability, were the Appeals Chamber to conduct its own review of the relevant factual findings of the Trial Chamber, applying the correct legal standards, it would first have to turn to the error on JCE liability and make findings on the existence and scope of a common criminal purpose shared by a plurality of persons and then proceed to assess Stanišić's and Simatović's contribution and intent for JCE liability. Depending on the result of such an analysis, the Appeals Chamber might then have to turn to the error on aiding and abetting liability.

However, the Appeals Chamber, Judge Afande dissenting, is of the view that it would be inappropriate to conduct this analysis as it would have to analyse the entire trial record without the benefit of having directly heard the witnesses in order to determine whether it is itself satisfied with respect to the requirements of JCE liability and, depending on the result of such an analysis, with respect to the requirements of aiding and abetting liability. Indeed, the evidence on which the Prosecution relies to establish the common criminal purpose and the mens rea for JCE liability is of a circumstantial nature and it would not be sufficient for the Appeals Chamber to focus on limited pieces of evidence or the existent findings in the Trial Judgement, which do not thoroughly address the evidence relevant to the common criminal purpose or the plurality of persons. In this regard, the Appeals Chamber also notes the scale and complexity of the case, with a trial record containing 4,843 exhibits and the testimony and/or written statements of 133 witnesses, the contents of which span wide swaths of Croatia and Bosnia and Herzegovina over a four and a half year time period (April 1991 - 31 December 1995) and pertain to multiple statutory crimes, numerous armed groups, and various high-ranking alleged JCE members. Assessing this trial record in its entirety without having directly heard the witnesses would not allow the Appeals Chamber to fairly and accurately determine Stanišić's and Simatović's criminal responsibility.

In light of the above, in determining the subsequent course of action, the Appeals Chamber may exercise a certain discretion. In so doing, the Appeals Chamber notes that, of the three judges of the original Trial Chamber, who directly heard the witnesses at trial, two judges no longer hold office at the Tribunal. Therefore, it is impractical to remit the case to the original Trial Chamber composed of the same three Judges, who would have been best placed to make the necessary findings on the basis of the original trial record. Should the case be remitted to a newly composed trial chamber to do this exercise solely on the basis of the original trial record, it would encounter similar difficulties to those which would be encountered by the Appeals Chamber as a result of not having directly heard the witnesses. Accordingly, and recalling that an appeal is not a trial de novo, the Appeals Chamber, Judge Afande dissenting, finds that this case gives rise to appropriate circumstances for a retrial pursuant to Rule 117(C) of the Rules. The Appeals Chamber, Judge Afande dissenting, hereby orders that Mr. Stanišić and Mr. Simatović be retried on all counts in the Indictment. Finally, if the new trial chamber were to examine the responsibility of Mr. Stanišić and Mr. Simatović for aiding and abetting the crimes, the Appeals Chamber, Judge Agius and Judge Afande dissenting, instructs it to apply the correct law on aiding and abetting liability as set out above, which does not require that the acts of the aider and abettor be specifically directed to assist the commission of a crime.

As a consequence of having granted the Prosecution's sub-grounds of appeal 1(A) and 2(A) and having ordered a retrial, the Appeals Chamber, Judge Agius and Judge Afande dissenting, need not consider the Prosecution's third ground of appeal and dismisses it as moot.

III. DISPOSITION

I will now read out in full the disposition of the Judgement of the Appeal Chamber.

Mr. Stanišić and Mr. Simatović, could you please stand?

For the foregoing reasons, THE APPEALS CHAMBER,

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules,

NOTING the respective written submissions of the parties and the arguments they presented at the appeal hearing on 6 July 2015;

SITTING in open session;

GRANTS, Judge Afande dissenting, the Prosecution's sub-ground of appeal 1(A) and **QUASHES**, Judge Afande dissenting, the Trial Chamber's decision to acquit Stanišić and Simatović for committing, through their participation in a JCE, murder as a violation of the laws or customs of war and murder, deportation, other inhumane acts (forcible transfer), and persecution as crimes against humanity under all counts of the Indictment;

GRANTS, Judge Agius and Judge Afande dissenting, the Prosecution's sub-ground of appeal 2(A) and **QUASHES**, Judge Agius and Judge Afande dissenting, the Trial Chamber's decision to acquit Stanišić and Simatović for aiding and abetting murder as a violation of the laws or customs of war and murder, deportation, other inhumane acts (forcible transfer), and persecution as crimes against humanity under all counts of the Indictment;

ORDERS, Judge Afande dissenting, pursuant to Rule 117(C) of the Rules that Stanišić and Simatović be retried on all counts of the Indictment;

ORDERS, Judge Agius and Judge Afande dissenting, the trial chamber composed for retrial, should it consider aiding and abetting liability, to apply the correct law on aiding and abetting liability as affirmed herein, which does not require that the acts of the aider and abettor be specifically directed to assist the commission of a crime;

DISMISSES the Prosecution's appeal in all other respects; and

PURSUANT TO Rules 64, 107, and 118 of the Rules,

ORDERS, Judge Afande dissenting, the detention on remand of Stanišić and Simatović and **ENJOINS**, Judge Afande dissenting, the Commanding Officer of the United Nations Detention Unit in The Hague to detain them until further order.

Judge Carmel Agius appends a separate and partly dissenting opinion.

Judge Koffi Kumelio A. Afande appends a dissenting opinion.
