

Case Note

Prosecutor v Milimir Stakic [IT-97-24-A] (Appeals Chamber) (22 March 2006)

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Introduction

The Appeals Judgment in *Prosecutor v Milimir Stakic* was handed down on 22 March 2006.¹ In the Judgment, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (‘Tribunal’) made significant findings in relation to the ‘target group’ for genocide; the *dolus specialis* (special intent) for genocide; ‘co-perpetratorship’ as a form of liability in the Tribunal’s jurisprudence; the elements of the crimes of deportation and forcible transfer; permissible cumulative convictions; and sentencing.

This case note will briefly discuss the background facts to the case; Dr. Milimir Stakić’s (‘Stakic’) role during the relevant events; his indictment by the Tribunal; the Trial Judgment;² the appeals by the Office of the Prosecutor (‘Prosecution’) and Stakic; and finally, the key parts of the Appeals Judgment as outlined above.

I. Background facts

On 29-30 April 1992, the Serbian Democratic Party (‘SDS’) effected a coup d’état in the municipality of Prijedor, Bosnia and Herzegovina, ‘with the ultimate aim of creating a pure Serbian Municipality’.³ Over the next few months, a campaign of persecution and extermination was conducted against the non-Serb population of Prijedor. This campaign included killings in Bosnian Muslim villages throughout the municipality;⁴ interrogations, sexual assaults, beatings and killings at the Omarska, Keraterm and Trnopolje camps;⁵ and the execution of approximately 200 Bosnian Muslim men at Vlastic Mountain.⁶

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1 *Prosecutor v Milimir Stakic* [IT-97-24-A] (Appeals Chamber)(22 March 2006) (‘*Stakic* [IT-97-24-T] (Appeals Chamber)’).

2 *Prosecutor v Milimir Stakic* [IT-97-24-T] (Trial Chamber)(31 July 2003) (‘*Stakic* [IT-97-24-A] (Trial Chamber)’).

3 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [84].

4 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [129]–[152].

5 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [159]–[244].

6 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [214]–[219].

2. Dr Milomir Stakic

Stakic was a physician in Prijedor. During this time he was the leading Bosnian Serb political figure in Prijedor. In November 1990, as a member of the SDS, he was elected to the Prijedor Municipal Assembly ('PMA'). In January 1991, he became Vice-President of the PMA.⁷ In September 1991, he was elected Vice-President of the SDS Municipal Board, and in January 1992, he was elected President of the Assembly of the Serbian People of the Municipality of Prijedor.⁸ Following the coup d'état, Stakic became President of the PMA, and as of May 1992, President of the Prijedor Municipal Crisis Staff, which effectively assumed the duties of the PMA on the grounds that the region was in a state of emergency.⁹ He served in those positions until January 1993.¹⁰

3. The Indictment

On 13 March 1997, Stakic was charged with one count of complicity in genocide in an indictment confirmed by Judge Elizabeth Odio Benito of the Tribunal.¹¹ This indictment was kept under seal until Stakic's arrest on 23 March 2001. Following his arrest, the Prosecution filed an amended indictment, which included 12 counts against Stakic. This was ultimately reduced to eight counts in the Fourth Amended Indictment (the 'Indictment').¹²

The Indictment charged Stakic with genocide and complicity in genocide under Article 4 of the Tribunal Statute; murder, extermination, persecutions, deportation and other inhumane acts (forcible transfer), all as crimes against humanity under Article 5 of the Tribunal Statute; and murder as a violation of the laws and customs of war under Article 3 of the Tribunal Statute.

4. The Trial Judgment

Following a 12-month trial, the Trial Judgment was handed down on 31 July 2003. The Trial Chamber found that Stakic 'played a unique pivotal role in co-ordinating the persecutory campaign carried out by the military, police and civilian government in Prijedor',¹³ and that the acts of persecutions and extermination formed 'the heart of the criminal conduct of Dr. Stakic'.¹⁴ Accordingly, he was found guilty as a co-perpetrator of extermination as a crime against humanity; murder as a violation of the laws and customs of war; and persecutions as a crime against humanity (incorporating murder as a crime against humanity and deportation as a crime against humanity).¹⁵ However, the

7 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [5], [336].

8 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [336].

9 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [88]–[101], [336].

10 *Id* at [7].

11 The Accused was originally indicted with Simo Drljaca and Milan Kovacevic. Drljaca was killed on 10 July 1997 while resisting arrest, and proceedings against Kovacevic were commenced on 6 July 1998 but terminated on 24 August 1998 following his death from natural causes on 4 August 1998.

12 Fourth Amended Indictment, filed 11 April 2002 (dated 10 April 2002) ('Indictment').

13 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [906].

14 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [907].

Trial Chamber was unable to infer that Stakic, or any of his subordinates, had the requisite *dolus specialis* for genocide.¹⁶ Consequently, he was acquitted of genocide and complicity in genocide. Furthermore, the Trial Chamber acquitted Stakic of other inhumane acts (forcible transfer) on the grounds that the crime of ‘other inhumane acts’ lacked sufficient clarity and should not be used to attach criminal liability to forcible transfers which were not otherwise punishable as deportations.¹⁷ Stakic was sentenced to life imprisonment (with review after 20 years).¹⁸

5. The Appeals

The Prosecution appealed the Trial Judgment in three areas. First, the Trial Chamber erred by finding that the ‘target group’ for genocide could not be defined negatively (i.e. ‘non-Serbs’ could not constitute a target group). Second, the Trial Chamber erred by finding that Stakic lacked the requisite *dolus specialis* for genocide. Third, the Trial Chamber erred in its application of the law on cumulative convictions.¹⁹ Stakic appealed the Trial Judgment in seven areas. First, the Trial Chamber erred by relying on evidence from outside the temporal scope of the Indictment. Second, the trial was unfair because Stakic was denied the right to call certain witnesses and the Prosecution violated its disclosure obligations. Third, the Trial Chamber drew impermissible inferences that resulted in a miscarriage of justice. Fourth, the Trial Chamber erred in its application of Article 5 of the Tribunal Statute (crimes against humanity) in relation to its finding that the attack was ‘widespread’ and ‘systematic’, and in its analysis of the law on extermination, persecutions and deportation. Fifth, the Trial Chamber erred in its application of Article 3 of the Tribunal Statute (violations of the laws or customs of war) by finding that there was a nexus between Stakic’s acts and an armed conflict. Sixth, the Trial Chamber erred in its determination of Stakic’s sentence. Seventh, the Trial Chamber erred in its application of the law on cumulative convictions.²⁰

6. The Appeals Judgment

The Appeals Chamber upheld the Trial Chamber’s decision to acquit Stakic of genocide and complicity in genocide; affirmed Stakic’s convictions for persecutions and extermination as crimes against humanity and murder as a violation of the laws or customs of war; and entered additional convictions against Stakic for deportation and other inhumane acts (forcible transfer) as crimes against humanity. The Appeals Chamber also imposed a ‘global sentence’ on Stakic of 40 years’ imprisonment.

The following findings of the Appeals Chamber will be discussed below:²¹

- (a) The ‘target group’ for genocide cannot be defined negatively;

15 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) Disposition.

16 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [559]–[561].

17 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [719]–[723].

18 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) Disposition.

19 Prosecution Appeal Brief (17 November 2003).

20 Stakic Appeal Brief (8 March 2004).

- (b) Stakic did not have the *dolus specialis* (special intent) for genocide;
- (c) Stakic was liable as a participant in a joint criminal enterprise ('JCE') rather than as a co-perpetrator;
- (d) The law on deportation and forcible transfer;
- (e) Permissible cumulative convictions; and
- (f) Amendments to Stakic's sentence.

A. The 'Target Group' for Genocide Cannot be Defined Negatively

In the Trial Judgment, the Trial Chamber found that 'where more than one group is targeted, it is not appropriate to define the group in general terms as, for example, "non-Serbs"'.²² Instead, it held that the target group needed to be established separately in relation to the Bosnian Croats and the Bosnian Muslims.²³ This signalled a departure from the 'negative approach' adopted by the earlier *Jelesic*²⁴ Trial Chamber, which had held that the target group could be defined by:

identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group.²⁵

The Appeals Chamber addressed this issue in some detail given the divergent views of the *Stakic* and *Jelesic* Trial Chambers, noting that 'the question of whether the group targeted for genocide can be defined negatively is one of first impression for the Appeals Chamber'.²⁶

Article 4(2) of the Tribunal Statute defines genocide as any one of several enumerated acts 'committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such'. The Appeals Chamber found the words 'as such' in Article 4(2) to be significant when considering the definition of a target group, because they demonstrate that the intent for genocide requires destruction of a group of people *with* a particular group identity, not individuals who *lack* certain national, ethnical, racial or religious characteristics.²⁷ The Appeals Chamber found that this interpretation was supported by the etymology of the term 'genocide,' which was 'originally conceived of as the destruction of a race, tribe, nation or other group with a particular positive identity – not as the destruction of various people lacking a distinct identity'.²⁸ Furthermore, the

21 The Accused's first, second, third, and fifth grounds of Appeal (reliance on evidence outside the temporal scope of the Indictment, the fairness of the trial, inferences drawn by the Trial Chamber, and the nexus between the crimes and an armed conflict) will not be analysed because they involved procedural, evidentiary or settled legal issues. All of these grounds of appeal were dismissed.

22 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [512].

23 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [512].

24 *Prosecutor v. Jelesic* [IT-95-10] (Trial Chamber) (14 December 1999).

25 *Jelesic* [IT-95-10] (Trial Chamber) (14 December 1999) at [71].

26 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [19].

27 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [20].

28 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [21].

Appeals Chamber found that the drafting history of the Genocide Convention itself supported a definition of genocide that protected groups who could be distinguished by well-established, immutable characteristics. In particular, the Appeals Chamber considered that the decision not to include the destruction of political groups or ‘cultural genocide’ in the Convention indicated that the drafters did not intend a negative definition to be applied to the target group.²⁹

Finally, the Appeals Chamber rejected the Prosecution’s argument that the Tribunal’s jurisprudence supported a subjective definition of the target group, by reference to the perpetrators’ perception of the victims. The Appeals Chamber found that the perpetrators’ perception could be a relevant factor when defining the target group, but that it could not define the target group by itself.³⁰ The Appeals Chamber held that even if this argument were accepted, a subjective definition of the target group was not relevant to whether the group could be defined positively or negatively.³¹ Accordingly, the Appeals Chamber held that the Trial Chamber did not err by finding that the target group for genocide could not be defined as ‘non-Serbs’.

The Appeals Chamber’s reasoning was clear. Nonetheless, a critique of its analysis suggests that there was scope for a more expansive finding that was still consistent with the purpose of Article 4 of the Tribunal Statute and the Genocide Convention. First, the Appeals Chamber found that the primary purpose of Article 4(2) was to protect a ‘collection of people who have a particular group identity’, but that this protection did not extend to individuals who ‘lack certain national, ethnical, racial or religious characteristics’.³² However, the Appeals Chamber did not explain in any detail why a *group* (as opposed to an individual) defined negatively on the basis of national, ethnical, racial or religious characteristics should not be subject to the same protection as a group defined positively on identical criteria. Second, the Appeals Chamber observed that a negatively-defined group may be subject to protection under Article 4 if it were comprised of several positively-defined groups, each of which constituted a protected group in its own right. However, the Appeals Chamber indicated that even if such a finding were to be made, it would not extend the protection of Article 4 to groups that were defined purely on a negative basis.³³ The Appeals Chamber did not appear to consider that *all* negatively-defined groups are arguably the subject of an underlying positive definition. For example, members of the negatively-defined group of ‘non-Serbs’ in Prijedor were members of the non-Serb group by virtue of their positive membership to a different ethnic group. This reasoning could apply equally across all protected categories under Article 4. Therefore, it is arguable that *all* groups defined negatively on the basis of national, ethnical, racial or religious characteristics should be protected under Article 4 by virtue of their underlying positive definition. Third, the Appeals Chamber found that the Genocide Convention was only designed to protect

29 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [21]–[22].

30 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [25].

31 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [26].

32 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [20].

33 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [27].

groups with ‘well-defined, immutable characteristics’, and cited the exclusion of political groups and ‘cultural genocide’ to support its finding that the negative definition of groups was not intended.³⁴ Political groups were excluded because they lack immutable characteristics, and ‘cultural genocide’ was excluded because the concept was deemed to be too vague.³⁵ However, there is nothing vague or undefined about a group which is explicitly defined by the *absence* of a particular national, ethnical, racial or religious characteristic; in fact, such a group can be as equally well-defined and immutable as a group defined by the *presence* of such a characteristic. This was certainly the case in Prijedor in 1992, where victims of Stakic’s persecutory campaign were no more able to change their Muslim or Croat ethnicity than they were able to change the fact that they were ‘non-Serbs’.

Fourth, Judge Mohamed Shahabuddeen’s dissenting opinion indicates that a more expansive finding was reasonably open to the Appeals Chamber. Judge Shahabuddeen found that there was nothing to prevent ‘several different victim groups from being defined as collectively belonging to a “group” other than that of the perpetrator’;³⁶ and that such an approach is ‘consistent with the purpose of the Genocide Convention; in some cases it may in fact be essential to the realisation of that purpose’.³⁷

Accordingly, it is arguable that the Appeals Chamber would have acted consistently with the purpose of the Tribunal Statute and the Genocide Convention had it extended the protection of Article 4 to groups defined by the lack of a particular national, ethnical, racial or religious characteristic.

B. Stakic Did Not Have the *Dolus Specialis* (Special Intent) for Genocide

Following its finding that the target group for genocide could not be defined negatively, the Appeals Chamber went on to analyse the Trial Chamber’s finding that Stakic did not have the required *dolus specialis* for genocide in relation to the Bosnian Muslims.³⁸ In its appeal, the Prosecution raised six specific challenges to the Trial Chamber’s finding. First, the Trial Chamber erroneously considered the mens rea of the direct perpetrators of the crimes rather than that of Stakic alone. Second, the Trial Chamber erroneously required an intent to kill *all* the Muslims in Prijedor. Third, the Trial Chamber confused motive with intent. Fourth, the Trial Chamber failed to consider the impact of the conditions in the detention camps and those created during the deportation process. Fifth, the Trial Chamber failed to draw reasonable inferences from Stakic’s statements. Finally, the Trial Chamber compartmentalised its analysis and failed to take into account the totality of the evidence.³⁹ The Appeals Chamber dismissed the first five challenges, finding that there were no errors in the Trial Chamber’s approach.⁴⁰ However, in relation

34 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [21]–[22].

35 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [22]–[23].

36 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [12] (Shahabuddeen J).

37 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [17] (Shahabuddeen J).

38 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [37]–[57].

39 Prosecution Appeal Brief (17 November 2003) at [3.71]–[3.126].

to the last challenge, the Appeals Chamber agreed with the Prosecution that the Trial Chamber's compartmentalised analysis 'obscured the proper analysis'.⁴¹ It stated that:

[r]ather than considering separately whether the Appellant intended to destroy the group through each of the genocidal acts specified by Article 4(1)(a), (b), and (c), the Trial Chamber should expressly have considered whether all of the evidence, taken together, demonstrated a genocidal mental state.⁴²

The Appeals Chamber was not persuaded by the Trial Chamber's evaluation of this evidence, because the Appeals Chamber found that, in principle, there was sufficient evidence to support a finding that Stakic intended to destroy the Bosnian Muslim population in part. However, the Appeals Chamber noted that the Prosecution bore a 'heavy burden of persuasion' on appeal, and ultimately held that the evidence was not 'so unambiguous that a reasonable Trial Chamber was *obliged* to infer that intent was established beyond a reasonable doubt'.⁴³ Accordingly, the Appeals Chamber found that the Trial Chamber's ultimate conclusion was reasonable and upheld its decision to acquit Stakic of genocide and complicity in genocide. This finding serves as a salient reminder of the Appeals Chamber's reluctance to disturb a Trial Chamber's findings of fact unless those findings have resulted in a miscarriage of justice.

C. *Stakic* was Liable as a Participant in a JCE Rather than as a Co-perpetrator

In its Judgment, the Trial Chamber rejected the Prosecution's theory that Stakic was liable as a participant in a JCE (despite it being pleaded in both the Indictment and at trial), instead finding that Stakic was liable as a co-perpetrator of the crimes for which he was convicted.⁴⁴

Neither party appealed this finding. However, the Appeals Chamber chose to review it *proprio motu* because the concept of 'co-perpetratorship' appeared to be 'new to the jurisprudence of this Tribunal'.⁴⁵ Following its review, the Appeals Chamber held that the Trial Chamber erroneously found Stakic liable as a 'co-perpetrator' rather than as a participant in a JCE. It stated:

This mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers. By way of contrast, joint criminal enterprise is a mode of liability which is firmly established in customary international law. Furthermore, joint criminal enterprise is the mode of liability under which the Appellant was charged in the Indictment, and to which he responded at trial. In view

40 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [37]–[52].

41 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [55].

42 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [55].

43 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [56].

44 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [417]–[498].

45 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [58].

of these reasons, it appears that the Trial Chamber erred in employing a mode of liability which is not valid law within the jurisdiction of this Tribunal.⁴⁶

The Appeals Chamber's support for JCE as a mode of liability is unsurprising given its long-standing recognition in the Tribunal's jurisprudence and customary international law.⁴⁷ Other judicial and academic sources have expressed concern about the conviction of individuals for crimes of specific intent through the JCE III form of liability,⁴⁸ and have argued that individual criminal responsibility would be more accurately enforced under the co-perpetration mode of liability.⁴⁹ However, regardless of the perceived advantages of co-perpetration as a mode of liability, such a finding was not open to the Trial Chamber because co-perpetration is not recognised by the Tribunal's jurisprudence or by customary international law. Furthermore, while the Appeals Chamber did not specifically address this point, the Trial Chamber's reliance on a mode of liability not pleaded in the Indictment was arguably prejudicial to Stakic's right to know the case he had to meet.

Following its finding that the Trial Chamber erred by its reliance on co-perpetration, the Appeals Chamber turned to consider whether the Trial Chamber's factual findings could support an alternate finding that Stakic was liable as a participant in a JCE. It found that a JCE was operating in the municipality of Prijedor during the relevant period with the common purpose of 'a discriminatory campaign to ethnically cleanse the Municipality of Prijedor by deporting and persecuting Bosnian Muslims and Bosnian Croats in order to establish Serbian control'.⁵⁰ It also found that Stakic was a participant in the JCE; that he made a substantial contribution to the implementation of the common purpose of the JCE; and that he shared the intent to further the common purpose of the JCE.⁵¹

The Appeals Chamber held that the crimes of persecutions, deportation and forcible transfer were committed in accordance with the common purpose of the JCE, and Stakic was therefore liable for those crimes as a participant in the JCE.⁵² Moreover, the Appeals Chamber held that the crimes of murder and extermination were a natural and foreseeable consequence of implementing the common purpose of the JCE, and Stakic was therefore also liable for those crimes as a participant in the JCE.⁵³

46 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [62].

47 See *Prosecutor v Dushko Tadic* [IT-94-1-A] (Appeals Chamber) (15 July 1999) at [185]–[234].

48 Liability under JCE III arises where the crime committed was not within the common purpose of the JCE, but was a natural and foreseeable consequence.

49 In addition to *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003), see eg, *Prosecutor v Simi et al* [IT-95-9-T] (Trial Chamber) (17 October 2003) at [2]–[5] (Lindholm J); and Mohamed Elewa Badar, "Just Convict Everyone!" – Joint Perpetration: From Tadic to Stakic and Back Again' (2006) 6 *International Criminal Law Review* 292.

50 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [73].

51 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [85].

52 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [68]–[85], [104].

53 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [86]–[104].

D. The Law on Deportation and Forcible Transfer

In its Judgment, the Trial Chamber found that the actus reus of the crime of deportation requires that the victims be displaced across a de jure or de facto border, including constantly changing frontlines.⁵⁴ It also held that the mens rea for deportation requires the intent to permanently displace the victims.⁵⁵ Stakic appealed both of these findings and alleged that the Trial Chamber's analysis of the facts amounted to a miscarriage of justice.⁵⁶ The Appeals Chamber outlined the elements of deportation; *proprio motu* discussed the Trial Chamber's findings on forcible transfer; and analysed the Trial Chamber's factual findings in light of the corrected law on deportation and forcible transfer.

First, the Appeals Chamber found that deportation requires that 'the displacement of people is forced, carried out by expulsion or other forms of coercion such that the displacement is involuntary in nature, and that the relevant persons had no genuine choice in their displacement'.⁵⁷ The Appeals Chamber upheld the Trial Chamber's finding that the displacements in Prijedor were involuntary in nature.⁵⁸ Second, the Appeals Chamber found that deportation requires the displacement of people across a border. Customary international law requires that the expulsion be across a de jure border, and the Appeals Chamber found that in certain circumstances, to be considered on a case-by-case basis, displacement across a de facto border may also amount to deportation.⁵⁹ However, the Appeals Chamber found that there was no support in customary international law for the Trial Chamber's finding that forced displacement across constantly changing frontlines constitutes deportation. Therefore, it found that the Trial Chamber erred as a matter of law by convicting Stakic for deportation where people were forcibly displaced across changing frontlines but not across a de jure or de facto border.⁶⁰ Judge Shahabuddeen dissented on this point, finding that under customary international law, deportation could apply to forcible displacements that take place across front lines.⁶¹ However, this dissenting opinion has found little support in subsequent Tribunal jurisprudence, primarily because liability for forced displacements over changing frontlines can be attached via the alternative crime of inhumane acts (forcible transfer).

Third, the Appeals Chamber held that the mens rea for deportation does not require the intent to permanently displace the victims.⁶² The Trial Chamber erred by finding this to be a requirement, but the error proved to be 'harmless' in this case because the Trial Chamber found that Stakic had satisfied this requirement. Nonetheless, while the Trial Chamber's error made no difference in this particular case, the Appeals Chamber chose

54 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [678].

55 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [687].

56 *Stakic* Appeal Brief (8 March 2004) at [307]–[317].

57 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [279].

58 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [286]–[287].

59 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [300].

60 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [303].

61 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [19]–[76] (Shahabuddeen J.).

62 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [307].

to correct it to ensure that in future cases, proof of intent to permanently displace would not be required.⁶³

Fourth, the Appeals Chamber *proprio motu* considered the Trial Chamber's finding that it could not enter a conviction of forcible transfer because the crime of 'other inhumane acts' lacked sufficient clarity and should not be used to attach criminal liability to forcible transfers which were not otherwise punishable as deportations.⁶⁴ The Appeals Chamber found that the Trial Chamber erred in its analysis; the crime of 'other inhumane acts' was clearly recognised in the Tribunal's jurisprudence; and acts of forcible transfer had been recognised in other cases as sufficiently serious to fall within the 'other inhumane acts' category of crimes.⁶⁵ The Appeals Chamber then clarified that forcible transfer is 'the forcible displacement of persons which may take place within national boundaries. The mens rea does not require the intent to transfer permanently'.⁶⁶ As noted above, this finding rendered Judge Shahabuddeen's dissenting opinion on deportation largely moot. Finally, after establishing that the Trial Chamber erred in its definition of deportation and its analysis of forcible transfer, the Appeals Chamber applied the correct tests to the Trial Chamber's factual findings to determine if convictions should be entered for either count. The Appeals Chamber found that at least one incident of deportation was proven, but declined to enter findings with respect to several other incidents because they did not satisfy the cross-border requirement.⁶⁷ However, the Appeals Chamber found that a number of these incidents amounted to forcible transfer because the displacement was within national boundaries.⁶⁸ Accordingly, the Appeals Chamber entered findings of both deportation and forcible transfer against Stakic.

E. Permissible Cumulative Convictions

The Trial Chamber convicted Stakic of extermination and persecutions as crimes against humanity and murder as a violation of the laws and customs of war. It declined to enter convictions for deportation or murder as crimes against humanity, finding that they were based on the same underlying acts as the persecutions count and that persecutions was the crime that most 'comprehensively reflects the totality of the accused's criminal conduct'.⁶⁹

The Prosecution appealed this finding, arguing that persecutions had a different intent requirement than either murder or deportation, and that the Trial Chamber therefore erred by not entering separate convictions for these counts.⁷⁰ Stakic also appealed this finding, arguing that the Trial Chamber erroneously convicted him of

63 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [307].

64 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [719]–[723].

65 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [313]–[318].

66 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [317].

67 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [320]–[321].

68 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [321].

69 *Stakic* [IT-97-24-T] (Trial Chamber) (31 July 2003) at [870], [880].

70 Prosecution Appeal Brief (17 November 2003) at [5.21]–[5.28], [5.38]–[5.44].

extermination and persecution-based on the same underlying facts.⁷¹ The Appeals Chamber applied the following two-pronged test on the permissibility of cumulative convictions from the *Celebici* Appeals Judgment:

[M]ultiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered under that provision.⁷²

The Appeals Chamber held that the Trial Chamber erred by finding that cumulative convictions for deportation and persecutions were not permissible. Rather, the Appeals Chamber found that cumulative convictions for deportation, persecutions, other inhumane acts (forcible transfer) and extermination were all permissible because each crime contains a materially distinct element which was not required for the others: i.e. deportation requires civilians to be forcibly displaced across a border;⁷³ persecutions requires the specific intent to discriminate;⁷⁴ other inhumane acts requires ‘proof of an act or omission causing serious mental or physical suffering or injury or constituting a serious attack on human dignity’;⁷⁵ and extermination requires proof that ‘the acts of the accused caused the death of a large number of people’.⁷⁶

The Appeals Chamber also found that cumulative convictions for persecutions and murder as a crime against humanity were permissible because murder required the materially distinct element that ‘the accused caused the death of one or more persons’.⁷⁷ However, it held that cumulative convictions for extermination and murder as a crime against humanity were not permissible because murder ‘does not require any material elements to be proven over and above those required for the crime of extermination’.⁷⁸ Therefore, while the Trial Chamber erred in finding that cumulative convictions were not permissible for murder and persecutions, the error made no difference to the final outcome. There was nothing controversial about the Appeals Chamber’s findings in relation to permissible cumulative convictions; it simply applied the test from the *Celebici* Appeals Judgment and reached a series of clear and logical conclusions. Accordingly, the final convictions entered by the Appeals Chamber against Stakic were: (a) murder as a

71 *Stakic* Appeal Brief (8 March 2004) at [534]–[544].

72 *Prosecutor v Delalic et al* [IT-96-21] (Appeals Chamber) (20 February 2001) at [412]–[413].

73 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [360].

74 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [360].

75 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [362].

76 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [364].

77 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [359].

78 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [366].

violation of the laws and customs of war; (b) extermination as a crime against humanity; (c) persecutions as a crime against humanity; (d) deportation as a crime against humanity; and (e) other inhumane acts (forcible transfer) as a crime against humanity.⁷⁹

F. Amendments to Stakic's Sentence

The Appeals Chamber found that the Trial Chamber made errors in determining Stakic's sentence, but found their impact on the actual sentence was very limited.⁸⁰ However, the Appeals Chamber found that the Trial Chamber also erred by imposing a 20-year review obligation on the Host State where Stakic would serve his sentence, because it effectively removed the power of final review from the President of the Tribunal and placed it with the Host State.⁸¹ Accordingly, without explaining its reasoning in any detail, the Appeals Chamber revised Stakic's sentence to 40 years imprisonment.⁸²

79 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) Disposition.

80 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) at [428].

81 Under Article 28 of the Tribunal Statute, where a convicted person becomes eligible for pardon or commutation of sentence under the laws of the Host State, the power of final review rests with the President of the Tribunal.

82 *Stakic* [IT-97-24-A] (Appeals Chamber) (22 March 2006) Disposition.