



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-97-24-T
Date: 31 July 2003
Original: English

IN TRIAL CHAMBER II

Before: Judge Wolfgang Schomburg, Presiding
Judge Volodymyr Vassilenko
Judge Carmen Maria Argibay

Registrar: Mr. Hans Holthuis

Judgement of: 31 July 2003

PROSECUTOR

v.

MILOMIR STAKIĆ

JUDGEMENT

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Nicholas Koumjian
Ms. Ann Sutherland

Counsel for the Accused:

Mr. Branko Lukić
Mr. John Ostojic

E. **Murder as a Violation of the Laws or Customs of War – Article 3 of the Statute (Count 5)**

1. **The Applicable Law**

577. Dr. Stakić is charged with murder as recognised by Article 3(1)(a) of the Geneva Conventions of 1949 and punishable under Article 3 of the Statute. It is settled in the jurisprudence of this Tribunal that violations of Article 3 common to the Geneva Conventions of 1949 (“common Article 3”) fall within the ambit of Article 3 of the Statute¹¹⁹⁸

578. Common Article 3 states in relevant part:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely [...].

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, *in particular murder of all kinds*,¹¹⁹⁹ mutilation, cruel treatment and torture;

[...]

579. The Trial Chamber recalls that it has already found two requirements for the applicability of Article 3: the existence of an armed conflict and a nexus between the acts of the accused and that conflict.

580. As argued by the parties,¹²⁰⁰ in addition to the requirements common to Articles 3 and 5 of the Statute, four additional requirements specific to Article 3 must be satisfied in respect of the crime of murder as a violation of the laws or customs of war:

1. The violation must constitute an infringement of a rule of international humanitarian law;
2. The rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [...];
3. The violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim [...];
4. The violation of the rule must entail, under customary or conventional law, the individual responsibility of the person breaching the rule.¹²⁰¹

¹¹⁹⁸ See *Kunarac* Appeal Judgement, para. 68.

¹¹⁹⁹ Emphasis added.

¹²⁰⁰ Prosecution Final Brief, para. 367, Defence Final Brief paras 610-11.

¹²⁰¹ *Tadić* Jurisdiction Decision, para. 94.

581. The last element under Article 3 is that the victim must have been taking no active part in the hostilities at the time the crime was committed. The Trial Chamber will now turn to the specific elements of the crime of murder.

(a) Arguments of the parties

582. The Prosecution submits that the crime of murder as a violation of the laws or customs of war has the following *actus reus*: the accused, either by act or omission, causes the death of one or more persons. In the Prosecution's submission, the accused's contribution must be "substantial" and the required *mens rea* for murder is the intent "to kill, or inflict serious injury in reckless disregard of human life."¹²⁰²

583. The Defence submits that the elements of murder under Article 3 are (i) the death of the victim as a result of an act or omission of the accused, and (ii) that the accused committed the act or omission with the intent to kill.¹²⁰³

(b) Discussion

584. The definition of murder as a violation of the laws or customs of war is now settled in the jurisprudence of the ICTR and the ICTY which holds that the death of the victim must result from an act or omission of the accused committed with the intent either to kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death.¹²⁰⁴

585. However, this definition may create a certain confusion because both Articles 3 and 5 use the term murder interchangeably with killings. The Trial Chamber notes that prior case-law on this issue held that the intent to kill is a pre-requisite, but did not provide any further description of what is meant by "intent to kill". "Intent to kill" is defined in Blacks' Law Dictionary (7th Edition) as:

An intent to cause the death of another; esp., a state of mind that, if found to exist during an assault, can serve as the basis for an aggravated-assault charge.

Moreover, the Trial Chamber notes that where the English text reads "murder" in Article 5 of the Statute, in the French, the term "assassinat" is used.

586. The Trial Chamber finds that in the context of Article 3 of the Statute "murder" means taking another person's life. If murder is conceived in the narrow sense only, ordinary killings, namely the taking of another person's life without any additional subjective or objective

¹²⁰² Prosecution Final Brief, paras 399-401.

¹²⁰³ Defence Final Brief, para. 614.

¹²⁰⁴ See e.g. *Prosecutor v. Radislav Krstić*, para. 485; *Prosecutor v. Tihomir Blaškić*, para. 217; *Prosecutor v. Miroslav Kvočka et al*, para. 132.

aggravating elements, do not fall under the Article. This Trial Chamber believes, however, that murder should be equated to killings, that is *meurtre* in French law and *Mord* in German law.

587. Turning to the *mens rea* element of the crime, the Trial Chamber finds that both a *dolus directus* and a *dolus eventualis* are sufficient to establish the crime of murder under Article 3.¹²⁰⁵ In French and German law, the standard form of criminal homicide (*meurtre*, *Totschlag*) is defined simply as intentionally killing another human being. German law takes *dolus eventualis* as sufficient to constitute intentional killing. The technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he “reconciles himself” or “makes peace” with the likelihood of death. Thus, if the killing is committed with “manifest indifference to the value of human life”, even conduct of minimal risk can qualify as intentional homicide. Large scale killings that would be classified as reckless murder in the United States would meet the continental criteria of *dolus eventualis*.¹²⁰⁶ The Trial Chamber emphasises that the concept of *dolus eventualis* does not include a standard of negligence or gross negligence.¹²⁰⁷

2. Trial Chamber’s findings

(a) Objective element: *actus reus*

588. The Trial Chamber is satisfied that all killings alleged in paragraphs 44 and 47 of the Indictment, except the alleged incident in the village of Jaškići¹²⁰⁸, have been proven beyond reasonable doubt to have been committed by armed Serb forces.

(b) Subjective element: *mens rea*

(i) Requirement that the victims were taking no active part in the hostilities

589. The Trial Chamber is convinced that the vast majority of the victims of these crimes were taking no active part in the hostilities at the time the crimes were committed. In particular, the Trial Chamber finds that those held in the Omarska, Keraterm and Trnopolje camps are automatically to be considered *hors de combat* by virtue of their being held in detention. The same applies to those victims who were displaced in the many convoys that were organised and those innocent civilians who were killed during indiscriminate armed attacks on civilian settlements, throughout the Municipality of Prijedor during the Indictment period. In relation to the women and children who

¹²⁰⁵ See e.g. Schönke/Schröder Strafgesetzbuch, Kommentar, 26. Auflage, Cramer/Sternberg-Lieben. Section 15, para. 84.

¹²⁰⁶ See generally Fletcher, GP, *Rethinking Criminal Law*, (Oxford University Press, 2000), p.325-326.

¹²⁰⁷ In German law: *Fahrlässigkeit*.