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UNITED
NATIONS

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

Case: IT-99-36-A

Date: 19 March 2004

Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Amin El Mahdi
Judge Ines Weinberg de Roca

Registrar: Mr Hans Holthuis

Decision of: 19 March 2004

PROSECUTOR

v

Radoslav BRĐANIN

DECISION ON INTERLOCUTORY APPEAL

The Office of the Prosecutor:

Ms Joanna Korner

Counsel for Accused:

Mr John Ackerman
Mr David Cunningham

1. Following certification of the Trial Chamber,[1] the Prosecution appeals from the decision of the Trial Chamber on the defence motion for acquittal.[2] The Prosecution appeal is limited to that part of the Decision which purported to acquit Radoslav Brđanin ("Brđanin") of Count 1 of the Indictment, genocide, in the context of a third category of joint criminal enterprise liability.[3] The third category of joint criminal enterprise liability refers to criminal liability of an accused for crimes which fall outside of an agreed upon criminal enterprise, but which crimes are nonetheless natural and foreseeable consequences of that agreed upon criminal enterprise.

2. The Trial Chamber held that the specific intent required for a conviction of genocide was incompatible with the lower *mens rea* standard of a third category joint criminal enterprise. A third category joint criminal enterprise requires that the Prosecution prove only awareness on the part of the accused that genocide was a foreseeable consequence of the commission of a separately agreed upon crime.[4] This awareness of the likelihood of genocide being committed is not as strict a *mens rea* requirement as the specific intent required to establish the crime of genocide. The Trial Chamber concluded that the *mens rea* required to prove responsibility under a third category of joint criminal enterprise fell short of the threshold that must be satisfied for a conviction of genocide under Article 4(3) (a) of the Tribunal's Statute.[5]

3. In this appeal the Prosecution argues that the Trial Chamber committed two errors. First, it argues that the Trial Chamber erred in law in concluding that the third category of joint criminal enterprise liability is incompatible with the specific intent requirement of genocide. Second, it argues that the Trial Chamber erred in law in dismissing proceedings under a mode of liability at the Rule 98*bis* stage of the trial.[6] The Prosecution asks the Appeals Chamber to reverse the Decision, and to reinstate the proceedings on the charge of genocide under the third category of joint criminal enterprise liability.

4. With respect to the first alleged error, the Prosecution argues that the Trial Chamber confused the *mens rea* required for the offence of genocide with the mental state required to establish responsibility of an accused pursuant to a particular mode of liability, here the third

[1] Trial Transcript 23122.
[2] Decision on Motion for Acquittal Pursuant to Rule 98*bis*, Case No IT-99-36-T, 28 November, 2003 ("Decision").
[3] Decision, par 30.
[4] *Prosecutor v Tadic*, Appeals Judgment, Case IT-94-1-A, 15 July 1999, par 228; See also *Prosecutor v Vasiljević*, Case IT-98-33-A, 25 February 2004, par 101 ("*Vasiljević* Appeal").
[5] Decision, pars 55-57.
[6] Prosecution's Appeal From Trial Chamber's Decision Pursuant to 98*bis*, 10 December 2003 ("Appeal Brief"), pars 6-8.

category of joint criminal enterprise liability.[7] It argues that the two concepts, while related, are distinct.[8] Regarding the second alleged error, the Prosecution says that the Decision was inconsistent with the purpose of Rule 98*bis*, which is limited to an assessment of whether the evidence of the Prosecution is sufficient to sustain a conviction.[9] According to the Prosecution, the Rule is not designed to test the legal arguments of the parties.[10]

First Ground of Appeal

5. The elements of a crime are those facts which the Prosecution must prove to establish that the conduct of the perpetrator constituted the crime alleged. However, participants other than the direct perpetrator of the criminal act may also incur liability for a crime, and in many cases different *mens rea* standards may apply to direct perpetrators and other persons.[11] The third category of joint criminal enterprise liability is, as with other forms of criminal liability, such as command responsibility or aiding and abetting, not an element of a particular crime. It is a mode of liability through which an accused may be individually criminally responsible despite not being the direct perpetrator of the offence.[12] An accused convicted of a crime under the third category of joint criminal enterprise need not be shown to have intended to commit the crime or even to have known with certainty that the crime was to be committed. Rather, it is sufficient that that accused entered into a joint criminal enterprise to commit a different crime with the awareness that the commission of that agreed upon crime made it reasonably foreseeable to him that the crime charged would be committed by other members of the joint criminal enterprise, and it was committed.

6. For example, an accused who enters into a joint criminal enterprise to commit the crime of forcible transfer shares the intent of the direct perpetrators to commit that crime. However, if the Prosecution can establish that the direct perpetrator in fact committed a different crime, and that the accused was aware that the different crime was a natural and foreseeable consequence of the agreement to forcibly transfer, then the accused can be convicted of that different offence. Where that different crime is the crime of genocide, the Prosecution will be required to establish that it was reasonably foreseeable to the accused that an act specified in Article 4(2) would be committed and that it would be committed with genocidal intent.[13]

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7 *Ibid*, par 13.
8 *Ibid*, par 14.
9 *Ibid*, par 33.
10 *Ibid*, par 34.
11 *Vasiljević* Appeal, par 102.
12 Appeal Brief, par 16.
13 See also the example given in *Vasiljević* Appeal, par 99.

7. As a mode of liability, the third category of joint criminal enterprise is no different from other forms of criminal liability which do not require proof of intent to commit a crime on the part of an accused before criminal liability can attach. Aiding and abetting, which requires knowledge on the part of the accused and substantial contribution with that knowledge, is but one example. Command responsibility liability, which requires the Prosecution to establish that a Commander knew or had the reason to know of the criminality of subordinates, is another.

8. This is the approach that the Appeals Chamber has taken with respect to aiding and abetting the crime of persecution. An accused will be held criminally responsible as an aider and abettor of the crime of persecution where, the accused is aware of the criminal act, and that the criminal act was committed with discriminatory intent on the part of the principal perpetrator, and that with that knowledge the accused made a substantial contribution to the commission of that crime by the principal perpetrator.[14]

9. The fact that the third category of joint criminal enterprise is distinguishable from other heads of liability is beside the point. Provided that the standard applicable to that head of liability, i.e. "reasonably foreseeable and natural consequences" is established, criminal liability can attach to an accused for any crime that falls outside of an agreed upon joint criminal enterprise.

10. The Trial Chamber erred by conflating the *mens rea* requirement of the crime of genocide with the mental requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused. The Decision of the Trial Chamber to acquit Brđanin of Count 1 of the Indictment, genocide, with respect to the third category of joint criminal enterprise liability is reversed.

Second Ground of Appeal

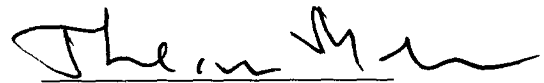
11. As regards the second alleged error, namely the submission that the Trial Chamber erred in law in dismissing proceedings under a mode of liability at the Rule 98bis stage, it is sufficient to say that the purpose of Rule 98bis proceedings is to test the sufficiency of the Prosecution's evidence-in-chief, and that this purpose does not preclude the Trial Chamber from entertaining legal issues where determination of those issues at that time is of benefit to the parties and the efficiency of the proceedings. Given that the first ground of appeal has been upheld, and that the Prosecution has been granted the relief it seeks, the Appeals Chamber does not find it necessary to discuss the submissions on the second alleged error in any detail.

Disposition

12. The Prosecution's appeal is allowed. The Decision of the Trial Chamber to acquit Brđanin of Count 1 of the Indictment, genocide, with respect to the third category of joint criminal enterprise liability is reversed, and that Count re-instated.

Judge Shahabuddeen appends a separate opinion to this decision.

Done in English and French, the English text being authoritative.



Judge Meron
Presiding Judge

Dated this 19th day of March 2004
At The Hague
The Netherlands

[Seal of the Tribunal]

[14] *Prosecutor v Krnojelac*, Appeals Judgment, Case IT-97-25-A, 17 September 2003, par 52.

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. I support the conclusion reached in the decision of the Appeals Chamber but have a difference as to the reasons. The difference is narrow but I would like to explain it. It concerns paragraph 5 of the decision of the Appeals Chamber. That paragraph states this:

> An accused convicted of a crime under the third category of joint criminal enterprise need not be shown to have intended to commit the crime or even to have known with certainty that the crime was to be committed. Rather, it is sufficient that that accused entered into a joint criminal enterprise to commit a different crime with the awareness that the commission of that agreed upon crime made it reasonably foreseeable to him that the crime charged would be committed by other members of the joint criminal enterprise, and it was committed.

That way of putting it suggests that a case brought under the third joint criminal enterprise category of *Tadić*[1] may be a case in which intent is not shown and that nevertheless a conviction could be made. I am uneasy about that possibility.

2. In my respectful interpretation, the third category of joint criminal enterprise mentioned in *Tadić* does not dispense with the need to prove intent; what it does is that it provides a mode of proving intent in particular circumstances, namely, by proof of foresight in those circumstances. What the Trial Chamber held was that, in the case of a crime of specific intent, foresight does not prove specific intent; as genocide is a crime of specific intent, a conviction for it is therefore not possible under the third category of joint criminal enterprise.

3. The Trial Chamber's approach may be stated more fully. In paragraph 52 of its decision, it referred to the specific intent that is required in a case of genocide. This, as mentioned in article 4(2) of the Statute, is an "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." In paragraph 30 of its decision, it then stated:

> ... the specific intent for genocide must be met. ... [T]his specific intent is incompatible with the notion of genocide as a natural and foreseeable consequence of a crime other

[1] IT-94-1-A, of 15 July 1999, paras. 204 and 220.

> than genocide agreed to by the members of the JCE. For this reason the Trial Chamber finds that there is no case to answer with respect to count 1 in the context of the third category of JCE.

In paragraph 57 of its decision, the Trial Chamber likewise said (footnotes omitted):

> The Trial Chamber reiterates that the specific intent required for genocide is set out in paragraph 52 above. This specific intent cannot be reconciled with the *mens rea* required for a conviction pursuant to the third category of JCE. The latter consists of the Accused's awareness of the risk that genocide would be committed by other members of the JCE. This is a different *mens rea* and falls short of the threshold needed to satisfy the specific intent required for a conviction for genocide under Article 4(3)(a). For this reason, the Trial Chamber has found that there is no case to answer with respect to count 1 in the context of the third category of JCE.

4. I agree with the Trial Chamber in so far as it took the view that the statutory intent has to be established in each case of a genocide conviction. The reason for my agreement is this: The third category of *Tadić* does not, because it cannot, vary the elements of the crime; it is not directed to the elements of the crime; it leaves them untouched. The requirement that the accused be shown to have possessed a specific intent to commit genocide is an element of that crime. The result is that that specific intent always has to be shown; if it is not shown, the case has to be dismissed.

5. I do not think that *Tadić* spoke differently. The case, as I appreciate it, concerned not the principle of having to show intent, but a method of doing so. It is only the method that is being referred to when it is said that the case established a mode of liability. In relevant parts of paragraph 220 of the case, the Appeals Chamber said that –

> ... in the so-called "concentration camp" cases, ... the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organizational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further

– individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose....

Reading this as a whole, what it implies is that it is necessary to show intent but that intent is shown by the particular circumstances of the third category of joint criminal enterprise.

6. Thus far, I agree with the Trial Chamber. Where I regret that I am not able to agree is with respect to its holding that the specific genocidal intent is not proved by the particular circumstances of the third joint criminal enterprise category mentioned in *Tadić*. What are called cases of oblique intent[2] may indeed show that intent is not proved by foresight in all circumstances; but that does not apply across the board, and the Appeals Chamber was competent to adjudicate as it did in *Tadić*.

7. In *Tadić*, the Appeals Chamber did use the word "aware"[3] but its judgment shows that it was speaking of more than awareness. It was referring to a case in which the accused, when committing the original crime, was able to "predict" that a further crime could be committed by his colleagues as the "natural and foreseeable consequence of the effecting of [the] common purpose" of the parties – and not the consequence of "negligence" – and that he nevertheless "willingly" took the "risk" of that further crime being committed.[4] In effect, for the purposes of determining a no-case submission made under Rule 98*bis* of the Rules of Procedure and Evidence, the accused in this case knew that genocide could be committed; any uncertainty in his mind went to the question whether it would in fact be committed, not to acceptance by him of it (if and when it was committed) as something which he could "predict" as the "natural and foreseeable consequence" of the activities of the joint criminal enterprise to which he was a willing party. In that important sense and for the purposes of determining such a submission, he contributed to the commission of the genocide even though it did not form part of the joint criminal enterprise. Putting it another way, his intent to commit the original crime included the specific intent to commit genocide also *if and when genocide should be committed.*

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[2] See *Moloney* [1985] A.C.905, *Hancock*, [1986] 1 A.C. 455, and *Woollin*, [1999] A.C. 82, and the cases mentioned in them.
[3] *Tadić*, IT-94-1-A of 15 July 1999, para. 220.
[4] The quoted words are from *Tadić*, IT-94-1-A of 15 July 1999, paras. 204 and 220.

8. To recapitulate, the Appeals Chamber in *Tadić* was not of the view that intent did not have to be shown; what it considered was that intent was shown by the particular circumstances of the third category of joint criminal enterprise. I note that, in paragraph 30 of its decision, the Trial Chamber considered that its reasoning would not apply to crimes of persecution and torture. A specific intent is also required in these cases. Therefore, in this part of its holding, the Trial Chamber held that the operation of the third *Tadić* category was not excluded in the case of crimes requiring proof of a specific intent. That was correct.

Done in English and in French, the English text being authoritative.

Mohamed Shahabuddeen

Dated 19 March 2004
At The Hague
The Netherlands.

[Seal of the Tribunal]