



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 No. IT-95-5/18-AR72.4
Date: 25 June 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrézia Vaz

Registrar: Mr. John Hocking

Decision: 25 June 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION APPEALING
TRIAL CHAMBER'S DECISION ON JCE III
FORESEEABILITY**

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić, *pro se*

1. The Appeals Chamber of the 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 (“Appeals Chamber” and “Tribunal”, respectively) is seized of the “Prosecution Appeal of Decision on JCE III Foreseeability” (“Appeal”), filed by the Office of the Prosecutor (“Prosecution”) on 13 May 2009. Radovan Karadžić (“Karadžić”) filed his response on 25 May 2009¹ and the Prosecution filed its reply on 29 May 2009.²

I. BACKGROUND

2. On 27 February 2009, the Prosecution filed a third amended indictment against Karadžić charging him with genocide, crimes against humanity and violations of the laws and customs of war.³ The Indictment alleges Karadžić’s individual criminal responsibility under Article 7(1) of the Statute for planning, instigating, ordering, committing and/or aiding and abetting the crimes charged through the acts and omissions described in paragraph 14 therein.⁴ It specifies that “committing”, in the context of Karadžić’s liability under Article 7(1), refers to his participation in a Joint Criminal Enterprise (“JCE”).⁵

3. In March 2009, Karadžić seized Trial Chamber III (“Trial Chamber”) of a series of motions challenging the Tribunal’s jurisdiction under Rule 72 of the Rules of Procedure and Evidence of the Tribunal (“Rules”). As relevant, these included the “Preliminary Motion to Dismiss Joint Criminal Enterprise III – Foreseeability (“Motion”)” filed on 16 March 2009.⁶

4. On 28 April 2009 the Trial Chamber issued its “Decision on Six Preliminary Motions Challenging Jurisdiction”⁷ in which it jointly considered all of Karadžić’s motions under Rule 72 of the Rules. Having reached the conclusion that none of the motions actually raised a proper jurisdictional challenge,⁸ the Trial Chamber analyzed certain issues, including those raised in the Motion, as alleging defects in the form of the Indictment pursuant to Rule 72(A)(ii).⁹ Concerning the Motion, the Trial Chamber held that the most appropriate formulation for the mental element of the third form of JCE (“JCE III”) is “reasonably foreseeable consequences”,¹⁰ i.e. “foresight by the

¹ Response to Prosecution Appeal of Decision on JCE III – Foreseeability, 25 May 2009 (“Response”).

² Prosecution Reply on Appeal of Decision on JCE III Foreseeability, 29 May 2009 (“Reply”).

³ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Third Amended Indictment, 27 February 2009 (“Indictment”), p. 1.

⁴ *Ibid.* para. 30.

⁵ *Ibid.* para. 5.

⁶ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Preliminary Motion to Dismiss Joint Criminal Enterprise III-Foreseeability, 16 March 2009.

⁷ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Six Preliminary Motions Challenging Jurisdiction, 28 April 2009 (“Impugned Decision”).

⁸ *Ibid.* para. 33.

⁹ *Ibid.* paras 33, 45.

¹⁰ *Ibid.* para. 56.

accused that the deviatory crimes would probably be committed”,¹¹ as opposed to the Indictment’s reference to “possible consequence”.¹² Rather than dismissing allegations based on JCE III responsibility, the Trial Chamber decided to “allow the Prosecution to propose an amendment to correct th[e] defect in the form of the Indictment”.¹³

5. On 6 May 2009, the Prosecution filed the application for certification to appeal the Impugned Decision insofar as it granted the Motion.¹⁴ Certification was granted on 6 May 2009.¹⁵

II. STANDARD OF REVIEW

6. Trial Chamber decisions with regards to amendments of indictments are discretionary.¹⁶ The Appeals Chamber overturns Trial Chambers’ discretionary decisions only where these are “found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion”.¹⁷

III. DISCUSSION

A. Arguments of the parties

7. The Prosecution submits that the Trial Chamber erred in law in determining that the standard for the *mens rea* component of JCE III is the “probability” that a crime is committed rather than the broader “possible consequence” standard proposed in the Indictment. It contends that the case law of the Appeals Chamber almost universally adopts the lower “possible consequence” standard.¹⁸ In support of its position, the Prosecution cites to a number of Appeal Judgements, including those in *Martić*,¹⁹ *Brđanin*,²⁰ *Stakić*,²¹ *Blaškić*,²² *Vasiljević*,²³ *Krnjelac*,²⁴ *Kvočka*²⁵ and *Deronjić*,²⁶ as well as an interlocutory decision by the Appeals Chamber in *Gotovina*.²⁷

¹¹ *Ibid.* para. 55.

¹² Indictment para. 10; *see also* Impugned Decision paras 50, 56.

¹³ Impugned Decision para. 57.

¹⁴ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution Request for Certification to Appeal Decision on Six Preliminary Motions Challenging Jurisdiction - Foreseeability, 6 May 2009.

¹⁵ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Status Conference, 6 May 2009, T. 227.

¹⁶ *Cf. Prosecutor v. Ante Gotovina & Prosecutor v. Ivan Čermak and Mladen Markač*, Case Nos. IT-01-45-AR73.1, IT-03-73-AR73.1, IT-03-73-AR73.2, Decision on Interlocutory Appeals Against the Trial Chamber’s Decision to Amend the Indictment and for Joinder, 25 October, 2006, para. 6.

¹⁷ *Ibid.*

¹⁸ *See* Appeal, paras 5-17.

¹⁹ *Ibid.* para. 4 n.5, (citing *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Appeal Judgement, 8 October 2008 (“*Martić* Appeal Judgement”), para. 168); *see also* *ibid.* para. 6 n.8 (citing *Martić* Appeal Judgement para. 83).

²⁰ *Ibid.* para. 4 n.5 (citing *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Appeal Judgement, 3 April 2007 (“*Brđanin* Appeal Judgement”), paras 365, 411); *see also* *ibid.* para. 6 n.8 (citing *Brđanin* Appeal Judgement para. 411).

8. The Prosecution attempts to differentiate a number of cases cited in the Impugned Decision. In particular, it maintains that any Trial Chamber cases cited for support by the Impugned Decision “cannot over-ride Appeals Chamber case-law”.²⁸ It further maintains that the *Martić* Appeal Judgement’s reference to the foreseeability by an accused that a crime “might be committed” supports a “possibility standard”, rather than the “probability standard” endorsed by the Impugned Decision.²⁹ The Prosecution contends that the Appeals Judgement in the *Krstić* case³⁰ is ambiguous as to the specifics of JCE III *mens rea*, and should be read as supporting a possibility standard.³¹ It further contends that a 2004 Appeals Chamber decision on an interlocutory appeal in the *Brdanin* case, which stated that an accused can be convicted of a crime under JCE III when aware “that the crime charged would be committed”³² has been overruled by subsequent appellate jurisprudence.³³

9. The Prosecution requests that the Appeals Chamber reverse the Impugned Decision insofar as it ordered the Prosecution to propose an amendment altering the Indictment’s formulation of JCE III *mens rea*, and “requests confirmation from the Appeals Chamber that the Indictment correctly pleads the JCE III standard”.³⁴

10. Karadžić responds, as relevant, that the Appeals Chamber’s case-law on JCE III *mens rea* is not “clear and consistent” and contends that the Appeals Chamber “explicitly adopted the probability standard in 25% of the cases that have addressed the issue”.³⁵ More specifically, Karadžić challenges the Prosecution’s characterizations of certain Appeals Chamber jurisprudence. He contends that the *Blaskić* Appeal Judgement, after examining international law, required a

²¹ *Ibid.* para. 4 n.5 (citing *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Appeal Judgement, 22 March 2006 (“*Stakić* Appeal Judgement”), para. 65); see also *ibid.* para 6 n.8 (citing *Stakić* Appeal Judgement para. 87).

²² *Ibid.* paras 4 n.5, 6 n.8, 7, 8 (citing *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004 (“*Blaškić* Appeal Judgement”), para. 33).

²³ *Ibid.* paras 4 n.5, 6 (citing *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Appeal Judgement, 25 February 2004 (“*Vasiljević* Appeal Judgement”), para. 101).

²⁴ *Ibid.* paras 4 n.5, 6 n.8 (citing *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Appeal Judgement, 17 September 2003 (“*Krnojelac* Appeal Judgement”), para. 32).

²⁵ *Ibid.* para. 6 n.8 (citing *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Appeal Judgement, 28 February 2005 (“*Kvočka* Appeal Judgement”), para. 83).

²⁶ *Ibid.* para. 6 n.8 (citing *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 (“*Deronjić* Appeal Judgement”), para. 44).

²⁷ *Ibid.* para. 9 (citing *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR72.1, Decision on Ante Gotovina’s Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, 6 June 2007 (“*Gotovina* Decision”), paras 22-24).

²⁸ Appeal, para. 12.

²⁹ *Ibid.* para. 13 (quoting *Martić* Appeal Judgement, para. 83).

³⁰ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeal Judgement, 19 April 2004 (“*Krstić* Appeal Judgement”). Appeal, para. 15.

³¹ *Prosecutor v. Brdanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal (“*Brdanin* Decision”), 19 March 2004, para. 5. see also *ibid.* para. 6.

³² Appeal, para. 14.

³³ *Ibid.* para. 18.

³⁴ Response, para. 22 (internal quotations omitted).

higher degree of awareness of the potential for additional crimes than the Prosecution alleges.³⁶ He further contends that the *Gotovina* Decision did not “discuss the issue” of JCE III *mens rea*.³⁷ Karadžić maintains that the *Krstić* and *Tadić* Appeal Judgements are not consistent in supporting a possibility standard,³⁸ and notes that even the Prosecution agrees that the *Brdanin* Decision does not support a possibility standard.³⁹

11 Karadžić suggests that the alleged inconsistencies in Appeals Chamber jurisprudence be resolved by turning to the approach adopted in the *Tadić* Appeal Judgement: “examin[ing] the relevant sources of customary international law”,⁴⁰ with any doubts “resolved in favour of the accused pursuant to the principle of *in dubio pro reo*”.⁴¹ As guidance in any review of international law, Karadžić surveys selected jurisprudence and legislation from Italy, Australia, the United States, the United Kingdom, India, Israel, Canada and Egypt,⁴² concluding that it “demonstrates that the [P]rosecution’s possibility allegations do not find support in customary international law”.⁴³

12. In its Reply, as relevant, the Prosecution contends that the *Blaškić* Appeal Judgement confirmed that the “possibility” standard applies to JCE III liability.⁴⁴ It also maintains that Karadžić’s review of legislation in domestic jurisdictions “conflicts with the *Tadić* Appeal Judgement, which found that there was no uniform approach among nations [and] relied primarily on post-World War II cases and international legislation”.⁴⁵

B. Analysis

13. The Impugned Decision, as relevant, focuses on the degree of foresight required of an accused to satisfy the *mens rea* requirement of JCE III. After considering the meaning of the phrase “natural and foreseeable” as it applies to an individual actor’s understanding of crimes committed beyond the common purpose of a JCE,⁴⁶ it concludes that in setting the *mens rea* requirement for JCE III, the *Tadić* Appeal Judgement “required of the accused foresight that the deviatory crimes were likely to occur, that is that they would probably occur”. Following this conclusion, it notes that “while subsequent jurisprudence has referred on various occasions to possibility and probability,

³⁶ *Ibid.* paras 16-19.

³⁷ *Ibid.* para. 20.

³⁸ *Ibid.* paras 24-25 (citing *Krstić* Appeal Judgement; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999 (“*Tadić* Appeal Judgement”)).

³⁹ *Ibid.* para. 23.

⁴⁰ *Ibid.* para. 29.

⁴¹ *Ibid.* para. 30.

⁴² *Ibid.* paras 32-42.

⁴³ *Ibid.* para. 43 (internal quotations omitted).

⁴⁴ Reply, para. 2.

⁴⁵ *Ibid.*

⁴⁶ Impugned Decision, paras 46-48, 56 (quotations omitted); see also *Tadić* Appeal Judgement, para. 204; *Kvočka* Appeal Judgement, para. 86.

there does not appear to have been a rejection at any stage of the test set in [the] *Tadić* [Appeal Judgement]”.⁴⁷

14 However, as the Impugned Decision noted and Karadžić concedes, the *Tadić* Appeal Judgement deploys a range of diverse formulations in setting out the *mens rea* element of JCE III.⁴⁸ These include several formulations that tend more towards a possibility than a probability standard. For example, one paragraph of the *Tadić* Appeal Judgement partly defines the *mens rea* of JCE III as requiring “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”,⁴⁹ while another partly summarizes the requirement as: “it was foreseeable that [. . .] a crime might be perpetrated by one or other members of the group”.⁵⁰ The variable formulations present in the *Tadić* Appeal Judgement at minimum suggest that it did not definitively set a probability standard as the *mens rea* requirement for JCE III.⁵¹

15. While the *Tadić* Appeal Judgement does not settle the issue of what likelihood of deviatory crimes an actor must be aware of to allow conviction under JCE III, subsequent Appeals Chamber jurisprudence does. For example, the *Brdanin* Appeal Judgement explained that:

[in the case of] crimes going beyond that purpose, the accused may be found responsible for such crimes provided that he participated in the common criminal purpose with the requisite intent and that, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated . . . in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk – that is the accused, with the awareness that such a crime was a *possible* consequence of the implementation of that enterprise, decided to participate in that enterprise.⁵²

More broadly, a significant number of Appeals Judgements have adopted formulations suggestive of a possibility standard rather than a probability one. Thus, the *Vasiljević*, *Brdanin*, *Stakić*, *Blaškić*, *Martić* and *Krnojelac* Appeal Judgements all deploy the *Tadić* Appeal Judgement phrase “foreseeable that such a crime might be perpetrated” in defining the JCE III *mens rea* requirement.⁵³ Most of these Appeal Judgements further explain that liability attaches even if an

⁴⁷ Impugned Decision, para. 55.

⁴⁸ See Impugned Decision, paras 49-50, Response, para. 29.

⁴⁹ *Tadić* Appeal Judgement, para. 220.

⁵⁰ *Ibid.* para. 228 (emphasis omitted).

⁵¹ Insofar as the Impugned Decision suggests that paragraph 232 of the *Tadić* Appeal Judgement, which states that Tadić “was aware that the actions of the group of which he was a member were likely to lead to [. . .] killings” definitively settled on a probability standard, see para. 50, it would appear to be mistaken. The Appeals Chamber’s factual conclusion demonstrated that Tadić either met or exceeded the standard for JCE III *mens rea*, but did not definitively indicate where the standard lay on any spectrum of likelihood.

⁵² *Brdanin* Appeal Judgement, para. 411 (emphasis added). See also *ibid.* para. 365.

⁵³ *Vasiljević* Appeal Judgement, para. 101; *Brdanin* Appeal Judgement, paras. 365, 411; *Stakić* Appeal Judgement, para. 65; *Blaškić* Appeal Judgement, para. 33; *Martić* Appeal Judgement, para. 168; *Krnojelac* Appeal Judgement, para. 32 (emphases, citations and quotations omitted). See also *Kvočka* Appeal Judgement, para. 83.

actor knows that perpetration of a crime is only a “possible consequence” of the execution of the common purpose.⁵⁴

16. Much of the jurisprudence that Karadžić advances in support of a probability standard does not support his point or is at best ambiguous.⁵⁵ Thus the *Blaskić* Appeal Judgement, which Karadžić claims “rejected the lower *mens rea* standard proposed by the [P]rosecution”⁵⁶ actually states with regards to JCE III *mens rea* that: “criminal responsibility may be imposed upon an actor for a crime falling outside the originally contemplated enterprise, even where he only knew that the perpetration of such a crime was merely a possible consequence, rather than substantially likely to occur”.⁵⁷ Karadžić is also mistaken in suggesting that the *Krstić* Appeal Judgement is inconsistent with a “possibility standard”. The Appeals Chamber used the ambiguous phrase “probability that other crimes *may* result” in defining the *mens rea* for JCE III,⁵⁸ a formulation that is potentially consistent with a possibility standard, especially in the context of prior and subsequent Appeals Chamber Judgements.⁵⁹

17. Both the Prosecution and Karadžić agree that the *Brdanin* Decision adopts a probability standard.⁶⁰ However, this approach has been implicitly overruled by subsequent Appeals Chamber jurisprudence, including the *Brdanin* and *Blaškić* Appeal Judgements.⁶¹

18. Reviewing the Appeals Chamber’s jurisprudence convincingly demonstrates that JCE III *mens rea* does not require a “probability” that a crime would be committed. Thus it is not necessary to address Karadžić’s contentions regarding customary international law. It is, however, worth noting that the term “possibility standard” is not satisfied by implausibly remote scenarios. Plotted on a spectrum of likelihood, the JCE III *mens rea* standard does not require an understanding that a deviatory crime would *probably* be committed; it does, however, require that the possibility a crime could be committed is sufficiently substantial as to be foreseeable to an accused. The Indictment pleads just such a standard.⁶²

⁵⁴ *Vasiljević* Appeal Judgement, para. 101; *Brdanin* Appeal Judgement, para. 411; *Stakić* Appeal Judgement, para. 87; *Blaškić* Appeal Judgement, para. 33. *See also* *Deronjić* Appeal Judgement, para. 44.

⁵⁵ Karadžić does accurately contend that the *Gotovina* Decision is not relevant to determining the standard of *mens rea* required for JCE III, *see* Response, para. 20. The *Gotovina* Decision simply decided that the specifics of JCE III *mens rea* did not qualify as a jurisdictional question, *see* para. 24. Thus it supports neither Karadžić’s nor the Prosecution’s contentions.

⁵⁶ Response, para. 16 (emphasis omitted).

⁵⁷ *Blaškić* Appeal Judgement, para. 33.

⁵⁸ *Krstić* Appeal Judgement, para. 150 (emphasis added).

⁵⁹ Paragraph 147 of the *Krstić* Appeal Judgement, contrary to Karadžić’s contentions, Response para. 24, simply states the level of certainty that *Krstić* enjoyed, rather than defining the minimum required level of JCE III *mens rea*.

⁶⁰ *See* Appeal, para. 14; Response, para. 23; *see also* *Brdanin* Decision, para. 5.

⁶¹ *Brdanin* Appeal Judgement, para. 365; *Blaškić* Appeal Judgement, para. 33.

⁶² *Cf.* *Tadić* Appeal Judgement, para. 204; *Kvočka* Appeal Judgement, para. 86; Impugned Decision, para. 56.

19. Accordingly, the Appeals Chamber finds that the Trial Chamber erred insofar as the Impugned Decision held that the Indictment's formulation of JCE III *mens rea* was flawed and ordered an amendment to the Indictment.

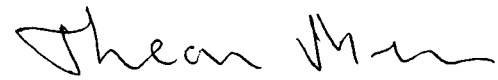
IV. DISPOSITION

20. For the foregoing reasons, the Appeals Chamber **GRANTS** the Appeal.

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

Done this 25th day of June 2009,

At The Hague, The Netherlands.



Judge Theodor Meron, Presiding

[Seal of the Tribunal]