

**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 No. IT-95-5/18
Date: 13 May 2009

IN THE APPEALS CHAMBER

Before: A Bench of the Appeals Chamber

Acting Registrar: Mr. John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION APPEAL OF DECISION ON JCE III
FORESEEABILITY**

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

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I. OVERVIEW

1. The Prosecution files this appeal against the Trial Chamber's Decision on Six Preliminary Motions Challenging Jurisdiction (Decision) insofar as it partly grants Karadžić's Motion on Foreseeability.¹ In the Decision, the Trial Chamber ordered the Prosecution to propose an amendment to alter the standard pleaded in the Third Amended Indictment (Indictment) regarding Joint Criminal Enterprise Category III (JCE III) responsibility.² In doing so, the Trial Chamber erred in law. The Indictment currently sets out the correct standard for JCE III liability in accordance with Appeals Chamber case-law and no amendment is necessary.

2. On 6 May 2009, pursuant to Rule 72(B)(ii), the Trial Chamber granted certification for the Prosecution to appeal the Decision.³ The procedural background to this appeal is set out in Appendix A.

II. THE INDICTMENT PLEADS THE STANDARD FOR JCE III AS SET OUT IN APPEALS CHAMBER CASE-LAW

3. The Indictment correctly pleads the following material facts regarding JCE III:

It was foreseeable that the crimes of genocide (under count 1 and/or count 2), persecution, extermination, and murder might be perpetrated by one or more members of this joint criminal enterprise or by persons used by any member of the joint criminal enterprise in order to carry out the *actus reus* of the crimes forming part of the shared objective. With the awareness that such crimes were a possible consequence of the implementation of the objective of the joint criminal enterprise, **Radovan KARADŽIĆ** willingly took that risk.⁴

4. This language accords with Appeals Chamber case-law. In six cases, the Appeals Chamber has used the same or substantially similar formulations in setting out the requirements for JCE III.⁵

¹ Decision on Six Preliminary Motions Challenging Jurisdiction, 28 April 2009 (Decision), paras.45-57.

² Decision, paras.57, 82(c).

³ Status Conference, Transcript p.227 (oral order rendered by Judge Bonomy on behalf of the Trial Chamber granting certification). See Transcript p.224 (regarding conferral with the remainder of the Trial Chamber).

⁴ Indictment, para.10. See also paras.39, 43, 59, 64, 67.

⁵ *Prosecutor v. Milan Martić*, Case No.IT-95-11-A, App.Ch., Judgement, 8 October 2008 (*Martić* AJ), para.168 (“(i) it was foreseeable that such a crime might be perpetrated [...] and (ii) the accused

III. THE APPEALS CHAMBER HAS CONFIRMED THAT A POSSIBILITY – RATHER THAN A PROBABILITY – STANDARD APPLIES FOR JCE III

5. Consistent with Appeals Chamber case-law, the Indictment sets out a possibility standard for JCE III: it was foreseeable that the crimes “might” occur and the accused acted with awareness that unplanned crimes were a “possible” consequence of the joint criminal enterprise. The Trial Chamber’s conclusion that a higher – probability – standard applies is incorrect.⁶

6. In *Vasiljević*, the Appeals Chamber stated that, for JCE III, the accused must have acted with awareness that the unplanned crime “was a *possible* consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.”⁷ The Appeals Chamber has confirmed the application of this standard on six subsequent occasions.⁸

willingly took that risk”); *Prosecutor v Radoslav Brdanin*, Case No. IT-99-36-A, App.Ch., Judgement, 3 April 2007 (*Brdanin* AJ), paras.365, 411 (“(i) it was foreseeable that such a crime might be perpetrated [...] and (ii) the accused *willingly took that risk* – that is the accused, with awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise”); *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, App.Ch. Judgement, 22 March 2006 (*Stakić* AJ), para.65 (“(i) it was *foreseeable* that such a crime might be perpetrated [...] and (ii) the accused *willingly took that risk*”); *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, App.Ch., Judgement, 29 July 2004 (*Blaškić* AJ), para.33 (endorsing the language from the *Vasiljević* AJ that “(i) it was *foreseeable* that such a crime might be perpetrated [...] and (ii) the accused *willingly took that risk*” – that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.”); *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, App.Ch., Judgement, 25 February 2004 (*Vasiljević* AJ), para.101 (“(i) it was *foreseeable* that such a crime might be perpetrated [...] and (ii) the accused *willingly took that risk*” – that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise”); *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, App.Ch., Judgement, 17 September 2003 (*Krnojelac* AJ), para.32 (“it was *foreseeable* that such a crime might be perpetrated [...] and (ii) the accused *willingly took that risk*”).

⁶ Decision, para.55.

⁷ *Vasiljević* AJ, para.101 (emphasis added).

⁸ *Martić* AJ, para.83 (“he willingly took the risk that this crime might be perpetrated”); *Brdanin* AJ, para.411 (“the accused, with awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise”); *Stakić* AJ, para.87 (“aware that the crimes were a possible consequence of the execution of the Common Purpose”); *Blaškić* AJ, para.33 (“aware that such a crime was a possible consequence of the execution of that enterprise”); *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, App.Ch., Judgement, 28 February 2005 (*Kvočka* AJ), para.83 (“the accused must also know that such a crime might be perpetrated by a member of the group”); *The Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, App.Ch., Judgement on Sentencing Appeal, 20 July 2005 (*Deronjić* SAJ), para.44 (“aware that these crimes were possible consequences of the execution of the joint criminal enterprise”). See also *Krnojelac* AJ,

7. In particular, the *Blaškić* Appeals Chamber endorsed the *Vasiljević* Appeals Chamber's finding that JCE III requires that the accused acted with awareness that the unplanned crime was a possible consequence in the following terms:

In relation to the responsibility for a crime other than that which was part of the common design, *the lower standard of foreseeability – that is, an awareness that such a crime was a possible consequence of the execution of the enterprise – was applied by the Chamber [...]* Hence, 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, and nevertheless participated in the enterprise.⁹

8. The *Blaškić* Appeals Chamber specifically directed its attention to the *mens rea* threshold for JCE III and confirmed that the possibility standard – as distinguished from a higher standard – applies.¹⁰ The *Blaškić* Appeals Chamber recognised that the possibility standard is lower than the substantial likelihood standard for indirect intent that applies to other forms of liability under the Statute. However, the Appeals Chamber explained that a lower standard is justified for responsibility under JCE III because the accused “already possesses the intent to participate and further the common criminal purpose of a group.”¹¹

9. Furthermore, in the *Gotovina* case, the Appeals Chamber dismissed a preliminary motion similar to the one brought by Karadžić in the present case. *Gotovina* argued that the indictment in his case improperly pleaded a possibility *mens rea* standard for JCE III responsibility – a threshold that he argued was too low.¹² The Appeals Chamber rejected *Gotovina*'s claim and confirmed that the indictment – which included the possibility standard – was in accordance with Tribunal jurisprudence.¹³ Thus the Appeals Chamber has specifically ruled that pleading a

para.32 (“foreseeable that such a crime might be perpetrated by one or other members of the group and [...] the accused willingly took that risk”).

⁹ *Blaškić* AJ, para.33 (emphasis added).

¹⁰ *Blaškić* AJ, para.33.

¹¹ *Blaškić* AJ, para.33.

¹² *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* JCE III Decision), paras.22-24.

¹³ *Gotovina* JCE III Decision, para.24 (“In the Joint Indictment, the Prosecution alleges JCE and its elements, as they are set out in the Tribunal's jurisprudence”).

possibility *mens rea* standard for JCE III responsibility accords with Tribunal case-law.

10. Finally, the Appeals Chamber has also confirmed JCE III convictions based on the possibility standard.¹⁴

IV. THE CASE-LAW CITED BY THE TRIAL CHAMBER DOES NOT UNDERMINE THE POSSIBILITY STANDARD

11. None of the authorities the Trial Chamber cited to support its conclusion undermine the clear and consistent line of Appeals Chamber case-law cited above.

A. Trial level authorities cannot over-ride Appeals Chamber case-law

12. To the extent that the Trial Chamber found support for a probability standard in the decisions and judgements of trial chambers, these cannot over-ride Appeals Chamber case-law.¹⁵ Insofar as these trial level authorities make the same error as the Decision, they should be disregarded.

B. The *Martić* Appeal Judgement endorsed the possibility standard

13. Contrary to the Trial Chamber's assertion,¹⁶ the *Martić* Appeals Chamber clearly endorsed the possibility *mens rea* standard for JCE III. The cited passage of the *Martić* Appeal Judgement states that the occurrence of the JCE III crime must be foreseeable to the accused and the accused must willingly take the risk that the crime "might be committed".¹⁷ The reference to "might" equates to a possibility standard.¹⁸

¹⁴ E.g., *Prosecutor v. Milan Martić*, Case No.IT-95-11-T, T.Ch., Judgement, 12 June 2007 para.454 (convicting Martić under Count 1 in part, Counts 3-9 and 12-14 based on Martić willingly taking the risk that the crimes "might be" perpetrated against the non-Serb population); *Martić* AJ, para.83 (confirming that the Trial Chamber applied the correct *mens rea* standard for JCE III).

¹⁵ Decision, para.52 (citing to the *Milošević* Rule 98bis Decision and the *Milutinović et al.* Trial Judgement).

¹⁶ Decision, para.54.

¹⁷ *Martić* AJ, para.83. See also para.168. The Appeals Chamber confirmed that this was the same test enunciated by the Trial Chamber in paragraph 439 of the Judgement. *Martić* AJ, para.83. That paragraph states that an accused will be held responsible for crimes outside the common purpose if "(i) it was foreseeable that such a crime might be perpetrated by one or other member s of the group and (ii) the accused willingly took that risk (*dolus eventualis*)."¹⁸ *Martić* TJ, para.439.

¹⁸ See e.g. *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction *Joint Criminal Enterprise*, (*Ojdanić* JCE Appeal Decision Separate Opinion of Judge Hunt), para.10 (equating "might" with "possibility"); *Gotovina* JCE III Decision, fn.67 (equating "might" and "possible").

This is confirmed by the fact that, elsewhere in the Judgement, the *Martić* Appeals Chamber adopted the *Brdanin* Appeals Chamber's formulation for JCE III *mens rea*, which requires proof that the accused acted with awareness of the possibility of the unplanned crime.¹⁹ Similarly, the *Martić* Appeals Chamber expressly approved the *Stakić* Appeals Chamber's approach to JCE III, which requires consideration of whether an accused "acted in furtherance of the common purpose despite his awareness that the crimes were a possible consequence thereof."²⁰

C. The *Brdanin* Decision on Interlocutory Appeal has been implicitly overruled by the clear and consistent line of subsequent Appeals Chamber case-law

14. The Trial Chamber erroneously relied on the *Brdanin* Decision on Interlocutory Appeal.²¹ This decision states that an accused can be convicted of a crime under JCE III where he acted with awareness "that the crime charged would be committed [...]".²² However, the *Brdanin* Decision is inconsistent with pronouncements by the Appeals Chamber in six subsequent Appeal Judgements, including *Blaškić* which squarely addressed the issue.²³ The Trial Chamber should have followed the binding subsequent appellate jurisprudence.

D. The *Krstić* Appeal Judgement does not support the probability standard

15. As the Trial Chamber acknowledged,²⁴ the *Krstić* Appeal Judgement does not unambiguously support the probability standard. The *Krstić* Appeals Chamber referred to the awareness of the accused of the "probability that other crimes may result".²⁵ Given the clear and consistent line of Appeals Chamber case-law cited

¹⁹ *Martić* AJ, para.168 (citing to *Brdanin* AJ, para.411, which in turn states in relevant part that "the accused, with awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise.").

²⁰ *Martić* AJ, para.169 (citing *Stakić* AJ, paras.91-98).

²¹ Decision, para.52 (citing to *Prosecutor v. Brdanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, paras.5-6).

²² Decision, para.52 (citing *Prosecutor v. Brdanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, paras.5-6).

²³ *Martić* AJ (October 2008), para.168; *Brdanin* AJ (April 2007), para.365; *Stakić* AJ (March 2006), para.65; *Deronjić* AJ (July 2005), para.44; *Kvočka* AJ (February 2005), para.83; *Blaškić* AJ (July 2004), para.33. See also earlier judgements *Vasiljević* AJ (February 2004), para.101; *Krnjelac* AJ (September 2003), para.32.

²⁴ Decision, para.51.

²⁵ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, App.Ch., Judgement, 19 April 2004, para.150 (emphasis added).

above, this imprecise formulation is most appropriately interpreted as consistent with a possibility standard.

E. The *Tadić* Appeal Judgement has been interpreted as setting out a possibility standard for JCE III

16. The Trial Chamber erroneously concluded that the *Tadić* Appeals Chamber required awareness of the probability of the unplanned crime for JCE III.²⁶ The *Tadić* Appeals Chamber used a variety of language to describe the *mens rea* standard for JCE III, some of which suggested a threshold higher than a possibility.²⁷ However, subsequent Appeals Chambers have interpreted the *Tadić* Appeal Judgement as setting out a possibility standard.²⁸ Furthermore, although the *Tadić* Appeals Chamber was satisfied on the facts of the case that *Tadić* acted with awareness that the unplanned crime was “likely”, this does not mean the Chamber mandated this threshold as a matter of law.²⁹

17. The Trial Chamber was wrong to find that the Appeals Chamber has never clearly rejected language in *Tadić* that might suggest a probability standard.³⁰ The *Blaškić* Appeals Chamber unequivocally endorsed the possibility standard for JCE III responsibility as opposed to a higher threshold. This must be seen as rejecting any language in the *Tadić* Appeal Judgement that would suggest a probability standard.

V. RELIEF REQUESTED

18. For the reasons given above, the Prosecution asks the Appeals Chamber to reverse the Decision insofar as the Trial Chamber ordered the Prosecution to propose an amendment to alter the standard for JCE III pleaded in the Indictment. The Prosecution requests confirmation from the Appeals Chamber that the Indictment correctly pleads the JCE III standard.

²⁶ Decision, para.50.

²⁷ *Prosecutor v. Duško Tadić a/k/a “Dule”*, Case No. IT-94-1-A, App.Ch., Judgement, 15 July 1999 (*Tadić* AJ), paras.204, 220, 228.

²⁸ *E.g. Vasiljević* AJ, para.101 fn.179 (citing to *Tadić* AJ, paras. 228, 204 and 220 as authority for the possibility standard); and more *generally above*, paras.6-10 *See further, Ojdanić* JCE Appeal Decision, Separate Opinion of Judge Hunt, paras.9-12.

²⁹ Decision, para.50 (citing to *Tadić* AJ, para.232).

³⁰ Decision, para.55.

Word Count: 2,766³¹



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Dated this 13th day of May 2009
At The Hague, The Netherlands

³¹ This word count includes the material in Appendix A

APPENDIX A: PROCDURAL BACKGROUND³²

DATE	FILING
16 March 2009	Preliminary Motion to Dismiss Joint Criminal Enterprise III – Foreseeability (arguing that the Tribunal has no jurisdiction to try an accused person under JCE III for unplanned crimes that “might” have been committed or were a “possible” consequence of the common purpose).
25 March 2009	Prosecution Response to Preliminary Motion to Dismiss Joint Criminal Enterprise III – Foreseeability (arguing that: (a) the Indictment correctly sets out the standard for JCE III responsibility; (b) there is no error in the references to foreseeability that crimes “might” occur and awareness that the unplanned crimes were a “possible” consequence; and (c) Karadžić had failed to raise a proper jurisdictional challenge).
3 April 2009	Motion for Leave to Reply and Reply Brief: Preliminary Motion to Dismiss Joint Criminal Enterprise III – Foreseeability (reiterating the arguments in the Motion).
28 April 2009	Decision on Six Preliminary Motions Challenging Jurisdiction (in which the Chamber: (a) accepted that Karadžić’s challenge to the standard pleaded in the Indictment was not a proper jurisdictional challenge; ³³ but nevertheless (b) determined that the language pleaded in the Indictment was defective and ordered the Prosecution to propose an amendment ³⁴).
5 May 2009	Prosecution Request for Certification to Appeal Decision on Six Preliminary Motions Challenging Jurisdiction – Foreseeability

³² In accordance with Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, 16 September 2005, IT/155 Rev.3, para.9(b).

³³ Decision, para.32.

³⁴ Decision, paras.57, 82(c).

	(requesting certification to appeal the Decision insofar as it ordered the Prosecution to propose an amendment to the Indictment regarding the <i>mens rea</i> standard for JCE III).
6 May 2009	Status Conference, T.221: Karadžić's response to Prosecution Request for Certification to Appeal Decision on Six Preliminary Motions Challenging Jurisdiction – Foreseeability (opposing the Prosecution's Motion).
6 May 2009	Status Conference, T.227: Trial Chamber's decision granting certification.