THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

IN TRIAL CHAMBER III Case No. IT-95-05/18-PT

Before: Judge Iain Bonomy, Presiding
Judge Michèle Picard
Judge Christoph Flügge

Registrar: Mr John Hocking, Acting Registrar

Date Filed: 16 March 2009

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

Public

PRELIMINARY MOTION TO DISMISS JOINT CRIMINAL ENTERPRISE III - FORESEEABILITY

The Office of the Prosecutor

Mr Alan Tieger
Mr Mark Harmon
Ms. Hildegard Uertz-Retzlaff

The Accused

Dr Radovan Karadžić

Dr. Radovan Karadzic respectfully moves, pursuant to Rule 72(A)(i), to dismiss the joint criminal enterprise, form III, allegations in each count of the Third Amended Indictment, on the grounds that this Tribunal has no jurisdiction to prosecute him for unintended acts that "might" have been committed or were a "possible" consequence of the intended plan.

I. The Indictment

1. In the Third Amended Indictment the prosecution alleges that

- It was foreseeable that crimes not previously agreed **might have been** perpetrated by one or more members of the joint criminal enterprise (JCE); and that
- The accused was aware that those crimes were a **possible** consequence of the JCE.

2. These terms have been used several times in the Indictment:

- "*it was foreseeable that the crimes of genocide (under coun1 and/or count 2), persecution, extermination, and murder **might** be perpetrated by one or more members of this joint criminal enterprise*" and "*such crimes were a **possible** consequence*";[1]
- "*it was foreseeable that genocide **might** be perpetrated*" and "*genocide was a **possible** consequence*";[2]
- "*it was foreseeable that one or more members* [...] ***might** perpetrate genocide*" and "*such genocide was a **possible** consequence*";[3]
- "*it was foreseeable that such persecutory acts **might** be perpetrated*" and "*persecution was a **possible** consequence*";[4]
- "*one or more members* [...] ***might** perpetrate persecutions*" and "*these persecutory acts were a **possible** consequence*";[5]
- "*it was foreseeable that such crimes **might** be perpetrated*" and "*extermination and/or murder were a **possible** consequence*";[6]
- "*it was foreseeable that one or more members* [...] ***might** perpetrate these crimes of extermination and murder*" and "*such acts of extermination and/or murder were a **possible** consequence*".[7]

[1] Indictment, para. 10.
[2] Indictment, para. 39.
[3] Indictment, para. 43.
[4] Indictment, para. 50.
[5] Indictment, para. 59.
[6] Indictment, para. 64.
[7] Indictment, para. 67.

3. Dr. Karadžić asserts that under Customary International Law and ICTY jurisprudence., the relevant standard for JCE III is:

- The commission of crimes outside the scope of the JCE must have been a **natural consequence** of the agreed ones; and that
- The accused foresaw the commission of such crimes as a **probable** consequence of the common criminal plan.

4. This Tribunal thus lacks jurisdiction under Article 7(1) of the Statute to prosecute Dr. Karadzic for crimes that **might** have been committed by one or more members of the JCE and that the accused could only have foreseen as **possible** consequences of the JCE.

II. Customary International Law

5. Customary International Law ("CIL") has always served as the Tribunal's primary source of jurisdiction *rationae materiae*.[8] The Prosecution has the burden of demonstrating that the standards being applied in an indictment reflect CIL at the relevant time. In the following paragraphs it will be shown that the Prosecution cannot satisfy that burden concerning the use of the "might" and "possibly" standards.

A. The crime as a natural consequence

6. In considering the possibility of charging a participant in a JCE for a crime committed outside the scope of the common plan, most national jurisdictions require that crime to have been more than merely a "possible" outcome of the common plan.

7. In many decisions of the Italian Court of Cassation ("Corte di Cassazione") – cases upon which the Appeals Chamber in *Tadić* relied heavily to establish the customary basis of JCE III[9] – the Court held that in order to be indictable, an unplanned crime must have been the natural and foreseeable consequence of the planned ones. In *Mannelli*, for example, it was stated that the unwanted crime must have been the "logical and foreseeable consequence" of the agreed one.[10] In *Solesio et al.* an unplanned crime was held to be imputable if it was a "not exceptional"

[8] See "*Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, presented the 3 May 1993, paras 33-34.
[9] See *Prosecutor v. Duško Tadić*, Judgment, Case No. IT-94-1-A, 15 July 1999, paras 214-219.
[10] See Italian Court of Cassation, *Mannelli*, 20 July 1949, in Giustizia penale, 1949, Parte II, col. 906.

deviation from the planned one.[11] And in *Tossani*, it was held that the crime must not have been an "exceptional and unforeseen" event.[12]

8. In Australia, the criminal codes of Queensland, Tasmania, and Western Australia each provide that when two or more persons form a common plan to commit an unlawful act, each participant is accountable for an unplanned crime only when its commission was a probable consequence of the intended unlawful act.[13] Australian case law supports that position.[14]

9. In the United States, the seminal case of *Pinkerton v. United States* (1946) held that the substantive offence must have been "*reasonably foreseen as a necessary or natural consequence of the unlawful agreement*".[15] The *Pinkerton* case has been interpreted by this Tribunal as allowing conviction only if such acts might have been reasonably contemplated as a *probable consequence* or a likely result of the common criminal plan.[16] Moreover, many state criminal statutes contain provisions that require an unplanned crime to be a "natural and foreseeable consequence," rather than a mere possible outcome, of the planned crime(s).[17]

10. In the United Kingdom, the Court of Criminal Appeal specifically held in *R. v. Anderson Morris* (1966) that, in a joint enterprise, each participant is criminally liable for unplanned crimes only "*if they arise merely from the execution of the agreed joint enterprise*".[18] In this context, a crime that "merely arise[s]" from the execution of a crime is synonymous with a "natural consequence" of the agreed-upon crime(s).

11. Section 111 of the Penal Code of India, which deals with the liability of an accused who abets a crime different than the one he believes he is abetting, provides

[11] See Italian Court of Cassation, *Solesio et al.*, 19 April 1950, in Giustizia penale, 1950, Parte II, col. 822.
[12] See Italian Court of Cassation, *Tossani*, 17 September 1946, in Archivio Penale, 1947, Parte II, pp. 88-89.
[13] See Criminal Code Act of Tasmania, Part1, Chapter 1, art.4; Criminal Code of Western Australia, Chapter 2, art. 8 and Criminal Code Act of Queensland, Chapter 2, art.8..
[14] See, for example, *Pemble v. Regina* [1971], HCA 20; (1971) 124 C.L.R. 107; *Regina v. Crabbe* [1985], HCA 22; (1985) 156 C.L.R. 464; *Boughey v. Regina* [1986] HCA 29; (1986) 161 C.L.R. 10; *Regina v. Van den Bemd* [1994] HCA 56; (1994) 68 A.L.J.R. 199; *Regina v. Hind and Harwood* [1995], QCA 202 (30 May 1995).
[15] See *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946).
[16] See *Tadić* Appeal Judgment, footnote 289.
[17] Iowa Code, § 703.2; Wisconsin Statutes, § 939.05(2)(c); Kansas Statutes, § 21-3205; Minnesota Statutes, § 609.05; Maine Criminal Code, § 57.
[18] See *Regina v. Anderson Morris*, [1966] 2 Q.B. 110.

that the abettor is responsible for the unforeseen crime only if it was a **probable** consequence of the abetment.[19] A participant in a JCE falls within the literal definition of an abettor.[20]

12. The former Penal Code of Israel also contained a provision that limits liability for unforeseen crimes to those that were a **probable** consequence of the intended unlawful purpose.[21]

B. The awareness of the accused about the commission of the crimes

13. Concerning the subjective foreseeability of unintended crimes, many national jurisdictions require that, in order to be charged, such crimes must have been foreseen by the accused as a **probable** consequence of the agreed-upon crime(s).

14. The Italian Court of Cassation consistently held after the Second World War, for example in *Antonini*, that a person may be convicted of a crime outside the scope of a common plan only if he or she not only foresaw the commission of the unplanned crime as probable, but fully accepted the risk that it would be committed.[22] Yet, the Italian Constitutional Court has specifically held that to convict someone under article 116 of the "*Codice Penale*" (Italian criminal code), which provides that a participant in a common criminal plan is responsible for unplanned crimes that result from his acts or omissions,[23] the different crime must have been foreseen as a logical development of the agreed one;[24] that standard requires more than a the mere possibility that the unplanned crime will be committed.

[19] Indian Penal Code, Section 111 (liability of abettor when one act abetted and different act done): "*when an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it: Proviso – Provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment*".

[20] Section 107 specifically states that an abettor is, among other figures, whoever "*engages with one or more person or persons in any conspiracy for the doing of that thing*"..

[21] See former Israeli Penal Code, section 28. Within the context of this motion, it is the former criminal text which is relevant, since the current penal code entered into force only in August 1994.

[22] Italian Court of Cassation , *Antonini*, 29 March 1949, in Giustizia Penale, 1949, Part II, cols. 740-742..

[23] Art. 116 *Codice Penale* states that "*qualora il reato commesso sia diverso da quello voluto da taluno dei concorrenti, anche questi ne risponde se l'evento è conseguenza della sua azione od omissione*": if the crime committed is different from that desired by someone of the participants, he or she too will respond, if the event is a consequence of his act or omission" (unofficial translation).

[24] Corte Costituzionale della Repubblica italiana, sentenza del 13 maggio 1965; in that judgment it is indeed stated that "*il reato diverso o piú grave commesso dal concorrente debba potere rappresentarsi alla psiche dell'agente, nell'ordinario svolgersi e concatenarsi dei fatti umani come uno sviluppo logicamente prevedibile di quello voluto*" (the different or more grave crime committed form the co-

15. The Canadian Criminal Code provides that "*where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a* ***probable*** *consequence of carrying out the common purpose is a party to that offence*".[25] Canadian national case-law implicitly reaffirms such a requirement.[26]

16. In the United Kingdom, in the case of *R. v. Hyde*,, an English Court of Appeal stated that to find a person liable for acts not previously agreed upon as part of a joint criminal plan, it is necessary that he or she "*foresaw and contemplated a real possibility that one of his fellows might in the excitement of the moment go beyond the actual plan*": in this case, the term "real" has to be interpreted as closer to probability than the mere possibility.[27]

17. The Indian Penal Code provides that, in abetting the commission of a crime, a person may be responsible for effects which are different from the one expected only if he knew that the crime was **likely** to cause that effect.[28]

18. The Egyptian Court of Cassation has held that accomplices can be liable for unplanned crimes committed during the execution of a common criminal plan only if they could have reasonably anticipated that those crimes would be committed as a result of their instigation, agreement or assistance.[29]

III. THE PRACTICE OF ICTY

19. This Tribunal's practice concerning the two elements outlined above *sub* II(A) and II(B) is also noteworthy.

perpetrator must to be possible to be represented in the subject's psyche, into the ordinary development and chain of human fact as a logical foreseeable development of the fact wanted (unofficial translation)).
[25] Canadian Criminal Code, section 21(2).
[26] See, for example, *R. v. Logan* [1990], 2 SCR 731 and *R. v. Rodney* [1990], 2 SCR 687.
[27] See *Regina v .Hyde*, [1991] 1 Q.B. 134. See also *Chang Wing Siu and others v. The Queen*, [Privy Council] HK June 5, 21, 1984 and *Regina v. Slack*, CA [1989] 3 W.L.R. 513, 1989.
[28] Indian Penal Code, section 113
[29] Sadiq Reza, India, in Kevin Jon Heller & Markus Dirk Dubber (eds.), *The Stanford Handbook of Comparative Criminal Law* (forthcoming, 2009).

20. As for the first element, it has to be underlined that the standard applied since *Tadić* has always been the "natural and foreseeable consequence" standard. That standard has never been changed or modified.[30]

21. Concerning the second element, this Tribunal's practice has not been uniform. Some Chambers have applied the "possible" standard, while others have applied the "probable" standard.

22. In *Tadić*, for example, both standards were utilised,[31] sometimes even within the same paragraph.[32]

23. Another example might be found in *Krstić*. In rendering its judgment, Trial Chamber I, quoting *Brđanin and Talić*, stated that a crime must have been foreseen as a possible consequence.[33] However, Appeals Chamber subsequently moved to a different position, stating that the accused "*participated in that enterprise aware of the probability that other crimes may result*"; in changing the standard applied, the Appeal Chamber did not give any explanation nor did not provide any clarification of that.[34]

24. In the recent trial judgment rendered in *Milutinović* the Trial Chamber stated that, as far as the elements of JCE III are concerned, "it was reasonably foreseeable to [the accused] that the crime or underlying offence **would be** perpetrated by one or

[30] See, for example, *Tadić* Appeal Judgment, para. 228; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Case No. IT-00-36-PT, 26 June 2001, para. 25; *Prosecutor v. Radilsav Krstić*, Judgment, Case No. IT-98-33-T, 2 August 2001, para. 613 referring to *Brđanin* decision on the form of the Amended Indictment, para. 31; *Prosecutor v .Fatmir Limaj et al.*, Judgment, Case No. IT-03-66-T, 30 November 2005, para. 511 referring to *Tadić*, Appeal Judgment, para. 204 and to *Prosecutor v. Miroslav Kvočka et al.*, Judgment, Case No. IT-98-30/1-A, 28 February 2005, para. 83; *Prosecutor v. Milan Martić*, Judgment, Case No. IT-95-11-A, 8 October 2008, para 171.

[31] *Tadić* Appeal Judgment, para. 228 (emphasis removed) and para. 232. At paragraph 228 it is clearly stated that "*responsibility for a crime other than the one agreed upon in the common plan arises only if* [...] *it was foreseeable that such a crime might be perpetrated by one or other members of the* group"; but, at paragraph 232, Appeals Chamber held that an accused had to be "*aware that the actions of the group of which he was a member were likely to lead to such killings*", where the use of the word "likely" indicate more than a mere possibility.

[32] *Tadić* Appeal Judgment, para. 220. In this paragraph, the Appeals Chamber used the first the expression "*foreseeability of the possible commission*" and then "*a person* [...] *was aware that the actions of the group were most likely to lead to that result*".

[33] See *Prosecutor v. Radilsav Krstić*, Judgment, Case No. IT-98-33-T, 2 August 2001, para. 613 referring to *Brđanin* decision on the form of the Amended Indictment, para. 31.

[34] *Prosecutor v. Radilsav Krstić*, Judgment, Case No. IT-98-33-A, 19 April 2004, para. 150.

more of the person used by him (or by any other member of the joint criminal enterprise)";[35]

25. Since, as far as the second element is concerned, a definitive position of the Court is not traceable, the general principle of *in dubio pro reo* should be applied, being the "probability" standard more favourable for the accused.

IV. CONCLUSION

26. At the time the crimes in the Indictment were allegedly committed, the CIL position was that an accused could not be held liable for a crime that fell outside of the scope of a criminal plan unless that crime was (1) a natural and foreseeable consequence of the agreed-upon crime(s); and (2) the accused foresaw that the commission of the crime was probable, not simply possible. The practice of this Tribunal supports that position. Despite those requirements, the Indictment seeks to convict Dr. Karadzic of unplanned crimes that "*might have been perpetrated*" by one or more members of the various JCEs and that Dr. Karadzic allegedly foresaw as a "*possible consequence of the implementation*" of those JCEs. The Indictment, therefore, is based on a mode of liability over which the Tribunal has no jurisdiction pursuant to Article 7 of the Statute.[36]

27. Dr. Karadžić respectfully requests the Trial Chamber to dismiss all the allegations in the Indictment based on JCE III.

Word count: 2893

Respectfully submitted,

Radovan Karadžić[37]

[35] *Prosecutor v. Milan Milutinović et al.*, Judgment (Volume 1 of 4), Case No. IT-05-87-T, 26 February 2009, para. 96.
[36] *Indictment*, paras 10, 39, 43, 50, 59, 64 and 67.
[37] Dr. Karadžić wishes to acknowledge with gratitude the contribution of Legal Intern Enrico Boninsegna, a graduate of the University of Bologna (Italy) Faculty of Law, to the research, and preparation of this motion..