

**UNITED  
NATIONS**

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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-PT

Date: 25 March 2009

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**IN THE TRIAL CHAMBER**

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

**Acting Registrar:** Mr. John Hocking

**THE PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

**PUBLIC**

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**PROSECUTION RESPONSE TO PRELIMINARY MOTION TO  
DISMISS JOINT CRIMINAL ENTERPRISE III –  
FORESEEABILITY**

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**The Office of the Prosecutor:**

Mr. Alan Tieger  
Ms. Hildegard Uertz-Retzlaff

**The Accused:**

Mr. Radovan Karadžić

**THE INTERNATIONAL CRIMINAL TRIBUNAL**  
**FOR THE FORMER YUGOSLAVIA**

**Case No. IT-95-05/18-PT**

**THE PROSECUTOR**

**v.**

**RADOVAN KARADŽIĆ**

**PUBLIC**

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**PROSECUTION RESPONSE TO PRELIMINARY MOTION TO DISMISS**  
**JOINT CRIMINAL ENTERPRISE III – FORESEEABILITY**

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**I. OVERVIEW**

1. The Prosecution opposes Karadžić's Preliminary Motion to Dismiss Joint Criminal Enterprise III – Foreseeability, dated 16 March 2009 (Motion) for two reasons:

- The Prosecution has correctly pleaded the *mens rea* standard for Joint Criminal Enterprise Category III liability (JCE III) in accordance with Tribunal case-law; and
- Karadžić has failed to raise a proper jurisdictional challenge.

## II. THE PROSECUTION HAS CORRECTLY PLEADED THE *MENS REA* STANDARD FOR JCE III LIABILITY

1. The Third Amended Indictment (Indictment)<sup>1</sup> uses the correct *mens rea* formulation for JCE III liability. In particular, the Prosecution has pleaded that

(i) it was “foreseeable” that the crimes of genocide, persecution, extermination and murder “might be perpetrated” by members of the joint criminal enterprise or by persons used by any member of the joint criminal enterprise; and

(ii) Karadžić acted with “awareness that such crimes were a possible consequence of the implementation of the objective of the joint criminal enterprise and willingly took that risk.”<sup>2</sup>

2. The Indictment accords with Tribunal case-law. In particular, the Vasiljević Appeals Chamber stated that the *mens rea* for JCE III liability requires proof that

“(i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and

(ii) the accused *willingly took that risk* – that is, being aware that such a crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.”<sup>3</sup>

3. In light of this Appeals Chamber case-law, the Trial Chamber should dismiss Karadžić’s argument that the Prosecution has pleaded the incorrect *mens rea* standard for JCE III liability.<sup>4</sup>

<sup>1</sup> Third Amended Indictment, 27 February 2009 (Indictment).

<sup>2</sup> Indictment, para.10. *See also* paras.39, 43, 59, 64, 67.

<sup>3</sup> *Prosecutor v Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004, para.101. *See also e.g., Prosecutor v Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para.33; *Prosecutor v Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006, para.65; *Prosecutor v Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008, para.83.

<sup>4</sup> Motion, para.26.

### III. KARADŽIĆ HAS NOT RAISED A PROPER JURISDICTIONAL CHALLENGE

4. Contrary to his assertion, Karadžić does not raise a valid jurisdictional challenge within the meaning of Rule 72(A)(i).<sup>5</sup> Karadžić seeks to change the accepted *mens rea* standard for JCE III liability. Arguments that simply seek to alter the accepted elements of a crime are not proper jurisdictional challenges and are inappropriate for resolution at the preliminary phase of the proceedings.<sup>6</sup>

5. For example, in the *Gotovina* case, the accused challenged the *mens rea* standard for JCE III liability in similar terms to Karadžić's challenge. The Appeals Chamber dismissed *Gotovina*'s argument because he had failed to raise a proper jurisdictional issue. The Appeals Chamber's reasoning is directly applicable to the present case:

In the Joint Indictment, the Prosecution alleges JCE and its elements, as they are set out in the Tribunal's jurisprudence, and the Appellant merely challenges the definition and interpretation of a particular element as established in cases subsequent to the *Tadić* Appeals Judgement. The Appeals Chamber agrees with the Trial Chamber that such a challenge is to be considered on the merits at trial.<sup>7</sup>

6. In light of this directly applicable Appeals Chamber precedent, the Trial Chamber should find that Karadžić has failed to raise a proper jurisdictional challenge.

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<sup>5</sup> Motion, preliminary paragraph.

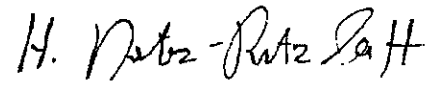
<sup>6</sup> *E.g.*, *Milutinović et al.*, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration, Case No. IT-05-87-PT, 22 March 2006, para.23 ("Like challenges relating to the contours of a substantive crime, challenges concerning the contours of a form of responsibility are matters to be addressed at trial.").

<sup>7</sup> *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, para.24.

#### IV. CONCLUSION

7. For the reasons given above, the Motion should be dismissed in its entirety.

Word Count: (647)



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Hildegard Uertz-Retzlaff  
Senior Trial Attorney

Dated this 25<sup>th</sup> day of March 2009  
At The Hague, The Netherlands