THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

IN TRIAL CHAMBER III

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

Acting Registrar: Mr John Hocking

Date Filed: 27 March 2009

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

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

Public

PRELIMINARY MOTION TO DISMISS JCE III – SPECIAL-INTENT CRIMES

The Office of the Prosecutor

Mr Alan Tieger
Mr Mark Harmon
Ms Hildegard Uertz-Retzlaff

The Accused

Dr Radovan Karadžić

1. Dr. Radovan Karadžić respectfully moves, pursuant to Rule 72(A)(i), to dismiss the extended joint criminal enterprise (JCE III) allegations in Counts 1, 2, and 3 of the Third Amended Indictment, on the ground that those Counts do not relate to a form of liability recognized by Article 7(1) of the Statute, because there is no basis in customary international law for convicting a defendant of a crime that requires special intent via JCE III.

I. THE INDICTMENT

2. In the Third Amended Indictment, the Prosecution alleges that Dr. Karadžić is criminally responsible for genocide and persecution because he participated in joint criminal enterprises whose objectives included the commission of those crimes.[1] In the alternative, the Prosecution alleges that even if it cannot prove that Dr. Karadžić intended to commit genocide and persecution, Dr. Karadžić may still be held responsible for those crimes on the ground that he willingly took the risk that they would be committed as a consequence of the JCEs.[2]

3. The Third Amended Indictment makes that claim for Counts 1, 2, and 3:

- Count 1: "Alternatively, as alleged in paragraph 10, it was foreseeable that genocide might be perpetrated by one or more members of this joint criminal enterprise... to carry out the crimes of deportation and forcible transfer. Radovan Karadžić was aware that genocide was a possible consequence of the implementation of the objective to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territories and willingly took that risk."[3]

- Count 2: "Alternatively, as alleged in paragraph 10, it was foreseeable that one or more members of the overarching joint criminal enterprise... might perpetrate genocide against the Bosnian Muslims of Srebrenica. Radovan Karadžić was

[1] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, *Third Amended Indictment* ("*Indictment*"), para. 9 (27 February 2009).
[2] *Indictment*, para. 10.
[3] *Indictment*, para. 39.

aware that such genocide was a possible consequence of this overarching objective, and willingly took that risk."[4]

- Count 3: "Alternatively, as alleged in paragraph 10, it was foreseeable that such persecutory acts might be perpetrated by one or more members of this joint criminal enterprise... to carry out the crimes of deportation and forcible transfer. Radovan Karadžić was aware that persecution was a possible consequence of the implementation of the objective to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territories and willingly took that risk."[5]

4. Dr. Karadžić asserts that customary international law does not permit a defendant to be convicted of a special-intent crime such as genocide or persecution via JCE III, a form of principal perpetration that does not require the defendant to share the special intent of the crime's physical perpetrator. More specifically, he asserts that:

i. No international or domestic case has ever suggested, much less held, that a defendant can be convicted of a special-intent crime as a principal perpetrator even though he did not possess the necessary special intent.

ii. The international and domestic cases that have addressed responsibility for crimes that were not part of a joint criminal enterprise clearly indicate that a defendant cannot be convicted as a principal perpetrator of an unplanned crime that requires special intent simply because that crime was foreseeable and foreseen.

5. If Dr. Karadžić was convicted of genocide and/or persecution via JCE III, he would be convicted as a principal perpetrator of those crimes.[6] This Tribunal thus lacks jurisdiction under Article 7(1) of the Statute to prosecute him for genocide and persecution via the Prosecution's alternative theory of JCE III.

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[4] *Indictment*, para. 43.
[5] *Indictment*, para. 50.
[6] *See Prosecutor v. Stakic*, Case No. IT-97-24-A, *Judgment*, para. 98 (22 March 2006) ("*Stakic Appeal Judgment*"); *Prosecutor v. Brdjanin*, Case No. IT-99-36-A, *Judgment*, para. 431 (3 April 2007); *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, *Judgment*, paras. 95-100 (25 February 2004).

II. ICTY PRACTICE AND SCHOLARLY OPINION

6. It is well established that a defendant cannot be convicted of physically committing genocide or persecution unless he acted with the special intent (*dolus specialis*) that the crimes require. Genocide requires the Prosecution to prove that the defendant committed the underlying act of genocide "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[7] Persecution requires the Prosecution to prove that the defendant committed the underlying persecutory act with "the intent to discriminate on political, racial or religious grounds."[8]

7. Despite this special-intent requirement, a split Appeals Chamber held in *Brdjanin* – reversing the decision of the Trial Chamber[9] – that a defendant can be convicted of genocide via JCE III even though that mode of liability does not require the Prosecution to prove that the defendant possessed the necessary special intent. According to the Court, "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."[10]

8. Judge Shahabuddeen dissented from the majority's holding. In his view, no matter what mode of liability the Prosecution relies on, a defendant can never be convicted of genocide as a principal perpetrator unless he possessed the necessary special intent:

> The third category of *Tadic* 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 specific intent always has to be shown; if it is not shown, the case has to be dismissed.[11]

9. In *Krstić*, the Appeals Chamber implicitly disapproved the majority decision in *Brdjanin*. The Trial Chamber had relied on both JCE I and JCE III to convict General Krstić of genocide as a principal perpetrator: JCE I for the actual killing of the

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[7] ICTY Statute, art. 4(2).
[8] *Stakic Appeal Judgment*, para. 328.
[9] *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, *Judgment*, para. 709 fn. 1736 (1 September 2004) ("*Brdjanin Trial Judgment*").
[10] *Prosecutor v. Brdjanin*, Case No. IT-99-36-A, *Decision on Interlocutory Appeal*, para. 7 (19 March 2004) ("*Brdjanin Appeal Decision*").
[11] *Ibid.*, *Dissenting Opinion of Judge Shahabuddeen*, para. 4.

military-age Bosnian Muslim men of Srebrenica,[12] and JCE III for the foreseeable serious bodily and mental suffering inflicted upon the men who survived the killings.[13] Nevertheless, once the Appeals Chamber concluded that General Krstić did not act with the special intent necessary for genocide,[14] it reversed *both* convictions on the ground that – regardless of the mode of liability – a defendant cannot be convicted of genocide as a principal perpetrator unless he possesses the requisite special intent:

> [A]ll that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established. There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent. Krstić, therefore, is not guilty of genocide as a principal perpetrator.[15]

10. Scholars have also been uniformly critical of the idea that a defendant can be convicted of a special-intent crime such as genocide via JCE III. Haan, for example, has pointed out that "in order to arrive at a conviction for genocide under Article 4(3)(a) of the Statute, the specific intent for genocide must be met. Otherwise JCE would fall short of the standards required for a form of *commission* and therefore would run contrary to the notion of JCE as a form of commission as set out in *Ojdanic* and *Tadic*."[16]

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[12] *Prosecution v. Krstić*, Case No. IT-98-33-T, *Judgment*, para. 633 (2 August 2001).

[13] *Krstić Trial Judgment*, para. 635 ("While the agreed objective of the joint criminal enterprise in which General Krstić participated was the actual killing of the military aged Bosnian Muslim men of Srebrenica, *the terrible bodily and mental suffering of the few survivors clearly was a natural and foreseeable consequence of the enterprise. General Krstić must have been aware of this possibility and he therefore incurs responsibility for these crimes as well.*") (emphasis added).

[14] *Prosecutor v. Krstić*, Case No. IT-98-33-A, *Judgment*, paras. 79-133 (19 April 2004) ("*Krstić Appeal Judgment*").

[15] *Krstić Appeal Judgment*, para. 134.

[16] Verena Haan, "The Development of the Concept of JCE at the ICTY", 5 *Int'l Crim. L. Rev.* 167, 200 (2005); Kai Ambos, "Joint Criminal Enterprise and Command Responsibility", 5 *J. Int'l Crim. Just.* 159, 168 (2007) (noting, with regard to genocide, that "the imputation of an act as a 'foreseeable consequence' that was not agreed upon beforehand and consequently not intended by all participants cannot constitute a form of co-perpetration or of perpetration at all. Perpetration requires that the perpetrator himself fulfills all objective and subjective elements of the offense"); Guenael Mettraux, *International Crimes and the ad hoc Tribunals* 259 (Oxford, 2005) ("The special genocidal intent does not form part of the *mens rea* specific to the mode of participation. Instead, it is an element of the *chapeau* of the offence which characterizes it as an international crime and which must be met... in relation to each and every individual charged with such a crime.").

11. Indeed, even the author of the Appeals Chamber's decision in *Tadic*, Antonio Cassese, does not believe that JCE III is available for crimes that require special intent:

> [A]n important qualification to the application of the third class of JCE under discussion. Resorting to such class would be intrinsically ill-founded when the crime committed by the 'primary offender' requires a special or specific intent (*dolus specialis*), that is, the crime charged is one of genocide, persecution, or aggression.... In these cases the 'secondary offender' may not share – by definition – that special intent (otherwise one would fall under the second class of JCE), even though entertaining such intent is a *sine qua non* condition for being charged with the crime. He may, therefore, not be accused of such crime under the doctrine at issue. This proposition is based on two grounds. First, on a logical impossibility: one may not be held responsible for committing a crime that requires special intent (in addition to the intent needed for the underlying crime) unless that special intent can be proved, whatever mode of responsibility for the commission of crimes is relied upon. Second... as the 'secondary offender' bears *responsibility for the same crime* as the 'primary offender', the 'distance' between the subjective element of the two offenders must not be so dramatic as in the case of crimes requiring specific intent.... For such crimes the 'secondary offender' could only be charged – it is submitted – with *aiding and abetting* the main crime.[17]

IV. CUSTOMARY INTERNATIONAL LAW

12. In addition to being theoretically problematic, the idea that a defendant can be convicted of a special-intent crime via JCE III finds no support in customary international law. The Appeals Chamber has held that "in order to fall within the Tribunal's jurisdiction *ratione personae*, any form of liability... must have existed under customary international law at the relevant time."[18] This Tribunal has never considered whether there is a customary basis for using JCE III to convict a defendant of genocide or persecution. *Tadic* upheld the customary status of JCE III itself, but that case did not involve genocide or any offence that requires special intent.[19] *Brdjanin* held that JCE III was available for special-intent crimes, but it did not examine whether customary international law supported that conclusion, as the

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[17] Antonio Cassese, "The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise", 5 *J. Int'l Crim. Just.* 109, 121 (2007).

[18] *Prosecutor v Milutinovic et al*, Case No. IT-99-37-AR72, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise*, paras. 40 ff (21 May 2003).

[19] *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44-AR72.4, *Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide*, para. 11 (22 October 2004) ("*Rwamakuba Appeal Decision*"). The Trial Chamber in *Tadic* concluded that the special intent to discriminate was an element of all crimes against humanity, but the Appeals Chamber held that such an intent was only require for the crime against humanity of persecution, with which Tadic was not charged. *See Prosecution v. Tadic*, Case No. IT-94-1-A, *Judgment*, para. 305 (15 July 1999) ("*Tadic Appeal Judgment*").

Appeals Chamber specifically noted in *Rwamakuba*.[20] And although *Rwamakuba* held that there was a customary basis for convicting a defendant of genocide via JCE I, it did not address whether the same was true of JCE III.[21]

13. This Tribunal and the International Criminal Tribunal for Rwanda (ICTR) have upheld the customary status of JCE III on the basis of World War II-era international and national jurisprudence, international agreements such as the Rome Statute and the Genocide Convention, and national legislation and cases. As explained below, those sources uniformly indicate that a defendant cannot be convicted of a special-intent crime via JCE III.

A. International Tribunals After World War II

14. In *Rwamakuba*, the Appeals Chamber relied on three judgments issued by post-WW II international tribunals to find that customary international law permitted a defendant to be convicted of genocide via JCE I: the IMT Judgment, the *RuSHA Case*, and the *Justice Case*.[22] Those cases do not help establish that a defendant can be convicted of genocide via JCE III.

15. First, this Tribunal has consistently held that a defendant cannot be convicted of genocide via JCE I unless he acts with the special intent that genocide requires – a requirement that follows naturally from the fact that JCE I "is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention."[23] The availability of JCE I for genocide thus has no bearing on whether JCE III is available for genocide, given that the defining characteristic of JCE

[20] *Rwamakuba Appeal Decision*, para. 9 (rejecting the Prosecution's claim that *Brdjanin* implicitly found that there is a customary basis for convicting a defendant of a special-intent crime via JCE, because "the reasoning in *Brdjanin* does not indicate that the Appeals Chamber dealt with the problem whether international customary law supports the application of joint criminal enterprise to the crime of genocide"). Indeed, Mettraux points out that "the Appeals Chamber appears to have failed to provide any authority (let alone any state practice or *opinio juris*) which would support its finding under customary international law." Mettraux, *supra* note 16, at 265.

[21] *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-I, *Indictment* (9 June 2005) (alleging that Rwamakuba was the physical perpetrator of genocide (Count 1) or alternatively instigated or aided and abetted genocide (Count 2). Indeed, despite the Appeal Chamber's decision that JCE I was available for genocide, the Prosecution ultimately removed all reference to JCE from the June 9, 2005, Indictment. *See Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, *Judgment*, para. 21 (20 September 2006).

[22] *Rwamakuba Appeal Decision*, paras. 15-24.

[23] *Tadic Appeal Judgment*, para.196.

III is that it holds defendants responsible for crimes that, though foreseeable and foreseen, they did not intend to commit.[24]

16. Second, nothing in the cases cited in *Rwamakuba* supports the idea that JCE III is available for genocide. All three cases involved a joint criminal enterprise whose special objective was the commission of genocide: a "plan for exterminating the Jews" at the IMT[25]; a "systematic program of genocide" in the *RuSHA Case*,[26] and "a plan for the persecution and extermination of Jews and Poles" in the *Justice Case*.[27] Moreover, in each case, all of the defendants convicted of genocidal acts clearly participated in the JCEs with the special intent that genocide requires. The IMT judgment notes, for example, that Rosenberg "helped to formulate the policies of Germanisation, exploitation, forced labour, extermination of Jews and opponents of Nazi rule, and he set up the administration which carried them out."[28] Similarly, in the *RuSHA Case*, Ulrich Griefelt was convicted because he was "the main driving force in the entire Germanization program."[29] Finally, in the *Justice Case*, the tribunal concluded that Oswald Rothaug "gave himself utterly" to the "programme of persecution and extermination" – a requirement that the Tribunal described as "the essence of the proof."[30]

B. National Military Tribunals After World War II

17. In *Tadic*, the Appeals Chamber relied heavily on two judgments issued by national military courts in 1945 to justify its conclusion that JCE III existed under customary international law: *Essen Lynching*,[31] decided by a British military court;

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[24] *See, e.g., Tadic Appeal Judgment*, at para. 204.
[25] *Judgment of the International Military Tribunal* ("*IMT Judgment*"), *judgment* of 30 September-1 October 1946, in Trial of the Major War Criminals before the International Military Tribunal, Vol. 22 p. 494.
[26] *United States v. Greifelt and others* ("*RuSHA*"), United States Military Tribunal No. 1, *judgment* of 10 March 1948, in Trials of War Criminals before the Nurenberg Military Tribunals under Control Council Law No.10, Vols. 4-5 (New York, 1997), p. 609.
[27] *Alstötter and others* ("*Justice*"), United States Military Tribunal III, *judgment* of 4 December 1947, in Trials of War Criminals before the Nurenberg Military Tribunals under Control Council Law No. 10, Vol. 3 (New York, 1997), p. 1063.
[28] *IMT Judgment*, p. 540.
[29] *RuSHA Case*, p. 155.
[30] *Justice Case*, p. 1156.
[31] *Trial of Erich Heyer and six others* ("*Essen Lynching*"), British Military Court for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd December, 1945, UNWCC, Vol. I, p. 88, p. 91.

and *Borkum Island*, decided by a United States military court.[32] Neither case, however, supports the idea that a defendant can be convicted of a special-intent crime like genocide via JCE III.

18. First, neither case involved a crime that required special intent. In *Essen Lynching*, seven defendants, two German soldiers and five German civilians, were charged with the war crime of being "concerned in the killing" of British prisoners of war.[33] That crime did not require the prosecution to prove that the defendants specifically intended to kill the POWs, much less that they acted with any kind of special intent; as the prosecutor in the case told the jury, the defendants could be convicted of the war crime if they were "concerned in the killing of these three unidentified airmen in circumstances which the British law would have amounted to *either murder or manslaughter*."[34]

19. Similarly, the defendants in *Borkum Island*, sixteen soldiers and civilians who had assaulted and killed American POWs, were variously charged with the war crimes of "wilfully, deliberately and wrongfully encourag[ing]... and participat[ing] in the killing" and "wilfully, deliberately and wrongfully encourag[ing]... and participat[ing] in the assaults."[35] Neither war crime required proof that the defendants acted with the kind of special intent required by genocide or persecution.

20. Second, both cases support the idea that a defendant who participates in a JCE cannot be convicted of an unplanned crime that requires special intent simply because that crime was both foreseeable and foreseen. As noted above, Cassese rejects the use of JCE III for special-intent crimes because the difference between the defendant's *mens rea* and the *mens rea* of the crime's physical perpetrator is simply too great: whereas the defendant acts only with the ordinary intent to commit the planned crimes, the physical perpetrator acts with the more culpable special intent.[36] *Essen*

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[32] *United States of America v. Kurt Goebell et al.* ("*Borkum Island*"), Case No. 12-489, U.S. National Archives Microfilm Publications.
[33] *Essen Lynching Case*, p. 88.
[34] *See Essen Lynching* Transcript, on file in the Public Record Office, London, WO 235/58, p. 65 (emphasis added). Under British law, manslaughter is a form of unintentional homicide.
[35] *See Borkum Island Case*, Charge Sheet, in U.S. National Archives Microfilm Publications, I (on file with the international Tribunal's Library).
[36] It is a basic principle of international criminal law that special intent (*dolus specialis*) is a more culpable *mens rea* than intent (*dolus directus*). *See, e.g., Krstić Appeal Judgment*, para. 134 (noting

Lynching implicitly adopted that argument. The prosecutor argued that the British military court should convict the defendants of murder under English law instead of the war crime of being involved in killing POWs.[37] The court refused, because it concluded that although all of the defendants had intended to participate in the ill-treatment of the POWs, thus satisfying the *mens rea* of the war crime, they had not all intended to kill, the necessary *mens rea* of murder.[38]

21. The only possible interpretation of *Essen Lynching* is that the court rejected the idea that JCE III[39] can be used to convict a defendant of an unplanned crime that requires a higher *mens rea* than the planned crimes. There was no question that the death of the POWs was a foreseeable consequence of their mistreatment, yet the court was only willing to convict the defendants of the unplanned crime (being concerned in the killing of a POW) that required the same *mens rea* as the planned crime (mistreatment) – the basic intent to commit the act. Had it believed that a member of a JCE could be convicted of an unplanned crime requiring a higher *mens rea*, it would have convicted the defendants of murder, which additionally required the intent to bring about a particular consequence, death.

22. The military court in *Borkum Island* also rejected the idea that a defendant can be convicted of an unplanned crime that requires a higher *mens rea* than the planned crime. Although the prosecution argued that all of the defendants had intended to kill the POWs and thus were guilty of the more serious war crime of participating in killing, the court convicted some of the defendants of the less serious war crime, participating in assaults.[40] As in *Essen Lynching*, there was no question that it was foreseeable that the assaults could lead to death. Indeed, none of the defendants denied that the killings were foreseeable; most simply denied the existence of a common plan or argued that they had only been part of a common plan to commit

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that "[g]enocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent"). The French term for special intent, *dol aggrave*, captures the difference. *See* Catherine Elliott, "The French Law of Intent and Its Influence on the Development of International Criminal Law", 11 *Crim. L. F.* 35, 42 (2000).

[37] *Essen Lynching Case*, p. 91

[38] *Tadic Appeal Judgment*, para. 204.

[39] The Court did not use the modern term "JCE III". I use it here and throughout the motion for sake of clarity.

[40] *Borkum Island Case*, Charge Sheet, pp. 1280-86.

assault and thus could not be convicted of the more serious crime.[41] The court obviously rejected the former claim, because all of the defendants were convicted. Yet it must have accepted the latter claim, because not all of the defendants were convicted of killing – an inexplicable result if the court believed that the defendants could be convicted of an unplanned crime (killing) that was more serious than the planned crime (assault) as long as the unplanned crime was both foreseeable and foreseen.

C. Italian Cases After World War II

23. In upholding the customary status of JCE III in general, *Tadic* also relied heavily on a number of cases decided by the Italian Court of Cassation in the aftermath of the war. With one early exception, *Bonati et al.*,[42] those decisions consistently held that a member of a JCE cannot be convicted of an unplanned crime that requires a higher *mens rea* than the planned crimes. The Italian cases thus indicate that customary international law does not permit a defendant to be convicted of a special-intent crime like genocide or persecution via JCE III.

24. In *Bonati et al.*, a defendant claimed that he could not be convicted of murder as a foreseeable consequence of his participation in a JCE, because that crime was more serious than the crimes the enterprise planned to commit. The Court of Cassation rejected that argument, holding that "the crime committed, despite more grave that that intended by some of the participants... was a consequence, albeit indirect, of their participation."[43]

25. That case, however, is the exception that proves the rule. Four years later, in *Aratano et al.*,[44] the Court of Cassation reversed the murder convictions of two members of a Fascist brigade who had participated in a search for partisans that had foreseeably but not intentionally resulted in a partisan being murdered. The Court

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[41] *Ibid.*, pp. 1268-70.
[42] Italian Court of Cassation, Penal Section II, *judgment* of 5 July 1946 (handwritten text of the unpublished judgment provided by the Italian Public Record Office in Rome; on file with the Tribunal's Library); *see also Giustizia Penale*, 1945-46, Part II, cols. 530-532.
[43] *Ibid.*, p. 19.
[44] Italian Court of Cassation, Penal Section II, *judgment* of 21 February 1949 (handwritten text of the unpublished judgment provided by the Italian Public Record Office in Rome; on file with the Tribunal's Library); *see also Archivio Penale*, 1949, p. 472.

specifically held that a member of a JCE cannot be convicted of an unplanned crime that required a higher *mens rea* than the planned crimes:

> The shootout that followed *was intended to frighten the partisans* so as to make them surrender; one must, therefore, rule out that the militiamen intended to kill – all these circumstances have been established in point of fact by the lower Court. Hence, it is evident that the participants may not be charged with the event [murder], which was not willed. **The criminal offense committed was in sum more serious that the one intended; one must, therefore, apply notions different from that of voluntary murder. This Supreme Court has already had the opportunity to set out the same principle by observing that to hold somebody responsible for murder committed in the course of a police sweep in which many persons have participated, it would be necessary to establish that in taking part in such operation, *all participants also voluntarily intended to perpetrate murder*.** It follows that while the position of other appellants who must answer for other murders or vicious ill-treatment must remain as it stands, Dell'Antonio and Raimondi may not be held guilty of voluntary murder.[45]

26. The Court of Cassation articulated that principle even more clearly in *Antonini*.[46] The trial court had convicted the defendant of murder for illegally arresting civilians involved in an attack on German soldiers knowing – though not intending – that they would be executed in reprisal once he arrested them.[47] The Court of Cassation rejected the trial court's theory of liability and reversed the defendant's conviction:

> Indeed, on the basis of such theory, the fact that a possible event is foreseen ('situation in which the death could likely occur') and the fact that a voluntary conduct from which the death can result is carried out suffice in order for an accused to be held liable of murder. These concepts are completely wrong as they are not consistent with the legal definition of *dolus* and with the principles doctrine and jurisprudence have always been expressing. *The intentional killing, or the killing with intent, must consist in an event which has been **both foreseen and intended by the agent.*** The fact that the author foresaw it (*representation theory*) does not suffice, but it is also necessary that he intended it (*willingness theory*) with the willingness to achieve a specific intended aim (intent).[48]

D. The Terrorist Bombing Convention and the Rome Statute

27. *Tadic* also noted[49] that JCE is embraced by two international treaties: the International Convention for the Suppression of Terrorist Bombing[50] and the Rome Statute of the International Criminal Court.[51] Neither treaty supports the idea that

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[45] *Ibid.*, pp. 13-14. (emphasis added; italics in the original).
[46] Italian Court of Cassation, Penal Section, *judgment* of 29 March 1949; see the text of the judgment in *Giustizia Penale*, 1949, Part II, cols. 740-742.
[47] *Ibid.*, col. 741.
[48] *Ibid.*, cols. 741-42 (emphasis added; italics in the original).
[49] *Tadic Appeal Judgment*, paras. 221-223.
[50] *International Convention for the Suppression of Terrorist Bombing*, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998), entered into force May 23, 2001 ("*Terrorist Bombing Convention*"), cited in *Tadic Appeal Judgment*, para. 221.
[51] *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9, 17 July 1998, cited in *Tadic Appeal Judgment*, para. 222 fn. 280.

customary international law permits a defendant to be convicted of a special-intent crime via JCE III.

28. The Terrorist Bombing Convention requires States Parties to criminalize "contribut[ing]to the commission of one or more offences" specified in the Convention "by a group of persons acting with a common purpose."[52] The Convention also provides, however, that the contribution must "either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned."[53] As a result, an individual would not commit the offence envisioned by the Convention if he only foresaw the possibility (or probability[54]) that an unplanned crime would be committed: whereas the minimum *mens rea* of the Convention offence is *knowledge*, JCE III simply requires *recklessness*.[55]

29. The same is true of the Rome Statute. Article 25(3)(d), which is an almost verbatim copy of Article 2(3)(c) of the Terrorist Bombing Convention, limits contributing to a common plan to conduct that is either intentional or knowing – recklessness is not enough.[56] Indeed, most of the States that were involved in drafting the Article were reluctant to base criminal responsibility for serious international crimes on recklessness.[57]

30. There is a second – and equally important – reason that the Rome Statute does not support the idea that JCE III is available for special-intent crimes. As noted earlier, a defendant convicted of a crime via JCE III is convicted as a principal perpetrator. A defendant who contributes to a common plan under Article 25(3)(d), by contrast, is convicted only as an accomplice.[58]

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[52] *Terrorist Bombing Convention*, art. 2(3)(c).
[53] *Id.*
[54] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, *Preliminary Motion to Dismiss Joint Criminal Enterprise III–Foreseeability* (16 March 2009).
[55] *See Tadic Appeal Judgment*, para. 89.
[56] *See Rome Statute*, art. 25(3)(d)(i)-(ii).
[57] *See* Roger S. Clark, "The Mental Element in International Criminal Law", 12 *Crim. L. F.* 291, 301 (2001).
[58] *See, e.g., Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, *Decision on the Confirmation of Charges*, para. 130 (29 January 2007).

31. The Appeals Chamber held in *Tadic* that because the Rome Statute "was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly," its text "may be taken to express the legal position i.e. *opinio juris* of those States."[59] Article 25(3)(d) is inconsistent with using JCE III to convict a defendant of a special-intent crime as a perpetrator. The Article is thus powerful evidence that such a conviction is impermissible under customary international law.

E. National Legislation and Cases

32. Finally, *Tadic* relied on national legislation and cases to uphold the customary status of JCE III, although it acknowledged that countries were too divided on the issue to consider the mode of liability a general principle of criminal law.[60] The Appeals Chamber examined the legal systems of nine countries, both common law and civilian: Germany, the Netherlands, France, Italy, England, Canada, the United States, Australia, and Zambia.[61] Of those nine countries, only two[62] – Italy[63] and Zambia[64] – permit a member of a criminal enterprise to be convicted of a foreseeable yet unplanned crime that requires special intent. As explained below, the remaining seven – and others such as Switzerland, Russia, Israel, and India – either reject JCE III outright, accept JCE III but prohibit its use for unplanned crimes that require a higher *mens rea* than the planned crimes, or consider JCE III to be a form of accomplice liability instead of a form of principal perpetration.

33. At least five countries categorically reject JCE III. Tadic itself mentions two: Germany[65] and the Netherlands.[66]

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[59] *Tadic Appeal Judgment*, para. 223.
[60] *Tadic Appeal Judgment*, para. 225.
[61] *Tadic Appeal Judgment*, para. 224.
[62] A third country not mentioned in *Tadic*, South Africa, also falls into this category. *See* Jonathan Burchell, "South Africa", in Kevin Jon Heller & Markus Dirk Dubber, *The Stanford Handbook of Comparative Criminal Law* (Stanford, forthcoming 2009).
[63] Codice Penale, art. 116. Note, though, that Article 116 provides that "the penalty for those who wanted the less grave offense will be reduced."
[64] Penal Code of Zambia, art. 22.
[65] *Tadic Appeal Judgment*, para. 224 fn. 283, citing BGH GA 85, 270 ("There is co-perpetration when and to the extent that the joint action of the several participants is founded on a reciprocal agreement, whereas any criminal action of a participant going beyond this agreement can only be attributed to that participant.")

34. In Switzerland, if one of the participants in a JCE commits a crime that was outside the scope of the common plan, he alone can be held responsible for that crime.[67]

35. In Russia, Article 36 of the Penal Code provides that "[t]he commission of a crime that is not embraced by the intent of other accomplices shall be deemed to be an excess of the perpetrator. Other accomplices to the crime shall not be subject to criminal responsibility for the excess of the perpetrator." JCE is a form of accomplice liability to which Article 36 applies.[68]

36. In Argentina, there is no form of perpetration equivalent to JCE III. A defendant can only be considered a perpetrator of a crime if he has control over it, such as where he designed the criminal plan or controlled the hierarchical organization that physically committed the crime. "[A]nyone who fails to bear this kind of (direct or indirect) control over at least a part of the execution of a crime would not count as its perpetrator (or co-perpetrator) – at most, she would count as an accomplice of one sort or another."[69] In addition, Article 47 of the Argentine Penal Code specifically provides that accomplices cannot be held responsible for a crime that they did not know the principal would commit.

37. At least three countries limit JCE III to unplanned crimes that do not require a higher *mens rea* than the planned crimes.

38. In India, Section 34 of the Penal Code provides that "[w]hen a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."

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[66] *Tadic Appeal Judgment*, para. 224 fn. 284, citing HR 6 December 1943, NJ 1944, 245; HR 17 May 1943, NJ 1943, 576; HR 6 April 1925, NJ 1925, 723 W 11393.

[67] Arrêts du Tribunal Fédéral Suisse, Recueil Officiel, Vol. 118, Part IV, pp. 227 ff., consideration 5d/cc, p. 232 cited in Marco Sassoli & Laura M. Olson, "The judgment of the ICTY Appeals Chamber on the merits in the Tadic case", 82 *Int'l Rev. Red Cross* 733, 755 (2000).

[68] Russian Penal Code, art. 33(1).

[69] Marcelo Ferrante, "Argentina", in Heller & Dubber, *Handbook of Comparative Criminal Law*, *supra* note 62.

Courts have interpreted Section 34 to prohibit holding a member of JCE responsible for an unplanned crime more serious than the crimes he intended to commit.[70]

39. In France, JCE is governed by Article 121-7 of the Penal Code, which provides that "[a]ny person who knowingly has assisted in planning or committing a crime or offence, whether by aiding or abetting, is a party to it."[71] Such accomplice liability, however, is limited to foreseeable unplanned crimes that have the same *actus reus* and *mens rea* as the planned crimes: "If the offence committed has a different *actus reus* or *mens rea* than that foreseen by the potential accomplice, the latter is not liable."[72]

40. In Israel, Section 34A of the Penal Law holds members of a JCE responsible for unplanned crimes "a reasonable person could have been aware" might be committed as a result of the planned crimes. Section 34(a)(1)(a), however, provides that if the unplanned crimes require a *mens rea* higher than the planned crimes, a defendant "shall bear liability for such as for an offence of indifference only." In other words, the defendant is not convicted of the unplanned crime, but of a *lesser* crime that requires only recklessness.

41. Finally, at least three countries adopt JCE III, but consider it to be a form of accomplice liability instead of a form of principal perpetration.

42. In Australia, neither the common-law nor the Code jurisdictions expressly rule out convicting a defendant of an unplanned but foreseeable special-intent crime via joint enterprise liability. In every jurisdiction, however, that defendant would be convicted as an accomplice instead of as a principal perpetrator.[73]

43. In England at the time of the crimes alleged in the Third Amended Indictment, courts were divided over the availability of JCE III for unplanned crimes that required

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[70] *See, e.g., Munna v State*, 1993 Cr LJ 45 (SC); *Joginder Ahir v State*, 1971 Cr LJ 1285.
[71] Translation in *Tadic Appeal Judgment*, para. 224 fn. 285.
[72] Catherine Elliott, "France", *Handbook of Comparative Criminal Law*, *supra* note 62, citing Orléans, 28 janvier 1896, *Recueil Dalloz*, 97.2.5.
[73] *See McAuliffe v The Queen*, 1995 WL 1689639, 130 ALR 26, 183 CLR 108, (HCA 28 June 1995), pp. 117-18.

a higher *mens rea* than the planned crimes.[74] Some cases, such as *Chan Wing-Siu v The Queen*,[75] held that JCE III was available in such situations. Others, such as *Reg. v Barr*[76] and *Reg. v Smith*,[77] held precisely the opposite. That split alone indicates that English law does not support the customary status of JCE III for special-intent crimes. Equally important, though, British courts have always held that a defendant convicted of an unplanned crime via JCE III is guilty as an accomplice, not as a principal perpetrator.[78]

44. In the United States, courts applying the so-called "*Pinkerton* rule" distinguish between two different kinds of foreseeable unplanned crimes: those that were unplanned but still within the scope of the unlawful project, and those that were unplanned and outside the scope of the unlawful project. The narrower version is part of federal law and has likely been adopted by a majority of states.[79] The broader version is applied much more rarely – and courts acknowledge its rarity when they do apply it.[80] In both versions, though, the defendant is convicted as an accomplice of the unplanned crime, not as a principal perpetrator.[81]

45. Almost no state practice or *opinio juris*,[82] in short, supports the idea that customary international law permits a defendant to be convicted of a special-intent crime as a perpetrator via JCE III. On the contrary, the overwhelming majority of countries – both common law and civilian – either prohibit such convictions outright or treat them as a form of accessorial liability.

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[74] This conflict was resolved in favour of permitting responsibility for unplanned crimes requiring a higher *mens rea* in *R. v. Powell* [1999] 1 A.C. 1, pp. 12-13. That case was decided in 1999, four years after the most recent crimes in the Third Amendment Indictment were allegedly committed. *See Indictment*, para. 10. Moreover, the House of Lords reaffirmed that responsibility for unplanned crimes is a form of accomplice liability, not perpetration. *See* Opinion of Lord Mustill.

[75] [1985] 1 AC 168 (PC).

[76] [1989] 88 Cr. App. R. 362; [1989] WL 649844 (CA (Crim Div)).

[77] [1988] WL 624408 (CA (Crim Div)), [1988] Crim. L.R. 616.

[78] *See* Law Commission of Great Britain, *Participating in Crime* (London, 2006), para. 3.147.

[79] *See* Joshua Dressler, *Understanding Criminal Law* 529 (4th ed. 2006).

[80] In *United States v. Alvarez*, 755 F.2d 830, 850 (11th Cir. 1980), for example, the Eleventh Circuit noted that it had "not found, nor has the government cited, any authority for the proposition that all conspirators, regardless of individual culpability, may be held responsible under *Pinkerton* for reasonably foreseeable but originally unintended substantive crimes."

[81] *See United States. v. Powell*, 632 F.2d 754, (9th Cir. 1980), para. 9.

[82] *See Prosecutor v. Hadzihasanovic et al.*, Case No. IT-01-47-AR-72, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, para. 12 (23 July 2003).

F. The Genocide Convention

46. In *Rwamakuba*, the Appeals Chamber relied on the Genocide Convention to support its holding that JCE I was available for genocide.[83] Like the previous sources, the Convention also indicates that a defendant cannot be convicted of committing genocide if he does not possess the special intent that genocide requires – a limitation that is inconsistent with convicting a defendant of genocide via JCE III.

47. Article II of the Genocide Convention provides that the *actus reus* of genocide must be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." There is an ongoing debate about whether the four modes of participation in genocide listed in Article III of the Convention other than direct commission – conspiracy, direct and public incitement, attempt, and complicity – require the defendant to possess the necessary special intent. Scholars insist that they do,[84] while this Tribunal has held that aiding and abetting genocide requires only knowledge of the principal perpetrator's genocidal intent.[85]

48. That debate is irrelevant, however, to whether a defendant can be convicted of genocide via JCE III. As noted above, JCE III is a form of *commission*: the defendant is convicted of the foreseeable unplanned crime as a principal perpetrator, not as an accomplice.[86] No court[87] or scholar[88] has ever suggested that the Genocide Convention does not require the Prosecution to prove that a defendant charged with *committing* genocide possessed the special intent that Article II of the Convention requires. The Convention is thus further evidence that permitting a defendant to be convicted of genocide via JCE III is inconsistent with customary international law.

V. CONCLUSION

49. At the time the crimes in the Third Amended Indictment were allegedly committed, customary international law did not permit a defendant to be convicted of

[83] *Rwamakuba Appeal Decision*, paras. 26-28.
[84] *See, e.g.*, William A. Schabas, *Genocide in International Law* 259 (Cambridge, 2000).
[85] *See, e.g.*, *Krstić Appeal Judgment*, para. 140. The Appeals Chamber also noted in *Krstić* that "there is authority to suggest that complicity in genocide, where it prohibits conduct broader than aiding and abetting, requires proof that the accomplice had the specific intent to destroy a protected group." *Krstić Appeal Judgment*, para. 142.
[86] *See* note 6, *supra*.
[87] *See, e.g.*, *Krstić Appeal Judgment*, para. 20.
[88] See, *e.g.*, Schabas, *supra* note 84, at 259.

a special-intent crime such as genocide or persecution via JCE III. It is not simply the case that the sources of customary international law do not recognize the availability of JCE III for special-intent crimes. On the contrary, as this motion has shown, those sources uniformly indicate that the *opposite* is true: a defendant cannot be convicted of an unplanned special-intent crime as a perpetrator unless he possesses the special intent that the crime requires. The alternative JCE III allegations in the Third Amended Indictment, therefore, are based on a mode of liability over which this Tribunal has no jurisdiction under Article 7(1) of the Statute.

50. Dr. Karadžić respectfully requests the Trial Chamber to dismiss all of the allegations in the Third Amended Indictment concerning genocide and persecution that are based on JCE III.[89] There is no basis in customary international law for such convictions; the allegations in Counts 1, 2, and 3 thus do not relate to a mode of liability recognized in Article 7(1) of the Statute.

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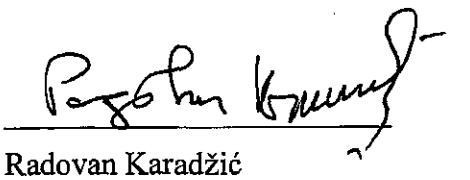
Respectfully submitted,



Radovan Karadžić

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