

IT-95-5/18-PT
D 13956 - D 13951
03 APRIL 2009

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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

IN TRIAL CHAMBER No. 3

Before: Judge Iain Bonomy, Presiding
Judge Michele Picard
Judge Christoph Flugge

Acting
P.K.

Registrar:

Mr. ~~Walter~~ ^{John Hoeking} P.K.

Date Filed: 3 April 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

MOTION FOR LEAVE TO REPLY and REPLY BRIEF:
PRELIMINARY MOTION TO DISMISS JOINT CRIMINAL ENTERPRISE III -
FORESEEABILITY

The Office of the Prosecutor:

Mr. Allan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadzic

No. IT-95-5/18-PT

Dr. Radovan Karadžić respectfully moves, pursuant to Rule 126 *bis*, for leave to reply to the *Prosecution's Response to Preliminary Motion to Dismiss Joint Criminal Enterprise III - Foreseeability* filed on 25 March 2009 ("Response"). The Response was served on Dr. Karadžić in Serbian on 27 March 2009.

MOTION FOR LEAVE TO REPLY

1. In its Response, the Prosecution raises two issues. First, it contends that the JCE III foreseeability requirements pleaded in the Third Amended Indictment ("Indictment") are consistent with ICTY practice.¹ Dr. Karadžić contends that, to the contrary, it is impossible to identify a consistent practice in the ICTY's jurisprudence.
2. Second, the Prosecution contends that, in his *Preliminary Motion to Dismiss Joint Criminal Enterprise III – Foreseeability* ("Motion"), Dr. Karadžić has not raised a proper jurisdictional challenge within the meaning of Rule 72(A)(i).² Dr. Karadžić contends, in this respect, that the Prosecution is relying on a definition of JCE III that does not exist under customary international law and thus falls outside the Tribunal's jurisdiction *ratione personae* pursuant to Article 7(1) of the Statute
3. Dr. Karadžić therefore seeks leave to reply to the Prosecution Response so that the Trial Chamber can sharpen its focus on these issues.

REPLY

Mens Rea Issue

4. In its Response, the Prosecution contends that the "*Indictment accords with Tribunal case-law*" when it pleads that it was "*foreseeable that [...] crimes [...] might be perpetrated by members of the joint criminal enterprise*" (the objective element of JCE III) and that the Accused "*had awareness*" that such crimes "*were a possible consequence*" of the implementation of the Joint Criminal Enterprise (the subjective element of JCE III).
5. There is no question that some of the decisions issued by the Appeals Chamber are consistent with the foreseeability standards used in the Indictment.³ The ICTY's

¹ Response, paras. II(1)-II(2).

² Response, para.II(4).

³ Response, para. II(1)-II(2). In paragraph II(2), Prosecution did refer to: *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgment, 25 February 2004, para. 101; *Prosecutor v. Blaškić*, Case No. IT-95-14-A,

jurisprudence, however, is far less consistent concerning the appropriate standards than the Prosecution acknowledges.

6. With regard to the objective standard, the Prosecution fails to note that the “natural consequence” standard has been used by the Appeals Chamber on multiple occasions, including in the *Tadić*, *Kvočka*, and *Martić* judgments.⁴
7. With regard to the subjective standard, the “probable consequence” standard was first used in the *Tadić* judgment⁵ and was explicitly affirmed by the Appeals Chamber in the *Krstić* judgment.⁶
8. In its Response, the Prosecution never claims that there is no practical difference between requiring unplanned crimes to be a “natural and foreseeable consequence” of the planned crimes and simply requiring them to be “foreseeable.” Indeed, considering them to be equivalent literally reads the term “natural” out of the objective foreseeability standard.
9. The Prosecution also never claims in its response that there is no practical difference between requiring the Accused to have foreseen that unplanned crimes would “probably” be committed and simply requiring him to have foreseen that would “possibly” be committed.
10. Because the ICTY’s jurisprudence is inconsistent concerning JCE III’s foreseeability requirements, and because there are significant practical differences between the different standards, it is appropriate for the Trial Chamber to consider which standards – those advocated by the Prosecution, or those advocated by Dr. Karadžić – are consistent with customary international law. This Tribunal has never addressed that question, as indicated by the Appeals Chamber’s inconsistent use of *both* objective foreseeability standards and *both* subjective foreseeability standards in *Tadić*, the case that established the customary basis of JCE III.⁷

Judgment, 22 March 2006, para. 65; *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006, para. 65; *Prosecutor v. Martić*, Case No. IT-95-11-A, Judgment, 8 October 2008, para. 83.

⁴ See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, para. 204; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, 28 February 2005, para. 83; *Prosecutor v. Martić*, Case No. IT-95-11-A, 8 October 2008, para. 171.

⁵ See *Tadić* Judgment, para. 206 (“likely to be committed”).

⁶ See *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001, para. 613 and *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004, para. 150.

⁷ See *Tadić* Judgment, paras. 204-28. In terms of objective foreseeability, the Judgment uses the “natural consequence” standard in para. 204 and the “foreseeability” standard in para. 228. In terms of subjective

11. Dr. Karadzic contends that the prosecution's use of the "might possibly" standard transforms JCE III into a form of liability not established in customary international law. The Trial Chamber, therefore, must look beyond the inconsistent decisions of the Appeals Chamber and determine whether customary international law allows for such a low standard of liability.

Jurisdictional Issue

12. In its Response, the Prosecution argues that "Karadžić does not raise a valid jurisdictional challenge within the meaning of the Rule 72(A)(i)."⁸ In support of this contention, it cites two previous decisions: a Trial Chamber decision in the *Milutinović* case⁹, and an Appeals Chamber decision in the *Gotovina* case.¹⁰ Neither decision, however, supports delaying the necessary customary analysis of JCE III's foreseeability requirements until trial.
13. The Prosecution correctly notes that, in *Gotovina*, the Trial Chamber rejected a jurisdictional challenge to the *mens rea* of JCE III. As the Prosecution's own quote from that decision makes clear, though, the Trial Chamber rejected the challenge *not* because customary international law challenges to an element of JCE III – as opposed to the customary status of JCE III itself – should always be considered at trial, but because the "the Appellant merely challenge[d] the definition and interpretation of a particular element *as established in cases subsequent to the Tadic Appeals Judgment*."¹¹ In other words, the Appellant in *Gotovina* did not argue that *Tadic* adopted a definition of JCE III's *mens rea* that was inconsistent with customary international law. Instead, he argued that "[t]he Trial Chamber did not base its decision on a reasonable interpretation of *Tadic*."¹²

foreseeability, the Judgement uses the "likely to be committed" standard in para. 206 and the "might be perpetrated" standard in para. 228. In paragraph 228, the probability standard has been used whereas in paragraph 232 the Appeals Chamber referred to the probability-one. In paragraph 220, both standards have been contemporaneously utilized.

⁸ Response, para. 4.

⁹ *Prosecutor v. Milutinović*, Case No. IT-05-87-PT, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-perpetration, 22 March 2006 ("*Milutinović* Decision"); see Response, footnote 6.

¹⁰ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, 6 June 2007 ("*Gotovina* Decision"); see Response, para. 5.

¹¹ *Gotovina* Decision, para. 24 (emphasis added).

¹² *Gotovina* Decision, para. 22.

14. That is not the argument in the present case. Dr. Karadžić is not arguing that the Prosecution has pleaded JCE III's objective and subjective foreseeability requirements in a manner that is inconsistent with *Tadić*; indeed, such a challenge would make no sense, given that – as noted above – the *Tadić* judgment does not adopt a consistent definition of either objective or subjective foreseeability. On the contrary, Dr. Karadžić is arguing that the Prosecution has pleaded those requirements in a manner that is inconsistent with *customary international law itself*. Such a claim is the prototypical example of a jurisdictional challenge.
15. The Prosecution additionally cites the *Milutinović* decision for the proposition that “[a]rguments 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.”¹³ As explained above, there are no “accepted elements” of JCE III in terms of objective and subjective foreseeability – ICTY practice, reflecting inconsistencies in *Tadić* itself, has oscillated between irreconcilable definitions of the appropriate foreseeability standards. It would thus be completely inappropriate to defer an analysis of which set of standards are consistent with customary international law until trial.
16. Properly understood, both decisions cited by the Prosecution in its Response *support*, not oppose, considering the disputed Motion to be a valid jurisdictional challenge within the meaning of Rule 72(A)(i). Dr. Karadžić's contention that the JCE III charges in the indictment does not relate to an established form of liability under Article 7 of the Statute raises a proper, and interesting, issue of jurisdiction.

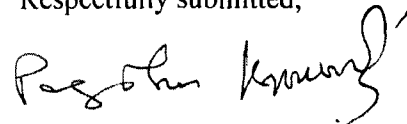
¹³ Response, para. 4.

REQUEST

Dr. Karadžić thus respectfully requests the Trial Chamber grant his motion and dismiss the JCE III allegations from the Third Amended Indictment.

Word count: 1475

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', with a stylized flourish at the end.

Radovan Karadzic