

**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-99-36-A  
Date: 3 April 2007  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Theodor Meron, Presiding  
Judge Mohamed Shahabuddeen  
Judge Mehmet Güney  
Judge Andréia Vaz  
Judge Christine Van Den Wyngaert

**Registrar:** Mr. Hans Holthuis

**Judgement of:** 3 April 2007

**PROSECUTOR**

v.

**RADOSLAV BRĐANIN**

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**JUDGEMENT**

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**The Office of the Prosecutor:**

Mr. Peter Kremer  
Ms. Helen Brady  
Ms. Kristina Carey  
Ms. Katharina Margetts

**Counsel for the Accused:**

Mr. John Ackerman

411. When the accused, or any other member of the JCE, in order to further the common criminal purpose, uses persons who, in addition to (or instead of) carrying out the *actus reus* of the crimes forming part of the common purpose, commit crimes going beyond that purpose, the accused may be found responsible for such crimes provided that he participated in the common criminal purpose with the requisite intent and that, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk – that is the accused, with the awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise.

412. As the Prosecution recognizes, for it to be possible to hold an accused responsible for the criminal conduct of another person, there must be a link between the accused and the crime as legal basis for the imputation of criminal liability. According to the Prosecution, this link is to be found in the fact that the members of the joint criminal enterprise use the principal perpetrators as “tools” to carry out the crime.<sup>890</sup>

413. Considering the discussion of post-World War II cases and of the Tribunal’s jurisprudence above, the Appeals Chamber finds that, to hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis.<sup>891</sup>

414. For the aforementioned reasons, the Appeals Chamber considers that the Trial Chamber erred in stating that, in order to hold the Accused criminally responsible for the crimes charged in the Indictment pursuant to the first category of JCE, the Prosecution must, *inter alia*, establish that the persons who carried out the *actus reus* of the crimes in question were members of a joint criminal enterprise. Therefore, the Appeals Chamber, Judge Shahabuddeen dissenting, grants Ground 1 of the Prosecution’s appeal but emphasizes that, for the reasons set out above, it will not examine the consequences of this finding on the facts of the case.

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<sup>890</sup> Prosecution Appeal Brief, paras 3.40-3.48.

<sup>891</sup> The jurisprudence of the Tribunal traditionally equates a conviction for JCE with the mode of liability of “committing” under Article 7(1). The Appeals Chamber declines at this time to address whether this equating is still appropriate where the accused is convicted via JCE for crimes committed by a principal perpetrator who was not part of the JCE, but was used by a member of the JCE.

417. It is undeniable that proving the existence of such an agreement may be an appropriate way of establishing that a crime formed part of the common purpose, especially with respect to the basic and extended forms of JCE. By stressing that it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system, the *Krnojelac* Appeals Chamber was merely referring to the fact that the emphasis in such a form of JCE must be put on the knowledge of the concerted system of ill-treatment and on the intent to further it. This finding cannot be interpreted – as the Trial Chamber appears to have done in the instant case – to mean that the criterion set by the Appeals Chamber in the *Tadić* case requires, in addition to the existence of a common purpose amounting to or involving the commission of a crime provided for in the Statute, an agreement between the accused and the principal perpetrator for the first and third category of JCE.

418. The Appeals Chamber understands that the Trial Chamber's disputed finding was reached out of a concern that it is inappropriate to impose liability on an accused where the link between him or her and those who physically perpetrated the crimes for which he or she is charged is too tenuous. The Appeals Chamber shares this concern. However, the Appeals Chamber does not consider that any form of JCE liability requires an additional understanding or agreement to commit that particular crime between the accused and the principal perpetrator of a crime. What JCE requires in any case is the existence of a common purpose which amounts to, or involves, the commission of a crime. The common purpose need not be previously arranged or formulated; it may materialize extemporaneously.<sup>897</sup> The Appeals Chamber recalls that, as far as the basic form of JCE is concerned, an essential requirement in order to impute to any accused member of the JCE liability for a crime committed by another person is that the crime in question *forms part of the common criminal purpose*. In cases where the principal perpetrator shares that common criminal purpose of the JCE or, in other words, is a member of the JCE, and commits a crime in furtherance of the JCE, it is superfluous to require an additional agreement between that person and the accused to commit that particular crime. In cases where the person who carried out the *actus reus* of the crime is not a member of the JCE, the key issue remains that of ascertaining whether the crime in question forms part of the common criminal purpose. This is a matter of evidence.

419. For the aforementioned reasons, the Appeals Chamber considers that the Trial Chamber erred in stating that, in order to hold the Accused criminally responsible for the crimes charged in the Indictment pursuant to the first category of JCE, the Prosecution must, *inter alia*, establish that

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<sup>897</sup> *Tadić* Appeal Judgement, para. 227(ii). See also *Vasiljević* Appeal Judgement, para. 100 and *Kvočka et al.* Appeal Judgement, para. 117.

430. The other requirements for a conviction under the JCE doctrine are no less stringent. A trier of fact must find beyond reasonable doubt that a plurality of persons shared the common criminal purpose; that the accused made a contribution to this common criminal purpose; and that the commonly intended crime (or, for convictions under the third category of JCE, the foreseeable crime) did in fact take place.<sup>911</sup> Where the principal perpetrator is not shown to belong to the JCE, the trier of fact must further establish that the crime can be imputed to at least one member of the joint criminal enterprise, and that this member – when using the principal perpetrator – acted in accordance with the common plan. In establishing these elements, the Chamber must, among other things: identify the plurality of persons belonging to the JCE (even if it is not necessary to identify by name each of the persons involved); specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims); make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise;<sup>912</sup> and characterize the contribution of the accused in this common plan. On this last point, the Appeals Chamber observes that, although the contribution need not be necessary or substantial,<sup>913</sup> it should at least be a significant contribution to the crimes for which the accused is to be found responsible.<sup>914</sup>

431. Where all these requirements for JCE liability are met beyond a reasonable doubt, the accused has done far more than merely associate with criminal persons. He has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission. Pursuant to the jurisprudence, which reflects standards enshrined in customary international law when ascertaining the contours of the doctrine of joint criminal enterprise, he is appropriately held liable not only for his own contribution, but also for those actions of his fellow JCE members that further the crime (first category of JCE) or that are foreseeable consequences of the carrying out of this crime, if he has acted with *dolus eventualis* (third category of JCE). It is not decisive whether these fellow JCE members carried out the *actus reus* of the crimes themselves or used principal perpetrators who did not share the common objective.<sup>915</sup>

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<sup>911</sup> See *Tadić* Appeal Judgement, para. 227.

<sup>912</sup> *Stakić* Appeal Judgement, para. 69.

<sup>913</sup> *Kvočka et al.* Appeal Judgement, paras 97-98.

<sup>914</sup> See *supra*, para. 427. Moreover, “[i]n practice, the significance of the accused’s contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose.” *Kvočka et al.* Appeal Judgement, para. 97.

<sup>915</sup> See *supra*, paras 410-414.