

**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-95-13/1-T  
Date: 27 September 2007  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Kevin Parker, Presiding  
Judge Christine Van Den Wyngaert  
Judge Krister Thelin

**Registrar:** Mr Hans Holthuis

**Judgement of:** 27 September 2007

**PROSECUTOR**

v.

**MILE MRKŠIĆ  
MIROSLAV RADIĆ  
VESELIN ŠLJIVANČANIN**

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*PUBLIC***JUDGEMENT**

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**The Office of the Prosecutor:**

Mr Marks Moore  
Mr Philip Weiner  
Mr Bill Smith  
Mr Vincent Lunny  
Ms Meritxell Regue  
Mr Alexis Demirdjian

**Counsel for the Accused:**

Mr Miroslav Vasić and Mr Vladimir Domazet for Mile Mrkšić  
Mr Borivoje Borović and Ms Mira Tapušković for Miroslav Radić  
Mr Novak Lukić and Mr Momčilo Bulatović for Veselin Šljivančanin

accepts that JCE existed in customary international law at the time of the events charged in the present Indictment.

545. The jurisprudence of the Tribunal has established three categories of JCE. The *actus reus* of a participant in a JCE is common to all three categories. First, a plurality of persons is required.<sup>1889</sup> They need not be organised in a military, political, or administrative structure.<sup>1890</sup> Secondly, the existence of a common plan, design or purpose, which amounts to or involves the commission of a crime provided for in the Statute, must be established.<sup>1891</sup> There is no need for the plan, design or purpose to have been previously arranged or formulated. Nor does JCE liability require an understanding or an agreement between the accused and the principal perpetrator of the crime to commit that particular crime. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in a unison to put into effect a JCE.<sup>1892</sup> Thirdly, the accused must have participated in the common design, either by participating directly in the commission of the agreed crime itself, or by assisting or contributing to the execution of the common purpose.<sup>1893</sup> The accused's contribution need not be necessary, in a sense of *sine qua non*, to achieve the common criminal purpose;<sup>1894</sup> indeed, the accused's contribution to the common purpose does not even need to be substantial, as a matter of law.<sup>1895</sup> However, the contribution of the accused in the common plan should at least be a *significant* one.<sup>1896</sup> Not every type of conduct amounts to a significant enough contribution to the common purpose to impute criminal liability to the accused for the crimes committed.<sup>1897</sup> The presence of the participant in the JCE at the time the crime is committed by the principal offender is not required.<sup>1898</sup>

546. As to the *mens rea*, the requirements of the three categories of JCE differ. In the first, basic type of JCE the accused intends to perpetrate a crime and this intent is shared by all co-perpetrators.<sup>1899</sup> In the second type, embracing the so-called "concentration camp" cases, or systemic JCE, the accused has knowledge of the system of repression, in the enforcement of which he participates, and the intent to further the common concerted design to ill-treat the inmates of a concentration camp.<sup>1900</sup> The third type concerns cases in which one of the participants commits a

<sup>1889</sup> *Vasiljević Appeals Judgement*, para 100.

<sup>1890</sup> *Tadić Appeals Judgement*, para 227; *Stakić Appeals Judgement*, para 64.

<sup>1891</sup> *Tadić Appeals Judgement*, para 227; *Vasiljević Appeals Judgement* para 100.

<sup>1892</sup> *Tadić Appeals Judgement*, para 227; *Krnjelac Appeals Judgement*, para 97, *Vasiljević Appeals Judgement*, paras 100, 109; *Brdanin Appeals Judgement*, paras 415, 418.

<sup>1893</sup> *Tadić Appeals Judgement*, para 227.

<sup>1894</sup> *Kvočka Appeals Judgement*, para 98.

<sup>1895</sup> *Kvočka Appeals Judgement*, para 97.

<sup>1896</sup> *Brdanin Appeals Judgement*, para 430.

<sup>1897</sup> *Brdanin Appeals Judgement*, para 427.

<sup>1898</sup> *Krnjelac Appeals Judgement*, para 81.

<sup>1899</sup> *Tadić Appeals Judgement*, paras 220, 228.

<sup>1900</sup> *Tadić Appeals Judgement*, paras 202-203; 227-228.

crime outside the common design. The *mens rea* in such cases is twofold. First, the accused must have the intention to take part in and contribute to the common criminal purpose. Secondly, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take that risk by joining or continuing to participate in the enterprise.<sup>1901</sup> Whether the crimes committed outside the common purpose of the JCE were “a natural and foreseeable consequence thereof” must be assessed in relation to the knowledge of a particular accused, *i.e.* the Prosecution must prove that the accused had sufficient knowledge that the additional crimes were a natural and foreseeable consequence.<sup>1902</sup>

547. The Chamber notes that the Appeals Chamber has recently clarified that the principal perpetrators carrying out the *actus reus* of the crimes set out in the indictment do not have to be members of the JCE. What matters in such cases is whether the crime in question forms part of the common purpose<sup>1903</sup> and whether at least one member of the JCE used the principal perpetrator acting in accordance with the common plan.<sup>1904</sup> In this respect, when a member of the JCE uses a person outside the JCE to carry out the *actus reus* of a crime, the fact that this person knows of the existence of the JCE, *i.e.* of the common purpose, may be a factor taken into consideration when determining whether the crime forms part of the common criminal purpose.<sup>1905</sup> When the direct perpetrator commits a crime beyond the common purpose of the JCE, but which is its natural and foreseeable consequence<sup>1906</sup> the accused may be found responsible if he participated in the common criminal purpose with the requisite intent and if, 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.<sup>1907</sup>

(b) Planning

548. The *actus reus* of “planning” requires that one or more persons plan or design, at both the preparatory and execution phases, the criminal conduct constituting one or more crimes provided

<sup>1901</sup> *Tadić* Appeals Judgement, paras 204; 227-228; *Kvočka* Appeals Judgement, para 83.

<sup>1902</sup> *Kvočka* Appeals Judgement, para 86.

<sup>1903</sup> *Brdanin* Appeals Judgement, paras 410, 418.

<sup>1904</sup> *Brdanin* Appeals Judgement, paras 413, 430.

<sup>1905</sup> *Brdanin* Appeals Judgement, para 410.

<sup>1906</sup> *Brdanin* Appeals Judgement, paras 431.

<sup>1907</sup> *Brdanin* Appeals Judgement, para 411.