

Case No. IT-99-36-A

**BEFORE THE APPEALS CHAMBER****Before:**

**Judge Theodor Meron, President**  
**Judge Mohamed Shahabuddeen**  
**Judge Mehmet Güney**  
**Judge Amin El Mahdi**  
**Judge Inés Mónica Weinberg de Roca**

**Declassified to Public**  
**06 September 2012**

**Registrar:**

**Mr. Hans Holthuis**

**Decision:**

**5 May 2005**

**THE PROSECUTOR**

**v.**

**RADOSLAV BRDJANIN**

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**DECISION ON MOTION TO DISMISS GROUND 1 OF THE PROSECUTOR'S APPEAL**

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**Counsel for the Prosecutor:**

**Mr. Mark J. McKeon**

**Counsel for the Accused:**

**Mr. John Ackerman**

**THE APPEALS CHAMBER** of the 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 ("International Tribunal");

**NOTING** the Judgement rendered in this case by Trial Chamber II on 1 September 2004 ("Trial Judgement");

**NOTING** the "Prosecution's Notice of Appeal" filed by the Prosecution on 30 September 2004;

**NOTING** the "Notice of Appeal" filed by Radoslav Brdjanin ("Appellant") on 1 October 2004;

**NOTING** the "Prosecution's Brief on Appeal" filed by the Prosecution on 28 January 2005 ("Brief on Appeal"), which contends as its Ground 1 that the Trial Chamber erred by holding that a joint criminal enterprise (JCE) must include the actual physical perpetrators of an offence among its members, but which accepts that there should be no alteration of the Judgement on this ground, acknowledging the fact that the Prosecution had, when arguing before the Trial Chamber, agreed with the position it now criticizes;

**BEING SEISED** of the "Motion to Dismiss Ground 1 of the Prosecutor's Appeal," filed by the Appellant on 15 February 2005 ("Motion to Dismiss"), in which the Appellant argues that (1) the Prosecution should not be permitted to reverse its own position, (2) the importance of the alleged error to the jurisprudence of the Tribunal is purely speculative, (3) the Defence has no significant interest in contesting the issue since the Prosecution does not argue that the Trial Chamber's Judgement should be altered, depriving this Chamber of the benefit of the adversarial process, (4) rendering a decision on this issue would amount to an advisory opinion, and (5) this portion of the appeal should therefore be dismissed, leaving the issue to be resolved in a subsequent case in which it is truly contested;

**NOTING** the "Decision on Prosecution's Request for an Extension of Time to Respond to Brdjanin's Motion to Dismiss Ground 1 of the Prosecution's Appeal", rendered by the Appeals Chamber on 11 March 2005 ("Decision on Prosecution's Request"), in which the Appeals Chamber, *inter alia*, granted the requested extension of time and ordered the Registry to file the "Prosecution Response to Motion to Dismiss Ground 1 of the Prosecutor's Appeal" ("Prosecution's Response") and serve it on the Appellant;

**NOTING** the Prosecution's Response, filed by the Registry in accordance with the Decision on Prosecution's Request on 18 March 2005, in which the Prosecution argues that its first ground of appeal, although it would not affect the verdict, raises an important legal issue of general importance to the jurisprudence of the International Tribunal that has a nexus to the case at hand,<sup>1</sup> and suggests that if this Chamber "finds it necessary to hear legal submissions from the perspective of the defence," it could invite an *amicus* brief from the Association of Defence Counsel of the International Tribunal;<sup>2</sup>

**NOTING** the absence of a reply from the Appellant;

**CONSIDERING** that although the principal mandate of the Appeals Chamber is to consider legal errors invalidating the Trial Chamber's Judgement or factual errors occasioning a miscarriage of justice,<sup>3</sup> it has repeatedly held that it may also consider legal issues that are "of general significance to the Tribunal's jurisprudence,"<sup>4</sup> even if they do not affect the verdict, so long as they have a "nexus with the case at hand,"<sup>5</sup> and that such determinations do not constitute impermissible "advisory opinions,"<sup>6</sup> but are instead necessary means of moving forward this *ad hoc* International Tribunal's jurisprudence within the limited time in which it operates and contributing meaningfully to the overall development of international criminal law;<sup>7</sup>

**CONSIDERING** that the legal issue presented by Ground 1 of the Prosecution's Appeal—whether liability for commission of a crime under a JCE theory requires the Prosecution to prove that the physical perpetrators of the crime were members of the JCE—is of considerable significance to the International Tribunal's jurisprudence, as it affects every case employing a JCE theory;

**CONSIDERING** that permitting the Trial Chamber's holding to stand while the Appeals Chamber waits for another case to present the same issue risks effectively requiring, in all JCE cases arising in the meantime, that the Prosecutor develop evidence and prove cases against particular physical perpetrators of offences even when those physical perpetrators have not been charged, a practice that would prove to

be a waste of the International Tribunal's resources if this Appeals Chamber eventually finds such a requirement to be unnecessary;

**CONSIDERING** that the Trial Chamber's holding on this issue was critical to its rejection of the JCE theory,<sup>8</sup> and thus its finding that the Appellant was not guilty of "committing" any of the crimes with which he was charged, but instead of instigating, ordering, aiding, and abetting them;

**CONSIDERING** that the issue thus plainly has a "nexus" with this case, and that the only reason the Prosecution is not seeking alteration of the verdict on this ground is that it failed to argue its current position before the Trial Chamber, instead conceding, upon questioning by the Bench, that a JCE must amount to an agreement between the defendant and the physical perpetrators of the crime;

**CONSIDERING** that the Prosecution's concession before the Trial Chamber and its current reversal of position, although unfortunate, do not prejudice the Appellant because the Prosecution does not seek to change the verdict;

**CONSIDERING** that, therefore, although the Prosecution would ordinarily be estopped from changing its position on appeal, this equitable doctrine of estoppel has no application where a change in position does not prejudice the opposing party, which is not obligated even to contest the issue;

**CONSIDERING** that, however, because the parties agreed on the issue before the Trial Chamber and because the Defence no longer has an incentive to contest the matter, no full adversarial argumentation on this issue will have taken place at any stage of the proceedings in this case unless the possible point of view of future defendants before the International Tribunal is otherwise represented during these appeal proceedings; and

**CONSIDERING** the Chamber's power to invite *amicus curiae* submissions under Rule 74 of the Rules of Procedure and Evidence;

**HEREBY DENIES** the Defence Motion to Dismiss Ground 1 of the Prosecutor's Appeal; and

**INVITES** the Association for Defence Counsel of the International Tribunal to submit an *amicus curiae* brief addressing the question whether the membership of a JCE must include the physical perpetrators of the crime, to be submitted within 30 days and to be no more than 15 pages in length.

Done in English and French, the English text being authoritative.

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Theodor Meron  
Presiding Judge

Dated 5 May 2005  
At The Hague  
The Netherlands

[Seal of the Tribunal]

1. Prosecution's Response, paras 19-25.
2. Prosecution's Response, para. 17.
3. Statute of the International Tribunal, Art. 25.
4. *Prosecutor v. Tadic*, Case No. IT-94-1-A, *Judgement*, 15 July 1999, paras 247 and 281; *Prosecutor v. Jean-Paul Akeyesu*, Case No. ICTR-96-4-A, *Judgement*, 1 June 2001 ("*Akeyesu* Appeal Judgement"), para. 19; *Prosecutor v. Delalic, Mucic, Delic, and Land'o et al.*, Case No. IT-96-21-A, *Judgement*, 20 February 2001, paras. 218 and 221.
5. *Akeyesu* Appeal Judgement, para. 24.
6. *Id.* para 23.
7. *Id.* paras. 21-22.
8. Trial Chamber Judgement, paras. 355-56.