



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-95-5/18-T

Date: 8 April 2011

Original: English

**IN THE TRIAL CHAMBER**

**Before:** Judge O-Gon Kwon, Presiding Judge  
Judge Howard Morrison  
Judge Melville Baird  
Judge Flavia Lattanzi, Reserve Judge

**Registrar:** Mr. John Hocking

**Decision of:** 8 April 2011

**PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

***PUBLIC***

**DECISION ON ACCUSED'S MOTION TO STRIKE JCE III ALLEGATIONS  
AS TO SPECIFIC INTENT CRIMES**

**Office of the Prosecutor**

Mr. Alan Tieger  
Ms. Hildegard Uertz-Retzlaff

**The Accused**

Mr. Radovan Karadžić

**Standby Counsel**

Mr. Richard Harvey

**THIS TRIAL 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 (“Tribunal”) is seised of the Accused’s “Motion to Strike JCE III Allegations as to Specific Intent Crimes” filed on 22 February 2011 (“Motion”), and hereby issues its decision thereon.

1. On 28 April 2009, the Trial Chamber issued its “Decision on Six Preliminary Motions Challenging Jurisdiction”, finding *inter alia* that a challenge brought by the Accused to those parts of the Indictment charging him with genocide and persecutions as a crime against humanity by way of the third form of joint criminal enterprise liability (JCE III), was not a proper challenge to jurisdiction within the terms of Rule 72(D)(iv) of the Tribunal’s Rules of Procedure and Evidence (“Rules”).<sup>1</sup> On this basis, the Accused’s “Preliminary Motion to Dismiss JCE III–Special Intent Crimes”, filed on 27 March 2009 (“Preliminary Motion”), was dismissed and the Appeals Chamber upheld that dismissal in a decision issued on 25 June 2009.<sup>2</sup> The Appeals Chamber further affirmed that “the contours and elements of modes of liability are considered an ‘issue [ ] of law ... which can be properly advanced and argued during the course of trial.’”<sup>3</sup>

2. In the Motion, the Accused states that he does not seek a reconsideration of that part of the Decision on Six Preliminary Motions Challenging Jurisdiction that dealt with his Preliminary Motion concerning JCE III and specific intent crimes, given that it was dismissed on jurisdictional grounds, but rather a fresh determination by the Trial Chamber of the question of the applicability of JCE III as a mode of liability to specific intent crimes such as genocide and persecutions.<sup>4</sup> He contends that crimes requiring specific intent cannot be prosecuted under JCE III and requests the Trial Chamber to strike from the Indictment those allegations that he committed genocide and persecutions by way of this mode of liability.<sup>5</sup>

3. While acknowledging in the Motion that the Trial Chamber has already stated, *obiter*, that “even if the Arguments brought by the Accused in [the Preliminary Motion] were

<sup>1</sup> Decision on Six Preliminary Motions Challenging Jurisdiction, 28 April 2009, para. 32.

<sup>2</sup> Decision on Radovan Karadžić’s Motions Challenging Jurisdiction (Omission Liability, JCE-III – Special Intent Crimes, Superior Responsibility), 25 June 2009, para. 37.

<sup>3</sup> Decision on Radovan Karadžić’s Motions Challenging Jurisdiction (Omission Liability, JCE-III – Special Intent Crimes, Superior Responsibility), 25 June 2009, para. 36, quoting *Prosecutor v. Tolimir*, Case No. IT-05-88/2-AR72.1, Decision on Tolimir’s “Interlocutory Appeal against the Decision of the Trial Chamber on the Part of the Second Preliminary Motion concerning the Jurisdiction of the Tribunal”, 25 February 2009, paras. 7, 10 and *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, paras. 22–24.

<sup>4</sup> Motion, para. 7.

<sup>5</sup> Motion, para. 1.

considered as proper challenges to jurisdiction, the Chamber would dismiss them, as there is clear Appeals Chamber authority to the effect that convictions for genocide, which is a specific intent crime, can be entered on the basis of the third form of joint criminal enterprise liability”, the Accused contends that this view has been “superseded by more recent events.”<sup>6</sup> Specifically, he argues that subsequent judicial decisions issued by the Appeals Chambers of the Special Court for Lebanon (STL) and the Extraordinary Chambers of the Courts of Cambodia (ECCC) have established that convictions for specific intent crimes cannot be entered on the basis of JCE III liability.<sup>7</sup>

4. On 1 March 2011, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution’s Response to Karadžić’s Motion to Strike JCE III Allegations as to Specific Intent Crimes” (“Response”) arguing that the Motion should be dismissed on the basis that the Trial Chamber is bound by the jurisprudence of this Tribunal’s Appeals Chamber “that recognises the availability of the third type of joint criminal enterprise liability ... for specific intent crimes.”<sup>8</sup>

5. The Chamber notes, firstly, that the Motion is filed pursuant to Rule 73(A) of the Rules, which provides, in part, that “after a case is assigned to a Trial Chamber, either party may at any time move before the Chamber by way of motion, not being a preliminary motion, for appropriate ruling or relief.” Thus, on the face of the Rule, and having determined that the Accused’s Preliminary Motion did not amount to a challenge to jurisdiction within the meaning of Rule 72(D), such a Motion may be filed “at any time.” However, the substance of the Motion is the same as the Preliminary Motion, except in respect of the references to the recent jurisprudence from the STL and ECCC. It raises an issue going to the relationship between a mode of liability and some of the crimes set out in the Statute of the Tribunal. It thus calls for a legal determination that is premature, and one which is to be conducted only once the Trial Chamber is asked to rule on the Accused’s responsibility for the crimes charged in the Indictment.

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<sup>6</sup> Motion, paras. 5, 7, quoting Decision on Six Preliminary Motions Challenging Jurisdiction, 28 April 2009, para. 32.

<sup>7</sup> Motion, paras. 9–11.

<sup>8</sup> Response, para. 1.

**Disposition**

6. Accordingly, pursuant to Rules 54 and 73 of the Rules, the Trial Chamber hereby **DENIES** the Motion.

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



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Judge O-Gon Kwon  
Presiding

Dated this eighth day of April 2011  
At The Hague  
The Netherlands

[Seal of the Tribunal]