THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

IN TRIAL CHAMBER III

Before: Judge Iain Bonomy, Presiding
Judge Michèle Picard
Judge Christoph Flügge

Registrar: Mr John Hocking, Acting Registrar

Date Filed: 20 April 2009

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

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

Public

MOTION FOR LEAVE TO REPLY AND REPLY BRIEF: PRELIMINARY MOTION TO DISMISS JCE III – SPECIAL-INTENT CRIMES

The Office of the Prosecutor

Mr Alan Tieger
Ms Hildegard Uertz-Retzlaff

The Accused

Dr Radovan Karadžić

Introduction

1. Dr. Radovan Karadžić respectfully moves, pursuant to Rule 126 *bis*, for leave to reply to the "Prosecution Response to 'Preliminary Motion to Dismiss JCE III – Special-Intent Crimes'", filed on 14 April 2009. Dr. Karadžić contends that a reply is necessary to address misinterpretations by the Prosecution of the arguments presented in his original motion.

2. The Prosecution offers two responses to Dr. Karadžić's argument that customary international law does not permit an accused to be convicted of a special-intent crime such as genocide or persecution via JCE III: (1) that its theory of liability does not need to be consistent with customary international law; and (2) that, if it does, customary international law does not exclude that theory. Both responses are mistaken.

The Need for Customary Analysis

3. The Prosecution argues that Dr. Karadžić "wrongly assumes that JCE III liability for specific-intent crimes is impermissible in the absence of state practice and *opinio juris* dealing with precisely this issue."[1] In its view, no customary analysis is required: "the correct question is whether the customary law principle of JCE III reasonably encompasses liability for specific-intent crimes."[2] It answers that question in the affirmative.[3]

4. In defense of its position, the Prosecution cites the Appeals Chamber's decisions in *Tadic*, *Ojdanic*, *Brdjanin*, and *Rwamakuba*. It cites *Tadic* for the principle that JCE III forms part of customary law and applies to any of the "crimes envisaged in Article 2, 3, 4, or 5 of the Statute – which includes genocide and persecution"[4]; *Ojdanic* as reaffirming the principle articulated in *Tadic*[5]; and *Brdjanin* for the idea "that an accused person can be convicted of genocide based on JCE III, notwithstanding that the accused did not act with genocidal intent."[6] It then cites

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[1] Response, para. 2.
[2] Response, para. 2.
[3] Response, paras. 4-12.
[4] Response, para. 4.
[5] Response, para. 5.
[6] Response, para. 7.

Rwamakuba for the principle that "customary international law recognised the application of JCE to genocide before 1992."[7]

5. What the Prosecution conveniently fails to mention is that *Rwamakuba* specifically *rejected* the argument that *Tadic*, *Ojdanic*, and *Brdjanin* establish the customary availability of JCE III for all crimes, including specific-intent crimes such as genocide and persecution. Rwamakuba claimed that customary international law did not permit a defendant to be convicted of genocide via JCE I. In response, the Prosecution argued "that the ICTY Appeals Chamber has recognized the doctrine of joint criminal enterprise in *Tadic* and reaffirmed it in *Ojdanic* and that there is 'no legal basis' for the Appellant's distinction between the applicability of joint criminal enterprise to crimes other than genocide in those cases and the applicability of joint criminal enterprise to genocide in this case."[8] It also claimed that *Brdjanin*'s decision "to reverse the acquittal and reinstate the corresponding count of the indictment reflected an implicit finding that a conviction under that count would be permitted under customary international law."[9]

6. The ICTR Appeals Chamber rejected all of the Prosecution's arguments – the same arguments that it offers in this case. It began by dismissing the Prosecution's reliance on *Brdjanin*, noting that the decision "does not indicate that the Appeals Chamber dealt with the problem whether international customary law supports the application of joint criminal enterprise to the crime of genocide."[10] It then pointed out that *Tadic* did not eliminate the Prosecution's need to establish that customary international law permitted a defendant to be convicted of genocide via JCE I, because "the ICTY Appeals Chamber had no reason to consider the doctrine's application to the crime of genocide because Tadic was not charged with that crime."[11]

7. Most importantly, however, the ICTR Appeals Chamber *then proceeded to determine whether JCE I was available for genocide under customary international law*[12] – a fact that directly contradicts the Prosecution's argument that no customary

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[7] Response, para. 5.
[8] *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44-AR72.4, *Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide*, para. 8 (22 October 2004) ("*Rwamakuba Appeal Decision*").
[9] *Ibid.*, para. 9
[10] *Ibid.*
[11] *Ibid.*, para. 11.
[12] *Ibid.*, paras.

analysis is necessary in this case. Indeed, the Prosecution never even acknowledges that *Rwamakuba* engaged in that analysis, despite the fact that it cites paragraph 24 of the decision,[13] in which the Appeals Chamber concluded that customary international law supports the availability of JCE I for genocide.[14]

8. As Dr. Karadžić noted in his original Motion, *Rwamakuba* only addressed whether convicting a defendant of genocide via *JCE I* was consistent with customary international law; it did not conduct a similar analysis for *JCE III*. This Chamber cannot simply infer the latter from the former: not only does the logic of *Rwamakuba* specifically reject such an inference, the two forms of JCE III are fundamentally different: whereas JCE I requires proof that the defendant acted with genocidal intent, JCE III does not – recklessness concerning the possibility that a co-perpetrator would commit an act of genocide is all that is required. *Rwamakuba* thus requires this Chamber to determine for itself whether customary international law permits a defendant to be convicted of a specific-intent crime such as genocide or persecution via JCE III.

9. This conclusion is not affected by the Prosecution's argument that the Appeals Chamber has held that JCE III "applies to all crimes under the Statute, regardless of specific-intent requirements."[15] The only citation the Prosecution offers for that argument is *Brdjanin*, which – as noted earlier – has nothing to say about the customary availability of JCE III for genocide and persecution.[16] Moreover, the Prosecution's argument that "[i]n this respect, JCE III is no different from other forms of criminal liability – such as aiding and abetting – which result in conviction for a crime without proof of the specific-intent required for that crime"[17] is simply incorrect. There is, in fact, a *fundamental* difference between JCE III and aiding and abetting: a defendant who is convicted of aiding and abetting a specific-intent crime is convicted as an *accomplice*, whereas a defendant who is convicted of a specific-intent crime via JCE III is convicted as a *perpetrator*.

10. The Prosecution attempts to downplay this difference by suggesting that it would not matter whether Dr. Karadžić was convicted as a perpetrator or as an

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[13] *See* Response, para. 5 n. 14.
[14] *Rwamakuba Appeal Decision*, para. 24.
[15] Response, para. 6.
[16] This fact also undermines the Prosecution's reliance on the Appeals Chamber's decision in *Martic*, Response, para. 11. Like *Brdjanin*, *Martic* did not examine the customary status of JCE III in the context of specific-intent crimes.
[17] Response, para. 6.

accomplice, because this Chamber could simply take the absence of specific intent into account at sentencing.[18] There are two problems with this suggestion. First, and most obviously, a sentencing discount is not an adequate remedy for convicting a defendant of a serious international crime via a mode of liability that has no basis in customary international law.

11. Second, the suggestion is inconsistent with the Appeals Chamber's insistence that the stigma of being convicted as a perpetrator of genocide is far greater than the stigma of being convicted as an accomplice to it. That is why, once it concluded General Krstić lacked the specific intent that genocide requires, the Appeals Chamber insisted on convicting him of aiding and abetting genocide instead of perpetrating it via JCE III:

> Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established. There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent. Krstić, therefore, is not guilty of genocide as a principal perpetrator... [h]is criminal liability... is more properly expressed as that of an aider and abettor to genocide.[19]

12. The Prosecution simply ignores *Krstić*'s emphasis on the difference between perpetrating genocide and aiding and abetting genocide. Indeed, it fundamentally mischaracterizes the *Krstić* decision itself when it argues that the Appeals Chamber did not uphold General Krstić conviction for perpetrating genocide because it rejected the Trial Chamber's conclusion that he was part of a JCE I to kill the Bosnian Muslim men.[20] What the Prosecution fails to mention is that the Trial Chamber found that General Krstić was part of a JCE I to "permanently remove the Bosnian Muslim population from Srebrenica, following the take-over of the enclave."[21] *That* overarching JCE I – the same overarching JCE I alleged in this case – *not* the JCE I to kill the Bosnian Muslim men, formed the basis for the Prosecution's two JCE III allegations: that General Krstić was responsible for the genocide allegedly committed at Srebrenica and for the "murders, beatings, and abuses" committed at Potocari.[22] The Appeals Chamber did not question the

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[18] Response, para. 14.
[19] *Prosecutor v. Krstić*, Case No. IT-98-33-A, *Judgment*, para. 134, 137 (19 April 2004) ("*Krstić Appeal Judgment*").
[20] Response, para. 12.
[21] *Prosecution v. Krstić*, Case No. IT-98-33-T, *Judgment*, para. 612 (2 August 2001).
[22] *See ibid.*, para. 614 ("In order to determine whether General *Krstić* had the requisite *mens rea* for responsibility to arise under the joint criminal enterprise doctrine, the Trial Chamber must determine

existence of the overarching JCE I,[23] nor did it conclude that the possibility of genocide at Srebrenica was any less foreseen by General Krstić than the crimes committed at Potocari.[24] Instead, the Appeals Chamber focused on the different mental states required by the unplanned crimes: unlike the "ordinary" crimes committed at Potocari, the genocide allegedly committed at Srebrenica required proof of specific intent.[25] Hence the Chamber's conclusion that although General Krstić could be convicted of the former via JCE III, he could only be convicted of the latter as an aider and abettor – when a defendant has been charged as a perpetrator, "[c]onvictions for genocide can be entered only where [specific] intent has been unequivocally established."

Customary International Law

13. The Prosecution also argues that "[t]he World II and other sources Karadžić cites do not establish that responsibility for specific-intent crimes falls outside the JCE III principle."[26] At the outset, it is important to note that the Prosecution does not take issue with Dr. Karadžić's first argument: that no international or domestic case has ever held that a defendant can be convicted of a special-intent crime as a principal perpetrator even though he did not possess the necessary specific intent.[27] Instead, it criticizes his second argument: that the international and domestic cases that have addressed responsibility for unplanned crimes indicate that a defendant cannot be convicted as a principal perpetrator of an unplanned specific-intent crime simply because it was foreseeable. According to the Prosecution, Dr. Karadžić's sources do not "preclude the conviction of an accused person under JCE III for specific intent crimes."[28]

14. As explained below, the Prosecution either misreads or mischaracterizes the cases that it discusses in its Response. Nevertheless, even if its discussion of the cases were accurate, the Prosecution's argument would still fall far short of establishing that there is a customary basis for convicting a defendant of a specific-intent crime via JCE III. The Appeals Chamber has consistently held that "in order to

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which crimes fell within and which fell outside the agreed object of *the joint criminal enterprise to ethnically cleanse the Srebrenica enclave.*").

[23] *See, e.g., Krstić Appeal Judgment*, 149.

[24] *See, e.g., ibid.*, 134.

[25] *Ibid.*, 134.

[26] Response, Part D, p. 7.

[27] Motion, para. 4.

[28] *See, e.g.*, Response, para. 16.

fall within the Tribunal's jurisdiction *ratione personae*, any form of liability... must have existed under customary international law at the relevant time."[29] That requirement is not satisfied by showing that customary international law "does not preclude" a particular mode of liability; it must affirmatively recognize it.[30] And again, the Prosecution does not cite a single case, international or domestic, that holds that a defendant can be convicted of a special-intent crime as a principal perpetrator even though he did not possess the necessary special intent.

15. That said, it is important to recognize that even the Prosecution's limited argument that customary international law "does not preclude" such a conviction is demonstrably erroneous.

16. First, the Prosecution argues that the Nuremberg Military Tribunal convicted Ernst Lautz, of genocide despite failing to determine that he acted with genocidal intent.[31] In part, that is correct: although the Tribunal concluded Lautz acted with genocidal intent regarding the infamous *Nacht und Nebel* procedure,[32] it did not specifically find that intent regarding his participation in "the national program of racial extermination of Poles by means of the perversion of the law of high treason."[33] What the Prosecution ignores is that, because he merely played a "consenting part" in the extermination program, Lautz was convicted of participating in that program only as "an *accessory* to... the crime of genocide."[34] Even on the Prosecution's reading, therefore, Lautz's conviction supports Dr. Karadžić's argument that a defendant cannot be convicted of a specific-intent crime via JCE III *as a perpetrator*.

17. Second, the Prosecution argues that *Essen Lynching* "does not preclude the conviction of an accused person under JCE III for specific intent crimes."[35] That is incorrect, for all of the reasons given in Dr. Karadžić's original motion.[36] The Prosecution does not challenge Dr. Karadžić's interpretation of the case; it simply argues that it is not supported by the Appeals Chamber's discussion of the case in

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[29] *Prosecutor v Milutinovic et al*, Case No. IT-99-37-AR72, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise*, paras. 40 ff (21 May 2003).
[30] *See, e.g., Rwamakuba Appeal Decision*, para. 31.
[31] Response, para. 15.
[32] *See United States v. Alstötter and others* ("*Justice Case*"), United States Military Tribunal III, *judgment* of 4 December 1947, in III Trials of War Criminals before the Nurenberg Military Tribunals under Control Council Law No. 10 (1997), p. 1120.
[33] *Justice Case*, p. 1123.
[34] *Ibid.*, 1128 (emphasis added).
[35] Response, para. 16.
[36] *See* Motion, paras. 18, 20-21.

Tadic. That argument is mistaken in two respects. First, because *Tadic* did not address crimes involving specific intent, it had no reason to address whether JCE III can be used to convict a defendant of unplanned crimes that required a higher mens rea than the planned crimes. Second, Dr. Karadžić's interpretation of *Essen Lynching* is based on the original records of the case, not on *Tadic*'s discussion of it. This Chamber is welcome to examine those records to determine whose interpretation – Dr. Karadžić's or the Prosecution's – is more accurate.

18. Third, the Prosecution argues that *Borkum Island* "has no bearing on whether JCE III can be applied to specific-intent crimes."[37] As Dr. Karadžić's original Motion makes clear, that is incorrect: the court's refusal to convict all of the defendants of the foreseeable killings reflects the fact that it did not believe the defendants could be convicted of an unplanned crime (killing) that was more serious than the planned crime (assault).

19. Fourth, the Prosecution claims that Dr. Karadžić "misconstrues" the Italian Court of Cassation's judgment in *Antonini*. There are two problems with that argument. First, the Prosecution simply ignores the *Aratano et al.* case, which reached the same conclusion concerning unplanned crimes that require a higher mens rea than the planned crimes.[38] Second, it is the Prosecution, not Dr. Karadžić, who misconstrues *Antonini*. The Court of Cassation's explanation of why it disagreed with the lower court's conclusion that the defendants could be convicted of a foreseeable but unplanned and unintended murder – quoted at length in the original Motion[39] – speaks for itself:

> *The intentional killing, or the killing with intent, must consist in an event which has been* ***both foreseen and intended by the agent.*** The fact that the author foresaw it (*representation theory*) does not suffice, but it is also necessary that he intended it (*willingness theory*) with the willingness to achieve a specific intended aim (intent).[40]

20. How is the Court's statement that an unplanned crime must be "both foreseen and intended" by the defendant consistent with the Prosecution's claim that the unplanned crime must only be foreseen?

21. Fifth, and finally, the Prosecution casually disregards the fact that the overwhelming majority of national criminal-law systems – both common law and

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[37] Response, para. 17.
[38] *See* Motion, para. 25.
[39] Motion, para. 26.
[40] Italian Court of Cassation, Penal Section, *judgment* of 29 March 1949, *Giustizia Penale*, 1949, Part II, cols. 741-742 (italics in the original).

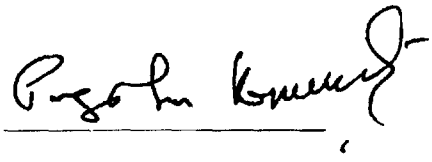
civilian – do not permit using JCE III to convict a defendant as a perpetrator of an unplanned crime requiring specific intent.[41] Instead, it simply points out that "the *Tadic* Appeals Chamber made clear that there is no uniform approach in the domestic practice of the major legal systems of the world."[42] Once again, the Prosecution wrongly implies that it does not have the burden of proving that customary international law authorizes the use of JCE III for specific-intent crimes. *Tadic* surveyed national legal systems for a reason: to "show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems."[43] The Prosecution has made no such effort regarding the use of JCE III for specific-intent crimes – which is not surprising, given that, as Dr. Karadžić's survey demonstrates, international criminal law's rejection of using JCE III to convict a defendant of such crimes has an *even stronger* underpinning in national systems.

Conclusion

22. Dr. Karadžić respectfully requests the Trial Chamber dismiss all of the allegations in the Third Amended Indictment concerning genocide and persecution that are based on JCE III.[44]

Word count: 2993

Respectfully submitted,



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[41] *See* Motion, paras. 32-46.
[42] Response, para. 19.
[43] *Tadic Appeal Judgment*, para. 225.
[44] Dr. Karadžić wishes to acknowledge with gratitude the contribution of Kevin Jon Heller, Senior Lecturer at the University of Melbourne School of Law (Australia), to the preparation of this motion.