



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-AR72.1
IT-95-5/18-AR72.2
IT-95-5/18-AR72.3
Date: 25 June 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andréia Vaz

Registrar: Mr. John Hocking

Decision: 25 June 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON RADOVAN KARADŽIĆ'S MOTIONS
CHALLENGING JURISDICTION (OMISSION LIABILITY,
JCE-III – SPECIAL INTENT CRIMES, SUPERIOR
RESPONSIBILITY)**

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić, *pro se*

1. 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 (“Appeals Chamber” and “Tribunal”, respectively) is seized of the “Notice of Appeal Under Rule 72(B)(i) from the Trial Chamber’s Decision on Six Preliminary Motions Challenging Jurisdiction: *Omission Liability*” (“Appeal on Omission Liability”), the “Notice of Appeal Under Rule 72(B)(i) from the Trial Chamber’s Decision on Six Preliminary Motions Challenging Jurisdiction: *JCE III – Special Intent Crimes*” (“Appeal on Special Intent Crimes”), and the “Notice of Appeal Under Rule 72(B)(i) from the Trial Chamber’s Decision on Six Preliminary Motions Challenging Jurisdiction: *Superior Responsibility*” (“Appeal on Superior Responsibility”), filed by Radovan Karadžić (“Karadžić”) on 12 May 2009 (collectively, “Appeals”). The Office of the Prosecutor (“Prosecution”) filed its responses on 22 May 2009¹ and Karadžić filed his replies on 26 May 2009.²

I. BACKGROUND

2. On 27 February 2009, the Prosecution filed a third amended indictment against Karadžić charging him with genocide, crimes against humanity and violations of the laws or customs of war, including persecutions, extermination, murder, deportation, forcible transfer, unlawful attacks against civilians, taking hostages and acts of violence, the primary purpose of which is to spread terror among the civilian population, under Articles 3, 4(3)(a), 5(a), 5(b), 5(d), 5(h) and 5(i) of the Tribunal’s Statute (“Statute”).³ The Indictment alleges Karadžić’s individual criminal responsibility under Article 7(1) of the Statute for planning, instigating, ordering, committing and/or aiding and abetting the crimes charged through the acts and omissions described in paragraph 14 therein.⁴ It specifies that “committing”, in the context of Karadžić’s liability under Article 7(1), refers to his participation in a Joint Criminal Enterprise (“JCE”).⁵ In addition, the Indictment charges Karadžić

¹ Prosecution Response to “Notice of Appeal Under Rule 72(B)(i) from the Trial Chamber’s Decision on Six Preliminary Motions Challenging Jurisdiction: *Omission Liability*”, 22 May 2009 (“Response to Appeal on Omission Liability”); Prosecution Response to “Notice of Appeal Under Rule 72(B)(i) from the Trial Chamber’s Decision on Six Preliminary Motions Challenging Jurisdiction: *JCE III – Special Intent Crimes*”, 22 May 2009; (“Response to Appeal on Special Intent Crimes”); Prosecution Response to Karadžić’s “Notice of Appeal Under Rule 72(B)(i) from the Trial Chamber’s Decision on Six Preliminary Motions Challenging Jurisdiction: *Superior Responsibility*”, 22 May 2009 (“Response to Appeal on Superior Responsibility”).

² Reply Brief: *Omission Liability*, 26 May 2009 (“Reply on Omission Liability”); Reply Brief: *JCE III – Special Intent Crimes*, 26 May 2009 (“Reply on Special Intent Crimes”); Reply Brief: *Superior Responsibility*, 26 May 2009 (“Reply on Superior Responsibility”).

³ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Third Amended Indictment, 27 February 2009 (“Indictment”).

⁴ Indictment, para. 30.

⁵ *Ibid.* para. 5.

with individual criminal responsibility for the crimes charged as a superior, pursuant to Article 7(3) of the Statute.⁶

3. In March 2009, Karadžić seized Trial Chamber III (“Trial Chamber”) of a series of motions challenging the Tribunal’s jurisdiction under Rule 72 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), including the “Preliminary Motion on Lack of Jurisdiction Concerning Omission Liability” filed on 25 March 2009,⁷ the “Preliminary Motion to Dismiss JCE III – Special-Intent Crimes” filed on 27 March 2009⁸ and the “Preliminary Motion on Lack of Jurisdiction: Superior Responsibility”⁹ filed on 30 March 2009 (collectively, “Motions”).

4. On 28 April 2009 the Trial Chamber issued its “Decision on Six Preliminary Motions Challenging Jurisdiction”¹⁰ in which it jointly considered all of Karadžić’s motions under Rule 72 of the Rules. Having reached the conclusion that none of the motions actually raised a proper jurisdictional challenge, the Trial Chamber nonetheless analyzed certain issues, including those raised in the Motion on Omission Liability, as alleging defects in the form of the Indictment pursuant to Rule 72(A)(ii).¹¹ The Trial Chamber also recalled that the parties’ “automatic right of appeal is confined to challenges to jurisdiction, which include the determination whether or not any challenge is truly jurisdictional”.¹²

5. On 4 May 2009, Karadžić applied for an extension of time for the filing of an application for certification to appeal the Impugned Decision on the grounds, *inter alia*, that he was entitled to appeal as of right the Trial Chamber’s refusal to treat his motions as jurisdictional challenges and that, consequently, his application for certification would be subject to the Appeals Chamber’s resolution of the matters appealed under Rule 72(B)(i) of the Rules.¹³ On 5 May 2009, the Trial Chamber dismissed his request “consider[ing] that it [was] in the interests of a fair and expeditious trial for [Karadžić] to apply immediately for certification to appeal the [Impugned] Decision, so

⁶ *Ibid.* para. 32.

⁷ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Preliminary Motion on Lack of Jurisdiction Concerning Omission Liability, 25 March 2009 (“Motion on Omission Liability”).

⁸ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Preliminary Motion to Dismiss JCE III – Special-Intent Crimes, 27 March 2009 (“Motion on Special Intent Crimes”).

⁹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Preliminary Motion on Lack of Jurisdiction: Superior Responsibility, 30 March 2009 (“Motion on Superior Responsibility”).

¹⁰ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Six Preliminary Motions Challenging Jurisdiction, 28 April 2009 (“Impugned Decision”).

¹¹ *Ibid.* para. 33.

¹² *Ibid.* para. 81.

¹³ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion for Extension of Time: Certification to Appeal Decision on Six Preliminary Motions Challenging Jurisdiction, 4 May 2009.

that, should certification be granted, the Appeals Chamber will have a complete picture of all possible issues arising from the [Impugned] Decision before it".¹⁴

6. On 6 May 2009, Karadžić filed the application for certification emphasizing that he intended to file appeals under Rule 72(B)(i), challenging the Trial Chamber's refusal to treat, *inter alia*, his Motions as jurisdictional challenges and therefore not seeking certification for those appeals, but only for the issues falling under Rule 72(B)(ii) of the Rules.¹⁵ He added that, in light of the Trial Chamber's refusal to extend the deadline for application for certification, it should "take this matter under submission until the Appeals Chamber has ruled on the admissibility of his appeals pursuant to Rule 72(B)(i), and then grant certification", if the Appeals Chamber refuses to review the Impugned Decision under Rule 72(B)(i) of the Rules.¹⁶

7. On the same day, the Trial Chamber refused certification in relation to the Motion on Omission Liability on the basis that its immediate resolution by the Appeals Chamber would not materially advance the proceedings, noting however, that Karadžić could still appeal the Impugned Decision on the relevant matters as of right.¹⁷ Concerning the Motions on Special Intent Crimes and Superior Responsibility, the Trial Chamber found that since they do not constitute challenges to the form of the Indictment, there is no issue on which certification could be granted.¹⁸

8. Karadžić considers the Motions to be challenging the Tribunal's jurisdiction and therefore asserts that the Impugned Decision dismissing the motions is, in the relevant parts, subject to appeal as of right pursuant to Rule 72(B)(i) of the Rules.¹⁹

II. APPLICABLE LAW

9. The Appeals Chamber recalls that pursuant to Rule 72(B)(i) of the Rules, an interlocutory appeal arising from a Trial Chamber's Decision on a preliminary motion challenging the jurisdiction of the Tribunal lies as of right. Pursuant to Rule 72(D) of the Rules, a motion

¹⁴ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused Motion for Extension of Time: Certification to Appeal Decision on Six Preliminary Motions Challenging Jurisdiction, 5 May 2009, para. 3.

¹⁵ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Application for Certification to Appeal Decision on Six Preliminary Motions, 6 May 2009, paras 2-4.

¹⁶ *Ibid.* para. 14.

¹⁷ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Status Conference, 6 May 2009, T. 222-223, 227.

¹⁸ *Ibid.* T. 227.

¹⁹ Appeal on Omission Liability, paras 1, 3-4; Appeal on Special Intent Crimes, paras 1, 3-5; Appeal on Superior Responsibility, paras 1, 3-4.

challenging jurisdiction refers exclusively to a motion challenging an indictment on the ground that it does not relate to the Tribunal's personal, territorial, temporal or subject-matter jurisdiction.²⁰

10. The Appeals Chamber further recalls that:

When reviewing a Trial Chamber's decision on jurisdiction under Rule 72(B)(i) of the Rules, the Appeals Chamber will only reverse the decision "if the Trial Chamber committed a specific error of law or fact invalidating the decision or weighed relevant considerations or irrelevant considerations in an unreasonable manner." In reaching its decision, it is incumbent upon a Trial Chamber "to provide a reasoned opinion that, among other things, indicates its view on all those relevant factors that a reasonable Trial Chamber would have been expected to take into account before coming to a decision".²¹

III. DISCUSSION

A. Arguments of the parties

1. Arguments common to the Appeals

11. Karadžić submits that the Trial Chamber committed discernible error by failing to consider each of his motions challenging jurisdiction individually and by failing to provide sufficient reasoning for their dismissal.²² He alleges that he suffered prejudice because all of his motions were dismissed without proper consideration.²³ While he does not dispute that, in general, Chambers have the discretion to consider similar motions in one decision, Karadžić argues that the collective approach taken by the Trial Chamber resulted in its failure to consider the relevant Appeals Chamber jurisprudence.²⁴ In this respect, he observes that no uniform standard as to whether a challenge is indeed jurisdictional has been developed, which in turn requires motions to be decided on a case-by-case basis.²⁵

²⁰ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-AR72.2, Decision on Zdravko Tolimir's Appeal Against the Decision on Submissions of the Accused Concerning Legality of Arrest, 12 March 2009, para. 11 (and cases cited therein).

²¹ *Prosecutor v. Ante 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, para. 7 ("*Gotovina Decision*"), citing *The Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR72.1, Decision on Petković's Interlocutory Appeal Against the Trial Chamber's Decision on Jurisdiction, 16 November 2005, para. 11 (and cases cited therein).

²² Appeal on Omission Liability, paras 6, 19; Appeal on Special Intent Crimes, paras 7, 20; Appeal on Superior Responsibility, paras 6, 18.

²³ Appeal on Omission Liability, para. 19; Appeal on Special Intent Crimes, para. 20; Appeal on Superior Responsibility, para. 18.

²⁴ Appeal on Omission Liability, paras 19, 21; Appeal on Special Intent Crimes, paras 20, 22; Appeal on Superior Responsibility, paras 18, 20.

²⁵ Appeal on Omission Liability, paras 10-17; Appeal on Special Intent Crimes, paras 11-18; Appeal on Superior Responsibility, paras 9-16, citing *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR72, Decision Pursuant to Rule 72(E) as to Validity of Appeal, 25 March 2003; *André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44-AR72.4, Decision on Validity of Appeal of André Rwamakuba Against Decision Regarding Application of Joint Criminal Enterprise to the Crime of Genocide Pursuant to Rule 72(E) of the Rules of Procedure and Evidence, 23 July 2004 ("*Rwamakuba Decision on Jurisdiction*"); *The Prosecution v. Vojislav Šešelj*, Case No. IT-03-67-AR72.1, Decision on Validity of Appeal of Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 29 July 2004

12. In response, the Prosecution submits that Karadžić should have sought authorisation by the Appeals Chamber to file multiple appeals against the Impugned Decision pursuant to the applicable practice direction.²⁶ With respect to the merits of the Appeals, the Prosecution first submits that the Trial Chamber provided sufficient reasons for determining that the Motions were non-jurisdictional.²⁷ It underscores that “[q]ualification under Rule 72(D) [of the Rules] is preliminary to assessing the merits of a jurisdictional challenge and is ultimately a yes or no determination”, and is thus typically brief.²⁸

13. The Prosecution further argues that Rule 72(D) provides the necessary framework and that formulation of further tests is unnecessary.²⁹ It contends that the Trial Chamber’s restrictive approach in determining the parameters of Rule 72(D) was correct³⁰ and consistent with the most recent Appeals Chamber’s jurisprudence.³¹ The Prosecution submits that “the test is not whether a finding in favour of the accused would exclude criminal liability” and that many non-jurisdictional considerations, including the “contours” of the mode of liability, may determine the ultimate issues of responsibility.³² The Prosecution further argues that the jurisprudence relied on by Karadžić does not demonstrate that the Trial Chamber erred in its determination as to whether the Motions posed jurisdictional challenges.³³

(“*Šešelj* Decision on Jurisdiction”); *Prosecutor v. Zdravko Tolimir*, 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 (“*Tolimir* Decision”); *Prosecutor v. Édouard Karemera et al.*, ICTR-98-44-AR72.7, Decision Pursuant to Rule 72(E) of the Rules of Procedure and Evidence on Validity of the Prosecution Appeal Regarding the Pleading of Joint Criminal Enterprise in a Count of Complicity in Genocide, 14 July 2006 (“*Karemera* Decision on Jurisdiction”); *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR72, Decision Pursuant to Rule 72(E) as to Validity of Appeal, 21 February 2003 (“*Hadžihasanović* Decision on Jurisdiction”).

²⁶ Response to Appeal on Omission Liability, para. 2; Response to Appeal on Special Intent Crimes, para. 2; Response to Appeal on Superior Responsibility, para. 2, citing Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155 Rev.3, 16 September 2005 (“Practice Direction”).

²⁷ Response to Appeal on Omission Liability, paras 4-6; Response to Appeal on Special Intent Crimes, paras 3-5; Response to Appeal on Superior Responsibility, paras 3-5.

²⁸ Response to Appeal on Omission Liability, para. 6; Response to Appeal on Special Intent Crimes, para. 5; Response to Appeal on Superior Responsibility, para. 5, citing, *inter alia*, *Tolimir* Decision, para. 10, as an example of a brief reasoning “stating only the Chamber’s conclusion”. *Id.*

²⁹ Response to Appeal on Omission Liability, para. 7; Response to Appeal on Special Intent Crimes, para. 6; Response to Appeal on Superior Responsibility, para. 6.

³⁰ Response to Appeal on Omission Liability, para. 8; Response to Appeal on Special Intent Crimes, para. 7; Response to Appeal on Superior Responsibility, para. 7.

³¹ Response to Appeal on Omission Liability, para. 9; Response to Appeal on Special Intent Crimes, para. 8; Response to Appeal on Superior Responsibility, para. 8, citing *Gotovina* Decision and *Tolimir* Decision.

³² Response to Appeal on Omission Liability, para. 10; Response to Appeal on Special Intent Crimes, para. 9; Response to Appeal on Superior Responsibility, para. 9.

³³ Response to Appeal on Omission Liability, paras 11-12; Response to Appeal on Special Intent Crimes, para. 10; Response to Appeal on Superior Responsibility, paras 10-11, citing *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003; *André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004; *Šešelj* Decision on Jurisdiction; *Karemera* Decision on Jurisdiction; *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-

14. Karadžić replies that neither the Rules nor the Practice Direction require authorisation before filing multiple appeals against an impugned decision.³⁴ Second, he reiterates that the Trial Chamber is required to provide reasoning even though “each step need not be spelled out”,³⁵ and that the Trial Chamber’s discussion whether the Preliminary Motions on Omission Liability and Superior Responsibility were a proper challenge of the form of the Indictment cannot substitute for the lack of reasoning as to why the motions did not constitute a challenge to jurisdiction.³⁶ Third, with reference to the former Rule 72(E) of the Rules, Karadžić argues that Rule 72(D) does not provide sufficient direction and that judicial guidance in this respect is required.³⁷ Further, Karadžić submits that the Prosecution misconstrued the purpose of his multiple references to the *Ojdanić*, *Šešelj*, *Milutinović*, *Rwamakuba*, *Tolimir* and *Karemera* decisions, which was to illustrate the lack of a definitive test for determining whether a motion is indeed jurisdictional.³⁸

2. Appeal on Omission Liability

15. Karadžić argues that the Trial Chamber erred in interpreting his Motion on Omission Liability as a motion challenging the form of the indictment as opposed to a motion challenging jurisdiction.³⁹ He posits that where the Prosecution characterises the essential elements of the forms of responsibility in a manner inconsistent with customary international law, this raises a question of jurisdiction.⁴⁰ He further contends that the Trial Chamber erroneously interpreted and applied the *Gotovina* and *Tolimir* Decisions. In this respect, Karadžić argues that unlike the submissions addressed in the *Gotovina* Decision, he is not seeking a correction or clarification of the pleadings in the Indictment, but rather a dismissal of the charges to the extent that they do not conform to customary international law and as such fall outside the Tribunal’s jurisdiction.⁴¹ Karadžić further argues that the Impugned Decision is at odds with the Appeals Chamber’s jurisprudence, which, in his view, has determined that where fundamental elements of a form of responsibility are questioned, this is properly considered a challenge to jurisdiction.⁴²

16. Finally, Karadžić submits that the Trial Chamber erred in concluding that because he is not “challeng[ing] the very existence of aiding and abetting and instigation as forms of responsibility at

AR72.6, Decision on Validity of Joseph Nzirorera’s Appeal of Decision “Reserving” Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity, 14 November 2005.

³⁴ Reply on Omission Liability, para. 2; Reply on Superior Responsibility, para.2.

³⁵ Reply on Omission Liability, para. 3; Reply on Special Intent Crimes, para. 2; Reply on Superior Responsibility, paras 3, 5.

³⁶ Reply on Omission Liability, para. 4; Reply on Superior Responsibility, para. 4.

³⁷ Reply on Omission Liability, para. 5; Reply on Special Intent Crimes, para. 3; Reply on Superior Responsibility, para. 6.

³⁸ Reply on Omission Liability, para. 6; Reply on Superior Responsibility, para. 7. *See also supra* n. 33.

³⁹ Appeal on Omission Liability, paras 22-23.

⁴⁰ *Ibid.* para. 24.

⁴¹ *Ibid.* para. 25.

all in international criminal law then any challenge to these forms of responsibility, however profound, must be either challenges to the form of the Indictment or matters for determination at trial".⁴³ He argues that in order to be found guilty of aiding and abetting or instigating by omission, it must be determined that these forms of responsibility exist in customary international law in the same way they are pleaded in the Indictment.⁴⁴ Accordingly, Karadžić submits that his Motion on Omission Liability met the criteria of Rule 72(D)(iv) as it challenged the existence in customary law of a fundamental element of the forms of responsibility pleaded in the Indictment.⁴⁵ He further argues that the Trial Chamber's extensive consideration of the Tribunal's jurisprudence on this issue reinforces the jurisdictional nature of the challenge posed by the motion.⁴⁶ Karadžić underlines that the Prosecution did not contest the jurisdictional nature of the motion when responding to it before the Trial Chamber.⁴⁷

17. Karadžić requests the Appeals Chamber to find that the Trial Chamber erred in determining that the Preliminary Motion on Omission Liability did not raise an issue of jurisdiction and to set a briefing schedule within which the parties can make submissions on the merits.⁴⁸

18. In response, the Prosecution submits that the Trial Chamber's interpretation of the Indictment was correct in finding that omission liability is charged only with respect to aiding and abetting and instigating.⁴⁹ It confirms that the Indictment does not allege omission liability with respect to planning and ordering.⁵⁰

19. It further submits that the matter raised by Karadžić cannot be distinguished from the issues the Appeals Chamber had to adjudicate upon in its *Gotovina* Decision.⁵¹ It argues that since Karadžić is not challenging the existence of aiding and abetting and instigating as modes of liability under article 7(1), but merely whether their *actus reus* may be perpetrated by omission, his assertion "goes directly to the contours of those modes of liability" and as such does not constitute a jurisdictional challenge.⁵²

20. In reply, Karadžić submits that the Prosecution's assessment of the appellate jurisprudence fails to reflect its relevance to the issue of jurisdiction with respect to omission liability, and

⁴² *Ibid.* para. 27, citing *Hadžihasanović* Decision on Jurisdiction.

⁴³ *Ibid.* para. 29 (footnote omitted).

⁴⁴ *Ibid.* para. 29(a).

⁴⁵ *Ibid.* para. 30.

⁴⁶ *Ibid.* para. 29(b).

⁴⁷ *Ibid.* paras 7, 31. *See also* Reply on Omission Liability, para. 7.

⁴⁸ Appeal on Omission Liability, para. 32.

⁴⁹ Response to Appeal on Omission Liability, para. 3, citing Impugned Decision, para. 69.

⁵⁰ *Ibid.* para. 3.

⁵¹ *Ibid.* para. 14, quoting *Gotovina* Decision, para. 24.

⁵² *Ibid.* para. 16.

erroneously purports that the issues raised go to the “contours” of the relevant forms of responsibility.⁵³

3. Appeal on Special Intent Crimes

21. Karadžić argues that the Trial Chamber erred in finding that his Motion on Special Intent Crimes did not raise a proper jurisdictional challenge.⁵⁴ He contends that the third category of JCE is not applicable to special intent crimes such as genocide, and therefore the respective allegations in the Indictment are based on a mode of liability over which the Tribunal has no jurisdiction.⁵⁵ In his view, the matter raised in his motion does not concern the contours or the scope of JCE responsibility, but whether this mode of liability falls within the Tribunal’s jurisdiction under Article 7(1) of the Statute.⁵⁶ Karadžić asserts in particular that since the Appeals Chamber recognized the motion in *Rwamakuba* as properly challenging the Tribunal’s jurisdiction, it should do so with regard to the present motion as well.⁵⁷ Karadžić requests the Appeals Chamber to find that the Trial Chamber erred in determining that the Motion on Special Intent Crimes did not raise an issue of jurisdiction, and to remand the matter to the Trial Chamber for consideration on the merits.⁵⁸

22. In response, the Prosecution submits that Karadžić’s Appeal on Special Intent Crimes should be dismissed.⁵⁹ It argues that the issues raised by Karadžić cannot be distinguished from the issues the Appeals Chamber had to adjudicate in its *Tolimir* and *Gotovina* Decisions.⁶⁰ Further, in its view, Karadžić is not challenging the applicability of JCE to the crime of genocide as a mode of liability in general, but only in relation to one of its sub-categories.⁶¹ As such, the Prosecution submits, the matter does not constitute a proper jurisdictional challenge and should be decided by the Trial Chamber on the basis of the facts of the case as they are established during the trial.⁶² The Prosecution requests the Appeals Chamber, should it find the challenges raised by Karadžić to be jurisdictional, to proceed with considering the appeal on the merits following the submission of briefings by the parties.⁶³

⁵³ Reply on Omission Liability, paras 8-9.

⁵⁴ Appeal on Special Intent Crimes, paras 24-25, citing *Rwamakuba* Decision on Jurisdiction, para. 13; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Decision on Ojdanić’s Motion Challenging Jurisdiction – Indirect Co-Perpetration (“*Ojdanić* Decision on Jurisdiction”), 22 March 2006, para. 23.

⁵⁵ *Ibid.* para. 26.

⁵⁶ *Ibid.* para. 26.

⁵⁷ *Ibid.* para. 24, citing *Rwamakuba* Decision on Jurisdiction, para. 13.

⁵⁸ *Ibid.* para. 28.

⁵⁹ See Response to Appeal on Special Intent Crimes, para. 11.

⁶⁰ *Ibid.* paras 12-15, citing *Tolimir* Decision, para. 10; *Gotovina* Decision, para. 24.

⁶¹ *Ibid.* para. 17.

⁶² *Ibid.* para. 17.

⁶³ *Ibid.* para. 18.

23. In reply, Karadžić argues that the Trial Chamber misinterpreted the Appeals Chamber's ruling in *Gotovina* which, in fact, supports the assertion "that a customary challenge to an element of a crime or an element of a mode of liability is jurisdictional under Rule 72(d)(iv)".⁶⁴ He further contends that unlike the appellant in the *Tolimir* Decision, in the instant case he is not disputing that the applicable law of the Tribunal allows conviction of a special-intent crime on the basis of the third category of JCE.⁶⁵ He advances the argument "that the applicable law, which has been correctly pleaded by the Prosecution, lacks the necessary customary foundation".⁶⁶ Karadžić further contends that both the Prosecution and the Trial Chamber misinterpreted the Appeals Chamber's decision in the *Rwamakuba* Decision on Jurisdiction, which supports the jurisdictional nature of the issues raised in his motion.⁶⁷

4. Appeal on Superior Responsibility

24. Karadžić submits that the Trial Chamber erred in finding that his Motion on Superior Responsibility did not raise a proper jurisdictional challenge. He argues that by alleging his responsibility under Article 7(3) for his subordinates' violations of the same Article, the Prosecution is introducing the concept of "multiple superior responsibility", which has no legal basis in customary international law and thus is *ultra vires* the Tribunal's jurisdiction.⁶⁸ He further submits that "a challenge to the constitutive elements of superior responsibility must necessarily be considered to be a jurisdictional challenge under Rule 72(A)(i)".⁶⁹ In support of his contention, Karadžić refers to the Appeals Chamber Decisions in *Hadžihasanović* and *Delić* where challenges to elements of a mode of liability were considered to be jurisdictional in nature.⁷⁰ Karadžić requests the Appeals Chamber to find that the Trial Chamber erred in determining that his motion did not raise an issue of jurisdiction, and to remand the matter to the Trial Chamber for consideration on the merits.

25. The Prosecution responds that in essence, Karadžić is challenging the interpretation of the term "commit" in the context of Article 7(3) of the Statute, which as such does not amount to a jurisdictional challenge.⁷¹ It further contends that where the appellant "merely challenges the definition and interpretation of a particular element [of a crime or mode of liability]" this does not

⁶⁴ Reply on Special Intent Crimes, para. 11.

⁶⁵ *Ibid.* paras 12-13.

⁶⁶ *Ibid.* para. 13.

⁶⁷ *Ibid.* paras 14-21.

⁶⁸ See Appeal on Superior Responsibility, paras 19, 21.

⁶⁹ *Ibid.* para. 22.

⁷⁰ *Ibid.* paras 23-24, citing *Hadžihasanović* Decision on Jurisdiction; *The Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR72, Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, 8 December 2005 ("*Delić* Decision on Jurisdiction"), para. 10.

⁷¹ Response to Appeal on Superior Responsibility, para. 12.

constitute a proper challenge to jurisdiction.⁷² The Prosecution argues that pursuant to the Appeals Chamber's jurisprudence, the invocation of customary international law is not considered to be an argument challenging the indictment on the basis that it does not relate to the matters referred to in Rule 72(D).⁷³ It further contends that contrary to Karadžić's submission, challenges to an element of a mode of liability or a crime are not necessarily jurisdictional.⁷⁴ The Prosecution requests the Appeals Chamber, should it find that the challenge raised by Karadžić is jurisdictional in nature, to proceed with considering the appeal on the merits following the submission of briefings by the parties.⁷⁵

26. In reply, Karadžić submits that the case law relied on by the Prosecution does not unequivocally support its claim.⁷⁶ He specifically notes that the Appeals Chamber Decision in *Gotovina* may be interpreted as supporting the contention that a challenge to the elements of a mode of liability can constitute a jurisdictional challenge pursuant to Rule 72.⁷⁷ Further, Karadžić submits that in order to relate to a particular mode of liability under Article 7 of the Statute, the indictment must plead all constitutive elements of that mode of liability as laid down in customary international law.⁷⁸ In his view, a challenge asserting no customary law basis for the charges pleaded in the indictment constitutes a proper jurisdictional challenge pursuant to Rule 72(D).⁷⁹

B. Analysis

1. Preliminary issues

27. The Appeals Chamber recalls that the Trial Chamber is endowed with a considerable degree of discretion in deciding issues of practice and procedure, including the issue of whether to consider similar motions together.⁸⁰ To this extent, the Appeals Chamber notes that the joint consideration of the six motions submitted by Karadžić does not *per se* amount to an error.

⁷² *Ibid.* para. 13, quoting *Gotovina* Decision, para. 24; see also *ibid.* paras 13-15, citing *Tolimir* Decision, para. 10; *Ojdanić* Decision on Jurisdiction, para. 23; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Decision on Preliminary Motions, 29 August 2005, para. 31.

⁷³ Response to Appeal on Superior Responsibility, paras 17-20, citing *Prosecutor v. Milimir Stakić*, Case No. IT-97-24-AR72, Decision on Application for Leave to Appeal, 19 February 2002; *Joseph Nzirorera v. The Prosecutor*, Case No. ICTR-98-44-AR72.3, Decision on Validity of Appeal of Joseph Nzirorera Regarding Joint Criminal Enterprise Pursuant to Rule 72(E) of the Rules of Procedure and Evidence, 11 June 2004.

⁷⁴ *Ibid.* para. 21.

⁷⁵ *Ibid.* para. 22.

⁷⁶ Reply on Superior Responsibility, para. 9.

⁷⁷ *Ibid.* para. 9.

⁷⁸ *Ibid.* para. 15.

⁷⁹ *Ibid.* para. 16.

⁸⁰ *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para 4, citing *Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 3.

28. With respect to Karadžić's decision to file several separate appeals against the Impugned Decision, the Appeals Chamber agrees with the Prosecution that this is not standard practice. If a party could file an unlimited number of appeals against one decision, provisions regulating the interlocutory appeals, such as word limitation,⁸¹ would be devoid of any sense. The proper procedure for Karadžić would thus generally be to file one appeal against the Impugned Decision, applying for extension of the word limit if necessary. Given the very particular context of these appeals, especially the wide range of issues addressed in the Impugned Decision, the filing of more than one appeal was potentially justifiable. In any event, the Appeals Chamber finds that it would not be in the interests of judicial expediency to order Karadžić to re-file his submissions in this case, and notes that no party has been prejudiced in the circumstances given that separate responses and replies were subsequently filed. In turn, the fact that the Appeals Chamber accepts these appeals as validly filed does not preclude it from rendering its decisions in a consolidated manner, if and where appropriate.⁸²

29. Finally, with respect to the scope of appeal, the Appeals Chamber clarifies that the issue currently before it is whether the Trial Chamber erred in its determination that the Motions did not raise any jurisdictional challenge.

2. Reasoned opinion

30. With respect to Karadžić's claim that the Impugned Decision lacked reasoned support, the Appeals Chamber emphasises that while a Trial Chamber must provide reasoning in support of its findings on the substantive considerations relevant for a decision, it is not required to articulate every step of its reasoning.⁸³ Nor is the Trial Chamber required to discuss at length all the Tribunal's case-law on a certain legal issue. Rather, it must identify the precedents on which its findings are based.⁸⁴

31. In the instant case, in determining that none of the six motions submitted by Karadžić amounts to a challenge to jurisdiction within the terms of Rule 72(D)(iv), the Trial Chamber considered the Tribunal's jurisprudence where "challenges of a similar nature" have been brought.⁸⁵ It relied upon the *Gotovina* Decision stating that the issue of whether the Prosecution has failed to plead an element of the mode of liability properly relates to pleading practice and the form of the

⁸¹ See Practice Direction on the Length of Briefs and Motions, IT/184 Rev.2, 16 September 2005, at 3.

⁸² The Appeals Chamber underscores that its flexibility in this case is exceptional, and notes that in future it may well require re-filing of submissions where multiple appeals are filed against a single decision.

⁸³ *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement, 3 April 2007, para. 39, citing *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-A, Judgement, 6 November 2001, para. 18.

⁸⁴ *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Judgement, 22 April 2008, para. 13.

⁸⁵ Impugned Decision, para. 31.

indictment, and does not amount to a jurisdictional challenge.⁸⁶ The Trial Chamber further referred to the *Tolimir* Decision where the appellant's challenge to the applicability of joint criminal enterprise to establishing responsibility for genocide and conspiracy to commit genocide was dismissed as non-jurisdictional.⁸⁷ Finally, it accorded with the position taken in its *Ojdanić* Decision on Jurisdiction, where the Trial Chamber stated that "challenges concerning the contours of a form of responsibility are matters to be addressed at trial".⁸⁸ Having satisfied itself that the Preliminary Motion raised similar challenges as discussed in the cited jurisprudence, the Trial Chamber concluded that "[f]or these reasons [...] none of the Motions amounts to a challenge to jurisdiction within the terms of Rule 72(D)(iv)".⁸⁹

32. While it may have been desirable for the Trial Chamber to indicate explicitly the relevance of the cited jurisprudence to the Motions on Omission Liability and Superior Responsibility, Karadžić fails to show that the Trial Chamber's reasoning, as a whole, was insufficient. As to the Motion on Special Intent Crimes, the Trial Chamber explicitly observed that the arguments advanced by Karadžić are similar to those discussed and dismissed by the Appeals Chamber in the *Tolimir* Decision.⁹⁰ Accordingly, the Appeals Chamber rejects Karadžić's submission that the Trial Chamber failed to provide sufficient reasoning in dismissing the jurisdictional nature of the motion.

3. Whether the Preliminary Motions raised any jurisdictional challenge

33. The Appeals Chamber recalls that Karadžić's challenges to the Tribunal's jurisdiction focus on the mode by which liability is attributed to him. As these challenges do not relate to persons, territories, or time periods,⁹¹ the core issue underlying the Appeals is whether they involve subject matter jurisdiction as defined in Rule 72(D)(iv) of the Rules,⁹² and thus may be appealed as of right.

34. Karadžić makes extensive reference to certain decisions, such as *Rwamakuba*,⁹³ issued by three judge panels under a previous version of Rule 72 of the Rules.⁹⁴ Many of the decisions cited by Karadžić lend some support to the view that even relatively granular issues, such as the contours and elements of mode of liability, could be jurisdictional in nature.⁹⁵ However, other decisions issued by these three judge panels advanced a narrower view of jurisdiction under Rule 72 of the

⁸⁶ *Ibid.* para. 30, citing *Gotovina* Decision.

⁸⁷ *Ibid.* para. 31, citing *Tolimir* Decision, paras 7, 10.

⁸⁸ *Ibid.* para. 31, citing *Ojdanić* Decision on Jurisdiction, para. 23.

⁸⁹ *Ibid.* para. 32.

⁹⁰ *Ibid.* para. 31.

⁹¹ Rule 72(D)(i)-(iii) of the Rules, IT/32/Rev. 36 (21 July 2005).

⁹² Karadžić does not contend that the Appeals related to personal, territorial or temporal jurisdiction.

⁹³ *Rwamakuba* Decision on Jurisdiction (commenting on the corresponding ICTR rule, which is equivalent in all relevant respects).

⁹⁴ See, e.g., Rule 72(E) of the Rules, IT/32/Rev. 34 (22 February 2005).

⁹⁵ See, e.g., *Šešelj* Decision on Jurisdiction; *Hadžihasanović* Decision on Jurisdiction.

Rules.⁹⁶ In 2005, a revision to the Rules eliminated Rule 72(E) of the Rules and reverted the question of whether an appeal addressed jurisdictional issues to standard panels of five Appeals Judges.⁹⁷ Since that revision of the Rules, the Appeals Chamber's jurisprudence has gradually resolved previous uncertainty relating to the issue of which questions qualified as jurisdictional challenges.

35. The Appeals Chamber's most recent jurisprudence on the question of jurisdiction focuses narrowly on the plain text of Rule 72 of the Rules. For example, in *Gotovina*, the Appeals Chamber dismissed a challenge concerning the applicable *mens rea* of the third category of JCE, as it determined that the claim was not related to questions of jurisdiction.⁹⁸ To the extent the appeal was challenging the definition and interpretation of a particular element of the mode of liability, the Appeals Chamber found that "[s]uch an argument goes to the pleading practice and the form of the indictment and is not a challenge to jurisdiction".⁹⁹ The Appeals Chamber also adopted this approach in its *Tolimir* Decision. There, the appellant challenged the applicability of JCE to establishing responsibility for the crimes of genocide and conspiracy to commit genocide. In rejecting his appeal, the Appeals Chamber concluded that "though at first glance [the appeal seemed] somewhat related to subject-matter jurisdiction", it involved non-jurisdictional issues that could be resolved during the course of trial.¹⁰⁰

36. As *Tolimir* and *Gotovina* demonstrate, the Appeals Chamber's approach to subject matter jurisdiction now focuses on whether the crime charged is envisioned by the statute, and whether the mode of liability upholds the principle of individual criminal responsibility; 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".¹⁰¹

37. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's reliance on the Appeals Chamber's distillation of case law on the scope of jurisdictional appeals as set out in

⁹⁶ See, e.g., *Joseph Nzirorera v. The Prosecutor*, Case No. ICTR-98-44-AR72, Decision Pursuant to Rule 72(E) of the Rules of Procedure and Evidence on Validity of Appeal of Joseph Nzirorera Regarding Chapter VII of the Charter of the United Nations, 10 June 2004 (rejecting an interlocutory appeal as failing to raise a jurisdictional challenge because Rule 72(D) is narrow in scope in permitting appeals as of right).

⁹⁷ Compare Rule 72 of the Rules, IT/32/Rev. 34 (22 February 2005), with Rule 72 of the Rules, IT/32/Rev. 36 (21 July 2005); see, e.g., *Šešelj* Decision on Jurisdiction.

⁹⁸ *Gotovina* Decision, para.24.

⁹⁹ *Ibid.* at para. 24.

¹⁰⁰ *Tolimir* Decision, paras 7, 10; see also Impugned Decision, para. 31. In 2007, the Appeals Chamber also noted that a broad based challenge to indirect modes of perpetration and aiding and abetting was jurisdictional, though it initially dismissed this challenge on other grounds. See *Prosecutor v. Jadranko Prlić et al*, Case No. IT-04-74-AR72.2, Decision on Petković's Appeal Against Decision on Defence Motion to Strike the Amended Indictment, 4 June 2007, paras 3-5; *Prosecutor v. Jadranko Prlić et al*, Case No. IT-04-74-AR72.3, Decision on Petković's Appeal on Jurisdiction, 23 April 2008, paras 19-22.

¹⁰¹ *Tolimir* Decision paras 7, 10 (internal quotations omitted); see also *Gotovina* Decision paras 22-24.

Gotovina and Tolimir.¹⁰² For the foregoing reasons, the Appeals Chamber finds that Karadžić fails to raise a proper jurisdictional challenge pursuant to Rule 72 of the Rules.

IV. DISPOSITION

38. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeals. Karadžić's request for a briefing schedule for the submissions on the merits is therefore moot.

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

Done this 25th day of June 2009,

At The Hague, The Netherlands.



Judge Theodor Meron, Presiding

[Seal of the Tribunal]

¹⁰² Impugned Decision paras 30-32.