THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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

IN TRIAL CHAMBER No. 3

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

Acting Registrar: Mr. ~~Hans Holthuis~~ John Hocking

Date Filed: 28 January 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

RESPONSE TO MOTION TO AMEND INDICTMENT

The Office of the Prosecutor:
Mr. Alan Tieger
Mr. Mark Harmon

The Accused:
Radovan Karadzic

Preliminary Matters

1. On 22 September 2008, the prosecution filed its *Motion to Amend the First Amended Indictment*. Dr. Karadzic now responds.

2. Dr. Karadzic wishes to strongly assert that the charges against him in the proposed amended indictment are untrue. Neither he nor the Republika Srpska ever had the objective of expelling or killing Bosnian Muslims or Croats, or of destroying the Bosnian Muslims, as a group, in whole or in part. The entire premise upon which the proposed indictment stands is false.

3. However, Dr. Karadzic recognizes that these are issues going to the merits which will be explored during the trial. He wants to bring a vigorous and comprehensive defence to the facts upon which the charges are based at that time. Therefore, his focus concerning the issue of amending the indictment is to ensure that conditions are in place which will allow him to have a fair trial and mount an effective defence.

4. Dr. Karadzic does not view this response as the time to challenge the jurisdiction of the Tribunal to try him on the proposed charges, or the time to challenge the form of the proposed indictment. Rule 72 gives him the right to do that by preliminary motion after leave to amend the proposed indictment is granted by the Trial Chamber. Therefore, he respectfully requests that should the Trial Chamber grant the prosecution's motion, it fix a date for such motions to be filed within 30 days from his initial appearance on the new indictment.[1]

5. Dr. Karadzic does not oppose, in principle, the amending of the amorphous First Amended Indictment. However, the proposed amended indictment is not much better. To prepare for and conduct a trial on such wide ranging charges will take years and years. He respectfully suggests that the Trial Chamber grant leave to amend only parts of the proposed amended indictment at this time, reserving its decision on the other parts until after final judgement.

[1] There appears to be an ambiguity in the date that preliminary motions are due. Rule 72(A) provides for such motions to be brought within 30 days of disclosure of all supporting material. But such motions challenge jurisdiction and form of the indictment, and the indictment in this case has not yet been filed. The proposed indictment could be modified during the leave-granting process. Therefore, Dr. Karadzic respectfully requests that the date for preliminary motions be fixed at 30 days after his initial appearance on the new indictment.

The Lessons of the Milosevic Trial

6. Lord Iain Bonomy, the Presiding Judge of this very Trial Chamber, commenting on the joinder of the Bosnia, Croatia, and Kosovo charges against Slobodan Milosevic, said that:

> Should a similar situation arise in the future, careful thought should be given to whether joining such massive indictments together may make a trial unwieldy, bearing in mind the adversarial process to be followed, and may delay judgement unduly in a long leadership case involving an elderly accused.[2]

7. The prosecution has not heeded this advice. Its proposed amended indictment against Dr. Karadzic, a 63 year old accused,[3] joins four distinct events: (a) crimes committed in various municipalities in Bosnia from 1991 in furtherance of the alleged objective of expelling Muslims and Croats; (b) crimes committed in connection with the alleged siege of Sarajevo from 1992; (c) crimes committed in Srebrenica in 1995; and (d) hostage taking incidents in 1995.

8. Trials have already been held on some of these components. For example, the *Krajisnik* trial took 3 years and 10 months of pre-trial preparation and 2 ½ years for trial on an indictment for crimes in municipalities in Bosnia during a shorter time frame than that alleged against Dr. Karadzic. The *Brdjanin* trial took 2 ½ years of pre-trial preparation and 2 years and 3 months of trial for just a portion of the municipalities charged in the proposed amended indictment.

9. For the Sarajevo events alone, the *Galic* case took 2 years of pre-trial preparation and 2 ½ years for trial of a military commander. For the Srebrenica case alone, the *Blagojevic & Jokic* case took 1 year and seven months of pre-trial preparation and 1 year and 5 months for trial of low-ranking military officers. The *Popovic* case is in its third year.

10. If it grants leave to amend the indictment in its present form, the Trial Chamber must provide Dr. Karadzic with adequate time to prepare for one of the most complex, wide-ranging trials in history, and then spend many years holding a mega-trial on the prosecutor's indictment.

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[2] Iain Bonomy, "The Reality of Conducting a War Crimes Trial", 5 *Journal of International Criminal Justice* 348, 358 (2007)

[3] Slobodan Milosevic was 61 years old when his trial commenced.

11. This would not be learning the lessons from the *Milosevic* trial.

12. Judge Bonomy's *Working Group on Speeding Up Trials* concluded in February 2006 that the ICTY prosecution was unwilling to voluntarily reduce the size of its indictments, and recommended that if any serious attempt was to be made to focus trials appropriately, it would have to be undertaken by judges of the Tribunal, setting appropriate limits in "a number of imaginative ways".[4]

13. Dr. Karadzic contends that this is the moment for the Trial Chamber to implement imaginative initiatives to focus the trial of his case.

14. Another member of the bench in the *Milosevic* trial, Judge O-Gon Kwon, has written that:

> ...the greatest challenge currently facing the judges of the ICTY is the sheer enormity of the cases before them. For the Tribunal to be able to process its remaining workload in the time made available to it in the Security Council, it is incumbent on the Office of the Prosecutor to give up its reluctance to take the lead in reducing the size of its own cases.[5]

15. A former Senior Legal Officer who worked on the *Milosevic* trial, Gideon Boas, has also observed that joinder of all charges into one trial against *Milosevic* was a mistake which impacted not only the management of the trial but the fair trial rights of the accused:

> In the framework of international criminal trials, this [joinder] ruling stands as a warning to the overextension of same transaction theories and the underestimation of the importance of practical case management issues in the exercise of a court's discretion to join events or indictments into large complex cases.[6]

16. One of the *amicus curiae* appointed by the Trial Chamber in the *Milosevic* trial, Gillian Higgins, has written that

> Increased judicial intervention at the pre-trial stage is essential in order to prevent unwieldy and overly complicated trials. Renewed consideration must be given to the development and/or proactive application of the rules in international criminal procedure

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[4] Final Report of the Working Group on Speeding Up Trials (13 February 2006) at 5,13
[5] O-Gon Kwon, "The Challenge of an International Criminal Trial as Seen From the Bench", 5 *Journal of International Criminal Justice* (2007) 360, 375
[6] Gideon Boas, *The Milosevic Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (2007), 121.

to permit the judiciary to reduce the scope of the indictment.[7]

17. Even a former member of the Office of the Prosecutor has called for reducing the size and complexity of indictments, observing that:

> Trying former world leaders is always going to test any criminal system, but the Milosevic precedent tells us that the prosecution can get smarter and more efficient about how they conduct proceedings, primarily by simplifying their prosecutorial strategy. Ambitious drafting is counter-productive and zealous posturing with respect to what these trials will achieve on a grand scale, will be met predictably by disdain and counterclaim from the defence.[8]

18. Therefore, participants in the *Milosevic* trial from all corners have recognized the dangers and unfairness of proceeding to trial on an amorphous indictment.

19. Those who champion the rights of victims also are in favor of more manageable indictments. Richard Dicker, Director of Human Rights Watch's international justice programs, has written that "in retrospect separate Milosevic trials on the crimes committed in Croatia, Bosnia, and Kosovo would have been more manageable than one combined proceeding."[9]

20. In its decision on the instant Motion to Amend the Indictment, the Trial Chamber has the opportunity to demonstrate that it has learned one of the lessons of the *Milosevic* trial. Dr. Karadzic respectfully urges the Trial Chamber to take control of the proceedings by limiting the charges in the proposed amended indictment.

Rule 50

21. The Trial Chamber has the power to do so under Rule 50, which governs the amendment of indictments. Rule 50 provides, in pertinent part:

(i) The Prosecutor may amend an indictment:

(a) at any time before its confirmation, without leave;

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[7] Gillian Higgins, "Fair and Expeditious Pre-Trial Proceedings: The Future of International Criminal Trials, 5 *Journal of International Criminal Justice* (2007) 394,398

[8] Gwynn McCarrick, "Lessons from the Milosevic Trial", http://www.globalpolicy.org/intljustice/tribunals/yugo/2006/0426online.htm (26April 2006)

[9] Richard Dicker, "Milosevic Won't Escape History's Verdict" *International Herald Tribune* (13 March 2006), http://www.iht.com/articles/2006/03/12/opinion/eddicker.php

(b) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and

(c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.

22. It is well established that judges at the ICTY have wide discretion in deciding whether to grant leave to amend an indictment, and that they have a duty to exercise discretion to avoid prejudice to the accused. Two factors are primarily considered when evaluating prejudice: (1) whether the accused is given an adequate opportunity to prepare an effective defence; and (2) whether granting the amendment will result in undue delay.[10] Amendments by the prosecution which would complicate the trial and thus delay its completion, should be denied.[11]

23. It is also established that granting leave to amend an indictment is not an "all or nothing" exercise. In the *Milutinovic* case, the Trial Chamber granted leave to amend a proposed indictment while ordering that the new indictment be modified from the proposed indictment of the prosecution.[12]

24. Therefore, the Trial Chamber has the power to grant leave to amend the indictment by ordering that the new indictment contain only one of the four components of the proposed amended indictment. It can reserve its decision on the remainder of the proposed amendments until after final judgement, at which time the interests of justice and prejudice to the accused in proceeding on additional components of the proposed amended indictment can be assessed.[13]

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[10] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Amended Indictment* (1 November 2005) at para. 7

[11] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on the Prosecution's Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment* (30 June 2006) at para. 74

[12] *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment* (22 March 2006)

[13] This would also allow the United Nations Security Council the opportunity to determine whether and how long it wished to continue to allow the Tribunal to operate without being held hostage by an uncompleted mega-trial.

Rule 73 *bis*

25. While Dr. Karadzic's proposal would represent the most extensive use of the Trial Chamber's powers under Rule 50 at the ICTY, it must be recognized that the Trial Chamber's power to organize a manageable trial is at its greatest when exercising its discretion on the indictment under Rule 50. Other mechanisms for managing the trial are not sufficient to significantly reduce its scope.

26. For example, Rule 73 *bis* (E) provides:

> Upon or after the submission by the pre-trial Judge of the complete file of the Prosecution case pursuant to paragraph (L)(i) of Rule 65 *ter*, the Trial Chamber, having heard the parties and in the interest of a fair and expeditious trial, may direct the Prosecutor to select the counts in the indictment on which to proceed.

27. This provision would provide too little, too late in Dr. Karadzic's case. The way the prosecution has structured the proposed amended indictment, it has lumped the Srebrenica and Sarajevo events in with the events in the municipalities in its persecution count (Count 3), extermination count (Count 4), and murder counts (Count 5 and 6). It has lumped the Srebrenica and municipalities events together in its deportation count (Count 7) and inhumane acts count (Count 8).

28. Therefore, an order under Rule 73 *bis* (E) could not accomplish a trial on one of the four components of the amended indictment, since those components are mixed into the counts of the indictment.

29. In addition, under Rule 73 *bis* (E), such action could not be taken until after the prosecution had made all of its pre-trial filings, including its pre-trial brief. Meanwhile, both parties would have to spend months preparing for a trial on the entire indictment. This would be a costly and time-wasting exercise that can be avoided by acting at the time of the amending of the indictment under Rule 50.

30. Rule 73 *bis* (D) provides another mechanism for reducing the scope of the trial. It provides:

> After having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by

> the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged

31. While this provision can be exercised at any time, it has a serious limitation for application to this case. Under the last sentence of Rule 73 *bis* (D), removal of counts or incidents must not result in an indictment which would no longer be representative of the prosecution's case as a whole.[14] Therefore, it would not be possible to eliminate any of the four components of the indictment by utilizing Rule 73 *bis* (D).

32. As can be seen by an analysis of the application of Rule 73 *bis* to Dr. Karadzic's case, once approved, an indictment will define the limitations of what the Trial Chamber can do to manage the trial. This makes it all the more important to act at the stage of amending the indictment to take control of the scope of the case which will be tried.

Rule 49

33. Rule 49 provides that:

> Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.

34. Given the broad interpretation given to the term "same transaction" by the Appeals Chamber in the *Milosevic* case[15], finding that crimes allegedly committed in three countries over 7 years were part of the same transaction, it appears unlikely that severance of the four components would be ordered in Dr. Karadzic's case under Rule 49.

35. Therefore, acting under Rule 50, at the stage of granting leave to the amended indictment is the only way to effectively avoid a *Milosevic*-like mega-trial.

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[14] *Prosecutor v Haradinaj*, No. IT-04-84-PT, *Decision Pursuant to Rule 73 bis (D)* (4 February 2008) at para 9

[15] *Prosecutor v Milosevic*, No. IT-99-37-AR73, *Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder* (18 April 2002)

Conclusion

36. This is the Tribunal's first and best opportunity to demonstrate that it has learned the lessons of the *Milosevic* trial. By approving only a limited amended indictment, the Trial Chamber will promote the interest of a fair and expeditious trial for all concerned.

Word count: 2763

Respectfully submitted,

Radovan Karadzic[16]

[16] The assistance of Legal Interns Sam Holden, Jakub Macak, Jennifer Robinson, and Rachael Wong in the research for this response is gratefully acknowledged.