

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. John Hocking

Date Filed: 20 March 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

PRELIMINARY MOTION ALLEGING DEFECT IN FORM OF THE INDICTMENT –
JOINT CRIMINAL ENTERPRISE MEMBERS
AND NON-MEMBER PARTICIPANTS

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark Harmon
Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadzic

Introduction

1. Dr. Radovan Karadzic hereby files this preliminary motion, pursuant to Rule 72(A)(ii), alleging defects in the form of the Third Amended Indictment concerning the identity of the alleged members of the joint criminal enterprises and non-member participants. He seeks a finding by the Trial Chamber that the Indictment is defective and an order requiring the Prosecution to further amend its Indictment to include the particulars listed in Annex A to this motion.

Identity of the Members of the Joint Criminal Enterprise

2. Article 18(4) of the ICTY Statute and Rule 47(C) of the Rules of Procedure and Evidence stipulate that a valid Indictment must contain a concise statement of the facts and the crime or crimes with which the Accused is charged. Read together with the Article 21 protections of the Accused's right to a fair and public hearing,¹ to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him,² and to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing,³ the Prosecution is required to plead the material facts with "the greatest precision" possible when preparing an Indictment.⁴ When the Prosecution alleges a joint criminal enterprise, the Tribunal has held that the

¹ Article 21(2)

² Article 21(4)(a)

³ Article 21(4)(b)

⁴ *Prosecutor v. Naletilic et al.*, No. IT-98-34-A, *Judgement*, (3 May 2006) at para. 24; *Prosecutor v. Gotovina et al.*, No. IT-06-90-PT, *Decision on Ante Gotovina's Preliminary Motions Alleging Defects in the Form of the Joinder Indictment* ("First Gotovina Decision"), (19 March 2007) at paras. 7 and 8; *Prosecutor v. Kvočka et al.*, No. IT-98-30-PT, *Decision on Defence Preliminary Motions on the Form of the Indictment* ("First Kvočka Decision"), (12 April 1999) at para. 17 and 18; *Prosecutor v. Blaskic*, No. IT-95-14-A, *Judgement*, (29 July 2004) at para. 212; *Prosecutor v. Kupreskic et al.*, No. IT-95-16-A, *Judgement*, (23 October 2001) at para. 114; *Prosecutor v. Krnojelac*, No. IT-97-25, *Decision on the Defence Preliminary Motion on Form of Indictment* ("First Krnojelac Decision"), (24 February 1999) at para. 12 and 60; *Prosecutor v. Blaskic*, No. IT-95-14-PT, *Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges)*, (4 April 1997) at para. 20; *Prosecutor v. Simic* No. 11-95-9-A, *Judgement*, (28 November 2006) at para. 20; *Prosecutor v. Pavkovic et al.*, No. IT-03-70-PT, *Decision on Vladimr Lazarevic's Preliminary Motion on Form of Indictment*, (8 July 2005) at para. 4, *Prosecutor v. Todovic et al.*, No. IT-97-25/1-PT, *Decision on Todovic Defence Motion on the Form of the Joint Amended Indictment*, (21 March 2006) at para. 11.

identity of participants constitutes a material fact that must be pleaded in detail, 'so far as their identity is known, but at least by category or group.'⁵

3. The requisite degree of specificity in each case is not an abstract question, but depends on the circumstances of the case and what can be realistically required of the Prosecution.⁶ While the Prosecution is therefore not required to 'perform the impossible',⁷ it is always required to provide the maximum specificity *that it can*.⁸
4. For example, in the *Gotovina* case, the Appeals Chamber said that: "since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in the position to name the victims, it should do so."⁹
5. The same principle requires the Prosecution to furnish the identities of the members of the JCE and non-member participants where it has that information.
6. The Indictment alleges four JCEs in which Dr. Karadzic is alleged to have participated: one 'overarching' JCE and three subsidiary ones. Paragraphs 11, 16, 21 and 26 (addressing each of the four JCEs respectively) identify some of the 'other members' of each JCE by name; the first two JCEs lists some of the more prominent political and military figures at the time;¹⁰ the second two JCEs name only Dr Karadzic and Ratko Mladic as participants.¹¹ In paragraphs 12, 17, 22 and

⁵ *Pavkovic et al.*, above n 1, at para. 7; *Prosecutor v. Krnojelac*, No. IT-97-25-PT, *Decision on Form of Second Amended Indictment* ("Second *Krnojelac* Decision"), (11 May 2000) at para. 16; *Prosecutor v. Boskoski and 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 Proposed Indictment*, (1 November 2005) at para. 42.

⁶ *Prosecutor v. Prlic et al.*, No. 11-04-74-PT, *Decision on Defence Preliminary Motions Alleging Defect in the Form of the Indictment*, (22 July 2005) at para 9; *Prosecutor v. Gotovina et al*, No. IT-06-90-AR73.3, *Decision on Joint Defence Interlocutory Appeal Against Trial Chamber's Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims* ("Second *Gotovina* Decision"), (26 January 2009) at para. 17; *Kupreskic et al.*, above n 1, at para. 89.

⁷ First *Krnojelac* Decision, above n 1, at para 40; Second *Gotovina* Decision, above n 2, at para. 18, *Todovic et al.*, above n 1, at para. 17.

⁸ *Naletilic et al*, above n 1, at para. 24; First *Kvočka* Decision, above n 1, at para. 24, Second *Gotovina* Decision, above n 3, at para. 18; *Boskoski and Tarculovski*, above n 2, at para. 42; , *Todovic et al.*, above n 1, at para. 16 and 20; *Pavkovic et al.*, above n 1, at para. 25, 26, 33 34; Second *Krnojelac* Decision, above n 2, at para. 18.

⁹ Second *Gotovina* Decision, above n 3, at para. 18, citing *Kupreskic et al.*, above n 1, at para. 90

¹⁰ *Prosecutor v. Karadzic*, No. IT-95-5/18-PT, *Third Amended Indictment* ("Third Amended Indictment"), (27 February 2009), at para. 11 and 16.

¹¹ *Ibid*, at para. 21 and 26.

26 that follow, however, the further alleged members are only described as ‘commanders, assistant commanders, senior officers, and chiefs of units’ of various military and political organisations, or simply ‘members of the Bosnian Serb leadership’.¹²

7. The allegations in Dr. Karadzic’s Indictment have been the subject of many trials at this Tribunal. The JCE members identified by name have generally been indicted and brought to trial at the ICTY.¹³ Their Indictments, trials, and (where applicable) judgments have provided significantly greater detail than the present Indictment – including names of those in leadership roles and more detail about relevant categories or groups.¹⁴ Given that the prosecution has these details, and has provided them in respect of the other JCE members’ cases, omitting that information in Dr. Karadzic’s Indictment renders the Indictment defective.
8. The joint criminal enterprise allegations include persons alleged to have been ‘used’ by the members. These persons are listed in the broadest possible terms, often barely even placing them in an adequate category or group. Identifying participants simply as ‘members of the VRS and the MUP’¹⁵ or ‘volunteer units’¹⁶ expands their ‘category’ to unacceptably broad proportions. Moreover, ‘local Bosnian Serbs’¹⁷ could pertain to any member of the Bosnian Serb population, and therefore identifies no valid category or group at all.
9. Reading the Indictment as a whole does not resolve the problem. Indeed, a holistic analysis reveals the irregularity of the Prosecution’s effort at identification, such as naming the most notorious figures of the alleged JCE but

¹² *Third Amended Indictment*, above n 7, at para. 12.

¹³ For example, Momcilo Krajisnik, Slobodan Milosevic, Biljana Plavsic, Nikola Koljevic, Mico Stanisic, Jovic Stanisic, Franko Simatovic, Zeljko Raznatovic, Vojislav Seselj and Dragomir Milosevic.

¹⁴ See, e.g., *Prosecutor v. Krajisnik*, No. IT-00-39-T, *Judgment*, 27 September 2006, see paras. 25-34, 37-42; *Prosecutor v. Galic*, No. IT-98-29-T, *Judgment*, (5 December 2003) see para. 201; *Prosecutor v. Seselj*, No. IT-03-67, *Third Amended Indictment*, (7 December 2007) see para. 8; *Prosecutor v. Mladic*, No. IT-95-5/18, *Amended Indictment*, (10 October 2002) see paras. 17 and 24; *Prosecutor v. Milosevic*, No. IT-02-54, *Amended Indictment “Bosnia and Herzegovina”*, (22 November 2002) see paras. 15, 16, 19 and 20; *Prosecutor v. Stanisic and Simatovic*, No. IT-03-69, *Prosecution Notice of Third Amended Indictment*, (10 July 2008) see para. 6; *Prosecutor v. Zupljanin and Stanisic*, No. IT-08-91-PT, *Prosecution’s Submission of Consolidated Indictment with Annex A and A Confidential Attachment*, (29 September 2008) see para. 8.

¹⁵ *Third Amended Indictment*, above n 7, at para. 28.

¹⁶ *Ibid*, at para. 13.

¹⁷ *Ibid*, at para. 13.

omitting those of lesser leadership roles despite having included them in other indictments.

10. The Prosecution can easily do better. For example, the events of Sarajevo have been the subject of two lengthy trials – those of Generals Galic and Milosevic. By now, the prosecution knows the identity of members of the alleged joint criminal enterprise it claims are responsible for crimes in Sarajevo.
11. Where the Indictment describes ‘members of the VRS, in particular the Sarajevo Romanija Corps; and members of other elements of the Serb Forces operating in or with responsibility over the Sarajevo area’,¹⁸ the implication is that the Prosecution is selectively specifying where it could provide more detail. Either the Prosecution should make clear that the Sarajevo Romanija Corps are the only category or group known by name – in which case it should strike out the more vague descriptors as insufficiently specific – or it should provide further detail.
12. While the alleged scale of crimes may have excused the listing of the individual members of the joint criminal enterprise in the first Sarajevo case, now that the Prosecution has learned the identity of the JCE members, it is obligated to provide that information in subsequent indictments.
13. The particulars of all other material facts are listed in substantial detail in seven appended schedules.¹⁹ These schedules include precise information identifying victim and location names and exact dates. The identification of known JCE members and non-member participants must be given the same treatment.
14. The same is true for the Srebrenica events, which have been the subject of three trials at the ICTY, many prosecutions at the Bosnia War Crimes Court, and a detailed investigation by the Dutch government which has been shared with the prosecution.
15. More accurate information is essential to Dr. Karadzic’s ability to adequately prepare his defence. Requiring this information is not asking ‘the impossible’ of the Prosecution as it would appear that it already possesses such particulars. The large scope of the crimes alleged and Dr. Karadzic’s proximity to them as a

¹⁸ Ibid, at para. 18.

¹⁹ Ibid, see Schedules A-G.

political leader do not mitigate this vagueness, as the Prosecution is simply being asked to provide the particulars it can, or, at times, the level of particulars required to make an Indictment valid *at all*. The Prosecution cannot be allowed to exploit the fact that practical concessions have been granted to it in cases where it is unable to provide a higher level of specificity than category or group – now that it has acquired the necessary information.²⁰

16. Indeed, the Prosecution itself identified its obligations when it stated in its Motion to Amend the First Amended Indictment that specificity was an essential factor in ‘assist[ing] the Accused in understanding the Prosecution’s case against him, and in preparing an effective defence’,²¹ as well as ‘help[ing] to ensure that the real issues in the case will be determined’²² and ‘the increased efficiency in the proceedings resulting from narrowed and clarified charges.’²³ While it has maintained these sentiments in identifying more precise dates, incident locations and victims’ names in its schedules, it has not sufficiently attended to the identity of joint criminal enterprise members and non-member participants.

17. Other Trial Chambers have required the prosecution to provide further particulars concerning the identity of members of a joint criminal enterprise. In the *Pavkovic* case, the Trial Chamber upheld the Defence’s objection that the “forces of the FRY and Serbia” were inadequately described in that Indictment, despite the large crime-base in question. The Trial Chamber stated that:

‘The Indictment provides some description of the corps, units and groups allegedly subordinated to the Accused. However, the Prosecution fails to explain why it would be impracticable to plead in the Indictment which of the units in question were allegedly involved in the events in each municipality. In addition, where specific forces are referred to, it is not clear whether the Prosecution pleads that only those forces and units were involved in the commission of the crimes charged.’²⁴

²⁰ *Pavkovic et al.*, above n 1, at para. 25, 33 34.

²¹ *Prosecutor v. Karadzic*, No. IT-95-5/18-PT, *Motion to Amend the First Amended Indictment*, (27 September 2006) at para. 3.

²² *Ibid*, at para. 3.

²³ *Ibid*, at para. 5.

²⁴ *Pavkovic et al.*, above n 1, at para. 33.

18. The Trial Chamber in *Krnojelac* made the same point,²⁵ and warned that ‘it would not be appropriate for the Prosecution to fail to comply with that obligation [of maximum specificity] in other Indictments.’²⁶
19. In *Todovic and Rasevic*, the Trial Chamber held that the Prosecution had provided an acceptable level of detail about participants identified in schedules to that Indictment, but upheld the Defence objection that those identified in the body of the Indictment were insufficiently described. It held: ‘The Trial Chamber considers that where the names of such members are *known*, the Prosecution is ordered to plead them specifically in the Joint Amended Indictment.’²⁷
20. Specificity of particulars is not only essential to promote the purpose of the Statute and the fundamental rights involved, but is also key in facilitating expediency throughout preparation and trial – as acknowledged by the Prosecution above. This is particularly important for a case of such complexity and potential length. By providing Dr. Karadzic with all particulars in its possession, the Prosecution will minimise the risk of lengthy litigation and cross-examination of Prosecution witnesses, will reduce the number of witnesses Dr. Karadzic may feel compelled to interview and call, and will allow Dr. Karadzic to respond most efficiently to the Prosecution’s true case.

Conclusion

21. Based on the foregoing, Dr. Karadzic requests that the Prosecution provide the maximum detail possible concerning the identity of JCE members and non-member participants. Dr. Karadzic suggests that these particulars be listed in an appended schedule along with all the other material facts. Given the amount of information the Prosecution is considered to possess, Dr. Karadzic also requests that the Prosecution provide a specific explanation when it believes that providing this level of detail is not possible.

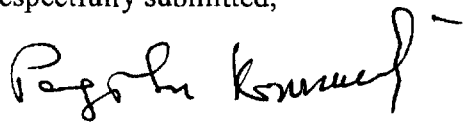
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²⁵ Second *Krnojelac* Decision, above n 2, at para 18.

²⁶ *Ibid*, at para. 19.

²⁷ *Todovic et al*, above n 1, at para. 20.

Respectfully submitted,



Dr. Radovan Karadzic²⁸

²⁸ Dr. Karadžić wishes to acknowledge with gratitude the contribution of Legal Intern Zoe Hamill, a graduate of the University of Auckland (New Zealand) Faculty of Law, to the research and preparation of this motion.

ANNEX A

INSTANCES OF INADEQUATE SPECIFICITY

The Accused requests the following either be clarified with maximum detail, struck from the Indictment for lack of specificity, or its inadequacy explained:

- **Paragraph 12:**
 - Who are the '*members of the Bosnian Serb leadership*' alluded to? (Repeated in *paragraph 17*)
 - Who are the '*members of SDS and Bosnian Serb government bodies at the republic, regional, municipal, and local levels, including Crisis Staffs, War Presidencies, and War Commissions*'?
 - Who are the '*commanders, assistant commanders, senior officers, and chiefs of units*' of the listed organisations that follow this general description? (Repeated in *paragraph 17*)
 - Who are the '*volunteer units*' mentioned?
- **Paragraph 13:**
 - Greater specificity as to the category or group of the '*members of the MUP, VRS, JNA, VJ, TO, the Serbian MUP, Serbian and Bosnian Serb paramilitary forces and volunteer units*' could be provided by the Prosecution;
 - The phrase '*local Bosnian Serbs*' does not comprise a category or group and is as such too vague to be part of a valid Indictment.
- **Paragraph 17:**
 - Who are the '*republic-level members of Bosnian Serb Political and Governmental Organs*'? (Repeated in *paragraph 22*)
 - Who are the '*regional, municipal and local level members of Bosnian Serb Political and Governmental Organs with responsibility in or for the Sarajevo area*'?
 - Who are the '*leaders of Serbian and Bosnian Serb paramilitary forces and volunteer units operating in or with responsibility over the Sarajevo area*'?
- **Paragraph 18:**

- Who are the '**members of the VRS**' other than those then described as '*in particular the Sarajevo Romanija Corps*'? If only the Romanija Corps was meant, than only that group should be listed;
- Who are the '**members of other elements of the Serb Forces operating in or with responsibility over the Sarajevo area**'? What 'other elements' are being alleged?
- **Paragraph 22:**
 - Who are the '**regional, municipal and local level members of Bosnian Serb Political and Governmental Organs with responsibility in or for the Srebrenica, Vlasenica, Bratunac and/or Zvornik areas**'?
 - Who are the '**commanders, assistant commanders, senior officers, and chiefs of the VRS and MUP operating in or with responsibility over territory within the Drina Corps area of responsibility and/or Trnovo municipality**'?