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: 7 April 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

MOTION FOR LEAVE TO REPLY AND REPLY BRIEF: PRELIMINARY MOTION ALLEGING DEFECT IN FORM OF INDICTMENT – MULTIPLE JOINT CRIMINAL ENTERPRISES

The Office of the Prosecutor:
Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:
Radovan Karadzic

INTRODUCTION

1. On 19 March 2009, Dr. Karadzic filed a Preliminary Motion Alleging Defect in Form of Indictment – Multiple Joint Criminal Enterprises ("Motion"). The prosecution filed the Prosecution's Response to Karadzic's Preliminary Motion Alleging Defect in Form of Indictment – Multiple Joint Criminal Enterprises on 1 April 2009 ("Prosecution's Response"). Dr. Karadzic hereby seeks leave to reply to the Prosecution's Response, as it raises matters not contained in the motion, and he hopes that by filing a reply, he can assist the Chamber in pointing out the fallacy in the prosecution's obsession with a quadra-headed JCE.

SUBMISSIONS

2. Dr. Karadzic reiterates that the pleading of his participation in multiple joint criminal enterprises ("JCE") is a defect in the form of the Third Amended Indictment that needs to be remedied because if allowed, it will bring additional complexity to Dr. Karadzic's trial proceedings.
3. Dr. Karadzic relies on American jurisprudence because the pleading of multiple JCEs by the prosecution is its own invention specific to Dr. Karadzic's case and is unprecedented at the Tribunal. In fact, the prosecution has failed to point to a single authority supporting its novel creation of multiple JCEs. There is not even a single known instance of multiple conspiracies to commit genocide being pled in any international Tribunal.[1]
4. Given the absence of any precedent in international criminal law and at any Tribunal for the prosecution's concept of multiple JCEs, it is only appropriate for the Tribunal to consider the practices developed in national jurisdictions. It is relevant to apply these practices concerning analogous concepts - such as American conspiracy - if these practices serve the same purposes sought by the Tribunal - in our case, to protect the rights of the accused.

[1] Conspiracy is only possible for genocide charges under the statutes of the ICTY and ICTR.

5. The Appeals Chamber has recognized that the concept of conspiracy as it is developed in American law is analogous to the mode of liability of JCE.[2]
6. The multiple conspiracy doctrine of American jurisprudence is the most closely analogous jurisprudence upon which the prosecution's multiple JCEs can be evaluated. Although the doctrine is regularly applied in relation to issues of double jeopardy and of joinder of trials, it most importantly serves as a safeguard against the overextension of the scope of conspiracy in American law, hence assuring the protection of the rights of the accused against fair trial violations and abuse of due process.
7. In a recent judgment, the United States Court of Appeals of the Second Circuit affirmed that it was appropriate to consider whether or not the Pinkerton theory of liability (the American counterpart of the concept of JCE) was charged against an accused while evaluating if prejudice was suffered because of prosecution's breach of the multiple conspiracy doctrine.[3] By doing so, the Appeals Court reiterated the U.S. Supreme Court's views expressed in the Pinkerton decision that the combination of a multiplicity of conspiracy charges and the possibility to be found liable for other co-conspirators' acts in the furtherance of a conspiracy can result in the impediment of the accused's fair trial rights. This is due to the excessive reach of the charges when they are combined, as they are in our case:

> The old doctrine of merger of conspiracy in the substantive crime has not obtained here. But the dangers for abuse, which in part it sought to avoid, in applying the law of conspiracy have not altogether disappeared. Cf. Kotteakos v. U.S.[4] There is some evidence that they may be increasing. The looseness with which the charge may be proved, the almost unlimited scope of vicarious responsibility for others' acts which follows once agreement is

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[2] See Prosecutor v. Tadic, No. IT-94-1-A, Appeals Chamber Judgment, 15 July 1999, para. 224. (footnote 289, refers to the Pinkerton doctrine of conspiracy liability elaborated in Pinkerton v. U.S., 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946): "This doctrine imposes criminal liability for acts committed in furtherance of a common criminal purpose, whether the acts or explicitly planned or not, provided that such acts might have been reasonability contemplated as a probable consequence or likely result of the common criminal purpose.")

[3] U.S. v. Adams, Slip Copy, 2009 WL 742123, 1-2 (C.A.2 (N.Y.)) (23 March 2009); (citing) U.S. v. McDermott, 245 F3d 133, 139 (2d Cir.2001); (citing) U.S. v. Johansen, 56 F.3d 347, 351-352 (2d Cir.1995). ("In evaluating whether prejudice to a particular defendant has occurred, we consider several factors, including: (1) whether the trial court gave a jury charge, pursuant to Pinkerton v. U.S. allowing the defendant to be convicted for substantial offenses committed by another ...")

[4] Kotteakos v. U.S., 328 U.S. 750, 90 L.Ed. 1557, 66 S.Ct. 1239 (1946).

> shown ... require that the broad limits of discretion allowed to prosecuting officers in relation to such charges and trials be not expanded into new, wider and more dubious areas of choice. If the matter is not generally of constitutional proportions, it is one for the exercise of this Court's supervisory power over the modes of conducting federal criminal prosecutions... [5]

8. Accordingly, the Trial Chamber has the same duty to evaluate the indictment to ensure the rights of the accused. Allowing prosecution of four separate JCEs in Dr. Karadzic's indictment will require him to defend himself against indiscriminate rounds from a shotgun fired in all directions rather than a single shot appropriately targeted. This prosecution tactic will enlarge yet again the scope of the concept of JCE in international criminal law at the expense of Dr. Karadzic's right to be informed of the nature and cause of the charges against him.[6]
9. Former ICTY associate legal officer Jennifer Martinez and Vanderbilt law Professor Allison Danner stress the JCEs doctrine's need for limitations and safeguards.[7] Referring to the multiple conspiracy doctrine elaborated in U.S. v. Kotteakos to compare the scopes of conspiracy law and JCEs, they assert that the U.S. Supreme Court's reasoning in that area mirrors the concerns of limitations in respect to JCEs.[8] Martinez and Danner stress that the expansive interpretations adopted in international law offer the prosecutor the potential to expand the range of crimes to which an individual may be held responsible, this, at the cost of the accused's rights.[9]
10. This over-expansive scope, which is remedied by the multiple conspiracy doctrine in the United States, is precisely what will result from the charging of multiple JCEs in Dr. Karadzic's indictment.
11. Furthermore, the Prosecution's Response alleges that the issue raised in the present motion is *res judicata*. However, it is obvious that the Trial Chamber was

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[5] Pinkerton v. U.S., 328 U.S. 640, 66 S.Ct. 1180, 649 (1946).
[6] Article 21(4)(a) of the Statute.
[7] A.S Danner and J.S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 15 September 2004, p. 55. ("Guilty Associations.")
[8] Guilty Associations, p. 54.
[9] Guilty Associations, p. 73.

not endorsing the present indictment against unknown and unmade challenges when it confirmed it. Otherwise, the accused's right to make preliminary motions after the filing of an amended indictment, enshrined in Rule 50(C), would be meaningless.

12. Finally, the charging of multiple JCEs in the Indictment will prolong the proceedings because it will increase the complexity of an already too-complex trial.

13. The allegations of Dr. Karadzic's participation in multiple JCEs instead of a sufficient single overarching JCE, will oblige Dr. Karadzic to quadruple the scale of his defense. In addition to having to defend against allegations of his individual role and contributions in committing the criminal acts charged in Counts 1-11 of the Indictment through Category Three participation in a JCE - which is already a complex undertaking – he will have to defend against his alleged individual participation in three other "related"[10] JCEs.

14. In its response to Dr. Karadzic's motion for specification of the identification of members of the joint criminal enterprises, the Prosecution has claimed that such information should not be required so that its indictment may be concise and "very succinct".[11] The prosecution cannot have it both ways—alleging a complex web of four JCEs while declining to include a schedule of its members so that its indictment can be simple.

15. The prosecution has recognized that in order to shorten the length of trials, it must reduce the scope of the criminal conduct alleged against the accused.[12] The pleading of multiple JCEs against Dr. Karadzic in the indictment, frustrates, rather than promotes, this objective.

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[10] Indictment, para. 8.

[11] *Prosecution Response to Preliminary Motion Alleging Defect in form of Indictment—Joint Criminal Enterprise Members and Non-Member Participants* (3 April 2009) at para. 3

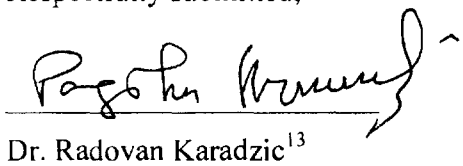
[12] Report of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Provided to the Security Council under Paragraph 6 of the Security council Resolution 1534 (2004), 24 November 2008, p. 14, para. 6.

CONCLUSION

16. Therefore, it is respectfully requested that the Trial Chamber order the prosecution to amend its indictment to charge a single joint criminal enterprise.

Word Count: 1,613

Respectfully submitted,



Dr. Radovan Karadzic[13]

[13] Dr. Karadžić wishes to acknowledge with gratitude the contribution of Legal Intern Stephanie Lafrance, a graduate of the University of Ottawa (Canada) School of Law, to the research and preparation of this reply.