

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: 10 April 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

MOTION FOR LEAVE TO REPLY AND REPLY BRIEF:
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

Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves, pursuant to Rule 126 *bis*, for leave to reply to the *Prosecution Response to Preliminary Motion Alleging Defect in Form of the Indictment – Joint Criminal Enterprise Members and Non-Member Participants* filed on 3 April 2009.

MOTION FOR LEAVE TO REPLY

2. In its Response, the Prosecution raises two issues. First, the Prosecution submits that the Third Amended Indictment (“the Indictment”) need only provide ‘a concise summary of the case against Karadzic’ and that the Indictment already meets this standard as it applies to identifying joint criminal enterprise (JCE) members and non-member participants.¹ Dr. Karadzic maintains that, in fact, the standards set by the Tribunal’s jurisprudence are not met by the Indictment, and that the body of jurisprudence pertaining directly to this issue requires greater specificity than has yet been provided.
3. Second, the Prosecution contends that where Dr. Karadzic is entitled more detail about individual JCE member identities, it can be more appropriately provided either through pre-trial briefs or disclosure.² Dr. Karadzic responds that while these mechanisms may be an appropriate means of dealing with the most remote participants, whose exact identities are potentially more a matter of evidentiary detail, they do not alleviate the defects in the Indictment pertaining to its material facts. The Prosecution is still required to provide the greatest possible precision in the Indictment, by directly identifying alleged participants when known,
4. Dr. Karadzic therefore seeks leave to reply to the Prosecution Response so that the Chamber may sharpen its focus on these issues.

REPLY

Pleading principles and joint criminal enterprise

5. The Prosecution grounds its approach to the valid form of the Indictment in an emphasis on the “summary nature” of an indictment, favouring conciseness over

¹ *Prosecution Response to Preliminary Motion Alleging Defect in Form of the Indictment – Joint Criminal Enterprise Members and Non-Member Participants* (“Prosecution Response”), (3 April 2009), at para. 1.

² *Prosecution Response*, at para. 1.

detail.³ This contrasts with the prevailing approach favoured in the Tribunal's jurisprudence, which reads Article 18 and Rule 47(C) (requiring an indictment to contain a concise statement of the facts and the crime or crimes with which the Accused is charged) together with Article 21 of the Statute (protecting the Accused's right to a fair and public hearing, to be informed of the nature and cause of the charge against him, and to have adequate time and facilities for the preparation of his defence), thus obligating the Prosecution to plead the material facts with 'the greatest precision' possible.⁴

6. Applying the principle of precision to indictments involving JCEs, the Trial Chambers in *Pavkovic, Krnojelac* and *Boskoski and Tarculovski* set out:⁵

In order to know the nature of the case he must meet, the accused must be informed by the indictment of:

- (a) the nature or purpose of the joint criminal enterprise (or its "essence", as the accused here has suggested),
- (b) the time at which or the period over which the enterprise is said to have existed,
- (c) the identity of those engaged in the enterprise – so far as their identity is known, but at least by reference to their category as a group, and
- (d) the nature of the participation by the accused in that enterprise.

Thus where a JCE is alleged, the Prosecution is obliged to provide the maximum possible detail about JCE participants in the Indictment. The Prosecution's authority for its conflicting position comes primarily from an early decision in *Delalic*,⁶ which did not include JCE as a mode of liability, and is therefore less germane to the present Indictment than the more recent jurisprudence that has developed directly on point.

7. The Prosecution next raises the further pleading principle that balances the inclusion of factual detail against the nature of the case in question – in particular

³ *Prosecution Response*, at para. 3.

⁴ See *Preliminary Motion Alleging Defect in Form of the Indictment – Joint Criminal Enterprise Members and Non-Member Participants* ("the Motion"), at para. 2, for a deeper discussion of the principles and authorities on point.

⁵ *Prosecutor v. Krnojelac*, No. IT-97-25-PT, *Decision on Form of Second Amended Indictment* ("Second Krnojelac Decision"), (11 May 2000) at para. 16; reiterated in *Prosecutor v. Pavkovic et al.*, No. IT-03-70-PT, *Decision on Vladimir Lazarevic's Preliminary Motion on Form of Indictment*, (8 July 2005), at para. 7; *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. 30.

⁶ *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, *Decision on Motion by the Accused Zejnir Delalic Based on Defects in the Forms of the Indictment*, (2 October 1996).

the scale of the crimes and the proximity of the accused to the events.⁷ Reading this principle together with its emphasis on conciseness, the Prosecution argues that the Indictment contains sufficient detail as, given the large scale of the crime-base alleged, including greater detail in the Indictment would improperly rob it of its requisite brevity.⁸ As noted in the Motion, while the scope of the case in question is an established factor in weighing up the appropriate specificity to require of an indictment, it is not an abstract calculus, turning rather on the circumstances of that case.⁹ As made clear in the Motion, Dr. Karadzic's case comes after many others involving the same factual situations and allegations. As such, the large scale of the case is mitigated by the level of information the Prosecution can realistically be expected to hold after so many years of investigation and trials.¹⁰ The Prosecution is in the position to provide a more specific Indictment; it follows, therefore, that the scale of the case should not inhibit its obligation to do so.

8. To illustrate its claim that, under its approach to pleading principles, sufficient detail has already been provided, the Prosecution re-lists those members who have been identified by name in the Indictment.¹¹ As noted in the Motion, however, these names do not constitute an adequate effort to provide detail about JCE members, as they simply identify those already indicted and/or brought to trial at the ICTY.¹² As such, they constitute no more than a cursory attempt to provide specifics. As also discussed in the Motion, that list cannot be allowed to disguise or excuse the Prosecution's lack of specificity when describing alleged JCE members in other leadership positions. As the Motion makes clear, this information has already been made available in the named participants' trials, judgments and, indeed, Indictments.¹³ In those earlier Indictments such further detail appears neither to have encumbered the Indictment, nor presented any other kind of practical issue for the Prosecution. If, given the magnitude of the case the

⁷ *Prosecution's Response*, at para. 3.

⁸ *Prosecution's Response*, at para. 2 and 4.

⁹ See the *Motion*, at para. 3, for more discussion.

¹⁰ See the *Motion*, at para. 7.

¹¹ *Prosecution's Response*, at para. 9, 11, 14.

¹² *Motion*, at para. 7.

¹³ *Motion*, at para. 7.

- Prosecution has decided to bring against Dr. Karadzic, it still feels appropriately detailed facts would not suit the body of the Indictment, it has not yet made clear why such information cannot be appended in a schedule – the same manner in which it has handled all other, lengthier facts.
9. The Prosecution has taken the Motion to not only demand ‘vast numbers’ of names, but moreover to have the Indictment amended every time more names come to light.¹⁴ This is an exaggeration of the requests made in the Motion. Dr. Karadzic simply asks for the Indictment to be amended once, comprehensively, to identify JCE participants ‘so far as their identity is known, but at least by their category or group.’ Given that the Prosecution is not only in possession of the names of those in the leadership positions it alludes to in paragraphs 12, 17, 22 and 26 of the Indictment, but moreover has included them in other Indictments involving similar facts, its concerns about an over-expansive Indictment would seem inconsistent with its own actions in the past. The same could be said about its reluctance to include these details in a schedule along with the other material facts.
 10. Dr. Karadzic does not request that evidentiary details are included in the Indictment; merely that the material facts be appropriately plead. Where the identity details of more remote participants fall more into the realm of evidence, they need not be listed in the Indictment, and may more appropriately be disclosed through other pre-trial mechanisms. However, even in such cases the Indictment is still required to specify the category or group to which those participants belong – with the ‘greatest precision’ possible.¹⁵
 11. In its current form, many of the categories or groups described in the Indictment are unacceptably vague. Phrases such as ‘local Bosnian Serbs’¹⁶ identify no category smaller than the entire local population, and as such does not constitute a relevant category at all. The bare descriptors ‘members of the VRS and MUP’¹⁷ or

¹⁴ *Prosecution's Response*, at para. 5.

¹⁵ See above, paras. 5, 6 and 7; also see the *Motion*, at paras. 2 and 3 for greater discussion and law.

¹⁶ *Third Amended Indictment*, at para. 13.

¹⁷ *Third Amended Indictment*, at para. 28; see also *Motion*, at para. 8.

‘volunteer units’¹⁸ similarly transgress the logical definitional standards of a category or group. Moreover, where the Indictment is more specific about the implicated category or group involved, this is often followed by unacceptable vagueness, such as the description of ‘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.’¹⁹ Those ‘other elements’ must be specified; they do not escape the requisite threshold simply by being preceded by more detailed particulars. Dr. Karadzic does not ask that the Indictment necessarily specify the name of every member of the Serb Forces, but rather which ‘other elements’ of those forces are meant – by proper category or group. Accordingly, this request will not transform the Indictment into a ‘vastly expanded’ document ‘akin to a pre-trial brief’,²⁰ but simply bring it into line with the dictates of the Tribunal’s jurisprudence.

12. Dr. Karadzic respectfully submits, therefore, that the Prosecution’s concerns about the consequences of this Motion are unfounded. The Motion does not request evidentiary matters to be disclosed in the Indictment, but simply that material facts are appropriately pleaded. Dr. Karadzic respectfully submits that this requires further detail about the alleged JCE members alluded to in leadership positions – if necessary by way of an appended schedule – and, at a minimum, more specific descriptions of all alleged categories and groups engaged in the JCEs.

The appropriate use of pre-trial briefs and disclosure

13. In accordance with the above submissions, Dr. Karadzic respectfully disagrees with the Prosecution assertion that other pre-trial mechanisms would be more appropriate mechanisms for providing this information than the Indictment. While Dr. Karadzic welcomes the Prosecution’s professed commitment to disclosure, this does not provide a substitute for the Indictment’s role of informing Dr. Karadzic of the nature of the case against him in sufficient detail to allow him to prepare his defence, and to avoid prejudicial surprise.

¹⁸ *Third Amended Indictment*, at para. 13; see also Motion, at para. 8.

¹⁹ *Third Amended Indictment*, at para. 18; see also Motion, at para. 11.

²⁰ *Prosecution’s Response*, at para. 5.

14. The Prosecution's position is based on a misconception about what the Motion requests, and an erroneous reading of the applicable pleading principles. Having confused material facts with evidentiary details, they assert that other modes of pre-trial disclosure are not only more appropriate than amending the Indictment, but also more expeditious.²¹ This is incorrect. The Prosecution cites the magnitude of the case as a reason for producing a less specific Indictment, but the very magnitude of the case brought against Dr. Karadzic makes a specific indictment in this case ever-more important, rather than weighing against it: given the huge amount of pre-trial disclosure, and the scale of information Dr. Karadzic is expected to process through these mechanisms, it is essential that the basic material facts are explicitly clear in the Indictment. As the Trial Chamber in *Krnojelac* affirmed, the inadequacy of an indictment should not justify a Prosecutor's reluctance to further amend it.²² The underlying rights and aims of a fair and expeditious trial make it crucial that the Indictment play its proper role in furnishing Dr. Karadzic's understanding of the case against him, and facilitating the preparation of his defence. Preferring a vague Indictment and voluminous disclosure documents over a clear and precise Indictment not only contradicts the Tribunal's jurisprudence on form of the indictment requirements, but, more urgently, inhibits the expediency of a trial where length and time are already an issue.

²¹ *Prosecution's Response*, at paras. 15 and 16.

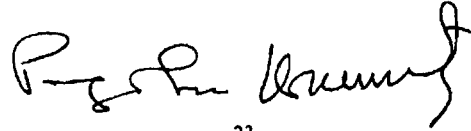
²² See the *Motion*, at para. 18.

REQUEST

Dr. Karadzic thus respectfully requests the Trial Chamber grant his motion and require the Prosecution to further amend its Indictment to include the particulars listed in Annex A of the Motion.

Word count: 2,287

Respectfully submitted,



Radovan Karadzic²³

²³ 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 reply.