

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 April 2009

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

Public

MOTION FOR LEAVE TO REPLY, AND REPLY BRIEF:
PRELIMINARY MOTION TO DISMISS PARAGRAPH
60(k) FOR LACK OF JURISDICTION

The Office of the Prosecutor:

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

The Accused:

Radovan Karadžić

1. Radovan Karadžić has moved, pursuant to Rule 72(A)(i), for an order dismissing paragraph 60(k) from the Third Amended Indictment on the grounds that it does not relate to violation of Article 5 of the Statute because it does not charge an act of sufficient gravity to constitute a crime against humanity.
2. He requested, alternatively, that paragraph 60(k) be dismissed because it is so devoid of facts that it is impossible for the accused to prepare a defence to these allegations. No acts, victims, perpetrators, locations, or dates are specified.
3. On 23 March 2009, the prosecution filed its *Prosecution Response to Preliminary Motion to Dismiss Paragraph 60(k) for Lack of Jurisdiction* (Response). The response was served on Dr. Karadzic on 15 April 2009.
4. Dr. Karadžić now seeks leave to reply, quite briefly, to demonstrate the fallacy of the prosecution's position.
5. The prosecution contends that the Tribunal has jurisdiction over crimes of persecution based on underlying acts described in paragraph 60(k) because these acts might possibly meet the equal gravity requirement when combined with other conduct to be proven at trial.¹ The *ad hoc* Tribunals have made it clear that not every denial or infringement of a fundamental right is sufficiently serious to qualify as a potential crime against humanity.² The conduct underlying persecution as a crime against humanity must be of the same gravity as the offences listed in Article 5 of the ICTY Statute and Article 3 of the ICTR Statute.³ It is true that this conduct need not constitute, on its own, a crime under international law;⁴ however, the prosecution cannot simply assert a range of conduct that clearly falls short of the equal gravity requirement and leave it to be sorted out at trial. In doing so, it fails to genuinely address the jurisdictional aspect of Dr. Karadžić's Motion.

¹ *Response* at paras. 3-6

² See, e.g., *Media* Appeal Judgement, para. 985; *Krajišnik* Trial Judgement, para. 735; *Blagojević and Jokić* Trial Judgement, para. 580; *Brđanin* Trial Judgement, para. 995; *Simić et al.* Trial Judgement, para. 48; *Naletilić and Martinović* Trial Judgement, para. 635; *Krnojelac* Trial Judgement, para. 434; *Kupreškić et al.* Trial Judgement, para. 621.

³ *Kvočka et al.* Appeal Judgement, para. 321; *Blaškić* Appeal Judgement, para. 135; *Krnojelac* Appeal Judgement, paras. 199, 221.

⁴ *Kvočka et al.* Appeal Judgement, para. 323 (departing from *Blaškić* Appeal Judgement, para. 139, and *Kordić and Čerkez* Appeal Judgement, para. 103); accord *Stakić* Appeal Judgement, para. 296; *Media* Appeal Judgement, para. 985; *Brđanin* Appeal Judgement, para. 296; *Krajišnik* Trial Judgement, para. 735.

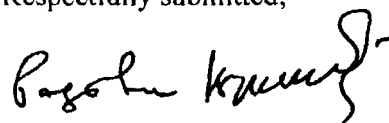
6. It is the responsibility of the prosecution to establish the jurisdictional basis upon which the conduct alleged will give rise to offences recognized as falling within the subject-matter jurisdiction of the Tribunal. All the prosecution has achieved by its Response is to assert that it will, at trial, lead evidence and make legal argument that will convince the Chamber that the acts described in paragraph 60(k) will meet the equal gravity requirement.
7. In the context of a case in which the prosecution relies on the joint criminal enterprise form of liability, it is not sufficient to make the blanket assumption that conduct not amounting to an act of equal gravity can cumulate to a crime of persecution. For example, if one JCE member in Banja Luka dismissed someone on account of ethnicity in 1992 and another member in Foca searched someone's apartment on the basis of ethnicity in 1995, can such acts be combined to constitute a crime against humanity by Dr. Karadzic? To answer that question is to provide the rationale for requiring that the gravity of the offences be apparent from the indictment or otherwise fail to charge a crime within the jurisdiction of the Tribunal.
8. Furthermore, in an indictment so unnecessarily enormous, it is difficult to see the point of pleading and leading evidence with respect to acts of discrimination so insignificant that they do not themselves satisfy the gravity requirement. The prosecution itself claims that it is able to rely upon a myriad of conduct pleaded under paragraph 60 that satisfies the gravity requirement; what useful and responsible purpose could be achieved by pressing the acts alleged in paragraph 60(k) of the indictment?
9. Finally, the prosecution's argument⁵ that paragraph 60(k) adequately puts Dr. Karadžić on notice by leaving him to guess in which of 27 municipalities during which day in a 1267-day period, any of the varied acts may have occurred, turns the notice requirement into a nullity.⁶
10. Therefore, by reason of lack of jurisdiction and/or, alternatively, a lack of pleading specificity, it is respectfully requested that paragraph 60(k) of the Third Amended Indictment be dismissed.

⁵ *Response* at paras. 15-16

⁶ Dr. Karadzic notes that the Interim Pre-Trial Brief filed on 8 April 2009 fails to provide the required notice.

Word count: 886

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadžić', written in a cursive style.

Radovan Karadžić