



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-95-5/18-PT

Date: 12 May 2009

Original: English

IN THE TRIAL CHAMBER

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

Acting Registrar: Mr. John Hocking

Decision of: 12 May 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON TWO MOTIONS ALLEGING DEFECTS
IN THE FORM OF THE INDICTMENT**

Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the Accused’s “Preliminary Motion Alleging Defect in Form of Indictment — Multiple Joint Criminal Enterprises”, filed on 19 March 2009 (“Motion on Multiple JCEs”) and “Preliminary Motion Alleging Defect in Form of the Indictment—Joint Criminal Enterprise Members and Non-Member Participants”, filed on 20 March 2009 (“Motion on JCE Members”), and hereby renders its decision thereon.

I. Background

1. On 22 September 2008, the Office of the Prosecutor (“Prosecution”) filed its “Motion to Amend the First Amended Indictment” (“Motion to Amend Indictment”), in order to make several changes to the indictment, which had not explicitly alleged his participation in a joint criminal enterprise.¹ The Prosecution submitted that its proposed amendments, contained in a Proposed Second Amended Indictment, “updated, clarified, and further particularized its legal and factual allegations relating to the Accused’s individual responsibility”,² by revising the co-perpetration pleadings, and by pleading four separate joint criminal enterprises in pursuit of distinct but related objectives.³ On 29 September 2008, the Prosecution filed a “Correction to the Proposed Second Amended Indictment” to make minor changes to the Proposed Second Amended Indictment.⁴

2. On 16 February 2009, the Chamber issued its “Decision on Prosecution’s Motion to Amend the First Amended Indictment” (“Decision on Motion to Amend Indictment”), granting the motion and the subsequent request for correction in large part, and ordering the Prosecution to file an amended indictment. The following day, the Prosecution filed its “Motion for Reconsideration of the Trial Chamber’s Decision to Amend the First Amended Indictment and Urgent Request for a Stay of the Trial Chamber’s Order to File a Second Amended Indictment”,⁵ and on 26 February 2009 the Chamber issued a decision granting that motion and ordering the Prosecution to file a third amended Indictment.⁶ Accordingly, the Prosecution filed its Third Amended Indictment in English and B/C/S on 27 February 2009 (“Indictment”).⁷

¹ Motion to Amend Indictment, para. 2.

² Motion to Amend Indictment, para. 2.

³ Motion to Amend Indictment, para. 11.

⁴ Correction to the Proposed Second Amended Indictment, 29 September 2008.

⁵ Motion for Reconsideration of the Trial Chamber’s Decision to Amend the First Amended Indictment and Urgent Request for a Stay of the Trial Chamber’s Order to File a Second Amended Indictment, 17 February 2009.

⁶ Decision on Prosecution’s Motion to Reconsider the Trial Chamber’s Decision on the Motion to Amend the First Amended Indictment, 26 February 2009.

⁷ Prosecution’s Third Amended Indictment, 27 February 2009.

3. The Indictment charges the Accused with responsibility for crimes falling into 11 counts, which it alleges that he *inter alia* committed through his participation in “several related joint criminal enterprises”, all of which were in pursuit of distinct but related objectives.⁸ According to the Prosecution, the Accused was a member of an “overarching” joint criminal enterprise (“JCE”) whose objective was the permanent removal of Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina from October 1991 until November 1995;⁹ while the “overarching” JCE existed, the Accused allegedly participated in three additional joint criminal enterprises (“JCEs”), the respective objectives of which were: (1) to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling conducted from April 1992 until November 1995, (2) to eliminate the Bosnian Muslims in Srebrenica, and (3) to take United Nations personnel as hostages in order to compel the North Atlantic Treaty Organization to abstain from conducting air strikes against Bosnian Serb military targets during May and June 1995.¹⁰ The Indictment alleges that “each of these objectives was related to the objective of the overarching joint criminal enterprise”;¹¹ however, each JCE had differences in its participants, objectives, places, and timeframes.¹²

II. Submissions

A. Motion on Multiple JCEs

4. In the Motion on Multiple JCEs, the Accused alleges a defect in the form of the Indictment with respect to the charging of multiple JCEs,¹³ and requests the Trial Chamber to “order the prosecution to remove from the Indictment, all but the overarching JCE as a form of individual responsibility labelled ‘committing’ under Article 7(1)”.¹⁴ The Accused contends that the Prosecution’s “tactic” of charging the Accused with concurrent participation in four JCEs is unprecedented at the Tribunal, and invalid, and “if admitted into the trial proceedings, will convey additional complexity to this already large trial”.¹⁵

⁸ Indictment, paras. 6, 8–9; *see* Motion to Amend Indictment, para. 11.

⁹ Indictment, paras. 6, 9.

¹⁰ Indictment, paras. 8, 15, 20, 25.

¹¹ Indictment, para. 8.

¹² *See* Indictment, paras. 11–29.

¹³ Motion on Multiple JCEs, paras. 1, 14.

¹⁴ Motion on Multiple JCEs, para. 14.

¹⁵ Motion on Multiple JCEs, para. 2; *see also* Motion on Multiple JCEs, paras. 12–13.

5. By drawing an analogy with “Multiple Conspiracy Doctrine” in the U.S.,¹⁶ the Accused claims that “the Prosecution’s pleading of multiple JCEs is defective, as these make up a single JCE whose membership and objectives evolved over time”,¹⁷ and that the JCEs enumerated in the Indictment overlap in terms of “the relevant time period, the nature and purpose, the identity of the participants, and [the Accused’s] alleged role in the JCE”.¹⁸

6. In its “Response to Karadžić’s Preliminary Motion Alleging Defect in Form of Indictment — Multiple Joint Criminal Enterprises”, filed on 1 April 2009 (“Response on Multiple JCEs”), the Prosecution submits that the Accused has failed to demonstrate how the structure of the Indictment “results in vagueness or otherwise constitutes a defect within the meaning of Rule 72(A)(ii)”, and how the alleged defect in the Indictment will complicate or unnecessarily prolong the proceedings,¹⁹ and requests that the Accused’s Motion on Multiple JCEs be dismissed,²⁰ as the structure of the Indictment provides a “clearer and more detailed description of the case that [the Accused] must answer”.²¹

7. The Prosecution further submits that U.S. Multiple Conspiracy Doctrine is irrelevant to the present case as “JCE is a mode of liability, whereas conspiracy is a criminal offence under U.S. law”,²² and explains that said theory is intended as a safeguard “against convictions on multiple counts of the criminal charge of conspiracy”,²³ as well as in multiple defendant cases, in order to prevent a single conspiracy conviction from entering against all of the defendants “when the evidence shows the presence of multiple conspiracies that do not involve each defendant”.²⁴ It asserts that in the present case, however, the Accused “is not charged with multiple counts for the same crime based on the same conduct”, but “with distinct crimes for which he is responsible through his contributions to separate JCEs”.²⁵

8. The Accused’s “Motion for Leave to Reply and Reply Brief: Preliminary Motion Alleging Defect in Form of Indictment — Multiple Joint Criminal Enterprises”, filed on 7 April 2009 (“Reply on Multiple JCEs”), contains the substance of the proposed Reply on Multiple JCEs, and raises few new arguments to those contained in the Motion on Multiple JCEs. In it, the Accused

¹⁶ Motion on Multiple JCEs, paras 5–6; *see also* Motion on Multiple JCEs, paras. 7–9.

¹⁷ Motion on Multiple JCEs, para. 10.

¹⁸ Motion on Multiple JCEs, para. 4.

¹⁹ Response on Multiple JCEs, paras. 1, 20.

²⁰ Response on Multiple JCEs, para. 1.

²¹ Response on Multiple JCEs, para. 20.

²² Response on Multiple JCEs, paras. 2, 10.

²³ Response on Multiple JCEs, para. 11.

²⁴ Response on Multiple JCEs, paras. 13–14.

²⁵ Response on Multiple JCEs, para. 13.

claims that the allegations of his participation in multiple JCEs, instead of a single “overarching” JCE, will oblige him “to quadruple the scale of his defence” as he will have “to defend himself 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. . . [as well as] against his alleged individual participation in three other ‘related’ JCEs”.²⁶ According to the Accused, this will prolong the proceedings, as it will “increase the complexity of an already too-complex trial”.²⁷ He further argues that the Multiple Conspiracy Doctrine “serves as a safeguard against the overextension of the scope of conspiracy. . . assuring the protection of the rights of the accused against fair trial violations and abuse of due process”,²⁸ and adds that, given the absence of any precedent in international law and at any Tribunal for the Prosecution’s concept of multiple JCEs, it is appropriate to rely on practices developed in national jurisdictions, if these practices serve to protect the rights of the accused.²⁹

B. Motion on JCE Members

9. In his Motion on JCE Members, the Accused requests the Chamber to find that the Indictment is defective and to order the Prosecution to further amend it to include certain particulars concerning the members of the JCEs alleged. He further suggests that these particulars be listed in an appended schedule and requests that the Prosecution provide a specific explanation if it is not possible to provide the maximum detail.³⁰ With reference to the Tribunal’s jurisprudence, the Accused argues that the Prosecution is required to furnish the identities of the members of the JCE and “non-member participants” where it has that information.³¹ The Accused submits that indictments and judgements in the cases of those alleged JCE members who are identified in the Indictment have provided relevant details that the Prosecution failed to include in the present Indictment.³² He argues that the Prosecution knows the identity of members of the alleged JCEs related to Sarajevo and Srebrenica through trials at the Tribunal related to the same crime base and that, while the scale of the alleged crimes may have excused the lack of a list of individual JCE members in the first of these indictments, it does not excuse such an absence in subsequent ones.³³

²⁶ Reply on Multiple JCEs, para. 13; *see also* Reply on Multiple JCEs, para. 8.

²⁷ Reply on Multiple JCEs, para. 12.

²⁸ Reply on Multiple JCEs, para. 6.

²⁹ Reply on Multiple JCEs, paras. 3–4.

³⁰ Motion on JCE Members, paras. 1, 21.

³¹ Motion on JCE Members, paras. 2–5, 17–19.

³² Motion on JCE Members, para. 7.

³³ Motion on JCE Members, paras. 10–14.

10. With regard to individuals who were not members of the alleged JCEs but were “used” by alleged JCE members, the Accused challenges certain categories identified in the Indictment as “unacceptably broad”.³⁴ He argues that the specification of these particulars is essential to his ability to adequately prepare his defence and would enhance the expeditiousness of the trial by reducing the number of witnesses and the time of examination.³⁵

11. A “Prosecution Response to Preliminary Motion Alleging Defect in Form of the Indictment – Joint Criminal Enterprise Members and Non-Member Participants” was filed on 3 April 2009 (“Response on JCE Members”). Referring to the Tribunal’s case-law and the vast scope of the crimes and extensive number of JCE members alleged in the Indictment, the Prosecution submits that it is not necessary or feasible for it to plead the identities of all JCE members and persons used by them,³⁶ nor would it be reasonable to amend the Indictment every time new information about their identity becomes available.³⁷ After recalling those details about JCE members and people used by them that are already included in the Indictment, the Prosecution submits that additional details are more appropriately provided through other means, including the interim and final pre-trial briefs, and pre-trial disclosure, as well as the possibility for the Accused to request additional information from the Prosecution.³⁸

12. On 14 April 2009 the Accused filed a “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” (“Reply on JCE Members”). In it, the Accused reiterates his request for relief and the arguments set out in the Motion and underlines that he does not request the inclusion of evidentiary material that would unduly expand the Indictment but merely to bring it into line with the pleading requirements set out in the Tribunal’s jurisprudence.

III. Applicable Law

13. The relevant part of Rule 72 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) provides that:

- (A) Preliminary motions, being motions which
 - [...]
 - (ii) allege defects in the form of the Indictment;

³⁴ Motion on JCE Members, para. 8.

³⁵ Motion on JCE Members, paras. 15, 20.

³⁶ Response on JCE Members, paras. 2–3.

³⁷ Response on JCE Members, para. 5.

[...]

shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66 (A)(i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84.

14. Article 18(4) of the Statute provides that, upon a determination that a *prima facie* case exists, the Prosecution shall prepare an indictment “containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute.” According to Article 21(4) of the Statute, the accused shall be entitled to certain minimum guarantees, such as (a) to be informed promptly and in detail of the nature and cause of the charge against him, (b) to have adequate time and facilities for the preparation of his defence, and (c) to be tried without undue delay. Finally, Rule 47 of the Rules deals in more detail with the submission of the indictment by the Prosecution and provides, in paragraph (C), that the indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged. The Appeals Chamber has repeatedly held that the Prosecution’s obligation under Article 18(4) of the Statute and Rule 47(C) of the Rules to set out in the indictment a concise statement of the facts of the case and the crimes charged, must be interpreted in conjunction with the rights of the accused set out in Article 21(2) and Article 21(4)(a) and (b) of the Statute.³⁹

15. Thus, the principal function of an indictment is to notify the accused in a summary manner of the nature of the crimes for which he is charged and to present the factual basis for those accusations.⁴⁰ The Prosecution is under an obligation to plead the material facts underpinning the charges in the indictment.⁴¹ Whether a particular fact is a material one depends on the nature of the Prosecution’s case. The decisive factor for the degree of specificity, with which the Prosecution is

³⁸ Response on JCE Members, paras. 15–17.

³⁹ See, e.g., *Prosecutor v. Naletilić et al.*, Case No. IT-98-34-A, Judgement, 3 May 2006 (“*Naletilić* Appeal Judgement”), para. 23; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, (“*Kvočka* Appeal Judgement”), para. 27; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 (“*Blaškić* Appeal Judgement”), para. 209; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 (“*Kupreškić et al.* Appeal Judgement”), para. 88.

⁴⁰ *Prosecutor v. Blaškić*, Case No. IT-95-14, 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; *Prosecutor v. Krnojelac*, Case No. IT-97-25, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 17; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 18.

⁴¹ *Prosecutor v. Hadžihasanović*, Case No. IT-01-47, Decision on Form of Indictment, 7 December 2001, para. 12; *Kupreškić et al.* Appeal Judgement, para. 88.

required to plead material facts, is the nature and scale of the alleged criminal conduct charged, including the proximity of the accused to the relevant events.⁴²

16. Accordingly, if the responsibility of the accused is invoked on the basis of his participation in a JCE, which is a mode of liability well-established in the jurisprudence of the Tribunal, the Prosecution must plead the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise.⁴³ The more remote the accused is from the alleged crimes, the more the identity of the physical perpetrator is a matter of evidence.⁴⁴ In order to know the nature of the case he must meet, an accused must be informed by the indictment of "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".⁴⁵ Some Trial Chambers have required the Prosecution to plead the identity of every JCE member and physical perpetrator it is aware of.⁴⁶ Other Trial Chambers have considered that "the names of all the members of the joint criminal enterprise ... are not material facts required to be pleaded in the Indictment but rather are matters of evidence",⁴⁷ and held that only key participants in the JCE must be named in light of the criterion of proximity to the accused, because "the Prosecution is not required to identify all 'known' participants by name, but only those who had a key position within the structure of the JCE".⁴⁸

⁴² *Prosecutor v. Gotovina*, Case 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, 26 January 2009, para. 17; *Naletilić* Appeal Judgement, para. 24; *Kvočka* Appeal Judgement, para. 28; *Blaškić* Appeal Judgement, para. 210, *Kupreškić et al.* Appeal Judgement, para. 89; *Prosecutor v. Deronjić*, Case No. IT-02-61, Decision on the Form of the Indictment, 25 October 2002, para. 5.

⁴³ *Prosecutor v. Simić*, Case No. IT-95-9-A, Judgement, 28 November 2006, para. 22; *Kvočka* Appeal Judgement, para. 28.

⁴⁴ *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 59; *Popović* Decision, para. 40.

⁴⁵ *Prosecutor v. Boškoski et al.*, Case 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 ("*Boškoski et al.* Decision"), para. 30; *Prosecutor v. Pavković et al.*, Decision on Vladimir Lazarević's Preliminary Motion on Form of Indictment, 8 July 2005, para. 7; *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on Form of Second Amended Indictment, 11 May 2000 ("*Krnojelac* Decision"), para. 16.

⁴⁶ See *Krnojelac* Decision, para. 18; *Prosecutor v. Todović et al.*, Case No. IT-97-25/1-PT, Decision on Todović Defence Motion on the Form of the Joint Amended Indictment, 21 March 2006, para. 20; *Popović* Decision, para. 40. See also *Boškoski et al.* Decision, para. 42.

⁴⁷ *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Šainović, 27 March 2003, p. 4.

⁴⁸ *Prosecutor v. Stanišić et al.*, Case No. IT-08-91-PT, Decision on Mićo Stanišić and Stojan Župljanin's Motions on Form of the Indictment, 19 March 2009 ("*Stanišić et al.* Decision"), para. 30; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-PT, Decision on Ante Gotovina's Preliminary Motions Alleging Defects in the Form of the Joinder Indictment, 19 March 2007 ("*Gotovina et al.* Decision"), para. 14.

IV. Discussion

A. Motion on Multiple JCEs

17. In his Motion on Multiple JCEs the Accused does not argue that the Indictment is factually deficient, but rather that the manner in which the charges are set out in it, alleging one “overarching” JCE and three specific JCEs, is unprecedented at this Tribunal, is invalid, and is liable to render the trial more complex and lengthy than would be the case if only the “overarching” JCE was pled, thus violating his right to a fair trial. The Chamber will address these three points in turn.

18. The Accused’s assertion that charging a person with concurrent participation in different JCEs is unprecedented at the Tribunal is incorrect. The Chamber recalls, by way of example, the indictments in the *Popović et al.* and the *Tolimir* cases, in which the same accused are charged with crimes through their participation in two different JCEs, to murder the able-bodied Muslim men, and to forcibly remove and deport the Muslim population from Srebrenica and Žepa, respectively.⁴⁹ In any event, even if this were the first case in which multiple JCEs were alleged in an indictment, that would not, in itself, render the Indictment defective.

19. The assertion by the Accused that the inclusion of multiple and overlapping JCEs in the Indictment is invalid is based on the “Multiple Conspiracy Doctrine” that has been developed in domestic criminal proceedings in the U.S. The Chamber recalls that in the *Milutinović, Šainović, and Ojdanić* case, the Appeals Chamber held that “Joint criminal enterprise and ‘conspiracy’ are two different forms of liability”, and explained that:

[w]hilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such showing, that the parties to that agreement took action in furtherance of that agreement. In other words, while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise. Thus, even if it were conceded that conspiracy was excluded from the realm of the Tribunal’s Statute, that would have no impact on the presence of joint criminal enterprise as a form of “commission” pursuant to Article 7(1) of the Statute.⁵⁰

⁴⁹ See *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Indictment, 4 August 2006, para. 96; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Second Amended Indictment, 16 October 2008, paras. 18, 27.

⁵⁰ *Prosecutor v. Milutinović, Šainović, and Ojdanić*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, 21 May 2003 (“*Ojdanić* Decision”), para. 23. Judge Hunt, in his separate opinion, agreed with this finding, albeit conceiving conspiracy as a separate (inchoate) crime and not as a mode of liability; *Prosecutor v. Milutinović, Šainović, and Ojdanić*, Case No. IT-99-37-AR72, Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction *Joint Criminal Enterprise*, 21 May 2003, para. 23. See also *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, Judgement, 17 October 2003, para. 158, footnote 292 referring to the distinction made by the Appeals Chamber in the *Ojdanić* Decision between JCE and conspiracy.

In light of this basic distinction between criminal responsibility as a participant in a JCE under customary international law, and the crime of conspiracy, the Chamber does not consider a doctrine that developed in a domestic jurisdiction in order to deal with particular issues that arose in the context of its laws on conspiracy to be applicable at this Tribunal.

20. Nor does any question of invalidity of the Indictment arise. The Indictment would be considered legally invalid if, for example, it did not give the Accused sufficient notice of the case against him, or if it did not sufficiently clarify the scope of new charges.⁵¹ On the other hand what arises here is criminal responsibility through participation in a JCE, which is a well established mode of liability at this Tribunal. The Chamber considers that there is no reason why an accused cannot be alleged to have participated in more than one JCE to commit a number of crimes, as long as the indictment complies with the standards set forth in the Tribunal's Statute, Rules and jurisprudence. In fact, it is standard practice that indictments charge accused for liability under various modes of liability included in Article 7(1) of the Statute.⁵² Thus, an accused can be charged simultaneously for committing—either individually or through his participation in a JCE—planning, instigating, ordering, *and* aiding and abetting in the planning, preparation or execution of, a crime or crimes. Moreover, the Appeals Chamber has held that an indictment may charge an accused for the commission of a crime or crimes through different forms of the same JCE.⁵³ The Chamber considers that it is entirely consistent with the foregoing that an accused can be charged for his participation in the commission of a crime or crimes through his participation in more than one JCE.

21. Additionally, the Chamber notes that it is also permissible for the Prosecution to charge an accused with responsibility for more than one *crime* set out in the Tribunal's Statute on the basis of the same factual allegations. Thus, an accused can be charged with murder as a crime against humanity (Article 5) and murder as a violation of the laws or customs of war (Article 3) for the killing of the same person. The Appeals Chamber in the *Čelebići* case concluded that

Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained,

⁵¹ See *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Defence Motions Regarding the Defects in the Form of the Second Amended Indictment, 12 April 2006, paras. 16–20.

⁵² See, *inter alia*, *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-PT, Indictment, 29 September 2008, para. 16; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Third Amended Indictment, 10 July 2008, para. 17; *Prosecutor v. Dorđević*, Case No. IT-05-87/1-PT, Fourth Amended Indictment, 9 July 2008, para. 17; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Second Amended Indictment, 11 June 2008, para. 218.

⁵³ *Prosecutor v. Simba*, Case No. ICTR-01-76-A, Judgement, 27 November 2007, para. 77.

based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.⁵⁴

In such circumstances, it is for the Trial Chamber, in reaching its final Judgement, to determine whether or not cumulative convictions may be entered, in accordance with the “materially distinct element” test.⁵⁵

22. The Accused is alleged to have committed murder and extermination, as charged under counts 4–6 of the Indictment, by his participation in the first, second, and third JCEs. However, a close reading of the Indictment reveals that each of the alleged instances of killing relates to only one of these three JCEs.⁵⁶ The situation is slightly different with respect to the allegations relating to the Accused’s liability under the third form of JCE for genocide and persecutions, as charged under counts 2 and 3 of the Indictment. For example, as far as count 3 is concerned, the Accused is alleged to have committed persecutions against the Bosnian Muslims of Srebrenica by way of the third form of JCE both through the first JCE and the third (Srebrenica) JCE. Thus, the same alleged murders are charged in the Indictment as underlying acts of persecution committed by the Accused by way of two of the four alleged JCEs.⁵⁷ As stated above, however, it is permissible for the Prosecution to charge an accused with responsibility for one crime under different modes of liability contained in Article 7(1) of the Statute, and, by extension, through his participation in more than one JCE.

23. Allegations of responsibility for criminal conduct through participation in a large JCE can be structured in different ways by the Prosecution. For example, in *Krajišnik* the Trial Chamber held that the common objectives of a JCE can themselves evolve over time through the commission of an expanded range of crimes,⁵⁸ a finding that was upheld by the Appeals Chamber.⁵⁹ Thus, in the present case, the Prosecution *could* have structured the Indictment by alleging that the

⁵⁴ *Prosecutor v Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelebići* Appeal Judgement”), para. 400; *see also Prosecutor v Galić*, Case No. IT-98-29-A, Appeal Judgement, 30 November 2006, para. 385; *Kupreškić et al.* Appeal Judgement, para. 385; *Prosecutor v Kunarac et al.*, Case No. IT-96-23/1 and IT-96-23/1-A, Appeal Judgement, 12 June 2002, para. 167; *Prosecutor v Musema*, Case No. ICTR-96-13-A, Appeal Judgement, 16 November 2001, para. 369 (establishing that “the [*Čelebići*] holding on cumulative charges reflects a general principle and is equally applicable” to ICTR cases); *Prosecutor v Nahimana et al.*, Case No. ICTR-99-52-T, Trial Judgement, 3 December 2003, para. 1089; *Prosecutor v Naletilić and Martinović*, Case No. IT-98-34, Trial Judgement, 31 March 2003, para. 718; *Prosecutor v Popović et al.*, Case No. IT-05-88-PT, Decision on Motions Challenging the Indictment pursuant to Rule 72 of the Rules, 31 May 2006, para. 24.

⁵⁵ *Čelebići* Appeal Judgement, para. 412.

⁵⁶ Indictment, paras. 63, 65–66; *see also* Status Conference, T. 199–200 (6 May 2009).

⁵⁷ Indictment, paras. 50, 58–60; *cf.* Status Conference, T. 244–245 (6 May 2009), where counsel for the Prosecution stated that “. . . there may be some misimpression that we find different underlying crimes, such as different individual acts of murder alleged to have been committed through more than one -- as an objective of more than one JCE, for example, that is not alleged”.

⁵⁸ *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Trial Judgement, 27 September 2006, paras. 1097–1098, 1118.

⁵⁹ *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Appeal Judgement, 17 March 2009, para. 163.

“overarching” JCE existed, and that it developed over time to include the objectives of the other three JCEs, while its membership also varied. However, the “overarching” JCE that is alleged in the Indictment does not in fact completely encompass, and subsume, the three other JCEs alleged, and the term “overarching” may thus be rather misleading.⁶⁰ Rather, the Indictment alleges only that the Accused committed the crimes charged in counts 1–8 of the Indictment through his participation in the “overarching” JCE.⁶¹ On the face of the Indictment, there appears to be an overlap in terms of crimes between the first JCE and the other three JCEs with regard to the allegations concerning Srebrenica under counts 2–8⁶² of the Indictment, and to the allegations concerning Sarajevo under counts 5–6 of the Indictment. However, as mentioned above, the different alleged criminal acts under each of these counts can be distinguished as belonging exclusively to one of the four alleged JCEs.⁶³ Moreover, the averments relating to the Accused’s “commission” responsibility for counts 9 and 10 are limited to his participation in the second alleged JCE (to spread terror among the civilian population of Sarajevo through a campaign of shelling and sniping), and for count 11 to his participation in the fourth alleged JCE (to take UN personnel hostage).⁶⁴ Thus, if the Chamber granted the relief requested by the Accused in the Motion on Multiple JCEs, his responsibility for the alleged criminal acts relating to the alleged second, third, and fourth JCEs, in particular the alleged criminal acts under counts 9, 10, and 11, would be alleged only under the other modes of liability contained in Articles 7(1) and 7(3) of the Statute, unless the Indictment were amended once again to allege that the objectives of the “overarching” JCE evolved over time to include the objectives of the other JCEs.

24. It is not clear that the connection between the objectives of the alleged “overarching” JCE and the three other JCEs is claimed by the Prosecution to have been such that it could be said that the former developed to *include* the latter. Rather, the Indictment simply states that the pursuit of the objectives of the JCEs related to Sarajevo, Srebrenica, and the taking of UN hostages “was related” to the objective of the first JCE to permanently remove Bosnian Muslims and Bosnian

⁶⁰ See Status Conference, T. 195 (6 May 2009).

⁶¹ Indictment, paras. 9–10.

⁶² The Chamber is only referring to counts 2–8 and not to count 1, as the latter deals only with the “overarching” JCE.

⁶³ In the section of the Indictment dealing with counts 7 and 8, the alleged criminal acts relating to the “overarching” JCE are identified in paragraphs 71–72, whereas the alleged criminal acts relating to the Srebrenica JCE are specified in paragraph 75. In the section of the Indictment dealing with counts 4, 5, and 6, the alleged criminal acts relating to the “overarching” JCE are identified in paragraph 63, whereas the alleged criminal acts relating to the Sarajevo JCE are contained in paragraph 65, and those relating to the Srebrenica JCE are specified in paragraph 66. In the section of the Indictment dealing with count 3, the alleged criminal acts relating to the “overarching” JCE are identified in paragraphs 53–54, whereas the alleged criminal acts relating to the Srebrenica JCE are specified in paragraph 58. However, there is an overlap in terms of alleged criminal acts in paragraph 59, which are charged as attributable through both the Srebrenica JCE and category three of the “overarching” JCE. Similarly, the alleged criminal acts relating to count 2 are contained in paragraphs 46–47, and are charged as attributable through both the Srebrenica JCE, and the third form of the “overarching” JCE.

⁶⁴ See Status Conference, T. 237 (6 May 2009).

Croats from Bosnian Serb-claimed territory.⁶⁵ While this language may seem somewhat vague, the Chamber considers that the facts alleged in relation to each of the three JCEs are such that their connection to the “overarching” JCE is apparent.⁶⁶ The four alleged JCEs are also connected by the manner in which the Accused is said to have contributed to each. The Accused is alleged to have made a significant contribution to achieving the objectives of the first JCE in a number of ways set out in paragraph 14(a)–(j). His significant contribution to the JCEs related to Sarajevo, Srebrenica, and the taking of UN hostages is also alleged to be demonstrated by many of the same actions and omissions set out in paragraph 14.

25. In relation to the final argument that the trial proceedings will be rendered more complex and prolonged if the Indictment remains in its current format, the Chamber recalls that the amendment of the Indictment to include the four distinct JCEs was proposed by the Prosecution to update, clarify, and further particularize the Indictment’s legal and factual allegations relating to the Accused’s individual responsibility.⁶⁷ In its Decision on Motion to Amend Indictment, the Chamber analysed whether the proposed amendments would result in prejudice to the Accused, and concluded that “in all the circumstances, and when weighed against the benefits of an improved indictment, granting the amendments [would] not have an impact that could be considered significant upon the Accused’s right to be tried without undue delay”,⁶⁸ and would not deprive the Accused of having an adequate opportunity to prepare an effective defence.⁶⁹ Amending the Indictment so as to include only one, evolving, JCE would not render it more straightforward, nor be likely to lead to a less lengthy or complex trial, as suggested by the Accused. Indeed, proceedings in cases of this nature are always lengthy and complex; however, the Chamber does not consider that the manner in which the Prosecution has organised the Indictment, i.e. with the inclusion of four distinct JCEs, will bring additional complexity to the proceedings or extend the proceedings unduly.

B. Motion on JCE Members

26. The Chamber reiterates that leave to reply to a response to a motion, under Rule 126 *bis*, is at the discretion of the Chamber. This Chamber will only grant leave to reply in exceptional cases, when it considers that a reply is warranted, and will not take into account replies that merely

⁶⁵ Indictment, para. 8.

⁶⁶ See Status Conference, T. 194–198 (6 May 2009).

⁶⁷ See Motion to Amend Indictment, paras. 2, 9, 11.

⁶⁸ Decision on Motion to Amend Indictment, para. 47.

⁶⁹ Decision on Motion to Amend Indictment, para. 48.

reiterate arguments made in the initial motion or application. Since the tendered Reply on JCE Members professes to add nothing material to the Motion on JCE Members, leave is refused.

27. The Chamber understands the reference by the Accused to “non-member participants” to mean those people or groups of people “used” by JCE members, identified in paragraphs 13, 18, 23, and 28 of the Indictment, as well as in the last sentence of paragraphs 12, 17, 22, and 27. The Chamber further understands people or groups of people “used” by JCE members to mean the physical perpetrators of the alleged crimes.

28. As to the question of whether the additional details requested by the Accused constitute material facts that must be pleaded in the Indictment, the availability of additional means of obtaining further particulars does not relieve the Prosecution from observing the requirement to plead the identity of physical perpetrators and participants in a JCE with sufficient specificity. The Chamber notes that some of the Tribunal’s jurisprudence would tend to suggest that the Prosecution is obliged to plead the identity of every JCE member and physical perpetrator it is aware of.⁷⁰ However, the Chamber considers the appropriate approach to be that recently taken by the Trial Chamber in *Gotovina et al.*, and since adopted in *Stanišić and Župljanin*, that “it is not required to identify all ‘known’ participants by name, but only those who had a key position within the structure of the JCE” and that it is sufficient for an indictment to identify other (known) participants by way of the category or group to which they belong.⁷¹ Consequently, the Chamber is satisfied that the Prosecution has adequately identified by name the key members of the JCEs in paragraphs 11, 16, 21, and 26 of the Indictment, and that it is sufficient to plead the other JCE members and the physical perpetrators “used” by the JCE by reference to a category or group to which they belong, given that they are more remote from the Accused.

29. With regard to whether the different categories of JCE members are pled with sufficient specificity in the Indictment, the Chamber notes that paragraphs 12, 17, 22, and 27 of the Indictment identify further members of the different JCEs by way of the category or group to which they belong. The Chamber considers that these JCE members are specifically identified as those in leading positions, such as “commanders, assistant commanders, senior officers, and chiefs of units”. Consequently, the Chamber is satisfied that the degree of specificity with which the Prosecution is required to plead the identity of JCE members in the Indictment has been met.

⁷⁰ See *Krnjelac* Decision, para. 18; *Prosecutor v. Todović et al.*, Case No. IT-97-25/1-PT, Decision on Todović Defence Motion on the Form of the Joint Amended Indictment, 21 March 2006, para. 20; *Popović* Decision, para. 40. See also *Boškoski et al.* Decision, para. 42.

⁷¹ *Gotovina et al.* Decision, para. 14. See also *Stanišić et al.* Decision, para. 30.

30. The Chamber notes that the physical perpetrators are identified by way of their category or group in paragraphs 13, 18, 23, and 28 of the Indictment, which refer to such perpetrators as “members” of the different categories. Considering the position of the Accused at the relevant time, and the averments of the relationship between him and the listed key members of the JCE, other JCE members, and the physical perpetrators of the alleged crimes, the Chamber finds that this general reference to “members” is sufficiently specific for the purposes of the Indictment. While noting that the reference in paragraph 13 of the Indictment to “local Bosnian Serbs” is very general, in light of the scale of the crimes alleged to have been perpetrated by them, as well as the remoteness of the Accused from the physical perpetration of the alleged crimes, the Chamber finds that the Prosecution is not required to provide further identification of “local Bosnian Serbs” for the purposes of the Indictment.⁷²

31. With regard to the remaining categories of alleged physical perpetrators, the Chamber has considered the large scale of the alleged crimes and the remoteness of the Accused from their physical commission, and is satisfied that the categories of physical perpetrators challenged by the Accused are identified with sufficient specificity in the Indictment.

32. Accordingly, the Chamber finds that the Indictment is not defective in regard to the specificity of pleading the identity of alleged JCE members and physical perpetrators. However, the Chamber considers that the further details concerning the identity of JCE members and physical perpetrators requested by the Accused constitute information relevant for the preparation of an effective defence. The Prosecution’s pre-trial brief is an appropriate vehicle in which to set out these details, and the Chamber notes that the Prosecution itself accepts that the Accused is entitled to disclosure of these details in so far as it has them.

V. Disposition

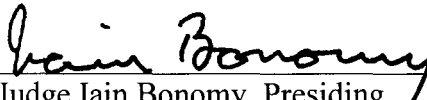
33. For the reasons outlined above, the Trial Chamber, pursuant to Rules 54, 72(A)(ii), and 126 *bis* of the Rules, and Articles 18 and 24 of the Tribunal’s Statute, hereby

- (a) **GRANTS** to the Accused the leave to reply to Prosecution’s Response on Multiple JCEs;
- (b) **DENIES** the Motion on Multiple JCEs;

⁷² See *Stanišić et al.* Decision, para. 35.

- (c) **DENIES** to the Accused the leave to reply to Prosecution's Response on JCE Members;
- (d) **DENIES** the Motion on JCE Members; and
- (e) **ORDERS** the Prosecution to submit its proposed amendments to the Indictment in accordance with the Chamber's Decision on Six Preliminary Motions Challenging Jurisdiction issued on 28 April 2009, no later than 20 May 2009.

Done in English and French, the English text being authoritative.


Judge Iain Bonomy, Presiding

Dated this twelfth day of May 2009
At The Hague
The Netherlands

[Seal of the Tribunal]