

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 Flüge  
Judge Michèle Picard

Acting Registrar: John Hocking

Date: <sup>19</sup> March 2009

*RMB*

THE PROSECUTOR

v.

RADOVAN KARADZIC

*Public*

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PRELIMINARY MOTION ALLEGING DEFECT IN FORM OF INDICTMENT –  
MULTIPLE JOINT CRIMINAL ENTERPRISES

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The Office of the Prosecutor:

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

The Accused:

Radovan Karadzic

### ***Introduction***

1. Dr. Karadzic hereby files this preliminary motion, pursuant to Rule 72(A)(ii), alleging defects in the form of the indictment as to the charging of multiple joint criminal enterprises. 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 eliminate all but the “overarching” joint criminal enterprise.
2. The present Indictment charges Dr. Karadzic with concurrent participation in four different but interrelated JCEs. This prosecution tactic is unprecedented at the Tribunal; it is invalid and if admitted into the trial proceedings, will convey additional complexity to this already large trial.

### ***Discussion***

3. The present Indictment concurrently alleges four JCEs: one “overarching” JCE and three subjacent JCEs. The Prosecutor purposely clarifies the nature of the relationship between the four JCEs by connecting each of the underlying JCEs’ objective to that of the overarching JCE:<sup>1</sup>

In particular, at various times during the existence of the overarching joint criminal enterprise, Radovan KARADZIC and Ratko MLADIC participated in three additional joint criminal enterprises ... The pursuit of each of these objectives was related to the objective of the overarching joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in BiH.

4. The Indictment lists the elements comprising each alleged JCE by enumerating the relevant time period, the nature and purpose, the identity of the participants, and Dr. Karadzic’s alleged role in the JCE. For each element, the same information is contained in the overarching JCE and at least one of the subsidiary JCEs. The Defence has attached to this motion a comparative table of the alleged JCEs to better illustrate the overlapping charges.<sup>2</sup>

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<sup>1</sup> *Prosecutor v. Karadzic*, No. IT-95-5/18-PT, *Third Amended Indictment* (“*Third Amended Indictment*”), (27 February 2009), at para. 8.

<sup>2</sup> See Annex A: Table of Comparison JCEs.

5. Although the pleading of participation in multiple JCEs is novel in international criminal law, the validity of such a tactic has been thoroughly discussed in American jurisprudence in relation to the analogous concept of conspiracy.
6. The Supreme Court of the United States developed the “Multiple Conspiracy Doctrine”<sup>3</sup> which, out of concern over the fundamental rights of the accused, renders invalid an indictment or a conviction based on a charge of single conspiracy when multiple conspiracies are present, and *vice versa*. American jurisprudence puts forth different factors to consider in order to characterize a claim of conspiracy as single or multiple: (1) the time frame; (2) the locations of the events charged; (3) the persons acting as co-conspirators; (4) the statutory offenses charged in the indictment; and (5) the overt acts or other description of the offense charges that indicate the nature and scope of the activity.<sup>4</sup>
7. Interpreting these factors, American courts have held that neither a lapse of time, nor a change in membership<sup>5</sup> nor a change of locale transpose a single conspiracy into multiple conspiracies.<sup>6</sup> They have also recognized that a single conspiracy can consist of a diversity of objectives<sup>7</sup> or include sub-agreements and subgroups,<sup>8</sup> given there is a common criminal purpose or plan between the conspirators.<sup>9</sup>
8. Addressing the question of overarching conspiracies, a U.S. District Court in Texas stated:

Where the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect of the scheme or to the overall success of the venture, where there are several parts

<sup>3</sup> See *Kotteakos v. U.S.*, 328 U.S. 750, 90 L.Ed. 1557, 66 S.Ct. 1239 (1946).

<sup>4</sup> *U.S. v. Potashnik*, Slip Copy, 2008 WL 5272807, 5 (N.D.Tex.) (17 Dec. 2008); *U.S. v. Ellender*, 947 F.2d 748, 759 (5th Cir.1991); See also *State v. Bobic*, 140 Wash.2d 250, 996 P.2d 610, 619-620 (2000); *U.S. v. Bibbero*, 749 F.2d 581, 587 (9th Cir.1984).

<sup>5</sup> See also *U.S. v. Robertson*, 67 Fed.Appx. 257, 265 (6th Cir.(Ky.) May 09, 2003); *U.S. v. Maliszewski*, 161 F.3d 992, 1013-1014 (6th Cir.1998). (“[A] single conspiracy may exist even if different members joined at different times, or the membership of the group changed.”)

<sup>6</sup> *U.S. v. Maliszewski*, paras. 1014-1015; *U.S. v. Segines*, 17 F.3d 847, 856 (6th Cir.1994).

<sup>7</sup> *U.S. v. Manfredi*, Slip Copy, 2009 WL 137316, 7 (W.D.Pa.) (Jan 21, 2009); *U.S. v. Bobb*, 471 F.3d 491, 494-495 (3d Cir.2006). (“Although its objectives may be numerous and diverse, a single conspiracy exists if there is one overall agreement among the parties to carry out those objectives.”)

<sup>8</sup> *U.S. v. Bibbero*, para. 587; *U.S. v. Tille*, 729 F.2d 615, 621 (9th Cir.1984).

<sup>9</sup> *U.S. v. Bobb*, para. 495-496. (“The existence of an overall common purpose and the conspirators’ knowledge of the larger operation suffice to prove that the various agreements and arrangements ... were part of a single conspiracy with multiple objectives.”)

inherent in a larger common plan, or where ... the nature of the activity is such that knowledge on the part of one member concerning the existence and function of other members of the same scheme is necessarily implied due to the overlapping nature of the various roles of the participants, the existence of a single conspiracy will be inferred.<sup>10</sup>

9. The rationale used in American conspiracy law equally applies to the present case. The determining factors used in the multiple conspiracy analysis correspond to the elements pleaded by the Prosecutor in the present Indictment. The Prosecutor alleges four JCEs that took place in Bosnia and Herzegovina of which the timeframes, the objectives, the members, and Dr. Karadzic's alleged role in the JCEs significantly overlap.<sup>11</sup> Moreover, the Prosecutor pleads that these JCEs all share the same common purpose.<sup>12</sup>
10. After applying the principles developed in American conspiracy law to our case, it is clear that the Prosecutor's pleading of multiple JCEs is defective, as these make up a single JCE whose membership and objectives evolved over time.
11. This was recently recognized by the Appeals Chamber in the *Krajisnik* case. The Appeals Chamber held that:
 

...[the Trial Chamber] found that the criminal means of realizing the common objective of the JCE can evolve over time. The Appeals Chamber can see no error in this: a JCE can come to embrace expanded criminal means, as long as the evidence shows that the JCE members agreed on this expansion of means. In this respect, it is not necessary to show that the JCE members *explicitly* agreed to the expansion of criminal means: this agreement may materialize extemporaneously and be inferred from circumstantial evidence.<sup>13</sup>
12. Additionally, the present Indictment adds redundant complexity to this substantial trial through the pleading of Dr. Karadzic's participation in multiple JCEs instead of a sole JCE.
13. It is acknowledged that the time required for proceedings will increase in proportion to the complexity of the case.<sup>14</sup> The three additional charges of JCE

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<sup>10</sup> *U.S. v. Potashnik*, para. 6.

<sup>11</sup> See Annex A.

<sup>12</sup> Third Amended Indictment, above n1, at para. 8.

<sup>13</sup> *Prosecutor v Krajisnik*, No. IT-00-39-A, *Judgement* (17 March 2009) at para. 163

<sup>14</sup> Judge S. Trechsel, *Human Rights in Criminal Proceedings* (2005), 144.

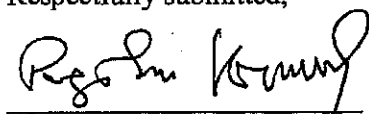
participation will unnecessarily prolong the proceedings by requiring the Prosecutor to demonstrate complicated intertwined criminal schemes that, in reality, are absorbed by the overarching JCE. A former Senior Legal Officer at the ICTY criticized the decision to join multiple Indictments into one large complex trial in the case of Milosevic, because “the overextension of same transaction theories” jeopardized the rights of the Accused and created practical case management issues.<sup>15</sup>

**Conclusion**

14. Based on the foregoing, Dr. Karadzic respectfully contends that the charging of multiple JCEs is a defect in the indictment. He requests that the Trial Chamber order the prosecution to remove from the Indictment, all but the overarching JCE as a form of individual responsibility labeled “committing” under Article 7(1).

Word Count: 1,332

Respectfully submitted,



Dr. Radovan Karadzic<sup>16</sup>

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<sup>15</sup> Gideon Boas, *The Milosevic Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (2007), 121.

<sup>16</sup> 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 motion.

# **ANNEX A**

TABLE OF COMPARISON OF THE ALLEGED  
JOINT CRIMINAL ENTERPRISES

	<b>OVER-ARCHING</b>	<b>SNIPING &amp; SHELLING</b>	<b>SREBRENIC A</b>	<b>HOSTAGE</b>
<b>Paragraphs in Indictment</b>	Paras. 9-14	Paras. 15-19	Paras. 20-24	Paras. 25-29
<b>Charges In The Indictment Based On This Form Of Individual Responsibility</b>	-Count 1: genocide (para 37)			
	-Count 2: genocide (para 43-44)		-Count 2: genocide (para 42)	
	-Count 3: persecutions (para 49-51, 57, 60)		-Count 3: persecutions (para 49, 57-58, 60)	
	-Count 4,5,6: extermination and murder (para 62, 63, 67)	-Count 5,6: murder (para 65)	-Count 4,5,6: extermination and murder (para 62, 66)	
	-Counts 7,8: Deportation and inhumane acts (para 70, 74-75)		-Counts 7,8: Deportation and inhumane acts (para 70, 75)	
		-Counts 9,10: Terror and unlawful attacks (para 77)		
				Count 11: taking of hostages (para 84)
<b>Time Period</b>	Para. 9 10/91 – 30/11/95	Para. 15 04/92 – 11/95	Para. 20 11/07/95 – 1/11/95	Para. 25 05/95 – 06/95

<b>Objective</b>	Para. 9 Permanently remove Bosnian Muslim and Bosnian Croat inhabitants from the territories of BiH claimed as Bosnian Serb territory.	Para. 15 Establish and carry out a campaign of sniping and shelling against the civilian population of Sarajevo, the primary purpose of which was to spread terror among the civilian population.	Para. 20 Eliminate the Bosnian Muslims in Srebrenica by killing the men and boys of Srebrenica and forcibly removing the women, young children and some elderly men from Srebrenica.	Para. 25 Take UN personnel hostage in order to compel the NATO to abstain from conducting air strikes against Bosnian Serb military targets.
<b>Crimes Allegedly Committed</b>	Para. 9 <i>By means which included</i> -Genocide (count 1) -persecution -extermination -murder -deportation -inhumane acts (forcible transfer).	Para. 15 -Terror -unlawful attacks on civilians -murder.	Para. 20 -Genocide (count 2) -persecution -extermination -murder -deportation -inhumane acts (forcible transfer)	Para. 25 -Taking the hostages



Members	Paras. 11-12	Paras. 16-17	Paras. 21-22	Paras.26-27
	-Krajisnik -Mladic -Milosevic -Plavsic -Koljevic -Mico Stanisic -Mandic -Jovica Stanisic -Simatovic -Raznatovic -Seselj	-Krajisnik -Mladic -Plavsic -Koljevic -Galic -Dragomir Milosevic -Seselj	-Mladic	-Mladic
	-Members of the Bosnian Serb leadership	-Members of the Bosnian Serb leadership		
	-Bosnian Serb Political and Governmental Organs	-Republic-level members of Bosnian Serb Political and Governmental Organs <i>with            responsibility in            or for the            Sarajevo area</i>	-Republic-level members of Bosnian Serb Political and Governmental Organs -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.	-Members of Bosnian Serb Political and governmental Organs
	-Commanders, assistant commanders, senior officers, and chiefs of Serbian MUP, JNA, VJ, VRS, MUP, TO at the republic, regional,	-Commanders, assistant commanders, senior officers, and chiefs of JNA, VRS, TO, and MUP units whose areas of responsibility	-Commanders, assistant commanders, seniors officers, and chiefs of the VRS and MUP operating in or with responsibility	-Commanders, assistant commanders, senior officers, and chiefs of the VRS and MUP

	municipal and local level	includes the Sarajevo area	over territory within the Drina Corps area of responsibility and/or Trnovo municipality.  -Members of a Serbian MUP unit called 'Scorpions'.	
	-Leaders of Serbian and Bosnian Serb paramilitary forces and volunteer units.	-Leaders of Serbian and Bosnian Serbian paramilitary forces and volunteer units operating in or with responsibility over the Sarajevo area		
<b>Members of Non-Members Implementing the Objective</b>	Para.13	Para.18	Para.23	Para.28
	-personally	-personally	-personally	-personally
	-Bosnian Serb Political and Governmental Organs			
	-Members of the MUP, VRS, JNA, VJ, TO, the Serbian MUP, Serbian and Bosnian Serb paramilitary and volunteer units, and Serb Forces	-Until 20/05/92:members of the JNA operating in or with responsibility over the Sarajevo area  -Members of the VRS, in particular the Sarajevo Romanija Corps  -Sarajevo Forces	-Members of the VRS and MUP operating in or with responsibility over territory within the Drina Corps area of responsibility and/or Trnovo municipality and Serbian MUP unit called 'Scorpions' (Scorpions only in Trnovo municipality).	-Members of VRS and the MUP

<b>Dr. Karadzic's Alleged Role</b>		<i>All same except (g)</i>	<i>All same except (f)</i>	<i>All same except (c), (f), (g), (i), (j)</i>
	Para. 14	Para. 19	Para. 24	Para. 29
	<i>Through commission...</i>	<i>Through a campaign of sniping and shelling</i>	<i>Through...</i>	<i>Through...</i>
	(a) formulating, promoting, participating in, and/or encouraging the development and implementation of SDS and Bosnian Serb governmental policies intended to advance the objective of the JCE.	(a) formulating, promoting, participating in, and/or encouraging the development and implementation of SDS and Bosnian Serb governmental policies intended to advance the objective of the JCE.	(a) formulating, promoting, participating in, and/or encouraging the development and implementation of SDS and Bosnian Serb governmental policies intended to advance the objective of the JCE.	(a) formulating, promoting, participating in, and/or encouraging the development and implementation of SDS and Bosnian Serb governmental policies intended to advance the objective of the JCE.
(b) participating in the establishment, support and/or maintenance of Bosnian Serb Political and Governmental Organs and of the VRS, the TO, the MUP, and Bosnian Serb Forces through which the objective of the JCE was implemented	(b) participating in the establishment, support and/or maintenance of Bosnian Serb Political and Governmental Organs and of the VRS, the TO, the MUP, and Bosnian Serb Forces through which the objective of the JCE was implemented	(b) participating in the establishment, support and/or maintenance of Bosnian Serb Political and Governmental Organs and of the VRS, the TO, the MUP, and Bosnian Serb Forces through which the objective of the JCE was implemented	(b) participating in the establishment, support and/or maintenance of Bosnian Serb Political and Governmental Organs and of the VRS, the TO, the MUP, and Bosnian Serb Forces through which the objective of the JCE was implemented	

	<p>(c) disseminating, encouraging and/or facilitating the dissemination of propaganda to Bosnian Serbs intended to engender in Bosnian Serbs fear and hatred of Bosnian Muslims and Bosnian Croats or to otherwise win support for and participation in achieving the objective of the JCE including: 1) that Bosnian Serbs were in jeopardy of oppression, including genocide, at the hands of Bosnian Muslims and Bosnian Croats. 2) that territories on which Bosnian Muslims and Bosnian Croats resided were Bosnian Serb land</p>	<p>(c) disseminating, encouraging and/or facilitating the dissemination of propaganda to Bosnian Serbs intended to engender in Bosnian Serbs fear and hatred of Bosnian Muslims and Bosnian Croats or to otherwise win support for and participation in achieving the objective of the JCE including: 1) that Bosnian Serbs were in jeopardy of oppression, including genocide, at the hands of Bosnian Muslims and Bosnian Croats. 2) that territories on which Bosnian Muslims and Bosnian Croats resided were Bosnian Serb land</p>	<p>(c) disseminating, encouraging and/or facilitating the dissemination of propaganda to Bosnian Serbs intended to engender in Bosnian Serbs fear and hatred of Bosnian Muslims and Bosnian Croats or to otherwise win support for and participation in achieving the objective of the JCE including: 1) that Bosnian Serbs were in jeopardy of oppression, including genocide, at the hands of Bosnian Muslims and Bosnian Croats. 2) that territories on which Bosnian Muslims and Bosnian Croats resided were Bosnian Serb land</p>	
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	(d) directing, encouraging, facilitating, and/or authorizing Bosnian Serb Political and Governmental Organs, SDS officials and members, and Serb Forces to carry out acts in furtherance of the objective of the JCE.	(d) directing, encouraging, facilitating, and/or authorizing Bosnian Serb Political and Governmental Organs, SDS officials and members, and Serb Forces to carry out acts in furtherance of the objective of the JCE.	(d) directing, encouraging, facilitating, and/or authorizing Bosnian Serb Political and Governmental Organs, SDS officials and members, and Serb Forces to carry out acts in furtherance of the objective of the JCE.	(d) directing, encouraging, facilitating, and/or authorizing Bosnian Serb Political and Governmental Organs, SDS officials and members, and Serb Forces to carry out acts in furtherance of the objective of the JCE.
	(e) participating in the design or formulation of acts carried out by Bosnian Serb Political and governmental Organs, SDS officials and members, and Serb Forces in furtherance of the objective of the JCE.	(e) participating in the design or formulation of acts carried out by Bosnian Serb Political and governmental Organs, SDS officials and members, and Serb Forces in furtherance of the objective of the JCE.	(e) participating in the design or formulation of acts carried out by Bosnian Serb Political and governmental Organs, SDS officials and members, and Serb Forces in furtherance of the objective of the JCE.	(e) participating in the design or formulation of acts carried out by Bosnian Serb Political and governmental Organs, SDS officials and members, and Serb Forces in furtherance of the objective of the JCE.
	(f) obtaining, facilitating, encouraging and/or supporting the participation of JNA/VJ forces and Serbian paramilitary forces to further the objective of the JCE.	(f) obtaining, facilitating, encouraging and/or supporting the participation of JNA/VJ forces and Serbian paramilitary forces to further the objective of the JCE.		

	(g) failing, while under a duty stemming from his positions described in para 33, to take adequate steps to ensure that Bosnian Serb Political and Governmental Organs and/or Bosnian Serb Forces would act to protect Bosnian Muslims and Bosnian Croats residing in areas under their control.		(g) failing, while under a duty stemming from his positions described in para 33, to take adequate steps to ensure that Bosnian Serb Political and Governmental Organs and/or Bosnian Serb Forces would act to protect Bosnian Muslims and Bosnian Croats residing in areas under their control.	
	(h) facilitating and/or encouraging the commission by Serb Forces and Bosnian Serb Political and Governmental Organs of crimes that furthered the objective of the JCE by failing, while under a duty stemming from his positions described in para 33, to take adequate steps to prevent and/or investigate such crimes, and/or arrest and/or punish the perpetrators of such crimes.	(h) facilitating and/or encouraging the commission by Serb Forces and Bosnian Serb Political and Governmental Organs of crimes that furthered the objective of the JCE by failing, while under a duty stemming from his positions described in para 33, to take adequate steps to prevent and/or investigate such crimes, and/or arrest and/or punish the perpetrators of such crimes.	(h) facilitating and/or encouraging the commission by Serb Forces and Bosnian Serb Political and Governmental Organs of crimes that furthered the objective of the JCE by failing, while under a duty stemming from his positions described in para 33, to take adequate steps to prevent and/or investigate such crimes, and/or arrest and/or punish the perpetrators of such crimes.	(h) facilitating and/or encouraging the commission by Serb Forces and Bosnian Serb Political and Governmental Organs of crimes that furthered the objective of the JCE by failing, while under a duty stemming from his positions described in para 33, to take adequate steps to prevent and/or investigate such crimes, and/or arrest and/or punish the perpetrators of such crimes.

	<p>(i) engaging in, supporting and/or facilitating efforts to deny or provide misleading information about crimes against Bosnian Muslims and Bosnian Croats and about the role that Serb Forces had played in those crimes to representatives of the international community, non-governmental organizations, the media and the public, thereby facilitating the commission of crimes in furtherance of the objective of the JCE</p>	<p>(i) engaging in, supporting and/or facilitating efforts to deny or provide misleading information about crimes against Bosnian Muslims and Bosnian Croats and about the role that Serb Forces had played in those crimes to representatives of the international community, non-governmental organizations, the media and the public, thereby facilitating the commission of crimes in furtherance of the objective of the JCE</p>	<p>(i) engaging in, supporting and/or facilitating efforts to deny or provide misleading information about crimes against Bosnian Muslims and Bosnian Croats and about the role that Serb Forces had played in those crimes to representatives of the international community, non-governmental organizations, the media and the public, thereby facilitating the commission of crimes in furtherance of the objective of the JCE</p>	
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	(j) directing and/or authorizing the restriction of humanitarian aid to Bosnian Muslim and/or Bosnian Croat enclaves located in territory controlled by Bosnian Serb Political and governmental Organs and/or Bosnian Serb Forces in an effort to create unbearable living conditions for these inhabitants in furtherance of the objective of the JCE.	(j) directing and/or authorizing the restriction of humanitarian aid to Bosnian Muslim and/or Bosnian Croat enclaves located in territory controlled by Bosnian Serb Political and governmental Organs and/or Bosnian Serb Forces in an effort to create unbearable living conditions for these inhabitants in furtherance of the objective of the JCE.	(j) directing and/or authorizing the restriction of humanitarian aid to Bosnian Muslim and/or Bosnian Croat enclaves located in territory controlled by Bosnian Serb Political and governmental Organs and/or Bosnian Serb Forces in an effort to create unbearable living conditions for these inhabitants in furtherance of the objective of the JCE.	
		<i>-in relation to the objective of spreading terror (para. 19)</i>	<i>-in relation to the objective of eliminating the Bosnian Muslims in Srebrenica (para. 24)</i>	<i>-in relation to the objective of taking hostages (para. 29)</i>