

# **The Indictments against Radovan Karadžić**

## **An Analysis of the Legal Developments in the ICTY's Crucial Upcoming Trial**

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### INTRODUCTION

On 21 July 2008, the Serbian Authorities announced that Radovan Karadžić, one of the most wanted men on the planet, had finally been arrested in Belgrade. The news spread quickly and once again the International Criminal Tribunal for the former Yugoslavia (ICTY) – and international criminal justice more generally – was in the spotlight. Dr. Radovan Karadžić was one of the three men accused by the ICTY who was still at large, having escaped apprehension for 13 years.<sup>1</sup>

Radovan Karadžić, the former President of the Bosnian-Serb administration, and Ratko Mladić, the former commander of the Bosnian-Serb army, were co-accused in two separate indictments, issued by the ICTY Prosecutor in 1995.

The initial indictment against Radovan Karadžić was confirmed on 25 July 1995 and charged Karadžić and Mladić with crimes committed against civilians throughout the territory of Bosnia and Herzegovina.<sup>2</sup> The second indictment was confirmed on 16 November 1995 and referred to the events that took place in and around the enclave of Srebrenica in July 1995.<sup>3</sup> On the same dates, the Judges issued warrants of arrest with orders for surrender against the two accused. The warrants were sent to the Federal Republic of Yugoslavia, the Republic of Bosnia and Herzegovina, and to the Bosnian-Serb administration in Pale.

On 31 May 2000, the two initial indictments of 1995 were consolidated. The so-called “Operative Indictment” was the one in force at the time of Karadžić’s arrest on 21 July 2008. Following the capture of one of the most wanted fugitives, the ICTY’s Prosecutor, Serge Brammertz, held a press conference where it was

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<sup>1</sup> The ICTY is still awaiting the capture and transfer of Bosnian Serb commander Ratko Mladić and Goran Hadžić, the former President of the self-proclaimed Republic of Serbian Krajina.

<sup>2</sup> *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Indictment confirmed on 25 July 1995, Case No. IT-95-5 “Bosnia and Herzegovina”.

<sup>3</sup> *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Indictment confirmed on 16 November 1995, Case No. IT-95-18 “Srebrenica”.

clearly announced that the Office of the Prosecutor would amend the Operative Indictment. During the eight years prior to the capture of Radovan Karadžić, the Tribunal made some crucial developments in the field of international criminal law and in terms of fact findings, which ought to be taken into account for the prosecution of one of the most wanted war criminals.

During the initial appearance of Radovan Karadžić before Judge Alphons Orie on 31 July 2008, the Prosecutor indicated that an updated indictment would be submitted. This intention was reiterated during the further initial appearance of the Accused which took place on 29 August 2008 before Judge Iain Bonomy.

Finally, on 22 September 2008, the Prosecution filed the much expected amended version of the Operative Indictment, which not only takes into account the latest developments in the ICTY's jurisprudence since 2000, but also clarifies and narrows the charges against Radovan Karadžić. The effect of the completion strategy can be seen here. But this move has also to be considered in light of Karadžić's announcement, during his initial appearance, that he will represent himself. After the difficulties encountered during the Milošević trial and the ongoing proceedings in the Šešelj case, the Prosecution's decision to submit a "compact indictment", one which is easier to use, reflects the desire to avoid a new fiasco at the ICTY.

This article analyses the current indictment against Radovan Karadžić, taking as a starting point the two indictments confirmed in 1995 and retracing the steps which led to the actual shape of the operative indictment. The article concludes with reflections on the chances that the indictment will be successful.

## PART 1: HISTORY OF THE INDICTMENTS AGAINST KARADŽIĆ

### 1. THE 1995 INDICTMENTS AGAINST RADOVAN KARADŽIĆ AND RATKO MLADIĆ

#### 1.1. THE INITIAL INDICTMENT, CONFIRMED ON 25 JULY 1995

Richard Goldstone, who in 1995 was the Chief Prosecutor at the ICTY, charged Radovan Karadžić and Ratko Mladić, in an initial indictment (confirmed by Judge Jorda on 25 July 1995) with 16 counts set out in three parts. The counts encompass all of the offences within the jurisdiction of the ICTY, namely genocide, crimes against humanity, violations of the laws and customs of war and grave breaches of the Geneva Conventions.

##### *1.1.1. Genocide as regards to detention facilities and on the basis of superior responsibility*

In the first part of the indictment (counts 1 to 9), the charge of genocide referred to the internment of Bosnian Muslim and Bosnian Croat civilians in detention facilities where they were subjected to widespread acts of physical and psychological abuse and to inhumane conditions. Approximately one thousand

detainees were killed. The Prosecutor alleged that personnel operating within the detention facilities “intended to destroy Bosnian Muslim and Bosnian Croat people as national, ethnic, or religious groups and killed, seriously injured and deliberately inflicted upon them conditions intended to bring about their physical destruction.”<sup>4</sup>

The two accused were charged with genocide pursuant to Articles 4(2) (a),(b),(c) and 7(3) of the Statute of the Tribunal (the Statute). Therefore, in this first indictment – as far as genocide is concerned – Radovan Karadžić and Ratko Mladić were *not* accused of planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of the crime of genocide under Article 7 (1)<sup>5</sup> of the Statute. Rather, Karadžić and Mladić were indicted on the basis of the doctrine of superior responsibility,<sup>6</sup> as set out in Article 7(3) of the Statute,<sup>7</sup> for the acts committed by their subordinates as well as the failure of the accused to prevent the commission of these crimes and to punish the perpetrators.

### *1.1.2. Other crimes committed against Bosnian Muslim and Bosnian Croat civilians*

The charges of crimes against humanity referred to the persecution on political, racial and religious grounds of Bosnian Muslim and Bosnian Croat civilians (count 2).

The initial indictment, in the first nine counts, also charged the accused with violations of the laws and customs of war and grave breaches of the Geneva Conventions in relation to the unlawful confinement, murder, rape, sexual assault, torture, beating, robbery and inhumane treatment of civilians; the targeting of political leaders, intellectuals and professionals; the unlawful deportation and transfer of civilians; the unlawful shelling of civilians; the unlawful appropriation and plunder of real and personal property; the destruction of homes and businesses; and the destruction of places of worship.<sup>8</sup>

<sup>4</sup> *Prosecutor v. Radovan Karadžić and Ratko Mladić* – Indictment confirmed on 25 July 1995 – Case No IT-95-5 “Bosnia and Herzegovina”, para. 18.

<sup>5</sup> Article 7 (1) of the Statute of the ICTY reads as follows: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”

<sup>6</sup> Superior responsibility is based on the principle that liability for subordinate criminal conduct can exist despite the absence of any direct or affirmative action taken by a superior.

<sup>7</sup> Article 7 (3) of the Statute of the ICTY reads as follows: “The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”

<sup>8</sup> *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Indictment confirmed on 25 July 1995, Case No. IT-95-5 “Bosnia and Herzegovina”, paras. 17-43.

### *1.1.3. The siege of Sarajevo*

The second part of the initial indictment (counts 10 to 12) was concerned with crimes allegedly committed by the forces of the Bosnian Serb Administration during the 44-month siege of Sarajevo, which started on 6 April 1992. Specifically, the initial indictment charged Karadžić and Mladić with committing a deliberate attack on the civilian population and individual civilians (count 10) which was characterised as a violation of the laws and customs of war as recognised by Articles 3, 7(1) and 7(3) of the Statute. Further, the second part of the initial indictment dealt with the sniper campaign against the civilian population of Sarajevo (counts 11 and 12) during the siege of the city, when snipers systematically, unlawfully, and wilfully killed and wounded civilians in the area of Sarajevo. These acts were characterised by the Prosecutor as crimes against humanity under Articles 5(a) (murder) and (i) (inhumane acts) of the Statute.<sup>9</sup>

### *1.1.4. The taking of UN personnel as hostages*

Finally, the third part of the initial indictment (counts 13 to 16) alleged that between 26 May 1995 and 2 June 1995 Bosnian Serb military personnel, under the direction and control of the accused, seized 284 UN peacekeepers in Pale, Sarajevo, Goražde, and other locations and held them hostage, by force or by the threat of force, in order to prevent further NATO air strikes targeting Bosnian Serb forces around Sarajevo.<sup>10</sup>

## 1.2. THE SECOND INDICTMENT, CONFIRMED ON 16 NOVEMBER 1995: SREBRENICA

The second indictment against Radovan Karadžić and Ratko Mladić, which was confirmed by Judge Riad on 16 November 1995, dealt with serious violations of international humanitarian law allegedly committed by the forces of the Bosnian Serb Administration in July 1995 during the takeover of the “safe area” of Srebrenica.<sup>11</sup>

In this indictment, Radovan Karadžić and Ratko Mladić were charged with genocide (count 1), crimes against humanity (counts 2, 3, 5, 7, 9, 11, 13, 15, 17 and 19) and with violations of the laws and customs of war (counts 4, 6, 8, 10, 12, 14, 16, 18 and 20).

According to the indictment, Karadžić and Mladić were responsible for the summary execution of thousands of Bosnian Muslim men which took place around the UN compound in Potočari, located within the safe area of Srebrenica. The refugees had sought shelter at the compound after the forces of the Bosnian

<sup>9</sup> *Ibid*, paras. 44-45.

<sup>10</sup> *Ibid*, paras. 46-48.

<sup>11</sup> On 16 April 1993, the Security Council of the United Nations, acting pursuant to Chapter VII of the United Nations Charter, adopted Resolution 819, in which it demanded that all parties to the conflict in the Republic of Bosnia and Herzegovina treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act. Resolution 819 was reaffirmed by Resolution 824 on 6 May 1993 and by Resolution 836 on 4 June 1993.

Serb Administration had attacked Srebrenica. The indictment also refers to executions which occurred in the woods in the direction of Tuzla where a second group of civilians had fled.

Specifically, in relation to the events which allegedly occurred around Potočari, the indictment stated that:

Between 12 July 1995 and 13 July 1995, Bosnian Serb military personnel summarily executed Bosnian Muslim men and women at diverse locations around the UN compound where they had taken refuge. The bodies of those summarily executed were left in fields and buildings in the immediate vicinity of the compound. These arbitrary killings instilled such terror and panic amongst the Muslims remaining there that some of them committed suicide and all the others agreed to leave the enclave.<sup>12</sup>

In relation to the Bosnian Muslims who had fled Srebrenica and headed to Tuzla, the second indictment alleged that thousands of them were captured by – or surrendered to – forces under the command and control of the two accused. Many of them surrendered because they had been reassured that if they did so their lives would be spared. Instead, the indictment stated that “many of the Bosnian Muslims who were captured by or surrendered to Bosnian Serb military personnel were summarily executed by Bosnian Serb military personnel at the locations of their surrender or capture, or at other locations shortly thereafter.”<sup>13</sup>

In this second indictment against Karadžić and Mladić, the two men were accused of being individually responsible for the crimes listed therein. They were charged with having “planned, instigated, ordered or otherwise aided and abetted” the planning, preparation or execution (under Article 7(1) of the Statute) of crimes referred to in Articles 2 to 5 of the Statute, including the crime of genocide. Alternatively, the indictment alleged that Karadžić and Mladić were criminally responsible as commanders for the acts of their subordinates pursuant to Article 7(3) of the Statute.

## 2. JULY 1996: INTERNATIONAL ARREST WARRANTS AND REVIEW OF CHARGES AGAINST KARADŽIĆ

### 2.1. RULE 61 OF THE RULES OF PROCEDURE AND EVIDENCE OF THE ICTY: REVIEW OF THE INDICTMENT AND THE ISSUANCE OF ARREST WARRANTS

The Tribunal’s Statute does not allow for trials *in absentia*.<sup>14</sup> According to Article 21 (4)(d) of the Statute, an accused is entitled to be tried in his presence.<sup>15</sup> Rule 61 of the ICTY’s Rules of Procedure and Evidence (RPE) is entitled “Procedure

<sup>12</sup> *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Indictment confirmed on 16 November 1995, Case No. IT-95-18 “Srebrenica” para. 14.

<sup>13</sup> *Ibid*, paras. 19-20.

<sup>14</sup> See F. Patel King and A. M. La Rosa, “The Jurisprudence of the Yugoslavia Tribunal: 1994-96”, *European Journal of International Law*, 8:123-179, 1997, pp. 128-130.

<sup>15</sup> Article 21 (4)(d) of the ICTY Statute.

in Case of Failure to Execute a Warrant”. Recourse to this rule allows the ICTY, which does not have a police force of its own, to react to the failure of the accused to appear voluntarily as well as the failure to execute warrants issued against them.<sup>16</sup>

The Rule 61 procedure is activated when arrest warrants for accused persons are not executed within a “reasonable time” of their issuance. In such cases, the judge who initially confirmed the indictment invites the Prosecutor to report on the measures taken to “effect personal service of the indictment”. If satisfied that the Prosecutor has taken all reasonable steps to effect personal service, including recourse to the appropriate authorities of the relevant state or states, and has otherwise tried to inform the accused of the existence of the indictment against him by seeking publication of newspaper advertisements, the confirming judge orders the Prosecutor to submit the indictment to the judge’s own Trial Chamber.<sup>17</sup>

The Trial Chamber then may conduct an open court review of the evidence supporting the indictment to determine whether there are reasonable grounds for believing that the accused committed the crimes with which he is charged. In so doing, the Prosecutor must submit the indictment together with all the evidence that was before the confirming judge; the Prosecutor also may examine any witness whose statement was submitted to the confirming judge and may tender further evidence to the Chamber.<sup>18</sup>

After the examination of the evidence presented by the Prosecutor, if the Trial Chamber is satisfied “that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment,”<sup>19</sup> it shall make a determination as such, resulting in several interesting consequences.

The Rule 61 procedure is not in any way a trial *in absentia*, and does not result in a conviction or acquittal of the accused.<sup>20</sup> In sum, this Rule is a remedy against the lack of the enforcement power which characterises the Tribunal in situations in which an accused fails to appear before it, allowing the Tribunal to proceed nonetheless.<sup>21</sup> An important consequence of a Rule 61 determination is that an international arrest warrant for the accused is transmitted to all states. Further, the Trial Chamber “may order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties.”<sup>22</sup> Rule 61 proceedings may also have repercussions for individual states. If the Trial Chamber finds that the failure to “effect personal service” is due in whole

<sup>16</sup> *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, Cases Nos. IT-95-5-R61 and IT-95-18-R61, 11 July 1996, 11 July 1996, para. 3.

<sup>17</sup> Rule 61(A) of the Rules of Procedure and Evidence of the ICTY.

<sup>18</sup> *Ibid*, Rule 61 (B). See also F. Patel King and A. M. La Rosa, *op. cit.*, pp.123-179.

<sup>19</sup> *Ibid*, Rule 61 (C).

<sup>20</sup> F. Patel King and A. M. La Rosa, *op. cit.*, p. 129.

<sup>21</sup> On this point see *Prosecutor v. Martić*, Case No. IT-95-13-R61, “Martić Rule 61 Decision”, (8 March 1996); *Prosecutor v. Nikolić*, Case No. IT-94-2-R61, Review of the Indictment Pursuant to Rule 61, para. 3, (20 October 1995); *Prosecutor v. Rajić*, Case No. IT-95-12-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, (13 September. 1996). See also F. Patel King and A. M. La Rosa, *op. cit.*, pp. 123-179, pp. 130-142.

<sup>22</sup> Rule 61(D) of the Rules of Procedure and Evidence of the ICTY.

or in part to a failure or refusal of a state to cooperate with the Tribunal, the President of the Tribunal “shall notify the Security Council [of this finding] in such manner as he thinks fit.”<sup>23</sup>

## 2.2. THE DECISION OF TRIAL CHAMBER I OF 11 JULY 1996: A BROADER DEFINITION OF THE RESPONSIBILITY FOR GENOCIDE

Nearly one year after the first indictment had been confirmed and the first arrest warrant had been issued, the two confirming judges – in their separate decisions of 18 June 1996 – both found that a reasonable time had elapsed since the issuance of the arrest warrants. Accordingly, the judges ordered that the matter be submitted to Trial Chamber I for joint consideration of the indictments in open court. In the course of these hearings, held on 27 and 28 June and on 1, 3, 4 and 8 July 1996, the Prosecutor tendered the evidence previously provided to the confirming judges, as well as certain additional materials. The Chamber heard the testimony of fourteen witnesses, including experts, an investigator, eye-witnesses and two *amici curiae*.<sup>24</sup>

In its decision of 11 July 1996, the Chamber confirmed all counts of the indictments and issued international arrest warrants for transmission to all states, as well as to Interpol and the Implementation Force (IFOR) in Bosnia.<sup>25</sup>

The Chamber’s decision focused on whether the defendants could be held criminally responsible for the policy of ethnic cleansing. The evidence submitted by the Prosecutor led the Chamber to infer that the offences alleged in the indictments were committed in accordance with a political programme and institutional and military organisation under the control of Radovan Karadžić and Ratko Mladić.<sup>26</sup>

Regarding the initial indictment of 25 July 1995, the Trial Chamber invited the Prosecutor to “consider broadening the characterisation of genocide to include other criminal acts listed in the indictment than those committed in the detention camps.”<sup>27</sup> The judges were satisfied by the Prosecution’s evidence that several acts submitted for review – in addition to those related to the detention facilities and the camps – could have been planned and ordered with genocidal intent.

The Trial Chamber then addressed the issue of the legal characterisation of the offences charged in the two indictments and concluded that, without prejudice to the findings of the judges who would conduct the eventual trial of the case, a characterisation of crimes against humanity or genocide was “more appropriate for the totality of acts charged in both indictments.”<sup>28</sup> The only

<sup>23</sup> *Ibid*, Rule 61 (E).

<sup>24</sup> See also F. Patel King and A. M. La Rosa, *op. cit.*, pp.123-179, p. 139.

<sup>25</sup> See *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, Cases Nos. IT-95-5-R61 and IT-95-18-R61, 11 July 1996, p. 58.

<sup>26</sup> See *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, Cases Nos. IT-95-5-R61 and IT-95-18-R61, 11 July 1996, para. 42.

<sup>27</sup> *Ibid*, para. 95.

<sup>28</sup> *Ibid*, para. 89.

exception concerned the acts that allegedly occurred in relation to the taking of UNPROFOR soldiers and using them as human shields. These acts kept their original legal characterisation as war crimes.

The Trial Chamber finally determined that the failure to “effect personal service” of the indictments and to execute the warrants of arrest issued against the Karadžić and Mladić had to be ascribed to the lack of cooperation of the *Republika Srpska* and Federal Republic of Yugoslavia (FRY) with the Tribunal.<sup>29</sup> The Trial Chamber noted in particular that this failure was a breach of the obligations made on *Republika Srpska*’s behalf by the FRY during the Dayton Peace Agreements.<sup>30</sup>

### 3. THE OPERATIVE INDICTMENT AGAINST KARADŽIĆ, CONFIRMED ON 31 MAY 2000

On 18 May 2000, the Prosecutor submitted a single amended indictment against Radovan Karadžić and, on 31 May 2000, Judge Wald granted leave to amend the first and second indictments against the accused. Judge Wald was satisfied that a *prima facie* case against Radovan Karadžić had been established by the Prosecution and confirmed the amended indictment, which is still the operative indictment in the case. On 11 October 2002, the confidentiality of the amended indictment was lifted.<sup>31</sup>

#### 3.1. A SINGLE AMENDED INDICTMENT

The operative indictment, as it stands today, consolidates the two initial indictments into one single, compact document. It includes one count of grave breaches of the Geneva Conventions of 1949, three counts of violations of the laws or customs of war, two counts of genocide, and five counts of crimes against humanity. The initial indictment and the second indictment together contained 36 counts. Former Chief Prosecutor Carla Del Ponte combined the two indictments against Radovan Karadžić into one document in May 2000. The Prosecutor dropped 25 counts, seemingly in the hope of capturing Karadžić in the immediate future and trying him together with Momčilo Krajišnik who had been transferred to The Hague in April 2000 (one month earlier).

The consolidated indictment is not in any respect less serious than the former two indictments; it still charges Radovan Karadžić with all the crimes within the jurisdiction of the Tribunal. In the rather compact, but nonetheless effective,

<sup>29</sup> *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, Cases Nos. IT-95-5-R61 and IT-95-18-R61, 11 July 1996, para. 101.

<sup>30</sup> For the official text of the Dayton Peace Agreement see [http://www.ohr.int/dpa/default.asp?content\\_id=379](http://www.ohr.int/dpa/default.asp?content_id=379)

<sup>31</sup> *Prosecutor v. Radovan Karadžić*, Order to Lift the Seal of Confidentiality of the Amended Indictment, Arrest Warrants, and Non-Disclosure Order, Case No.: IT 95-5/18-I, 11 October 2002.



operative indictment, Radovan Karadžić is held individually responsible for all the crimes listed therein pursuant to Article 7(1) and Article 7(3) of the Statute for his superior responsibility.

The operative indictment charges Radovan Karadžić with crimes committed between 1 July 1991 and 30 November 1995. It alleges that Karadžić, acting individually or in concert with others, participated in the crimes named in the indictment “in order to secure control of those areas of Bosnia and Herzegovina which had been proclaimed part of the Serbian Republic.”<sup>32</sup> The Prosecutor alleges that, between 1 July 1991 and 31 December 1992, the accused acted in concert with Momčilo Krajišnik and Biljana Plavšić.<sup>33</sup>

Additionally, the operative indictment alleges that between 1 July 1991 and 30 November 1995, Radovan Karadžić knew or had reason to know that Bosnian Serb forces under his command and control were committing or had committed the crimes alleged in the indictments and failed to take necessary and reasonable measures to prevent such acts or punish the perpetrators thereof. The indictment also alleges that between 1 December 1995 and 19 July 1996, Karadžić knew or had reason to know that Bosnian Serb forces under his direction and control had committed the acts described in the indictment and that Karadžić had again failed to take necessary and reasonable measures to punish the perpetrators.<sup>34</sup>

Only in count 11 of the operative indictment is Karadžić’s superior responsibility related to a different time-frame: between 26 May 1995 and 19 July 1996. This count concerns the alleged kidnapping and use as human shields of over 200 UN military observers and peacekeepers by Bosnian Serb forces directed and controlled by Karadžić.<sup>35</sup>

The indictment states that the crimes committed were part of a campaign which was undertaken by Bosnian Serb forces in order to implement the central policy of the Serbian Democratic Party<sup>36</sup> (SDS), namely “the unity of all Serbs within Yugoslavia as the only way of protecting Serbian national interests.”<sup>37</sup> The potential separation of Bosnia and Herzegovina from the federal Yugoslav system was perceived as a grave threat to the Serb population living in Bosnia and was therefore unacceptable.

<sup>32</sup> *Prosecutor v. Radovan Karadžić*, Amended Indictment 31 May 2000, para. 9.

<sup>33</sup> See *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, Case No. IT-00-39 & 40-PT. Biljana Plavšić pleaded guilty on 2 October 2002 to one count of persecutions on political, racial and religious grounds, a crime against humanity and was sentenced to 11 years’ imprisonment on 27 February 2003. On 25 November 2002, the Trial Chamber ordered that the trial of Momčilo Krajišnik be severed from the sentencing proceedings for Biljana Plavšić. Momčilo Krajišnik was sentenced to 27 years’ imprisonment on 26 September 2006. The case is pending before the Appeals Chamber.

<sup>34</sup> *Prosecutor v. Radovan Karadžić*, Amended Indictment 31 May 2000, paras. 31-32, 35-36, 42-43 and 51-52.

<sup>35</sup> *Ibid.*, paras. 58-59.

<sup>36</sup> Radovan Karadžić was a founding member of the Serbian Democratic Party, established within the Socialist Republic of Bosnia and Herzegovina on 12 July 1990. Radovan Karadžić was its President from 12 July 1990 until his resignation on 19 July 1996.

<sup>37</sup> *Prosecutor v. Radovan Karadžić*, Amended Indictment 31 May 2000, para. 74.

According to the Prosecutor, Bosnian Serb forces, including military, paramilitary, police, territorial defence units, the SDS, and governmental authorities implemented a policy aimed at creating impossible conditions of life for the non-Serb population, under the direction and control of Radovan Karadžić. This policy encouraged the non-Serb population to flee from the areas targeted by Bosnian Serb forces. Bosnian Muslims, Bosnian Croats, and other non-Serb groups that did not flee were deported and/or executed.<sup>38</sup>

### 3.2. A BROADENED SCOPE OF THE CHARACTERISATION OF GENOCIDE

Interestingly, the Prosecutor seems to have followed the twofold invitation extended by the judges of Trial Chamber I in their Rule 61 Decision relating to the charge of genocide.<sup>39</sup> First, the individual criminal responsibility of Radovan Karadžić in relation to the count of genocide and complicity in genocide, as drafted in the operative indictment, is also implicated through the operation of paragraph 1 of Article 7 of the Statute (and not only through paragraph 3 as it was in the initial indictment of 25 July 1995). Second, the operative indictment broadens the scope of the characterisation of genocide to include criminal acts – other than those committed in the detention camp. Consequently, the killings that allegedly occurred during attacks on the municipalities listed in paragraph 9 of the indictment are identified as genocide.

In the first six of the eleven counts listed in the Amended Indictment of 31 May 2000, the Prosecutor charges Radovan Karadžić with genocide, complicity in genocide, extermination, murder and wilful killing. According to the indictment, Radovan Karadžić, acting individually or in concert with others, planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of the destruction, in whole or in part, of the Bosnian Muslim and Bosnian Croat national, ethnic, racial or religious groups, in several municipalities.<sup>40</sup> The destruction of these groups was allegedly implemented by Bosnian Serb forces through killing, causing serious bodily or mental harm, and detaining Bosnian Muslims and Bosnian Croats in camps and detention facilities under inhumane conditions.

Regarding the execution of Bosnian Muslims and Bosnian Croats, the Amended Indictment can be divided into three main sections:

- I. *The killings that occurred during the attacks allegedly carried out by Serb forces, from 1 April to 13 August 1992, in the municipalities listed in the indictment.* The Prosecutor describes several specific

<sup>38</sup> *Ibid.*, para. 10.

<sup>39</sup> See *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, Cases Nos. IT-95-5-R61 and IT-95-18-R61, 11 July 1996, paras. 84-85 and 95.

<sup>40</sup> See *Prosecutor v. Radovan Karadžić*, Amended Indictment 31 May 2000, para. 17. The indictment lists several municipalities such as Bijeljina; Bratunac; Bosanski Šamac; Brčko; Doboj; Foča; Ilijaš; Ključ; Kotor Varoš; Novi Grad; Prijedor; Rogatica; Sanski Most; Srebrenica; Višegrad; Vlasenica; Zavidovići; and Zvornik.

episodes in which Bosnian Muslims and Bosnian Croats were killed.<sup>41</sup>

- II. *The summary executions of Bosnian Muslims and Bosnian Croats carried out by Serb forces within the camps and detention facilities set up by the Bosnian-Serb administration.* The Prosecutor alleges that the staff and the military police operating within the camps and detention facilities were under the direct control of Radovan Karadžić. The indictment specifically mentions several camps in which the alleged crimes were committed, including the notorious Omarska camp, Susica camp and KP Dom in Foča<sup>42</sup> and several specific episodes in which Bosnian Muslims and Bosnian Croats were summarily executed.<sup>43</sup>
- III. *The massacre of thousands of Bosnian Muslim boys and men, in an organised, widespread and systematic manner, in and around the “safe area” of Srebrenica between 11 and 18 July 1995.* The indictment retraces the steps which led to the executions: the creation of the safe area of Srebrenica through Security Council Resolution 819 of 16 April 1993, the subsequent shelling of the enclave by Serb forces on 6 July 1995, and the flight of civilians to both the UN compound of Potočari and Tuzla in response to the attack. The Prosecutor then identifies several sites in which the executions took place.<sup>44</sup>

### 3.3. OTHER CRIMES COMMITTED AGAINST THE BOSNIAN MUSLIM AND BOSNIAN CROAT CIVILIANS

“*Persecutions*” - In count 7 of the Amended Indictment, Radovan Karadžić is charged with the persecution of Bosnian Muslims, Bosnian Croats and other members of the non-Serb population in the municipalities listed in the indictment. This persecution was allegedly carried out by Serb forces through, *inter alia*, the killing of the non-Serb population as described above; the forced transfer or deportation of tens of thousands of Bosnian Muslim and Bosnian Croat civilians as well as inhumane treatment and/or torture inflicted when they were taken to detention facilities, police stations, military barracks, [and/or] private homes after the attacks on these municipalities.<sup>45</sup>

The persecution of Bosnian Muslims, Bosnian Croats and other non-Serbs included humiliation brought about by the inhumane living conditions in the detention facilities and the atmosphere of constant terror which reigned in these camps, where detainees were subjected to brutality with no certainty of surviving.

<sup>41</sup> Amended Indictment, para. 18.

<sup>42</sup> *Ibid*, para. 20.

<sup>43</sup> *Ibid*, para. 22.

<sup>44</sup> *Ibid*, para. 28.

<sup>45</sup> *Ibid*, paras. 33-34. See footnote 33.

Bosnian Muslims and Bosnian Croats were denied fundamental rights, such as the right to work, freedom of movement, the right to judicial process, and the right to equal access to public services including proper medical care.<sup>46</sup>

Finally, the Bosnian Serb forces undertook a campaign of destruction of non-Serb cities, towns, and villages as part of the systematic attacks carried out against the municipalities listed in the indictment. “The destruction was so extensive that nothing but portions of buildings and rubble remained in many of these municipalities. Buildings associated with the Serbian Orthodox religion remained untouched.”<sup>47</sup>

By these acts and omissions, it is alleged that Karadžić participated in persecution on political, racial, and religious grounds, which is a crime against humanity, punishable under Article 5(h) of the ICTY Statute.

*“Forcible Transfer and Deportation”* - In counts 8-9 of the Amended Indictment, the Prosecutor alleges that Karadžić “planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of the forced transfer and deportation of tens of thousands of Bosnian Muslims, Bosnian Croats and other non-Serbs from the municipalities listed in the indictment and the Srebrenica enclave.”<sup>48</sup>

The indictment specifically alleges that beginning in early April 1992, tens of thousands of Bosnian Muslim, Bosnian Croat and other non-Serb civilians were forcibly transferred and deported by Serb forces to areas under the control of the internationally-recognised government in Bosnia and Herzegovina, and to Croatia, and Serbia.<sup>49</sup>

The Amended Indictment also refers to the “safe area” of Srebrenica in relation to the deportation, stating that the forcible transfer of thousands of Bosnian Muslims from the enclave between 11 and 18 July 1995 contributed to the continuation of the “ethnic cleansing” campaign begun in 1992 by Bosnian Serb forces.<sup>50</sup>

Consequently, according to the Prosecutor, Radovan Karadžić, through these acts and omissions participated in the deportation and commission of other inhumane acts (forcible transfer) of Bosnian Muslim, Bosnian Croat and other non-Serb civilians, punishable under Article 5 (d)(i) of the ICTY Statute

### 3.4. THE SIEGE OF SARAJEVO

In count 10, Karadžić is charged with having “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a protracted campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population, thereby inflicting terror upon its civilian population.”<sup>51</sup>

<sup>46</sup> Amended Indictment, para. 34.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, para. 38.

<sup>49</sup> *Ibid.*, paras. 39-41.

<sup>50</sup> *Ibid.*, para. 40.

<sup>51</sup> Amended Indictment, para. 45.

The strategy of shelling the city of Sarajevo and its civilian population coupled with sniper attacks was implemented by the Sarajevo Romanija Corps, which stemmed from a transformation of the former Yugoslav Peoples Army (JNA).

The shelling and sniping of civilians in Sarajevo often had no connection with military actions and was aimed at creating and maintaining an atmosphere of constant terror. The siege transformed “the life of every Sarajevo inhabitant [into] a daily struggle to survive”; in addition, the Amended Indictment asserts that “the sheer human carnage that the shelling and sniping caused, the endless threat of death and maiming caused extensive trauma and psychological damage to the inhabitants of Sarajevo.”<sup>52</sup>

Consequently, the Amended Indictment states that Radovan Karadžić is responsible for unlawfully inflicting terror upon civilians, a violation of the laws or customs of war, as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949, punishable under Article 3 of the Statute of the Tribunal.

### 3.5. THE KIDNAPPING OF THE UN PERSONNEL

The last count (count 11) of the operative indictment refers to the kidnapping of over 200 UN military observers and peacekeepers by Bosnian Serb forces following the NATO air strikes that took place on 25 and 26 May 1995. The UN personnel were held hostage by force from 26 May until 2 June 1995 at strategic locations bearing military importance in order to prevent further air strikes against Bosnian Serb forces by NATO. “Some of the hostages were assaulted and otherwise maltreated during their captivity. Some of these hostages were forced to warn their UN commanders that they would be killed if NATO continued to bomb.”<sup>53</sup>

By these acts it is alleged that Radovan Karadžić participated in the taking of hostages, a violation of the laws or customs of war, as recognised by Common Article 3(1)(b) of the Geneva Conventions of 1949, and punishable under Article 3 of the Statute of the Tribunal.

## PART 2: THE SECOND PROPOSED AMENDED INDICTMENT

On 22 September 2008, the Prosecution filed its highly anticipated motion to amend the first amended indictment against Radovan Karadžić. According to the Prosecutor, the Proposed Second Amended Indictment (Proposed Indictment) narrows and clarifies the allegations, “update[s] the factual pleadings in the Operative Indictment and provides more precise notice of the Prosecution’s case to the Accused.”<sup>54</sup>

<sup>52</sup> *Ibid*, para. 50.

<sup>53</sup> *Ibid*, para. 56.

<sup>54</sup> *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion to Amend the First Amended Indictment, 22 September 2008, para. 1.

Four main amendments to the Operative Indictment were implemented by the Prosecutor. First, legal and factual allegations related to the Accused's individual responsibility were "updated, clarified and further particularized".<sup>55</sup> Second, the scope of criminal conduct underlying the charges was narrowed and Karadžić is now charged with events relating to 27 municipalities instead of the 41 municipalities in the Operative Indictment. Srebrenica and Sarajevo are not included in these municipalities but are dealt with separately. Third, the Prosecutor restructured the counts and legally re-characterised certain underlying conduct. Fourth, more precise notice of the charges against the Accused was provided.<sup>56</sup>

## 1. RULE 50 OF THE RULES OF PROCEDURE AND EVIDENCE

According to Rule 50 of the Rules of Procedure and Evidence (Rules), the Prosecutor may amend the indictment after the assignment of a case to a Trial Chamber with the permission of that Trial Chamber or a Judge of the Trial Chamber. Rule 50 does not provide specific guidelines for the Trial Chamber regarding whether or not to allow the amendment of an indictment after it has been submitted. As various Trial Chambers have noted, "the test for whether leave to amend [an indictment] will be granted is whether allowing the amendments would cause unfair prejudice to the Accused."<sup>57</sup> Leave to amend an indictment will be forthcoming unless it is proven that such a decision might cause prejudice to the Accused.<sup>58</sup> Prejudice to the Accused, according to the jurisprudence of the ICTY, might occur if granting leave to amend an indictment would affect the opportunity of the Accused to prepare an effective defence and if it would cause undue delay.<sup>59</sup> It is worthwhile to highlight that "an amendment will not be refused merely because it assists the prosecution quite fairly to obtain a conviction."<sup>60</sup>

Furthermore, if the new amended indictment contains new charges against the Accused, according to Rule 50(A)(ii) of the Rules, the Trial Chamber must

<sup>55</sup> *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion to Amend the First Amended Indictment, 22 September 2008, para. 2.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Prosecutor v. Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision Granting Prosecution's Motion to Amend the Indictment and Scheduling Further Appearance, 1 February 2006, para. 10; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004, para. 22.

<sup>58</sup> *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-PT, Decision on Vinko Martinović's Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, 14 February 2001, p. 7; *Prosecutor v. Sredoje Lukić*, Case No. IT-98-32/1-PT, *op. cit.*, para. 10.

<sup>59</sup> *Prosecutor v. Beara*, Case No. IT-02-58-PT, Decision on Prosecution Motion to Amend the Indictment, 24 March 2005, p. 2; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004, para. 23; *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-PT, Decision on Prosecution Motion Seeking Leave to Amend the Indictment, 19 October 2005, para. 35.

<sup>60</sup> *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Filing of Replies, 7 June 2001, para. 3.

be satisfied that there is enough evidence, in relation to these new charges, to support a *prima facie* case in accordance to Article 19 of the Statute of the ICTY.<sup>61</sup> According to Rule 50(B) and (C) of the Rules, the accused is entitled to enter a plea with regard to the new charges at a further appearance, and preliminary motions may be filed regarding the amended parts of the indictment.

The Prosecutor further states that allowing the Accused to enter a plea and file preliminary motions in relation to the new charges contained in the Proposed Indictment will not cause any undue delay considering the early stage of the proceedings. No prejudice will be caused to the Accused, who will, on the contrary, benefit from narrowed and clarified charges.<sup>62</sup>

## 2. THE AMENDED INDICTMENT IN LIGHT OF RECENT DEVELOPMENTS IN CASE LAW

### 2.1. INDIVIDUAL CRIMINAL RESPONSIBILITY - JOINT CRIMINAL ENTERPRISES

One of the most relevant amendments concerns the Individual Criminal Responsibility of the Accused, who was alleged in the Operative Indictment to have participated in the charged crimes in concert with others, including Momčilo Krajišnik and Biljana Plavšić. The Proposed Indictment reflecting the developments in the case law of the ICTY specifies joint criminal enterprise (JCE) liability as the form of the alleged co-perpetration.<sup>63</sup>

The JCE mode of liability plays a predominant role in the Proposed Indictment, which includes four separate (but related) JCEs and specifies that Radovan Karadžić acted in concert with different people at different times. Ratko Mladić is identified as a key member of each of these criminal enterprises.

#### 2.1.1. The “overarching JCE”

From October 1991 until November 1995, Karadžić and Mladić were allegedly key members of an overarching joint criminal enterprise which had as its goal the permanent removal of Bosnian Muslim and Bosnian Croat inhabitants from the territories of BiH.<sup>64</sup> Many relevant figures are included in the main JCE including, *inter alia*, Krajišnik, Slobodan Milošević and Vojislav Šešelj.

The purpose of the overarching JCE was pursued through the commission of the crimes of genocide (under count 1), persecution, extermination, murder, deportation and inhumane acts (forcible transfer).<sup>65</sup> The Prosecution alternatively charges the Accused with the crimes of genocide, persecution, extermination and murder, as it was foreseeable that these crimes might be committed “by one

<sup>61</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted 25 May 1993 by S/RES 827 (1993) and last amended by S/RES 1800 (2008).

<sup>62</sup> Motion to Amend the Indictment, para. 4.

<sup>63</sup> *Ibid*, para. 11.

<sup>64</sup> *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion to Amend the First Amended Indictment, 22 September 2008, Appendix B, Proposed Indictment, paras. 7-9.

<sup>65</sup> *Ibid*, para. 11.

or more members of this joint criminal enterprise or by persons used by any members of the joint criminal enterprise in order to carry out the *actus reus* of the crimes forming part of the shared objective (the crimes of deportation and inhumane acts – forcible transfer).<sup>66</sup> Although he knew that such crimes might be committed, the Accused willingly took that risk.

Therefore the Prosecutor has chosen to employ the first and the third type of the JCE mode of liability.

The jurisprudence of the Tribunal has identified three different forms of JCE which are all characterised by the same *actus reus* (a plurality of persons; the existence of a common plan, design or purpose that amounts to or involves the commission of a crime provided for in the Statute; and the participation of the accused in the common plan). The *mens rea* requirement, on the contrary, differs for each form of JCE.

As far as the first category of JCE (JCE I) is concerned, there must be a shared intent, amongst the co-perpetrators, to commit a certain crime that is provided for in the Statute.<sup>67</sup>

The third category (JCE III) is an extended form of JCE which applies to cases involving a common purpose to commit a crime where one of the perpetrators commits a crime that is not part of the common plan. In this case, the Accused is also held responsible for this further crime if it is proven that he intended to participate and further the common plan of the group or if it is proven that under the circumstances of the case it was foreseeable that such a crime would have been committed by the physical perpetrator and notwithstanding that the Accused willingly took the risk (*dolus eventualis*).

JCE II, which applies to crimes committed in concentration camps, does not apply to this case.

### 2.1.2. “The additional JCE”

The Proposed Indictment alleges that – during the existence of the above-mentioned overarching joint criminal enterprise – Karadžić and Mladić took part in three different joint criminal enterprises which were aimed at:

- Spreading terror among the civilian population of Sarajevo through a campaign of sniping and shelling (April 1992 – November 1995)

The primary purpose of this JCE involved the commission of the crimes of terror, unlawful attacks on civilians, and murder charged in the indictment.

- Eliminating the Bosnian Muslims in Srebrenica (from the days immediately preceding 11 July 1995 until 1 November 1995)

<sup>66</sup> *Ibid*, para. 10.

<sup>67</sup> The second category of JCE (JCE II) refers to the so called “concentration camp” cases, and is a variant of JCE I, in which the Prosecution must prove that the Accused had personal knowledge of the system of ill-treatment (such knowledge can be inferred from the position of authority held in that context) along with intent to further the system. See Matteo Fiori, “A Further Step in the Development of the Joint Criminal Enterprise Doctrine”, *Hague Justice Journal*, Vol. 2, No. 2, 2007.



The objective of the JCE, consisting of the elimination of the Bosnian Muslims in Srebrenica, was implemented through the commission of the crimes of genocide (under count 2), persecution, extermination, murder, deportation, and inhumane acts (forcible transfer).<sup>68</sup>

- Taking United Nations personnel as hostages (May and June 1995 )

The objective of this JCE was to force NATO to refrain from further air strikes against Bosnian Serb targets and included the commission of the crime of taking UN personnel hostage.

In addition to the JCE mode of liability, the Proposed Indictment alleges the individual criminal responsibility of Karadžić for planning, instigating, ordering and/or aiding and abetting the crimes charged in the indictment itself. Furthermore, the Accused is charged for his superior responsibility pursuant to Article 7(3) of the Statute for all the crimes.

## 2.2. THE “CRIME BASES”

The Operative Indictment and the Proposed Indictment both make reference to crimes allegedly committed in three different “crime bases”, namely the Sarajevo area, Srebrenica and a certain number of municipalities within the territory claimed by Bosnian Serbs.<sup>69</sup> In relation to the collection of municipalities listed in the Proposed Indictment, the Prosecutor reduced the number from 41 to 27, dropping some 14 municipalities and consequently narrowing the focus of the indictment.

Furthermore, as highlighted by the Prosecutor, the Proposed Indictment “rectifies an anomaly in the Operative Indictment which distinguishes between killings and other crimes in the municipalities.”<sup>70</sup>

Specifically, the Proposed Indictment charges the Accused with murder and extermination in relation to all 27 municipalities. The charges of genocide refer to ten municipalities in addition to the enclave of Srebrenica, whereas in the Operative Indictment the overall geographical scope of the charges was extended to 41 municipalities but the charges of genocide, murder and extermination were limited to only 17 municipalities (persecutions, deportation, and forcible transfer were charged in relation to all 41 municipalities).<sup>71</sup>

## 3. THE COUNTS OF THE PROPOSED INDICTMENT

Like the Operative Indictment, the Proposed Second Amended Indictment charges the Accused with 11 counts. Nevertheless, there are differences to be analysed.

<sup>68</sup> Proposed Indictment, para. 20.

<sup>69</sup> *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion to Amend the First Amended Indictment, 22 September 2008, para. 16.

<sup>70</sup> *Ibid*, para. 18.

<sup>71</sup> *Ibid*.

First of all, the count alleging grave breaches of the Geneva Conventions in the Operative Indictment does not appear in the Proposed Indictment. Consequently, the Prosecution will not be called to prove that an international armed conflict existed at the relevant time which reduces the complexity of its case.<sup>72</sup>

In relation to the count of genocide, the Proposed Indictment eliminates the count of complicity in genocide and proposes two charges of genocide in relation to the attacks and takeover of ten municipalities and in relation to the massacre at Srebrenica.

Specifically:

**Count 1 – Genocide** – This count alleges that the objective of the main joint criminal enterprise, namely the permanent removal of Bosnian Muslims and Bosnian Croats from the territories of BiH claimed as Serb territory, was pursued through a campaign of persecutions which between 31 March 1992 and 31 December 1992 included or escalated to include genocide.<sup>73</sup>

According to the Proposed Indictment, the members of the JCE shared the intent to partly destroy the Bosnian Muslims and/or Bosnian Croats.

The Proposed indictment alleges that Bosnian Serb political and governmental organs and Serb forces, between 31 March 1992 and 31 December 1992, carried out:

- “The killing of Bosnian Muslims and Bosnian Croats during and after the takeovers of certain municipalities,<sup>74</sup> in the detention facilities,<sup>75</sup> and were responsible for the killing of Bosnian Muslims and Bosnian Croats committed during, and resulting from, inhumane treatment at detention facilities.”<sup>76</sup>
- “The causing of serious bodily or mental harm to thousands of Bosnian Muslims and Bosnian Croats, during their confinement in detention facilities.”<sup>77</sup> This includes, *inter alia*, torture, rape and beatings.
- “The detention of thousands of Bosnian Muslims and Bosnian Croats in detention facilities under conditions of life calculated to bring about their physical destruction.”<sup>78</sup>

**Count 2 – Genocide** – This count refers to the events in Srebrenica and is the second charge of genocide in the Proposed Indictment. It alleges that the

<sup>72</sup> *Ibid*, paras. 23-24.

<sup>73</sup> *Ibid*, paras. 38-39.

<sup>74</sup> See Schedule A., which, according to the Prosecutor, provides a more extensive list of killing incidents during and after takeovers in municipalities than the Operative Indictment.

<sup>75</sup> See Schedule B., which, according to the Prosecutor, provides a more comprehensive list of killing incidents related to detention facilities than the Operative Indictment.

<sup>76</sup> See Schedule C., lists 86 detention facilities in the municipalities, compare with 21 examples of such facilities in the Operative Indictment. *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion to Amend the First Amended Indictment, 22 September 2008, Appendix B, Proposed Indictment, para. 40 (a).

<sup>77</sup> *Ibid*, para. 40 (b).

<sup>78</sup> *Ibid*, para. 40 (c).

Accused participated in a joint criminal enterprise aimed at the elimination of “Bosnian Muslims in Srebrenica by killing the men and boys of Srebrenica and forcibly removing the women, young children and some elderly men” from the enclave.<sup>79</sup> In the Proposed Indictment, the Prosecutor classifies the killings as “opportunistic” and “organized”.<sup>80</sup>

Therefore the Prosecutor has chosen to separate the single count of genocide contained in the Operative indictment into two counts of genocide, each of which relates to one of the two different time periods and locations described above.

**Count 3 – Persecutions** – Karadžić is charged with persecutions in all of the 27 municipalities and in relation to the Srebrenica enclave in a time frame which stretches from March 1992 until 30 November 1995. The Proposed Indictment includes the same underlying acts of persecutions contained in the Operative Indictment, although it adds the additional underlying acts of unlawful detention, forced labour, and appropriation or plunder of property. Furthermore, the underlying act of “restrictive and discriminatory measures” is enriched by the inclusion of two new components, namely “arbitrary search” and “unlawful arrest”.<sup>81</sup> The crime of persecution is charged pursuant to the third type of JCE, namely as it was foreseeable that such a crime could have been committed by the physical perpetrators of the crimes of deportation and forcible transfer and nonetheless the Accused willingly took that risk.<sup>82</sup>

**Counts 4, 5 and 6 – Extermination and Murder** – The Accused is charged with extermination and murder in relation to all the 27 municipalities enlisted in the Proposed Indictment. As mentioned above, the Proposed Indictment includes allegations of killings in relation to 13 municipalities which were not contained in the Operative Indictment. Murder is characterised as a crime against humanity under Article 5(a) of the Statute and as a violation of the laws or customs of war under Article 3 of the Statute. The Accused is also charged with killings in relation to the Srebrenica area and in relation to the sniping and shelling campaign in the area.<sup>83</sup> In the Operative Indictment, the killings related to the Sarajevo area were alleged “only” as underlying acts of terror.<sup>84</sup> The crimes of extermination and murder according to the Proposed Indictment formed part of the objectives of the overarching JCE as well as part of the JCEs related to Sarajevo and Srebrenica.<sup>85</sup> Also in relation to extermination and murder, the Prosecution alleges that Karadžić was aware that these crimes might have been a consequence of the perpetration of

<sup>79</sup> *Ibid*, para. 42.

<sup>80</sup> *Ibid*, paras. 46-47.

<sup>81</sup> *Ibid*, paras. 48-60.

<sup>82</sup> *Ibid*, para. 59.

<sup>83</sup> *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion to Amend the First Amended Indictment, 22 September 2008, Appendix B, Proposed Indictment, paras. 61-67.

<sup>84</sup> See *Prosecutor v. Radovan Karadžić*, Amended Indictment, 31 May 2000, para. 48.

<sup>85</sup> *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion to Amend the First Amended Indictment, 22 September 2008, Appendix B, Proposed Indictment, para. 62.

the crimes of deportation and forcible transfer carried out in the “implementation of the objective to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory and willingly took that risk.”<sup>86</sup>

**Counts 7 and 8 – Deportation, Inhumane Acts** – Radovan Karadžić is charged with deportation and forcible transfer as inhumane acts in relation to each of the 27 municipalities listed in the Proposed Indictment and in relation to the Srebrenica area.<sup>87</sup> The Proposed Indictment alleges that at the beginning of March 1992 Bosnian Muslims and Bosnian Croats commenced fleeing because of the restrictive and discriminatory measures implemented by Serb forces which included, *inter alia*, arbitrary arrest and detention, torture, rape, killings and destruction of houses and cultural monuments. Those who did not flee spontaneously were forcibly removed from the Bosnian Serb-claimed territory.<sup>88</sup> Furthermore, the Proposed Indictment describes the situation in Srebrenica, where many Bosnian Muslims who had been forcibly displaced found shelter, and where prior to its takeover humanitarian aid was restricted and “civilian targets were shelled and sniped in an effort to make life impossible for the inhabitants of the enclave and to remove its population.”<sup>89</sup> Karadžić is allegedly criminally responsible for deportation and inhumane acts (forcible transfer) which are crimes against humanity under Articles 5(d) and 5(i) of the Statute, respectively.

**Counts 9 and 10 – Terror, Unlawful Attacks** – The Proposed Indictment alleges that the Accused is criminally responsible for the sniping and shelling campaign carried out by Serb forces in and around the Sarajevo area, which included direct attacks on the civilian population and on civilians not taking part in hostilities. Specifically, these attacks targeted people who, due to a lack of gas, water and electricity, were forced to leave their homes and faced the risk of death on a daily basis. “The constant threat of death and injury caused trauma and psychological damage to the civilian inhabitants of Sarajevo.”<sup>90</sup>

**Count 11 – Taking of Hostages** – In relation to this charge, the Proposed Indictment extends the time frame which now stretches from 26 May to 19 June 1995, whereas in the Operative Indictment it ran from 26 May to 2 June 1995.<sup>91</sup>

## CONCLUSION

The arrest of Radovan Karadžić represents a welcome but unexpected second chance for the ICTY – and, indeed, for international criminal justice in general. With the former Bosnian Serb leader’s transfer to The Hague, the Tribunal has an

<sup>86</sup> *Ibid*, para. 64.

<sup>87</sup> *Ibid*, paras. 68-75.

<sup>88</sup> *Ibid*, para. 71.

<sup>89</sup> *Ibid*, para. 74.

<sup>90</sup> *Ibid*, paras. 80-81.

<sup>91</sup> *Ibid*, paras. 83-87.

opportunity to regain credibility by properly conducting a complex international trial in which a prominent political figure is charged with the most heinous crimes under international criminal law.

After the death of Slobodan Milošević, the ICTY was fiercely criticised for the conduct of both the Prosecution and the Trial Chamber during the trial. This criticism led to a slow but constant erosion of trust in the capability of the Tribunal to fulfil its mandate. It also raised doubts about international criminal justice as a viable judicial system.

A manageable indictment, like the Proposed Indictment, constitutes a significant improvement compared to the other prominent trials the Tribunal has dealt with thus far. The Proposed Indictment seems to be both effective and exhaustive, despite the fact that it consists of only eleven counts. It provides a full and accurate account of the crimes with which the Accused is charged and it will provide the framework within which the Prosecution and the Defence will confront each other.

The Proposed Indictment, with only eleven counts, will be easier to manage for all parties. This may also benefit Karadžić, who will challenge the indictment by himself as he has, unsurprisingly, opted for self-representation.

Through the Proposed Indictment the Prosecutor will also try to prove that genocide was not limited to the events which occurred in the area of Srebrenica in July 1995 but was carried out against the non-Serb population more broadly between March and December 1992. In light of the difficulties inherent in proving all the elements of genocide,<sup>92</sup> the approach followed by the Prosecutor, who has chosen to focus on the events which allegedly occurred in ten municipalities rather than in 18 as in the Operative Indictment, appears commendable. Reducing the crime base of the new count of genocide may result in a more effective presentation of the evidence during the trial.

The Prosecutor might be criticised for reducing the scope of the Proposed Indictment from 41 to 27 municipalities; many serious crimes may be forgotten and many victims may not see justice for the specific actions which they have suffered. This criticism is certainly understandable, particularly from the perspective of the victims.

On the other hand, it is necessary to strike a balance between the so-called truth-telling function of a criminal trial and its effectiveness. The Proposed Indictment may not give a completely accurate description of all the crimes allegedly committed throughout the territory of Bosnia and Herzegovina between 1991 and 1995. Therefore, if proved, it might not leave a complete historical legacy. However, the Proposed Indictment as it is currently structured could provide the Prosecutor with improved prospects to prove the charges therein and obtain a guilty verdict.

<sup>92</sup> The jurisprudence of the ICTY has found that genocide was committed only in relation to Srebrenica. This finding was confirmed by the ICJ in 2007.

The opposite approach was taken by the Prosecutor in the Milošević trial, in which there were three indictments covering almost ten years and three different wars. The Milošević case proved to be difficult and left no verdict and no historical legacy at all.

The imminent Karadžić trial will not be an easy and straightforward confirmation of all the counts contained in the indictment. The trial must be fair, expeditious and well-conducted and the Prosecutor will have to be meticulous in building the facts of the case. A major factor will be the conduct of the Accused. It appears, at the time of writing, that Karadžić's behaviour may well echo that of Milošević during his own trial. Nevertheless, this author is convinced that many changes have been made at the Tribunal since that trial and lessons have been learned. In this regard, a rather compact indictment which approaches the charges in a straightforward fashion will leave less room for the Accused to turn the trial into a political rally. Combined with a determined effort on the part of the judges to prevent Karadžić from averting the focus from the events alleged in the indictment, the chances of a fair and orderly trial, in which justice is duly served, are reasonably high.

In spite of the problems which have already been highlighted<sup>93</sup> and those which will undoubtedly arise in the future as the case unfolds, this trial represents an important second chance which neither the ICTY nor international criminal law in general can afford to waste. Such a golden opportunity for the Tribunal to redeem itself in the eyes of its critics may not come again.

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<sup>93</sup> See G. Sluiter, "Karadžić on Trial: Two Procedural Problems", *Hague Justice Journal*, Vol. 3, No. 2, 2008, available at [www.haguejusticeportal.net](http://www.haguejusticeportal.net). Professor Sluiter correctly underlined how in the case at stake there is significant overlap between the Krajišnik conviction and the current Karadžić indictment, which could jeopardize the right of the accused to an impartial Tribunal and to the presumption of innocence. However, since the publication of Sluiter's article, the case against Radovan Karadžić has been transferred to Trial Chamber III. The transfer was made after Karadžić asserted that he would not receive a fair trial before Trial Chamber I, with Judge Orie presiding.