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025388

CASE/AFFAIRE NO. IT-95-5/18-PT (R. KARADŽIĆ) DATE 09 October 2009

FROM/DE RAM DORAISWAMY, COURT OFFICER

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THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-05/18-PT

IN TRIAL CHAMBER No. 3

Before: Judge O-Gon Kwon, Presiding  
Judge Howard Morrison  
Judge Melville Baird  
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Date: 9 October 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

*Public*

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MOTION FOR FINDING OF  
*NON-BIS-IN-IDEM*

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The Office of the Prosecutor:  
Mr. Alan Tieger  
Ms. Hildegard Uertz-Retzlaff

The Accused:  
Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves the Trial Chamber for a finding that he cannot be prosecuted in the future for the acts which are contained in the indictment but for which the prosecution has been ordered not to lead evidence.

2. On 8 October 2009, the Trial Chamber issued its *Decision on the Application of Rule 73 bis*. It ordered the prosecution, pursuant to Rule 73 bis (D) not to present evidence on various crime sites and incidents.<sup>1</sup> Dr. Karadzic contends that he cannot be thereafter prosecuted for those acts, either at this Tribunal or in national courts. He seeks a finding to this effect from the Trial Chamber so that all parties understand the ramifications of the Trial Chamber's decision before the trial commences.

3. Rule 73 bis (D) provides:

After having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged.

4. This Rule does not provide for dismissal or striking of acts or charges—they remain in the indictment but are not the subject of evidence. Therefore, under principles of *non-bis-in-idem* or double jeopardy, they may not be the subject of future proceedings.

5. Article 10 of the Statute provides that:

No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal

6. Since Dr. Karadzic will be tried upon an indictment which includes the acts which are the subject of the Rule 73 bis (D) decision, he cannot be tried for these acts again.

7. Double jeopardy protection is an internationally recognized principle. It is also known as *ne/non bis in idem* (literally “not twice for the same”), as well as *autrefois*

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<sup>1</sup> Para. 6

*acquit* or *autrefois convict* (already convicted or acquitted of the same offense).<sup>2</sup> The general principal is that no person may be tried twice for the same crime. This has been recognized by the ICTY, as well as the International Criminal Court, the International Covenant on Civil and Political Rights, and the legal systems of many nations.<sup>3</sup>

8. The purpose of double jeopardy provision is to protect an individual from continued prosecution for the same set of circumstances:

“The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . .”<sup>4</sup>

9. “The protection of the individual from State abuse and *ad infinitum* prosecutions is also the rationale behind the international recognition of *ne bis in idem* as a human right. . . It is to the first trial, therefore, that all efforts should be directed.”<sup>5</sup>

10. In *Ashe v. Swenson* the U.S. Supreme Court held that a person could not be tried for a charge arising out of the same events as a charge he was previously tried for, even though the second trial would contain evidence not presented in the first, as well as different victims.<sup>6</sup> This case is directly on point.

11. The defendant in *Ashe* was accused of participating in a conspiracy with three others in the robbery of six victims while playing a game of poker. Each defendant was charged with seven criminal counts (one for each victim, plus car theft), and Ashe was ultimately brought to trial on the charge of robbing Donald Knight, one victim. Ashe was acquitted by a jury for insufficient evidence.

12. Six weeks later, Ashe was brought to trial again, for the robbery of a different participant in the poker game, Mr. Roberts. At the second trial, the testimony proffered by the witnesses differed from at the first trial, and Ashe was convicted.

<sup>2</sup> Spinellis, Dionysios, *Global Report: The Ne Bis In Idem Principle in “Global” Instruments*, International Review of Penal Law, Vol. 73, p1149

<sup>3</sup> *Prosecutor v Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999), Declaration of Judge Nieto-Navia, at p146; Spinellis, *Ne Bis In Idem Principal in “Global” Instruments*.

<sup>4</sup> Justice Black, *Green v. US*, 355 US 184, 187-8 (1957)

<sup>5</sup> Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2<sup>nd</sup> Edition, Verlag C.H.Beck oHG 2008 Munich, “Article 20”, p672

<sup>6</sup> 397 US 436 (1969) (US Supreme Court)

13. The Supreme Court found that, although the victim and the evidence presented was different, the conviction violated Ashe's right against double jeopardy. It held that:

"For whatever else that constitutional guarantee [Fifth Amendment guarantee against double jeopardy] may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time."<sup>7</sup>

14. Therefore, the protection against double jeopardy, or the rule of *non-bis-in-idem*, does not turn on the evidence which the prosecution chooses to, or is allowed to, present, but instead on the protection of the accused for being tried twice for the same offence.

15. The ICTY has adopted and followed United States law on double jeopardy. Its test for cumulative convictions is based on the US Supreme Court's *Blockburger* "materially distinct elements" double jeopardy test.<sup>8</sup> Under this test, it is the indictment, not the evidence that the prosecution brings, which determines the scope of the protection against double jeopardy.

16. Rule 73 *bis* (D) is concerned with the evidence that the prosecution can lead, not the scope of the indictment. Indeed, under Rule 73 *bis* (F):

After commencement of the trial, the Prosecutor may file a motion to vary the decision as to the number of crime sites or incidents in respect of which evidence may be presented or the number of witnesses that are to be called or for additional time to present evidence and the Trial Chamber may grant the Prosecutor's request if satisfied that this is in the interests of justice.

17. Therefore, the charges which include the acts for which the prosecution has been ordered not to present evidence remain in place throughout the trial. Under these circumstances, Dr. Karadzic is placed in jeopardy for all of the acts in the indictment, whether evidence is ultimately presented to support them or not.

18. This was the conclusion drawn by Judge Jean-Claude Antonetti, in his concurrence in the *Milutinovic* case. He found that the decision under Rule 73 *bis* (D)

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<sup>7</sup> *Id.* at 446-47

<sup>8</sup> *Prosecutor v. Krstic*, No. IT-98-33-A, Judgement (19 April 2004) at para 232, fn 283; *Prosecutor v. Kunarac et al.*, No. IT-96-23-A, Judgement (12 June 2002) at para 168; *Blockburger v US*, 284 US 299, 304 (1932).

that evidence would not be led as to acts in certain locations, which was not contested by the prosecution “led to the definitive termination of the international public prosecution case against the Accused for crimes committed in these locations.”<sup>9</sup>

19. The same result would inure in other national systems. United Kingdom courts recognize that charges that have been brought, or could have been brought, under the first indictment, should be dealt with during the first trial. If brought at a second trial, the accused will have a claim of *autrefois acquit/convict* (double jeopardy). A basic principle of *autrefois acquit/convict* is that “[a] person cannot be tried for a crime in respect of which he has previously been acquitted or convicted, or for a crime in respect of which he could on some previous indictment have been convicted.”<sup>10</sup>

20. Canadian courts recognize that “once a plea is entered to a charge the accused is in jeopardy and can therefore, if necessary, avail himself of the pleas of *autrefois acquit* or *autrefois convict*.”<sup>11</sup> If the prosecution drops information against the accused, after he has pled, this information can not be used to bring a second trial without violating *autrefois acquit*: “the withdrawal of an information to which the accused had pleaded not guilty was tantamount to an acquittal.”<sup>12</sup>

21. The provisions of Rule 73 *bis* were enacted by the Judges of the Tribunal as a time management tool. No Chamber has directly confronted the question of the impact of orders made pursuant to Rule 73 *bis* (D) on whether an accused may be tried again for conduct which remains in the indictment, but for which the prosecution has led evidence.

22. Dr. Karadzic contends that the Separate Opinion of Judge Antonetti, combined with jurisprudence from national jurisdictions, lead to the conclusion that he can not subsequently be prosecuted for the acts covered by the Trial Chamber’s *Decision on the Application of Rule 73 bis*. He respectfully requests that the Trial Chamber make an explicit finding to this effect to avoid any uncertainty prior to the commencement of the trial.

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<sup>9</sup> *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Separate Opinion of Judge Antonetti Regarding Prosecution Submission Concerning the Decision Rendered on 11 July 2006 Pursuant to Rule 73 bis (D)* (7 April 2009)

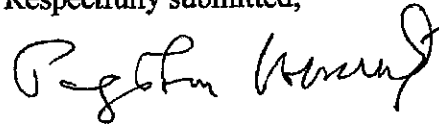
<sup>10</sup> *Connelly v Director of Public Prosecutions* (1964) 48 Cr. App. R. 183, 184 (House of Lords)

<sup>11</sup> *R. v Waugh*, 68 N.S.R. (2d) 247, para. 11 (1985), (Nova Scotia Supreme Court, Appeals Division)

<sup>12</sup> *Waugh*, para. 11

Word count: 1689

Respectfully submitted,



Radovan Karadzic<sup>13</sup>

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<sup>13</sup> The assistance of Legal Intern Allegra Johnson of Cornell University law school (USA) in the research for this motion is gratefully acknowledged.