



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

Case No.: IT-05-87-T
Date: 11 July 2006
Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova

Registrar: Mr. Hans Holthuis

Order of: 11 July 2006

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

DECISION ON APPLICATION OF RULE 73 *BIS*

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Mr. John Ackerman and Mr. Aleksander Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

During the Pre-Trial Conference held pursuant to Rule 73 *bis* of the Rules of Procedure and Evidence of the Tribunal (“Rules”),¹ and after having heard the parties, this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) rendered an oral decision, pursuant to Rule 73 *bis*(D), fixing the number of crime sites in respect of which evidence may be presented by the Office of the Prosecutor (“Prosecution”) in this case.² The Chamber indicated then that a written determination would be forthcoming, and hereby issues this Decision.

I. Procedural History

1. The operative indictment in the proceedings against Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić (collectively, “the Accused”) is the Redacted Third Amended Indictment, filed on 21 June 2006 (“Indictment”).³ The Indictment contains five counts, which charge the Accused with deportation as a crime against humanity, forcible transfer as “other inhumane acts” as a crime against humanity, murder as a crime against humanity, murder as a violation of the laws or customs of war, and persecution as a crime against humanity, respectively, in several municipalities in Kosovo.⁴

2. On 21 June 2006, in the last conference of the parties held pursuant to Rule 65 *ter*(D), the parties were informed that the Chamber was considering exercising its powers under Rule 73 *bis* to fix a number of crime sites or incidents on which evidence would be led by the Prosecution at trial, and were advised to prepare to discuss the issue at the Pre-Trial Conference.⁵ The Chamber’s consideration of Rule 73 *bis* was prompted by the number of witnesses scheduled for the Prosecution’s case in chief;⁶ the Prosecution’s estimate that the examination in chief of these

¹ See generally *Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić*, Case No. IT-05-87-PT, Transcript of Pre-Trial Conference, T. 280–413 (7 July 2006).

² *Ibid.*, T. 371:

JUDGE BONOMO: Well, the decision of the Trial Chamber—and this will need to be issued in writing for the avoidance of any doubt and for complete clarity—will be to confine the trial to a [certain] number of events ... but excluding these three particular ones, which will be more specifically defined in the order, always recognising the further provisions of Rule 73 *bis* (D), which could result in these ultimately nevertheless becoming part of the trial.

³ See *Milutinović et al.*, Order Replacing Third Amended Joinder Indictment and Severing Vlastimir Đorđević from the Trial, 26 June 2006, p. 3.

⁴ The Trial Chamber notes that the parties repeatedly refer to there being 13 municipalities in the Indictment, ostensibly because that is the number of municipalities listed in paragraph 72, which presents the allegations related to forcible displacement of Kosovo Albanian civilians. A close review of the Indictment, however, reveals that two additional municipalities are mentioned in subparagraphs (a), (c), and (j) of paragraph 75, which allege murders in Račak/Rečak (Štimlje/Shtime municipality), Padalište/Padaliste, and Dubrava/Dubravë Prison (both in Istok/Istog municipality). See *Milutinović et al.*, Motion Seeking to Replace Indictment and Sever Đorđević from the Trial, 21 June 2006, Annex B (“Redacted Third Amended Indictment”), paras. 72, 75.

⁵ See *Milutinović et al.*, Transcript of Rule 65 *ter* conference, T. 319–322 (21 June 2006).

⁶ See *Milutinović et al.*, Prosecution’s Submissions pursuant to Rule 65*ter*(E), 10 May 2006, Confidential Annex A.

witnesses would last for 280 hours, an estimate which does not include time for cross-examination or questions by the Chamber;⁷ the fact that this trial involves six Accused, each of whom is represented by counsel; and the consequent prospect of the trial extending beyond two years.

3. On 26 June 2006, counsel for Accused Ojdanić submitted “General Dragoljub Ojdanić’s Request for Application of Rule 73 bis (D) at Pretrial Conference” (“Ojdanić Request”), in which counsel for the Accused “invite[d] the Trial Chamber to adopt a measure designed to speed up the trial at the expense of the prosecution, and to implement the tools provided to it by Rule 73 bis (D).”⁸ The Ojdanić Request further asserted that “[t]he Indictment in this case contains 32 separate incidents of deportation and murder spread throughout 13 municipalities in Kosovo”,⁹ and requested that the Chamber fix the total number of incidents “for which evidence may be presented by the prosecution at ten”.¹⁰ Neither the Prosecution nor any other Accused filed a written submission on this issue in advance of the Pre-Trial Conference.

4. At the Pre-Trial Conference on 7 July 2006, it emerged that the Ojdanić Request contained a typographical error: instead of 32 incidents, the submission should have read “38 separate incidents”.¹¹ Counsel for Accused Ojdanić explained that this total of 38 incidents corresponded to the number of separate paragraphs under the deportation and murder counts of the Indictment, each one alleging and recounting a different set of events,¹² and that the proposed number of 10 incidents to be fixed by the Chamber was “used simply as a basis for discussion and to get the issue on the table”.¹³ The Trial Chamber noted that a given paragraph of the Indictment may contain allegations of different crimes committed in several different locations, so this manner of counting may result in an underestimation of the actual number of incidents or sites.¹⁴ In opening its remarks on the possible application of Rule 73 bis, the Prosecution first noted that deportation is a crime that cannot necessarily be limited to one location, and then explained how it arrived at its own total of the number of incidents and crime sites:

On my count we have 13 municipalities which we refer to as deportation municipalities. And I counted within those 13 municipalities 20 separate incidents, and that’s basically a count of the paragraphs, paragraph 72, 72[(a)], et cetera, is how I got my numbers. And then for the killing sites, we referred to killing sites or killing incidents. For killing sites we had 11 separate sites with 14 incidents, and the way I came to that count, Your Honour, was because in the municipality of Ka[č]anik we listed four separate killings on four separate dates, and that’s why we have 14 incidents for 11 sites.

⁷ See *Milutinović et al.*, Transcript of Rule 65 ter conference, T. 253 (17 May 2006).

⁸ Ojdanić Request, para. 5.

⁹ *Ibid.* para. 6.

¹⁰ *Ibid.* para. 8.

¹¹ *Milutinović et al.*, Transcript of Pre-Trial Conference, T. 363 (7 July 2006).

¹² *Ibid.* T. 364, 365 (7 July 2006).

¹³ *Ibid.* T. 365 (7 July 2006).

¹⁴ *Ibid.*

I should say also there's some overlap between the alleged deportation sites and the killing sites. Of the 11 killing sites, three, Ra[č]ak, Padali[š]te and Dubrava do not have a site alleged of deportation. So ... from our 13 municipalities involving deportation, six of them had related killing sites, seven have no related killing sites alleged in connection with them.¹⁵

II. Applicable Law

5. The Rules of Procedure and Evidence contain several provisions outlining the various powers of a Trial Chamber to ensure that trials before the Tribunal are both fair and expeditious at all stages of the proceedings. When a case is about to move from the extended preparations of the pre-trial stage to the daily hearings of an ongoing trial, Rule 73 *bis* requires the Trial Chamber to hold a Pre-Trial Conference at which any outstanding issues may be resolved, and sets forth the various means at the Chamber's disposal to set constraints on the presentation of the Prosecution's case in chief. In particular, this Rule permits the Chamber to intervene to focus the issues on which evidence will be led at trial; as recently amended,¹⁶ the Rule provides in relevant part:

- (D) 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.
- (E) Upon or after the submission by the pre-trial Judge of the complete file of the Prosecution case pursuant to paragraph (L)(i) of Rule 65 *ter*, the Trial Chamber, having heard the parties and in the interest of a fair and expeditious trial, may direct the Prosecutor to select the counts in the indictment on which to proceed. Any decision taken under this paragraph may be appealed as of right by a party.
- (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.

6. Under the terms of these provisions, therefore, the Trial Chamber has four options for direct or indirect action:

- i. The Chamber can invite the Prosecution to reduce the number of counts charged;
- ii. The Chamber can fix the number of crime sites;

¹⁵ *Ibid.* T. 366–367 (7 July 2006).

¹⁶ *See* IT/247, Amendments to the Rules of Procedure and Evidence, 6 June 2006, p. 2 (noting that certain amendments, including changes to Rule 73 *bis*, “shall enter into force seven days after the date of issue of this official document, *i.e.*, on 13 June 2006”).

- iii. The Chamber can fix the number of incidents; and
- iv. The Chamber can direct the Prosecution to select the counts upon which to proceed.

The first three options are derived from paragraph (D), which refers to the fairness and expeditiousness of the trial and the requirement of reasonable representativeness as overarching principles that are to guide the Chamber's exercise of discretion; and gives examples of factors that, in light of the relevant circumstances, may be considered in reaching a decision. The last option is derived from paragraph (E), which cites only the fundamental principle of a fair and expeditious trial as a constraint on the Chamber's discretion.¹⁷

III. Discussion

7. The Prosecution's case is fundamentally one alleging ethnic manipulation or modification of Kosovo's population through deportation, forcible transfer, and associated acts of persecution, including murder, of Kosovo Albanians.¹⁸ Each count of the Indictment charges a different crime under the Statute, but each presents allegations arising from events in several different municipalities in Kosovo. Given the manner in which the Prosecution has chosen to structure its charging instrument,¹⁹ any attempt to reduce the number of counts in the Indictment would be inappropriate in this case,²⁰ so the Chamber has decided to confine its consideration of Rule 73 bis to subparagraph (D), and in particular to the question of whether to "fix the number of crime sites or incidents".

8. During the Pre-Trial Conference, the Prosecution indicated that, as a general matter, it did not interpret Rule 73 bis as permitting an approach where the Chamber exercised this power by fixing the particular crime sites on which evidence may or may not be led at trial, because it would "allow[] the judiciary to intrude in the area of what should be the Prosecution's bailiwick" as "the Prosecution should be in the best position to determine what's representative of their case".²¹ The Prosecution's submission was thus that, while the Chamber could determine the number of sites or incidents, it was for the Prosecution to identify the particular ones which were representative of its case. Unless the Prosecution had the authority to do so without further reference to the Trial

¹⁷ As certain key terms in the provisions are either unclear or undefined, it is possible that these options may not be discrete or clearly distinguishable, particularly if a Chamber decides to interpret the terms "count" and "charge" broadly. For example, depending on the structure of—or crimes alleged in—a particular indictment, there may be no practical difference between fixing the number of crime sites or fixing the number of incidents.

¹⁸ See *Milutinović et al.*, Transcript of Prosecution's Opening Statement, T. 415 (10 July 2006) ("The purpose of this joint criminal enterprise, this JCE, was to manipulate or modify the ethnic balance in Kosovo in order to maintain and continue Serbian control over the province of Kosovo.").

¹⁹ See *supra*, para. 1.

²⁰ See *Milutinović et al.*, Transcript of Pre-Trial Conference, T. 359 (7 July 2006); *Milutinović et al.*, Transcript of Rule 65 ter conference, T. 319–320 (21 June 2006).

Chamber, its interpretation of the Rule would demand multiple steps: a Trial Chamber determines that evidence should be led on only a specific number of sites or incidents, but does not identify the sites or incidents; then, the Prosecution proposes certain sites or incidents; and finally, the Chamber reviews the proposed selection for conformity with the requirements of Rule 73 *bis*(D).²²

9. In the circumstances of this case, the Chamber considers that such an approach is unnecessarily cumbersome, a conclusion with which the Prosecution appears to agree.²³ Moreover, it is inconsistent with a proper construction of the Rule, which empowers the Chamber, “[a]fter having heard the Prosecutor,” to “fix a number of crime sites or incidents ... which, having regard to all the relevant circumstances, ... are reasonably representative of the crimes charged”. The Trial Chamber has the power to fix the number of crime sites or incidents after the Prosecution has been heard, which points to one submission followed by a decision. The Trial Chamber has an obligation to ensure that the Rule’s requirement of reasonable representativeness is met, which points to the Chamber itself identifying the sites or incidents that will satisfy this standard, having regard to the factors listed in the Rule, and in light of all the relevant circumstances of the case. In any event, for the purpose of these proceedings, the Trial Chamber considers that it is inappropriate to simply specify a number of crime sites or incidents on which evidence may be led, an approach which runs the risk of imposing an arbitrary and ill-fitting numerical constraint on a case that is fundamentally based on allegations of deportation and forcible transfer, which arise from and comprise a series of occurrences over a period of time in different locations.

10. The submissions of the parties at the Pre-Trial Conference and a review of the Indictment demonstrate that it is possible for the Chamber to determine the charges on which evidence should be led at trial by identifying those crime sites or incidents that are clearly different from the fundamental nature or theme of the case, and ordering the Prosecution to lead evidence relating to the other sites or incidents that fall squarely within that nature or theme. Furthermore, these submissions, that review, and the scale of the Prosecution’s proposed case in chief²⁴ illustrate that such an exercise is likely to prove beneficial in ensuring that the trial is expeditious and fair.

11. In the view of the Chamber, the three killing sites identified by the Prosecution at the Pre-Trial Conference are suitable candidates for this approach. Each of the three—Račak/Reček,²⁵ Padalište/Padalishte,²⁶ and Dubrava/Dubravë Prison²⁷—is associated with a single alleged attack or

²¹ *Milutinović et al.*, Transcript of Pre-Trial Conference, T. 374 (7 July 2006).

²² *Ibid.* T. 373–374 (7 July 2006).

²³ *Ibid.*

²⁴ *See supra*, para. 2.

²⁵ *See Milutinović et al.*, Redacted Third Amended Indictment, *supra* note 4, para. 75(a).

²⁶ *Ibid.* para. 75(c).

a discrete set of events that form part of one distinct alleged criminal transaction or incident, so there is no problem of disentangling them from the other alleged incidents and crime sites in the Indictment. Unlike other killing sites, none of the three is associated with what the Prosecution terms “deportation sites”, which are locations from which persons were allegedly forcibly displaced, whether or not the crime thus committed constituted deportation or forcible transfer. Most importantly, none of the three sites is located in the 13 municipalities the Prosecution identified as the locus of its case,²⁸ but rather in the municipalities of Štimlje/Shtime and Istok/Istog, which are mentioned for the first time in paragraph 75 of the Indictment. The other crime sites and incidents in paragraphs 72 and 75 more than adequately reflect the scale of the alleged criminal activity, as well as the extremely large number of alleged victims, and are reasonably representative of the crimes charged in the Indictment.

12. As it did at the Pre-Trial Conference,²⁹ the Chamber emphasises that there is a possibility that evidence in respect of these three crime sites or incidents may eventually be permitted pursuant to Rule 73 *bis* (F), depending on how the case develops, should the Chamber conclude that it is necessary to hear such evidence in order to have a full appreciation of the events giving rise to these criminal proceedings. Moreover, the Chamber reiterates that that this Decision should in no way be interpreted as a determination that the events in these three locations are of less significance or are not representative at all of the Prosecution’s case against the Accused. Rather, its application of Rule 73 *bis*(D) reflects its present conclusion that the case the Prosecution seeks to establish, based on allegations of forcible displacements, killings, and acts of persecution, will be adequately presented even if evidence in relation to these three sites is not led, and that focusing the trial on the remaining charges will improve the expeditiousness of the proceedings while ensuring that they remain fair.

13. For these reasons, and pursuant to Rule 73 *bis* of the Rules, the Trial Chamber hereby decides as follows:

- a. Pending further order by the Chamber, the Prosecution may present evidence in relation to all crime sites and incidents listed in paragraph 72; and all crime sites and incidents listed in paragraph 75, except subparagraphs (a), (e), and (j) (including subparagraph (j)(i)), which set forth the charges in respect of Račak/Rečëk, Padalište/Padalishite, and Dubrava/Dubravë Prison.

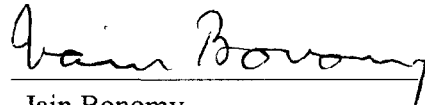
²⁷ *Ibid.* para. 75(j).

²⁸ See *supra* note 4; text accompanying note 15.

²⁹ *Milutinović et al.*, Transcript of Pre-Trial Conference, T. 368, 370–371 (7 July 2006).

- b. The debate during the Pre-Trial Conference was confined to the extent to which the allegations in paragraphs 72 and 75 of the Indictment should be part of the trial, and this Decision should therefore not be read as affecting the Prosecution's ability to lead evidence in relation to any other part of the Indictment.

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


Iain Bonomy
Presiding

Dated this eleventh day of July 2006
At The Hague
The Netherlands

[Seal of the Tribunal]