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**UNITED
NATIONS**



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-04-81-PT
	Date:	17 January 2008
	Original:	English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Krister Thelin
Judge Frank Höpfel

Registrar: Mr. Hans Holthuis

Decision: 17 January 2008

PROSECUTOR

v.

MOMČILO PERISIĆ

PUBLIC FILING

**DECISION ON PROSECUTION'S FILING OF SECOND
AMENDED INDICTMENT**

The Office of the Prosecutor:

Mr. Mark B. Harmon

Counsel for the Accused:

Mr. James Castle
Mr. Novak Lukić

I. PROCEDURAL BACKGROUND

TRIAL CHAMBER III of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”) is seised of “Prosecution’s Filing of the Second Amended Indictment” filed on 13 September 2007 (“Prosecution Filing”), wherein the Prosecution submits a Second Amended Indictment which includes both changes made at the direction of the Chamber, and some which exceed the direction of the Chamber.

1. On 15 May 2007, this Chamber issued its “Decision on Application of Rule 73 *bis* and Amendment of Indictment,”¹ (“15 May 2007 Decision”), in which it held that the Prosecution could not present evidence regarding any unscheduled incidents in relation to the Sarajevo counts contained in the Amended Indictment of 26 September 2005 (“Amended Indictment”) unless the Prosecution was able to demonstrate that evidence of certain unscheduled incidents in relation to those counts was essential to prove an important aspect of the Prosecution’s case.² Additionally, the Chamber addressed in its 15 May 2007 Decision several proposed “minor” amendments to the Amended Indictment which had been filed by the Prosecution in this case on 26 September 2005.³ In the disposition of the 15 May 2007 Decision, the Chamber directed the Prosecution to “file an Amended Indictment containing all the amendments proposed by the Prosecution as mentioned in paragraphs 21 and 22” of its decision.⁴

2. On 13 September 2007, the Prosecution complied with the Chamber’s 15 May 2007 decision by filing its Second Amended Indictment.⁵ In the 19 September 2007 Status Conference, the Pre-Trial Judge noted that the Second Amended Indictment filed by the Prosecution included modifications and corrections which exceeded the amendments initially proposed by the Prosecution which had been outlined in paragraphs 21 and 22 of the Chamber’s 15 May 2007 decision.⁶ The Chamber, therefore, gave the Defence a period of 30 days from the date on which a B/C/S language version of

¹ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Decision on Application of Rule 73 *bis* and Amendment of Indictment, 15 May 2007.

² *Ibid.*, Disposition, para. 3.

³ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Prosecution’s Filing of Amended Indictment in Compliance with Trial Chamber Order of 29 August 2005, 26 September 2005. The Chamber issued its decision granting the Prosecution’s motion to amend the original indictment on 12 December 2005. *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Decision Granting Prosecution Motion to Amend Indictment, 12 December 2005. The original indictment in this case was issued on 22 February 2005, and was confirmed on 24 February 2005. This indictment was made public on 7 March 2005. Order to Disclose Indictment and Warrant of Arrest against Momčilo Perišić, 7 March 2005.

⁴ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Decision on Application of Rule 73 *bis* and Amendment of Indictment, 15 May 2007, Disposition, para. 1.

⁵ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Prosecution’s Filing of Second Amended Indictment, 13 September 2007.

⁶ *Ibid.*

the Second Amended Indictment was received by the Defence to file any objections to the proposed amendments.⁷ The Prosecution was given 14 days from the date of the Defence filing within which to respond.⁸

3. The Defence received a B/C/S version of the Second Amended Indictment on 11 October 2007⁹ The Defence electronically filed its “Defence Objections to Prosecution’s Filing of Second Amended Indictment” (“Defence Objections”) on 11 November 2007, in which the Defence registers objection to what it refers to as “two categories of amendments.”¹⁰ The positions of the parties will be detailed further below.

4. The Prosecution replied to the Defence Objections on 26 November 2007¹¹ (“Prosecution Reply”). This was within the 14 days which the Chamber provided to the Prosecution to respond in the Status Conference of 19 September 2007, in accordance with Rule 126(B)¹² of the Rules of Procedure and Evidence (“Rules”) as the 26th of November was the Monday immediately following the deadline imposed by the Chamber.¹³

5. On 3 December 2007, the Defence filed a “Defence Motion to Strike Prosecution’s Reply”, (“Defence Motion to Strike”) arguing that the Prosecution’s submission should be viewed as being filed out of time under Rule 126 *bis* of the Rules.¹⁴ On 15 January 2008, at the Status Conference in this case, the Defence orally moved to withdraw the Defence Motion to Strike.¹⁵

II. SUBMISSIONS OF THE PARTIES

6. In its Filing, the Prosecution submits that it has incorporated into the Second Amended Indictment those agreed facts which it submits the parties have reached. In addition to those amendments which the Chamber authorised in its 15 May 2007 Decision, the Prosecution further

⁷ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Transcript of Status Conference, 19 September 2007, p. 108.

⁸ *Ibid.*

⁹ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, *Druga izmenjena optuznica*, 11 October 2007. Note that a correction was required to the B/C/S version of the indictment, which was completed on 11 October 2007. Internal Memorandum: Corrigendum of BCS Translation of the Second Amended Indictment, dated 1 October 2007, but filed on 11 October 2007.

¹⁰ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Defence Objections to Prosecution’s Filing of Second Amended Indictment, 11 November 2007, para. 2.

¹¹ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Reply to Defence Objections to Prosecution’s Filing of Second Amended Indictment, 26 November 2007.

¹² Rule 126 (B): Should the last day of a time prescribed by a Rule or directed by a Chamber fall upon a day when the Registry of the Tribunal does not accept documents for filing it shall be considered as falling on the first day thereafter when the Registry does accept documents for filing.”

¹³ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Status Conference Transcript, 19 September 2007, p. 108.

¹⁴ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Defence Motion to Strike Prosecution’s Reply, 3 December 2007.

¹⁵ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Transcript of Status Conference, 15 January 2008, p. 120, lines 18 – 25.

modified paragraphs 1, 5, 6a 30, 34, 46, 54 56, 57, 58 and 62 of the Amended Indictment.¹⁶ The Prosecution reply submits that none of the changes which exceed the Chamber's 15 May 2007 Decision "add new charges against the Accused."¹⁷ The Prosecution submits that some of the proposed amendments were "the subject of agreement between the parties and have been adopted by the Trial Chamber"¹⁸, and specifically the Prosecution submits that changes made to paragraph 57 of the Amended Indictment were made based upon agreement with the Defence.¹⁹ In paragraph 18 of its Filing, the Prosecution submits that "[t]he proposed amendments to the Amended Indictment described in paragraphs 5 – 12 and 14 – 15 make minor changes to the indictment", which the Prosecution submits were made to correct typographical errors or to add precision to language in the Amended Indictment.²⁰ The Prosecution submits that the proposed amendments do not prejudice the rights of the Accused nor will they cause delay in the proceedings.

7. In its submission, the Defence argues that the Prosecution did not seek leave to file the Second Amended Indictment, citing Rule 50A(i) of the Rules.²¹ Aside from that general technical objection, the Defence submits that the proposed changes to the Second Amended Indictment constitute an impermissible expansion of the indictment. Specifically, the Defence argues that the proposed amendments in paragraphs 5 and 6a of the indictment would modify it to allege that the Accused had daily operational control over the members of the 30th and 40th Personnel Centres. The Defence argues that this constitutes an "entirely new and different theory of prosecution based on a direct command and subordinate relationship rather than the indirect and state-to-state based interstate liability that was the basis of the original indictment."²²

8. The Defence further argues that allegations that the Accused had any control over the actions on the ground are not supported by evidence presented to support the indictment. The Defence submits that it would, nonetheless, have to defend against such a position if the proposed amendments in paragraphs 5 and 6a of the proposed Second Amended Indictment deleting certain language are permitted.²³

9. The Defence also objects to the amendment to paragraph 30 of the proposed Second Amended Indictment which would insert the language "until 24 November 1998" as designating the end of

¹⁶ Prosecution Filing, paras. 5 – 15.

¹⁷ Prosecution Filing, para. 17.

¹⁸ *Ibid.*, para. 17.

¹⁹ *Ibid.*, para. 13.

²⁰ *Ibid.*, para. 18.

²¹ Defence Objections, paras. 3 – 5.

²² *Ibid.*, para 7.

²³ *Ibid.*, para 7. Note that the Defence Objections incorrectly references paragraph 7 in this submission, but it is clear in context that the Defence is actually referring to the proposed change to paragraph 6a.

the temporal period of the indictment.²⁴ The Defence submits that the proposed language substantially expands the temporal period of the indictment.²⁵

10. Finally, the Defence submits that the modifications to the indictment at this point in time are neither timely, nor prompt, and that permitting the amendments to the Amended Indictment at this point in time would “violate the rights of the accused to a fair trial.”²⁶ The Defence submits that the Prosecution has failed to establish that it would serve the interests of justice to grant the application to file the Second Amended Indictment, and submits that the interests of justice would weigh in favour of maintaining or lessening the scope of the indictment.²⁷ The Defence requests the Chamber not permit the amendments objected to by the Defence, summarising its position in two components: a) the Prosecution has not followed proper procedure for filing the amendments, and b) the Prosecution has not established good cause for such amendments.²⁸

11. In its Reply, the Prosecution submits that while there may have been less artful wording used in its Filing, the substance of its Filing in fact amounts to a request to the Chamber for leave to amend the indictment.²⁹ The Prosecution argues that the modifications do not expand the indictment or result in a new theory of prosecution, and the Prosecution identifies wording in the proposed Second Amended Indictment which, the Prosecution argues, refutes the allegations of the Defence that these modifications constitute an effort to expand the theory of prosecution.³⁰ The Prosecution submits further that the proposed addition of “until 24 November 1998” in paragraph 30 of the proposed Second Amended Indictment would not alter the temporal scope of the indictment in any way.³¹ Finally the Prosecution argues that even were the Chamber to conclude that the modification to paragraph 30 adds a new charge, such a modification at this stage in the proceedings would not unfairly prejudice the Accused in any way.³² The Prosecution also submits that the proposed amendment to paragraph 30 of the Second Amended Indictment would not unduly delay the proceedings, as no trial date has yet been set. The Prosecution argues that granting it permission to amend paragraph 30 of the indictment as requested would ensure that the real issues in the case will be determined, citing to decisions in “*Prosecutor v. Brđanin and Talić(sic)*”.³³

²⁴ *Ibid.*, paras 11 - 14.

²⁵ *Ibid.*, para. 13 - 14.

²⁶ *Ibid.*, para. 17.

²⁷ *Ibid.*, para. 18.

²⁸ *Ibid.*, para. 19.

²⁹ Prosecution Reply, paras. 8 – 11.

³⁰ *Ibid.*, paras. 13 – 15.

³¹ *Ibid.*, paras. 16 -28.

³² *Ibid.*, paras. 21 – 25.

³³ *Ibid.* at para. 27, citing to the *Brđanin* Decision, para.50.

12. In its Motion to Strike, the Defence submits that the Prosecution's Reply is filed out of time, and the Defence argues it should therefore not be considered at all in accordance with Rule 126 *bis*. The Defence further argues that should the Chamber consider the Prosecution's Reply, the Defence seeks leave to file an additional response as the Defence submits that the Prosecution raises "numerous issues in its response (*sic*) which would have been improper to raise in its initial motion. (*sic*)"³⁴ The Defence then sets out two arguments contained in the Prosecution Reply which it submits should be considered if the Prosecution Reply is considered by the Chamber. As indicated above, the Defence moved to withdraw its Defence Motion to Strike at the Status Conference on 15 January 2008, and thus the two arguments contained in that motion will not be considered by the Chamber in deciding on the issue of the Filing of the Second Amended Indictment.

III. DISCUSSION

13. Rule 50 of the Rules provides for the amendment of an indictment:

- (i) The Prosecutor may amend an indictment:
 - (a) at any time before its confirmation, without leave;
 - (b) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and
 - (c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.
- (ii) Independently of any other factors relevant to the exercise of the discretion, leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the standard set forth in Article 19, paragraph 1, of the Statute to support the proposed amendment.³⁵

14. The Prosecution acknowledges that it was less artful in its captioning of its filing, but submits that its Filing is, indeed, a request in context for leave to amend further the Amended Indictment. The Prosecution was ordered to submit a Second Amended Indictment in the Chamber's 15 May 2007 Decision, which required modification of the Amended Indictment to reflect the decision taken pursuant to Rule 73 *bis* as well as those changes which the Chamber included in that Decision at paragraphs 21 and 22. The Chamber accepts that the Prosecution intended to comply with its obligation pursuant to Rule 50(A)(i)(c) by its Filing, and thus dismisses the Defence argument that the Chamber

³⁴ Defence Motion to Strike, para. 6.

³⁵ Rule of Evidence 50; Article 19, paragraph 1, of the Statute of the Tribunal provides, "The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed."

should reject the proposed Second Amended Indictment for the procedural error in the form of the pleading.

15. Turning to the substance of the challenges posed by the Defence, the Chamber first addresses the Defence objections relating to the proposed amendment to paragraph 30 of the indictment, replacing “and continuing during the period of this indictment,” with “until 24 November 1998”³⁶ The Prosecution asserts in its Reply that this language “does not alter the temporal scope of the indictment for the failure of the Accused to *punish* (italics in the original text) his subordinates.”³⁷ The Prosecution submits that the proposed amendment is made to reconcile the language of paragraph 30 with the language of paragraph 34 of the Amended Indictment.

16. Notwithstanding the Prosecution’s argument concerning conformity, it appears that allowing the Prosecution to make the modification it seeks in paragraph 30 of the indictment would, in fact, needlessly complicate the indictment, and would not serve any useful purpose. If the temporal scope of the Amended Indictment is meant to include the period from 1996 to 1998, it is unclear to the Chamber how the proposed amending language in paragraph 30 would coincide with the language in paragraph 32, 33 and in particular paragraph 64 of the Amended Indictment, which provides that “At all times relevant to this indictment a state of armed conflict existed in Croatia and BiH.”

17. Whatever the real reasons might be for the proposed addition of the date of 24 November 1998 in paragraph 30 of the Second Amended Indictment, the Chamber is of the view that it does more to confuse than clarify, and that leave to amend paragraph 30 in the requested manner should not be granted.

18. The Chamber now turns to the Defence objections relating to paragraph 5 of the Second Amended Indictment, in which the Prosecution seeks to delete the last sentence, which reads “In the case of VJ officers seconded to the SVK and the VRS, Momčilo PERIŠIĆ delegated or transferred, at least in substantial part, daily operational control of these officers to General Ratko Mladić, Commander of the Main Staff of the VRS; General Milan Čeleketić, Commander of the SVK and his successor General Mile Mrkšić.” The Defence notes an objection to language it states is being eliminated in paragraph 7 of the indictment.³⁸ Upon closer review, however, the language being eliminated to which the Defence has objected is actually contained in paragraph 6(a) of the indictment. The Defence specifically objects to

³⁶ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Amended Indictment, 26 September 2005, para. 30.

³⁷ Prosecution Reply, para. 17.

³⁸ Defence Objections, para. 6.

the deletion of a phrase in paragraph 6 of the indictment, specifically the language “whether or not operational control of the personnel was delegated or transferred to the commanders of these other forces and for whom. . .”³⁹.

19. The Prosecution submits that the modification to paragraph 5 is made because, in its view, there is now “insufficient direct evidence that there was a formal delegation of daily operational control by the Accused to Generals Mladić, Čeleketić and Mrkšić.”⁴⁰ It appears, in that context, that allowing the requested amendment would be consistent with the intent of Article 19(1) of the Amended Statute of the Tribunal (“Statute”.) It is not clear how the interests of justice are served by maintaining language which the Prosecution concedes it has insufficient evidence to establish a conviction. Therefore, as to the disputed language in paragraph 5, the amendment should be allowed.

20. With respect to the language being omitted by the amendment in paragraph 6(a) of the Second Amended Indictment, the Prosecution submits that the changes to paragraph 6(a) constitute minor changes which do not expand the indictment and do not result in a new theory of prosecution. The Chamber agrees that the modifications to paragraph 6(a) constitute minor changes and do not expand the indictment nor do they result in a new theory of prosecution. Therefore these disputed changes should also be permitted.

21. In all other respects, the Second Amended Indictment either complies with modifications to the indictment which were ordered by the Chamber in its 15 May 2007 decision, or contains modifications which are made by agreement of the parties, or without objection, and therefore, the remaining modifications to the indictment may be filed with the Revised Second Amended Indictment as set forth below in the disposition in this Decision.

22. With respect to the Defence’s general objection to the delay in amending the indictment⁴¹, as to most of the amendments in the indictment, the Prosecution is making the amendments to the Amended Indictment pursuant to an order of the Chamber following its 15 May 2007 Decision. As to several of the minor modifications to the indictment, the Defence agreed to those amendments during the meeting of the parties pursuant to Rule 65 *ter* held on 1 December 2006.⁴²

23. The Defence submits that the Chamber must carefully analyse any modifications at this stage of the case to ensure that whatever modifications might be made to the indictment will not either unduly delay the trial or undermine the Accused’s right to a fair trial.

³⁹ *Ibid.*

⁴⁰ Prosecution Filing, para. 6B.

⁴¹ Defence Objections, paras. 15 – 18.

⁴² *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Transcript, Rule 65 *ter* Conference, 1 December 2006, pp. 111 – 114.

24. The Chamber has considered those matters raised by the Defence in its arguments submitted in paragraphs 15 – 19 of its Defence Objections, and concludes that the amendment to paragraph 6(a) is warranted and will neither unduly delay the trial nor will it undermine the Accused's right to a fair trial. Furthermore, the Chamber finds that as to all of the amendments other than those proposed to be made in paragraphs 5, 6(a), and 30 of the Second Amended Indictment, the Defence either did not sufficiently state its objection to those modifications, or concurred in the modifications either explicitly in its representation in the *65 ter* Conference on 1 December 2006, or implicitly by failing to note the objection after having had 30 days following receipt of the B/C/S version of the indictment within which to inspect the proposed Second Amended Indictment.

25. **FOR THESE REASONS**, and pursuant to Rule 50:

- a. the Chamber **DENIES** the Prosecution's request to amend paragraph 30 of the Amended Indictment and **GRANTS** the Prosecution's request to modify the Amended Indictment in accordance with the Second Amended Indictment in all other respects;
- b. **ORDERS** the Prosecution to file a Revised Second Amended in accordance with paragraph 25(a) above;
- c. **DECLARES** that the Revised Second Amended Indictment once filed is the operative indictment in this case.

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


Judge Frank Höpfel

Dated this seventeenth day of January 2008
At The Hague,
The Netherlands

Seal of the Tribunal