



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: 7 April 2009
Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Jean-Claude Antonetti
Judge Christoph Flügge

Acting Registrar: Mr. John Hocking

Order of: 7 April 2009

PROSECUTOR

v.

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

PUBLIC

**ORDER REGARDING PROSECUTION'S SUBMISSION WITH
RESPECT TO RULE 73 *BIS* (D)**

Office of the Prosecutor

Mr. Thomas Hannis
Mr. Chester Stamp

Counsel for the Accused

Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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”) is seised of the “Prosecution Submission with Respect to Rule 73 *bis* (D) Decision of 11 July 2006”, filed on 12 March 2009 (“Submission”), and hereby issues this order in relation thereto.

1. The *Milutinović* trial was conducted by Trial Chamber III, composed of Judge Iain Bonomy, presiding, as well as three *ad litem* Judges, namely Judges Ali Nawaz Chowhan, Tsvetana Kamenova, and Janet Nosworthy (reserve) (“*Milutinović* Trial Chamber”).

2. The *Milutinović* Trial Chamber conducted a pre-trial conference on 7 July 2006. On 11 July 2006 the Chamber issued its “Decision on Application of Rule 73*bis*” (“Decision”) in which, applying Rule 73 *bis* (D) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), it made the following order:

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/Reçak, Padalište/Padalishte, and Dubrava/Dubravë Prison.¹

Thus the Office of the Prosecutor (“Prosecution”) was precluded from leading evidence in relation to each of the crime sites of Račak/Reçak, Padalište/Padalishta, and Dubrava Prison, on the ground that what allegedly occurred there was not, unlike other killing sites, associated with locations from which persons were allegedly forcibly displaced, and thus did not fall within “the nature or theme” of the Prosecution case.² The legal result was that the charges in the Indictment relating to paragraphs 75(a), (e), and (j) still existed and the six Accused were still charged in relation thereto, but these charges were not the subject of the *Milutinović* trial proceedings.³

¹ Decision on Application of Rule 73*bis*, 11 July 2006, para. 13(a).

² Decision on Application of Rule 73 *bis*, 11 July 2006, paras. 10–13; *see also* Decision Denying Prosecution’s Request for Certification of Rule 73 *bis* Issue for Appeal, 30 August 2006.

³ *Cf. Prosecutor v. Stanišić et al.*, Case No. IT–03–69–PT, Decision Pursuant to Rule 73 *bis* (D), 4 February 2008, p. 9, where the Chamber ordered the Prosecution to amend the Indictment as a result of the Chamber’s decision under Rule 73 *bis* (D).

3. The Judgement in the *Milutinović* case was issued on 26 February 2009. In it, the Chamber ordered the parties as follows:

Pursuant to the Trial Chamber's "Decision on Application of Rule 73bis", issued on 11 July 2006, relating to the crime sites in Račak/Rečak, Padalište/Padalishta, and Dubrava Prison in paragraphs 75(a), (e), and (j), respectively, of the Indictment, the parties shall, within two weeks of the date of this Judgement, make appropriate submissions to Trial Chamber III of the Tribunal regarding how to proceed in relation to these existing charges.⁴

The current Submission, filed before the three permanent Judges of Trial Chamber III, was made as a result of that order.

4. In the Submission, the Prosecution notes that the *Milutinović* Trial Chamber's Decision effectively removed the charges relating to the three crime sites from the Indictment and barred the Prosecution from presenting evidence in relation thereto. As a result, throughout the trial, the Accused were on notice that no evidence seeking conviction in relation to those crime sites would be presented.⁵ Accordingly, the Prosecution states that, for all purposes, these charges formed no part of the Prosecution case and "the parties understood that in this trial no conviction would be entered in relation to them".⁶ The Prosecution concludes:

In light of the Decision and the awareness and conduct of the parties throughout the trial, the only reasonable conclusion is that the judicial effect of the Decision was that the three crime sites' charges were removed from the Indictment and were not part of the trial. The Prosecution requests the Trial Chamber to declare accordingly.⁷

5. None of the Defence teams from the *Milutinović* case made submissions with respect to this issue.

6. The Rules 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

⁴ *Milutinović* Trial Judgement, Vol. III, para. 1213.

⁵ Submission, paras. 3–6.

⁶ Submission, para. 7.

⁷ Submission, para. 8.

Rule permits the Chamber to intervene to focus the issues on which evidence will be led at trial; as recently amended,⁸ 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.

7. Accordingly, paragraph (F) allows the Prosecution to submit, after commencement of a trial, a motion to vary any decision as to the number of crime sites or incidents in respect of which the evidence may be brought. The *Milutinović* Trial Chamber, in applying Rule 73 *bis* (D), made the following reference to paragraph (F):

As it did at the Pre-Trial Conference, 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.

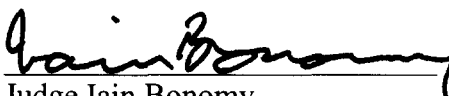
During the *Milutinović* trial, the Prosecution made no application under Rule 73 *bis* (F) relating to the Decision.

⁸ 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").

8. In light of (i) the failure of the Prosecution to make any motion under Rule 73 *bis* (F), (ii) the Prosecution's Submission which gives no indication of an intention to proceed further against any of the Accused, and (iii) the Accused's right to be tried without undue delay, the Chamber, pursuant to Rules 54 and 73 *bis*, **HEREBY DECLARES** that there remain no outstanding charges against Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić before this Tribunal.

Judge Antonetti appends a separate opinion.

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


Judge Iain Bonomy
Presiding

Dated this seventh day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]



Tribunal international chargé de
poursuivre les personnes présumées
responsables de violations graves
du droit international humanitaire
commises sur le territoire de
l'ex-Yougoslavie depuis 1991

Affaire n° : IT-05-87-T

Date : 7 avril 2009

Original: Français

LA CHAMBRE DE PREMIÈRE INSTANCE

Composée comme suit : M. le Juge Iain Bonomy, Président
M. le Juge Jean-Claude Antonetti
M. le Juge Christoph Flügg

Assistée de : M. John Hocking, Greffier par intérim

Ordonnance rendue le : 7 avril 2009

LE PROCUREUR

c/

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

DOCUMENT PUBLIC

OPINION INDIVIDUELLE DU JUGE JEAN-CLAUDE ANTONETTI RELATIVE AUX OBSERVATIONS DE L'ACCUSATION CONCERNANT LA DÉCISION RENDUE LE 11 JUILLET 2006 EN APPLICATION DE L'ARTICLE 73 *BIS* D) DU RÈGLEMENT

Le Bureau du Procureur

M. Thomas Hannis
M. Chester Stamp

Les Conseils des Accusés

MM. Eugene O'Sullivan et Slobodan Zečević pour Milan Milutinović
MM. Toma Fila et Vladimir Petrović pour Nikola Šainović
MM. Tomislav Višnjić et Norman Sepenuk pour Dragoljub Ojdanić
MM. John Ackerman et Aleksandar Aleksić pour Nebojša Pavković
MM. Mihajlo Bakrač et Đuro Čepić pour Vladimir Lazarević
MM. Branko Lukić et Dragan Ivetić pour Sreten Lukić

La Chambre III constituée des juges permanents **Bonomy, Antonetti** et **Flügge** a décidé à l'unanimité de constater que les charges concernant les trois lieux de meurtre de Račak/Reçak, Padalište/Padalishta, et le complexe pénitentiaire de Dubrava avaient été retirés.

La requête soulevait de mon point de vue une série de problèmes que je vais examiner.

1. La saisine directe de la Chambre III

L'Accusation, à la suite du jugement *MILUTINOVIĆ* rendu par la Chambre III constituée des Juges Iain Bonomy, Ali Nawaz Chowhan, Tsvetana Kamenova et Janet Nosworthy a saisi la présente Chambre III au sujet de l'application de la décision du 11 juillet 2006.

La question se pose de savoir si l'Accusation devait saisir **directement** cette Chambre ou bien aurait dû demander au Président du Tribunal de désigner la Chambre compétente.

Le précédent de l'affaire Karadžić militait en faveur de cette dernière solution.

Dans le cas de l'affaire Karadžić, cette affaire était attribuée initialement à la Chambre I et, par décision du 21 août 2008, cette affaire était confiée à la Chambre III. Le même jour, le Président du Tribunal, en application de l'article 14.5 du Statut, affectait un juge *ad litem* dans la composition de la Chambre III en motivant sa décision par l'attendu suivant :

“CONSIDERING Article 14(5) of the Statute and Rule 19(A) of the International Tribunal's Rules of Procedure and Evidence, and the trial management and case distribution needs of the International Tribunal;”

De ce fait, dans le présent cas, ne devait-il pas y avoir une désignation d'une Chambre *ad hoc* motivée par un attendu identique ?

J'estime que non, car l'interprétation du texte du Statut et de son esprit est simple : le Tribunal est constitué de 3 Chambres et les affaires sont affectées aux Chambres par une décision administrative du Président tenant en compte seule la notion de **bonne administration de la Justice** pour éviter toute polémique sur la « politisation », le choix des Juges ou toute autre considération.

La pratique suivie depuis la création de ce Tribunal était de laisser normalement la gestion des affaires aux Chambres **initialement** saisies et de nommer le cas échéant une autre Chambre ou d'autres juges pour des raisons sérieuses tirées de la bonne administration de la Justice.

Dans le présent cas, il n'y a **aucune raison** de déroger à ce principe, et c'est pourquoi j'estime que la Chambre III est **naturellement** compétente pour statuer sur cette requête.

2. La décision du 11 juillet 2006

La Chambre III a indiqué dans sa décision :

« Jusqu'à nouvel ordre, l'Accusation peut présenter des preuves concernant tous les lieux des crimes et les faits incriminés mentionnés dans le paragraphe 72 et tous les lieux des crimes et les faits incriminés énumérés dans le paragraphe 75, réserve faite des alinéas a), e) et j) (y compris le point j) i)) dans lesquels sont formulées les accusations concernant Račak/Rečak, Padalište/Padalishte et le complexe pénitentiaire Dubrava/Dubravë ».

Les termes « **jusqu'à nouvel ordre** » laissent subsister la possibilité d'une reprise de l'acte d'accusation sur ces localités.

C'est la raison pour laquelle au paragraphe 1213 du volume 3 du Jugement *MILUTINOVIĆ*, figure la mention :

1213. Pursuant to the Trial Chamber's « Decision on Application of Rule 73bis », issued on 11 July 2006, relating to the crime sites in Račak/Rečak, Padalište/Padalishta, and Dubrava Prison in paragraphs 75(a), (e), and (j), respectively, of the Indictment, the parties shall, within two weeks of the date of this Judgment, make appropriate submissions to Trial Chamber III of the Tribunal regarding how to proceed in relation to these existing charges.”

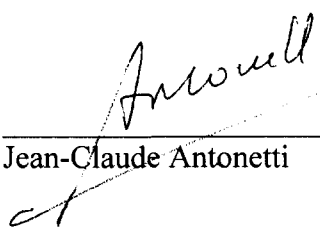
La question se pose de savoir pourquoi y a-t-il maintenant cette possibilité théorique de poursuites nouvelles à l'encontre des Accusés ?

Le débat résulte du paragraphe D) de l'article 73bis du Règlement. Cet article a été adopté pour écourter la durée des procès. Ce texte ne prévoit pas que les Juges suppriment les chefs d'accusation mais qu'ils invitent l'Accusation à le faire. Dès lors, il est clair que la décision du 11 juillet 2006 était « une invitation » à l'Accusation de ne pas présenter des preuves concernant tous les lieux des crimes et les faits incriminés dans le paragraphe 75 énumérés aux alinéas a), e) et j). En cas d'acceptation par l'Accusation, cela impliquait « *de jure* » que les Accusés n'étaient plus poursuivis pour les crimes commis dans ces lieux et ne seraient plus poursuivis à l'avenir pour ces mêmes crimes. En revanche, si l'Accusation n'était pas d'accord, il lui incombait de contester cette décision car l'article 16.1 du Statut qui lui donne à **elle seule** la responsabilité de l'exercice de la poursuite, les Juges ne pouvant en aucune façon l'en empêcher.

Le fait que le Procureur n'ait pas contesté cette décision entraîne définitivement l'extinction de l'action publique internationale à l'encontre des Accusés pour les crimes commis dans ces lieux. Il m'apparaît que la Chambre III n'aurait pas dû mentionner dans sa décision jusqu'à « nouvel ordre » car elle donnait ainsi une possibilité de reprise de l'action publique

internationale alors même que la finalité première du paragraphe D) de l'article 73 bis était d'écourter le procès.

Fait en anglais et en français, la version en français faisant foi.



Jean-Claude Antonetti

Le 7 avril 2009
La Haye (Pays-Bas)

[Sceau du Tribunal]