IT-95-5/18-T
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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-95-5/18-T

Date: 16 November 2009

Original: English

IN THE TRIAL CHAMBER

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

Registrar: **Mr. John Hocking**

Decision of: **16 November 2009**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S MOTION FOR FINDING OF *NON-BIS-IN-IDEM*

Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

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 Accused's Motion for Finding of *Non-Bis-In-Idem* filed on 9 October 2009 ("Motion"), and hereby issues its decision thereon.

I. Procedural Background

1. On 22 July 2009, the Trial Chamber, pursuant to Rules 54 and 73 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"), ordered the Office of the Prosecutor ("Prosecution") to propose in writing ways in which the scope of the trial may be reduced through the application of Rule 73 *bis*(D).[1] On 31 August 2009, the Prosecution filed its Submission Pursuant to Rule 73 *bis*(D), in which the Prosecution designated witnesses whom it no longer anticipates calling and revised time estimates for other witnesses in light of adjudicated facts and a further review of the evidence.[2] In case the Trial Chamber found that further reductions in the scope of the case were necessary, the Prosecution also proposed to reduce its presentation of evidence in relation to a number of municipalities as well as individual crime sites and incidents connected to the remaining municipalities, the Srebrenica enclave, and the Sarajevo siege. In its submission, the Prosecution indicated that it would not lead evidence of crime-base witnesses relating to these specified crime sites and incidents, and that the Accused could not be held criminally liable for the related alleged crimes.[3]

2. At the Status Conference held on 8 September 2009, the Pre-trial Judge informed the parties that even after considering the Prosecution Submission Pursuant to Rule 73 *bis*(D), "further reductions [were] warranted as a necessity for the manageable conduct of [a] fair and expeditious trial."[4] He added that the removal of certain crime sites or counts from the scope of the trial does not suggest any determination as to the responsibilities of the Accused in relation to those charges.[5] Indeed, the Pre-trial Judge made clear that "the Accused might still be

[1] Order to the Prosecution under Rule 73 *bis*(D), 8 October 2009, para. 7.

[2] Prosecution Submission Pursuant to Rule 73 *bis*(D), 31 August 2009 ("Prosecution Submission Pursuant to Rule 73 *bis*(D)"), paras. 1, 6-9.

[3] Prosecution Submission Pursuant to Rule 73 *bis*(D), para. 10.

[4] Status Conference, T. 450-451 (8 September 2009). The Trial Chamber issued a written order on 9 September 2009 inviting the Prosecution to make further submissions pursuant to Rule 73 *bis* and for the Accused to file a response to the Prosecution submissions. Order Following Status Conference, 9 September 2009, para. 4.

[5] Status Conference, T. 450-451 (8 September 2009).

prosecuted on those charges by [the] Tribunal or by a domestic court following the completion of the trial [at hand]."[6]

3. The Prosecution filed a second Submission Pursuant to Rule 73 *bis*(D) on 18 September 2009, wherein it declined to make further reductions suggested by the Trial Chamber because it considered that such reductions would have an adverse impact on its ability to fairly present its case.[7] According to the Prosecution, the Trial Chamber's proposals "would result in the omission of evidence which would compromise the prosecution of [the] case, and offer modest time savings."[8]

4. At the Pre-trial Conference on 6 October 2009, the Trial Chamber accepted each of the Prosecution's proposals for reduction in the Submission Pursuant to Rule 73 *bis*(D) and determined that the Prosecution may not present evidence in respect of the crime sites and incidents identified in these proposals.[9] The Trial Chamber also ordered the Prosecution to file a marked-up version of the Indictment and its schedules with each of the municipalities and crime sites that will not be the subject of evidence at trial struck through.[10] The Prosecution duly filed the marked-up version of the Indictment on 19 October 2009.

II. Submissions

5. In the Motion, the Accused argues that since the protection against double jeopardy is an internationally recognised principle, he cannot thereafter be prosecuted either at the Tribunal or in national courts for the acts alleged in the Indictment that will not be the subject of evidence at trial.[11] According to the Accused, Rule 73 *bis*(D) "does not provide for [the] dismissal or striking of acts or charges [and] these acts or charges remain in the indictment but are [simply] not the subject of evidence."[12]

6. The Accused also argues that the Tribunal has embraced the "materially distinct elements" test that the United States Supreme Court adopted in *Blockburger v. United States*.[13] The Accused avers that under this test, the scope of an accused's protection from double

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[6] Status Conference, T. 451(8 September 2009).

[7] Prosecution Second Submission Pursuant to Rule 73 *bis*(D), 18 September 2009 ("Prosecution Second Submission Pursuant to Rule 73 *bis*(D)"), para. 1.

[8] Prosecution Second Submission Pursuant to Rule 73 *bis*(D), para. 2.

[9] Status Conference, T. 467 (6 October 2009). *See also* Decision on the Application of Rule 73 *bis* ("Decision on the Application of Rule 73 *bis*"), 8 October 2009, para. 11.

[10] Status Conference, T. 468 (6 October 2009). *See also* Decision on the Application of Rule 73 *bis*, para. 8.

[11] Motion, paras. 1-2, 7. The Accused argued that since he will be tried on an indictment which includes acts "which are the subject of [a] Rule 73 *bis* decision, he cannot be tried for those acts again." Motion, para. 6.

[12] Motion, para. 4.

[13] Motion, para. 15.

jeopardy is not determined by the evidence that a prosecutor introduces at trial, but by the charges that are included in the indictment.[14] According to the Accused, courts from the United Kingdom and Canada follow the same approach. The Accused points out that courts in the United Kingdom have held that "[a] person cannot be tried [. . .] for a crime in respect of which he could on some previous indictment have been convicted."[15] He also relies on Canadian courts which have held that "once a plea is entered to a [charge,] the accused is in jeopardy and can therefore, if necessary, avail himself of the [protection against double jeopardy.]"[16]

7. Interpreting Rule 73 *bis*(D), the Accused further argues that the Rule is concerned with the evidence that the Prosecution may present at trial and not the scope of the Indictment.[17] As such, according to the Accused, he "is placed in jeopardy for all of the acts in the [I]ndictment", including those acts in respect of which the Prosecution will not present evidence.[18] In the estimation of the Accused, those acts "remain in place throughout the trial."[19]

8. The Prosecution submitted the "Prosecution Response to Karadžić's 'Motion for Finding of *Non-Bis-In-Idem*'" on 26 October 2009 ("Response"), wherein it argues that the Accused's Motion is premature because neither the Prosecution nor any other prosecutorial entity has requested that the Accused be tried for the charges that were removed under Rule 73 *bis*(D).[20] According to the Prosecution, an accused at the Tribunal is protected from double jeopardy when he has "already been tried" for the relevant crimes.[21] Relying on the ICTR Appeals Chamber decision in *Laurent Semanza*, the Prosecution notes that an accused is found to have been "tried" when he has undergone "a trial for the acts covered by the indictment brought against [the accused] [. . .] and at the end of which trial a final judgment is rendered."[22] The Prosecution argues that the Accused has failed to establish grounds for applying the principle of

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[14] Motion, para. 15.

[15] Motion, para. 19 (citing *Connelly v. Director of Public Prosecutions* (1964) 48 Cr. App. R. 183, 184 (House of Lords)).

[16] Motion, para. 20 (citing *R. v. Waugh*, 68 N.S.R. (2d) 247, para. 11 (1985), (Nova Scotia Supreme Court, Appeals Division)).

[17] Motion, para. 16

[18] Motion, para. 17.

[19] Motion, para. 17.

[20] Response, para. 2.

[21] Response, para. 3 (citing Article 10 and Rule 13).

[22] Response, para. 3 (citing *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Decision, 31 May 2000, para. 74). The Prosecution argues that the definition of the term "tried" is narrow and should not be extended to include the removal of charges prior to trial under Rule 73 *bis*(D). Response, para. 3. As examples, the Prosecution points out that the term "tried" does not encompass the withdrawal of counts prior to final judgment. Response, para. 3 (citing *Prosecutor v. Joseph Nzabirinda*, Case No. ICTR-2001-77-T, Sentencing Judgment, 23 February 2007, para. 46). The Prosecution asserts that the term "tried" also does not cover the investigation and indictment of an accused (citing *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of *Non-Bis-In-Idem*, 14 November 1995, paras. 6-8).

non-bis-in-idem because "there has been no trial resulting in a final judgment against Karadžić for any charges."[23]

9. The Accused filed a "Motion for Leave to Reply: *Non Bis In Idem* Motion" on 2 November 2009 seeking leave to reply to the Prosecution Response,[24] which was granted by the Chamber on 3 November 2009.[25] On 5 November 2009, the Accused filed his reply but failed to present new arguments in support of his position.[26]

III. Discussion

10. Article 10 of the Statute of the Tribunal ("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."

11. Rule 73 *bis*(D) of the Rules empowers a Trial Chamber to invite the Prosecution to reduce the number of counts charged in an indictment, and to fix a number of crime sites or incidents in respect of which evidence may be presented by the Prosecution, in the interests of a fair and expeditious trial. When a Chamber exercises this power, it remains open to the Prosecution, after the commencement of trial, to apply under Rule 73 *bis*(F) to vary the Chamber's decision as to the number of crime sites or incidents in respect of which evidence may be presented.

12. The essence of the Accused's submissions in the Motion and the Reply is that the Indictment, following the application of Rule 73 *bis*(D), contains certain allegations in respect of which evidence will now not be presented during his trial, and that, as these allegations remain in the Indictment, he cannot, on the basis of the principle of *non-bis-in-idem,* be tried in relation to those allegations or "acts" by this Tribunal or any domestic court at any later stage. However, among other things, this argument fails to appreciate the precise wording of Rule 73 *bis* and the effect of Rule 73 *bis*(F) in particular. On the basis of this provision alone, the Trial Chamber finds that the Accused's motion is premature. During the course of the trial proceedings, the Prosecution may file a motion to vary the Trial Chamber's decision as to the crime sites and incidents which would be the subject of evidence at trial. Thus, as the Chamber made clear in the course of making its decision on the application of Rule 73 *bis*(D), notwithstanding its

[23] Response, para. 4.
[24] Motion for Leave to Reply: *Non Bis In Idem* Motion, 2 November 2009, para. 3.
[25] Decision on the Accused's Motion for Leave to Reply: *Non Bis In Idem* Motion, 3 November 2009.
[26] Reply Brief: *Non-Bis-In-Idem*, 5 November 2009.

removal of certain crime sites or incidents from the scope of the trial, the Accused may still be prosecuted on those charges by the Tribunal.[27] One of the circumstances in which this may occur is when a Trial Chamber grants a Prosecution motion under Rule 73 *bis*(F).

13. Moreover, the principle of *non-bis-in-idem* applies only in cases where an accused has already been tried, and the trial of this Accused is far from completed.[28] Furthermore, the removal of crime sites or incidents from an indictment pursuant to Rule 73 *bis*(D) cannot be interpreted as a finding on an accused's responsibility for those crime sites or incidents. The responsibilities of an accused with respect to specific charges can only be determined by way of a trial, including through the Chamber's assessment of all evidence presented by the parties in respect of those charges. Indeed, the Trial Chamber itself said that the removal of crime sites or incidents from the scope of the trial is not tantamount to any determination as to the responsibility of the Accused in relation to those charges.[29] Therefore, the removal of crime sites or incidents from the Indictment cannot be said to constitute a completed trial of the Accused in respect of those crime sites or incidents for purposes of an application of the principle of *non-bis-in-idem*.

14. The Trial Chamber agrees with the Accused that the charges in the Indictment in respect of which evidence will not be presented at trial pursuant to Rule 73 *bis*(D) have not simply disappeared, and notes that it will be for the Prosecution to either withdraw those charges, or indicate the manner in which it wishes to proceed against the Accused in relation to them, at the end of this trial.

15. However, as noted above, in light of the provisions of Rule 73 *bis*(F), it would be premature for the Chamber to order the Prosecution to do this now.

[27] Status Conference, T. 451 (8 September 2009).

[28] *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of *Non-Bis-In-Idem*, 15 November 1995, paras. 9, 20. *See also Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Decision on Orić's Motion Regarding Breach of *Non-Bis-In-Idem*, 7 April 2009, p. 5. *See also Prosecutor v. Joseph Nzabirinda*, Case No. ICTR 2001-77-T, Sentencing Judgement, 23 February 2007, para. 46 (citing *Prosecutor v. Laurent Semanza*, Case No. ICTR 97-20-A, Decision, 31 May 2000, para. 74).

[29] Status Conference, T. 450-451 (8 September 2009).

IV. Disposition

16. For these reasons, pursuant to Rule 54 of the Rules, the Trial Chamber hereby **DENIES** the Accused's Motion.

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

Judge O-Gon Kwon
Presiding

Dated this sixteenth day of November 2009
At The Hague
The Netherlands

[Seal of the Tribunal]