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27 May 2011

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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-09-92-I

Date:

27 May 2011

Original:

English

**BEFORE A JUDGE OF THIS TRIBUNAL**

**Before:** Judge Alphons Orie

**Registrar:** Mr John Hocking

**Decision of:** 27 May 2011

**PROSECUTOR**

v.

**RATKO MLADIĆ**

***PUBLIC***

**DECISION ON AMENDMENT OF INDICTMENT**

**Office of the Prosecutor**

Mr Serge Brammertz

**The Accused**

Ratko Mladić

## I. Procedural history

1. On 24 July 1995, the Prosecution submitted an indictment against Radovan Karadžić and Ratko Mladić, which was confirmed by Judge Jorda on the same day.<sup>1</sup> On 15 November 1995, the Prosecution submitted a second indictment against Radovan Karadžić and Ratko Mladić, which was confirmed by Judge Riad on 16 November 1995.<sup>2</sup> On 16 July 1996, Trial Chamber I of the Tribunal joined the cases IT-95-5 and IT-95-18.<sup>3</sup> On 11 October 2002, the Prosecution submitted an amended indictment against Ratko Mladić (“Accused”).<sup>4</sup> On the same day, the President assigned me as confirming Judge for the amended indictment against the Accused.<sup>5</sup> I confirmed the amended indictment on 11 November 2002 (“Operative Indictment”).<sup>6</sup> On 15 October 2009, Trial Chamber III of the Tribunal severed the Accused Ratko Mladić from case IT-95-5/18.<sup>7</sup>

2. On 10 May 2010, the Prosecution requested to amend the Operative Indictment and sought orders under Rules 53 (A), 55, and 59 *bis* (A) of the Tribunal’s Rules of Procedure and Evidence (“Rules” and “Motion”, respectively).<sup>8</sup>

3. The Registry has advised that the Accused has been arrested and will be transferred to the seat of the Tribunal pursuant to Rule 62 of the Rules.

## II. Submissions by the Prosecution

4. The Prosecution submits that the purpose of the Proposed Second Amended Indictment (“Proposed Indictment”) is to provide further clarification and specification of its allegations against the Accused, and to update the legal and factual pleadings contained in the Operative Indictment.<sup>9</sup> It submits that the Proposed Indictment contains four main amendments, which are set out below.<sup>10</sup>

<sup>1</sup> *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Case no. IT-95-5-I, Indictment, 24 July 1995; *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Case no. IT-95-5-I, Review of the Indictment, 24 July 1995.

<sup>2</sup> *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Case no. IT-95-18-I, Indictment, 15 November 1995; *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Case no. IT-95-18-I, Review of the Indictment, 16 November 1995.

<sup>3</sup> *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Case nos IT-95-5-R61 & IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 16 July 1996.

<sup>4</sup> *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Case no. IT-95-5/18-I, Amended Indictment, 11 October 2002.

<sup>5</sup> *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Case no. IT-95-5/18-I, Ordonnance du Président Portant Désignation D’un Juge de Confirmation, 11 October 2002.

<sup>6</sup> *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Case no. IT-95-5/18-I, Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, 11 November 2002 (“Order of 11 November 2002”).

<sup>7</sup> *Prosecutor v. Radovan Karadžić*, Case no. IT-95-5/18-PT, Order Severing Ratko Mladić, 15 October 2009.

<sup>8</sup> Motion to Amend the Amended Indictment and for Orders under Rules 53 (A), 55, and 59 *bis* (A), 10 May 2010.

<sup>9</sup> Motion, para. 1.

<sup>10</sup> Motion, para. 2.

5. First, the Prosecution seeks to update, clarify, and further particularize its allegations relating to the Accused's individual responsibility.<sup>11</sup> In this respect, the Prosecution proposes several changes related to the single Joint Criminal Enterprise ("JCE") charged in the Operative Indictment.<sup>12</sup> The Proposed Indictment distinguishes four separate JCEs, corresponding to the four "crime bases" in the Operative Indictment.<sup>13</sup> The Prosecution submits that the Accused acted in concert with different people at different times, in pursuit of four distinct, but related, criminal objectives.<sup>14</sup> It further identifies a distinct set of participants for each of the four JCEs.<sup>15</sup> In addition, the Prosecution submits that the Proposed Indictment more specifically describes the acts and omissions of the Accused that form the basis for planning, instigating, ordering, and aiding and abetting crimes pursuant to Article 7 (1) of the Tribunal's Statute ("Statute").<sup>16</sup> In relation to Article 7 (3) of the Statute, the Prosecution submits that the Proposed Indictment more precisely describes the manner in which the Accused knew or had reason to know of the involvement of his subordinates in the commission of crimes, and the manner in which he failed to take the necessary and reasonable measures to prevent crimes or punish the perpetrators thereof.<sup>17</sup>

6. Secondly, the Prosecution proposes "minor changes" to the criminal conduct underpinning the charges in the Operative Indictment.<sup>18</sup> These changes mainly relate to the scope of the crime base relating to a collection of municipalities located within territory claimed by the Bosnian Serbs ("Municipalities"), the scope of the responsibility of the Accused for the Sarajevo crime base, and the timeframe within which the crimes charged were allegedly committed.<sup>19</sup> In particular, the Prosecution proposes to remove six municipalities from the Municipalities crime base, and to replace them with six other municipalities.<sup>20</sup> Where the Municipalities crime base of the Operative Indictment includes the events in Srebrenica, the Proposed Indictment lists these events as a separate crime base.<sup>21</sup> In relation to the Sarajevo crime base, the Prosecution proposes to remove counts of cruel

<sup>11</sup> Motion, paras 2, 5-8.

<sup>12</sup> Motion, paras 6-7.

<sup>13</sup> Ibid. The three principal crime bases are (1) a collection of municipalities located within territory claimed by the Bosnian Serbs, (2) the Sarajevo area, and (3) the Srebrenica area. The fourth crime base relates to the alleged taking of UN personnel as hostages, who were allegedly detained in various locations including Pale, Sarajevo, Banja Luka, and Goražde and held at various locations in the *Republika Srpska* in order to, *inter alia*, render those locations immune from NATO air strikes (Motion, para. 10 and paras 82-86 of the Proposed Indictment).

<sup>14</sup> Motion, para. 7.

<sup>15</sup> Motion, para. 7 and footnote 2.

<sup>16</sup> Motion, para. 8.

<sup>17</sup> Ibid.

<sup>18</sup> Motion, para. 2.

<sup>19</sup> Motion, paras 11-12, 14.

<sup>20</sup> Motion, para. 11.

<sup>21</sup> Motion, footnote 3.

treatment or inhumane acts.<sup>22</sup> Lastly, whereas the timeframe for the crimes charged in the Operative Indictment extends into 1996, the charges in the Proposed Indictment relate to criminal conduct allegedly carried out between 12 May 1992 and late 1995.<sup>23</sup>

7. Thirdly, the Prosecution proposes to restructure and reduce the number of counts and legally re-characterize certain underlying criminal conduct contained in the Operative Indictment.<sup>24</sup> Specifically, the number of counts is reduced from 15 counts in the Operative Indictment to eleven counts in the Proposed Indictment.<sup>25</sup> The counts which are to be removed relate to the Sarajevo crime base.<sup>26</sup> The Prosecution further proposes to particularize the crime of genocide, which in the Operative Indictment is charged under a single count.<sup>27</sup> The Prosecution proposes to divide this crime into two separate counts, each representing distinct time periods and locations in which genocide is alleged to have occurred, thereby also removing the charge of complicity in genocide.<sup>28</sup>

8. Finally, the Prosecution seeks to provide more precise notice of the underlying criminal conduct alleged, both in factual pleadings contained in the body of the Proposed Indictment and in the attached schedules.<sup>29</sup> Where the Operative Indictment has two schedules listing particulars of underlying acts of killings (Schedules A and B), the Proposed Indictment has five schedules listing such particulars (Schedules A, B, E, F, and G). In Schedules E, F, and G of the Proposed Indictment, the Prosecution submits a more extensive list of locations relating to incidents for the Sarajevo and Srebrenica crime bases.<sup>30</sup> Schedule C of the Proposed Indictment separately and more extensively<sup>31</sup> lists detention facilities previously listed in Schedule C of the Operative Indictment, and particularizes when these facilities were in operation.<sup>32</sup> The Prosecution further proposes to add Schedule D in order to more accurately identify cultural monuments and sacred sites in the Municipalities which were allegedly destroyed.<sup>33</sup>

9. The Prosecution submits that the proposed amendments do not unfairly prejudice the Accused and refers to the Tribunal's case law in this respect.<sup>34</sup> It submits that more

<sup>22</sup> Motion, para. 12.

<sup>23</sup> Motion, para. 14.

<sup>24</sup> Motion, para. 2.

<sup>25</sup> Motion, para. 15.

<sup>26</sup> Motion, para. 17.

<sup>27</sup> Motion, para. 16.

<sup>28</sup> Ibid.

<sup>29</sup> Motion, para. 2.

<sup>30</sup> Ibid.

<sup>31</sup> Whereas Schedule C of the Operative Indictment lists 49 detention facilities, Schedule C of the Proposed Indictment lists 62 detention facilities, see Motion, para. 18, footnote 5.

<sup>32</sup> Motion, para. 18 and footnote 5.

<sup>33</sup> Motion, para. 18.

<sup>34</sup> Motion, paras 3, 20-21.

detailed and precise pleadings will assist the Accused in understanding the Prosecution's case against him and in preparing an effective defence.<sup>35</sup> It further submits that no delay to the proceedings would be caused by the proposed amendments, but that on the contrary the proposed changes will enhance the proceedings' efficiency.<sup>36</sup> For example, it proposes to remove certain incidents contained in the Operative Indictment on the basis that they have not previously been adjudicated by the Tribunal.<sup>37</sup> Furthermore, it submits that more detailed charges will assist in focusing the trial on the real issues in dispute.<sup>38</sup>

10. The Prosecution submits that the Proposed Indictment largely conforms to the scope and structure of the indictment in its case against the accused Radovan Karadžić.<sup>39</sup> It submits that the Proposed Indictment would allow for a possible joinder of the case against the Accused with the case against Radovan Karadžić,<sup>40</sup> which would enhance the overall efficiency of proceedings before the Tribunal.<sup>41</sup>

11. Lastly, the Prosecution requests an order from me preventing public disclosure of the supporting materials, as well as an order for the Warrant of Arrest of the Accused pursuant to Rules 53 (A), 55, and 59 *bis* (A) of the Rules.<sup>42</sup>

### III. Applicable law

12. Rule 50 (A) of the Rules provides, in relevant part, that:

(i) the Prosecutor may amend an indictment:

[...]

(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; [...]

(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.

(iii) Further confirmation is not required where an indictment is amended by leave.

13. Under this rule, a Judge or Trial Chamber has a wide discretion to allow the amendment of an indictment.<sup>43</sup> In particular, "a clearer and more specific indictment benefits

<sup>35</sup> Motion, para. 3.

<sup>36</sup> Motion, paras 3, 21.

<sup>37</sup> Motion, para. 22.

<sup>38</sup> Motion, para. 23.

<sup>39</sup> Motion, para. 24.

<sup>40</sup> Ibid. At the time of filing the Motion (May 2010), the Prosecution submitted that a joinder would be possible provided the Accused was to be arrested "within a reasonable period of time".

<sup>41</sup> Motion, para. 24.

<sup>42</sup> Motion, paras 25-26.

the accused [...] because the accused can tailor their preparations to an indictment that more accurately reflects the case they will meet, thus resulting in a more effective defence”.<sup>44</sup> While a Judge or Trial Chamber will generally grant leave to amend the indictment where it ensures “that the real issues in the case will be determined, such leave will not be granted unless the amendment meets both of the following conditions: it must not result in unfair prejudice to the accused when viewed in light of the circumstances of the case as a whole, and, if the proposed amendment is material, it must be supported by documentation or other material meeting the *prima facie* standard set forth in Article 19 of the Statute”.<sup>45</sup> In relation to the requirement that the amendment must not cause unfair prejudice to the accused, two factors are of particular importance: the amendment must not deprive the accused of an adequate opportunity to prepare an effective defence, and the amendment must not adversely affect the accused’s right under Article 21 of the Statute to be tried without delay.<sup>46</sup>

14. The Statute does not define the concept of a *prima facie* case.<sup>47</sup> No generally accepted and uniformly applied definition of what constitutes a *prima facie* case exists in the Tribunal’s case law.<sup>48</sup> The concept of a *prima facie* case may be interpreted as requiring that the Prosecution’s evidence, if accepted and uncontradicted, sufficiently supports the likelihood of the accused’s being convicted by a reasonable trier of fact.<sup>49</sup>

15. Pursuant to Rule 53 (A) of the Rules, in exceptional circumstances, a Judge may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.

#### IV. Discussion

16. I will first consider whether amendment of the Operative Indictment would result in unfair prejudice to the Accused when viewed in light of the circumstances of the case. Two factors of particular importance in this respect are that the accused must not be deprived of an adequate opportunity to prepare an effective defence and that the accused’s right to be tried without delay must not be adversely affected. A number of the amendments proposed by the

<sup>43</sup> *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Decision on the Prosecution’s motion to request leave to file a Corrected Amended Indictment, 13 December 2002, para. 21, where it was held that “Rule 50 [...] neither provides any parameters as to the exercise of discretion by a Chamber when seized [of] a Motion to grant leave to amend an indictment nor does it contain any express limits of such discretion.” See also *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT & IT-05-88/1-PT, Decision on further amendment and challenges to the indictment, 13 July 2006 (“*Popović* Decision”), para. 8.

<sup>44</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor’s interlocutory appeal against Trial Chamber III decision of 8 October 2003 denying leave to file an amended indictment, 19 December 2003, para. 13.

<sup>45</sup> *Popović* Decision, para. 8 (footnotes omitted), with further references.

<sup>46</sup> *Popović* Decision, para. 9, with further references.

<sup>47</sup> See Order of 11 November 2002, para. 12.

<sup>48</sup> See Order of 11 November 2002, paras 12-18.

Prosecution seek to clarify and further particularize the Prosecution's allegations. These amendments include those pertaining to the Accused's responsibility as a participant in a JCE or under 7 (3) of the Statute, as well as the proposed schedules listing the particulars of the criminal conduct alleged. Such amendments may lead to a clearer and more specific indictment, allowing the Accused to more effectively prepare his defence. I further consider the early stage of the proceedings in this case. The Accused has been arrested by the authorities of the Republic of Serbia, by whom he will be held in detention pending his transfer to the United Nations Detention Unit in The Hague. The Accused has not yet made an initial appearance before a Trial Chamber and entered a plea on the charges of the indictment, nor has he been assigned counsel before the Tribunal. Considering this early stage of the proceedings, I find that the amendment of the Operative Indictment would not deprive the Accused of an adequate opportunity to prepare an effective defence, nor result in delays to the trial.

17. I will now consider whether a *prima facie* case has been established by the Prosecution in respect of the Proposed Indictment. I have carefully reviewed the proposed material changes to the Operative Indictment and the supporting materials provided by the Prosecution both in relation to the JCEs and the crime bases.<sup>50</sup> I have primarily considered the additions to - and restructuring or legal re-characterization of - the charges in the Operative Indictment. The proposed material changes to the Operative Indictment include the addition of alleged criminal conduct in six new municipalities, as well as the legal re-characterization of certain criminal conduct. In reviewing the Proposed Indictment, I have focused mainly on whether the amendments are sufficiently supported by the evidentiary material provided by the Prosecution. In doing so, I have disregarded what appeared to be minor discrepancies, for instance with regard to details of locations or exact numbers of victims, between the supporting materials and the incidents charged.<sup>51</sup> In view of the supporting materials provided by the Prosecution, I am satisfied that the Prosecution evidence, if accepted and uncontradicted, sufficiently supports the likelihood of the Accused's being convicted by a reasonable trier of fact. I make one exception to that in relation to the incident described in Schedule E, number 12.<sup>52</sup> The material provided fails to meet the applicable test. In view of

<sup>49</sup> See Order of 11 November 2002, paras 19-26.

<sup>50</sup> See headings "JCE and General Supporting Material" and "Schedules A-G" in Motion, Appendix C Parts 1 and 2.

<sup>51</sup> I include in such minor discrepancies an instance when the Prosecution misplaced supporting materials, see Schedule G numbers 11 and 12.

<sup>52</sup> The incident reads: "The killing of over thirty Bosnian Muslim men, some of whom were previously detained in Sušica prison, in Bišina in Šekovići Municipality".

the aforementioned considerations, I grant leave to amend the Operative Indictment as proposed by the Prosecution with the mentioned exception.

18. For the reasons set out by the Prosecution, I consider it in the interests of justice to order the public non-disclosure of the supporting materials until further order.

19. Finally, in view of the arrest of the Accused by the authorities of the Republic of Serbia pursuant to the previously issued warrant of arrest, which remains in force, I consider the Prosecution's request for orders pursuant to Rules 55 and 59 *bis* (A) of the Rules moot. The obligations with regard to the transfer of the Accused, following his arrest, namely to detain him and arrange for his transfer to the seat of the Tribunal, remain unaffected by the present decision.

### V. Disposition

20. For the foregoing reasons, pursuant to Article 19 of the Statute and Rules 50 (A) and 53 (A) of the Rules, I

**GRANT** the Motion in part;

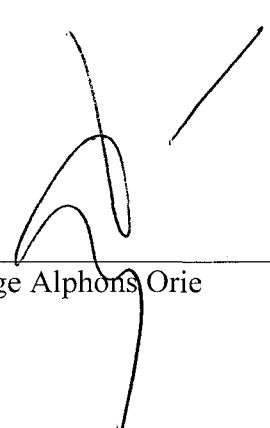
**DENY** the Motion in respect of item 12 in Schedule E;

**INSTRUCT** the Prosecution to file the Proposed Indictment, with the exception of the incident mentioned above, within seven days of the filing of this decision;

**ORDER** that there be no public disclosure of the supporting materials until further order; and

**DECLARE** moot the Motion in respect of the Prosecution's request for orders pursuant to Rules 55 and 59 *bis* (A) of the Rules.

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



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Judge Alphons Orie

Dated this twenty-seventh day of May 2011  
At The Hague  
The Netherlands

[Seal of the Tribunal]