

IT-09-92-PT
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13 October 2011

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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-PT
Date: 13 October 2011
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 13 October 2011

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE PRELIMINARY MOTION
OBJECTING TO THE FORM OF
THE SECOND AMENDED INDICTMENT**

Office of the Prosecutor
Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić
Mr Branko Lukić

I. PROCEDURAL HISTORY

1. The operative indictment in this case was filed on 1 June 2011 (“Second Amended Indictment”).¹ On 12 August 2011, the Defence filed a motion for an extension of time to file preliminary motions, requesting a period of 25 days from the date of the Prosecution’s fulfilment of its disclosure obligations.² These obligations were fulfilled on 18 August 2011.³ At the Status Conference on 25 August 2011, the Chamber granted the motion for extension of time and set the deadline for the filing of any preliminary motions at 12 September 2011.⁴

2. On 12 September 2011, the Defence filed a preliminary motion, alleging defects in the form of the Second Amended Indictment (“Motion”).⁵ On 26 September 2011, the Prosecution responded (“Response”).⁶ On 30 September 2011, Defence filed a request to reply (“Request to Reply”) and included the reply in an annex to the Request to Reply (“Reply”).⁷ On 3 October 2011, the Chamber granted the Request to Reply and the parties were informed accordingly at the *65 ter* meeting on the same day.⁸

II. RELEVANT PLEADING PRINCIPLES

3. The general pleading principles are set out in Article 18(4) of the Statute of the Tribunal (“Statute”) and Rule 47(C) of the Rules of Procedure and Evidence (“Rules”), which provide that an indictment shall contain a concise statement of the facts of the case and the crimes with which the accused is charged. These provisions are to be interpreted together with Article 21 and in particular, 21(4)(a) and (b) of the Statute, which provide for the right of an accused to be informed in detail of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. These rights place an obligation on the Prosecution to plead the material facts underpinning the charges against an accused with enough detail to inform the accused

¹ For the procedural history of the indictment, see *Prosecutor v. Ratko Mladić*, Case no. IT-09-92-I, Decision on Amendment of Indictment, 27 May 2011, paras 1-2.

² Ratko Mladić’s Motion for Enlargement of Time to File Preliminary Motion (Confidential), 12 August 2011, p. 5. The Prosecution deferred to the Chamber’s discretion in its adjudication of the Motion. See Prosecution Response to Motion for Enlargement of Time, 23 August 2011, para. 8.

³ T. 59.

⁴ Ibid.

⁵ Defence Preliminary Motion Objecting to the Form of the Second Amended Indictment, 12 September 2011.

⁶ Prosecution Response to Defence Preliminary Motion Objecting to the Form of the Second Amended Indictment, filed on 26 September 2011. On 27 September 2011, Prosecution filed a Corrigendum to the Response requesting that a correction be made to the name of the counsel for the Accused. However, no further action is needed by the Chamber or by the Prosecution.

⁷ Defence Request to File Reply in Support of Preliminary Motion Objecting to the Form of the Second Amended Indictment, with Annex A, Defence Reply in Support of Preliminary Motion Objecting to the Form of the Second Amended Indictment, 30 September 2011.

clearly of the nature and cause of the charges against him so that he is in a position to prepare a defence. The Prosecution is not, however, required to plead the evidence by which such material facts are to be proven.⁹

4. The materiality of a particular fact cannot be decided in the abstract and depends on the Prosecution case.¹⁰ The nature of the alleged criminal conduct for which the accused is charged is a decisive factor in determining the degree of specificity with which the Prosecution is required to particularize the facts in the indictment.¹¹ The materiality of facts (such as the identity of the victim, the place and date of the events, and the description of the events themselves) depend upon the alleged proximity of the accused to those events, that is, the type of responsibility alleged by the Prosecution.¹² In cases where it is not alleged that the accused personally committed acts for which he is held responsible, and as the proximity of the accused person to those events becomes more distant, less precision is required in relation to the identity of the victim, the place and date of the events in question, and the means by which the crime was committed.¹³ In such instances, not every victim needs to be identified in the indictment,¹⁴ and a reference to their category or position as a group may be sufficient.¹⁵ The Appeals Chamber has held, however, that even where the identity of a victim is not a material fact, this information assists the defence in the preparation of its case, and the Prosecution should provide this information if it is able to do so and “[...] as soon as is practicable after obtaining it.”¹⁶ With regard to dates, the jurisprudence indicates that where the precise date cannot be specified, a reasonable range of dates may be sufficient.¹⁷ With respect to the identity of perpetrators for whose acts an accused is charged pursuant to Article 7(1) or 7(3) of the Statute, the jurisprudence indicates that it is also a matter of the proximity of the accused to the events and that it is sufficient to identify perpetrators by category or as a group, where an accused is

⁸ T. 25.

⁹ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 (“*Blaškić* Appeal Judgement”), paras 209-210; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001 (“*Kupreškić* Appeal Judgement”), para. 88.

¹⁰ *Blaškić* Appeal Judgement, para. 210; *Kupreškić* Appeal Judgement, para. 89.

¹¹ Ibid.

¹² *Blaškić* Appeal Judgement, para. 210.

¹³ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeal Judgment, 28 February 2005 (“*Kvočka* Appeal Judgement”), para. 65; *Kupreškić* Appeal Judgement, para. 89.

¹⁴ *Kupreškić* Appeal Judgement, paras 89-90.

¹⁵ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-PT, Decision on Ante Gotovina’s Preliminary Motions Challenging Defects in the Form of the Joinder Indictment, 19 March 2007 (“*Gotovina* Decision”), para. 41; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Objection by Momir Talić to the Form of the Amended Indictment, 20 February 2001 (“*Brđanin* Decision”), para. 22.

¹⁶ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR73.3, Decision on Joint Defence Interlocutory Appeal Against Trial Chamber’s Decision on Joint Defence Motion to Strike The Prosecution’s Further Clarification of Identity of Victims, 26 January 2009 (“*Gotovina* Appeal Decision”), paras 18, 20; *Kupreškić* Appeal Judgement, para. 90.

¹⁷ *Brđanin* Decision, para. 22.

not charged with committing the crimes personally.¹⁸ Finally, the Chamber notes that a paragraph of an indictment should not be read in isolation from the rest of the indictment but should be considered in the context of other paragraphs of the indictment.¹⁹

III. DISCUSSION OF ALLEGED DEFECTS

A. Insufficient Identification of Victims, Dates and Locations with Regard to Murder and Other Crimes

a) Submissions

5. The Defence submits that the Second Amended Indictment only generally sets out the charges against Ratko Mladić (“the Accused”) and is therefore not sufficiently pled.²⁰ In particular, the Defence submits that the Second Amended Indictment is defective in that it lacks sufficient identification of victims, dates, and locations.²¹ According to the Defence, the lack of sufficient identifying information applies not only to victims who were killed, but also to the alleged victims of the underlying acts of torture, beatings, abuse, inhumane living conditions, rapes, forced labour, plunder, and discriminatory measures, all enumerated in paragraph 59 of the Second Amended Indictment as underlying the charge of Persecution (Count 3).²² The Defence submits that the general and vague references used to describe the victims in the Second Amended Indictment do not sufficiently put the Defence on notice of the charges against the Accused and impedes the ability of the Defence to efficiently and effectively prepare its case.²³ The Defence acknowledges that the Prosecution is not required to identify every victim when the scale of the crimes renders such a high degree of specificity impractical, but submits that the identity of the victims who are known should be included in a schedule to the Second Amended Indictment.²⁴ The Defence requests that the Chamber order the Prosecution to provide the “basic” particulars for all persons alleged by the Prosecution to be victims of the charges in the Second Amended Indictment, including a) names; b) dates of birth; c) JMBG identification numbers; d) home addresses; e)

¹⁸ *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, 31 May 2006 (“*Popović* Decision”), para. 40; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 59; *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on Defence Preliminary Motion on the Form of the Indictment, 24 February 1999 (“*Krnojelac* Decision”), para. 46.

¹⁹ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on the Defence Preliminary Motion Under Rule 72(A)(ii), 18 July 2005, para. 21; *Prosecutor v. Radislav Mrkšić*, Case No. IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003, para. 28; *Krnojelac* Decision, para. 7.

²⁰ Motion, para. 3; Reply, para. 5.

²¹ Motion, paras 5-16.

²² Motion, paras 13-15, fn. 77; Reply, paras 8-9.

²³ Motion, paras 5, 7; Reply, para. 3.

²⁴ Motion, paras 6, 16.

father's first name; and f) any other available identifying information for these victims.²⁵ The Defence argues that identifying information of the victims must be known to the Prosecution, given the amount of time that the Prosecution has had to investigate and prepare for the proceedings.²⁶ Finally, the Defence submits that the charges for which the Prosecution does not possess the identity of the victims should be dismissed from the Second Amended Indictment, as it would be a violation of due process to force someone to defend themselves against charges of crimes against "unknown" victims.²⁷

6. The Prosecution asserts the Second Amended Indictment fully conforms to all of the applicable pleading requirements, and that the Motion should be denied.²⁸ The Prosecution contends that the identities of the victims are not material facts to the Second Amended Indictment, but rather evidentiary considerations.²⁹ While the Prosecution acknowledges its obligation to name the alleged victims to the extent possible as soon as practicable, it submits that there are no formal requirements as to how this notification to the Defence should be made, and thus the Accused may receive this information separately from the Second Amended Indictment.³⁰ The Prosecution has already included schedules for the victims of the Srebrenica crimes in its disclosure of 3 October 2011 and intends to provide the Defence with lists of the victims it refers to as the *Municipalities* and the *Sarajevo* crimes by approximately 1 November 2011.³¹ With respect specifically to the underlying charges of Persecution in Count 3, the Prosecution submits that they are pled with sufficient specificity.³² The Prosecution submits that in light of 1) the high-level position of the Accused as commander of the Main Staff of the VRS; 2) the fact that he is not charged with physically committing any of the crimes personally; and 3) the fact that the Second Amended Indictment alleges the commission of crimes on a massive scale, the Second Amended Indictment pleads all material facts required by the jurisprudence of the Tribunal and is sufficiently focused and detailed where required, namely, with respect to the acts and *mens rea* of the Accused.³³ In support, the Prosecution identifies the relevant paragraphs in the Second Amended Indictment that plead the material facts in relation to the Accused's individual responsibility pursuant to Article 7(1) with particular focus on the details of his alleged participation in the four JCE's alleged, as

²⁵ Motion, para. 7.

²⁶ Motion, paras 5, 7.

²⁷ Motion, paras 7, 13-15; Reply, para. 4.

²⁸ Response, para. 1.

²⁹ Response, para. 8.

³⁰ Response, para. 9.

³¹ Response, para. 9, fn. 29.

³² Response, fn. 22.

³³ Response, paras 2-4.

well as the material facts in relation to the command responsibility of the Accused pursuant to Article 7(3).³⁴

b) Discussion

7. The Second Amended Indictment alleges that in the period between 12 May 1992 until 30 November 1995 on the territory of Bosnia and Herzegovina (“BiH”), the Accused participated in four joint criminal enterprises (“JCE”): 1) an overarching JCE to permanently remove Bosnian Muslim and Bosnian Croat inhabitants from the territories of BiH claimed as Bosnian Serb territory;³⁵ 2) a JCE to establish and carry out a campaign of sniping and shelling against the civilian population of Sarajevo, the primary purpose of which was to spread terror among the civilian population;³⁶ 3) a JCE to eliminate the Bosnian Muslims in Srebrenica by killing boys and men and forcibly removing the women, young children, and some elderly men from the area;³⁷ and 4) a JCE to compel NATO to abstain from conducting air strikes against Bosnian Serb military targets by taking hostage UN personnel.³⁸ In addition to his liability for his participation in these four JCE’s, the Accused is charged with individual criminal responsibility for planning, instigating, ordering, and/or aiding and abetting the crimes in the Second Amended Indictment through certain acts and omissions, and as a superior responsible for such actions pursuant to Article 7(3) of the Statute.³⁹ It is not alleged that the Accused personally committed any of the acts in the Second Amended Indictment.⁴⁰ The charges against the Accused cover a vast amount of territory of the BiH, and span over a period of over three years.

8. The Second Amended Indictment identifies the victims as “Bosnian Muslims” and “Bosnian Croats.” Often, the groups of victims are further identified by their size and by the location where the crimes against them took place. Given the scale and nature of the crimes charged and the modes of liability through which the Accused’s responsibility is alleged, the Chamber is of the view that the identities of the victims are not material facts. The Chamber finds that the victims are sufficiently identified as categories or groups for the purpose of the Second Amended Indictment. However, even if the identity of a victim is not a material fact, it is information that will inevitably assist the Defence in the preparation of its case and the Prosecution is obliged to provide this information if, and as soon as, it is in a position to do so. The Defence argues that in the *Popović* case, the Prosecution was required to provide identification of known victims of alleged crimes by

³⁴ Response, paras 5-6.

³⁵ Second Amended Indictment, paras 5, 8-12.

³⁶ Second Amended Indictment, paras 7, 14-18.

³⁷ Second Amended Indictment, paras 7, 19-23.

³⁸ Second Amended Indictment, paras 7, 24-28.

³⁹ Second Amended Indictment, para. 29.

way of annexes to the Indictments.⁴¹ In the view of the Chamber, the fact that the *Popović* Trial Chamber ordered the Prosecution to do so does not stand for the principle that an indictment must have the names of victims attached to it as an Annex or a Schedule. In fact, the Tribunal's jurisprudence has not imposed any formal requirements as to how the relevant notification of information concerning the identity of victims should be made, and the approach to this issue varies from case to case.⁴² The Prosecution submits it will provide lists of the Srebrenica victims in its disclosure to the Defence. For full transparency the Chamber would prefer that the list of victims is formally filed on the record.

9. The Defence submits, with respect to some of the underlying acts of Persecution (Count 3), that Schedules C and D dealing with torture, beatings, and abuse, provide a date range that is often six months long. While, the Defence has cited to the *Naletilić and Martinović* Appeal Judgment in support of a dismissal of the charges based on the failure to "specify the dates of the beatings" rendering "the indictment for torture and causing great suffering defective"⁴³, the Chamber notes that the *Naletilić and Martinović* Appeal Judgement citation is distinguishable because in that case, one of the accused was alleged to have been personally involved in the beating charged.⁴⁴ It is not alleged that Mladić personally took part in any of the crimes charged in the Second Amended Indictment. The Chamber considers that for the same reasons it has found that the victims are sufficiently pled in the Second Amended Indictment, it is not necessary for the Prosecution to specify the dates of the persecutory acts with further detail than is done in the Second Amended Indictment.

10. With respect to the underlying acts of forced labour and plunder, enumerated in paragraphs 59(h) and (i), respectively, the Defence has submitted that "not a single location nor a single date nor date range" is provided.⁴⁵ However, the contextual framework for the specific persecutory acts set out in paragraph 59 starts at paragraph 47, where an exhaustive list of 23 municipalities is provided in which the underlying acts of persecution are alleged to have been committed. Paragraph 48 specifies that the persecutory acts described in paragraph 59 were committed against Bosnian Muslims and/or Bosnian Croats in the 23 municipalities as well as against the Muslims in Srebrenica. Paragraph 49 refers to a period of time between 12 May 1992 and 30 November 1995. In the view of the Chamber, the contextual paragraphs leading up to the enumeration of persecutory

⁴⁰ Second Amended Indictment, para. 4.

⁴¹ *Popović* Decision, paras 36-37.

⁴² *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Second Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 2 March 2009, para. 4; *See Stanišić and Simatović Decision*, para. 13.

⁴³ Motion, para. 13.

⁴⁴ *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 39-40.

acts in paragraph 59 of torture, beatings, abuse, forced labour, and plunder have sufficiently put the Accused on notice of the charges against him.

B. Insufficient Identification of Perpetrators, Dates, and Locations with Respect to Rapes and Other Acts of Sexual Violence

a) Submissions

11. The Defence submits that the Second Amended Indictment fails to allege any proper facts relating to rapes and other acts of sexual violence and the perpetrators of these crimes.⁴⁶ The Defence further submits that none of the paragraphs of the Second Amended Indictment referring to the crimes of rape and other acts of sexual violence are pled in compliance with Tribunal jurisprudence because Prosecution has failed to sufficiently identify the perpetrators by name or by group, and that in some cases, no perpetrators are identified at all.⁴⁷ The Defence submits that, per the Trial Chamber in *Popović*, where the Prosecution is in a position to identify the perpetrators by name, it should do so.⁴⁸ In addition, it submits that perpetrators are vaguely identified as persons who have not been pled as subordinates of the Accused, merely referring to “Bosnian Serb Political and Governmental Organs and Serb forces”.⁴⁹ The Defence relies on a finding by the Trial Chamber in the *Prosecutor v. Hadzihasanović* case which, it submits, held that the bare minimum requirement for Article 7(3) is at least identification of the group to which the perpetrators belong.⁵⁰ The Defence submits that the ambiguity of these allegations prejudice the Accused by placing an unfair burden upon the Defence to prepare its case against allegations of acts of rape and sexual violence without knowing any of the particulars relating to these allegations.⁵¹

12. The Prosecution contests the Accused’s submission that the charges of rape and acts of sexual violence are ambiguous.⁵² It submits that these crimes are pled as criminal acts underlying the charges of genocide, persecution, and deportation/forcible transfer, and that the Second Amended Indictment includes general information about the locations and time frames for these underlying crimes, which is sufficient to put the Accused on notice.⁵³ Moreover, it argues that the

⁴⁵ Motion, para. 14; Reply, para. 8.

⁴⁶ Motion, paras 17-21.

⁴⁷ Motion, para. 19.

⁴⁸ Motion, para. 18; Reply, para. 5.

⁴⁹ Motion, para. 19.

⁵⁰ Motion, para. 18.

⁵¹ Motion, paras 20-21.

⁵² Response, para. 7.

⁵³ Response, para. 7.

acts of subordinates of the Accused will usually be stated with less precision.⁵⁴ The Prosecution furthermore submits that the Second Amended Indictment does in fact identify the groups to which the perpetrators of these crimes belong, submitting that the paragraphs of the Second Amended Indictment relating to these crimes should be read together with the contextual paragraphs relevant to these crimes.⁵⁵ In this respect, it submits that the Defence citation of the *Popović* Trial Chamber finding that the perpetrators should be identified by name if possible is incomplete, in that this same Chamber also expressly acknowledged that the more remote an accused is from the alleged crimes, the more the identity of the physical perpetrator becomes a matter of evidence.⁵⁶ Finally, the Prosecution submits that for purposes of pleading, the *Karadžić* Chamber, when disposing of a motion relating to the nearly identical indictment, held that the identification of physical perpetrators by category – such as “local Bosnian Serbs” – was sufficiently specific.⁵⁷ According to the Prosecution, the *Karadžić* Chamber also held that the Prosecution’s Pre-Trial Brief is an “appropriate vehicle” in which to set out further details concerning the identity of physical perpetrators relevant to the preparation of an effective defence.⁵⁸

b) Discussion

13. With respect to identification of victims, dates, and locations for crimes of rape and sexual violence, the Chamber refers to and incorporates its considerations and findings in the previous discussion section.

14. The Defence has submitted that the Second Amended Indictment fails to properly plead that the perpetrators of the alleged acts of rape and sexual violence are subordinates of the Accused with respect to Counts 1, 3, 7 and 8, since the Second Amended Indictment refers merely to “Bosnian Serb Political and Governmental Organs and Serb forces”.⁵⁹ The Second Amended Indictment alleges that the Accused was the most senior officer of the VRS and was the superior of, and had effective control over, members of the VRS and elements of Serb Forces integrated into, or subordinated to, the VRS, which participated in the crimes alleged in the Second Amended Indictment.⁶⁰ Paragraphs 11 and 12 of the Second Amended Indictment identify the alleged perpetrators of the acts of rape and sexual violence as “Bosnian Serb Political and Governmental Organs” and “Serb forces”. This should be read in the context of the part of paragraph 12 which specifies that the alleged members of the group referred to as “Serb forces” include members of the

⁵⁴ Response, para. 7, fn. 22.

⁵⁵ Response, paras 11-12.

⁵⁶ Response, para. 13.

⁵⁷ Response, para. 14.

⁵⁸ Response, para. 15.

⁵⁹ Motion, para. 19.

Bosnian Serb Ministry of Internal Affairs; members of the Army of Republika Sprska; members of the Yugoslav People's Army; members of the Yugoslav Army; members of the Bosnian Serb Territorial Defence; members of the Serbian Ministry of Internal Affairs; members of Serbian and Bosnian Serbian paramilitary forces and volunteer units; and members of local Bosnian Serbs. Under these circumstances, the Chamber considers the term "Serb Forces" to be sufficiently precise for the purpose of identifying the perpetrators.

15. The Chamber acknowledges that the phrase "Bosnian Serb Political and Governmental Organs and Serb forces" also includes forces over whom it is not alleged the Accused had superior responsibility (*i.e.*, "Bosnian Serb Political and Governmental Organs", defined in more detail in paragraph 11 of the Second Amended Indictment) but does not consider that this manner of pleading is improper, as alleged by the Defence. The Accused's responsibility for these crimes is alleged not only on the basis of superior responsibility pursuant to Article 7(3), but also on the basis of his membership of the four JCE's pled in the Second Amended Indictment. The "Bosnian Serb Political and Governmental Organs" are alleged to have been members of these four JCE's.⁶¹ Whether the Accused had effective control over any of the Serb forces defined in paragraph 12 of the Second Amended Indictment is a matter of evidence.

⁶⁰ Second Amended Indictment, paras 31-32.

⁶¹ See Second Amended Indictment, paras 11, 16, 21, 26.

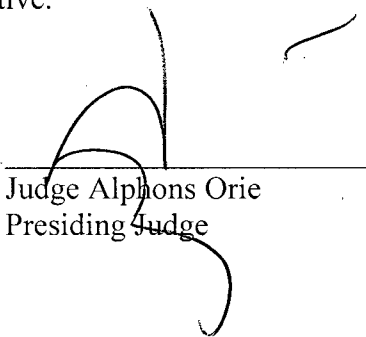
IV. DISPOSITION

16. For the foregoing reasons, and pursuant to Rule 72 of the Rules, the Chamber:

DENIES the Motion; and

INSTRUCTS the Prosecution to file a list with identifying information of the victims in the case by 1 November 2011.

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



Judge Alphons Orié
Presiding Judge

Dated this Thirteenth of October 2011
At The Hague
The Netherlands

[Seal of the Tribunal]