

**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-PT
Date: 2 December 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: 2 December 2011

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

DECISION PURSUANT TO RULE 73 *BIS* (D)

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić

I. PROCEDURAL HISTORY

1. On 25 August 2011, at a status conference, the Chamber announced that it would invite the Prosecution to file submissions on the reduction of the counts charged in the indictment pursuant to Rule 73 *bis* (D) of the Rules of Procedure and Evidence (“Rules”).¹ The Chamber noted that several municipalities which had been removed from the *Karadžić* Indictment remained in the then-operative *Mladić* Indictment.² The Chamber stated that, given the similarities between the cases, it would expect the Prosecution to address this matter in its submissions.³ On 6 October 2011, at a status conference, the Chamber set the deadline for the Prosecution’s Rule 73 *bis* (D) submissions at 18 November 2011 and for the Defence’s response at 25 November 2011.⁴
2. On 20 October 2011, the Prosecution filed the Third Amended Indictment (“Operative Indictment”).⁵
3. On 18 November 2011, the Prosecution filed its Rule 73 *bis* (D) submissions (“Prosecution Submission”).⁶ On 25 November 2011, the Defence responded.⁷

II. SUBMISSIONS OF THE PARTIES

4. According to the Prosecution, the Operative Indictment contains 196 scheduled crimes.⁸ The Prosecution proposes to limit its presentation of evidence to a selection of 106 crimes.⁹ The Prosecution submits that the selected crimes reasonably reflect the criminal conduct of the Accused, are representative of the totality of the crimes charged, and establish a basis for conviction on all eleven counts of the indictment.¹⁰

¹ T. 64-65.

² T. 65.

³ *Ibid.*

⁴ T. 83.

⁵ Third Amended Indictment, 20 October 2011; Decision on Consolidated Prosecution Motion to Sever the Indictment, to Conduct Separate Trials, and to Amend the Indictment, 13 October 2011.

⁶ Prosecution Submission on Reduction of the Indictment Pursuant to Rule 73 *bis* (D), 18 November 2011.

⁷ Defence Response to Prosecution’s Submission Pursuant to Rule 73 *bis* (D), 25 November 2011 (“Response”).

⁸ Prosecution Submission, para. 7.

⁹ Prosecution Submission, para. 7, Annex A. The Chamber notes that Prosecution Submission, Annex A appears to contain an error in relation to Schedule D: Destruction of Cultural Property. Annex A suggests that the enumerated crimes in Pale municipality are to be cut from Schedule D. However, Prosecution Submission, paras 7 and 9 and footnote 12 clearly indicate that Pale is to be retained in Schedule D. Based on the Prosecution submission, para. 7, the Chamber understands that Annex A, Schedule C, 21.6 should have been struck through along with the other incidents in Zvornik municipality.

¹⁰ Prosecution Submission, paras 2, 5.

5. According to the Prosecution, Counts 1 and 3-8 of the Operative Indictment contain 140 crimes committed in 23 municipalities of Bosnia-Herzegovina.¹¹ Of these, the Prosecution has selected 66 crimes in 15 municipalities.¹² While it will not lead evidence regarding the remaining 74 crimes and eight municipalities of the Operative Indictment, the Prosecution reserves its right to present evidence related to these crimes and municipalities when necessary to establish an element of a charged count, including the *mens rea* of the Accused.¹³ The Prosecution submits that it will provide notice of any such evidence in its Rule 65 *ter* filings.¹⁴

6. Regarding Count 2, related to Srebrenica, the Prosecution proposes to remove two out of the 22 killing sites enumerated in the Operative Indictment.¹⁵ The Prosecution submits that further reduction would be inappropriate, as the remaining incidents all occur within the period of a month and are integral to an understanding of the overall crime.¹⁶ According to the Prosecution, Counts 9 and 10 of the Operative Indictment, related to the Sarajevo siege, contain 16 sniping and 18 shelling incidents.¹⁷ The Prosecution proposes a reduction of six sniping incidents and eight shelling incidents.¹⁸ Regarding Count 11 of the Operative Indictment, related to the taking of hostages, the Prosecution submits that this count is a single event, not amenable to reduction.¹⁹

7. Finally, the Prosecution requests that the Chamber clarify that the Prosecution's voluntary reductions to the size and scope of its case do not prohibit it from tendering evidence related to those reductions to the extent necessary to establish an element of any of the eleven counts of the indictment, which evidence is to be identified in its Rule 65 *ter* filings.²⁰

8. The Defence takes no position on the reduction of the indictment, deferring to the Chamber in this regard.²¹ The Defence submits that if the Prosecution presents evidence related to the crimes it has proposed to be removed from the Operative Indictment, the burden upon the Defence is not lightened by that removal.²² Consequently, the time for the preparation and presentation of the Defence case should not be reduced as a result of the removal.²³ Further, if the Prosecution presents such evidence, the notice provided by the indictment to the Accused of the case against him is

¹¹ Prosecution Submission, paras 7, 9.

¹² Prosecution Submission, paras 7-9, Annex A.

¹³ Prosecution Submission, paras 7, 10.

¹⁴ Prosecution Submission, para. 10.

¹⁵ Prosecution Submission, paras 7, 13, Annex A.

¹⁶ Prosecution Submission, para. 13.

¹⁷ Prosecution Submission, paras 7, 11.

¹⁸ Prosecution Submission, paras 7, 11, Annex A.

¹⁹ Prosecution Submission, para. 12.

²⁰ Prosecution Submission, para. 14.

²¹ Response, para. 5.

²² Response, paras 8-9, 12.

²³ Ibid.

reduced.²⁴ The Defence argues that the Prosecution should only be allowed to tender such evidence provided that the Accused cannot be convicted for the commission of those crimes and if the Prosecution provides sufficient notice.²⁵

III. APPLICABLE LAW

9. Under Rule 73 *bis* (D) of the Rules, having heard the Prosecution, a Chamber may, in the interest of a fair and expeditious trial, invite the Prosecution 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 Prosecution which, having regard to all the relevant circumstances, are reasonably representative of the crimes charged. The relevant circumstances include 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.

10. The Appeals Chamber has held that the Prosecution may lead evidence in relation to crime sites which have been removed from an indictment pursuant to Rule 73 *bis* (D) of the Rules, provided sufficient notice is given to the Accused.²⁶

IV. DISCUSSION

11. The Chamber has carefully considered the Prosecution's proposals. The Chamber finds that the incidents selected by the Prosecution are reasonably representative of the crimes charged in the Operative Indictment.

12. The Prosecution requests that the Chamber clarify that it be allowed to present evidence related to the incidents it proposes to remove from the Operative Indictment, to the extent necessary to establish an element of a count of the indictment. Pursuant to Appeals Chamber case law, such evidence is admissible, provided sufficient notice is given to the Accused.²⁷ However, the Chamber considers that the scale, nature, and locations of the incidents selected by the Prosecution should provide an opportunity to present evidence on all elements of the counts of the indictment, including general elements and jurisdictional requirements. Thus, the Chamber expects the Prosecution to focus on the selected incidents when presenting its evidence. Nonetheless, the Chamber does not strictly prohibit the Prosecution from presenting evidence on incidents it has

²⁴ Response, para. 8.

²⁵ Response, para. 10.

²⁶ *Prosecutor v. Vojislav Šešelj*, IT-03-67-AR73.7, Decision on Appeal Against the Trial Chamber's Oral Decision of 9 January 2008, 11 March 2008 ("Šešelj Decision"), paras 21, 23-24.

²⁷ *Ibid.*

proposed to remove, if it considers this necessary to prove an element of a charged count. The Prosecution should indicate such proposed evidence clearly in its Rule 65 *ter* filings and explain its specific relevance to the Prosecution's case. The Chamber notes that the Accused cannot be convicted with respect to crimes which have been removed pursuant to Rule 73 *bis* (D) of the Rules.²⁸

13. Under Counts 1 and 3-8 of the Operative Indictment (which relate to municipalities in Bosnia-Herzegovina), the Prosecution proposes that a number of crimes in the municipalities of Kalinovik and Kotor Varoš be retained.²⁹ These municipalities were removed from the indictment in the *Karadžić* case based on the Prosecution's Rule 73 *bis* (D) submissions.³⁰ In light of the similarity between the two cases, the Chamber would have expected the Prosecution to propose the same reductions in the present case, or at least to explain why municipalities which it had proposed to remove from the *Karadžić* indictment should remain in the *Mladić* indictment.³¹ Nonetheless, the Chamber notes that the Prosecution has proposed other substantial reductions to the Operative Indictment, including the removal of incidents which were retained in the *Karadžić* case. Therefore, the Chamber is not inclined to further pursue this matter.

14. In the interests of a fair and expeditious trial, the Chamber fixes the number of crime sites or incidents of the charges in respect of which evidence may be presented by the Prosecution in accordance with the Prosecution Submission.

V. DISPOSITION

15. For the forgoing reasons, pursuant to Rule 73 *bis* (D) of the Rules, the Chamber

ADOPTS the Prosecution's proposals in respect of the reduction of its case and the selection of crimes for each of the charges;

DECIDES that the Prosecution may not present evidence on crimes other than those it has proposed to retain from the Operative Indictment, unless it considers such evidence necessary to establish an element of any of the counts of the indictment;

²⁸ See *Prosecutor v. Vojislav Šešelj*, IT-03-67-T, Transcript of 9 January 2008, T. 2251-2257; Šešelj Decision, paras 23-24.

²⁹ Prosecution Submission, Annex A, Schedule B, 7.1, Schedule C, 9.1-9.2, Schedule D, 6, 8.

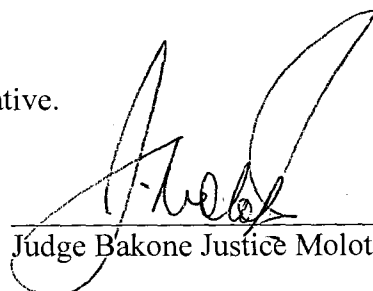
³⁰ *Prosecutor v. Radovan Karadžić*, IT-95-5/18-PT, Prosecution Submission pursuant to Rule 73 *bis* (D), 31 August 2009; *Prosecutor v. Radovan Karadžić*, IT-95-5/18-PT, Decision on the Application of Rule 73 *bis*, 8 October 2009; *Prosecutor v. Radovan Karadžić*, IT-95-5/18-PT, Prosecution's Marked-up Indictment, 19 October 2009.

³¹ See T. 65.

INSTRUCTS the Prosecution, if it intends to present evidence on the crimes which it has proposed to remove from the Operative Indictment, to provide prior notice of such evidence and explain its specific relevance to the Prosecution's case in its Rule 65 *ter* filings; and

INSTRUCTS the Prosecution to file an amended indictment and amended lists of victims in accordance with the above, within two weeks of the date of this decision.

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



Judge Bakone Justice Moloto

Dated this second of December 2011
At The Hague
The Netherlands

[Seal of the Tribunal]