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: 27 January 2012

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: **27 January 2012**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S MOTION TO STRIKE SCHEDULED SARAJEVO SHELLING AND SNIPING INCIDENTS

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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 to Strike Scheduled Sarajevo Shelling and Sniping Incidents", filed on 22 November 2011 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. On 22 July 2009, the Pre-Trial Chamber in this case issued an order inviting the Office of the Prosecutor ("Prosecution") to identify the ways in which the scope of the indictment in this case, and the length of the Accused's trial, could be reduced.[1] The Prosecution did so on 31 August 2009 proposing, *inter alia*, some reductions to the scheduled shelling and sniping incidents in the Sarajevo component of the case, and stating that further reductions would not be in the interests of justice.[2] On 8 October 2009, the Trial Chamber issued its "Decision on the Application of Rule 73 *bis*" ("Rule 73 *bis* Decision") in which it accepted the proposed reductions relating to Sarajevo, thus confining the Sarajevo component of the case to 16 sniping incidents in Schedule F and 15 shelling incidents in Schedule G of what is now the Third Amended Indictment ("Indictment").[3]

2. In the Motion, the Accused moves the Chamber, pursuant to Rule 54 of the Tribunal's Rules of Procedure and Evidence ("Rules"), to strike out from the Indictment a number of Sarajevo sniping and shelling incidents listed in Schedules F and G, namely F2, F6, F7, F8, F10, F15, G5, G9, G11, and G12.[4] In support, the Accused refers to the fact that the Prosecution offered, pursuant to Rule 73 *bis* (D), not to lead evidence on these incidents in the *Prosecutor v. Mladić* case, which is a case that overlaps significantly with the Accused's case. In doing so, the Prosecution represented that it can meet its burden in relation to Sarajevo-related charges against Ratko Mladić by relying on ten selected sniping and ten selected shelling incidents.[5] The Accused argues that there is no reason to adopt a different approach in these proceedings and notes that what the Prosecution seems to have done in the *Mladić* case is to weed out incidents for which its evidence is weak or for which similar incidents exist.[6] In that respect, the Accused specifically refers to two incidents. In relation to G9, the Accused notes that the Prosecution has failed to prove this incident in two previous cases and that therefore there is no

[1] Order to the Prosecution under Rule 73 *bis* (D), 22 July 2009, para. 6.
[2] Prosecution Submission Pursuant to Rule 73 *bis*, paras. 10–13, Appendix B, pp. 74–75.
[3] Rule 73 *bis* Decision, para. 6.
[4] Motion, para. 1.
[5] Motion, paras. 5, 11.
[6] Motion, paras. 5–11.

reason to retain this incident and require the Accused to lead evidence to rebut it.[7] As for incident G5, the Accused submits that the Prosecution has led no evidence on it and relies entirely on the adjudicated facts in relation thereto. According to the Accused, since the presumption created by these adjudicated facts will disappear once he elicits evidence relating to this incident, there is no sense in requiring him to lead such evidence.[8] In conclusion, the Accused submits that the Prosecution's Rule 73 *bis* (D) submission in the *Mladić* case provides the Chamber with an opportunity to "shorten the length of the remaining portions of the trial and the length of its deliberation and judgements [*sic*] by eliminating incidents which are superfluous" to the case.[9]

3. On 7 December 2011, the Prosecution filed the "Prosecution Response to Motion to Strike Scheduled Sarajevo Shelling and Sniping Incidents" ("Response"), opposing the Motion.[10] The Prosecution first submits that, having been filed under Rule 54, the Motion lacks any legal basis for reducing the Indictment and should be dismissed on that basis alone.[11] Should the Chamber nevertheless decide to address the substance of the Motion, the Prosecution submits that it should be dismissed as the Accused has failed to demonstrate that the reconsideration of the Rule 73 *bis* Decision is necessary to prevent an injustice.[12] In support, the Prosecution states that the reductions to the indictment in the *Mladić* case do not automatically entail the same reductions in the present case, especially given that different considerations apply in the two cases.[13] It also submits that the Accused provides no additional reason for reconsideration and notes that, with respect to scheduled incident G9, the Accused simply repeats the submissions he has previously made to the Chamber unsuccessfully.[14] As for scheduled incident G5, the Prosecution argues that it has, in addition to adjudicated facts, provided documentary evidence on this incident and that the Accused misunderstands the jurisprudence on adjudicated facts as they will not simply "disappear" if he leads contrary evidence.[15]

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[7] Motion, para. 9.
[8] Motion, para. 10.
[9] Motion, para. 12.
[10] Response, para. 1.
[11] Response, para. 2.
[12] Response, para. 3.
[13] Response, paras. 4–5.
[14] Response, para. 6.
[15] Response, para. 6.

II. Applicable Law

4. Rule 54 of the Rules provides that, at the request of either party, or *proprio motu*, a Judge or a Trial Chamber may issue such orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

5. Rule 73 *bis* (D) of the Rules provides as follows:

> 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.

6. The Chamber recalls that there is no provision in the Rules for requests for reconsideration. Such requests are the product of the Tribunal's jurisprudence, and are permissible only under certain conditions.[16] The standard for reconsideration of a decision set forth by the Appeals Chamber is that "a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice'".[17] Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.[18]

III. Discussion

7. While the Accused based the Motion on Rule 54, the Chamber is of the view that it is more accurate to characterise his request as a request for reconsideration of the Rule 73 *bis* Decision. That Decision fixed the number of scheduled shelling and sniping incidents in Sarajevo, which the Accused now wants reduced simply in order to align the Indictment with the

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[16] *See Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009 ("*Prlić* Decision on Reconsideration"), p. 2.

[17] Decision on Accused's Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010, para. 12, citing *Prosecutor v. S. Milošević*, Case No. IT-02-54-AR108*bis*.3, Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, confidential, 6 April 2006, para. 25, fn. 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); *see also Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence "Requête de l'Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d'une Erreur Matérielle", 14 June 2006, para. 2.

[18] *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2; *see also Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić's Motion for

indictment in the *Mladić* case. In other words, the Accused's argument is essentially that the new developments in the *Mladić* case necessitate reconsideration of the Rule 73 *bis* Decision in order to prevent an injustice.

8. While the Chamber is cognisant of the Prosecution's position that it is able to prove the Sarajevo-related component of its case against Mladić by relying on ten shelling and ten sniping incidents alone, the Chamber does not consider that this should lead to a similar reduction of the Indictment in this case. First, there is nothing in the Rules which indicates that incidents excluded from one case under that Rule should necessarily be excluded from other cases where those incidents are also charged. In addition, while the case against Mladić overlaps with these proceedings to a significant extent, there are also a number of differences between them, such as the fact that the two accused held different positions during the conflict. In the Chamber's view that divergence alone may be sufficient to account for a variation in the incidents charged and the necessity to lead evidence on a greater number of incidents in this case.

9. The Chamber also cannot see how the reduction of the indictment in the *Mladić* case results in any injustice to the Accused. The Prosecution has already led most of its evidence in relation to Sarajevo and the Accused will get an opportunity to challenge all or some of it during his defence case, if he so wishes. The fact that he may have to lead evidence in relation to the incidents he now wants removed from the Indictment does not cause any injustice to him so long as he can lead that evidence with all the safeguards of the fair and expeditious trial in mind. Having said that, the Chamber also notes that the Prosecution may wish to consider on completion of its case the feasibility of withdrawing certain charges or incidents if of the view that it has not provided sufficient evidence to secure a conviction in relation thereto.

10. More specifically with respect to incident G9, the Chamber recalls that the Accused already sought to have this incident removed from the Indictment back in April 2011, basing his request on the same arguments he now makes, namely that the incident was not proved beyond a reasonable doubt in the previous cases before the Tribunal.[19] The Chamber recalls that it rejected this request as premature since the Prosecution case was ongoing and the Prosecution could still choose to lead additional evidence on that incident.[20] As the Prosecution case is still ongoing, the Chamber remains of the same view. Accordingly, the Chamber considers that

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Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Decision on Reconsideration, pp. 2–3.

[19] *See* Motion for Finding of No Case to Answer: Shelling Incident G9, 5 April 2011.

[20] *See* Decision on Accused's Motion for Finding of No Case to Answer: Shelling Incident G9, 13 May 2011, para. 3.

retaining incident G9 in the Indictment does not result in an injustice to the Accused and should, therefore, not be removed from the Indictment at this point in time.

11. Finally, the Chamber considers that the Accused's argument regarding the effect of adjudicated facts with respect to incident G5 is misguided. As stated by the Appeals Chamber, the effect of adjudicated facts which are judicially noticed under Rule 94 (B) of the Rules is only to relieve the Prosecution of its initial burden to produce evidence on the point. The Accused may then put that point into question by introducing reliable and credible evidence to the contrary.[21] If and when he does so, the Prosecution may still choose to present additional evidence on the point during its rebuttal case. Thus, given that this is how Rule 94 (B) is meant to operate, there is no injustice in requiring the Accused to lead evidence rebutting the presumption created by the adjudicated facts here, especially in light of the fact that when it decided to take judicial notice of these adjudicated facts, the Chamber did so bearing in mind the rights of the Accused to a fair trial.[22] In addition, accepting the Accused's argument in relation to incident G5 would effectively render Rule 94 (B) ineffectual as the Prosecution would never be able to rely on adjudicated facts if it had notice that the defence would challenge them. Accordingly, the Chamber does not consider that this particular incident should be removed from the Indictment on the basis that the Prosecution is, at this point, relying solely on adjudicated facts in relation thereto.

IV. Disposition

12. Accordingly, the Trial Chamber, pursuant to Rules 54 and 73 *bis* (D) of the Rules, hereby **DENIES** the Motion.

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

Judge O-Gon Kwon
Presiding

Dated this twenty seventh day of January 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

[21] *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 42.

[22] *See* Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts, 5 June 2009, paras. 9, 33–38.