

V-04-84-R
D KWSI - D KWSI
22 February 2007

KWSI MB.



International Tribunal for the
Prosecution of Persons Responsible for
Serious Violations of International
Humanitarian Law Committed in the
Territory of Former Yugoslavia since
1991

Case No. IT-04-84-PT
Date: 22 February 2007
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Frank Höpfel
Judge Ole Bjørn Støle

Registrar: Mr Hans Holthuis

Decision of: 22 February 2007

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

DECISION PURSUANT TO RULE 73 bis (D)

Office of the Prosecutor

Mr David Re
Mr Gramsci di Fazio
Mr Gilles Dutertre
Ms Katrina Gustafson

Counsel for Ramush Haradinaj

Mr Ben Emmerson, QC
Mr Rodney Dixon
Mr Michael O'Reilly

Counsel for Idriz Balaj

Mr Gregor Guy-Smith
Ms Colleen Rohan

Counsel for Lahi Brahimaj

Mr Richard Harvey
Mr Paul Troop

1. On 12 January 2007, the Pre-Trial Judge granted the Prosecution's 10 November 2006 motion, making the "Revised Second Amended Indictment" the operative indictment.¹ The Prosecutor filed its Pre-Trial Brief on 29 January 2006.² On 6 February 2007, the Chamber, pursuant to Rule 73 *bis* (D) of the Rules of Procedure and Evidence, invited the Prosecutor to reduce the scope of its indictment.³ The Chamber also requested the Prosecutor to explain why counts 5/6, 9/10, 11/12, and 21/22 (limited to paragraphs 78, 79, 80, 81, 84, 85, 86, and 89 of the indictment), should not be removed.⁴
2. On 7 February 2007, the Prosecutor requested the Chamber to withdraw its request, or alternatively, for an extension of time in order to file its response.⁵ On 9 February 2007, the Chamber denied the Prosecutor's request to withdraw the invitation to reduce the counts in the indictment, but granted the Prosecutor a two-day extension to respond to the request.⁶ On 13 February 2007, the Prosecutor filed its response to the Chamber's request, declining the invitation to reduce the indictment.⁷
3. On 16 February 2007, the Prosecutor requested the Chamber to delay its decision on the reduction of the indictment.⁸ Considering the direction of the Chamber's present decision, the Prosecutor's request of 16 February 2007 is moot.

A. Law

4. Rule 73 *bis* (D) gives a Trial Chamber discretion to (i) invite the Prosecutor to make reductions in the counts of the indictment and (ii) to fix the number of crime sites or incidents included in one or more of the charges. The Rule states:

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

¹ Decision on Motion to Amend the Indictment, 12 January 2007.

² Prosecution's Pre-Trial Brief with Confidential Annexes, 29 January 2007.

³ Request to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment, 6 February 2007.

⁴ *Ibid.*

⁵ Prosecution's Request for Reconsideration and Withdrawal of the Trial Chamber's 6 February 2007 Request and Alternative Request for an Extension of Time, 7 February 2007.

⁶ Decision on Prosecution's Request for Reconsideration or Extension of Time, 9 February 2007.

⁷ Prosecution's Response to Trial Chamber's "Request to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment", 13 February 2007 (Response), para. 4.

⁸ Request to Delay Decision on "Request to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment" Following the Death of a Prosecution Witness, 16 February 2007.

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.

5. The Tribunal previously applied Rule 73 *bis* (D) in three instances to reduce the scope of the Prosecutor's indictments. In *Prosecutor v. Milutinović et al.* Trial Chamber III focused on eliminating those "crime sites or incidents that are clearly different from the fundamental nature of the case".⁹ Trial Chamber III identified and eliminated three such crime sites, reasoning that "the case that the Prosecution seeks to establish ... will be adequately presented even if evidence in relation to these three sites is not led".¹⁰

6. In *Prosecutor v. Vojislav Šešelj* Trial Chamber I identified those counts and incidents that were "reasonably representative of the crimes charged".¹¹ Trial Chamber I accepted the Prosecutor's proposal to reduce the scope of the indictment by eliminating five counts and several crime sites after concluding that the geographical scope and the scale of the alleged criminal activity would be maintained in the indictment without those counts and crime sites.¹² Similarly, sixteen incidents were removed from the indictment in *Prosecutor v. Dragomir Milošević*, resulting in a 93-hour reduction in time for *viva voce* evidence, after Trial Chamber I reasoned that without the incidents, the Prosecutor would still be able to present evidence that is "reasonably representative of the crimes charged".¹³

B. Discussion

7. The Prosecutor argues in its Response that a reduction in the number of charges or incidents "would jeopardise the core of the Prosecution's case, thereby violating the Prosecution's right to a fair trial" and "would result in charges that are not 'reasonably representative' of the Prosecution's case as a whole".¹⁴ The Prosecutor argues that it must prove broad allegations, such as the existence of a joint criminal enterprise and a widespread or systematic attack, and it must substantiate these allegations with relatively few victims and incidents.¹⁵ The Prosecutor asserts that each incident in the indictment is necessary to prove

⁹ *Prosecutor v. Milutinović et al.*, Decision on Application of Rule 73 *bis*, 11 July 2006 (*Milutinović* Decision), para. 12.

¹⁰ *Ibid.*, para. 10.

¹¹ *Prosecutor v. Vojislav Šešelj*, Decision on Application of Rule 73 *bis*, 8 November 2006 (*Šešelj* Decision), para. 10.

¹² *Ibid.*, paras. 30-1.

¹³ *Prosecutor v. Dragomir Milošević*, Decision on Amendment of the Indictment and Application of Rule 73 *bis* (D) (*Milošević* Decision), 12 December 2006, paras. 38-9.

¹⁴ Response, para. 4.

¹⁵ *Ibid.*, para. 10.

the entirety of the joint criminal enterprise, and that the removal of even a few incidents would jeopardise the proof of such an enterprise.¹⁶

8. The Prosecutor further argues that the pleading of the indictment may give the misleading impression that the case is larger than it actually is, that a reduction in counts or incidents would not result in significant time savings, that the Prosecutor may be forced to reduce its case in the future due to the potential unavailability of witnesses, and that the Prosecutor has already furthered the purposes of Rule 73 *bis* (D) by proposing reductions to its Rule 65 *ter* witness list.¹⁷

9. The Chamber is persuaded by the Prosecutor's submissions. Particularly, the Chamber is persuaded that the removal of counts or incidents, including any of those suggested by the Chamber, may (i) result in an indictment that is no longer reasonably representative of the case as a whole and (ii) may affect the Prosecutor's ability to present evidence on the scope of the alleged widespread or systematic attack and joint criminal enterprise.

10. For the purposes of Rule 73 *bis* (D), the Prosecutor's case is different in kind from *Šešelj, Milutinović et al.*, and *D. Milosević*. The removal of three killing sites in the *Milutinović* Decision did not prejudice the Prosecutor because "the other crime sites and incidents . . . more than adequately reflect[ed] the scale of the alleged criminal activity".¹⁸ In the *Šešelj* and *Milosević* Decisions, significant time was saved in *viva voce* witness testimony after the reduction of incidents which did not affect the geographical distribution of the alleged crimes.¹⁹ In each of these cases, the indictment remained "reasonably representative of the crimes charged".

11. The Chamber recognizes that the Prosecutor announced a reduction in its case presentation at the same time that the Chamber invited the Prosecutor to reduce the indictment, and that the Prosecutor must now rely on a relatively small number of victims and witnesses in order to prove broad allegations. Considering the relatively small number of witnesses in the case, the potential unavailability of even a few witnesses may have a detrimental affect on the ability of the Prosecutor to present its case. Furthermore, the elimination of a few incidents as proposed by the Chamber may be detrimental to the Prosecutor's ability to lead evidence in relation to the scope of the alleged widespread or

¹⁶ *Ibid.*, para. 13.

¹⁷ Response, para 4.

¹⁸ *Milutinović* Decision, para. 12

¹⁹ *Šešelj* Decision, para. 30; *Milosević* Decision, paras. 36, 39.

systematic attack. The Chamber also finds that the removal of incidents may upset the balance of the ethnicity of the victims and may diminish the alleged scope of the joint criminal enterprise. The resulting reduced indictment may no longer be reasonably representative of the case as a whole, thus contravening the requirements of Rule 73 *bis* (D).

12. The Chamber finally notes that the Prosecutor may still have to present evidence supporting each count, regardless of whether the count remains in the indictment, in order to prove the existence of a widespread or systematic attack. This may mean that savings of time are insignificant, and thus that the Chamber's interests in a "fair and expeditious trial" pursuant to Rule 73 *bis* (D) are not furthered.


C. Conclusion

13. For the foregoing reasons, and pursuant to Rule 73 *bis* (D), the Chamber accepts the Prosecutor's reasoning in response to the Chamber's request of 6 February 2007 and accepts the Prosecutor's declination to reduce the scope of its indictment.

14. Having decided not to reduce the scope of the indictment, and in light of changes that may be made in the upcoming days to the Prosecutor's witness list, the Chamber requests the Prosecutor to file its amended witness list as soon as possible and to inform the Chamber of the expected order of witnesses for the March 2007 period. The Chamber will give its orders as to the length as to the length of the Prosecutor's case and other scheduling matters, pursuant to Rule 65 *ter*, at the pre-trial conference.

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

Dated this 22nd day of February 2007
At The Hague
The Netherlands



Judge Alphons Orie
Presiding Judge

[Seal of the Tribunal]