



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-T
Date: 30 November 2016
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 30 November 2016

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE MOTION ALLEGING DEFECTS IN
THE FORM OF THE INDICTMENT**

Office of the Prosecutor
Mr Peter McCloskey
Mr Alan Tieger

Counsel for Ratko Mladić
Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 12 September 2011, the Defence filed a preliminary motion objecting to the form of the then-operative indictment.¹ On 13 October 2011, the Chamber issued a decision denying that preliminary motion (“Preliminary Motion Decision”).² On 16 December 2011, the Prosecution filed the operative indictment in its current form (“Indictment”).³ On 25 October 2016, the Defence filed a motion alleging defects in the form of the Indictment (“Motion”).⁴ On 8 November 2016, the Prosecution responded to the Motion (“Response”).⁵ On 15 November 2016, the Defence requested leave to reply to the Response and filed a reply (“Reply”).⁶ On 22 November 2016, the Prosecution requested leave to sur-reply and sur-replied (“Sur-Reply”).⁷

II. SUBMISSIONS OF THE PARTIES

2. The Defence submits that since no conviction may be entered in respect of charges which are improperly pleaded, the right time to resolve issues of pleading are as the Chamber prepares for deliberations.⁸ It submits that the factual basis for the charges in the Indictment is limited to 106 scheduled incidents.⁹ In particular, the Defence argues that the scheduled incidents, as stipulated in the Indictment or subsequently attempted to be ‘cured’ by the Prosecution in its pre-trial brief, are vague and defective in that they lack sufficient identification of victims, dates, locations, and identities of the perpetrators.¹⁰ The Defence submits that Counts 1, 4 to 9, and 11, as articulated in the Indictment, are defective for the following reasons: *chapeau* elements lack material facts; the presence of a widespread or systematic attack is unsubstantiated; legal criteria for persecution are not satisfied and associated conduct is unclear and inconsistent (Count 3); killings are not pleaded

¹ Defence Preliminary Motion Objecting to the Form of the Second Amended Indictment, 12 September 2011. *See also* Second Amended Indictment, 1 June 2011; Ratko Mladić’s Motion for Enlargement of Time to File Preliminary Motion (Confidential), 12 August 2011; Prosecution’s Response to Motion for Enlargement of Time, 23 August 2011; T. 59; Prosecution Response to Defence Preliminary Motion Objecting to the Form of the Second Amended Indictment, 26 September 2011; 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.

² Decision on Defence Preliminary Motion Objecting to the Form of the Second Amended Indictment, 13 October 2011.

³ Fourth Amended Indictment, 16 December 2011.

⁴ Defence Motion Alleging Defects in the Form of the Indictment, 25 October 2016.

⁵ Prosecution Response to Defence Motion Alleging Defects in the Form of the Indictment, 8 November 2011.

⁶ Defence Request for Leave to Reply to Defence Motion Alleging Defects in the Indictment, 15 November 2016 (“Request to Reply”); Request to Reply, Annex A: Reply in Support of the Defence Motion Alleging Defects in the Form of the Indictment.

⁷ Prosecution Request for Leave to Sur-Reply to Defence Reply in Support of the Defence Motion Alleging Defects in the Form of the Indictment, 22 November 2016 (“Request to Sur-Reply”); Request to Sur-Reply, Annex: Prosecution Sur-Reply to Defence Reply in Support of the Defence Motion Alleging Defects in the Form of the Indictment.

⁸ Motion, para. 1; Reply, para. 5.

⁹ Motion, paras 7, 36-39; Reply, paras 4, 10.

as intentional and the scale requirement for extermination is unsubstantiated (Counts 4 to 6); the factual basis for certain counts is missing since there are no scheduled incidents listed and there is impermissible cumulative charging (Counts 7 and 8); and material facts are absent in certain counts (Counts 9 and 11).¹¹ The Defence also submits that the Indictment vaguely and impermissibly alleges all possible modes of liability for each count and for associated scheduled incidents without specificity to the Prosecution's case.¹² The Defence argues that the Motion identifies precise defects in the Indictment and that these defects have undermined investigations and the presentation of closing submissions and have, therefore, hindered a proper defence.¹³ It further submits that the Prosecution case presented at trial and in its final trial brief is not consistent with the Indictment and seeks to take advantage of defectively pleaded elements of the Indictment.¹⁴ The Defence considers that the Accused is irreparably prejudiced and has been unable to prepare, assess, or defend critical aspects of the case against him.¹⁵ Accordingly, the Defence requests that the Chamber declare that aspects of the Indictment are defective and that the Chamber refrains from deliberating on those aspects.¹⁶ The Defence also requests authorization to increase the word limit for the Motion on the basis that it raises exceptional and important issues.¹⁷

3. The Prosecution contends that the Motion is unsubstantiated and vague, and that it reformulates claims made by the Defence that were adjudicated at the pre-trial stage (including in the Preliminary Motion Decision) and at the Rule 98 *bis* stage of proceedings.¹⁸ It argues that the Defence has not provided appropriate justification for a very late filing and has failed to discharge the burden that it bears in proving that any alleged defects prejudice the rights of the Accused to prepare a defence.¹⁹ The Prosecution submits that the Chamber should summarily dismiss the Motion in its entirety on this basis alone.²⁰ It nevertheless submits that it was entitled to present evidence necessary to establish any counts of the Indictment and as such was not limited to evidence solely pertaining to the scheduled incidents.²¹ The Prosecution clarifies that the language of the Indictment is clear and specific, which put the Defence on notice of details related to a particular charge.²² It further argues that as the Motion fails to prove any alleged defects in the

¹⁰ Motion, paras 8-25.

¹¹ Motion, paras 26-41.

¹² Motion, paras 42-65.

¹³ Reply, paras 6-7.

¹⁴ Reply, para. 8.

¹⁵ Motion, paras 21, 25, 66.

¹⁶ Motion, para. 67.

¹⁷ Motion, para. 3.

¹⁸ Response, paras 1, 5-9, 16; Sur-Reply, paras 1, 4.

¹⁹ Response, paras 1-2.

²⁰ Response, paras 1-3.

²¹ Response, paras 13-14; Sur-Reply, para. 6.

²² Response, paras 16-19; Sur-Reply, para. 5.

Indictment, or to demonstrate how such alleged defects prejudiced the rights of the Accused to prepare a defence, it should be denied.²³

III. APPLICABLE LAW

4. In relation to the Defence's request to exceed the word limit for the Motion, the Chamber notes that motions shall not exceed 3,000 words and that a party must seek authorization from the relevant chamber to exceed this word limit, providing an explanation of the exceptional circumstances that necessitate the oversized filing.²⁴

5. In relation to the substantive issues in the Motion, the general principles set out in Article 18 (4) of the Statute of the Tribunal ("Statute") and Rule 47 (C) of the Tribunal's Rules of Procedure and Evidence ("Rules") 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 in conjunction with Article 21 and, in particular, 21 (4) (a) and (b) of the Statute, which provide for the rights of an accused to be informed promptly and in detail of the nature and cause of the charges against him or her and to have adequate time and facilities for the preparation of his or her defence.²⁵

6. The Chamber recalls the applicable law relevant to the specificity of material facts in an indictment as set out in a previous decision.²⁶

7. In respect of Defence challenges to an indictment, Rules 72 and 73 of the Rules provide, in relevant parts, as follows:

Rule 72

Preliminary Motions

(A) Preliminary motions, being motions which

(ii) allege defects in the form of the indictment;

[...]

shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66(A)(i) and

²³ Response, paras 1, 3-4, 15-16; Sur-Reply, paras 1, 3.

²⁴ Practice Direction on the Length of Briefs and Motions, IT/184 Rev. 2, 16 September 2005, paras 5, 7.

²⁵ See, e.g., *Prosecutor v. Naletilić et al.*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 23; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, para. 27; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 209; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001, para. 88.

²⁶ Preliminary Motion Decision, para. 4.

shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84. [...]

Rule 73

Other Motions

(A) After a case is assigned to a Trial Chamber, either party may at any time move before the Chamber by way of motion, not being a preliminary motion, for appropriate ruling or relief. Such motions may be written or oral, at the discretion of the Trial Chamber.

8. When the Defence is of the view that the Prosecution introduces evidence of material facts of which it had no notice, it can make an objection to the admission of such evidence for lack of notice.²⁷ The Appeals Chamber has held that Defence objections to an indictment based on lack of notice should be specific and timely such that they should be raised either at the pre-trial stage (in a motion challenging the indictment) or at the time the evidence of a new material fact is introduced.²⁸ When an objection based on lack of notice is raised at trial but after the evidence of a new material fact was adduced, the Trial Chamber should determine whether the objection was so untimely as to consider that the burden of proof on whether an accused's ability to defend himself or herself has been materially impaired has shifted to the Defence.²⁹ In doing so, the Trial Chamber should take into account relevant factors such as whether the Defence has provided a reasonable explanation for its failure to raise its objection at the time the evidence of the material fact was introduced and whether the Defence has shown that the objection was raised as soon as possible thereafter.³⁰

IV. DISCUSSION

A. Preliminary Considerations

9. Given that the Defence's claims relate to important issues and absent any objection from the Prosecution, the Chamber will grant authorization to increase the word limit in the Motion. As the Prosecution raises new issues in the Response, the Chamber finds that the Defence has shown good cause for its request to reply and will grant the requested leave. As the Defence raises further new issues in the Reply, the Chamber will also grant the Prosecution's request for leave to sur-reply.

²⁷ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006 ("*Bagosora* Decision"), paras 17-18, 29.

²⁸ *Bagosora* Decision, para. 46; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement of 9 July 2004, paras 199-200.

²⁹ *Bagosora* Decision, paras 42-47.

³⁰ *Bagosora* Decision, para. 45.

B. Substantive Issues

10. Challenges to an indictment may be brought by the Defence in two ways: (a) at the pre-trial stage, as a preliminary motion pursuant to Rule 72 of the Rules, for alleged defects on the face of an indictment; or (b) at the trial stage, by way of objecting to the admission of evidence, when alleged defects become apparent as a result of evidence of material facts proffered by the Prosecution.

11. In respect of (b), the Defence does not identify any evidence of apparent new material facts led by the Prosecution during trial to which it objects and, therefore, this avenue is not pursued by the Defence.

12. The alleged defects identified by the Defence in the Motion relate only to the analysis of the language of the Indictment. The alleged defects noted therein were required to have been raised as a preliminary motion pursuant to Rule 72 of the Rules during the pre-trial stage. As the Motion was filed on 25 October 2016, almost five years after the filing of the Indictment, it is, therefore, untimely. Based on the foregoing, the Chamber dismisses the Defence's submissions.

V. DISPOSITION

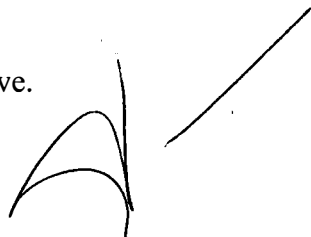
13. For the foregoing reasons, and pursuant to Rules 72, 73 and 126 *bis* of the Rules, the Chamber

GRANTS leave to reply and to sur-reply;

GRANTS the Defence request to exceed the word limit in the Motion; and

DENIES the remainder of the Motion.

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



Judge Alphons Orié
Presiding Judge

Dated this thirtieth day of November 2016
At The Hague
The Netherlands

[Seal of the Tribunal]