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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-03-69-PT

Date: 4 February 2008

Original: English

IN TRIAL CHAMBER III

Before: **Judge Patrick Robinson, Pre-Trial Judge**

Registrar: **Mr. Hans Holthuis**

Decision of: **4 February 2008**

PROSECUTOR

v.

JOVICA STANIŠIĆ
AND
FRANKO SIMATOVIĆ

PUBLIC

DECISION PURSUANT TO RULE 73 *bis*(D)

The Office of the Prosecutor

Ms. Doris Brehmeier-Metz

Counsel for the Accused

Mr. Geert-Jan Alexander Knoops and Mr. Wayne Jordash for Jovica Stanišić
Mr. Zoran Jovanović for Franko Simatović

1. Procedural History

1. The operative indictment in the proceedings against Jovica Stanišić and Franko Simatović is the Revised Second Amended Indictment ("Indictment"). It contains five counts, which charge the Accused with persecution as a crime against humanity, murder as a crime against humanity, murder as a violation of the laws or customs of war, deportation as a crime against humanity, and forcible transfer as a crime against humanity.

2. On 9 November 2007, Trial Chamber I, pursuant to Rule 73 *bis*(D), invited the Prosecution to propose a "means of reducing the scope of the Indictment by reducing the number of crime sights or incidents comprised in one or more of the charges in the Indictment by one third."[1] Additionally, Trial Chamber I invited the Prosecution to provide information as to how such a reduction would impact on the number of witnesses to be called and the time required for the presentation of its case.[2]

3. On 3 December 2007, the Prosecution filed its Response.[3] The Trial Chamber notes that in the Response, the Prosecution requested to be allowed to exceed the page and word limit given the critical nature of the Indictment and the need to provide the Trial Chamber with a fully explained legal and factual explanation.[4] The Trial Chamber grants the Prosecution's request to exceed the allowed word and page limits.

2. Submissions

4. In the Response, the Prosecution declined the Trial Chamber's invitation to reduce the Indictment.[5] However, the Prosecution also outlined ways in which the scope of the Indictment could be reduced "while doing the least possible damage to the Prosecution's ability to present its case" in the event that the Trial Chamber does so *proprio motu*.[6] The Prosecution suggested the following reduction:

> • The "SAO Krajina" part of the Indictment consists of nine incidents; 24 of the Prosecution's witnesses give evidence in relation to those events. If the second incident described in paragraph 24, and the incidents described in paragraphs 26, 30 and 31 of the Indictment were dropped it would reduce the number of incidents by more than one third. Many of the witnesses will testify about several incidents. Removing these incidents will significantly reduce the amount of time required for direct and cross-examination of these witnesses. This reduction will also save court

[1] Request to the Prosecution pursuant to Rule 73*bis*(D) to reduce the scope of the indictment, 9 November 2007 ("Request"), p. 3.
[2] *Ibid.*
[3] Prosecution response to the Trial Chamber's "Request to the Prosecution pursuant to Rule 73 *bis*(D) to reduce the Indictment", 3 December 2007 ("Response").
[4] *Id.* para. 1.
[5] *Id.* para. 4.
[6] *Id.* para. 40.

time associated with authenticating documents relevant to the dropped incidents. This reduction will even allow the Prosecution to drop two witnesses relevant to this region entirely.[7]

- The "SAO SBWS" part of the Indictment consists of ten incidents; 14 of the Prosecution's witnesses give evidence in relation to these events. If the incidents described in paragraphs 37, 38 and 40 of the Indictment were dropped, the number of incidents would be reduced by one third. In this region as well, many Prosecution witnesses are expected to give evidence with respect to more than one incident or crime site. But the court time required for the examination of these witnesses will be decreased as a result of the removal of these incidents. In addition, the Prosecution would be able to cut three witnesses completely.[8]

- The BiH part of the Indictment covers nine incidents; 36 of the Prosecution's witnesses give evidence in relation to these events. If the incidents described in paragraphs 41, 42, 46 and 50 of the Indictment were dropped, the number of incidents would be reduced by three, and the number of witnesses by fourteen. This is a one third reduction in incidents and a more than one-third reduction in witnesses.[9]

5. Finally, the Prosecution submits that in the event that the above mentioned crime sites and incidents are removed, the Prosecution would still want to rely on any evidence that goes to proof of "the purpose and methods of the JCE, the acts and conduct of the Accused, and the high degree of coordination and cooperation of the diverse groups of individuals and institutions they represent within the JCE".[10] The Prosecution would also want to be able "to lead evidence for the purposes of proving the general elements of the persecution campaigns as charged in Count 1 of the Indictment".[11]

6. The Defence did not file a response to the Prosecution's proposals by the required date.

3. Discussion

7. Rule 73 *bis*(D) gives a Trial Chamber discretion to (i) invite the Prosecution 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:

> [a]fter 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.

8. This rule has thus far been applied in four cases. In *Prosecutor v. Milutinović* the Trial Chamber focused on identifying and eliminating "those crime sites or incidents that are clearly

[7] *Id.* para. 41.
[8] *Id.* para. 42.
[9] *Id.* para. 43.
[10] *Id.* para. 44.
[11] *Ibid.*

different from the fundamental nature or theme of the case."[12] The Chamber found that "the case the Prosecution seeks to establish [....] will be adequately presented even if evidence in relation to [the three removed] sites is not led, and that focusing the trial on the remaining charges will improve the expeditiousness of the proceedings while ensuring that they remain fair."[13]

9. In contrast, in *Prosecutor v. Vojislav Šešelj*, the Trial Chamber focused on identifying the crime sites or incidents that are "reasonably representative of the crimes charged."[14] The Trial Chamber removed five counts and several crime sites, 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.[15] Similarly, in *Prosecutor v. Dragomir Milošević* the Trial Chamber focused on identifying the sites and incidents that were reasonably representative of the crimes charged and removed 16 incidents which resulted in a 93-hour reduction in the time required for *viva voce* evidence.[16]

10. Finally, in *Prosecutor v. Haradinaj* the Trial Chamber was persuaded by the Prosecution's arguments against a reduction in the indictment. The Trial Chamber agreed that the removal of any of the counts or incidents "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."[17]

11. The Prosecutor declined the invitation to reduce the Indictment on a number of grounds. The submissions amount to a proposition that the case is not reducible. In the Trial Chamber's view, it will only be in very exceptional circumstances that a case cannot be reduced within the terms of Rule 73 *bis*(D).

12. The first submission of the Prosecution was that the Trial Chamber's request was premature, as no decision had et been made on the numerous motions pursuant to Rule 92 *bis*, *ter*, and *quater*. It argued that until such time that the Trial Chamber rules on the motions, it is "not in a position to accurately estimate what impact any reduction in the scope of the [Indictment] would have on the time required to present its case."

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[12] *Prosecutor v. Milan Milutinović, et al.*, Case No. IT-05-87-T, Decision on application of Rule 73 *bis*, 11 July 2006, para. 10.
[13] *Id.* para 12.
[14] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on the application of Rule 73 *bis*, 8 November 2006, para. 12.
[15] *Id.* paras 30-31.
[16] *Prosecutor v. Dragomir Milošević*, Decision on Amendment of the Indictment and Application of Rule 73 *bis*(D), dated 12 December 2006, paras 38-39.
[17] *Prosecutor v. Ramush Haradinaj, et al.* Case No. IT-04-84-PT, Decision pursuant to Rule 73 *bis*(D), 22 February 2007, para. 9.

13. The Trial Chamber understands this argument to be a response to the request to provide an estimate of the possible impact of a reduction of the time required to present its case, rather than a basis for declining the invitation itself.

14. The Prosecution also submitted that it had already substantially furthered the underlying purpose of Rule 73 *bis*(D) through the use of Rule 92 *bis* and *ter* and 94(B). It pointed to the decision of the Trial Chamber in the *Haradinaj* case, which "recognised" an announced reduction in time needed for the presentation of the Prosecution's case and decided not to reduce the scope of the Indictment; the Prosecution submitted that this Trial Chamber should follow a similar course. It also submitted that the witnesses in the current case can be broadly defined as linkage witnesses and crime base witnesses; the linkage witnesses "are relevant to most of the crime sites or incidents" and "no linkage witnesses can be dropped even if the scope of the Indictment is reduced". Furthermore, given the Prosecution's extensive use of other tools available for ensuring an efficient trial, including its Motion for Judicial Notice of Adjudicated Facts, eliminating crime sites or incidents from the Indictment would strike a poor balance between fairness and efficiency, resulting in "only a very small time savings".

15. The Trial Chamber notes that the use of Rule 92 *bis* and *ter* does not preclude the application of Rule 73 *bis*. The two rules are methods to promote the fairness and expediency of trials and can be utilised simultaneously. The Trial Chamber also finds that the current case is distinctly different from the case of the *Prosecutor v. Ramush Haradinaj et al*, in which the Prosecution charged the Accused with 35 counts, and declines to follow the approach taken by that Trial Chamber.

16. A third submission of the Prosecution is that its case "inherently requires evidence of a sufficient number of crime sites and incidents to prove the modes of liability alleged." In particular, it submits that the joint criminal enterprise ("JCE"), as alleged in the Indictment, includes a large number of participants and thus necessarily and inherently requires demonstrating that the criminal purpose spanned a representative geographical and temporal scope." For the purposes of proving the existence of a common plan, the Prosecution argues, the evidence is often circumstantial and it is the consistency of a significant number of events that demonstrates the existence of such a plan. In light of the length of the indictment period as well as the geographical scope, the Prosecution submits that the Indictment is "already minimalist." The similarity of the various incidents across geography and time leads to the conclusion that they were part of a larger plan and in the Prosecution's view, a reduction of the incidents or crime sites would "seriously compromise the Prosecutor's ability to prove the existence and scope of the JCE." Insofar as it pertains to the participants of the JCE, the Prosecution submits that it may be required to provide evidence of a

pattern of co-ordination or co-operation between alleged members of the JCE and the Accused and that the numerous situations in which the Accused co-operated with individuals demonstrates their liability for the acts of those individuals.

17. As regards other modes of liability, the Prosecution submits that if it is not permitted to provide evidence regarding a significant number of incidents, its ability to prove its case based on ordering will be impaired, as will its ability to do so for its case based on the modes of liability of planning and aiding and abetting.

18. A fourth argument of the Prosecution is that its case requires evidence of a sufficient number of crime sites to prove the general requirements of Articles 3 and 5 of the Statute of the Tribunal. The Trial Chamber rejects this argument and observes that an order for the reduction of the scope of the Indictment may be made so as not to impact on the Prosecution's ability to prove its case within the terms of Articles 4 and 5 of the Statute.

19. The fifth argument of the Prosecution is that a reduction of the Indictment would result in charges that are no longer reasonably representative of the Prosecution's case as a whole, because that case is that the Accused were "major players in the JCE in all geographical areas and in all phases of both the Croatia and Bosnia wars." It submits that any selection of charges that does not accurately reflect this, or marginalises the role of the Accused, "would not reasonably represent either the Prosecution's case or reality." In this respect, it submits that the charges are representative "in three key respects: (1) they represent a limited number of examples of crimes in three geographical areas in which the Accused had influence; (2) they constitute a representative sampling of three key phases of the wars in Croatia and BiH; and (3) they represent the three ethnic groups victimised by the Accuseds' conduct."

20. The Trial Chamber rejects the submission that a reduction of the Indictment will impair the Prosecution's ability to prove its case. However, it will take the above submissions of the Prosecution, including the third and fifth submissions, into consideration in its evaluation of the alternative proposal of the Prosecution as to the way the Indictment could be reduced with the least amount of "damage".

21. As a final argument, the Prosecution submits that reducing the scope of the Indictment would risk the creation of an inaccurate historical record. It argues that "[t]he loss of the *Slobodan Milošević* Judgement left an inevitable void in terms of the historical record of the scope of the atrocities committed by Milošević and his co-perpetrators" and that "the Tribunal is now faced with the opportunity [...] to create a permanent historical record of these atrocities and to bring justice to the victims of these heinous crimes." In this regard, it also submits that a further reduction of

the Indictment "would result in a historically and factually inaccurate record, and a loss of possibly the last opportunity the Tribunal has to achieve one of its core goals [...] - to bring effective redress to the victims of international humanitarian law violations." However, the Tribunal was established to administer justice, and not to create a historical record. The Trial Chamber will therefore not consider this argument as relevant for a decision to be taken pursuant to Rule 73 *bis*(D).

22. In sum, the Trial Chamber rejects the Prosecution's submissions against reduction of the Indictment.

23. Rule 73 *bis*(D) provides that the Trial Chamber should verify that, in the event that the Indictment is reduced, the remaining allegations are reasonably representative of the crimes charged. The Trial Chamber notes, first of all, that the reductions in the Indictment suggested by the Prosecution are equally and proportionally distributed among the three regions were the crimes are alleged to have occurred. As such, a reduction of the incidents as suggested would not affect the representative nature of the Indictment in terms of geographical distribution of the crimes originally charged.

24. The two Accused are charged with four counts of crimes against humanity and one count of violations of the laws or customs of war. The charges relate to crimes allegedly committed the SAO Kraijna, the SOA Slavonia, Baranja and Western Srem and the municipalities of Bijeljina, Bosanski Šamac, Doboj, Sanski Most, Trnovo and Zvornik in Bosnia and Herzegovina. The Prosecution underlined in its Response that the crimes charged in the Indictment mainly included victims who are members of three different ethnic groups: in the SAO Krajina the victims were almost entirely Croat; in the SAO SBWS they were Croats and ethnic Hungarians; in BiH they were Croats and Muslims.

25. The charges in the different regions relate to several incidents, occurring on different dates. Under counts two and three, murder, a total of 28 incidents are specifically mentioned in the Indictment. In addition, the Indictment contains charges of persecutions under count one and of deportation and inhumane acts (forcible transfers) under counts four and five. These three counts pertain to the same geographical areas, but also include alleged criminal conduct other than the incidents listed under counts two and three.

26. The suggested reduction of the Indictment would not jeopardise the Prosecution's ability to prove the victimisation of the three ethnic communities. Indeed, the incidents to be removed are equally distributed in the three regions. Equally, the geographical distribution of the alleged crimes would not be affected by the proposed reduction of the number of incidents for which evidence will

be presented.

27. As noted in paragraphs 16 and 17 above, it is argued that the Prosecution's case requires evidence of a sufficient number of crime sites and incidents to prove the modes of liability alleged. In this respect, the Prosecution emphasised that circumstantial evidence may also be relied on to prove the existence and the scope of the JCE: the similarity of various incidents across geography and time could lead to the conclusion that they were all part of a larger plan. Further, it is argued that circumstantial evidence has to be used to prove the other modes of liability; the number of illegal acts, their widespread occurrence and the similarity of crimes committed by physical perpetrators could be meaningful elements for this purpose.

28. There is no legal requirement for proof of a certain number of incidents in order to prove the crimes charged in the Indictment. Each case has to be judged on its own merits. Circumstantial evidence going to the alleged existence of a JCE or other modes of liability can be led from any number of incidents. The proposed reduction consists of the removal of ten incidents. It leaves intact another 18 incidents as well as the wider allegations in counts one, four and five. The remaining incidents are reasonably representative of both the geographical areas covered in the Indictment, and of the three key phases of the wars in Croatia and BiH. In other words, the circumstantial evidence would be reduced in quantity but not in quality.

29. Furthermore, it has to be emphasised that this Decision should in no way be interpreted as a determination that the events described in the paragraphs of the Indictment to be dropped are of less significance than those that have been retained. Rather, the application of Rule 73 *bis*(D) reflects the conclusion that the case the Prosecution seeks to establish, based on allegations of murder, deportation, forcible transfer, and acts of persecution, will be fairly and expeditiously presented even if not supported by those incidents that are to be dropped. The Trial Chamber is convinced that with the removal of the ten incidents, the remaining charges in the Indictment are reasonably representative of the crimes charged in the Indictment and will order that the Prosecution not lead evidence in respect of those incidents that are set out in paragraph four above.

4. Disposition

FOR THE FOREGOING REASONS, the Trial Chamber,

GRANTS the request for the Response to exceed the allowed word and page limits and, pursuant to Rule 73 *bis*(D) of the Rules, **ORDERS** that:

1. The Prosecution will not present evidence in respect of the second incident described in

paragraph 24 of the Indictment and the incidents described in paragraphs 26, 30, 31, 37, 38, 40, 41, 42, 46 and 50 of the Indictment;

2. The Prosecution shall file an Amended Indictment to reflect this decision no later than Monday, 11 February 2008; and

3. The Prosecution shall file an amended Rule 65 *ter* witness list with an amended estimate of the number of hours needed by the Prosecution for the presentation of its case, no later than Monday, 11 February 2008.

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

Judge Patrick Robinson
Pre-Trial Judge

Dated this fourth day of February 2007
At The Hague
The Netherlands

[Seal of the Tribunal]