

**UNITED
NATIONS**



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-98-29/1-T
Date: 3 April 2007
Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Frederik Harhoff

Registrar: Mr. Hans Holthuis

Decision of: 3 April 2007

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

**DECISION ON PROSECUTION'S MOTION PURSUANT
TO RULE 73 *BIS* (F)**

The Office of the Prosecutor:

Mr. Alex Whiting
Mr. Stefan Waespi
Ms. Carolyn Edgerton
Mr. John Docherty

Counsel for the Accused:

Mr. Branislav Tapušković
Ms. Branislava Isailović

A. Introduction

1. Trial Chamber III (“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 “Prosecution’s Motion Pursuant to Rule 73*bis*(F)” (“Motion”), filed on 7 February 2007.

2. The Motion arises from submissions made by the Office of the Prosecutor (“Prosecution”) during the hearing of 31 January 2007, in which the Prosecution requested permission to present evidence on a scheduled shelling incident that was the subject of the Trial Chamber’s earlier “Decision on Amendment of the Indictment and Application of Rule 73 *bis* (D)”, dated 12 December 2006 (“Decision”). In the Decision, the Trial Chamber decided pursuant to Rule 73 *bis* (D) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) that the Prosecution could not present evidence in respect of this shelling incident, as well as other scheduled incidents (“dropped incidents”).¹ More specifically, the Trial Chamber ordered that:

The Prosecution shall not present evidence in respect of the incidents listed in Schedule 1 to the Indictment, dated 9 November 1994, 8 December 1994, 11 December 1994, 13 December 1994, 6 March 1995, 13 May 1995 and 25 May 1995, and shall not present evidence in respect of the incidents listed in Schedule 2 to the Indictment, dated 30 October 1994, 17 November 1994, 12 December 1994, 12 April 1995, 28 June 1995, 29 June 1995, 1 July 1995 and 19 July 1995.²

3. Following the Prosecution’s submissions made during the hearing of 31 January 2007, the Trial Chamber ruled orally that:

Under Rule 73 *bis*, the Chamber has a discretion to identify a number of crime sites or incidents in respect of which evidence is not to be led by the Prosecution. In exercise of that discretion, the Chamber did identify those sites and this incident is one of those. An unscheduled incident cannot be, by definition, an incident in respect of which the Chamber has expressly exercised its discretion and decided that evidence should not be led in relation to it. An unscheduled incident is an incident other than one of those incidents that the Chamber has identified as an incident in respect of which evidence should not be led. [...] In the circumstances, the Chamber will maintain the ruling that it made when it exercised its discretion under 73 *bis* (D) and will not allow evidence to be led on this particular incident.³

4. In the Motion, the Prosecution requests permission to lead “some limited” evidence in respect of the dropped incidents through witnesses who are appearing to testify on other matters.

¹ These incidents are defined as “dropped incidents” for the purposes of this decision. In accordance with Rule 73 *bis* (D) of the Tribunal’s Rules of Procedure and Evidence, the incidents remain listed in schedules to the Amended Indictment of 18 December 2006 despite the Prosecution not being permitted to present evidence in respect of them.

² Decision, see Disposition.

³ Trial Hearing, 31 January 2007, T. 1305-06. See more generally, T. 1300-06.

5. In its Response, the Defence does not address the issues raised by the Motion.⁴ Instead, the Defence requests that “the Chamber rules [...] on the Prosecution’s presentation of evidence related to incidents not listed in First and Second Schedules of the Amended Indictment”.⁵ The Trial Chamber regrets that the Defence did not respond to the issue at hand. If the Defence wishes to bring a matter before the Trial Chamber for adjudication it should do so in the proper manner and file a motion in which it sets out its request and submissions. Until the Defence files such a motion the request will not be considered.

6. On 14 March 2007, the Trial Chamber requested the Prosecution to inform the Trial Chamber about what constitutes the “limited” evidence that the Prosecution wishes to present and the incidents to which that evidence relates, and what are the other matters to which the witnesses will testify.⁶ The Prosecution filed its submissions on 16 March 2007.⁷

B. Submissions

7. The Prosecution provides three primary reasons for its request for variation of the Decision. In the first place, the Prosecution submits that some evidence of the dropped incidents is “highly relevant” to the charges in the Amended Indictment.⁸ The evidence will consist of contemporaneous criminal investigation reports and files concerning the dropped shelling incidents 1, 3, 4, 7 and 20 and the dropped sniping incidents 9, 11, 12, 16, 17, 19 and 20.⁹ The Prosecution argues that it has the duty to present its case in the most complete way possible and that allowing the presentation of the evidence will assist the Trial Chamber in its assessment of the charge of terror and the allegation that the crimes alleged were widespread or systematic.¹⁰ The Prosecution also submits that, “[t]he dropped incidents are no different than the picture of unscheduled incidents, which the Prosecution has been proving [...], and which are essential to proof of the Terror charge and the widespread or systematic allegation”.¹¹

8. Secondly, the Prosecution submits that the “proposed modification” of the Decision is consistent with the purposes of the Decision, namely, to expedite and shorten the trial in a manner consistent with the rights of the Accused Dragomir Milošević (“Accused”) and the Prosecution to a

⁴ Submission in Response to the Prosecution’s Motion Pursuant to Rule 73 *bis* (F) and Motion to Rule on the Presentation of Evidence Referring to Incidents not Listed in the Schedules I and II of the Indictment, 21 February 2007, (“Response”).

⁵ Response, p. 3.

⁶ Trial Hearing, 14 March 2007, T. 3707-3708.

⁷ Prosecution’s Submission Regarding Rule 73 *bis* (F) pursuant to Trial Chamber’s Oral Order of 14 March 2007, with Confidential Annexes A and B (“Prosecution’s Submission”), 16 March 2007.

⁸ Motion, para. 1.

⁹ Prosecution’s Submission, paras 3 and 4.

¹⁰ Motion, para. 7.

¹¹ Motion, para. 7.

fair trial, and the Prosecution's obligation to present evidence that is relevant to the charges contained in the Amended Indictment.¹² In this regard, the Prosecution argues that allowing the presentation of some evidence in respect of dropped incidents will not prolong the trial;¹³ the Prosecution will be "extremely narrow" in its proof of the incidents, only eliciting evidence from three witnesses who will appear to testify about other matters.¹⁴ According to the Prosecution, these three witnesses, who participated in differing capacities in investigations of sniping and shelling, will testify generally about shelling and certain scheduled shelling and sniping incidents, and will authenticate and summarise a number of investigation reports.¹⁵ The Prosecution also notes that should the Trial Chamber determine that the Prosecution is presenting "excessive evidence" concerning a dropped incident, "it of course retains the authority to instruct the Prosecution to leave the incident and move on".¹⁶

9. Thirdly, the Prosecution submits that it will be unfairly prejudiced in the presentation of its case should the Trial Chamber not vary the Decision, and that a variation will not unfairly prejudice the Accused as he has been on notice concerning the dropped incidents and the evidence that relates to them.¹⁷

C. Applicable Law

10. Under Rule 73 *bis* (F) of the Rules, the Prosecutor may file a motion *inter alia* to vary the decision as to the number of crime sites or incidents in respect of which evidence may be presented, and the Trial Chamber may grant the Prosecutor's request if it is satisfied that a variation is in the interests of justice.

11. The Decision was made pursuant to Rule 73 *bis* (D) of the Rules, which requires the Trial Chamber to strike a delicate balance between several considerations. The Trial Chamber has a discretion, "having regard to all the relevant circumstances", to fix the number of "reasonably representative" crime sites and incidents in respect of which evidence is to be presented by the Prosecution. Moreover, the Trial Chamber's discretion must be exercised in the interest of a fair and expeditious trial. In the Decision, this balance was struck by the Trial Chamber, taking into consideration the widest possible set of factors in order to ensure both a fair and expeditious trial and the reasonable representativity of crime sites and incidents.

¹² Motion, paras 1 and 6.

¹³ Motion, para. 1.

¹⁴ Motion, para. 8.

¹⁵ Prosecution's Submission, paras 5-8.

¹⁶ Motion, para. 78.

¹⁷ Motion, para. 9.

12. Varying the Decision to permit the Prosecution to present evidence on the dropped incidents would disturb the balance struck in the Decision, and particularly the representative nature of the fixed crime sites and incidents, which resulted from the exercise of the Trial Chamber's discretion. Furthermore, the Decision informed the Accused that evidence would not be presented by the Prosecution on the dropped incidents; a variation would have repercussions for notice of the Accused of the case he has to answer. For these reasons, the Trial Chamber considers that a variation is only in the interests of justice where there are compelling reasons for it.

D. Discussion

13. The Prosecution's request must be seen in the context of its approach to the presentation of its evidence, in which the scheduled incidents of sniping and shelling are intended to be "only an illustrative number of individual incidents for specificity of pleading".¹⁸ A consequence of this approach is set out in the Prosecution's Pre-Trial Brief: "In addition to the scheduled incidents, evidence will also be led at trial of other *similar* incidents which formed part of the unlawful campaign of sniping and shelling and terror for which the Accused is also criminally responsible".¹⁹ As this statement also indicates, there is no substantive difference between the scheduled and "unscheduled incidents", that is, incidents of sniping or shelling which are not listed in the schedules to the Amended Indictment. In the Motion, the Prosecution reiterated that, "[t]he dropped incidents are no different than the picture of unscheduled incidents, which the Prosecution has been proving [...], and which are essential to proof of the Terror charge and the widespread or systematic allegation".²⁰

14. The Trial Chamber notes that its oral request to the Prosecution to specify what constitutes the evidence that it wishes to present arose from a concern about preventing or allowing the presentation of such evidence while not knowing its nature and significance. The Trial Chamber is satisfied from the Prosecution's Submission that the evidence the Prosecution wishes to present is not critical to the Prosecution case and that the evidence, which is similar to evidence that has been led or will be led before the close of the Prosecution case, will not add materially to the body of evidence before the Trial Chamber. Furthermore, the Trial Chamber is not satisfied that this evidence will materially assist the Trial Chamber in its assessment of the charges against the Accused.

15. The Trial Chamber reaches this conclusion despite the relevance of the evidence that the Prosecution wishes to present and the assertion by the Prosecution that the evidence is non-

¹⁸ Amended Indictment, para. 29.

¹⁹ Prosecution Pre-Trial Brief, 31 January 2006, para. 12. Emphasis added.

cumulative.²¹ The Trial Chamber notes that relevance and the non-cumulative nature of the evidence were factors considered previously in the exercise of the Trial Chamber's discretion pursuant to Rule 73 *bis* (D) of the Rules.

16. With regard to the Prosecution's submissions that granting the requested variation is consistent with the Decision, the Trial Chamber agrees that granting the request would not result in a prolongation of the Prosecution's case. The Prosecution has 180 hours in which to present its case.²² Within the constraints established by the Trial Chamber, the Prosecution may use its time as it sees fit. If the Trial Chamber granted the Prosecution's request for variation, the Prosecution would have to present any evidence of the dropped incidents within the allocated 180 hours.

17. However, the Trial Chamber finds that while the overarching purpose of the Decision is to achieve a fair and expeditious trial, its central purpose is the reduction of the scope of the Prosecution case through the identification of crime sites and incidents that are reasonably representative of the crimes charged. Although the Prosecution submits that it will "only touch upon these dropped incidents relatively briefly",²³ the Trial Chamber considers that, if granted, the requested variation would be contrary to the central purpose of the Decision; not only would the presentation of *any* evidence on the dropped incidents result in a corresponding expansion of the scope of the Prosecution case but the balance struck by the Decision as a whole will be disturbed.

18. Furthermore, the Trial Chamber does not agree with the Prosecution's submission that the Accused would not be unfairly prejudiced if the requested variation was granted because "he has long been on notice concerning the dropped incidents and the evidence that supports them".²⁴ The Decision signalled to the Accused that evidence would not be presented on the dropped incidents. Permitting the presentation of evidence as requested on the dropped shelling incidents 1, 3, 4, 7 and 20 and the dropped sniping incidents 9, 11, 12, 16, 17, 19 and 20 would create a burden for the Accused.

19. Finally, the Prosecution submits that it will be unfairly prejudiced in the presentation of its case should the Trial Chamber not vary the Decision. The Trial Chamber notes that in exercising its discretion under Rule 73 *bis* (D) of the Rules, it determined that the Prosecution would not suffer unfair prejudice if evidence on the dropped incidents could not be led. In the Motion, the Prosecution states that it "has a duty to present its case in the most complete way possible" and

²⁰ Motion, para. 7.

²¹ Motion, para. 9.

²² Pre-Trial Conference, 10 January 2007, T. 224.

²³ Motion, para. 8.

²⁴ Motion, para. 9.


submits that the evidence in question is relevant and non-cumulative.²⁵ However, the Prosecution does not specifically elaborate on how it will be prejudiced if its request is not granted. The Trial Chamber is not persuaded that the Prosecution will suffer unfair prejudice if the request is not granted.

20. The Trial Chamber is not satisfied that any compelling reasons such as to warrant a variation of the Decision in the interests of justice have been provided by the Prosecution. On the contrary, to vary the Decision in the manner requested by the Prosecution would be inconsistent with the Decision's purpose of reducing the scope of the Prosecution case in a representative manner and it would unfairly prejudice the Accused. Nor is the Trial Chamber satisfied on the basis of the submissions made by the Prosecution that it will suffer unfair prejudice if the variation is not granted. The Trial Chamber is not satisfied that a variation of the Decision as requested by the Prosecution is in the interests of justice.

E. Disposition

FOR THE FOREGOING REASONS and pursuant to Rule 73 *bis* (F) of the Rules, the Trial Chamber **DENIES** the request for variation in the Motion.

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



Judge Patrick Robinson
Presiding

Dated this third day of April 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁵ Motion, para. 9.