



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: 23 February 2017
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 23 February 2017

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR
RECONSIDERATION OF OR, IN THE ALTERNATIVE,
CERTIFICATION TO APPEAL THE 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 Dragan Ivetić

I. PROCEDURAL HISTORY

1. On 25 October 2016, the Defence filed a motion alleging defects in the form of the Indictment (“Original Motion”).¹ On 30 November 2016, the Chamber denied the Original Motion (“Impugned Decision”).² On 7 December 2016, the Defence filed a motion requesting that the Chamber reconsider or, in the alternative, grant certification to appeal the Impugned Decision (“Motion”).³ On 15 December 2016, the Prosecution responded opposing the Motion (“Response”).⁴

II. SUBMISSIONS OF THE PARTIES

A. Reconsideration

2. The Defence submits that the Impugned Decision contains errors of reasoning and bases its Motion on two main grounds.⁵ First, it contends that the Chamber erred in reasoning that due notice was given by the Prosecution on the inclusion of additional incidents into the Indictment.⁶ In this regard, the Defence submits that the Chamber had limited the Indictment to 106 scheduled incidents.⁷ It further submits that the fact that it did not object to the Prosecution presenting evidence on additional incidents does not mean that these incidents can *de facto* be incorporated into the Indictment.⁸ Secondly, it submits that the Chamber erred in stating that the alleged defects identified by the Defence relate only to the language of the Indictment and contends that the alleged defects are of evidential nature.⁹ The Defence argues that the Original Motion is different from a preliminary motion pursuant to Rule 72 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) and that it challenges the ability to enter convictions on defective counts, a matter which is rightly raised at this stage alongside the final brief.¹⁰ Specifically, the Defence considers that the Impugned Decision appears to allow the Prosecution to lead evidence not specified in advance, and then implicitly rewrite the charges of the Indictment to include this evidence later.¹¹ This is

¹ Defence Motion Alleging Defects in the Form of the Indictment, 25 October 2016.

² Decision on Defence Motion Alleging Defects in the Form of the Indictment, 30 November 2016.

³ Defence Motion for Reconsideration or, in the Alternative, Certification to Appeal the Decision on Defence Motion Alleging Defects in the Form of the Indictment, 7 December 2016.

⁴ Prosecution Response to Defence Motion for Reconsideration or, in the Alternative, Certification to Appeal the Decision on Defence Motion Alleging Defects in the Form of the Indictment, 15 December 2016.

⁵ Motion, paras 1, 3, 7-13, 19.

⁶ Motion, paras 3 (a), 9, 13.

⁷ Motion, paras 3 (a), 9.

⁸ Motion, paras 3 (a), 9-10.

⁹ Motion, paras 3 (b), 11.

¹⁰ Motion, para. 3 (b). The Chamber understands the Defence’s reference to Rule 73 of the Rules to be a typographical error referring to Rule 72 of the Rules, which deals with preliminary motions. *See also* Impugned Decision, paras 10-12.

¹¹ Motion, para. 11.

problematic because it allows the Prosecution to fill in the gaps in its case depriving the Defence of the possibility to mount an effective defence.¹²

3. The Prosecution responds that the Defence does not identify a clear error of reasoning in the Impugned Decision but merely reargues points related to the Original Motion, and therefore has not established that reconsideration is warranted.¹³ With regard to the Defence's first ground, the Prosecution submits that the Defence does not identify any evidence of supposedly new material facts led by the Prosecution during trial that it considers objectionable.¹⁴ Moreover, the Prosecution considers that the Defence's explanation for why it did not object to unspecified evidence is irrelevant to the Impugned Decision's observation that the Defence should have done so at the trial stage of proceedings.¹⁵ It further submits that since the Defence did in fact object to evidence that it considered outside the scope of the Indictment, this alleged explanation is "specious and disingenuous".¹⁶ With regard to the Defence's second ground, the Prosecution contends that it is devoid of support and that the Defence does not provide a single example of an alleged defect that was not related to the language of the Indictment.¹⁷

B. Certification to Appeal

4. The Defence submits that the Impugned Decision involves an issue that significantly affects the fairness and the expeditiousness of the proceedings.¹⁸ Particularly, the Defence contends that it was prevented from mounting an effective defence due to the lack of notice of the crimes the Accused was charged with, the lack of clarity of the Indictment, and a "legally-flawed" Prosecution approach.¹⁹ The Defence further contends that since these issues are critical to the rights of the Accused and "given the case history with regard to his fair trial rights", they are certain to be dealt with on appeal.²⁰ Thus, it would be more expedient to resolve those issues now.²¹ In addition, the Defence submits that the Impugned Decision involves an issue that significantly affects the outcome of the trial as it allows the Prosecution to supplement its case retroactively, thereby putting the Defence at a disadvantage.²² Finally, the Defence contends that an immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings.²³ Specifically, the

¹² Motion, para. 12.

¹³ Response, paras 1-2, 4-5.

¹⁴ Response, para. 3.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Response, para. 4.

¹⁸ Motion, paras 15, 20.

¹⁹ Motion, para. 15.

²⁰ Motion, paras 15-16.

²¹ Motion, para. 16.

²² Motion, paras 17, 20.

²³ Motion, paras 18, 20.

Defence considers that an immediate resolution by the Appeals Chamber is imperative as the Defence is presenting its closing arguments, and that action by the Chamber to ensure the fairness of proceedings will materially advance any proceedings in which such fundamental rights as those at issue are impugned.²⁴

5. The Prosecution responds that the Defence fails to satisfy the cumulative test for certification of an interlocutory appeal as it fails to demonstrate that an immediate resolution of the issue by the Appeals Chamber is required to materially advance the proceedings.²⁵ In particular, it submits that as the evidence phase of the trial is over, an interlocutory appeal would have no impact on the calling of witnesses, the tendering of documents or the length of the trial.²⁶ Moreover, the Prosecution considers the Defence's argument that "action by the Trial Chamber to ensure fairness will materially advance any proceedings in which such fundamental rights are impugned" is insufficient as it provides no indication how the immediate resolution of an issue could materially advance the proceedings.²⁷

III. APPLICABLE LAW

6. The Chamber recalls and refers to the applicable law governing reconsideration of decisions, as set out in a previous decision.²⁸ The Chamber further recalls and refers to the applicable law governing certification to appeal pursuant to Rule 73 (B) of the Rules, as set out in a previous decision.²⁹

IV. DISCUSSION

A. Reconsideration

7. The Chamber finds that the arguments put forward by the Defence concerning the lack of due notice by the Prosecution on the inclusion of additional incidents into the Indictment repeat substantive issues related to the Original Motion and are not relevant for its request for reconsideration of the Impugned Decision. Contrary to the Defence's submission, the Chamber, in

²⁴ Motion, para. 18.

²⁵ Response, paras 1, 6-7.

²⁶ Response, para. 7.

²⁷ Response, para. 6.

²⁸ Reasons for Decision on Defence Motion for Reconsideration, 29 June 2012, para. 10.

²⁹ Decision on Defence Motion for Certification to Appeal the Decision on the Admission of the Evidence of Milan Turić, 15 July 2015, para. 4.

the Impugned Decision, did not dismiss the Original Motion on the ground that proper notice was given, but because it was filed untimely pursuant to Rule 72 of the Rules.³⁰

8. In the Impugned Decision, the Chamber reiterated that 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.³¹ In respect of (b), the Chamber decided that since the Defence in its Original Motion did not identify any evidence of apparent new material facts led by the Prosecution during trial to which it objected, this avenue was not pursued by the Defence.³²

9. With respect to the Defence's argument that the Original Motion was different from a motion pursuant to Rule 72 of the Rules, the Chamber notes that the title of the Original Motion, "Motion Alleging Defects in the Form of the Indictment", reflects the language of Rule 72 (A) (ii) of the Rules, pursuant to which motions which allege defects in the form of the indictment are preliminary motions. The Chamber further notes that one of the main purposes of a Rule 72 preliminary motion is to avoid commencing trial on the basis of an inadequately drafted instrument. In this regard, the Chamber finds that the Defence neither showed that any alleged defects are not related to the language of the Indictment, nor that the purpose of the Original Motion was different from that of a Rule 72 preliminary motion. Consequently, the Defence failed to demonstrate that the Chamber committed a clear error of reasoning in finding that the Original Motion is a Rule 72 preliminary motion. The Chamber therefore finds no support for the Defence's submission in this respect. The Chamber further finds that there are no particular circumstances justifying reconsideration of the Impugned Decision in order to avoid injustice.

10. Based on the above, the Chamber finds that the Defence has failed to demonstrate the existence of a clear error of reasoning or of a particular circumstance which would justify reconsideration in order to avoid injustice. Considering the foregoing, the Chamber will deny the Defence's request for reconsideration.

11. Furthermore and contrary to the Defence's claim, the Chamber did not limit the Indictment to 106 scheduled incidents. The Chamber's decision to which the Defence refers, fixed the number

³⁰ Impugned Decision, paras 12-13.

³¹ Impugned Decision, para. 10.

³² Impugned Decision, para. 11.

of *scheduled* incidents but did not affect other incidents within the scope of the Indictment, which remained part of the Indictment as charged.³³

B. Certification to Appeal

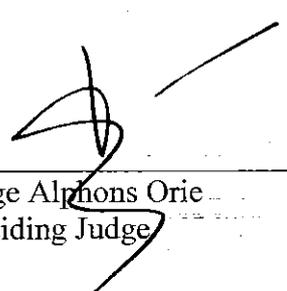
12. With regard to the first prong of Rule 73 (B) of the Rules, the Defence identifies the issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial as the lack of clear and timely notice of the crimes against the Accused. The Impugned Decision does not involve such an issue. Rather, in the Impugned Decision, the Chamber denied the Original Motion because it was filed untimely. The Chamber finds that the Impugned Decision was limited to this matter and as such the Motion does not meet the first prong of Rule 73 (B) of the Rules.

13. As the test under Rule 73 (B) of the Rules is cumulative and the first prong of the test has not been satisfied, the Chamber will not address the second prong of the test. Considering the above, the Chamber will deny the Defence's request for certification to appeal.

V. DISPOSITION

14. For the foregoing reasons, pursuant to Rule 73 (B) of the Rules, the Chamber **DENIES** the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-third day of February 2017
At The Hague
The Netherlands

[Seal of the Tribunal]

³³ See Decision Pursuant to Rule 73 *bis* (D), 2 December 2011, paras 12, 14-15.