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-04-81-PT
		Date:	15 May 2007
		Original:	English

IN THE TRIAL CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge Krister Thelin
Judge Frank Höpfel

Registrar: **Mr. Hans Holthuis**

Decision: **15 May 2007**

PROSECUTOR

v.

MOMČILO PERIŠIĆ

DECISION ON APPLICATION OF RULE 73 *BIS* AND AMENDMENT OF INDICTMENT

The Office of the Prosecutor:

Mr. Mark B. Harmon
Ms. Susan L. Somers

Counsel for the Accused:

Mr. James Castle
Mr. Novak Lukić

1. Trial Chamber III 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") on 20 November 2006, invited the Prosecution, pursuant to Rule 73 *bis* of the Rules of Procedure and Evidence ("Rules"), to propose means of reducing the scope of its case by at least one-third by reducing (i) the number of counts charged in the Indictment, and/or (ii) the number of crime sites or incidents comprised in one or more charges in the Indictment ("Invitation"). The Prosecution responded to the Invitation on 4 December 2006 ("Response").[1]

2. During a Status Conference held on 1 December 2006, the Prosecution indicated its preference to further amend its amended indictment of 26 September 2005 ("Amended Indictment") in conjunction with any Order from the Trial Chamber in respect of the invitation to the Prosecution to reduce the scope of the Amended Indictment.[2] Accordingly, the Trial Chamber will issue a decision on both matters.

I. APPLICATION OF RULE 73 *BIS* OF THE RULES

A. Indictment against the Accused

3. The original Indictment against the Accused was confirmed on 24 February 2005[3] and made public on 7 March 2005.[4] The Prosecution filed its Amended Indictment on 26 September 2005.[5] The Amended Indictment charges Momčilo Perišić ("Accused") with eight counts of crimes against humanity (persecution, murder, inhumane acts) and five counts of violations of the laws or customs of war (murder, attacks on civilians). The Accused is charged with individual criminal responsibility under Article 7(1) and Article 7(3) of the Tribunal's Statute. The Amended Indictment contains four Schedules, which list specific incidents that pertain to the counts of shelling and sniping in the city of Sarajevo (Schedules A and B), shelling of the city of Zagreb (Schedule C) and killings in Srebrenica (Schedule D). A fifth Schedule identifies senior Yugolsav Army personnel over whom the Accused is alleged to have had command authority (Schedule E).

[1] Prosecution's Response to Invitation to the Prosecutor to Make Proposals to reduce the Scope of the Indictment, 4 December 2006.
[2] Status Conference, 6 February 2007, T. 82 and 83.
[3] Confirmation of Indictment, 24 February 2005.
[4] Order to Disclose Indictment and Warrant of Arrest against Momčilo Perišić, 7 March 2007.
[5] Prosecution's Filing of Amended Indictment in Compliance with Trial Chamber Order of 29 August 2005, 26 September 2005; Amended Indictment, 26 September 2006.

B. Invitation and Response

4. On 20 November 2006, the Trial Chamber invited the Prosecution, pursuant to Rule 73 *bis*(D) of the Rules, to propose means of reducing the scope of its case by at least one-third by reducing (i) the number of counts charged in the Indictment, and/or (ii) the number of crime sites or incidents comprised in one or more charges in the Indictment.[6]

5. The Prosecution response to the Invitation was filed on 4 December 2006.[7] The Prosecution declined to accept the Invitation. However, it further submitted that, "should the Trial Chamber order the Prosecution to reduce the Amended Indictment, the Prosecution would propose to eliminate Counts 5 to 8 in the Amended Indictment." The Trial Chamber notes that Counts 5 to 8 relate to all the counts in the Amended Indictment regarding the shelling of Zagreb. The two incidents that relate to the shelling of Zagreb are listed in Schedule C to the Amended Indictment.

6. In a Rule 65 *ter* Conference held on 5 February 2007, the Senior Legal Officer of Trial Chamber III remarked that while the number of the Counts in the Amended Indictment "perhaps represent a third of the indictment, it's not a third of the scope of the indictment. Of the 48 distinct sets of crime bases alleged in the indictment, Sarajevo comprises 21 of those, Srebrenica 25, and Zagreb 2. That means Zagreb accounts for about four per cent of the crime base allegations."[8]

7. During a Status Conference held on 6 February 2007, the Pre-Trial Judge stated that, in order to make its determination pursuant to Rule 73 *bis*(D) of the Rules, the Trial Chamber would issue its Decision only after receiving the Prosecution Witness List pursuant to Rule 65 *ter*(E) (ii) of the Rules ("Witness List").[9]

8. On 23 February 2007, the Prosecution filed the Witness List. On 1 March 2007, the Prosecution filed an application to replace the Witness List and the witness summaries filed pursuant to Rule 65 *ter*(E) of the Rules with a corrected witness list ("Corrected Witness List").[10] That application was granted by the Trial Chamber on 28 March 2007.[11]

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[6] Invitation to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment, 20 November 2006.
[7] Prosecution's Response to Invitation to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment, 4 December 2006.
[8] Rule 65 *ter* Conference, 5 February 2007, p. 153.
[9] Status Conference, 6 February 2007, T. 82, 87.
[10] Prosecution's Application to Replace Witness List and Summaries Filed Pursuant to Rule 65 *ter*(E) and Corrigenda, 1 March 2007.
[11] Decision on Prosecution's Application to Replace Witness List and Summaries Filed Pursuant to Rule 65 *ter*(E), 28 March 2007.

C. Discussion

9. Rule 73 *bis* is generally designed to allow the Trial Chamber, having regard to all the relevant circumstances, to prevent excessive and unnecessary time being taken by the Prosecution. It allows the Chamber to ensure that the prosecution litigates only those issues that are really in dispute and which are necessary to be determined for the purposes of its case. Rule 73 *bis*(C) of the Rules permits the Trial Chamber to determine the number of witnesses the Prosecution may call and to fix the time available to the Prosecution for presenting its evidence. Rule 73 *bis*(E) of the Rules allows the Trial Chamber to select counts in an indictment on which the Prosecution may proceed. Rule 73 *bis*(D) of the Rules reads:

> (D) 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 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.

10. As such, Rule 73 *bis*(D) of the Rules permits the Trial Chamber to invite the Prosecutor to reduce the number of counts charged and fix the number of crime sites or incidents in an indictment. The Chamber's discretion under Rule 73 *bis*(D) of the Rules to extend this invitation to the Prosecutor must be exercised in the interest of a fair and expeditious trial.

11. After hearing the Prosecutor, the Trial Chamber may reduce the number of counts charged and fix, on the basis of the criteria set out in Rule 73 *bis*(D) of the Rules, crime sites or incidents that are "reasonably representative of the crimes charged" and for which evidence will be presented. The corollary of fixing the number of crime sites or incidents in respect of which evidence will be presented is that the Prosecution shall not present evidence in respect of other crime sites or incidents that are not included in the fixed number.[12]

12. In order to achieve the goal of ensuring a fair and expeditious trial, the Chamber had invited the Prosecution to reduce the scope of its Amended Indictment by one-third, which, as noted above, was declined, although the Prosecution also proposed not presenting evidence in respect of the Zagreb counts. The Trial Chamber reiterates that the elimination of evidence in respect of the

[12] See *Prosecutor v. Šešelj*, Case No. IT-06-37-PT, Decision on the Application of Rule 73 *bis*, 8 November 2006, para. 12. *Cf. Prosecutor v. Milutinović*, Case No. IT-05-97-T, Decision on Application of Rule 73 *bis*, 11 July 2006, para. 10.

Zagreb counts would not constitute a one-third reduction of the scope of the Prosecution case.[13] Furthermore, the elimination of evidence on an entire crime site (Zagreb) in a country (Croatia) not otherwise represented in the Amended Indictment does not fulfil the requirement of Rule 73 *bis*(D) that the remaining crime sites or incidents be reasonably representative of the crimes charged. In particular, a consequence of removing the Zagreb counts would be that the victims of the alleged crimes committed in Zagreb are no longer represented in this case.

13. The Trial Chamber has examined the Corrected Witness List so as to ascertain how the Prosecution wishes to present its case and how many witnesses it intends to call with respect to each crime site.

14. The Corrected Witness List indicates that the Prosecution intends to introduce certain witnesses who will give testimony in relation to all counts in the Amended Indictment.[14] However, most witnesses will give testimony on one specific crime site. With respect to the latter category of witnesses, the Prosecution intends to introduce (1) 146 witnesses with respect to the Sarajevo counts, (2) 59 witnesses with respect to the Srebrenica counts and (3) 14 witnesses with respect to the Zagreb counts. With respect to the largest category of witnesses, those who will testify on the Sarajevo counts, 103 witnesses will give crime-base evidence, 59 witnesses are 'international' witnesses and four witnesses will provide 'linkage' testimony, that is, testimony directly linking the Accused to the alleged crimes.

15. If all the witnesses whom Prosecution intends to introduce with respect to the Sarajevo counts were to be called to give testimony (either *viva voce* or pursuant to Rule 92 *bis* or 92 *ter* of the Rules), direct examination of those witnesses alone would take 490.5 hours. The admission of all the Rule 92 *bis* statements would only reduce that number by one-fifth. By comparison, the witnesses who will testify about events in Srebrenica would require 127.5 hours for direct examination. Lastly, the witnesses who will testify in respect of Zagreb would require 54.5 hours for direct examination. As these numbers give a strong indication that the Prosecution intends to spend most of its time in direct examination on the Sarajevo counts, the Trial Chamber has specifically directed its attention to this part of the case.

[13] Rule 65 *ter* Conference, 5 February 2007, p. 153.
[14] The Trial Chamber has calculated that these witnesses are scheduled to give approximately 276 hours of testimony. Unfortunately, as certain summaries are missing from the Corrected Witness list, the Trial Chamber is unable to give an exact estimate of the total amount of hours that the Prosecution will require to examine these witnesses.

16. The Trial Chamber notes that at least 22 witnesses are scheduled to give evidence on 'terror' in Sarajevo. Two of the 22 witnesses are scheduled to give evidence on "the terror count".[15] As the Amended Indictment does not include a terror count, the relevance of this type of testimony is not apparent. Although the Prosecution alleges a "protracted campaign of sniping and shelling upon Sarajevo", there is no indication in the Amended Indictment that a protracted campaign is being alleged in support of a charge of Terror against the Accused. Only one indication on terror is given in the Pre-Trial brief: the Prosecution asserts that *written* evidence will be presented in support of the assumption that, *inter alia*, the nature or purpose of the aforementioned campaign was to spread terror amongst the civilian population of Sarajevo.[16] However, this does not justify the presentation of extensive evidence on this aspect of the campaign. Therefore, the Trial Chamber will instruct the Prosecution not to lead evidence on 'terror' in relation to the Sarajevo counts.

17. The scheduled incidents, listed in Schedules A and B of the Amended Indictment, represent less than a quarter of the incidents in respect of which the Prosecution intends to lead evidence in relation to the Sarajevo counts. Other than the fact that the Prosecution alleges a "protracted campaign of sniping and shelling upon Sarajevo",[17] there seems to be no basis in the Amended Indictment for the volume of evidence to be led on incidents, which are not mentioned in Schedules A and B of the Amended Indictment. The Pre-trial brief is silent on the unscheduled incidents.[18] The Trial Chamber, however, finds that the scheduled incidents, having regard to all the relevant circumstances, including the crimes charged in the Amended 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 and sufficiently representative of the crimes charged. For this reason, and particularly for the purposes of reducing the scope of this case, the Trial Chamber will instruct the Prosecution only to lead evidence in relation to the *scheduled* incidents that are listed in schedules A and B of the Amended Indictment. It may, however, lead evidence on *unscheduled* incidents if it can show that such evidence is essential to prove an important aspect of this case (for example, if an unscheduled incident is necessary to link the Accused to the crimes charged). In such a case, the Prosecution must file a motion requesting the leave of the Trial Chamber to lead such evidence at least four weeks in advance of the scheduled testimony, to which the Defence shall have an opportunity to respond.

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[15] Corrected witness list, pp 113 and 157.

[16] Prosecution Pre-Trial Brief, 23 February 2007, para. 54: "[T]he Prosecution will also present relevant written documentation to establish the campaign and its nature. For example, on 28 August 1992, Tadeusz Mazowiecki, UN Special Rapporteur of the Commission on Human Rights, reported the results of his and the Commission's first hand observations in respect of Sarajevo: (...) The city is shelled on a regular basis, in what appears to be a deliberate attempt to spread terror among the population".

[17] Amended Indictment, paragraph 42.

[18] Pre-Trial Brief, paras 49-53.

18. The Trial Chamber will now return to its calculations based on the information in the Corrected Witness List. It has calculated that, if all witnesses on the Corrected Witness List were to be called to give testimony (either *viva voce* or pursuant to Rule 92 *bis* or 92 *ter* of the Rules), the Prosecution would require more than 950 hours for direct examination of its witnesses. Even if the Chamber trying the case allows half of the testimony to be introduced pursuant to Rule 92 *bis* of the Rules, the number of hours of testimony would not significantly be reduced. On a five-day sitting schedule, this would translate to a Prosecution case lasting about three years.[19]

19. Rule 65 *ter* (B) of the Rules requires the Trial Chamber to ensure that certain measures are taken to prepare the case for a fair and expeditious trial. A period of more than three years is not a reasonable time estimate for *any* Prosecution case. In fact, the Trial Chamber concurs with the view expressed in the decision by the Trial Chamber in *Slobodan Milošević*, which held that a Prosecution case should generally not last longer than 14 months.[20]

20. In light of the above, the Prosecution is instructed to reduce its witness list in accordance with the instructions listed in paragraphs 16 and 17 of this Decision, and to ensure that it fixes a reasonable number of hours for direct examination.

II. AMENDMENT OF THE INDICTMENT

21. During the Rule 65 *ter* Conference held on 1 December 2006, the Prosecution proposed several minor amendments to Schedule D of the Amended Indictment. These proposed amendments to Schedule D of the Amended Indictment are: (1) paragraph 1.4: strike the words "approximately 6.000" and substitute it with the words "thousands of"; (2) paragraph 3.5: insert "VRS" after "14 July 1995" and before "personnel including"; (3) paragraph 3.5: insert "VRS" after "personnel" and before "including members"; paragraph 3.5: insert "VRS" after "July 1995," and before "members of".[21] Furthermore, the Prosecution proposes to insert the following paragraph into schedule D:

> **16 July 1995, Branjevo Military Farm**: on 14 July 1995, Bosnian Muslim prisoners from Bratunac were bussed to a school in the village of Pilica and detained there until 16 July 1995 when they were taken out of the school and loaded onto buses with their hands tied behind their backs. They were then driven to the Branjevo Military Farm where groups of 10 were lined up and shot. Between 1,000 and 1,200 men were killed in the

[19] This calculation includes a calculation of time for cross-examination (approximately. 950 hours), re-examination (approximately 95 hours), questions by the Judges (approximately 95 hours) and procedural issues (approximately 140 hours).

[20] *Prosecutor v. Slobodan Milošević*, Case No. 02-54-T, 10 April 2002, T.2784; *Prosecutor v. Slobodan Milošević*, Case No. 02-54-T, 10 April 2002, T.2784 (*Milošević* Decision); *See also Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73, "Reasons for Refusal of Leave to Appeal from Decision to impose Time Limit", filed on 16 May 2002, which upheld the *Milošević* Decision to limit the case to fourteen months.

> course of that day at this execution site. Members of the VRS were engaged in guarding the Bosnian Muslim prisoners in the buses that took them to the Branjevo Military Farm and Zvornik Brigade equipment was used for activities relating to the burial of the victims. The Drina Corps Assistant Commander for Security, Colonel Vujadin Popović, was involved in organising fuel to transport the Bosnian Muslim prisoners to the execution site at Branjevo Military Farm and Drina Corps personnel and assets facilitated the executions. Participants in the execution included members of the VRS 10th Sabotage Detachment (a Main Staff subordinate unit).[22]

22. Additionally, the Prosecution has expressed its wish to insert language explaining the "column" mentioned in paragraphs 1.4, 3.2, 3.5, 3.6, 3.8, 3.9, 3.10, 4.1, 4.2, 4.3, 5.1 and 5.2 of Schedule D, namely: "The evidence currently indicates that around one-third of the men in the column were Bosnian Muslim soldiers from the 28th Division, although not all the soldiers were armed.". This language was based on findings of the *Krstić* Trial Chamber.[23]

23. The test for whether leave to amend will be granted is whether allowing the amendments would cause unfair prejudice to the accused.[24] The Trial Chamber finds that the proposed amendments will not cause any unfair prejudice to the Accused, and it notes that the Defence has already accepted all of the Prosecution's amendments to the Amended Indictment.[25] The proposed amendments do not add any charges to the Amended Indictment and, consequently, Rules 50(B) and (C) of the Rules are not applicable to the present case. For these reasons, the Trial Chamber will allow the proposed amendments.

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[21] Rule 65 *ter* Conference, 1 December 2006, pp 111-113.
[22] Rule 65 *ter* Conference, 1 December 2006, pp 112 and 113.
[23] Rule 65 *ter* Conference, 1 December 2006, page 114 (T?); *See Prosecutor v. Krstić*, Case No. IT-99-33-T, Judgement, para. 61 and footnote 111.
[24] *Prosecutor v Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Leave to Amend the Indictment, 2 June 2005 (dated 27 May 2005), para. 5; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004, para. 22; *Prosecutor v. Brđanin and Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 50; *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-PT, Decision on Vinko Martinović's Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, 14 February 2001, p. 7.
[25] Rule 65 *ter* Conference, 1 December 2006, page 113.

III. DISPOSITION

For the reasons stated above,

The Trial Chamber **ALLOWS** the proposed amendments to the Amended Indictment and **ORDERS THAT**:

1. The Prosecution will file an Amended Indictment containing all the amendments proposed by the Prosecution as mentioned in paragraphs 21 and 22 of this Decision;

2. In order to reduce the Amended Indictment pursuant to Rule 73 *bis* of the Rules, the Prosecution shall not lead evidence on terror in relation to the Sarajevo counts.

3. The Prosecution shall not present evidence in respect of any unscheduled incidents in relation to the Sarajevo counts, unless it is able to demonstrate that evidence of certain identified unscheduled incidents in relation to the Sarajevo counts is essential to prove an important aspect of its case. In such case, the Prosecution may file a motion requesting the leave of the Trial Chamber to lead testimony on unscheduled incidents relating to the Sarajevo counts at least four weeks in advance of the scheduled testimony, providing reasons for its request. The Defence shall have an opportunity to respond to such a Motion.

4. The Prosecution shall file a new witness list which shall reflect the orders made above and it shall file new time estimates for direct examination of the remaining witnesses. The Prosecution shall ensure that the total amount of hours necessary for direct examination represents a reasonable amount of hours.

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

Patrick Robinson
Presiding

Dated this fifteenth day of May 2007
At The Hague
The Netherlands

[Seal of the Tribunal]