



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-T

Date: 31 October 2008

Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding Judge
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. Hans Holthuis

Decision of: 31 October 2008

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON PROSECUTION'S SUBMISSION ON
INTERPRETATION OF THE TRIAL CHAMBER'S
DECISION OF 15 MAY 2007 REGARDING
"UNSCHEDULED INCIDENTS"**

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

Counsel for the Accused

Mr. Novak Lukić
Mr. Gregor Guy-Smith

Trial Chamber I (“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 Submission on Interpretation of the Trial Chamber’s Decision of 15 May 2007 on Application of Rule 93 *bis* and Amendment of Indictment, with Confidential Annex A and Public Annex B” (“Submission”), filed partly confidentially on 29 October 2008, and hereby renders its Decision.

I. PROCEDURAL HISTORY

1. On 15 May 2007, the Trial Chamber III then seised of the case (“Pre-Trial Chamber”) issued its “Decision on Application of Rule 73 *bis* and Amendment of Indictment”¹ (“Rule 73 *bis* Decision”) in which it ordered, *inter alia*, that the Prosecution request leave of the Trial Chamber to lead testimony on unscheduled incidents relating to the Sarajevo counts of the indictment at least four weeks in advance of the scheduled testimony. In its Submission, the Prosecution seeks guidance and clarification on the interpretation of the term “unscheduled incidents” in the Rule 73 *bis* Decision and attaches thereto a sample witness summary filed pursuant to Rule 65 *ter* to show how it envisages the distinction between scheduled and unscheduled incidents.²

II. SUBMISSIONS

2. The Prosecution interprets the Rule 73 *bis* Decision to apply to only those unscheduled incidents identified as such in the witness summaries which form part of the Prosecution’s Rule 65 *ter* witness list, filed on 1 March 2007 (“65 *ter* Witness Summaries”).³ The Prosecution argues that the Pre-Trial Chamber did not envisage in its Rule 73 *bis* Decision that general evidence relating to the campaign of sniping and shelling of civilian targets in Sarajevo would be considered as “unscheduled incidents”.⁴

3. In the Prosecution’s view, “from a close review of the 73 *bis* Decision it is apparent that it refers only to unscheduled incidents identified as such in the [65 *ter* Witness Summaries]”.⁵ In support of this interpretation, the Prosecution observes that the 73 *bis* Decision states:

- a) that the Pre-Trial Chamber has examined the 65 *ter* Witness Summaries “so as to ascertain how the Prosecution wishes to present its case”,⁶

¹ Decision on Application of Rule 73 *bis* and Amendment of Indictment, 15 May 2007.

² See Confidential Annex A.

³ Prosecution Submission, para. 4.

⁴ Prosecution Submission, para. 8.

⁵ Prosecution Submission, paras 4-5, referring to the Prosecution’s Application to Replace Witness List and Summaries Filed Pursuant to Rule 65 *ter* (E), 28 March 2007.

b) that “[t]he Pre-Trial Brief is silent on the unscheduled incidents” and refers in the footnotes to paragraphs 49 to 53 of the Prosecution’s Pre-Trial Brief. These paragraphs do not mention unscheduled incidents, rather they refer to the “campaign of shelling and sniping and incidents in Schedules A and B of the Indictment”.⁷ Thus, it is evident “from a review of these paragraphs that the Pre-Trial Chamber did not consider evidence relating to the campaign of shelling to constitute evidence relating to “unscheduled incidents”.⁸

4. In its response to the Prosecution Submission,⁹ the Defence submits that the language contained in paragraphs 11, 16 and 17 of the Rule 73 *bis* Decision “clearly reflects the intent of the Chamber and the procedures to be followed”.¹⁰ The Defence argues that the Trial Chamber found that evidence related to a “protracted campaign of sniping and shelling upon Sarajevo” should not be led by the Prosecution. In this regard, it recalls the Pre-Trial Chamber’s finding that the presentation of extensive evidence on the campaign of terror on Sarajevo was not justified.¹¹

5. In the Defence’s view, it was the Pre-Trial Chamber’s intention that “if incidents are not included in the fixed number (charged counts and/or scheduled incidents) the evidence is not to be lead.”¹² Therefore, according to the Defence, *any* evidence on incidents which are not mentioned in Schedules A and B of the Indictment is encompassed by the Rule 73 *bis* Decision.¹³

6. The Defence further contends that the Prosecution’s reference to the 65 *ter* Witness Summaries demonstrates the confusion caused by the Prosecution regarding unscheduled incidents and proposed evidence on the general conditions of Sarajevo.¹⁴ In particular, the Defence notes that the category titled “sniping generally” contains two specific unscheduled incidents to which the witness is expected to testify which “are exactly the superfluous and unnecessary evidence which the Pre-Trial Chamber ordered to be excluded decision.”¹⁵

⁶ Prosecution Submission, para. 6 referring to Rule 73 *bis* Decision, paras 8, 13.

⁷ Prosecution Submission, paras 8-12.

⁸ Prosecution Submission, para. 8.

⁹ Mr. Perišić’s Response to Submission on Interpretation of the Trial Chamber’s Decision of 15 May 2007 on Application of Rule 93 *bis* and Amendment of Indictment, with Confidential Annex A and Public Annex B, filed publicly on 30 October 2008 (“Response”).

¹⁰ Response, paras 8, 13 and 14 with the relevant quotations of the Rule 73 *bis* Decision.

¹¹ Response, para. 11.

¹² Response, para. 11.

¹³ Response, para. 14.

¹⁴ Response, para. 19.

¹⁵ Response, paras 18-20.

7. The Defence also notes that the Prosecution fails to acknowledge or discuss the fact that the Trial Chamber has already admitted 285 adjudicated facts relevant to Sarajevo, which “certainly addresses the concern ‘to prove the campaign’”.¹⁶

8. Finally, in the Defence’s view, reconsideration of this issue at this late stage is both unfair and prejudicial to the Accused who has relied on the Rule 73 *bis* Decision as to how the case against him shall proceed.¹⁷

III. DISCUSSION

9. At the outset, the Trial Chamber is satisfied that the determinations made by the Pre-Trial Chamber in the Rule 73 *bis* Decision are clearly based on an analysis of the 65 *ter* Witness Summaries.¹⁸ Within those summaries, the Prosecution distinguished between three main areas of expected testimony: scheduled incidents; unscheduled incidents and evidence related to the campaign of sniping and shelling.

10. The Trial Chamber therefore agrees with the submission of the Prosecution that the words “unscheduled incidents” as stated in Rule 73 *bis* Decision refers to unscheduled incidents described as such in 65 *ter* Witness Summaries.¹⁹ The Trial Chamber is also of the view that the Pre-Trial Chamber did not envisage evidence related to the campaign of sniping and shelling to constitute “unscheduled incidents”. This interpretation finds support in the reference made by the Rule 73 *bis* Decision to the relevant paragraphs of the Prosecution’s Pre-Trial Brief, which explicitly relates to the campaign of sniping and shelling, but does not mention “unscheduled incidents”.²⁰

11. The Trial Chamber further notes that the scheduled incidents listed in the Indictment need to be read in conjunction with paragraphs 40-46 of the Indictment, which refer to “a protracted campaign of shelling and sniping upon Sarajevo” resulting in the “killing and wounding [of] thousands of civilians.” It follows that in order to prove these broad allegations, the Prosecution must be able to lead evidence of a general nature related to the shelling and sniping campaign against civilians, outside of the incidents listed in Schedules A and B of the Indictment. This is also confirmed by the fact that the Accused is charged in Counts 1 to 4 with war crimes and crimes against humanity.²¹ In relation to the latter, it is well-established in the jurisprudence that the Prosecution must prove not only the underlying offences of those crimes (which are represented by

¹⁶ Response, para. 17.

¹⁷ Response, para. 21.

¹⁸ Rule 73 *bis* Decision, para. 8.

¹⁹ Prosecution Submission, para. 4.

²⁰ Rule 73 *bis* Decision, para. 17. *See* Prosecution Submission, paras 8-12.

²¹ Indictment, para. 46.

the scheduled incidents), but also the existence of a widespread or systematic attack on the civilian population.²²

12. In addition, the Pre-Trial Chamber ordered the Prosecution to not lead evidence specifically with respect to “terror” in relation to the Sarajevo counts. Although the Pre-Trial Chamber acknowledged the Prosecution’s assertion in its Pre-Trial Brief that “the nature or purpose of the aforementioned campaign was to spread terror among the civilian population of Sarajevo”, it also finds that “this does not justify the presentation of extensive evidence *on this aspect* of the campaign”.²³ Contrary to the Defence’s submission, this finding is an implicit admission that the Prosecution could lead evidence on other aspects of the campaign of shelling and sniping.

13. The Trial Chamber therefore agrees with the Prosecution Submission and finds that the Rule 73 *bis* Decision applies only to those unscheduled incidents identified as such in the 65 *ter* Witness Summaries. This understanding is already reflected in the Trial Chamber’s two decisions on adjudicated facts regarding Sarajevo, in which the Trial Chamber took judicial notice of facts related to the general campaign of sniping and shelling.²⁴

14. Finally, the Trial Chamber underscores that nothing in this Decision should be understood as a reconsideration of the Rule 73 *bis* Decision. The Trial Chamber is also satisfied that no prejudice to the Accused is caused by this Decision as he was already put on notice well in advance by the 65 *ter* Witness Summaries which make reference to unscheduled incidents in relation to which the Prosecution has to seek leave of the Trial Chamber.

IV. DISPOSITION

15. **FOR THE FOREGOING REASONS** and **PURSUANT TO** Rules 54 of the Rules, the Trial Chamber

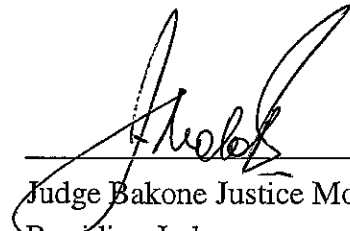
DECIDES that the term “unscheduled incidents” in the Rule 73 *bis* Decision shall be interpreted as those unscheduled incidents described as such in the Prosecution’s 65 *ter* Witness Summaries.

²² Statute of the Tribunal, Article 5; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 98.

²³ Rule 73 *bis* Decision, para. 16 (emphasis added).

²⁴ See Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, 26 June 2008; Decision on Second Motion for Judicial Notice of Facts Relevant to the Sarajevo Crime Base, 17 September 2008.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this thirty-first day of October 2008

At The Hague

The Netherlands

[Seal of the Tribunal]

²⁵ See Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, 26 June 2008; Decision on Second Motion for Judicial Notice of Facts Relevant to the Sarajevo Crime Base, 17 September 2008.