



Original : English

No.: ICC-01/04-01/06
Date: 23 November 2007

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR vs. THOMAS LUBANGA DYILO**

Public

**Prosecution's Submission of Authorities supporting the
withdrawal of a fact or element underpinning a charge**

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Introduction

1. In the present filing the Prosecution, pursuant to the authorisation of the Trial Chamber, submits a number of authorities which support the possibility discussed during the status conference on 20 November 2007, to withdraw specific elements of the charges added by the Pre-Trial Chamber.

Procedural Background

2. Pursuant to orders of the Trial Chamber,¹ the Prosecution filed submissions relating to, *inter alia*, the status of decisions of the Pre-Trial Chamber on 12 September 2007.² The Defence³ and the Legal Representatives of Victims⁴ filed submissions on 16 November 2007.
3. On 20 November 2007, the Trial Chamber held a status conference, to discuss these issues.⁵
4. At this hearing, the Prosecution stated it was ready to lead all relevant evidence in its possession relating to the armed conflict, including both potentially internationalized and non-international aspects of the conflict in order to provide clarity at the outset that the Prosecution's case contains both possibilities. The Prosecution further submitted that if, after the presentation of the evidence, the Trial Chamber were to conclude that the evidence presented might also establish the crime included in Article 8(2)(e)(vii), then the Chamber could apply this provision, resorting to Regulation 55 if necessary.⁶ Alternatively, it was submitted that the Chamber could provide early notice to participants under Regulation 55, in order again to ensure that all participants are on full notice from an early stage

¹ ICC-01/04-01/06-936, 18 July 2007; and ICC-01/04-01/06-947, 5 September 2007.

² ICC-01/04-01/06-953.

³ ICC-01/04-01/06-1033.

⁴ ICC-01/04-01/06-1030; ICC-01/04-01/06-1034 (although filed on 16 November, this document was not registered or notified until 19 November).

⁵ ICC-01/04-01/06-T-61-ENG. On the issue of the recharacterisation of the armed conflict by the Pre-Trial Chamber, see pp. 36-58 and 62-71.

⁶ See e.g. ICC-01/04-01/06-T-61-ENG, pp. 41[1] – [18], 44[12] – [15], 64[21] – 65[3].

of the potential recharacterisation of the charges (from Article 8(2)(b)(xxvi) to 8(2)(e)(vii)).⁷ Finally, the Prosecution also submitted that should the Chamber consider the proprio motu amendment of the charges to be null and void, the Chamber could disregard that confined part of the Confirmation Decision while maintaining its valid portions.⁸

5. In addition, during the status conference the Presiding Judge raised the possibility to withdraw the charge or the charges, pursuant to Article 61(9).⁹ In connection with this possibility, the issue of partial withdrawal of the charges was raised during the hearing.¹⁰ The Chamber enquired whether there was material supporting such a partial withdrawal of charges, and granted the Prosecution leave to file any such material by 4.00pm on 23 November 2007.¹¹
6. The Prosecution hereby files material from the ICTY supporting the possibility of withdrawing part of a charge. The Prosecution understands “partial withdrawal of charges” to mean the withdrawal of specific factual allegations or elements from the charges, which may result in a change of the legal characterisation, without withdrawing the whole charge or a particular count.

Authorities

7. A brief survey of the ICTY jurisprudence demonstrates that the possibility of partial withdrawal of charges is broadly accepted, despite the fact that the relevant provision of the Rules of Procedure and Evidence of the ICTY makes reference only to “the indictment”.¹² The partial withdrawal of charges by the

⁷ See e.g. ICC-01/04-01/06-T-61-ENG, pp. 44[16] – 45[1], 65[3] – [11].

⁸ See e.g. ICC-01/04-01/06-T-61-ENG, pp. 45[19] – 47[4], 63[6] – 64[18].

⁹ See e.g. ICC-01/04-01/06-T-61-ENG, p. 36[15]ff. The Prosecution had foreshadowed that other remedies might be available, including the possibility of applying to withdraw an element of the charges pursuant to Article 61(9), and had expressed its willingness to explore such further possibilities and assist the Chamber with supplementary submissions (if necessary) in its original filing (ICC-01/04-01/06-953, footnote 43).

¹⁰ See e.g. ICC-01/04-01/06-T-61-ENG, pp. 64[6] – [18], 65[21] – 66[15].

¹¹ See ICC-01/04-01/06-T-61-ENG, pp. 66[23] – 67[15].

¹² See ICTY Rules of Procedure and Evidence, Rule 50 (Amendment of Indictment) and Rule 51 (Withdrawal of Indictment).

Prosecution has been linked to the Prosecution's right to prepare and present its case in the manner that it considers to be the most adequate.¹³

8. In the very first case tried before the ICTY, the trial against *Duško Tadić*, the prosecution charged the accused with 34 counts.¹⁴ Count 1 (persecution) was based on a wide array of crimes committed during different periods of time.¹⁵ Among other things, the prosecution alleged that:

“[d]uring the period between September 1992 and December 1992, in Trnopolje camp or in the adjacent area, TADIC physically took part or otherwise participated in the killing of more than 30 detainees, including groups of male detainees executed near a white house adjacent to the camp and a group of male detainees executed in a plum orchard adjacent to the camp. TADIC also physically took part or otherwise participated in the torture of more than 12 female detainees, including several gang rapes, which occurred both in the camp and at a white house adjacent to the camp”.¹⁶

These allegations were supported only by the testimony of one witness. During trial, aspects of the testimony of that witness were revealed which led the Prosecution to state in open court that it did not consider him a witness of truth and to submit a motion to withdraw these allegations.¹⁷ In the Trial Judgement, the Trial Chamber found that these allegations were therefore no longer part of the charges against the accused.¹⁸ The Trial Chamber nevertheless convicted the accused on count 1 of the crime of persecution basing its conviction on the remaining factual allegations included in paragraph 4 of the indictment.¹⁹

¹³ In the case against *Mile Mrškić*, the accused argued after the joinder of his case and filing of a consolidated indictment that the Prosecution must provide further explanation, “in particular the withdrawal of allegations that appeared in the Second Amended Indictment.” In denying the request for explanation, the Trial Chamber held that “The Prosecution is free to plead its case as it sees fit, as long as it sets out the material facts that will allow the Defence to meet the case.” - *Prosecutor v Mrškić et al*, IT-95-13/1-PT, Decision on Form of Consolidated Amended Indictment and on Prosecution Application to Amend, 23 January 2004, para. 14: <http://www.un.org/icty/mrksic/trialc/decision-e/040123.htm>.

¹⁴ *Prosecutor v. Tadić*, IT-94-1-I, Indictment (Amended), 14 December 1995: <http://www.un.org/icty/indictment/english/tad-2ai951214e.htm>.

¹⁵ Indictment (Amended), para. 4.

¹⁶ Indictment (Amended), para. 4.3.

¹⁷ *Prosecutor v. Tadić*, IT-94-1-T Opinion and Judgement, 7 May 1997, para. 452: <http://www.un.org/icty/tadic/trialc2/judgement/tad-ts70507JT2-e.pdf>.

¹⁸ *Ibid.*, para. 452.

¹⁹ *Ibid.*, paras. 714-718.

9. In the case against *Enver Hadžihasanović et al*, the initial indictment pleaded that “At all times relevant to this indictment, a state of international armed conflict and partial occupation existed in Bosnia and Herzegovina”.²⁰ The Prosecution was, *inter alia*, “ordered to amend the indictment to clearly state between which states it is alleging an international armed conflict existed”.²¹ However the amended indictment did not clarify matters as ordered; rather, the Prosecution merely pleaded that “At all times relevant to this indictment, an armed conflict existed on the territory of Bosnia and Herzegovina.”²² Thus the Prosecution, without seeking the permission of the Chamber, withdrew the allegation that the armed conflict had been international in character. The underlying conduct relating to the crimes pleaded remained the same; however, because the allegation that the conflict was international had been withdrawn, the legal characterisation of the crimes was also changed.²³ Both the Appeals Chamber²⁴ and the Defence²⁵ characterised the actions of the Prosecution as a withdrawal of the allegations that the armed conflict was international.

²⁰ *Prosecutor v Hadžihasanović et al*, IT-01-47, Indictment, 13 July 2001, para. 46:

<http://www.un.org/icty/indictment/english/had-ii010713e.htm>

²¹ *Prosecutor v Hadžihasanović et al*, IT-01-47-PT, Decision on Form of the Indictment, 7 December 2001, para. 29: <http://www.un.org/icty/hadzihas/trialc/decision-e/11207FI216966.htm>. The Prosecution was also ordered to clarify or strike out its allegations relating to the partial occupation (paras. 30-38) and to make other amendments relating to the pleading of command responsibility, alleged imprecision in the indictment, and reorganising the structure of the indictment.

²² *Prosecutor v Hadžihasanović et al*, IT-01-47-PT, Amended Indictment, 11 January 2002, para. 11: <http://www.un.org/icty/indictment/english/had-ai020111e.htm>. This formulation remained through to the Third Amended Indictment, 26 September 2003, para. 8: <http://www.un.org/icty/indictment/english/had-3ai030926e.htm>

²³ The number of counts also changed, as the change in characterization of the armed conflict meant that counts based on the grave breaches provision were no longer an option. The underlying conduct pleaded remained the same, however, with the exception that some conduct was pleaded with slightly more specificity, and one set of counts (hostages and unlawful labour), fell away entirely.

²⁴ *Prosecutor v Hadžihasanović et al*, IT-01-47-AR72, Decision Pursuant to Rule 72(E) as to Validity of Appeal, 21 February 2003, para. 12 (“Following the withdrawal of both the Article 2 charges and the express allegation in the original indictment that the armed conflict was international in character”): <http://www.un.org/icty/hadzihas/appeal/decision-e/030221.htm>

²⁵ *Prosecutor v Hadžihasanović et al*, IT-01-47-T, Decision on Defence motion regarding cross-examination of witnesses by the Prosecution, 9 December 2004 (“NOTING that, in support of its request, the Defence submits ... v) that, at its own initiative, the Prosecution withdrew the allegation of an international armed conflict mentioned in the initial Indictment of 5 July 2001”): <http://www.un.org/icty/hadzihas/trialc/decision-e/041209.htm>. The Trial Chamber appeared to accept this characterisation as a withdrawal of specific allegations.

10. Furthermore, in this same case against *Enver Hadžihasanović et al*, the Prosecution withdrew the allegations relating to the commission of wanton destruction crimes (counts 5 and 6) at one particular crime-site (Dusina).²⁶ The withdrawal was made in the Prosecution's Pre-Trial Brief,²⁷ did not amend the indictment,²⁸ and does not appear to have been challenged by the Chamber.
11. In the case against *Radoslav Brđanin*, the accused was charged with 12 counts for crimes pertaining to 16 municipalities. The Prosecution later withdrew the charges in respect of Bihać-Ripač, Bosanska Dubica and Bosanska Gradiška municipalities, but maintained all 12 counts of the indictment.²⁹ The Trial Chamber took notice of the above and found that there is no case to answer in relation to the incidents charged to have occurred in these municipalities. The Trial Chamber ruled that the incidents in question are being struck from the indictment.³⁰ Accordingly, the amended indictment filed by the Prosecution, while containing the same 12 counts, it does not include any allegations with respect to crimes committed in the municipalities of Bihać-Ripač, Bosanska Dubica and Bosanska Gradiška.³¹ The amendment affected the factual basis of all 12 counts of the indictment.³²

²⁶ See *Prosecutor v Hadžihasanović et al*, IT-01-47-T, Decision on Motions for Acquittal pursuant to Rule 98bis, 27 September 2004, paras. 111 and 132: <http://www.un.org/icty/hadzihas/trialc/judgement/index.htm>

²⁷ Para. 135 of which simply states "The Prosecution does not intend to proceed on these allegations": <http://www.un.org/icty/had-3ai030926e.htm>

²⁸ Dusina is still listed under the relevant counts 5 and 6 in the Third Amended Indictment:

<http://www.un.org/icty/indictment/english/had-3ai030926e.htm>

²⁹ See *Prosecutor v. Brđjanin*, IT-99-36-T, Judgement, 1 September 2004, footnote 2, referring to part A of Appendix C to the "Prosecutor's Response to the 'Motion for Judgement of Acquittal – Rule 98bis'", 2 October 2003. See also para. 965 of the Trial Judgement: <http://www.un.org/icty/brdjanin/trialc/judgement/brd-tj040901e.pdf>.

³⁰ See transcript of 9 October 2003, during which the Trial Chamber rendered its oral decision on the Prosecution's Motion for Judgement of Acquittal – Rule 98bis, (T-20784): <http://www.un.org/icty/transe36/031009ED.htm>.

³¹ *Prosecutor v. Brđjanin*, IT-99-36-T, Sixth Amended Indictment, 9 December 2003: <http://www.un.org/icty/indictment/english/brd-6ai031209e.htm>.

³² See in comparison: *Prosecutor v. Brđjanin*, IT-99-36-T, Fifth Amended Indictment, 7 October 2002: <http://www.un.org/icty/indictment/english/brd-5ai021007e.htm>. Count 1 (genocide) and count 2 (complicity in genocide), see para. 38. Count 3 (persecution), see para. 47. Count 4 (extermination) and count 5 (wilful killing), see reference to paras. 38 and 42 in para. 49. Counts 6 and 7 (torture), see reference to para. 42 in para. 53. Counts 8 and 9 (deportation), see reference to para. 42 in para. 53. Counts 10-12 (unlawful and wanton extensive destruction and appropriation of property; wanton destruction or devastation of villages), see reference to para. 47 in para. 61.

12. During the trial against *Mitar Vasiljević*, the Prosecution led evidence on a particular killing incident to establish the widespread and systematic attack against the civilian population of Višegrad and the accused's link with a particular paramilitary group. The accused was not charged with that specific killing incident. The only witness to testify about this incident was Witness VG-115, who described the killing incident and identified the accused as one of the perpetrators. During cross examination, the witness refused to reveal the name of the person who was witnessing the incident together with her. As a consequence, the Prosecution agreed to "withdraw any reference of this incident". The Trial Chamber accordingly ruled to "exclude this incident from [its] consideration".³³
13. In the trial against *Naser Orić*, the indictment charged the accused with four counts of wanton destruction of cities, towns or villages not justified by military necessity, and plunder of public or private property.³⁴ The crime base for these counts included, among other things, the alleged attack by the TO on the village of Rupovo Brod on 10 June 1992.³⁵ Shortly before the commencement of the trial, the prosecution submitted a motion to the Trial Chamber seeking leave to withdraw the allegations in relation to the attack on this village.³⁶ The Trial Chamber granted the motion orally and instructed the prosecution to "remove [...] all factual allegations pertaining to the village of Rupovo Brod and thus remove paragraph 30 and strike off reference to Rupovo Brod from paragraph 36 of the indictment".³⁷ The second amended indictment filed by the prosecution

³³ See *Prosecutor v. Vasiljević*, IT-98-32, transcript of hearing of 26 September 2001: <http://www.un.org/icty/transe32/010926ED.htm>. Evidence on the incident, see T.1033[21] - T.1035[16]. Relevant sections during cross-examination, see T.1054[5] – T.1055[18]. Withdrawal of the incident, see T.1071[16-23]. Ruling of the Trial Chamber, see T.1071[24] – T.1072[2].

³⁴ *Prosecutor v. Orić*, IT-03-68-PT, Amended Indictment, 23 July 2003, counts 3-6, paras. 27-38: <http://www.un.org/icty/indictment/english/ori-ai030723e.htm>.

³⁵ *Ibid.*, para. 30.

³⁶ *Prosecutor v. Orić*, IT-03-68-PT, Prosecution's Motion for Leave to Amend the Amended Indictment, 23 September 2004. In the same motion, the prosecution also requested the Trial Chamber be permitted to alter the characterisation of the conflict in BiH from an 'international armed conflict' to an 'armed conflict'.

³⁷ *Prosecutor v. Orić*, IT-03-68-PT, transcript of hearing pre-trial conference held on 28 September 2004, T.110[6-19]: <http://www.un.org/icty/transe68/040928IT.htm>. The Trial Chamber further instructed to Prosecution to "amend [...] the indictment by pleading an armed conflict rather than an international armed conflict".

complied with the instructions of the Trial Chamber. Counts 3-6 of the indictment remained otherwise unaltered.³⁸

14. In the *Krnojelac* case, the indictment charged the accused with, among other crimes, three counts of enslavement.³⁹ Under these counts, the Prosecution alleged that detainees were required to perform various tasks in the KP Dom prison kitchen, as well as in other areas such as the furniture factory and the metal and mechanical workshop.⁴⁰ However, the Prosecution's Final Trial Brief indicated that allegations as to being required to work in the kitchen were not charged as enslavement,⁴¹ leading the Trial Chamber to "regar[d] this indication as a withdrawal of those charges."⁴² The Trial Chamber nevertheless considered the remaining factual allegations in the same paragraph in reaching a finding on the counts of enslavement.⁴³

15. In the case against *Milomir Stakić*, the accused was charged with five counts of genocide, complicity in genocide, murder, and extermination; one count of persecution and two counts of deportation and inhumane acts.⁴⁴ During the trial, the Presiding Judge expressly requested that the Prosecution consider withdrawing certain factual allegations relating to charges.⁴⁵ As the Prosecution's case at trial drew to a close, the Prosecution filed a document conceding that there was insufficient evidence as to four allegations contained in the Fourth Amended

³⁸ *Prosecutor v. Orić*, IT-03-68-PT, Second Amended Indictment, 1 October 2004: <http://www.un.org/icty/indictment/english/ori-2ai041004e.htm>. See also *Prosecutor v. Orić*, IT-03-68-T, Judgement, 30 June 2006, para. 790, which summarizes the above: <http://www.un.org/icty/oric/trialc/judgement/ori-jud060630e.pdf>.

³⁹ *Prosecutor v. Krnojelac*, IT-97-25-I, Third Amended Indictment, 25 June 2001, paras. 5.41-5.46, Counts 16-18: <http://www.un.org/icty/indictment/english/krn-3ai010625e.htm>

⁴⁰ *Ibid*, paras. 5.43.

⁴¹ *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, 15 March 2002, para. 379 (citing Prosecution Final Trial Brief, para. 160, fn 521): <http://www.un.org/icty/krnjelac/trialc2/judgement/index.htm>

⁴² *Ibid*, para. 379.

⁴³ *Ibid*, paras. 380 – 392. The Trial Chamber in its final judgement reached findings on count 16 (enslavement) and count 18 (slavery) both of which had the same factual basis, which was in part withdrawn by the Prosecution, as described above. Count 17 of the indictment was withdrawn independently from the above withdrawal of facts, as a consequence of a general withdrawal by the Prosecution of all counts which were charged as grave breaches (*Ibid*, para. 541, last sentence).

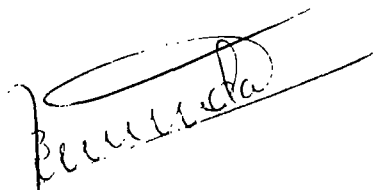
⁴⁴ *Prosecutor v. Stakić*, IT-97-24-PT, Fourth Amended Indictment, 10 April 2002, paras. 39-59: <http://www.un.org/icty/indictment/english/sta-4ai020410e.htm>.

⁴⁵ See transcript of 2 September 2002, T-7204, <http://www.un.org/icty/transe24Stakic/020902IT.htm>.

Indictment,⁴⁶ and therefore requesting permission to withdraw these specific allegations.⁴⁷ The Trial Chamber granted permission orally during a discussion between the Chamber and the parties in open court prior to the close of the Prosecution case,⁴⁸ and the Fourth Amended Indictment, with the same counts, remained in effect.⁴⁹

Conclusion

16. The Prosecution submits that these authorities demonstrate that Trial Chambers in the ICTY have permitted the Prosecution to withdraw certain elements within a charge without withdrawing the entirety of that charge, including withdrawing the characterisation of the relevant armed conflict as international. Without prejudice to the other avenues presented by the Prosecution, as recalled in paragraphs 2–6 above, the Prosecution requests that the Trial Chamber consider these authorities within the context of the options before it in its determination of the status of the Pre-Trial Chamber's amendment of the charges in the Confirmation Decision.



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Prosecutor

Dated this 23rd day of November, 2007
At The Hague, The Netherlands

⁴⁶ *Prosecutor v. Stakić*, IT-97-24-T, Prosecution Notice of Specific Allegations From the Fourth Amended Indictment Which Are Conceded as Not Proven, 30 September 2002. Specifically regarding a particular instance of murder alleged under the genocide and alternative counts (para. 2), and regarding destruction, willful damage, and looting of the town of Rakovcani, or of the destruction of two particular mosques which were alleged under the persecution count (paras. 3-4).

⁴⁷ *Prosecutor v. Stakić*, IT-97-24-T, Prosecution Notice of Specific Allegations From the Fourth Amended Indictment Which Are Conceded as Not Proven, 30 September 2002, para. 5.

⁴⁸ See transcript of 1 October 2002, T-8949, <http://www.un.org/icty/transe24Stakic/021001IT.htm>.

⁴⁹ See *Prosecutor v. Stakić*, IT-97-24-T, Judgement, 31 July 2003, paras. 499-868: <http://www.un.org/icty/stakic/trialc/judgement/index.htm>