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# The Impact of the Size, Scope, and Scale of the Milošević Trial and the Development of Rule 73bis before the ICTY

Gillian Higgins\*

“Today, as never before, we see international justice in action.”  
Carla Del Ponte, February 12, 2002

## I. INTRODUCTION

¶1 The death of Slobodan Milošević in his cell on March 11, 2006 at the United Nations Detention Unit in The Hague brought an end to a trial that had lasted more than four years. The news of his death was shocking, and yet not wholly unexpected. It prompted instant worldwide analysis of his trial before the International Criminal Tribunal for the former Yugoslavia (ICTY) and the question of whether or not things should have been done differently. He was charged with sixty-six counts in three indictments (Kosovo, Croatia and Bosnia) including war crimes, crimes against humanity and genocide. It was alleged that he was individually criminally responsible for having planned, instigated, ordered, aided and abetted and/or committed the crimes pursuant to a joint criminal enterprise (JCE).<sup>1</sup> He was also charged pursuant to

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<sup>1</sup> The Statute of ICTY does not explicitly codify the concept of joint criminal enterprise (JCE). Rather the Appeals Chamber in Tadić introduced JCE in its Judgment in July 1999 and elaborated on the concept. The Appeals Chamber in Tadić determined that there are three types of JCE. All three forms share the following actus reus elements: (i) a plurality of persons; (ii) the existence of a common plan, design or purpose which need not be previously arranged or formulated and which amounts to or involves the commission of a crime under the Statute; and (iii) the participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. The

the doctrine of superior responsibility. The size and scope of the sixty-six count indictment spanning a ten year period of war has raised legitimate questions about the propriety and fairness of such mega-trials.

¶2

This article examines the impact of the scale of the *Milošević* indictment and the subsequent positive development and application of increased judicial powers under Rule 73bis at the ICTY to control the presentation of the prosecution's case in chief. Rule 73bis was introduced into the Rules of Procedure and Evidence of the ICTY in July 1998, after the trial of the first defendant, Duško Tadić.<sup>2</sup> The aim of the Rule is to expedite and improve the management of pre-trial and trial proceedings.<sup>3</sup> Under Rule 73bis, at the pre-trial conference, the trial chamber has the power to call upon the prosecution to shorten the estimated length of the examination-in-chief of witnesses, and determine the number of witnesses the prosecution may call as well as the time available for the presentation of evidence.<sup>4</sup> In July 2003, the scope

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mens rea element distinguishes the three forms of liability. The first category requires the shared intent on the part of all members of the group to perpetrate the crime. Under the second category, which relates to systems of ill-treatment, such as detention camps, the accused must have personal knowledge of the system of ill-treatment as well as the intent to further the system. In the third category, the accused must intend to participate in and further the criminal activity of the group and to contribute to the JCE. For liability for crimes falling outside the common plan to be attributed to the accused, it must be foreseeable that a member of the group might perpetrate the crime and the accused must willingly take that risk. See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶¶ 185-237 (July 15, 1999). For a more general explanation of the concept, see Verena Haan, *The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia*, 5 *Int'l. Crim. L. Rev.* 167 (2005). See also Antonio Cassese, *The Oxford Companion to International Criminal Justice* 391-96 (Oxford University Press 2009).

<sup>2</sup> Duško Tadić was a Bosnian Serb from the Municipality of Prijedor in Bosnia. Prijedor was violently taken over by the Serbian Democratic Party together with Bosnian Serb forces on April 30, 1992. During this takeover, Bosnian Serb forces committed crimes against non-Serbs. Duško Tadić was charged with 31 counts alleging grave breaches, war crimes and crimes against humanity committed against Bosnian Muslims and Bosnian Croats between May 23 and December 31, 1992 in Prijedor.

<sup>3</sup> JOHN R.W.D. JONES & STEVEN POWLES, *INTERNATIONAL CRIMINAL PRACTICE* 692 (Transnational Publishers 2003).

<sup>4</sup> ICTY Rules of Procedure and Evidence, IT/32/Rev. 41, Rule 73bis(B), (C) (Feb. 28, 2008), available at [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_Rev41\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev41_en.pdf).

of Rule 73bis was expanded significantly. Rule 73bis(D) was added to allow the trial chamber to fix the number of crime sites or incidents comprised in one or more of the charges with respect to which evidence may be presented by the prosecution before the beginning of a trial. In May 2006, two months after the death of Slobodan Milošević, Rule 73bis was amended in order to provide trial chambers with the power to “invite the Prosecutor to reduce the number of counts charged in the indictment” and “direct the Prosecutor to select the counts in the indictment on which to proceed.”

¶3 The author argues that the development and proactive application of Rule 73bis in post-*Milošević* trials represents a positive and necessary step towards the prevention of unwieldy and overly complicated international criminal proceedings. Given the importance of the Rule 73bis powers as essential tools for judges at the pre-trial stage, the author advocates that similar powers, as appropriate, should be introduced and proactively used in other international and internationalized courts and tribunals.

## II. THE SCALE OF THE *MILOŠEVIĆ* INDICTMENT AND ISSUES OF MANAGEABILITY

¶4 The trial of Slobodan Milošević began on February 12, 2002. On the first day of trial, Carla Del Ponte, Chief Prosecutor, correctly predicted that the trial would “challenge the very capacity of a modern criminal court to address crimes which . . . extend so far in time and place” and would “test the criminal justice process.”<sup>5</sup>

¶5 The Kosovo indictment alleged that between January and June 1999, forces of the Federal Republic of Yugoslavia (FRY) and Serbia, acting at the direction of or with the support of Mr. Milošević, executed a campaign of terror directed at Kosovo Albanian civilians with the objective of expelling a substantial portion of them from Kosovo to ensure Serbian control over the province. Mr. Milošević was charged on the basis of his *de jure* position as President of the FRY, Supreme Commander of the armed forces of the FRY (VJ), President of the Supreme Defence Counsel and his *de facto* authority. The Croatia indictment alleged

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<sup>5</sup> Transcript of Prosecutor’s Opening Statement at 5, *Prosecutor v. Milošević*, Case No. IT-02-54-T (Feb. 12, 2002).

*inter alia* that Mr. Milošević participated in a joint criminal enterprise between 1991 and 1992, the purpose of which was the forcible removal of the majority of the Croat and other non-Serb population from approximately one-third of the territory of Croatia. In the Bosnia indictment, the prosecution alleged that Mr. Milošević acted alone and with other members of a joint criminal enterprise to commit crimes by *inter alia* (i) exerting control over the JNA and the VJ which participated in the planning and forcible removal of the majority of non-Serbs; (ii) providing financial, logistical and political support to the Bosnian Serb army (VRS), the special forces of the Republic of Serbia MUP and the Serbian irregular forces or paramilitaries; and (iii) exercising substantial influence over and assisting the political leadership of Republika Srpska. A couple of months before the start of the trial, the prosecution applied to join the three separate indictments on the basis that they all concerned the same transaction. Namely, Mr. Milošević attempted to create a “Greater Serbia”—a centralized Serbian state encompassing the Serb-populated areas of Croatia and Bosnia and Herzegovina, and all of Kosovo, and was alleged to have committed multiple crimes in the process.<sup>6</sup>

¶6 The prosecution claimed that joinder would ensure that the “accused receives a fair and expeditious trial”<sup>7</sup> and would also result in a “shorter and more consolidated overall trial timetable.”<sup>8</sup> Joinder would “avoid inconsistent verdicts and sentences and multiple appeals that may result if the Indictments [were to be] . . . tried piece-meal by different Trial Chambers.”<sup>9</sup> The prosecution estimated that it would seek to call between 483 and 600 witnesses during a trial lasting either three hundred days in total or about three years.<sup>10</sup>

¶7 Concerned by both the impact of such a trial upon Mr. Milošević and the overall manageability of the case, the *Amici Curiae* advised the Chamber that it would have to “consider the

<sup>6</sup> See Prosecutor v. Milošević, Case Nos. IT-99-37-PT, IT-01-50-PT, & IT-01-51-I, Prosecution’s Motion for Joinder (Nov. 27, 2001).

<sup>7</sup> *Id.* ¶ 7.

<sup>8</sup> *Id.* ¶ 32.

<sup>9</sup> *Id.* ¶ 7.

<sup>10</sup> The reference to 483 witnesses can be located in the Pre-Trial Conference transcript. Transcript of Pre-Trial Conference at 125-27, Prosecutor v. Milošević, Case No. IT-02-54-T (Oct. 30, 2001). For the reference to 600 witnesses, see Prosecutor v. Milošević, Case Nos. IT-99-37-PT, IT-01-50-PT, & IT-01-51-I, Prosecution’s Motion for Joinder, ¶ 41 (Nov. 27, 2001).

extreme scale of the single trial exercise and whether [it was] able to deal adequately with all the charges within the 3 indictments.”<sup>11</sup> Mr. Milošević took the position that it would soon “become clear on what shaky legs this whole thing [stood].”<sup>12</sup>

¶8

The Trial Chamber ordered the Kosovo Indictment to be tried separately and allowed the joinder of the Croatia and Bosnia Indictments to be tried subsequently. The Trial Chamber did not accept the prosecution’s theory of the Greater Serbia golden thread and observed that no mention of a Greater Serbia plan appeared in the Kosovo indictment and that it was only in relation to other individuals that the plan was mentioned in the Bosnia and Croatia Indictments. The Trial Chamber considered that nexus too nebulous to point to the existence of a common scheme, strategy or plan required for the same transaction test under Rule 49 of the Rules of Procedure and Evidence. The Chamber noted that a gap of more than three years had elapsed between the last events in Bosnia and the first events in Kosovo.<sup>13</sup> It opined that in contradistinction to the conflict in Kosovo, the conflicts in Croatia and Bosnia did not take place in the Federal Republic of Yugoslavia (FRY) but in neighboring states; and must be seen against the background of conflicts arising from the break-up of the former Yugoslavia. The Trial Chamber stated that on the other hand, the conflict in Kosovo occurred in a province of the FRY in

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<sup>11</sup> Prosecutor v. Milošević, Case Nos. IT-99-37-PT, IT-01-50-PT, & IT-01-51-I, *Amici Curiae* Response to the Prosecution Motion on Joinder, ¶ 10 (Dec. 5, 2001). The Trial Chamber ordered the appointment of *Amici Curiae* following Mr. Milošević’s assertion of his right to represent himself. Their role was not to represent the accused, but rather to provide assistance to the Chamber in ensuring the fairness of the trial. *See* Transcript of Status Conference at 15-18, Prosecutor v. Milošević, Case No. IT-99-37-PT (Aug. 30 2001); Prosecutor v. Milošević, Case No. IT-99-37-PT, Order Inviting Designation of Amicus Curiae (Aug. 30, 2001); Prosecutor v. Milošević, Case No. IT-99-37-PT, Order Concerning Amici Curiae (Jan. 11, 2002). The Chamber ordered that the *Amici* would assist the Trial Chamber by (i) making any submissions properly open to the accused by way of preliminary motions or objections to evidence during the trial and cross-examining witnesses as appropriate; (ii) drawing to the attention of the Trial Chamber any exculpatory or mitigating evidence; and (iii) acting in any other way considered appropriate in order to secure a fair trial. Prosecutor v. Milošević, Case No. IT-99-37-PT, Order Inviting Designation of Amicus Curiae, at 2 (Aug. 30, 2001).

<sup>12</sup> Transcript of Hearing on Prosecution’s Motion for Joinder at 140, Prosecutor v. Milošević, Case Nos. IT-99-37-PT, IT-01-50-PT, & IT-01-51-I (Dec. 11, 2001).

<sup>13</sup> Prosecutor v. Milošević, Case Nos. IT-99-37-PT, IT-01-50-PT, & IT-01-51-I, Decision on Prosecution Motion for Joinder, ¶ 42 (Dec. 13, 2001).

relation to which Mr. Milošević was alleged to have acted directly and was in *de jure* and *de facto* control of the VJ. The Chamber was particularly concerned that the weight of a single trial would be excessively onerous and prejudicial to Mr. Milošević and that the trial would become unmanageable.<sup>14</sup> Subsequently on appeal, the Appeals Chamber ordered the three indictments to be tried together on the basis that the acts alleged therein formed part of the same transaction. The Chamber placed a heavy responsibility on the prosecution to ensure that the single trial which it wanted did not “become unmanageable by overloading the Trial Chamber and the Defence with unnecessary material.”<sup>15</sup>

¶9 The Appeals Chamber acknowledged that the resulting trial would be undoubtedly long and complex and that the prosecution “must ensure that only essential evidence to prove its case is presented, and that inessential evidence is discarded.”<sup>16</sup> The Appeals Chamber warned that if the prosecution failed to discharge its responsibility, the Trial Chamber had sufficient powers to order the prosecution to reduce its list of witnesses to ensure that the trial remained as manageable as possible. The Appeals Chamber also left open the possibility that if:

with the benefit of hindsight it becomes apparent...that the trial has developed in such a way as to become unmanageable – especially if, for example, the prosecution is either incapable or unwilling to exercise the responsibility which it bears to exercise restraint in relation to the evidence it produces – it will still be open to the Trial Chamber at that stage to order a severance of the charges arising out of one or more of the three areas of the former Yugoslavia. Nothing in the present Decision or in these reasons will prevent it from doing so.<sup>17</sup>

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<sup>14</sup> *Id.* ¶¶ 43, 44.

<sup>15</sup> Prosecutor v. Milošević, Case Nos. IT-99-37-AR73, IT-01-50-AR73, & IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, ¶ 25 (Apr. 18, 2002).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* ¶ 26.

The Appeals Chamber determined that two successive trials would “inevitably take even longer” than a single trial.<sup>18</sup> The importance of breaks in the proceedings was reiterated in order to allow the parties to “marshal their forces and, if need be, for the unrepresented accused to rest from the work involved.”<sup>19</sup>

¶10 The Appeals Chamber explained that the “responsibility for the accused’s decision not to avail himself of defence counsel” could not be shifted to the Tribunal.<sup>20</sup> When asked for his opinion on the issue of joinder, the Appeals Chamber noted that the accused merely criticized the prosecution’s reliance upon reasons of judicial economy and stated that the prosecution “certainly don’t care whether I will be fatigued or not.”<sup>21</sup> Mr. Milošević was asked by the Appeals Chamber whether he would prefer to defend himself in a single trial. His reply was predictable: “how you are going to conduct your proceedings, that’s up to you. I will give you no suggestions regarding that.”<sup>22</sup>

¶11 In retrospect, His Honor Judge May’s pre-trial concerns that a single trial of the scale sought by the prosecution would not be “manageable” were well-founded.<sup>23</sup> On numerous occasions

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<sup>18</sup> *Id.* ¶ 27.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Transcript of Trial Chamber Hearing at 134, Prosecutor v. Milošević, Case Nos. IT-99-37-PT, IT-01-50-PT, & IT-01-51-I (Dec. 11, 2001).

<sup>22</sup> Transcript of Interlocutory Appeal Hearing at 352, Prosecutor v. Milošević, Case Nos. IT-99-37-AR73, IT-01-50-AR73, & IT-01-51-AR73 (Jan. 30, 2002).

<sup>23</sup> Transcript of Trial Chamber Hearing at 89, Prosecutor v. Milošević, Case Nos. IT-99-37-PT, IT-01-50-PT, & IT-01-51-I (Dec. 11, 2001). His Honour Judge May: “And there is, of course, behind all this - while I am dealing with these matters - there is behind all this the manageability of the trial. I know you haven’t reached that, and no doubt you will, of course, address us on it, but the sort of trial which you are arguing for, involving some 600 witnesses and lasting - I don’t know how long you anticipate, Mr. Nice - but lasting some two to three years, is not one which at the moment would appear to be very manageable.” This concern was also voiced by the *Amici Curiae* during the interlocutory appeal hearing on 30 January 2002 by Mr. Kay QC: “Another of our arguments which we left very much with the Judges and did feature in their judgment was the unmanageability of the case, whether the Judges felt that handling all those three issues, three indictments, that they were given birth to individually, they were considered separately, dealing with all those three at the same time, it was a matter, as we saw it, for the Judges to decide whether what had been presented to them by the Office of the Prosecutor in their conduct of the matter, whether that was manageable in the form that was being presented before the Court.” Transcript of Interlocutory Appeal Hearing at 369, Prosecutor v. Milošević, Case Nos. IT-99-37-AR73, IT-01-50-AR73, & IT-01-51-AR73 (Jan. 30, 2002).

throughout the proceedings, Mr. Milošević complained about the overwhelming volume of prosecution disclosure and the crushing scale of the case. Mr. Milošević also protested the inability of the system to handle the timely translation of the amount of potential evidence he wanted to use at trial.

¶12 During the presentation of the prosecution's case, it became clear that even the resources of the Office of the Prosecutor could not cope with the procedural burdens generated by the scale of trial it had requested. The prosecution applied to change its witness list on at least thirty separate occasions and sought numerous extensions of time in which to present its case.<sup>24</sup> Even after 250 days of hearing, nineteen months of trial and 244 witnesses, the prosecution had still not produced a definitive witness list with respect to those witnesses it intended to call for the remainder of its case.<sup>25</sup> Neither had the prosecution provided a similarly definitive exhibit list.<sup>26</sup> The procedural and substantive demands of the trial upon all parties were excessive.

¶13 On a practical level, a brief overview of the number of exhibits, transcripts, filings and prosecution disclosure reveals the extraordinary amount of material which had to be processed during the trial. By November 2005, the prosecution had served in excess of 1.2 million pages of disclosure. Transcripts of the proceedings exceeded 46,000 pages. The trial record consisted of more than 85,000 pages of prosecution exhibits and over 100 videos. The written filings amounted to 2,600 separate briefs, motions, replies and responses.

¶14 In terms of legal analysis, the scale of the sixty-six count indictment consisted of twenty-three different types of crimes

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<sup>24</sup> See, e.g., Prosecutor v. Milošević, Case No. IT-02-54-T, Prosecution's Motion for Leave to Amend the Witness List and Request Protective Measures for Sensitive Source Witnesses (Feb. 5, 2003); Prosecutor v. Milošević, Case No. IT-02-54-T, Prosecution's Further Omnibus Motion for Leave to Amend the Witness List and Request Protective Measures for Sensitive Source Witnesses (Apr. 11, 2003); Prosecutor v. Milošević, Case No. IT-02-54-T, Prosecution's Third Omnibus Motion for Leave to Amend the Witness List and Request Protective Measures for Sensitive Source Witnesses (June 23, 2003); Prosecutor v. Milošević, Case No. IT-02-54-T, Order to the Prosecution to Finalise Its Witness List, (Sept. 30, 2003); Prosecutor v. Milošević, Case No. IT-02-54-T, Order to the Prosecution to Finalise Its List of Exhibits (Nov. 4, 2003).

<sup>25</sup> Prosecutor v. Milošević, Case No. IT-02-54-T, Order to the Prosecution to Finalise Its Witness List (Sept. 30, 2003).

<sup>26</sup> Prosecutor v. Milošević, Case No. IT-02-54-T, Order to the Prosecution to Finalise Its List of Exhibits (Nov. 4, 2003).

charged pursuant to two forms of individual criminal responsibility. The crimes included grave breaches of the Geneva Conventions, violations of the laws and customs of war, crimes against humanity and genocide. Mr. Milošević was charged pursuant to Article 7(1) of the Statute with having planned, instigated, ordered and committed crimes pursuant to a joint criminal enterprise with other individuals.<sup>27</sup> He was also charged under Article 7(3) with responsibility for the crimes of his subordinates as a superior who knew or had reason to know that the subordinates were about to commit the crimes.<sup>28</sup>

¶15 In terms of the complexity of the factual analysis of the evidence, one count of deportation in Kosovo encompassed allegations that Mr. Milošević was responsible for this particular crime in at least sixty-four different locations within thirteen municipalities, pursuant to eight different forms of conduct.

¶16 In addition to the scale of the documentation and the complexity of the factual and legal issues, the Trial Chamber was constantly confronted with issues of fairness which resulted directly from the extensive scope of the indictment. These issues included matters relating to the timely translation of documentation for production as potential exhibits in the trial, the disclosure of evidence and exculpatory material to the defendant, and the allocation of time for the examination and cross-examination of witnesses.

¶17 It is noteworthy that in the pre-trial phase in *Milošević*, the Chamber did not have the power to fix the number of crime sites or incidents in the indictment or invite the prosecution to reduce or select the counts on which to proceed.<sup>29</sup> The Chamber did, however, consider the possibility of severance of the Kosovo indictment to ensure that the trial would be “concluded in a fair

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<sup>27</sup> Prosecutor v. Milošević, Case No. IT-02-54-T, Second Amended Indictment [Croatia] (Oct. 23, 2002); Prosecutor v. Milošević, Case No. IT-02-54-T, Amended Indictment [Bosnia and Herzegovina] (Nov. 22, 2002); Prosecutor v. Milošević, Case No. IT-99-37, Indictment [Kosovo] (May 22, 1999).

<sup>28</sup> Prosecutor v. Milošević, Case No. IT-02-54-T, Second Amended Indictment [Croatia], at 5-6 (Oct. 23, 2002); Prosecutor v. Milošević, Case No. IT-02-54-T, Amended Indictment [Bosnia and Herzegovina], at 5-6 (Nov. 22, 2002); Prosecutor v. Milošević, Case No. IT-99-37, Indictment [Kosovo], at 11 (May 22, 1999).

<sup>29</sup> These amendments to Rule 73bis(D) were introduced on July 17, 2003 and May 30, 2006, respectively.

and expeditious manner” on two separate occasions.<sup>30</sup> Given the opposition to severance by the parties in 2004, the Chamber declined to consider the matter further until sixteen months later, when it became increasingly concerned by the length of the trial. At a hearing on November 29, 2005, both the prosecution and Mr. Milošević vehemently opposed severance.<sup>31</sup> Prior to the decision on severance, on December 8, 2005, the Trial Chamber held a further hearing to deal with the related question of time to be allotted to present the defense case. In February 2004, it had allotted Mr. Milošević the same amount of court time as the prosecution in which to present his case. During the hearing in December, however, Mr. Milošević requested an additional 380 hours. On December 12, 2005, the Trial Chamber rejected the defendant’s request and concluded that he had failed to take a reasonable approach to the presentation of his case. The Chamber determined that because its rejection of Mr. Milošević’s request “should lead to the conclusion of the trial within the anticipated time scale,” it was not appropriate to sever the Kosovo Indictment.<sup>32</sup>

¶18 Today, the question remains as to whether or not a severed Kosovo trial as originally contemplated by the Trial Chamber would have increased the fairness and expediency of the proceedings, bearing in mind the absence of pre-trial 73bis(D) and (E) powers in 2001. The Kosovo indictment, although factually intricate, contained only five counts. A trial on this indictment alone could have been concluded within a relatively short time. Support for this proposition is taken from an analysis of the time taken to try *six* defendants in the case of *Milutinović*, on the five Kosovo counts. The trial lasted only twenty-five months.<sup>33</sup> The

<sup>30</sup> Prosecutor v. Milošević, Case No. IT-02-54-T, Further Order on Future Conduct of the Trial Relating to Severance of One or More Indictments (July 21, 2004); Prosecutor v. Milošević, Case No. IT-02-54-T, Decision in Relation to Severance, Extension of Time and Rest (Dec. 12, 2005).

<sup>31</sup> Transcript of Trial Chamber Hearing at 46640-66, 46676-77, 46688-96, Prosecutor v. Milošević, Case No. IT-02-54-T (Nov. 29, 2005).

<sup>32</sup> Prosecutor v. Milošević, Case No. IT-02-54-T, Decision in Relation to Severance, Extension of Time and Rest, ¶ 27 (Dec. 12, 2005).

<sup>33</sup> Milan Milutinović, the former President of Serbia, was charged with five other defendants (Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten. Lukić) for crimes in Kosovo in 1999. Mr. Milutinović was acquitted on February 26, 2009. From the case information sheet on the ICTY website, the trial started on July 10, 2006 with closing arguments between August 19-27, 2008, available at

efficient management of this trial was undoubtedly increased as a result of the prudent use of pre-trial *73bis* powers to limit the number of incidents and crime sites on which evidence was led by the prosecution.

¶19 However, notwithstanding this difference, a focused trial on the allegations contained in the Kosovo indictment alone would have enabled Mr. Milošević to concentrate on one aspect of the conflict within clear temporal and geographical boundaries. Such focus would also have reduced the physical and mental burden of analysis and preparation upon Mr. Milošević, caused by the overwhelming disclosure of prosecution materials pertaining to all three territories (Kosovo, Croatia and Bosnia) covering a decade of war. At the conclusion of the Kosovo trial, the prosecution could then have considered whether or not it was in the *interests of justice* to try the defendant with respect to the other indictments pertaining to Bosnia and Croatia, and if so, when, given his right to adequate time to prepare his defense.

### III. COMPATIBILITY OF A SINGLE TRIAL WITH THE RIGHTS OF THE ACCUSED

¶20 From the defense perspective, one fundamental question is whether or not a single trial of *Milošević* proportions is compatible with the fundamental rights of an accused. Pursuant to Article 20(1) of the Statute of the ICTY, a trial chamber has a duty to ensure that the trial is “fair and expeditious” and conducted with “full respect for the rights of the accused.”<sup>34</sup> The minimum guarantees afforded to an accused include the right to be informed in detail of the nature of the charges against him,<sup>35</sup> the right to

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[http://www.icty.org/x/cases/milutinovic/cis/en/cis\\_milutinovic\\_al\\_en\\_1.pdf](http://www.icty.org/x/cases/milutinovic/cis/en/cis_milutinovic_al_en_1.pdf).

<sup>34</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 20(1), S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (“The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”).

<sup>35</sup> STEFAN TRECHSEL, *HUMAN RIGHTS IN CRIMINAL PROCEEDINGS* 193 (Oxford University Press 2005) (“The purpose of this clause seems clear: the right to defend oneself can only be exercised effectively, i.e. with a minimum of chances of success, if the accused knows what he or she is accused of.”).

adequate time and facilities for the preparation of his defense;<sup>36</sup> and the right to be tried without undue delay,<sup>37</sup> which requires not only a speedy commencement of trial, but also an expeditious conclusion.

¶21 A trial of sixty-six counts over a ten year period of war is one which not only challenges the capacity of an international criminal tribunal but also requires particular attention to be paid to the protection of the rights of an accused. Has the accused had adequate notice of the detail of the case he faces? If so, is the detail of the case and the extent of the disclosure so overwhelming that the trial becomes unfair? The accused must be in a position to review and process incoming disclosure effectively, in order to know in advance the nature of the prosecution's case and the evidence to be called at trial. Ongoing disclosure by the prosecution throughout the trial makes it more difficult for the defense to ensure that all material has been properly sifted and reviewed in a timely manner. Regard must also be paid to whether or not the defense has adequate preparation time and resources to deal with the scale of the prosecution's case as well as sufficient time to cross-examine the witnesses and challenge the content of the documents sought to be produced. Such issues need to be tackled when attempting to deal with the practical impact of prosecuting and defending mega-trials of one or more individuals. Furthermore, as Judge Bonomy has observed, "[t]he inherent challenges of conducting a large-scale war crimes trial are further exacerbated when the accused chooses to represent himself."<sup>38</sup>

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<sup>36</sup>SALVATORE ZAPPALA, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 124 (Oxford University Press 2003) (explaining that "the issue of adequate time for the preparation of the defence . . . must be read in correlation with the right of the accused to be tried without undue delay and that it is the duty of the Trial Chambers to ensure expeditious trials.").

<sup>37</sup>TRECHSEL, *supra* note 36, at 135 ("Prolonged proceedings can put a considerable strain on accused persons and have the potential to exacerbate existing concerns such as uncertainty as to the future, fear of conviction, and the threat of a sanction of an unknown severity.").

<sup>38</sup>Iain Bonomy, *The Reality of Conducting a War Crimes Trial*, 5 J. INT'L CRIM. JUST. 348, 348 (2007).

IV. THE DEVELOPMENT AND APPLICATION OF RULE 73BIS POST  
*MILOŠEVIĆ*

¶22 The introduction of extended Rule 73bis powers in July 2003 and May 2006 has already had an impact on the fair and expeditious conduct of proceedings before the ICTY. The application of these powers in several trials including *Milutinović*,<sup>39</sup> *Šešelj*<sup>40</sup> and *Dragomir Milošević*<sup>41</sup> should encourage other trial chambers to assess the size, scope and scale of the proceedings at the pre-trial stage and engage in careful analysis as to whether or not to invite the prosecution to reduce the number of counts charged, fix the crime sites and incidents, and direct the prosecution to select the counts on which to proceed.<sup>42</sup>

¶23 In *Milutinović*, at the invitation of the defense, the Trial Chamber reduced the scale of the five count indictment by disallowing the calling of crime-based evidence with respect to three killing sites, namely Račak/Rečak, Padaliste/Padalishte and Dubrava/Dubravë prison.<sup>43</sup> The Chamber used its powers under Rule 73bis to fix the number of crime sites and incidents on which evidence would be led by the prosecution at trial; these powers were introduced in July 2003. The Chamber applied the Rule 73bis powers at the pre-trial stage due to the number of witnesses scheduled for the prosecution's case in chief, the prosecution's estimate that the examination-in-chief of these witnesses would

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<sup>39</sup>Prosecutor v. Milutinović, Case No. IT-05-87-T, Decision on Application of Rule 73bis (July 11, 2006); Prosecutor v. Milutinović, Case No. IT-05-87-T, Decision Denying Prosecution's Request for Certification of Rule 73bis Issue for Appeal (Aug. 30, 2006).

<sup>40</sup>Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on the Application of Rule 73bis (Nov. 8, 2006); Prosecutor v. Šešelj, Case No. IT-03-67-T, Order on Time Allocated to the Prosecution Pursuant to Rule 73bis of the Rules of Procedure and Evidence (Nov. 13, 2007).

<sup>41</sup> Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-PT, Decision on Amendment of the Indictment and Application of Rule 73bis(D) (Dec. 12, 2006).

<sup>42</sup> See Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-PT, Amended Indictment, ¶¶ 22-25 (Dec. 18, 2006). The indictment in *Dragomir Milošević* contained five counts charging the accused with deportation as a crime against humanity, forcible transfer as "other inhumane acts" as a crime against humanity, murder as a crime against humanity, murder as a violation of the laws or customs of war, and persecution as a crime against humanity, respectively in several municipalities in Kosovo.

<sup>43</sup> Prosecutor v. Milutinović, Case No. IT-05-87-T, Decision on Application of Rule 73bis, ¶ 6 (July 11, 2006).

last for 280 hours, the fact that the trial involved six accused, and the prospect of the trial extending beyond two years.<sup>44</sup>

¶24 The prosecution tried to resist the application of Rule 73bis submitting that it should not be interpreted so as to allow the Chamber to fix the *particular* crime sites on which evidence may be led at trial as it would “[allow] the judiciary to intrude in the area of what should be the Prosecution’s bailiwick. . . . the Prosecution should be in the best position to determine what’s representative of their case.”<sup>45</sup> The Chamber rejected this interpretation and stated that it was “unnecessarily cumbersome” and inconsistent with a proper construction of the Rule which empowers the Chamber “[a]fter having heard the Prosecutor, to fix a number of crime sites or incidents . . . which having regard to all the relevant circumstances . . . are reasonably representative of the crimes charged.”<sup>46</sup> The Chamber recognized its obligation to ensure that the Rule’s requirement of reasonable representativeness is met, and focused on identifying those crime sites or incidents which were clearly different from the fundamental nature or theme of the case. In doing so, the Chamber identified three killing sites, each of which was “associated with a single alleged attack or a discrete set of events that form[ed] part of one distinct alleged criminal transaction or incident.”<sup>47</sup> None of the three sites were associated with the prosecution’s main theme of the case, namely the deportation and forcible transfer of Kosovo Albanians. The Chamber left open the possibility that evidence with respect to these three sites or incidents may eventually be permitted pursuant to Rule 73bis(F), depending on how the case develops, should the Chamber conclude that it is necessary to hear such evidence in order to have a full appreciation of the events giving rise to these criminal proceedings.<sup>48</sup> Following the Trial Chamber’s judgment on February 26, 2009, the Trial Chamber invited the parties to make submissions as to how to proceed in relation to the three crimes of Račak/Rečak, Padaliste/Padalishte and Dubrava/Dubravë

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<sup>44</sup> *Id.* ¶ 2.

<sup>45</sup> Transcript of Pre-Trial Conference at 374, Prosecutor v. Milutinović, Case No. IT-05-87-PT (July 7, 2006).

<sup>46</sup> Prosecutor v. Milutinović, Case No. IT-05-87-T, Decision on Application of Rule 73bis, ¶ 9 (July 11, 2006).

<sup>47</sup> *Id.* ¶ 11.

<sup>48</sup> *Id.* ¶ 12.

prison.<sup>49</sup> The prosecution submitted that in light of the Trial Chamber's decision on Rule 73bis, and the awareness and conduct of the parties throughout the trial, "the only reasonable conclusion . . . was that the three crime sites' charges were removed from the indictment and were not part of the trial."<sup>50</sup>

¶25 In the case of *Šešelj*,<sup>51</sup> the Chamber invited the prosecution under Rule 73bis(D) to propose means of reducing the scope of the indictment by at least one-third by reducing the number of counts, crime sites or incidents comprised in one or more of the charges in the indictment, or both.<sup>52</sup> Initially, the prosecution declined the invitation and submitted that a reduction of the indictment was "unnecessary" and would result in a case that was not "reasonably representative of the crimes charged," impeding the prosecution's ability to prove its case.<sup>53</sup> The prosecution requested another opportunity to submit a proposal for reducing the indictment should the Chamber require it to do so. A further request made by the Chamber<sup>54</sup> resulted in the prosecutor dropping five counts from the indictment and removing charges relating to Western Slavonia, Brcko, Bijeljina and a crime site in Nevesinje.<sup>55</sup> The Chamber granted the prosecution's request to call non-crime evidence in relation to these sites as relevant *inter alia* to evidence of pattern or proof of the purpose and methods of the alleged joint criminal

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<sup>49</sup> Prosecutor v. Milutinović, Case No. IT-05-87-T, Trial Chamber Judgment, vol. III, ¶ 1213 (Feb. 26, 2009).

<sup>50</sup> Prosecutor v. Milutinović, Case No. IT-05-87-T, Prosecution Submission with Respect to Rule 73bis(D) Decision of July 11, 2006, ¶ 8 (Mar. 12, 2009).

<sup>51</sup> See Prosecutor v. Šešelj, Case No. IT-03-67-PT, Modified Amended Indictment, ¶¶ 15-34 (Jul. 12, 2005). Vojislav Šešelj is currently president of the Serbian Radical Party. He surrendered to the ICTY on February 23, 2003 and is charged with crimes of persecutions on political, racial or religious grounds, inhumane acts, murder, torture, cruel treatment and destruction in Croatia and Bosnia between August 1991 until at least September 1993.

<sup>52</sup> Prosecutor v. Šešelj, Case No. IT-03-67-PT, Request to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment (Aug. 31, 2006).

<sup>53</sup> Prosecutor v. Šešelj, Case No. IT-03-67-PT, Prosecution's Response to Trial Chamber's "Request to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment" (Sept. 12, 2006).

<sup>54</sup> See Transcript of Status Conference, Prosecutor v. Šešelj, Case No. IT-03-67-PT (Sept. 14, 2006).

<sup>55</sup> Prosecutor v. Šešelj, Case No. IT-03-67-PT, Prosecution's Submission of Proposals to Reduce the Scope of the Indictment, ¶¶ 4-11 (Sept. 21, 2006). In addition, the Chamber *proprio motu* decided that evidence (with the exception of non-crime based evidence) should not be presented with respect to the municipality of Bosanski Samac.

enterprise. The use of Rule 73*bis* powers in this case led to a significant reduction in both the counts and the crime site locations.

¶26 In *Dragomir Milošević*,<sup>56</sup> the Chamber made the same request of the prosecution and invited it to reduce the scope of its case by at least one third pursuant to Rule 73*bis*. The prosecution was also invited to reconsider the overall number of witnesses and exhibits in support of the charges. In response to the invitation, the Chamber accepted the prosecution’s proposal to remove sixteen incidents from the indictment which resulted in a ninety-three hour reduction in time for *viva voce* witness evidence. The prosecution also proposed to remove fifty-four witnesses from its witness list, another measure approved by the Chamber which held that the Prosecutor would still be able to present evidence that was “reasonably representative of the crimes charged.”<sup>57</sup> It was unnecessary in the circumstances to remove any of the counts from the indictment.

¶27 In *Haradinaj*,<sup>58</sup> the Chamber requested the prosecution to explain the reason why eight of the counts in the indictment should not be removed.<sup>59</sup> The prosecution argued that a reduction of the charges would “jeopardize” the case and violate the prosecution’s right to a fair trial resulting in charges which are not “reasonably representative” of the case as a whole.<sup>60</sup>

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<sup>56</sup> See *Prosecutor v. Milošević*, Case No. IT-98-29/1-T, Judgment, vol. III, ¶¶ 1006-08 (Dec. 12, 2007). Dragomir Milošević has been sentenced to 33 years imprisonment for his role as Chief of Staff to Stanislav Galić, Commander of the Sarajevo Romanija Corps of the Bosnian Serb Army in 1993 and his subsequent position as Commander of the Sarajevo Romanija Corps of the Bosnian Serb Army in 1994. He is alleged to have conducted various strikes against the civilian population of Sarajevo, which amount to crimes against humanity and war crimes. This case is currently pending before the Appeal Chamber.

<sup>57</sup> *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Amendment of the Indictment and Application of Rule 73*bis*(D), ¶¶ 38-39 (Dec. 12, 2006).

<sup>58</sup> See *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, vol. I, ¶¶ 502-05 (Apr. 3, 2008). Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj were charged with crimes against humanity and war crimes. Ramush Haradinaj and Idriz Balaj were found not guilty of all charges, while Lahi Brahimaj was found guilty of cruel treatment and torture and sentenced to six years imprisonment. This case against all three accused is currently pending appeal.

<sup>59</sup> *Prosecutor v. Haradinaj*, Case No. IT-04-84-PT, Decision Pursuant to Rule 73*bis*(D), ¶ 1 (Feb. 22, 2007).

<sup>60</sup> *Id.* ¶ 7 (quoting *Prosecutor v. Haradinaj*, Case No. IT-04-84-PT, Prosecution’s Response to Trial Chamber’s “Request to the Prosecutor to Make Proposals to

¶28 The prosecution argued that it must prove “broad allegations, such as the existence of a joint criminal enterprise and a widespread or systematic attack, and it must substantiate these allegations with relatively few victims and incidents.”<sup>61</sup> Any reduction in counts or incidents “would not result in significant time savings and the Prosecutor may be forced to reduce its case in the future due to the potential unavailability of witnesses.”<sup>62</sup> In this particular case, the Chamber was “persuaded by the Prosecutor’s submissions.”<sup>63</sup> In particular, the Chamber agreed that the removal of counts may “result in an indictment that is no longer reasonably representative of the case as a whole and . . . may affect the Prosecutor’s ability to present evidence on the scope of the alleged widespread or systematic attack and joint criminal enterprise.”<sup>64</sup>

¶29 In *Stanisić*, the two accused are charged with four counts of crimes against humanity and one count of violations of the laws or customs of war.<sup>65</sup> The Trial Chamber employed the same standard request under Rule 73bis(D) in which it invited the Prosecution to reduce the number of counts or incidents by one third.<sup>66</sup>

¶30 Initially, the prosecution declined the invitation but also outlined ways in which the scope of the indictment could be reduced. It was stressed however that even if crimes sites and incidents were removed, the prosecution would still seek to rely on

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Reduce the Size of the Indictment,” ¶ 4 (Feb. 13, 2007)).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* ¶ 8 (quoting Prosecutor v. Haradinaj, Case No. IT-04-84-PT, Prosecution’s Response to Trial Chamber’s “Request to the Prosecutor to Make Proposals to Reduce the Size of the Indictment,” ¶ 4 (Feb. 13, 2007)).

<sup>63</sup> *Id.* ¶ 9.

<sup>64</sup> *Id.* ¶ 9; see also ¶ 11 (“The Chamber recognises that the Prosecutor announced a reduction in its case presentation at the same time that the Chamber invited the Prosecutor to reduce the indictment, and that the Prosecutor must now rely on a relatively small number of victims and witnesses in order to prove broad allegations.”).

<sup>65</sup> See Prosecutor v. Stanisić, Case No. IT-03-69-PT, Prosecution Notice of Third Amended Indictment (July 10, 2008). Jovica Stanišić and Franko Simatović, in their roles of Head of the State Security Service and intelligence personnel, respectively, are alleged to have participated in a joint criminal enterprise with the purpose of forcibly and permanently removing non-Serbs from large areas of both Croatia and Bosnia and Herzegovina. Both are charged with crimes against humanity and war crimes. This case is currently at the pre-trial phase.

<sup>66</sup> Prosecutor v. Stanisić, Case No. IT-03-69-PT, Request to the Prosecution Pursuant to Rule 73bis(D) to Reduce the Scope of the Indictment, at 3 (Nov. 9, 2007).

any evidence that goes to proof of the “purpose and methods of the JCE, the acts and conduct of the Accused, and the high degree of coordination and cooperation of the diverse groups of individuals and the institutions they represented within the JCE.”<sup>67</sup> The Trial Chamber held that it would “only be in very exceptional circumstances that a case cannot be reduced within the terms of Rule 73bis(D).”<sup>68</sup> The prosecution argued that its case “inherently requires evidence of a sufficient number of crime sites and incidents to prove the modes of liability alleged.”<sup>69</sup> Further, any reduction in the indictment would result in charges “that are no longer reasonably representative of the Prosecution’s case as a whole.”<sup>70</sup> Such a reduction would also risk the creation of an inaccurate historical record. This argument was immediately dismissed however by the Trial Chamber on the basis that “the Tribunal was established to administer justice, and not to create a historical record.”<sup>71</sup>

¶31 The Chamber determined that the reductions in the Indictment suggested by the prosecution were “equally and proportionally distributed among the three regions where the crimes were alleged to have occurred.”<sup>72</sup> Reduction would not jeopardize the prosecution’s ability to prove the victimization of the three ethnic communities. The Chamber accepted the proposed reduction of ten incidents, which left intact another 18 incidents. None of the counts were reduced.

¶32 In *Perišić*, the Trial Chamber stated that the purpose of Rule 73bis was to “prevent excessive and unnecessary time being taken by the Prosecution” in the presentation of its case.<sup>73</sup> Momčilo Perišić, who was Chief of the General Staff of the Yugoslav Army (VJ) from August 1993 to November 1998, was charged with eight counts of crimes against humanity and five counts of violations of the laws or customs of war. The amended indictment contains four

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<sup>67</sup> Prosecutor v. Stanišić, Case No. IT-03-69-PT, Prosecution Response to the Trial Chamber’s “Request to the Prosecution Pursuant to Rule 73bis(D) to Reduce the Indictment,” ¶ 44 (Dec. 3, 2007).

<sup>68</sup> Prosecutor v. Stanišić, Case No. IT-03-69-PT, Decision Pursuant to Rule 73bis(D), ¶ 11 (Feb. 4, 2008).

<sup>69</sup> *Id.* ¶ 16.

<sup>70</sup> *Id.* ¶ 19.

<sup>71</sup> *Id.* ¶ 21.

<sup>72</sup> *Id.* ¶ 23.

<sup>73</sup> Prosecutor v. Perišić, Case No. IT-04-81-PT, Decision on Application of Rule 73bis and Amendment of Indictment, ¶ 9 (May 15, 2007).

schedules which list specific incidents pertaining to the shelling and sniping of Sarajevo (schedules A and B), shelling of the city of Zagreb (schedule C) and killings in Srebrenica (schedule D).

¶33 The Chamber invited the prosecution to reduce the scope of its amended indictment by one-third which was declined, although the prosecution proposed not presenting evidence in respect of an allegation concerning the shelling of Zagreb. The Trial Chamber noted that such a proposal amounted to a reduction of only “four percent of the crime base allegations.”<sup>74</sup> The Chamber determined that at least twenty-two witnesses were scheduled to give evidence on terror in Sarajevo, even though the indictment did not contain a terror count and there was no indication that the allegation of a “protracted campaign of sniping and shelling” of Sarajevo was alleged in support of a charge of terror against the accused. Concerning Sarajevo, the Chamber instructed the prosecution to lead only evidence in relation to *scheduled* incidents, as opposed to unscheduled incidents which had been part of the intended prosecution’s case in chief. The prosecution would only be allowed to lead evidence on unscheduled incidents if it could show that such evidence was “essential to prove an important aspect of the case.”<sup>75</sup>

## V. CONCLUSION

¶34 In considering whether or not the availability of Rule 73bis powers at the pre-trial stage would have made a difference to the fairness and expediency of the proceedings in *Milošević*, it is necessary to bear in mind Judge Kwon’s incisive observation that the application of Rule 73bis requires the pre-trial judges to have a “comprehensive and intimate understanding of the Prosecution’s case.”<sup>76</sup> As Judge Kwon observes, Judge Bonomy’s ability to apply the Rule 73bis powers in *Milutinović* was evidently influenced by his familiarity with the substance of that case, given its similarity to the Kosovo indictment in *Milošević*, a trial he had worked on for

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<sup>74</sup> *Id.* ¶ 6.

<sup>75</sup> *Id.* ¶ 17; see also Prosecutor v. Perišić, Case No. IT-04-81-T, Decision on Prosecution’s Submission on Interpretation of the Trial Chamber’s Decision of 15 May 2007 Regarding “Unscheduled Incidents” (Oct. 31, 2008).

<sup>76</sup> O-Gon Kwon, *The Challenge of an International Criminal Trial as Seen from the Bench*, 5 J. INT’L CRIM. JUST. 360, 375 (2007). See also Bonomy, *supra* note 40, at 354.

several years. Even if the powers had been available to the pre-trial bench in *Milošević*, the question arises as to whether or not the Chamber in the particular circumstances of that case would have had such familiarity with the prosecution's case so as to allow them to implement the Rule given the range of the sixty-six counts in the joined indictment. In *Milošević*, perhaps the most appropriate option would have been to sever the Kosovo indictment during the trial, an option which had been left open by the Appeals Chamber's decision on joinder.

¶35 The powers of Rule 73bis are not without controversy. Prosecutors at the ICTY have voiced their discomfort with the ability of judges to put limits on the remit of an indictment. Rule 73bis(E) has been described as “troublesome” and a “boon to an accused person” as implementation of the Rule “forces the Prosecution to abandon counts in an indictment thereby eliminating the possibility of establishing the breadth of an accused person's provable criminality.”<sup>77</sup>

¶36 Notwithstanding the reservations of the prosecution, the author maintains that the Rule 73bis powers are nonetheless an important tool in the possession of the pre-trial chamber. The tool is particularly useful in circumstances of prosecutorial reluctance to reduce the scope of an indictment to manageable proportions. Such reluctance to try Milošević on a severed Kosovo indictment was described by one of the Trial Judges as reflective of the prosecution's desire to conduct a “hunting expedition.”<sup>78</sup> Judge Kwon explained that “by charging the accused with more crimes through more modes of responsibility, the Prosecutor apparently believes that she stands a greater chance of convicting the accused on at least one charge.”<sup>79</sup> Judge Kwon noted the persistent resistance of the prosecution even as late as December 2005, when the Trial Chamber “proposed severing the Kosovo indictment and rendering judgment on it before rendering judgment on the other two indictments.”<sup>80</sup>

¶37 In the event of a lack of prosecutorial will to focus future indictments in international criminal trials, appropriate intervention

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<sup>77</sup> Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 697 n.56 (2007).

<sup>78</sup> Kwon, *supra* note 78, at 373.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*; see also *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision in Relation to Severance, Extension of Time and Rest, ¶ 12 (Dec. 12, 2005).

and trial management by the chamber at the pre-trial stage will help to ensure that the cases are kept within reasonable parameters. Although the particular tools may vary in order to suit the needs of the institution, the presence of pre-trial mechanisms to encourage judicial control of the proceedings is essential in order to guard against prosecutorial excess.

¶38

In proceedings before the International Criminal Court (ICC), both the prosecution and the pre-trial chamber have worked at the confirmation hearing stage to narrow the scope of indictments. The prosecution has adopted a policy of selecting a limited number of incidents and as few witnesses as possible are called to testify.<sup>81</sup> Such a policy allows the prosecution to “carry out short investigations and propose expeditious trials while aiming to represent the entire range of criminality.”<sup>82</sup> In practice, this has resulted in trials which are limited in scope. In *Lubanga*, the accused is charged only with enlisting, conscripting and using children under the age of fifteen into the Patriotic Forces for the Liberation of Congo.<sup>83</sup> In *Katanga and Ngudjolo Chui*, although the accused were initially charged with thirteen counts, the number of counts was reduced to ten by the Pre-Trial Chamber at the confirmation hearing, all of which deal with one incident on February 24, 2003, in Bogoro, Ituri.<sup>84</sup> At the Special Court of

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<sup>81</sup> Louis Moreno-Ocampo, *Report on Prosecutorial Strategy*, Office of the Prosecution Report, ¶ 2(b) (Sept. 14, 2006), [http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf).

<sup>82</sup> *Id.*

<sup>83</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 410 (Jan. 29, 2007). M. Lubanga is charged as a co-perpetrator, with war crimes consisting of: (i) Enlisting and conscripting of children under the age of 15 years into the *Forces patriotiques pour la libération du Congo* [Patriotic Forces for the Liberation of Congo] (FPLC) and using them to participate actively in hostilities in the context of an international armed conflict from early September 2002 to June 2, 2003 (punishable under article 8(2)(b)(xxvi) of the Rome Statute); and (ii) Enlisting and conscripting children under the age of 15 years into the FPLC and using them to participate actively in hostilities in the context of an armed conflict not of an international character from June 2, 2003 to August 13, 2003 (punishable under article 8(2)(e)(vii) of the Rome Statute).

<sup>84</sup> See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Situation in Democratic Republic of the Congo, Decision on the Confirmation of Charges, ¶¶ 573-581 (Sept. 30, 2008). On September 26, 2008, the ICC Pre-Trial Chamber I confirmed all but three of the charges against the two defendants. The Chamber found insufficient evidence to try the accused for inhuman treatment and outrages upon personal dignity (war crimes). The

Sierra Leone, Rule 73*bis* extended powers were adopted in 2006.<sup>85</sup> The International Criminal Tribunal for Rwanda has yet to implement the full range.<sup>86</sup> Before the Extraordinary Chambers of the Courts of Cambodia (ECCC), the Co-Investigating Judges have extensive powers to ensure a thorough investigation of both inculpatory and exculpatory evidence,<sup>87</sup> before formulating the indictment in order to ensure that it does not contain charges, crime sites or incidents which are irrelevant, unnecessary or where there is insufficient evidence.<sup>88</sup> After the indictment has been issued, the trial chamber retains the power to reject an application to call a particular witness if it considers that it would not be conducive to the good administration of justice.<sup>89</sup> In consultation with other judges, the President may also exclude any proceedings that unnecessarily delay the trial and are not conducive to ascertaining the truth.<sup>90</sup>

¶39

Whether the appropriate mechanism involves the adoption of extended Rule 73*bis* powers or other methods of control such as the confirmation hearing process at the ICC or the pre-trial investigation procedure before the ECCC, the proactive implementation and application of such measures is essential to ensure the expediency of future international criminal proceedings.

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Chamber also declined the charge of inhumane acts (a crime against humanity).

<sup>85</sup> Special Court for Sierra Leone, Rules of Procedure and Evidence, Rule 73*bis*(G) (Jan. 16, 2002) (adopted on Nov. 24, 2006, the subsection states: “In the interest of a fair and expeditious trial, the Trial Chamber, after hearing the parties, may at any time invite the Prosecutor to reduce the number of counts charged in the Indictment. Furthermore, the Trial Chamber may determine a number of sites or incidents comprised in one or more of the charges made by the Prosecutor, which may reasonably be held to be representative of the crimes charged.”), [http://www.scsl.org/LinkClick.aspx?fileticket=1YNrqhd4L5s%3d&t=20080808\\_En.pdf](http://www.scsl.org/LinkClick.aspx?fileticket=1YNrqhd4L5s%3d&t=20080808_En.pdf).

<sup>86</sup> At the time of publication, the Rules of Procedure and Evidence at the ICTR did not include the equivalent of Rule 73*bis*(D) and (E) powers before the ICTY.

<sup>87</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules, Rule 55(5) (Sept. 5, 2008), [http://www.eccc.gov.kh/english/cabinet/fileUpload/88/IR\\_Revision2\\_05-01-08\\_En.pdf](http://www.eccc.gov.kh/english/cabinet/fileUpload/88/IR_Revision2_05-01-08_En.pdf).

<sup>88</sup> *Id.* at Rule 66(2), 67.

<sup>89</sup> *Id.* at Rule 80(2).

<sup>90</sup> *Id.* at Rule 85(1).