

**UNITED
NATIONS**

IT-05-88/1-PT

1432

D 1432 - D 1420

NC

06 MAY 2011

International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No. IT-05-88/1-PT

Date: 6 May 2011

IN THE REFERRAL BENCH

Before: **Judge Alphons Orie, Presiding**
Judge O-Gon Kwon
Judge Kevin Parker

Registrar: **Mr. John Hocking**

THE PROSECUTOR

v.

MILORAD TRBIĆ

PUBLIC

PROSECUTION'S FINAL PROGRESS REPORT

The Office of the Prosecutor:

Mr. Serge Brammertz

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-05-88/1-PT

THE PROSECUTOR

v.

MILORAD TRBIĆ

PUBLIC

PROSECUTION'S FINAL PROGRESS REPORT

1. Pursuant to the Referral Bench's Decision on Referral of Case Under Rule 11 *bis* with Confidential Annex ("Referral Decision") of 27 April 2007, the Prosecution files its final progress report in this case.

2. The Decision on referral ordered:

...the Prosecutor to file an initial report to the Referral Bench on the progress made by the Prosecutor's Office of Bosnia and Herzegovina in this case six weeks after transfer of the evidentiary material. Thereafter, the Prosecution shall file a report every three months. These reports shall include information on the course of the proceedings before the competent national court after commencement of trial, and shall include any reports or other information received from any international organizations also monitoring the proceedings.¹

¹ *Prosecutor v. Milorad Trbić* ("Trbić case"), Case No. IT-05-88/1-PT, Referral Decision, p. 26.

3. The Prosecution's fifteenth progress report in the *Trbić* case was filed on 26 January 2011.² On 14 January 2011, the Appeals Chamber rejected appeals brought by the parties and confirmed the first instance judgement of 16 October 2009 in its entirety. The Trial Chamber had convicted Milorad Trbić for genocide committed in the Srebrenica area in July 1995 and sentenced him to imprisonment of 30 years. This is the first case where the Appeals Chamber of the BiH State Court has confirmed a verdict for Genocide.
4. Following the agreement between the Chairman in Office of the Organization for Security and Co-operation in Europe's Mission to Bosnia and Herzegovina (the "OSCE") and the Office of the Prosecutor ("OTP"), the Prosecution received OSCE's fifteenth and final report on 19 April 2010.³
5. The Report provides a summary of the main points in the *Trbić* appellate verdict as follows:
 - The Appeals Chamber rejected as unfounded the Defence's argument that the Defendant's statements to U.S. authorities and ICTY investigators should not have been admitted into evidence due to the fact that he had not been informed that he was a suspect and that he had not been properly instructed of his rights. The Defendant further argued that he was promised that he would be relocated to Australia if he agreed to testify. Even though the Appeals Chamber found that the Defendant had not preserved his right to appeal on this ground and that he had not properly explained his appeal, the Panel examined in detail all of the Trial Panel's findings challenged by the Defence. It concluded that the statements were properly admitted and correctly assessed by the Trial Panel.
 - The Defendant also argued that his right to a trial within a reasonable time under Article 6 (1) of the European Convention of Human Rights (ECHR) had been violated due to the length of the proceedings against him. However, the Appeals Chamber found that only the period of two years between the confirmation of the indictment and the rendering of the first instance verdict is relevant for the assessment of the reasonable length of proceedings, and that no violation of Article 6(1) occurred in the present case.
 - The Appeals Chamber rejected as unfounded the arguments of both parties regarding the incorrectly or incompletely established facts, providing a detailed analysis of each ground of appeal. The arguments of both parties related, *inter alia*, to the use of the Defendant's prior statements in the

² *Trbić* case, Prosecution's Fifteenth Progress Report, 26 January 2011 ("Prosecution's Fifteenth Progress Report").

³ OSCE's Fifteenth and Final Report in the *Milorad Trbić* Case Transferred to the State Court pursuant to Rule 11 bis, April 2011 ("Report").

determination of factual findings. The Defence claimed that the Trial Panel erred when it relied on the prior statements in the convicting part, and that there was no other evidence to support the findings outlined in the first instance verdict. On the other hand, the Prosecution argued that the Trial Panel misapplied its own rule regarding the corroboration and reliability of evidence. However, following a detailed analysis of all of the relevant findings, the Appeals Chamber concluded that the Trial Panel consistently applied this standard, as evidenced by the fact that it convicted the Defendant only for those parts of his statements which were corroborated by independent evidence.

- The Appeals Chamber further rejected the Prosecution's argument that the Trial Panel incorrectly assessed the aggravating and mitigating factors when determining the sentence and that the given sentence thus fails to satisfy the purpose of punishment. The Appeals Chamber found that the Trial Panel properly considered all relevant facts and that this is evident, *inter alia*, from the fact that the Prosecution's appeal merely repeats the Trial Panel's findings in this regard. The Appeals Chamber also stressed that circumstances which constitute elements of the crime cannot be assessed as aggravating factors as well. Even though the Defence had not appealed the part of the first instance verdict related to sentencing, the Appeals Chamber assessed this ground in accordance with Article 308 of the CPC BiH, and found that the Trial Panel's findings were correct.
 - The Appeals Chamber rejected the appeals of seven injured parties related to the Trial Panel's decision on their claims under property law and with respect to the costs of the criminal proceedings. Specifically, the Appeals Chamber found that the decision to refer the injured parties to civil proceedings was correct in light of the fact that adjudication of property claims would have prolonged the proceedings and placed a burden on the court. The Appeals Chamber further stated that the injured parties have not shown that they have suffered direct harm as a result of the Trial Panel's decision that the costs of the proceedings should be paid out of the Court budget.⁴
6. The OSCE further elaborated on a number of procedural and evidentiary rules that the Appeals Chamber articulated in the Verdict such as timelines of the appellate arguments related to the admissibility of evidence; standard of review in relation to alleged errors of facts; rules related to the admissibility of photographic evidence and telephone intercepts; and application of the Criminal Code of BiH instead of SFRY Criminal Code.⁵
7. The OSCE also reports that, for the first time, one of the OSCE's reports was discussed during the appellate proceedings. The Prosecution referred to the

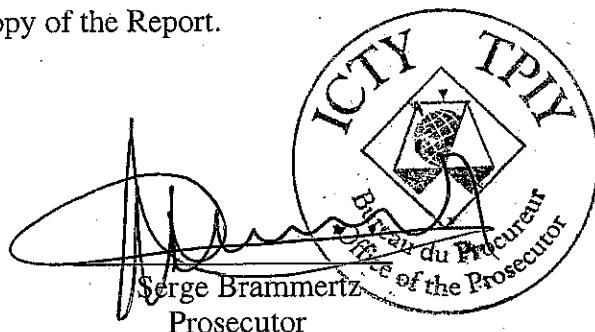
⁴ Report, pp. 4-5.

⁵ Report pp. 5-6.

OSCE's Twelfth Report⁶ in the *Trbić* case wherein it was stated that the First Instance Verdict was well-structured. The Appeals Chamber ruled that the OSCE's Report can not be admitted into evidence, since it is not relevant to the assessment of the Trial Chambers' legal and factual conclusions.⁷

8. This is the OTP's final report regarding monitoring of proceedings in the *Trbić* case. The OTP has informed the OSCE that upon the finalization of the case, OTP's monitoring activities and the obligation to submit reports to the Referral Bench ends.
9. The English version of the judgement is available on the web page of the Court of Bosnia and Herzegovina and the Prosecution hereby provides a link to the verdict for the Referral Bench.⁸ If the Referral Bench deems it necessary, the Prosecution could separately provide the print-out of the judgement.
10. Attached to this report is Annex A, a copy of the Report.

Word Count: 1,216.



Dated this sixth day of May 2011
At The Hague
The Netherlands

⁶ OSCE's Twelfth Report in the *Milorad Trbić* Case Transferred to the State Court pursuant to Rule 11 bis, July 2010.

⁷ Report, p.7.

⁸ <http://www.sudbih.gov.ba/?opcija=predmeti&id=47&zavrsen=1&jezik=e>

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ANNEX A
TO
PROSECUTION'S FINAL PROGRESS REPORT



Organization for Security and
Co-operation in Europe
Mission to Bosnia and Herzegovina

Fifteenth and Final Report in the

Milorad Trbić Case

Transferred to the Court of Bosnia and Herzegovina

pursuant to Rule 11bis

April 2011

SUMMARY OF DEVELOPMENTS

The case of Milorad Trbić (hereinafter also Defendant) is the sixth case transferred from the International Criminal Tribunal for the former Yugoslavia (ICTY) to the Court of Bosnia and Herzegovina (Court of BiH) pursuant to Rule 11bis of the ICTY Rules of Procedure and Evidence (RoPE). This constitutes the fifteenth and final Report of the OSCE Mission to Bosnia and Herzegovina ("OSCE BiH" or "Mission") concerning this case, covering the period between 19 January 2010 and 19 April 2011. It should be noted that, at the time of the writing of this report, the appellate verdict was available only in Bosnian, Croatian and Serbian (BCS). Thus, all references herein are based on the BCS version of the verdict.

The indictment against Milorad Trbić was confirmed by the Court of BiH on 27 July 2007, following his transfer to Bosnia and Herzegovina (BiH) from The Hague. The main trial began on 8 November 2008. On 16 October 2009, the Trial Panel rendered the oral verdict, finding Milorad Trbić guilty of genocide, and sentencing him to 30 years' long-term imprisonment. All compensation claims filed in this case were referred to civil proceedings and the Defendant was relieved of the obligation to pay the costs of proceedings. The written verdict was published on 29 April 2010.

Both the Prosecution and the Defence, as well as a number of injured parties, appealed the first instance verdict. The appeal hearing was held on 21 October 2010. Even though a number of injured parties filed appeals, neither they nor their representatives addressed the Court during the appeal hearing.

In the reporting period, the Appellate Panel rendered the appellate verdict, confirming the first instance verdict in its entirety. The verdict was delivered to the Defendant on 14 January 2011. On the same day, the Appellate Panel issued a decision to extend custody,¹ and the first instance presiding judge issued an order for the execution of the criminal sanction.² The Mission has learned that the Defendant was duly transferred to the penal correctional institution in Foča on 14 January 2011, where he is to serve his sentence. The time the Defendant spent in custody since 7 April 2005 will be taken into account in the calculation of the remainder of his sentence.

The Mission notes that the appellate verdict was published on the Court's website on 17 January 2011, three days after it was delivered to the Defendant and after he began serving his sentence. In cases where the first instance verdict is confirmed or revised, Appellate Panels

¹ Decision on the Extension of Custody, 14 January 2011, done in accordance with Article 138(6) of CPC BiH which provides: "[t]he accused placed in custody against whom a sentence of imprisonment has become legally binding, shall remain in custody until he/she is sent to prison but not after the expiration of the prison term he has received."

² Order on the Execution of the Sentence of 30 Years' Long-Term Imprisonment, 14 January 2011, pursuant to the BiH Law on the Execution of Criminal Sanctions. As noted in the Mission's previous report, the maximum fifteen months the Defendant could spend in custody between the pronouncement of the first instance verdict and the finalization of the appellate verdict, in accordance with Article 138(3) of CPC BiH, was supposed to expire on 16 January 2011.

have developed the practice of not orally pronouncing the verdict.³ In such instances, the appellate verdict is dated according to when the appellate session was held. Accordingly, the appellate verdict in *Trbić* is dated 21 October 2010. However, as noted, the Defendant only learned of the result of the appellate proceedings on 14 January 2011 when the written verdict was delivered to him. This situation results from the fact that the BiH Criminal Procedure Code (CPC BiH) does not foresee a public announcement of the appellate verdict, as is the case with the first instance verdict. While in the specific case the rights of the Defendant and injured parties do not appear to be strongly prejudiced, it is noted that an oral and public announcement of the verdict immediately following the deliberations of the Appellate Panel, would increase the transparency of the proceedings and would not additionally burden the Court.⁴ Previous Mission reports have highlighted ambiguities in the appellate procedure as a concern that should be addressed.

³ In cases where a new trial is held before the Appellate Panel, the second instance verdict is pronounced orally in the same manner as the first instance verdict.

⁴ An amendment to the CPC BiH specifically providing for a hearing to publicly announce the appellate verdict would be the best way to increase transparency of the appellate proceedings and it would benefit all the parties involved.

SUMMARY OF THE VERDICT

The following is a brief summary of the main points in the Appellate Verdict:

- The Appellate Panel rejected as unfounded the Defence's argument⁵ that the Defendant's statements to U.S. authorities and ICTY investigators should not have been admitted into evidence due to the fact that he had not been informed that he was a suspect and that he had not been properly instructed of his rights. The Defendant further argued that he was promised that he would be relocated to Australia if he agreed to testify. Even though the Appellate Panel found that the Defendant had not preserved his right to appeal on this ground and that he had not properly explained his appeal,⁶ the Panel examined in detail all of the Trial Panel's findings challenged by the Defence. It concluded that the statements were properly admitted and correctly assessed by the Trial Panel.⁷
- The Defendant also argued that his right to a trial within a reasonable time under Article 6 (1) of the European Convention of Human Rights (ECHR) had been violated due to the length of the proceedings against him.⁸ However, the Appellate Panel found that only the period of two years between the confirmation of the indictment and the rendering of the first instance verdict is relevant for the assessment of the reasonable length of proceedings, and that no violation of Article 6(1) occurred in the present case.⁹
- The Appellate Panel rejected as unfounded the arguments of both parties regarding the incorrectly or incompletely established facts,¹⁰ providing a detailed analysis of each ground of appeal. The arguments of both parties related, *inter alia*, to the use of the Defendant's prior statements in the determination of factual findings. The Defence claimed that the Trial Panel erred when it relied on the prior statements in the convicting part, and that there was no other evidence to support the findings outlined in the first instance verdict.¹¹ On the other hand, the Prosecution argued that the Trial Panel misapplied its own rule regarding the corroboration and reliability of evidence.¹² However, following a detailed analysis of all of the relevant findings, the Appellate Panel concluded that the Trial Panel consistently applied this standard, as evidenced by the fact that it convicted the Defendant only for those parts of his statements which were corroborated by independent evidence.¹³

⁵ Under Article 297 of the Criminal Procedure Code of BiH (CPC BiH), covering essential violations of criminal procedure.

⁶ See p. 4 of this report.

⁷ Appellate Judgment, paras 15-78.

⁸ The Defendant was arrested in the United States on 2 July 2003, after which he was transferred to The Hague and subsequently to Bosnia and Herzegovina.

⁹ Appellate Judgment, paras 79-81.

¹⁰ Article 299 of the CPC BiH.

¹¹ Appellate Judgment, paras 108-111.

¹² Appellate Judgment, para. 304.

¹³ Appellate Judgment, paras 103-279, 302-327.

- The Appellate Panel further rejected the Prosecution's argument that the Trial Panel incorrectly assessed the aggravating and mitigating factors when determining the sentence and that the given sentence thus fails to satisfy the purpose of punishment.¹⁴ The Appellate Panel found that the Trial Panel properly considered all relevant facts and that this is evident, *inter alia*, from the fact that the Prosecution's appeal merely repeats the Trial Panel's findings in this regard.¹⁵ The Appellate Panel also stressed that circumstances which constitute elements of the crime cannot be assessed as aggravating factors as well.¹⁶ Even though the Defence had not appealed the part of the first instance verdict related to sentencing, the Appellate Panel assessed this ground in accordance with Article 308 of the CPC BiH,¹⁷ and found that the Trial Panel's findings were correct.¹⁸
- The Appellate Panel rejected the appeals of seven injured parties related to the Trial Panel's decision on their claims under property law and with respect to the costs of the criminal proceedings. Specifically, the Appellate Panel found that the decision to refer the injured parties to civil proceedings was correct in light of the fact that adjudication of property claims would have prolonged the proceedings and placed a burden on the court. The Appellate Panel further stated that the injured parties have not shown that they have suffered direct harm as a result of the Trial Panel's decision that the costs of the proceedings should be paid out of the Court budget.¹⁹

Noted Points of Jurisprudential Value in the Appellate Verdict

In confirming the first instance verdict, the Appellate Panel articulated a number of important procedural and evidentiary rules. This is of particular significance in light of the fact that the BiH Criminal Procedure Code provides only the general rules with regard to the admissibility of evidence.

The Appellate Panel first discussed the timeliness of the appellate arguments related to the admissibility of evidence. Specifically, the Panel noted that objections to the inclusion of evidence had to be made at the time the evidence is being tendered, and that the failure to lodge an objection bars a party from raising the issue on appeal. The Appellate Panel further elaborated on the appropriate form of appellate arguments, stating that each appellate ground must be supported by a proper legal argument as to the alleged error of the Trial Panel, rather than simply repeating arguments presented at trial.²⁰

¹⁴ Namely, the Prosecution argued that the Trial Panel had placed too much importance on the mitigating factors, such as the fact that the Defendant was not one of the planners of the genocide, while insufficient consideration was given to aggravating circumstances related to the brutality, gravity and systematic nature of the criminal act, as well as its effect on the surviving victims. See Appellate Judgment, paras 293-296. Para. 296 mistakenly refers to the appeal of the Defence, instead that of the Prosecution.

¹⁵ Appellate Judgment, paras 297-300.

¹⁶ Appellate Judgment, para. 299.

¹⁷ An appeal filed in favor of the accused due to the state of the facts being erroneously or incompletely established or due to the violation of the Criminal Code shall also contain an appeal of the decision concerning the punishment and forfeiture of the property gain (Article 300).

¹⁸ Appellate Judgment, para. 301.

¹⁹ Appellate Judgment, paras 328-334.

²⁰ Appellate Judgment, paras 22-26, 111.

Furthermore, the Appellate Panel reiterated the standard of review in relation to alleged errors of fact. Namely, the Appellate Panel will disturb the Trial Panel's factual findings only if it concludes that a reasonable trier of fact could not have established the contested state of facts, and that the error of fact resulted in a miscarriage of justice.²¹

In its review of the factual findings, the Appellate Panel further concluded that the Trial Panel had correctly assessed the Defendant's prior statements, accepting only those parts which were corroborated by independent evidence. Those factual allegations which could not be supported by independent evidence had to be dismissed in accordance with the *in dubio pro reo* principle.²²

The Appellate Verdict also articulated clear rules related to the admissibility of photographic evidence and telephone intercepts. Namely, the Appellate Panel elaborated on the requirements of authenticity and reliability of such evidence.²³ It further stated that certain imperfections in the evidence in question, such as when the transcript does not identify the person who is speaking, do not automatically render the evidence inadmissible, but rather affect the weight the panel will afford such evidence.²⁴ When discussing the Trial Panel's decision to admit aerial photographs of mass graves, the Appellate Panel explained that photographs can either serve to illustrate the testimony of a witness or be tendered as independent substantive evidence. Only the latter theory requires the party who seeks to have the photographs admitted to present evidence as to how they were taken, thus proving that the "matter in question is what its proponent claims."²⁵

It should also be noted that the Appellate Panel upheld the application of the Criminal Code of BiH, rather than the Criminal Code of the SFRY in the present case. Specifically, the Panel found that the latter code was more lenient for the Defendant, given the specific circumstances of the case and the offence with which he is charged. In its analysis, the Panel relied, *inter alia*, on the decision of the Constitutional Court of BiH in the *Abduladhim Maktouf* case.²⁶ The decision to apply the Criminal Code of BiH was taken by the Appellate Panel in all other cases, with the exception of *Zijad Kurtović* case, where the Panel ruled that

²¹ Appellate Judgment, para. 42 (citing to *Stupar et al.*, Appellate Judgment, 9 September 2009, paras 325-330) and paras 103-106. Applying this rule to the factual findings challenged by both the Prosecution and Defence, the Appellate Panel concluded that any reasonable trier of fact would have reached the same factual conclusions as the Trial Panel and that the parties' appeals were thus unfounded. See paras 103-279, 302-327.

²² Appellate Judgment, paras 119-120, 306-307. Thus, the Appellate Panel rejected the Prosecution's argument that the Trial Panel erred when it acquitted the Defendant of the acts committed by the members of the Bratunac Brigade, finding that the only indication of his participation in these events came from his own statements. See paras 302-333.

²³ Appellate Judgment, paras 85-100.

²⁴ Appellate Judgment, para. 99.

²⁵ Appellate Judgment, para. 123. The Panel concluded that the photographs admitted by the Trial Panel satisfied both theories. See paras 124-125.

²⁶ Appellate Judgment, paras 280-292. In the *Maktouf* case, the Constitutional Court ruled that the fact that the death penalty was subsequently abolished in BiH does not render the SFRY Criminal Code, which provided for the death penalty, more lenient for the defendant by virtue of the fact that this sanction could no longer be applied. In fact, the Court found that "it is simply not possible to 'eliminate' the more severe sanction under both earlier and later laws, and apply only other, more lenient, sanctions, so that the most serious crimes would be left inadequately sanctioned." See *Abduladhim Maktouf*, Decision on Admissibility and Merits, 30 and 31 March 2007, para. 69.

in the limited circumstances of that case, the SFRY Criminal Code was more lenient for the defendant.²⁷

Finally, the Appellate Panel pronounced itself on the relevance of Mission trial monitoring reports as evidence. As noted in the Mission's previous report, the Prosecution referred to the Mission's Twelfth Report to the ICTY in the Trbić case, assessing the first instance verdict, in its appellate arguments. The Prosecution stated that the report found the first instance verdict to be well-structured and praised its reliance on international law and ICTY judgments. The Defence, on the other hand, stated that the report supports the Prosecution's position and constitutes pressure on the Court, and that it should not be regarded as evidence. The Appellate Panel ruled that the Mission's Twelfth Report in the Trbić case cannot be admitted into evidence, since it is not relevant to the assessment of the Trial Panel's legal and factual conclusions. The Panel further stressed that the Mission's comments are in no way binding on the Appellate Panel, nor can they influence it in reaching an impartial and objective decision based exclusively on the law.²⁸ This was the first time one of the parties relied on a Mission report in its appellate arguments.

²⁷ Specifically, the Appellate Panel found that that, when considering the minimum statutory sentence in crimes that were foreseen in both the 2003 BiH CC and the SFRY CC, the latter should be applied as the more lenient law. See *Zijad Kurtović*, Appellate Judgment, 25 March 2009, paras 97-133.

²⁸ Appellate Judgment, para. 13.