

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

Case No. IT-04-75-PT

IN TRIAL CHAMBER II

Before: Judge Guy Delvoie, Presiding
Judge Burton Hall
Judge Antoine Kesia-Mbe Mindua

Registrar: Mr. John Hocking

Date: 31 July 2012

THE PROSECUTOR

v.

GORAN HADŽIĆ

Public with Confidential Annex

PRE-TRIAL BRIEF OF GORAN HADŽIĆ

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for the Accused:

Mr. Zoran Živanović
Mr. Christopher Gosnell

PRE-TRIAL BRIEF OF GORAN HADŽIĆ

I. INTRODUCTION

1. Goran Hadžić is charged pursuant to the Second Amended Indictment with fourteen counts of fourteen separate crimes within the jurisdiction of the Statute.¹ He is alleged to be criminally responsible for these crimes by way of a number of different modes of participation prescribed by the Statute of the International Criminal Tribunal for the former Yugoslavia (“Statute”), including an allegation that purports to recite all the forms of participation encompassed within Article 7(1) of the Statute, and an allegation that he is responsible as a superior pursuant to Article 7(3) of the Statute.
2. On 3 July 2012, the Prosecution filed a Pre-Trial Brief pursuant to Rule 65ter (E) of the Rules of Procedures and Evidence (“Rules”), providing further particulars concerning the nature of the Prosecution’s case.²
3. Rule 65ter (F) of the Rules provides:

After the submission by the Prosecutor of the items mentioned in paragraph (E), the pre-trial Judge shall order the defence, within a time-limit set by the pre-trial Judge, and not later than three weeks before the Pre-Trial Conference, to file a pre-trial brief addressing the factual and legal issues, and including a written statement setting out:

- i. in general terms, the nature of the accused’s defence;
- ii. the matters with which the accused takes issue in the Prosecutor’s pre-trial brief; and
- iii. in the case of each such matter, the reason why the accused takes issue with it.

¹ Notice of Filing of Second Amended Indictment, 22 March 2012.

² Prosecution Pre-Trial Brief, 3 July 2012.

4. This Pre-Trial Brief complies with that obligation. The specificity of a Defence Pre-Trial Brief is, of course, not the same as that expected of the Prosecution Pre-Trial Brief. The Prosecution, under the Statute, bears the burden of proof continuously throughout the case and is obliged to give the accused full and adequate notice of its case.³ The Accused bears no such obligation and, indeed, has the right to remain silent and present no evidence or case whatsoever.⁴ The scope of the Defence Pre-Trial Brief must be understood accordingly:

The defence pre-trial brief is primarily intended to be a response to the prosecutor's pre-trial brief and should set some general boundaries for the trial prior to its commencement. In particular, it is a tool for identifying areas of possible agreement between the parties so that trial may be conducted as efficiently as possible.⁵

5. The Defence notes that it has already contributed significantly to this objective by participating actively and constructively with the Prosecution in reaching certain agreed facts.⁶

II. THE GENERAL NATURE OF GORAN HADŽIĆ'S CASE

6. The general nature of the Mr. Hadžić's case is that he did not commit any of the crimes alleged in the Indictment, nor is he otherwise liable for any of the forms of participation alleged in the Indictment. With the exception of the facts that have been agreed to, or admissions made, in the Second Joint Report on Agreed Facts and Documents,⁷ all factual propositions in the Indictment and Pre-Trial Brief are disputed and denied. The admissibility of any and all documents or other

³ Statute, Article 21(4)(a) and (b).

⁴ Statute, Article 21(4)(g).

⁵ *The Prosecutor v. Brdjanin*, Case No. IT-99-36-PT, Decision on Prosecution Response to Defendant Brdjanin's Pre-Trial Brief, 14 January 2002, para. 4.

⁶ First Joint Report on Agreed Facts and Documents, 13 January 2012; Second Joint Report on Agreed Facts and Documents, 4 April 2012.

⁷ Second Joint Report on Agreed Facts and Documents, 4 April 2012.

proposed Prosecution evidence (again, save for those agreed to in the Second Joint Report on Agreed Facts and Documents) is subject to objection at an appropriate time.

7. The Prosecution offers no submissions in its Pre-Trial Brief as to the legal elements of the crimes and modes of liability alleged in the Indictment. This deviates from the practice of Prosecution pre-trial briefs that have been filed up until recently.⁸ The Defence considers, in the absence of such submissions, that there is no need at this stage to make any submissions concerning these elements, except to state generally that it reserves the right to contest and dispute whatever unstated legal standards may underlie the Prosecution's allegations, or that purport to be the basis of Mr. Hadžić's criminal liability.

8. The Defence recalls that the Prosecution, pursuant to Rule 87(A) of the Rules, is required as a matter of law to prove its case against Mr. Hadžić beyond a reasonable doubt. This standard must be satisfied in respect of each and every element of every crime and mode of responsibility.⁹ Furthermore, any legal standard applied must comply with the principle of *nullem crimen sine lege*, and must have been duly recognized, as a matter of customary international law or declared by treaty law, to apply before this court.

9. The Defence objects to the lack of specificity in the Prosecution Pre-Trial Brief. The summaries appended to the Pre-Trial Brief are vague, often saying little or nothing about the alleged conduct or role of Mr. Hadžić. This is the case not only in respect of witnesses who are testifying generally about crimes but who, based on the paragraphs of the Indictment on which they are supposed to testify and the amount of time allocated to them, are expected to give testimony that purportedly

⁸ See e.g. *The Prosecutor v. Dorđević*, Case No. IT-05-87/2, Notice of Filing of Public Redacted Version of the Prosecution Pre-Trial Brief, 3 September 2008, pp. 43-50, 62-72; *The Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Submission of Public Version of Prosecution Pre-Trial Brief, 23 March 2007, pp. 34-44.

⁹ *The Prosecutor v. Orić*, Case No. IT-03-68-A, Judgment, 3 July 2008, para 82.

incriminates Mr. Hadžić.¹⁰ The Defence also maintains that it is fundamentally unfair for one of the Prosecution's principal experts to purport to submit an expert report in this case which, in substance and in form, is no more than a photocopy of reports tendered in other cases against other accused persons.¹¹ The Prosecution Pre-Trial Brief contains thirty-seven references to this expert, "Theunens," which not only omit any reference to a page, but which now omit reference to any report at all.¹² The lack of specificity is an ongoing obstacle to defence preparations, and has impaired the preparation of this Pre-Trial Brief. The Defence notes that the Prosecution has resisted motions seeking more adequate notice of the nature of the Prosecution case, and of the nature of the evidence to be called.¹³

10. Several allegations in the Pre-Trial Brief cite to videos of several hours' length, and yet no specification is given as to the portion relied upon for, in some cases, a highly incriminating and specific proposition. For example, footnote 21 asserts that Hadžić "openly advocated using violence against Croats and other non-Serbs" to "create an ethnically-separate Serb state."¹⁴ This allegation must be read, since this is a criminal indictment, as referring to something other than advocacy of resort to lawful armed force against combatants or other individuals directly participating in hostilities. Given the specific nature of the allegation, Mr. Hadžić is, in all fairness, entitled to be informed by the Prosecution as to which portion of a three-hour video compilation supports this allegation. This failure is all too frequently repeated.¹⁵ Witness statements and prior testimonies on which the Prosecution intends to rely, often comprising several *hundreds* of pages, are repeatedly cited without any page references, leaving the Defence to speculate as

¹⁰ Defence Motion to Expunge Portions of the Prosecution's Rule 65ter Filing and For More Detailed Witness Summaries, 29 June 2012, paras. 11-18.

¹¹ Prosecution Notice of Compliance with Rule 94bis, 10 July 2012, para 3.

¹² See e.g. Prosecution Pre-Trial Brief, fns. 37, 52-57, 88, 160, 162, 167, 171, 173, 216, 220, 223, 226, 229, *et al.*

¹³ Prosecution Response to Motion to Expunge Portions of the Prosecution's Rule 65ter Filing and For More Detailed Witness Summaries, 16 July 2012, paras. 7-11.

¹⁴ Prosecution Pre-Trial Brief, para. 7.

¹⁵ See also, e.g., Prosecution Pre-Trial Brief, footnotes 14, 17, 20, 21, 22, 59, 76, 83, 94, 119, 120, 121, 149, 162, 206, 209, 235, 238, 248, 250, 277, 278, 279, 310, 340, 341, 351, 359, 417, 418.

- to which portions are supposedly relevant to the allegation.¹⁶ Seven video and audio tapes have not been transcribed and no specific reference is provided to any citations thereto in the Pre-Trial Brief.¹⁷
11. The Defence further objects to and protests the extent to which core information about the Prosecution case has been withheld on the basis of claims of confidentiality, whether arising from witness protection or other asserted grounds.¹⁸ The Prosecution has made no effort, despite a request from the Defence, to mitigate the effects of this non-disclosure by providing the redacted versions of their statements or providing the pseudonyms of these witnesses as used during their testimony in previous cases, which would at least have apprised the Defence of the content of their public testimony.¹⁹ Four hundred and ninety-two of 805 references from the Prosecution Brief are related to witnesses whose statements or identity have not yet been revealed to the Defence.
12. These matters cumulatively are impairing Defence preparations and will have a lasting impact on the fairness of the trial. The Defence reserves the right to raise objections to these matters as and when they arise, or to seek other legal remedies should the unfairness only become evident or manifest at a later stage of proceedings.
13. Without prejudice to the generality of the objection in paragraph 6 above, and without prejudice to the fundamental lack of notice that has been provided as to

¹⁶ See e.g. *id.* footnotes 442, 449, 709, 763.

¹⁷ See e.g. 65ter#04804, 1hr09min; 65ter#04818, 2hrs56min; 65ter#04829, 3hrs; 65ter#04831, 3hrs; 65ter#04859, 3hrs; 65ter#04873, 3hrs4min; 65ter#04874, 3hrs.

¹⁸ Defence Motion to Expunge Portions of the Prosecution's Rule 65ter Filing and For More Detailed Witness Summaries, 29 June 2012, paras. 4-10; Prosecution Response to Motion to Expunge Portions of the Prosecution's Rule 65ter Filing and For More Detailed Witness Summaries, 16 July 2012, paras. 2-6.

¹⁹ See Confidential Annex. The Prosecution asserts erroneously that "To the extent delayed disclosure witnesses have previously testified publicly, Hadžić already has access to the public transcripts." Request for Leave To Reply And Reply To Response To Prosecution Motion For Protective Measures For Witnesses, 9 July 2012, para 9. Such access is meaningless unless the Defence is informed by the Prosecution of the pseudonym of the witness as used in the previous cases. This, despite the request, has not been done.

the Prosecution case as set out in paragraphs 8 through 11, Goran Hadžić objects with further particularity as set out below.

III. JOINT CRIMINAL ENTERPRISE

14. The Prosecution in this case, as in other cases it has brought before this Tribunal, alleges an association of individuals, including Mr. Hadžić, participated together in a “criminal enterprise.” The notion of JCE is established in the jurisprudence of the ICTY, and the Prosecution is entitled to rely on it. It is nonetheless regrettable that the notion of JCE is used here as a device to obscure, rather than to clarify, the key issues concerning the criminal liability alleged. Thus, the Prosecution Pre-Trial Brief describes a series of alleged inter-actions between various members of the alleged JCE while entirely neglecting that these individuals were obviously inter-acting primarily as part of the war effort; that they had legitimate reasons for so doing; and that this is not an unlawful purpose under international criminal law. A recognition by the Prosecution that the war effort was the primary purpose would not, of course, prevent it from claiming that a criminal purpose also existed. However, the Pre-Trial Brief fails to offer a realistic and meaningful description of how these inter-actions demonstrate the alleged *criminal*, rather than the *non-criminal*, purpose. This ought to be the central distinction that the Prosecution must prove, and yet the Prosecution Pre-Trial Brief ignores it entirely. The consequence is that numerous allegations and claims are ambiguous as to their legality or illegality.

15. Goran Hadžić disputes and denies that he was ever a member of any joint criminal enterprise as alleged by the Prosecution. He does not deny that he had some interactions with some of the alleged “JCE members,” but disputes and denies that he ever acted, or failed to act, with criminal intent, much less with a criminal intent shared in common with those “JCE members.”

16. The Pre-Trial Brief's vagueness or mischaracterization of many of the individual allegations of Goran Hadžić's supposed contributions to the JCE presently precludes a detailed enumeration of which allegations could be accepted in some form, and which would be disputed and denied in their entirety. All those allegations are therefore disputed and denied, save and except to the extent specified in the Second Joint Report on Agreed Facts. Further, to the extent that any of those alleged "contributions" did occur, Mr. Hadžić disputes and denies that he engaged in any of them as a "contribution" to any joint criminal enterprise, or that they did, in fact, "contribute" to any joint criminal enterprise.

IV. OTHER FORMS OF COMMISSION UNDER ARTICLE 7(1)

17. Goran Hadžić disputes and denies the allegation that he "actively participated in crimes against non-Serbs," by which the Prosecution appears to be alleging direct commission liability pursuant to Article 7(1).²⁰ He disputes and denies each and every factual allegation enumerated in the Prosecution Pre-Trial Brief as being in reference to this mode of liability.

18. Goran Hadžić disputes and denies the allegations that he planned, ordered, or instigated any of the crimes with which he is charged.²¹ He disputes and denies each and every factual allegation enumerated in the Prosecution Pre-Trial Brief as being in reference to this mode of liability.

19. Goran Hadžić disputes and denies the allegations that he aided and abetted any of the crimes with which he is charged.²² He disputes and denies each and every factual allegation enumerated in the Prosecution Pre-Trial Brief as being in reference to this mode of liability.

²⁰ Prosecution Pre-Trial Brief, paras 2, 8, 88, 93-94, 107.

²¹ *Id.* paras 2, 19, 88, 94, 109, 111-112, 131.

²² *Id.* paras 3, 88, 113.

V. LIABILITY PURSUANT TO ARTICLE 7(3)

20. Goran Hadžić disputes and denies that he possessed effective control over the alleged perpetrators of crimes, including alleged crimes committed by certain members of the “Serb Forces.”²³ He disputes and denies, *inter alia*, that he possessed the “material ability” to prevent or punish the alleged perpetrators of the criminal conduct alleged, including those amongst the forces alleged to have been commanded by Željko Ražnatović.
21. The Prosecution Pre-Trial Brief does not acknowledge that effective control over various “Serb Forces” was at any time exercised by anyone other than Goran Hadžić. However the Prosecution’s own narrative of events, which frequently suggests that other organizations or persons were exercising effective control over those forces at the relevant time,²⁴ belies the Prosecution’s nebulous assertion that Hadžić also, if not exclusively, exercised such control. No explanation is given as to how Mr. Hadžić’s alleged effective control fits in to the effective control exercised by these other organizations or persons. There is also no attempt to distinguish between a wide variety of formations encompassed within the phrase “Serb Forces;” whether there are any differences of “effective control” depending on their identity; or whether there is any distinction as to the time and place where they were operating.²⁵ The Prosecution is obliged, to the extent possible, not only to identify with specificity the identity of subordinate perpetrators, but also the basis for the allegation of effective control.²⁶ Although the Second Amended Indictment may not be facially defective in these respects,²⁷ the Prosecution is obliged to provide further particulars to the extent that it can in its Pre-Trial

²³ Prosecution Pre-Trial Brief, paras. 114-119.

²⁴ *Id.* paras. 9, 40, 115-119.

²⁵ *Cf. The Prosecutor v. Milutinovic et al.*, Case No. IT-05-88-PT, Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment 22 March 2006 para. 10.

²⁶ *The Prosecutor v. Blaskic*, Case No. IT-95-14, Appeal Judgment, 29 July 2004, para. 218; *The Prosecutor v Popovic et al.*, Case No. IT-05-88-PT, Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, 31 May 2006, para. 40.

²⁷ Decision on Defence Motion Alleging Defects in the Form of First Amended Indictment, 10 November 2011, para. 38.

Brief.²⁸ These are the central issues of which the Defence, and the Trial Chamber, ought to be informed, and yet they are not addressed, or are not addressed realistically and forthrightly, in the Prosecution Pre-Trial Brief.

VI. COUNTS 10 to 11: DEPORTATION AND FORCIBLE TRANSFER

22. The Prosecution Pre-Trial Brief makes a variety of allegations that appear to be related to Counts 10 and 11 of the Second Amended Indictment, that Goran Hadžić is criminally responsible for Deportation and Inhumane Acts (Forcible Transfers). The Prosecution has not spelled out its position as to the elements of these crimes, perhaps considering the elements to be well-settled and, accordingly, not worthy of enumeration. However, the Prosecution makes reference throughout its Pre-Trial Brief to actions that do not distinctly fulfill the requirements, or correspond to the elements, of this crime. For example, the Prosecution alleges at various points that Hadžić advocated an “ethnically-separate Serb state” or “a separate Serb state;”²⁹ or that he worked to create “ethnic-Serb territories;”³⁰ or that he used the term “Ustasha” (without any context or specification as to whom he may have been referring in using this term);³¹ or by using the term “liberate” within inverted quotation marks in its Pre-Trial Brief, presumably attempting to suggest some euphemistic implication.³² The Prosecution does not specify whether it considers these various actions to be constitutive or probative of the crimes of deportation or forcible transfer.

23. Goran Hadžić does not deny that some crimes were perpetrated against individuals of Croat ethnicity, particularly in the aftermath of armed clashes. Mr. Hadžić does dispute and deny that he is criminally responsible in any fashion for

²⁸ *The Prosecutor v Haradinaj et al.*, Case No. IT-04-84-T, Decision on Idriz Balaj’s Preliminary Motion Concerning Paragraph 29 of the Indictment, 31 May 2007, paras. 8-9.

²⁹ Prosecution Pre-Trial Brief, paras. 7, 97.

³⁰ *Id.* para.11.

³¹ *Id.* para. 7.

³² *Id.* paras. 7, 19, 24.

those crimes, and does dispute and deny that he committed, or is otherwise criminally responsible for, Deportation and Inhumane Acts (Forcible Transfers).³³

24. Goran Hadžić denies that he adopted or advocated the adoption of any discriminatory legal measures based on ethnicity whatsoever, nor did he adopt any measures, allegedly discriminatory or otherwise, with the intent of committing Deportation or Inhumane Acts (Forcible Transfers). He denies that individuals of Croat ethnicity were legally barred from returning to, or remaining in, their homes. The actions he undertook were lawful or legally justified and were not animated by any unlawful or criminal purpose. The Prosecution offers none of the salient context that would contribute to a frank and realistic distinction between its view of criminal and non-criminal conduct. The lack of such a perspective even leads the Prosecution to allege that Mr. Hadžić should be criminally responsible for allegedly instructing police to cooperate with the United Nations.³⁴

VII. COUNT 1: PERSECUTION

25. Goran Hadžić disputes and denies any and all allegations purporting to support the charge that he is criminally responsible for the crime of Persecution.³⁵ It is not true that he “headed [a] campaign of persecutions.”³⁶ Hadžić does not deny that some acts rising to the level of persecution may have been committed against individuals of Croat ethnicity, particularly in the aftermath of armed clashes, but denies and disputes that he committed any such acts or that he is criminally responsible in any fashion for those acts. He neither acted nor omitted to act to deny or infringe any fundamental right of any person, nor did he commit any such

³³ Prosecution Pre-Trial Brief, paras. 26-27, 30, 48, 94, 134, 162-163, 175, 178, 180, 183-184, 194, 196, 199, 204, 220, 222-223, 227-228, 234-235, 239, 241, 245.

³⁴ *Id.* para. 242.

³⁵ *Id.* paras. 1, 4, 20, 22, 28, 82-87, 94, 105, 107, 128, 132, 136, 149, 164, 242-244, 246.

³⁶ *Id.* para. 132.

acts, or omit to act, with an intent to discriminate against Croats and other non-Serbs.³⁷

VIII. COUNTS 2 to 4: EXTERMINATION AND MURDER

26. Goran Hadžić disputes and denies any and all allegations purporting to support the charge that he is criminally responsible for the crimes of Extermination and Murder.³⁸ He denies and disputes, in particular, any allegation (if indeed this is the nature of the ambiguously-worded allegation) that he secured the release of any prisoners and handed them over to Željko Ražnatović.³⁹ The Defence again objects to the lack of specification as to the basis of this allegation that is provided in the Prosecution Pre-Trial Brief.⁴⁰

IX. COUNTS 5 to 9: IMPRISONMENT, TORTURE, INHUMANE ACTS and CRUEL TREATMENT

27. Goran Hadžić disputes and denies any and all allegations purporting to support the charge that he is criminally responsible for the crimes of Imprisonment, Torture, Inhumane Acts and Cruel Treatment.

28. Goran Hadžić disputes and denies, in particular, that he ordered, or is otherwise criminally responsible for, any unlawful detentions.⁴¹ The Prosecution offers no particulars to substantiate the nature of Hadžić's alleged control over the various prison facilities mentioned in the Pre-Trial Brief, and he denies that he exercised any effective control over any facilities where prisoners were allegedly mistreated, beaten or killed.

³⁷ Prosecution Pre-Trial Brief, para 132

³⁸ *Id.* paras 133-134, 138-141, 143, 145-146, 151-161, 166, 188-190, 215-221.

³⁹ *Id.* para. 139.

⁴⁰ *Id.* fn. 447.

⁴¹ *Id.* 1, 29, 94, 102-103, 129, 135, 150, 164, 166, 207, 209, 214, 223-241.

X. COUNTS 12 to 14: WANTON DESTRUCTION, DESTRUCTION OR WILFUL DAMAGE TO INSTITUTIONS DEDICATED TO EDUCATION OR RELIGION, OR PLUNDER OF PRIVATE OR PUBLIC PROPERTY

29. Goran Hadžić disputes and denies any and all allegations purporting to support the charge that he is criminally responsible for the crimes of Wanton Destruction, Destruction or willful damage to institutions dedicated to education or religion, or Plunder of Private or Public Property.⁴²

XI. GENERAL REQUIREMENTS OF ARTICLE 3 and ARTICLE 5 CRIMES

30. Goran Hadžić disputes that there was an armed conflict in the relevant territory that had commenced “at least” as of June 1991.⁴³ The Defence acknowledges only that a state of armed conflict existed on the territory of the SAO SBWS as of 30 September 1991.

Respectfully submitted,



Zoran Zivanovic, Lead Counsel



Christopher Gosnell, Co-Counsel

Word count: 3,768.

Submitted on this day of 31st day of July 2012
at The Hague, Netherlands

⁴² Prosecution Pre-Trial Brief, 1, 26-27, 128, 136, 149, 162, 164, 178, 194, 197, 199, 205, 209, 241.

⁴³ *Id.* para. 123.